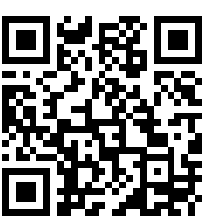

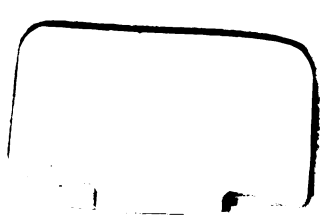

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MINNESOTA LAW REVIEW

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THE LEGAL THEORY OF THE MINNESOTA "SAFETY COMMISSION" ACT[1]

HERE are two or three familiar episodes in American history:

(1) The Vallandigham episode. Clement L. Vallandigham was a democratic congressman from Ohio, at the outbreak of the Civil War. He made a nuisance of himself, criticising the government and talking about the constitution. He was defeated for re-election in 1862. On the 1st of May, 1863, he made a speech in Knox County, Ohio. In it he said, among other things, the following:

"The present war is a wicked, cruel and unnecessary war;" "a war not being waged for the preservation of the Union;" but "a war for the purpose of crushing out liberty and erecting a despotism;" "a war for the freedom of the blacks and the enslavement of the whites;" and "if the administration had so wished the war could have been honorably terminated months ago."[2]

Based upon an address delivered before the Minnesota State Bar Association at Faribault, Aug. 15, 1918.

[1] Laws of Minnesota 1917, Ch. 261. "An act providing for the Minnesota public safety commission, defining its powers and duties in event of war and otherwise, and appropriating money for carrying out the purposes thereof." The act creates a commission of seven members, including the governor and attorney general ex officio, gives the commission specific duties and broad general powers, and appropriates one million dollars for its use.

[2] Ex parte Vallandigham, 28 Fed. Cas. 874, (Case No. 16,816) decided May 16, 1863, where the arguments of counsel and the decision are given in full.

General Burnside was then in command of the military department of Ohio, with headquarters at Cincinnati. It was a peaceful district, free from the forces of the enemy and with the courts open and the regular civil authorities performing their usual functions. On the evening of May 4th, Captain Hutton, of General Burnside's staff, arrested Vallandigham, and on May 6th he was tried before a military commission for publicly expressing his sympathies for those in arms against the government of the United States in violation, not of any statute, but of an order of General Burnside's forbidding the expression of such sympathies. The next day he was found guilty and sentenced to close confinement in some fortress, during the continuance of the war. A writ of habeas corpus was denied by the United States circuit court on two grounds; 1st, because the conviction was legal, and 2nd, because the court was satisfied the military authorities would not obey the writ, if it issued.[3] The Supreme Court of the United States unanimously refused to review the sentence by certiorari for the reason that it had not jurisdiction to so review the proceedings of a military commission.[4] No one can read either decision without feeling that both courts thought General Burnside was acting within his powers.

The sentence was subject to the president's approval, and while Lincoln was considering the matter there were loud protests from all parts of the country, and mass meetings were held in many places. On May 16th a mass meeting was held at Albany, New York, at which was read a letter from Horatio Seymour, then governor of New York, and afterwards a candidate for the presidency, a part of which was as follows:

"I cannot attend the meeting at the Capitol this evening, but I wish to state my opinion in regard to the arrest of Mr. Vallandigham.

"It is an act which has brought dishonor upon our country; it is full of danger to our persons and to our homes; it bears upon its front a conscious violation of law and of justice. Acting upon the evidence of detailed informers, shrinking from the light of day, in the darkness of night, armed men violated the home of an American citizen, and furtively bore him away to a military trial conducted without those safeguards known in the proceedings of our judicial tribunals.

[3] Ibid.

[4] Ex parte Vallandigham, (December Term 1863) 1 Wall. 243, 17 L. Ed. 589.

"The transaction involved a series of offences against our most sacred rights. It interfered with the freedom of speech; it violated our rights to be secure in our homes against unreasonable searches and seizures; it pronounced sentence without a trial save one which was a mockery, which insulted as well as wronged. The perpetrators now seek to impose punishment, not for an offence against law, but for a disregard of an invalid order, put forth in an utter disregard of the principles of civil liberty. If this proceeding is approved by the government and sanctioned by the people, it is not merely a step towards revolution, it is revolution; it will not only lead to military despotism, it establishes military despotism. In this aspect it must be accepted, or in this aspect it must be rejected.

"If it is upheld, our liberties are overthrown. The safety of our persons, the security of our property, will hereafter depend upon the arbitrary wills of such military rulers as may be placed over us, while our constitutional guaranties will be broken down. . . . . It is a fearful thing to increase the danger which now overhangs us by treating the law, the judiciary and the authorities of States with contempt. . . .

"The action of the Administration will determine in the minds of more than one-half of the people of the loyal States whether this war is waged to put down rebellion at the South, or to destroy free institutions at the North. We look for its decision with the most solemn solicitude."

It was in answer to the resolutions adopted at this meeting that Lincoln wrote his famous letter of June 12, 1863.

This is one extract from the letter:

"The insurgents had been preparing for [the war] for more than thirty years, while the government had taken no steps to resist them. The former had carefully considered all the means which could be turned to their account. It undoubtedly was a well pondered reliance with them that, in their own unrestricted efforts to destroy Union, Constitution and law all together, the Government would, in a great degree, be restrained by the same Constitution and law from arresting their progress. . . . Under cover of 'liberty of speech,' 'liberty of the press,' and 'habeas corpus,' they hoped to keep on foot amongst us a most efficient corps of spies, informers, suppliers, aiders and abettors of their cause in a thousand ways. . . . Thoroughly imbued with a reverence for the guaranteed rights of individuals, I was slow to adopt the strong measures which, by degrees, I have been forced to regard as being within the exceptions of the Constitution, and as indispensable to the public safety. Nothing is better known to history than that courts of justice are utterly incompetent to such

cases. Civil courts are organized chiefly for trials of individuals or, at most, a few individuals acting in concert, and this in quiet times, and on charges of crimes well defined in the law. Even in times of peace, bands of horse thieves and robbers frequently grow too numerous and powerful for the ordinary courts of justice. But what comparison in numbers have such bands ever borne to the insurgent sympathizers, even in many of the loyal states? Again, a jury too frequently has at least one member more ready to hang the panel than to hang the traitor. And yet again, he who dissuades one man from volunteering, or induces one soldier to desert, weakens the Union cause as much as he who kills a Union soldier in battle. Yet this discussion or inducement may be so conducted as to be no defined crime of which any civil court would take cognizance."

This is another extract:

"Long experience has shown that armies cannot be maintained unless desertion shall be punished by the severe penalty of death. The case requires and the law and the constitution sanction this punishment. Must I shoot a simple minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert? This is nonetheless injurious when effected by getting a father or brother or friend into a public meeting and there working upon his feelings till he is persuaded to write the soldier boy that he is fighting in a bad cause, for a wicked administration of a contemptible government, too weak to arrest and punish him if he shall desert. I think that in such a case to silence the agitator and save the boy is not only constitutional, but withal a great mercy."

This is another extract:

"I can no more be persuaded that the government can constitutionally take no strong measures in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown to not be good for a well one. Nor am I quite able to appreciate the danger, apprehended by the meeting, that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury and habeas corpus, throughout the indefinite peaceful future which I trust lies before them, any more than I am able to believe that a man could contract so strong an appetite for emetics, during temporary illness, as to persist in feeding upon them during the remainder of his healthful life."

President Lincoln approved the sentence, and Vallandigham was taken to Fort Warren in Boston Harbor. Afterwards his

punishment was modified to banishment and he was transported to Shelbyville, Tennessee, and turned loose inside the Confederate lines.

(2) The Benedict episode. This is told upon the authority of "The American Bastile," a copperhead book, published at the close of the war.

Rev. Judson D. Benedict was a Campbellite clergyman, pastor of a church at East Aurora, which is near Buffalo, New York. He was of intellectual appearance and sixty-one years old. On August 31st, 1862, he preached a sermon in which he said that the command of the New Testament was explicit that Christians should not engage in wars of any kind. He referred to the constitution of the state of New York, which granted military exemption to Quakers and said he saw no reason why his brethren should not obtain like immunity. On September 2nd, the United States marshal of the western district of New York arrested him, without a warrant and before breakfast, and put him in the county jail at Buffalo. On the 15th, his attorney got a writ of habeas corpus from Judge Hall of the U. S. district court addressed to the jailor and the marshal; three days later the jailor produced his body in court and, after a hearing, Judge Hall ordered him freed, filing an opinion replete with citations from Magna Charta, the Petition of Rights, the Bill of Rights and the Act of Settlement, and quotations from Hume, Hallam, Blackstone, Story, and other authors. As the reverend gentleman left the court room, thus discharged from custody, a deputy U. S. marshal approached him and advised him that he was again under arrest. He asked by whose orders he was seized this time. He was told, "We will show you the authority, when we get you where we want you." He was hurried to a carriage in waiting, driven forty miles to Lockport in Niagara County, put on a railroad train and conveyed to Washington, D. C., where he was incarcerated in the old capitol prison. The next day his attorney got another writ of habeas corpus from the same Judge Hall, this time addressed to the marshal alone, but the marshal returned that he could not produce Rev. Benedict's body because it was in Washington and not in his custody.

(3) The Milligan episode. Lambdin P. Milligan was an Indiana lawyer. He was prominent in a society organized to oppose the war. In 1863 and 1864 he made a number of public

speeches, in which he said that the purpose of the war was to break down the influence of the agricultural districts of the country and elevate the moneyed and manufacturing interests. He appears to have been a noisy agitator, posing as a friend of the farmers and active in stirring up social discontent and class hatred. In October, 1864, he was arrested by order of General Hovey, in command of the military district of Indiana, which included the city of Indianapolis, and where there was not, and never had been, any serious warfare. He was tried before a military commission, found guilty and *sentenced to be hanged.* On May 8, 1865, President Johnson approved the sentence and fixed May 19th as the date of execution, but afterwards commuted the punishment to life imprisonment. Milligan sued out a writ of habeas corpus and the case got to the Supreme Court of the United States, where it was argued and decided at the December, 1866, term.[5] In the interval between Milligan's conviction and the hearing in the Supreme Court, the Civil War had ended and the country was keen to forget it and to effect a restoration of the Union. The attention of the House of Representatives had been called to the large number of military prisoners confined in the old capitol prison at Washington and elsewhere, and at the initiative of James A. Garfield, a congressman from Ohio, the military committee was instructed to make an investigation. The committee found that during the period of the war more than thirty-seven thousand men and women had been arrested, without warrants or specific charges against them, and incarcerated in one prison or another, without trial or the benefit of counsel. Many of them were people of refinement and education, whose fate had broken them both in health and fortune. Milligan's case was in the hands of Jerry Black of Pennsylvania and David Dudley Field of New York, but Garfield's connection with the congressional inquiry got him a retainer in it also. He was about thirty-five years old at the time, and was a member of the bar, but had never tried a case. The Milligan case was his first court experience and the burden of the argument fell on him. The Supreme Court, which three years before could not hear Vallandigham, now held that Milligan's conviction was illegal and laid down the following principles:

[5] Ex parte Milligan, (1866) 4 Wall. 2, 18 L. Ed. 281.

"Military commissions, organized during the late Civil War in a state not invaded and not engaged in rebellion, in which the federal courts were open and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious state, nor a prisoner of war, nor a person in the military or naval service. *And congress could not invest them with any such power.*[6]

"The guaranty of trial by jury contained in the constitution was intended for a state of war as well as a state of peace; and is equally binding upon rulers and people at all times and under all circumstances."[7]

This is in substance a ruling that arbitrary arrests of civilians, under executive orders or the orders of military officers, are illegal except in times of actual warfare and even then are illegal except in districts where there are contemporary hostilities by contending armies and where the civil courts are not open and in operation. Vallandigham, Benedict, Milligan, and most of the other thirty-seven thousand were thus unjustly incarcerated.

In 1902 there was a strike in the Pennsylvania coal mines, accompanied by a riot, and the militia was called out to restore order. One of the soldiers shot and killed a rioter and was arrested for manslaughter. The court discharged him in response to a writ of habeas corpus.[8] There wasn't any war in Pennsylvania at the time and the courts were open. In the Milligan case, the Supreme Court of the United States had said:

"Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."[9]

The Pennsylvania court did not agree with it. It said:

"Martial law is the right of a general in command of a town or district menaced with a siege or insurrection to take the requisite measures to repel the enemy, and depends, for its extent, existence, and operation, on the imminence of the peril and the obligation to provide for the general safety. As the offspring of necessity, it transcends the ordinary course of law, and may be exercised alike over friends and enemies, citizens and aliens.[10]

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[6] Ibid. (Syllabus). Italics are the author's. [Ed.]
[7] Ibid. (Syllabus).
[8] Commonwealth v. Shortall, (1903) 206 Pa. St. 165, 55 Atl. 952, 65 L. R. A. 193, 98 Am. St. Rep. 759.
[9] Ex parte Milligan, (1866) 4 Wall. 2 (127), 18 L. Ed. 281.
[10] Commonwealth v. Shortall, (1903) 206 Pa. St. 165 (170) where the court refers to dissenting opinion of Chief Justice Chase in Ex parte Milligan, quoting Hare, American Constitutional Law, p. 930.

"Many other authorities of equal rank hold that martial law exists wherever the military arm of the government is called into service to suppress disorder and restore the public peace. . . . The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.

"It is not infrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life and yet a state of disorder, violence and danger in special directions, which, though not technically war, has in its limited field the same effect, and if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it. . . . When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force. . . .

"The resort to the military arm of the government therefore means that the ordinary civil officers to preserve order are subordinated, and the rule of force under military methods is substituted to whatever extent may be necessary in the discretion of the military commander. To call out the military and then have them stand quiet and helpless while mob law overrides the civil authorities would be to make the government contemptible and destroy the purpose of its existence. The effect of martial law, therefore, is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation. And in this respect there is no difference between a public war and domestic insurrection. What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful."

At about the same time, there was a riot in San Miguel County, Colorado. Governor Peabody ordered out the militia, who seized and incarcerated one Moyer. Moyer sued out a writ of habeas corpus and the adjutant general returned that he held him because he *apprehended*[11] that if he were released he would be a participant in the prevailing disorder. The supreme court of Colorado discharged the writ, and left him in military

[11] Italics are the author's. [Ed.]

custody.[12] Afterwards he sued the governor for damages, but the Supreme Court of the United States held against him, saying:

"Where the constitution and laws of a state give the governor power to suppress insurrection by the National Guard, as is the case in Colorado, he may also seize and imprison those resisting, and is the final judge of the necessity for such action; and when such an arrest is made in good faith he cannot be subjected to an action therefor. . . . Public danger warrants the substitution of executive for judicial process; and the ordinary rights of individuals must yield to what the executive honestly deems the necessities of a critical moment."[13]

In 1912, during the West Virginia coal strikes, Governor Glascock appointed a military commission to try and punish all offenders within the affected district, and the supreme court of the state sustained him and also held that he was not civilly liable in a suit for malicious trespass brought by the proprietor of a newspaper known as the "Socialist Labor Star" which the commission had summarily suppressed.[14]

These are fairly specimen cases, illustrating the law on the subject as it existed prior to the outbreak of the present war. The Milligan case, as modified by the later decisions, holds that in times and places of disorder, as well as of actual warfare, the military authority can be substituted for the civil, and that the administration of government, ordinarily performed by civil officers and courts, may, in the interest of public safety and welfare, be supplanted by the arbitrary and irresponsible activities of soldiers or extraordinary commissions, and that the test is not whether the courts are open, but whether the machinery they provide can adequately meet the situation. All this would seem to be elementary. Our institutions were born as much in a struggle for religious liberty as for governmental freedom. But the very provisions of our constitution, which secure a man the right to worship God according to the dictates of his own conscience, forbid his using this right as a cloak for licentiousness or as a justification for practices inconsistent with the peace or safety of the state. And in the same spirit, it would be an extraordinary

[12] Re Charles H. Moyer, (1905) 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (N.S.) 979, 117 Am. St. Rep. 189.

[13] Moyer v. Peabody, (1909) 212 U. S. 78 (Syl.), 53 L. Ed. 410, 29 S. C. R. 235.

[14] Hatfield v. Graham, (1914) 73 W. Va. 759, 81 S. E. 533, L. R. A. 1915A 175, Ann. Cas. 1917C 1.

state of affairs if the other great constitutional guaranties, like freedom of speech and assembly, trial by jury and due process of law, could be invoked in the hour of danger to arrest the arm of the state uplifted for its own preservation. In order that we may have a constitution, we have got to have a state, and if the guaranties of the constitution can be used for the destruction of the state, they will be used by the same act for their own destruction.

But none of this gets us very far, for this reason: whether we turn to the Milligan case, or to the later cases, we find ourselves limited to this proposition: the state cannot have recourse to extraordinary procedure until there are extraordinary conditions to justify it. There must be either regular warfare, actually waging in the district affected, or there must be quasi warfare in the shape of riots or disorder. No court has as yet sustained the thirty-seven thousand arbitrary arrests and the banishment of Vallandigham, or the proposed execution of Milligan, after a trial by a military commission, operating in a community far removed from the scene of actual fighting. The only case in the Supreme Court of the United States on the subject seems to say that the government is powerless, by way of summary anticipatory action under such circumstances, and that its recourse is limited to the slow process of courts of law and the enforcement of existing statutes.

The Civil War was not fought alone by the soldiers at Gettysburg and in the Wilderness. It was fought also by the farmers in Ohio and Indiana, and by the factory hands in Indianapolis and Cincinnati, who produced the food the soldiers ate, the clothes they wore, and the arms with which they did battle. If a traitor tried to stir up a mutiny among the men in line, a drum head commission could condemn him to death and execute him in short order. Could Vallandigham stir up the factory hands at Cincinnati to strike, or Milligan breed discontent among the farmers of Indiana, or Benedict urge the boys in his parish not to enlist, and in the absence of an applicable statute, must the government submit to the demoralization of the industrial branch of its military service; or if there were an applicable statute, must it follow the painful course of indictments, demurrers, trials and appeals, while the enemy, hampered by none of these things, pressed joyously on it? *Ex parte Milligan* to the contrary not-

withstanding, I don't think so. I believe that in time of war the government of every state has inherent power to do all acts and things necessary or proper to defeat the enemy and that it is performing its full duty to the constitution when it exercises every form of activity to preserve the state, on the preservation of which the existence of the constitution itself depends. I believe Lincoln was right when he banished Vallandigham, that Johnson was right when he approved the execution of Milligan, and I believe that the Supreme Court of the United States would have said so, had the question been put up to it before the close of hostilities.

This is the legal basis of the safety commission act, if it has any legal basis. It provides for a body of seven men who, in the event of war,

". . . . shall have power to do all acts and things non-inconsistent with the constitution or laws of the state of Minnesota or of the United States, which are necessary or proper for the public safety and for the protection of life and . . . property . . . and shall do and perform all acts and things necessary or proper so that the military, civil, and industrial resources of the state may be most efficiently applied toward maintenance of the defense of the state and nation and toward the successful prosecution of such war."[15]

It assumes the admission of two facts already alluded to. The first is this: The constitution of Minnesota is not a grant of power, but a statement of limitations on power which, but for it, would be boundless. The United States government has no powers except such as are enumerated in the federal constitution. A state has every conceivable power, except such as have been taken away from it by the grant to the federal government, or by the express provisions of its own constitution.[16] And superior to the grants to the federal government and to the limitations imposed by its own constitution is its right to self preservation. The state has the right to live, and when its life is in danger no one can invoke the provisions of a paper constitution to thwart its work for self defence. The second proposition is this: It is as essential to winning the war, for example, that the street cars which carry workers to the munition factories in St. Paul and Minneapolis should operate uninterruptedly as it is that our ma-

[15] Laws of Minn. 1917, Ch. 261, Sec. 3.

[16] State ex rel. Simpson v. City of Mankato, (1912) 117 Minn. 458, 136 N. W. 264, 41 L. R. A. (N.S.) 111.

rines should fight in France, and it is as proper a function of a war board to see that they do operate uninterruptedly during war times as it is for the secretary of war to see that the marines get across the ocean, and any scheme of compulsion which can be used for the second purpose is also available for the first.

Historically the safety commission act is framed on the analogy of the health act, and the functions of the commission are like the functions of a health board. The state public health law of 1883[17] provided in substance that in the event of the prevalence of an epidemic or infectious disease, a local board of health "shall . . . do and provide all such acts, matters and things as may be necessary for mitigating or preventing the spread of any such disease."

Under this general provision, which makes no express reference to any specific disease or to the method of handling it, the supreme court, in the Zimmerman case[18] held that the St. Paul health department had power to make a rule that children should be vaccinated and to punish such as were not, by excluding them from the public schools. The court in its decision said, among other things:

"It will be noted that none of the provisions of the statutes . . . . just quoted expressly authorizes . . .health officers to require children to be vaccinated, as a condition precedent to their admission to the public schools; yet we have no hesitation in holding . . . that the legislature intended to confer such power on them. . . . It is very true that the statutes of our state provide that admission to the public schools shall be free to all persons of a defined age and residence. . . . But all these statutory provisions must be construed in connection with and subordinate to, the statutes on the subject of the preservation of the public health and the prevention of the spread of contagious diseases. The welfare of the many is superior to that of the few, and, as the regulations compelling vaccination are intended and enforced solely for the public good, the rights conferred thereby are primary and superior to the rights of any pupil to attend the public schools."[19]

If, under a statute permitting a local health board to do all acts and things necessary to prevent the spread of disease in the event of an epidemic, a health board can compel vaccination and prescribe and enforce a penalty for the violation of its orders in

[17] Gen. Laws 1883 Ch. 132 Sec. 3.
[18] State ex rel. Freeman v. Zimmerman, (1902) 86 Minn. 353, 90 N. W. 783, 58 L. R. A. 78, 91 Am. St. Rep. 351.
[19] Ibid. p. 358.

this regard, why, in the event of war, cannot a board or commission, clothed with powers expressed in identical language, promulgate and enforce orders when, in its judgment, such are needed to preserve the public safety and to protect life and property, and are calculated to most efficiently apply the state's resources to the great job ahead of us, towit: "the winning of the war"? If a health board can be lawfully empowered to exercise arbitrary power in times of epidemic, in the interest of the public health, it would seem as though a safety commission, in times of war, could be given like authority, that the life of the state may be saved. If this can be and has been legally done, it surely is a considerable achievement. Martial law becomes unnecessary, because there is available the machinery to anticipate and prevent the physical disorder which, under the decisions, must exist before martial law can be proclaimed. The state is not confronted with the alternatives of waiting until the disloyal in Brown County take up arms against it, or of arresting the ringleaders without warrant of law, as Vallandigham and Milligan were arrested. Before the harm is done beyond repair, a commission authorized to do all acts and things necessary or proper to preserve the public safety and apply the state's resources to winning the war can handle the problem promptly and efficiently.

Most people have thought this was all right and have acquiesced in the commission's orders. But the situation has puzzled some lawyers a good deal. It has given them the pain of a new idea. I do not say this by way of criticism. The commission, as originally constituted, included among its seven members five lawyers and a law book publisher, and the commission itself was puzzled. The act, as introduced in the legislature, provided that disobedience of an order of the commission should constitute a felony. A penal provision appears in the South Dakota and Montana laws, which are modeled on ours, but it was stricken out of the Minnesota act before its passage. The commission wanted to know how its orders were to be enforced, if there was no penalty prescribed for their violation. On April 30, 1917, an employee of the attorney general's office gave it an opinion on this point, reading as follows:

"The most serious feature for consideration is the proper method of enforcing the commission's orders. Ordinarily when the legislature constitutes a board with prescribed authority, it makes violation of its lawful orders an offence with a stated

penalty, or provides that the board shall use the courts' civil process to make its orders effective. In the one case, obedience is compelled by inspiring fear of the penalty which will follow disobedience, and in the other case, by the use of writs like mandamus or injunction. But Chapter 261 contains no provisions for recourse to either method. The question thus arises as to whether the commission is powerless in this direction, or if not, how it should proceed. Suppose, for example, in the exercise of its judgment, the commission should undertake to draft certain men to labor in the state's agricultural or other industries, and they should resist, what would be the situation in the absence of a penal clause? I think as to this line of inquiry, the proper position for the commission to take is this: while the courts are ordinarily the law's agent for law enforcement, they are not under the constitution a necessary factor.[20] A statute can provide other machinery, if the legislature believes it will be more effective, and in the present instance has done so. Under the act the commission can not only make orders, but can itself summarily enforce them, not by inflicting punishment subsequent to their violation, but by original action on its part, or through agents of its selection. It may do 'all acts and things' which are necessary for the purposes of its creation, using all required agents, including the 'Home Guard' provided for in subdivision 7 to help it. It is not to be expected that the commission will take any action which will not be sustained by the best popular opinion. But if the discharge of its duties makes it desirable to compel obedience by the direct apprehension and incarceration of malefactors or resistants, the machinery to this end it has at hand."

I am afraid the lawyers and the law book publisher on the commission did not think much of this view. It seemed to eliminate the courts, and lawyers and law book publishers are apt to think that the earth cannot revolve on its axis except with the assistance of the judges. It will be noticed that the commission's earlier orders reflect this state of mind. In general, they direct municipal councils to enact certain ordinances. The theory here was that ordinances so enacted could prescribe penalties, even if the commission's orders could not, and that municipal councils could legislate under the commission's direction, even if the commission itself had not been empowered or could not be empowered to do so. This was the plan followed with the commission's vagrancy legislation, by all odds the most ingenious and effective of its measures. The commission itself did not order the incarceration of professional agitators as vagrants, but it required the

[20] Oceanic Steam Navigation Co. v. Stranahan, (1909) 214 U. S. 320, 53 L. Ed. 1013, 29 S. C. R. 671.

several cities and villages of the state by local ordinances to so define such persons and to provide for their suppression and punishment.

There have been two lawsuits only involving the commission's powers and functions, but they have both been enlightening, as well to the commission as to the public. The first was *Cook v. Burnquist*[21] tried before Judge Booth at St. Paul in the United States District Court in July, 1917. Cook was an alien saloonkeeper in Minneapolis who was jealous of the federal constitution and claimed that his sacred rights were being violated by Order No. 7, which required him to close his saloon at ten o'clock at night. His counsel said that the order was legislative in its character and that the legislature neither had delegated nor under the constitution could delegate legislative power to the commission. But in this instance, the device of a municipal ordinance had been employed, and inasmuch as the Minneapolis council had complied with the commission's instructions and had twice passed an ordinance embodying the terms of Order No. 7, once over the mayor's veto, the point was not strictly before the court. But in the general interest, Judge Booth went beyond the immediate requirements of the pending controversy and said in substance that he would non suit Cook, even had there been no ordinance; that in his opinion Order No. 7 was not legislative but administrative in nature; that the legislature had authority to create the commission, defining its functions as it had; and that the commission for the effectuating of these functions could make orders, rules and regulations, germane to the purposes of its creation, which would have the force of laws. There cannot be any doubt that he was right. The question had been before the courts in various shapes thousands of times. Rate making is a legislative function, which the earlier cases thought could not be delegated. The care of the public domain is under congressional control and the early acts covered the minutest detail of its management, and the officers and boards in direct charge had no room for the exercise of discretion and no duty except to administer the law. But unless the legislature is to be continuously in session, it is impossible to run a government under modern conditions by such a system, and the courts have gradually got to this position: The standard to be observed and the object to be attained, in any

[21] 242 Fed. 321.

department of governmental activity, must be prescribed by the legislature itself, and it cannot delegate this duty, because it is legislative in character. For example, in rate making it is for the legislature to say that the rates shall be fair both to the enterprise and to the consumer, or in health legislation it is for the legislature to say that the public health shall be preserved by proper procedure, or in war legislation that the state shall act so as to win the war, but the details of how all or any of this shall be done are not legislative but administrative functions, and can legally be left to the officer, board, or commission which the legislature selects or creates for the particular work.[22]

After the decision in *Cook v. Burnquist,* the commission gradually abandoned the municipal ordinance device and proceeded by direct order. It has covered the widest range of subjects. It has undertaken, for example, to fix the sales price of bread and milk, to compel every male person over sixteen years old to work, to forbid the transportation of liquor in automobiles, to require the destruction of noxious plants, to regulate public dance halls and pool rooms, to suppress strikes and lockouts. By Order No. 33, it has gone so far as to make disobedience of its orders a misdemeanor.[23] In general, its powers have not been challenged. Its orders, of course, have not been strictly obeyed, any more than any laws are. But most people have acquiesced, even when they questioned the wisdom or necessity of the commission's action. Before there were any laws or any machinery to enforce his regulations, Mr. Hoover reduced the consumption of wheat by one hundred millions bushels in a single year, simply by appealing to the country's patriotism. In the same spirit of patriotism, most lawyers and most judges, and most other people have stood back of the commission, in the hope that what it was trying to do would help to win the war.

The commission's other law suit was the Blooming Prairie case. This has had two phases, one in the Hennepin County district court, and the other in the supreme court. I am not going to tell its story, because it would take too long. But the outcome

[22] The subject of "The Delegation of Legislative Functions" is discussed with much learning and a full citation of authorities in an article by Professor Cheadle in the May, 1918, Yale Law Journal, Vol. XXVII p. 892.

[23] This is not so extraordinary as it seems at first glance. Vide United States v. Eaton, (1892) 144 U. S. 677, 36 L. Ed. 591, 12 S. C. R. 764; Oceanic, etc., Co. v. Stranahan, supra.

is interesting and significant in two particulars. The action in the district court turned on the validity of Order No. 17 and of Order No. 34.[24] The first order fixed the time within which liquor could be sold by licensed saloons at Blooming Prairie as the hours between nine a. m. and five p. m., and forbade its sale at all, except for consumption on the premises where sold. The second ordered that three saloons, which had disobeyed the first order, should be closed for the period of the war. Judge Hale of Minneapolis, before whom the case came on a motion for a preliminary injunction restraining the commission from enforcing the orders, held that they were valid, that the commission had power to make them and that the court would not inquire into the facts to learn whether it was justified in the course it had taken. If sustained on appeal, this would give the commission the vindication in the state courts which more than a year ago it had in the United States Court. The action in the supreme court arose in this way: the Blooming Prairie suit in which Judge Hale rendered his decision was begun in Ramsey County and got into Hennepin County by a change of venue. While it was still pending in Ramsey County, and on June 29th, 1918, on the application of the plaintiff saloon-keeper, Judge Dickson of St. Paul had issued an ex parte restraining order, by the terms of which the members of the commission, including the governor and the attorney general, together with the sheriff of Steele County and the president of the village of Blooming Prairie, were forbidden to interfere with the operation of the plaintiff's saloon or to arrest the plaintiff for the period of seventeen days and thereafter until the further order of the court. The commission, the sheriff, and the president of the village, out of respect for the constituted authorities, obeyed the order until it was vacated by Judge Hale. But on July 1, 1918, while it was still in force, the governor of the state, in his capacity as such, sent a detachment of soldiers to Blooming Prairie, and closed the saloon, which the court had said should not be molested. Conceiving that this constituted disobedience of the restraining order, in the afternoon of July 11, 1918, Judge Dickson cited the governor to appear before him and show cause why he should not be punished for contempt. The citation was returnable on July 13th at ten o'clock in the morning. Doubtless further time might have been had by stipulation of counsel or

[24] Carroll v. Burnquist, (1918) Hennepin County District Court Docket No. 166538.

by application to the court. But inasmuch as questions of jurisdiction were involved, it appeared unwise to ask for any continuance. There were thus available thirty-six hours only in which to prepare for a hearing on a great constitutional question, an adverse decision in which, perhaps, meant the physical incarceration of Minnesota's chief magistrate and the paralysis of the state's war arm. On the 12th of July, at eleven o'clock at night, Judge Holt of the supreme court signed an alternative writ of prohibition restraining Judge Dickson from proceeding further, and the writ has since been made absolute.[25]

The governor's position was that he had not been and could not be enjoined by any court, in the performance of his executive functions, that one of his functions under the constitution was to take care that the laws were faithfully executed, that the orders of the commission were laws, and that in the absence from the act of any other provision for their enforcement he had the right and it was his duty to have recourse, if necessary for the purpose, to the military forces under his command. In other words, in July, 1918, in practice he adopted the view advanced in April, 1917, already referred to, that the commission not only had the right to make orders, but it had itself the right to enforce the orders which it made, without employing the machinery of any court, unless it wanted to, and that it could select its own agents and follow its own methods to this end. The omission from the act of any penalty for disobedience of the commission's orders connoted the inevitable conclusion that there would be no disobedience to be punished, because the commission could and would compel obedience.

The supreme court has not in so many words said that this is right. Its opinion does not decide that the commission has power to make its orders, because the question was not before it. But Judge Booth and Judge Hale have said it has, and the supreme court has said that, if it has the power, the governor may enforce them by summary process, and no court has the right to restrain him.

A good many years ago Canon Kingsley wrote a pamphlet with the title "What then does Dr. Newman mean?" It wasn't a very learned or wise production, but it inspired Cardinal Newman to write his "Apologia" by way of defence of his convic-

[25] State ex rel. Burnquist v. District Court, (Minn. 1918) 168 N. W. 634.

tions. There is no finer specimen of sustained reasoning and coherent expression in the English language than Cardinal Newman's book, and Kingsley deserves the gratitude of all lovers of elevated literature, because, even if unintentionally, he induced its production. The Blooming Prairie litigation has many discreditable features. But it was worth while, in that it called forth Judge Holt's decision and has helped to settle the question that Minnesota has an effective governmental agency, through which, in the hour of danger, public safety can be preserved, life and property protected, and the resources of the state be effectually applied to the defence of the state and nation and the prosecution of the war.

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THE PROPOSED LEAGUE OF NATIONS

THE Shining Sword which was flashed in the face of the world is broken and the glittering armor of the war lord lies by the wayside as Autocracy flees from the vengeance of an outraged people. Appalled and dazed by the catastrophe which so nearly wrecked the results of ages of patient endeavor, statesmen, publicists, jurists, and the people are determined so to reorganize the world that never again may one state or class of men bring about a great war. The course of history is broken; our conceptions of justice and the proper ambitions of states are being readjusted; and men now feel not only the necessity, but realize the practicability of organizing a world community on lines which will substitute some form of adjustment for war and some sort of supernational force for many great national armies. The alternative seems to be the ultimate destruction of civilization.

There is nothing new in the proposal to create either a world state, a federation of the world, or a league of nations pledged to maintain a certain system of international polity. Many schemes having this in view have been formulated but they have generally embodied the dreams of poets, idealists and closet statesmen.

The Great Design of Henry of Navarre, the projects of Emeric Crucé, Saint Pierre, Penn, Kant and many others fell on the ears of a world occupied with its selfish ends and dominated by theories which it is hoped are now discredited. Although these plans have generally been presented at the end of a great war, the conditions were never such as to impress those in power with the fact that it was necessary to choose between some form of world organization which would preserve peace, and the probable destruction of all free societies. Neither the selfish statesmen of the day nor the revolutionary leaders desired that the conditions then existing be fixed and maintained by force. The statesmen desired a free hand, and the agitators a reorganization. There could be no final peace in the world while dissatisfied nationalities were under the feet of their conquerors. Those only faced the realties who, like the Italian Mazzini, contended that there could be no real peace until the world had passed

through a great conflict in which the forces of justice would triumph. There had to be a leveling before there could be a permanent building.

History repeats itself. The recurring centuries bring back similar conditions and problems, and men try to solve them in the same way. There is little new in the realm of government. Three hundred years ago a war weary Europe was dominated by the House of Austria, of evil memory. Elizabeth ruled over England and Henry of Navarre sat on the throne of France. In the famous *Mémoires* of the Duke of Sully we find the details of a plan which he attributes to Henry IV, under which Austria was to have been confined within narrow limits and the rest of Europe reorganized into states, inhabited by people bound together by ties of nationality, custom, and religion, and their international relations determined and the peace of the world maintained by an assembly in which all were to be represented. It was modeled on the Amphictyonic Council of Greece. An international army to which each state should contribute was to be maintained to enforce the decrees of this council. It is very possible that this Great Design originated and ended temporarily with Henry's minister, but it is vastly interesting to know that three centuries ago men like the Duke of Sully were planning for the use of the major force of the world for the protection of the peace of the world. Henry fell beneath the dagger of Ravaillac.

"Had he lived to execute this wonderful project," said the Abbé de Saint Pierre, "he would have been incomparably the greatest man of all the past and of all future. . . . However, that prince has still the honor of making the most conspicuous device and the most useful discovery for the happiness of the human race in the history of the world. The execution of that great enterprise may well be preserved by Providence for the greatest man of posterity."

May we not reasonably hope that the purpose of the Great Design will be effected by the group of statesmen who now represent the great liberal powers of the world?

Of course the word "peace" has many connotations,—ranging from the mere absence of organized war to that condition of non-resistance which Tolstoi advocated, a state of pacifism in which "it is better to be killed by a madman than to resist him by force,"—from the peace of the mystic which passeth under-

standing, to that of the militant citizen who is determined to have peace if he has to fight for it. The peace we refer to means the absence of war in a world governed on the principles of common justice.

My purpose in this article is not to consider particularly the practicability of a League of Nations or the merits of any particular plan of world organization, but to state as briefly as possible the nature of the present world wide movement, the attitude of nations and statesmen toward it and the progress so far made toward the realization of the idea.

Forty years ago Gladstone expressed the hope that he might live to see the idea of right accepted as the governing principle in world policy. Reasonable, practical men of the world believe that the time has arrived when this dream of idealists of the past may be realized. Human nature has not changed, but it has received a tremendous shock. It required the great war to bring the world to a realization of the solid fact that unless the old selfish theories of state conduct are abandoned civilization is headed for a grand wreck. Never before has there been such a condition of open-mindedness and willingness to consider as realities what a selfish world heretofore regarded as the dreams of idealism.

The agitation which resulted in the present world wide movement began in the United States soon after the commencement of the great war. Peace societies representing various shades and degrees of pacifism had been active for several decades in England and the United States. We had taken a leading part in the Hague Conventions, which it is now the unworthy fashion to depreciate. Carnegie had devoted his millions to an endowment for international peace, which under the lead of Elihu Root and a board of earnest men was working quietly and effectively along educational lines. The very general demand for arbitration had resulted in Bryan's series of rather platonic treaties. But through many of these activities there ran more than a suggestion of the peace-at-any-price doctrine. Many of the men and women who were most conspicuous if not always the most influential at Peace Conventions and Mohawk Conferences, were fond of ringing the changes on Sumner's query, "Can there be in our age any peace that is not honorable, any war that is not dishonorable?" Such ideas found ready acceptance among a people naturally inclined toward peace and unfamiliar with world conditions. They so

hated militarism that they innocently played into the hands of the militarists of Europe and refused to prepare the nation for the dangers confronting it. With their eyes on the stars they could not see the rough way. While playing the good Samaritan they forgot that the road to Jericho was infested with thieves.

In the spring of 1915 a number of citizens distinguished in diplomacy, commerce, finance, industry, art, education and the church, met in Independence Hall, Philadelphia, and launched a movement which it was hoped would lead to a reorganized world in which another great war would not be allowed. The key note of this organization was struck when the word *enforce* was inserted in the title, and the League of Peace, became the League to Enforce Peace, thus, as President Lowell says, "alienating those who were really opposed to the principles advocated by the league, and attracting men who saw that these principles were not mere nebulous abstractions, but something which it might not be impossible for the nations of the world to approve, adopt and put into operation."

It was not to be a pacifist organization. Although conservative in its platform and moderate in its immediate aims, the League advocated the use of force to control the disturbing factors in international relations, somewhat as law and order is maintained within the borders of the individual state. The great success of this League is due to the fact that it recognizes the solid fact that so long as human nature remains what it is, it is improbable that war can be prevented entirely, and advances a workable scheme for reducing the evil to a minimum. It stands for the very simple and elementary proposition that States, like individuals, must be forced, when necessary, to obey the law.

As Mr. Hamilton Holt said, it furnished the common ground on which the pacifists and the preparationists could unite, because it provided for all sanctions, moral, economic, and physical, to maintain law and order.

Former President William H. Taft has been the president of the League to Enforce Peace from the time of its organization and much of its success has been due to his untiring activity and devotion to the cause. With him have labored many earnest men and women representing all parties, creeds, and occupations, differing in opinion as to many things, but agreeing on the vital principle that the time has come when the world must be so reorganized that there can be no more great wars.

The first national meeting, held in Washington, May 26, 1916, was a notable gathering of more than two thousand men and women, representing almost every occupation in life and coming from every state in the Union. Ex-President Taft presided, and President Wilson delivered an address which was heard throughout the world. Naturally such a meeting gave an immense impulse to the work. After America entered the war the League became a powerful agency for consolidating sentiment in favor of throwing every ounce of the strength of the nation into the contest and winning a victory such as would insure a peace worth preserving. In May, 1918, it held a Win-the-War-for-Peace convention in Philadelphia at which more than five thousand delegates pledged it to support the Government in the struggle against autocracy. Since that time the membership of the national organization has been rapidly increasing. State branches have been organized in many of the states, and the work of organization is being actively pushed. The enthusiasm shown by the public is evidenced by the fact that at the convention recently held in Denver for organizing a local branch in Colorado more than fifteen thousand people were in attendance. Similar organizations have been working in the other allied countries.

The war has been won and it now remains to secure the victory with a peace of justice and organize a League of Nations with the will and the machinery to enforce the peace.

The most serious obstacle in the way of an effective peace has been removed by the fall of the House of Hohenzollern, the destruction of the Prussian military monarchy and the discrediting of the philosophy of force upon which the political system of the Central Powers rested. The keenest critics of a proposed League of Nations such as Frederick Harrison and Mr. J. B. Firth seem to have had very little hope of a military victory over the Central Powers and no confidence whatever in the desirability of a League of Nations in which a victorious or even a partially defeated Germany would participate. "There can be no security," wrote Mr. Firth in the Fortnightly Review, "unless German militarism is completely destroyed, together with the whole German System, of which it is the spirit and the life." The position was correct and unassailable. There is no question but that the German people, almost without exception, accepted the theory that Force is a manifestation of the Divine Will expressed through the mystical entity known as the State; and that success

in the use of force is the justification for its use. Necessarily, then, according to this doctrine, *failure is condemnation*. The Germans are nothing if not logical. Germany has failed, and Chancellor Prince Maximilian now announces that "The victory for which many had hoped has not been granted to us. But the German people has won this still greater victory over itself and its belief in the right of might." It is certainly something gained if the German people have learned that might is not necessarily right. The old Germany could never have been a member of a league of free nations. It was very willing to join a league after a German victory and "to suppress disturbers of the peace." As Chancellor Von Hertling placidly announced, Germany was ready to place herself *at the head* of a league after she had arranged all the national boundaries according to her idea of what was best for Germany. As the mobilized German professors put it, the league, "must, of course, be under the leadership of the most efficient people."

All this has passed away. The world has now to deal with a broken and, we trust, a chastened Germany, and it will grant such terms and impose such conditions as are necessary to establish and maintain a just peace. However, there should be no illusions as to the difficulties to be overcome. The hope of success is in the awakened conscience of the world, and the changed attitude of practical men toward proposals heretofore regarded as mere dreams. It may be that this is a result of fright and therefore temporary. Let us hope, however, that the fires have burned out some of the selfishness of men and that a heretofore dormant sense of justice has been awakened. There is encouragement in the fact that practical men no longer deny the possibility of world organization for world protection.

In the United States the overwhelming sentiment is in favor of a League of Nations, along the lines laid down in the platform of the League to Enforce Peace. If we may judge by the attitude of the press, there is hardly a discordant note. The general principle is almost universally accepted. Public men and politicians of all shades of opinion approve the idea. Mr. Taft is the father of the movement in this country, and his views are well known.

Elihu Root says, "I heartily agree with the purpose and general principle of the League to Enforce Peace. It seems clear to me that if we are ever to get away from the necessity for great

armaments and special alliances, with continually recurring wars, growing more and more destructive, it must be by a more systematic treatment of international disputes brought about by common agreement among civilized nations. It seems to me that any such system must include the better formulation of international law, the establishment of an international court to apply the law, *and a general agreement to enforce submission to the jurisdiction of the court.* I also think the Court of Conciliation for dealing with questions which are not justiciable is very desirable."

It has been approved by such organizations as the Chambers of Commerce of the United States and the American Federation of Labor, and by publicists, jurists and writers such as Charles E. Hughes, A. Lawrence Lowell, Alton B. Parker, Henry Cabot Lodge, John Bates Clark, Nicholas Murray Butler, Franklin H. Gidding, Stephen S. Wise, Anna Howard Shaw, John Spargo, Lyman Abbott and many others of equal eminence. Col. Roosevelt, who deprecated the agitation for a League of Nations until a victory over Germany had been won, now says:

"But if without in the smallest degree sacrificing our belief in a sound and intense national aim we all join with the people of England, France, and Italy and with the people in smaller states, who in practise show themselves able to steer equally clear of bolshevism and of kaiserism, we may be able to make a real and much needed advance in the international organization. The United States cannot again completely withdraw into its shell. We need not mix in all European quarrels nor assume all spheres of interests everywhere to be ours, but we ought to join with the other civilized nations of the world in some scheme that in a time of great stress would offer a likelihood of obtaining just settlements that will avert war.

"Therefore, in my judgment, the United States at the peace conference ought to be able to co-operate effectively with the British and French and Italian governments to support a practical and effective plan which won't attempt the impossible, but which will represent a real step forward.

"Probably the first essential would be to limit the league at the outset to the Allies, to the people with whom we have been operating and with whom we are certain we can co-operate in the future. Neither Turkey nor Austria need now be considered as regards such a league, and we should clearly understand that bolshevist Russia is and that bolshevist Germany would be as undesirable in such a league as the Germany and Russia of the Hohenzollerns and Romanovs. Bolshevism is just as much an

international menace as kaiserism. Until Germany and Russia have proved by a course of conduct extending over years that they are capable of entering such a league in good faith, so that we can count upon their fulfilling their duties in it, it would be merely foolish to take them in.

"The league, therefore, would have to be based on the combination among the Allies of the present war—together with any peoples like the Czech-Slovaks, who have shown that they are fully entitled to enter into such a league if they desire to do so. Each nation should absolutely reserve to itself its right to establish its own tariff and general economic policy and absolutely ought to control such vital questions as immigration and citizenship and the form of government it prefers. Then it probably would be best for certain spheres of interest to be reserved to each nation or a group of nations."

President Wilson was prompt to express his approval of the program of the League to Enforce Peace. Speaking with reference to the war at the meeting of the League on May 27, 1916, he said:

"With its causes and its objects we are not concerned. The obscure fountains from which its stupendous flood has burst forth we are not interested to search for or explore. . . . And the lesson which the shock of being taken by surprise in a matter so deeply vital to all the nations of the world has made poignantly clear is that the peace of the world must henceforth depend upon a new and more wholesome diplomacy. Only when the great nations of the world have reached some sort of an agreement as to what they hold to be fundamental to their common interest, and as to some feasible method of acting in concert when any nation or group of nations seeks to disturb those fundamental things, can we feel that civilization is at last in a way of justifying its existence and claiming to be finally established. . . . . Repeated utterances of the leading statesmen of most of the great nations now engaged in war have made it plain that their thought has come to this, that the principle of public right must henceforth take precedence over the individual interests of particular nations and that the nations of the world must in some way band themselves together to see that right prevails as against any sort of selfish aggression. . . . I am sure that I speak the mind and wish of the people of America when I say that the United States is willing to become a partner in any feasible association of nations formed in order to realize these objects and make them secure against violation."

On September 2, of the same year, in accepting a renomination Mr. Wilson said:

"The nations of the world must unite in joint guarantees that whatever is done to disturb the whole world's life must first

be tested in the court of the whole world's opinion before it is attempted."

On January 22, 1917, in his address to the Senate on Essential Terms of Peace in Europe, the President, who then favored "a peace without victory," stated the conditions upon which this government "would feel justified in asking our people to approve its formal and solemn adherence to a League of Peace."

There must, he said, be "a peace that is worth guaranteeing and preserving," and "It will be absolutely necessary that a force be created as a guarantor of the permanency of the settlement so much greater than the force of any nation now engaged or any alliance hitherto formed or projected that no nation, no probable combination of nations could face or withstand it. If the peace presently to be made is to endure, it must be a peace *made secure by the organized major force of mankind*. . . . And in holding out the expectation that the people and government of the United States will join the other civilized nations of the world in guaranteeing the permanence of peace upon such terms as I have named I speak with the greater boldness and confidence because it is clear to every man who can think that there is in this promise no breach in either our traditions or our policy as a nation, but a fulfillment, rather, of all that we have professed or striven for. I am proposing, as it were, that all nations should with one accord adopt the doctrine of President Monroe as the doctrine of the world. . . . There is no entangling alliance in a concert of power. When all unite to act in the same sense and with the same purpose all act in the common interest."

America finally became involved in the war and on January 8, 1918, the President formulated his "program of the world's peace," in which appeared the following:

"14. *A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike.*"

In his speech at New York on September 27, President Wilson further elaborated his views. Both the Democratic and Republican party platforms approved the principle of a League of Nations.

Recent events make it unnecessary to refer in detail to the expressions of British statesmen. Those who hesitated have been driven to support the general principle by the growing force of public opinion. The great leaders such as Lloyd George, Lord Bryce, Balfour, Lord Grey, Lord Curzon, Lord Robert Cecil and

Mr. Asquith are definitely committed in favor of a League of Nations. All political parties and factions are united. Lord Grey has published an able pamphlet on the subject. Lord Curzon has supported it in a powerful speech in the House of Lords. On November 13, Lloyd George, in speaking of the coming conference to fix the terms of peace, said, "It is the duty of Liberalism to use its influence to ensure that it shall be a reign of peace. . . . . In my judgment a league of nations is absolutely essential to permanent peace. We shall go to the peace conference to guarantee that a League of Nations is a reality."

According to the pessimistic Mr. J. B. Firth (who appears to have been serving in the capacity of Devil's Advocate), in England, "the League of Nations has become a popular catchword. If there is to be a general election late in November or December, all the political parties will have to subscribe to it and every candidate will pledge himself to support any practical scheme that may be put forward." And he adds, with some irritation, the British Government "will continue to explore the possibilities of the idea in the hope of evolving a workable scheme and they and the United States will not be satisfied until they have persuaded their allies to join with them in setting up some new instrument of international machinery for the prevention of war, which they will call the League of Nations."

It has been asserted that Clemenceau and other French statesmen have not been enthusiastic over such a league. Certainly there has been less agitation of the matter in Paris than in England and the United States. But France, like the other Allies, has accepted the Wilson bases of peace and, on November 15, the chairman of the French official commission, appointed some time ago to work out a plan, announced his approval of the project. "The universal war," says M. Bourgois, "has demonstrated to all nations the necessity for an international constitution. This would assure to each nation the sanctity of its rights. Diplomatic and judicial measures could place a discordant state in intolerable solitude, and not only the state, but its citizens would suffer. President Wilson has admitted the legitimacy of economic penalties and hinted that they might possibly be used against the Central Powers.

"If this weapon should fail, there would remain international military intervention. But economic measures which would de-

prive a country of raw materials and interrupt land and sea transport would be sufficient to crush resistance."

It is therefore certain that the representatives of the victorious Allies are fully committed to the idea of a League of Nations and that the peace conference must make a serious attempt to formulate a practical working scheme.

The difficulties are many and serious and the highest qualities of statesmanship will be required. Nothing will be easier than to repeat the platitudes of political morality and lay down perfectly valid general principles. So far, very naturally under the circumstances, we have had little in the way of details from those in authority. Evidently President Wilson is in substantial accord with the original program formulated by the League to Enforce Peace, which is as follows:

"We believe it to be desirable for the United States to join a league of nations binding the signatories to the following:

"First: All justiciable questions arising between the signatory powers, not settled by negotiation, shall, subject to the limitations of treaties, be submitted to a judicial tribunal for hearing and judgment, both upon the merits and upon any issue as to the jurisdiction of the question.

"Second: All other questions arising between the signatories, and not settled by negotiation, shall be submitted to a council of conciliation for hearing, consideration, and recommendation.

"Third: The signatory powers shall jointly use forthwith, both their economic and military forces against any one of their number that goes to war, or commits acts of hostility, against another of the signatories before any question arising shall be submitted as provided in the foregoing.

"Fourth: Conferences between the signatory powers shall be held from time to time to formulate and codify rules of international law, which, unless some signatory shall signify its dissent within a stated period, shall thereafter govern in the decisions of the judicial tribunal mentioned in article one."

Later the following interpretation of Article Three was authorized by the Executive Committee:

"The signatory powers shall jointly use forthwith, their economic forces against any of their members that refuses to submit any question which arises to an international judicial tribunal or council of conciliation before issuing an ultimatum or threatening war. They shall follow this by the joint use of their military forces against that nation if it actually proceeds to make war or invade another's territory."

As Mr. Taft says, it must be observed that this platform is constructed on broad lines and its machinery must be worked out in international conferences. It may be open to attack, but its feasibility is not successfully shown by exceptional hypotheses under which it would fail of its purpose. The most practical plan of government may thus be shown to be futile. If the platform will work in most cases, the value of the result justifies its adoption. The distinction between justiciable and non-justiciable controversies is recognized.

The life giving element in this plan, and that which distinguishes it from the various Hague Conventions and the Bryan arbitration treaties, is the provision for using force against a state that resorts to war *without first submitting its claim to arbitration or conciliation.* Experience has shown pretty conclusively that when the serious ambitions and interests of powerful states are involved moral sanctions are not sufficient to ensure the observance of international obligations. The history of the past four years has demonstrated that no state may ignore and defy the moral judgment of the world. But it also shows that unless there is some exterior, restraining, physical force, swollen empires, intoxicated with their own power, are liable to try the experiment. Force must be controlled by superior force, and the mere fact of the known existence of the superior force is generally sufficient to maintain peace. It is the big club which Roosevelt advises all soft spoken communities to carry. But Bryan says that if you speak softly you will never need a club, and thus we have the two schools. Even the gentle (but exceedingly practical) Quaker, William Penn, who in 1693 published an *Essay towards the Present and Future Peace of Europe,* in which he urged the establishment of a European parliament, provided that "if any of the Sovereignties that constitute these imperial states, *shall refuse to submit their claim or pretentions to them, or to abide and perform the judgments thereof, and seek their remedy at arms,* or delay their compliance beyond the time prefixed in their resolutions, *all the other sovereignties, united as one strength, shall compel the submission and performance of the sentence,* with damages to the suffering party, and charges to the sovereignties that obligated their submission."

It will be noted that this original program did not provide for the use of force to compel the enforcement of the judgment of the tribunal or the recommendation of the Council of Conciliation.

According to Mr. Bryan, "this, of course, lessens the objection in proportion as it lessens the probability of a resort to force." Others regarded the plan as incomplete because it did not provide for the execution of the decrees of the court and recommendations of the Council.

Since the signing of the armistice and the certainty of victory the League to Enforce Peace has somewhat amplified its program and restated its principles as follows:

It is necessary to create:

"1—For the decision of justiciable questions, an impartial tribunal whose jurisdiction shall not depend upon the assent of the parties to the controversy, provision to be made for enforcing its decisions.

"2. For the questions that are not justiciable in their character, a council of conciliation, as mediator, which shall hear, consider and make recommendations, and failing acquiescence by the parties concerned, the league shall determine what action, if any, shall be taken.

"3. An administrative organization for the conduct of affairs of common interest, the protection and care of backward regions and internationalized places, and such matters as have been jointly administered before and during the war. We hold that this object must be attained by methods and through machinery that will insure both stability and progress, preventing on the one hand, any crystallization of the status quo that will defeat the forces of healthy growth and change, and providing, on the other hand, a way by which progress can be secured and necessary change effected without recourse to war.

"4. A representative congress to formulate and codify rules of international law, to inspect the work of the administrative bodies, and to consider any matter affecting the tranquillity of the world or the progress or betterment of human relations. Its deliberations should be made public.

"5. An executive body able to speak with authority in the name of the nations represented and to act in case the peace of the world is endangered.

"The representatives of the different nations in the organs of the league should be in proportion to the responsibilities and obligations they assume. The rules of international law should not be defeated for lack of unanimity.

"A resort to force by any nation should be prevented by a solemn agreement that any aggression will be met immediately by such an overwhelming economic and military force that it will not be attempted.

"No member of the league should make any other offensive or defensive treaty or alliance and all treaties of whatever nature made by any member of the league should at once be made public.

"Such a league must be formed at the time of the definite peace, or the opportunity may be lost forever."

That the proposed league must be provided with adequate means to enforce its will upon a guilty state is implied, when not expressly stated, in all President Wilson's utterances. As to the extent to which it shall go, the interpretation of the phrase economic force, and the nature and source of the necessary military power, he has expressed no opinion. All such matters must be left for the peace conference to determine. If the members of that body can not work out a practicable plan of world organization it will simply mean that they are no more capable of managing world affairs than were their predecessors. Seventy years ago Tennyson dipt into the future and saw "The nations' airy navies grappling in the central blue." Science made this vision a reality. Had but a small part of the skill, energy, and intense application which made the airy navies, submarines and other destructive agencies possible been devoted to organizing the world for peace, the poet's prophecy of a time when "the common sense of most shall hold a fretful realm in awe" would also have been realized and the battle flags would long since have been furled in "the Parliament of man, the Federation of the World." The scientists were successful in providing for destruction; the statesmen bungled the work of construction and conservation.

No one imagines that the creation of an effective League of Nations is not difficult. It is easy to say, with Sir Gilbert Murray, "Laugh at impossibilities, and cry, 'It shall be done.'" But faith and confidence are not enough. The objections raised by those of little faith are many and some of them are serious. The representatives of great states which have long been in competition in the race for political and trade supremacy will find it extremely difficult to waive the advantages given them by their power. All past alliances have been based on self interest and therefore came to an end when conditions changed. The past is strewn with the wrecks of such alliances, most of which pledged perpetual friendship. The Concert of Europe often played but jangling music. Delays and bickerings have usually accompanied the attempts of independent military bodies to act as a unit, but

the possibility of combined military action under a single head has been demonstrated when there is a real necessity therefor. It will, of course, be difficult to induce the great states to consent to restraints on their future actions. It is said that after Great Britain disentangled herself from the Holy Alliance, Canning exclaimed, "No more Areopagus. Now, England will be free to look after her own interests in her own way." It is very probable, however, that the "splendid isolation" idea has lost some of its attractiveness for British statesmen and the practice by any state of seeking "her own interest in her own way," regardless of the rights of others, is exactly what the world does not intend longer to tolerate. The war was fought to put an end to just that sort of thing.

But it is said that in order to enter a League of Nations which will be more than a platonic partnership it will be necessary for a state to consent to restrictions upon its independence and to surrender a part of its sovereignty. In a sense this is true, but instead of being an objection it is an argument in favor of a League of Nations. Sovereignty, in this sense, means simply supreme power,—a state subject to no law, no legal restraint, with the "right" to run amuck in the world without moral responsibility therefor. The principal object of a League of Nations is to restrict this sort of sovereignty and place states under the control of a super-national authority.

The contention that the United States could not enter a League of Nations under its present constitution and that such action would imperil the Monroe Doctrine is not entitled to very serious consideration. It might be said that unless the United States is willing to submit its vital international policies to the judgment of the world it may not ask other nations to do so. But the Monroe Doctrine will no more be endangered under a treaty establishing a League of Nations than it is under some twenty-five existing arbitration treaties by which the United States has agreed that all disputes "of every nature whatever" shall be referred for investigation and report to an international commission. Under the plan proposed by the League to Enforce Peace, any controversy which might affect the Monroe Doctrine may very well be submitted to the Council of Conciliation and thereafter, as in all other cases, it would be for the United States to determine its future course. No one proposes to enforce the recommendation by war.

The claim that such a treaty would violate the constitution in that it would take from Congress the power to declare war rests upon a misconception of the situation. No act of the proposed league could take this power from Congress. The treaty would, of course, be approved by the Senate in the ordinary way and at the most would impose upon Congress the duty to declare a war under certain conditions, and "to impose in a contractual way by treaty an obligation on Congress is not to take away its *power* to discharge it or to refuse to discharge it." The power would remain with Congress exactly as at present. As to this there seems to be little, if any, difference of opinion among those who are qualified to express an opinion on such a question. The whole situation is summarized in the following statement of Mr. Taft:

"The United States should enter the League: first because of all nations in the world it wishes to avoid war and to make it as remote as possible; second because its interests have now become so world-wide, and it has become so close a neighbor of all the great powers of Europe and of Asia that a general war must involve the United States. . . .

"The objection that by such a league as this the United States will have to abandon the Monroe Doctrine is entirely unfounded. On the contrary, the League will assist the United States in maintaining that doctrine by invoking the action of the world to hold off its violation by a European nation's making war against an American country until after a hearing or a decision on the merits of the controversy. Nor will it commit the United States to any judgment in respect to the Doctrine, because, under the League it is not the subject matter of a judgment, but only of a recommendation of a compromise which the United States is at liberty to accept or reject. The League offers no authority or opportunity to European nations to subvert American governments or colonize American territory, any more than it offers to the United States corresponding authority or opportunity for similar action in Europe.

"Nor does the League involve the delegation to an international council, in which the United States has but one vote, the power to hurry this country into war. The President and the Senate sign the treaty of the League and bind the United States to its obligations. Congress is the authority which will decide whether the facts exist calling for action by the United States, and then will take such action as the obligation requires."

The people of the liberal world are in grim earnest in this matter and demand that the men who represent them at the

peace conference shall devise some plan of world organization which will protect them and their children from the danger of another great war. They demand something more than a formula of words and phrases expressing a desire for justice and the intention to be controlled in the future by copy-book sentiments. The members of the conference will not all be altruists or internationalists. Regardless of fine words, the most of them will consider themselves as there to care for the interests of their own countries first and for humanity in general afterwards. As these interests begin to clash, the idea of a League of Nations will be in danger of falling into the background. The present objections and difficulties will then loom larger than the future advantages. With the removal of the pressure of war, the conflicting interests, passions, and prejudices of parties and individuals will destroy the unanimity which has so far prevailed and unless the demand for effective action is backed by a strong aggressive public sentiment there is danger that the entire movement may come to nothing. Unfortunately, although perhaps necessarily, the proposals for a League so far as they are official have been put forth in language so general as to leave room for much freedom of construction and many who are really in favor of a league hesitate for fear that it will lead the country—they know not where. There is danger, also, that enthusiastic friends of a League of Nations may demand too much and thus get nothing. It will be advisable, probably, for the nations to supervise certain matters, such for instance as the former German colonies, through the League, because the terms of the peace can be carried out in no other way. But an attempt to create a new world sovereign state with independent powers of legislation and with direct control over all sorts of matters is doomed to failure. The world is not ready for that sort of internationalism.

The program of the League to Enforce Peace is reasonable and practicable.

CHARLES B. ELLIOTT.

MINNEAPOLIS

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THE LAW SCHOOL—Three quite distinct courses of study are being given this year, the civilian course, the S. A. T. C. course for law students as prescribed by the Committee of the War Department on Special Training and Education, and the course on Military Law as prescribed by the same committee.

The registration in the civilian course is seventeen, only twelve per cent of what it was in the fall of 1917. Fortunately, however, it has not been necessary to abridge in any appreciable degree the regular law curriculum, but only to consolidate some of the second and third year classes. The registration in the

S. A. T. C. prescribed course for law students is forty-seven, while the registration for Military Law is 928.

The work in Military Law is cared for by five professors and one quiz master. The students are divided into eight sections. Mr. Wilbur H. Cherry is directing the course, assisted by three professors from the law faculty and Mr. Lobb of the political science department of the University. Mr. H. W. Cox, of the class of 1916, is quiz master. Chief Justice A. A. Bruce of the supreme court of North Dakota has been called to a professorship in the Law School. He is teaching Equity, Trusts, and Military Law.

Dean W. R. Vance has been granted a leave of absence for this year. He is in Washington, D. C., as Counsel for the Bureau of War Risk Insurance. The administrative work and lecture courses are being cared for by other members of the faculty. Mr. James Paige is Acting Dean. Professor Thurston is now a lieutenant colonel in the Judge Advocate General's Department of the army and is at present in Russia.

Mr. A. C. Pulling, law librarian, is also absent this year, having been appointed librarian in the office of the Judge Advocate General, Washington, D. C. Mrs. Marie Bond is acting librarian during his absence.

THE LAW REVIEW—A list of names of members of the 1917-18 student editorial board who entered war service is printed in this issue, not so much for the purpose of calling attention to the difficulties under which the staff of THE REVIEW labors in carrying the work through the period of the war, as preserving for the future a record of the honorable service of its members. Return to normal conditions, commencing with the January term, will gradually restore to the Law School many of its members and permit the student body to resume full co-operation in the editorial work. The immediate future is likely to bring before the courts and the law-making bodies legislative and judicial problems of the most important character. Changes in the law are sure to parallel political and economic developments, and in the wise solution of these problems and the accurate registration of these changes the MINNESOTA LAW REVIEW hopes to share.

NOTES

TRUSTS—VALIDITY OF A PERPETUAL TRUST—RULE AGAINST PERPETUITIES—RULE AGAINST RESTRAINTS ON ALIENATION.—There are two distinct rules of law governing the limitation of estates. The Rule against Perpetuities (remoteness) restricts the creation of estates; the Rule against Restraints on Alienation prevents restraints on the disposition of estates. By the former, limitations of property which by the terms of their creation might remain contingent or executory beyond lives in being and twenty-one years from their creation, are void; by the latter restraints on the alienation of estates are void; the former applies only to future interests; the latter generally to present interests; the former ceases to operate before the latter begins; the former avoids the estate; the latter avoids the restraint on the estate. The two rules are distinct in subject matter and effect. Their single unifying principle is the public policy which underlies both.[1] Yet both courts and legislatures have confused the two.[2]

The confusion is well illustrated by recent cases in Maryland.[3] A deed of real estate was made to trustees, their heirs and assigns to hold in trust to pay the American Colonization Society the net income to be used for the transportation of colored persons to Liberia, for which purpose the Society had been incorporated. The trust was held invalid as violating the Rule against Perpetuities. The court said: "Whatever may be the law

[1] Gray, Rule Against Perpetuities, 3rd ed., Secs. 2a, 118a, 236, 278, 437a.

[2] That the common law rule against perpetuities was nothing more than a rule against restraint on alienation was the theory on which the New York Revised Statutes (1830) were framed. These statutes have been copied by Michigan, Wisconsin, and Minnesota, with the result, in Minnesota, that a limitation of real estate is not invalid merely because it may not vest within the statutory period, unless there is a restraint on the alienation which might continue beyond the statutory period. Buck v. Walker, (1911) 115 Minn. 239, 132 N. W. 205; Mineral Land Investment Co. v. Bishop Iron Co., (1916) 134 Minn. 412, 159 N. W. 966, L. R. A. 1917D 900. What rule prevails here in respect to personal property is uncertain. In re Tower's Estate, (1892) 49 Minn. 371, 52 N. W. 27; Minnesota Loan & Trust Co. v. Douglas, (1917) 135 Minn. 413, 166 N. W. 158.

[3] American Colonization Society v. Soulsby, (1917) 129 Md. 605, 99 Atl. 944, L. R. A. 1917C 937; on second appeal, (1917) 131 Md. 296, 101 Atl. 780; American Colonization Society v. Latrobe, (Md. 1918) 104 Atl. 120.

elsewhere, we, following the decisions of this Court, must hold the trust in this case to be void because it is a perpetuity, in that it attempts to create an active trust which is required to continue beyond the period allowed by the rule."[4] The Maryland courts have oscillated between the true Rule against Perpetuities and a spurious rule which is neither the Rule against Perpetuities nor the Rule against Restraints on Alienation.[5]

The true Rule against Perpetuities has nothing to do with the case. By the deed of trust the legal interest of the trustees and the equitable interests of the cestui que trust, the Society, began at once. There was no remoteness in the vesting with which alone this Rule has to do. The deed of trust was perfectly valid so far as the Rule against Perpetuities is concerned.[6]

Was the gift invalid under the Rule against Restraints on Alienation? The deed did not expressly restrain the alienation of the specific property. On the contrary, power was given the trustees to sell the property and to change investments. There was no other restraint than such as arose from the purpose of the deed to create a perpetual trust of the property or its proceeds. The donor intended that the legal title should be kept forever separate from the equitable, and that the net income should be forever paid to the Society. This it was that the court held avoided the deed under the Rule against Perpetuities. That, it is submitted, was wrong. But were the interests created inalienable, and, if they were, were they invalid for that reason?

Restraints on property in a broad sense are attempts to deprive the owner of the usual incidents of ownership. It is frequently said that restraints are repugnant to the estates.[7] If that means that they are contrary to the ownership given, it is begging the question, for as the estates and restraints are created at the same time, the real question is whether an absolute or qualified ownership was created.[8] But repugnancy may mean

[4] (1917) 129 Md. at 616.

[5] See an analysis of earlier Maryland cases, Gray, Rule Against Perpetuities, 3rd ed., Sec. 245c-245l.

[6] Pulitzer v. Livingstone, (1896) 89 Me. 359, 36 Atl. 635. "If land is devised to A in trust for B and his heirs, the rule against perpetuities has no application. The trust is perfectly good. B's equitable fee is no more objectionable because it may last forever than is a demise of a legal fee simple; that, too, may last forever. B may at once demand from the trustee a conveyance of the legal fee." Gray, Rule Against Perpetuities, 3rd ed. Sec. 236.

[7] Hause v. O'Leary (1917) 136 Minn. 126, 161 N. W. 392.

[8] Kales, Future Interests Sec. 291.

qualifications of ownership which the law will not allow.[9] A new species of estate cannot be created as to A and his heirs male.[10] New and unusual incidents cannot be attached to estates at the will of the grantor.[11] It is equally true that certain legal incidents can not be taken away from them. What legal incidents may not be denied depends on the policy of the law. Thus an attempt to restrain the alienation of a fee-simple in specific property is void because it would keep the land out of commerce and would hinder persons, sui juris, in the enjoyment of property in which they have an indefeasible and equitable interest.[12] An attempt to restrain the alienation of a certain person's absolute and indefeasible interest in a mutable property, as, e.g., a trust for a sole cestui with power in the trustees to change investments, but with a direction that the cestui's interest shall not be alienable, voluntarily or involuntarily, is void because it would hinder a person, sui juris, in the enjoyment and would defeat creditors.[13] Is an attempt to restrain the beneficial owner from having the possession of, or legal title in, the property beneficially owned, as in the principal case a trust of mutable property for a sole beneficiary, to continue forever, likewise void? There is no restraint on alienation in this class of cases. But the earlier common law was very clearly against a restraint on the enjoyment of property in the view of equity absolutely and indefeasibly owned, solely for the benefit of the owner. Thus if a fund were given to trustees upon trust to accumulate until A attained twenty-five and then to transfer the gross amount to him, A, on attaining twenty-one, might, as the person exclusively interested, call for the immediate payment.[14] So on a devise of real estate with a direction that the devisee was not to have the enjoyment until he attained the age of twenty-five, where the gift was vested and no one else had any interest in it, the court struck out the direction as to non-enjoyment, and gave the property at once to the devisee as abso-

[9] Bowen v. John, (1903) 201 Ill. 292, 66 N. E. 357; Potter v. Couch, (1890) 141 U. S. 296 (315), 35 L. Ed. 721, 11 S. C. R. 1005.

[10] Co. Lit. 27b.

[11] Keppel v. Bailey, (1834) 2 Mylne & K. 517, 39 Eng. Reprint 1042.

[12] Gray, Restraints on Alienation, 2nd ed., Sec. 105 et. seq.

[13] Mebane v. Mebane, (1845) 4 Ired. Eq. (N. C.) 131, 44 Am. Dec. 102; Potter v. Couch, (1891) 141 U. S. 296 (315), 35 L. Ed. 721, 11 S. C. R. 1005.

[14] Saunders v. Vautier, (1841) 4 Beav. 115, Cr. & Ph. 240, 10 L. J. Ch. (N. S.) 354, 49 Eng. Reprint 282, 41 Eng. Reprint 482.

lute owner.[15] And directions by a testator as to the mode of enjoyment by a legatee exclusively interested were held not to preclude his right to the payment of his legacy.[16] While a few American courts[17] have broken away from the strict rule and have held that directions of the donor for continuing the trust beyond the majority of the sole cestui will be respected, the restraints were only for a limited time, and it is inconceivable that the courts would so far disregard the old rule as to sustain directions for perpetual trusts.[18] The result is that the cestui can compel the trustee to convey the legal title to him. And this even though the trustee has active duties to perform.[19] The restraints on the cestui's interest, including the provision for active duties of the trustee, are void and not the interests themselves.

To the rule that indefeasible equitable fees created by way of trust may not be inalienable, charitable trusts are an exception. It is of the nature of a charitable trust that the cestuis are indefinite. There is, consequently, no one who can convey the beneficial interest.[20] And the donor's directions for keeping the principal intact will be enforced against the trustees. But if the

[15] "The principle of this court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age; unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full, so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to induce the court to hold that, as to the previous rents and profits, there has been an intestacy,—the court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years." Per Sir W. P. Wood, V. C., in Gosling v. Gosling, H. R. V. Johns 265.

[16] Re Johnston, (1894) 3 Ch. 204, 71 L. T. R. 392.

[17] Claflin v. Claflin, (1889) 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393; Lunt v. Lunt, (1884) 108 Ill. 307; King v. Shelton, (1913) 229 U. S. 90, 57 L. Ed. 1086, 33 S. C. R. 686. But see Welch v. Episcopal Theological School, (1905) 189 Mass. 108, 75 N. E. 139; Parker v. Cobe, (1911) 208 Mass. 260, 94 N. E. 476, 33 L. R. A. (N.S.) 978, 21 Ann. Cas. 1100.

[18] Gray, Rule Against Perpetuities, 3rd ed., Secs. 121c-121i; Kales, Future Interests Sec. 265.

[19] Wharton v. Masterman, 1895 A. C. 182, 72 L. T. R. 431, 11 T. L. R. 301.

[20] Gray, Rule Against Perpetuities, 3rd ed, Secs. 589-628.

property is left to trustees in trust for a corporation organized for charitable purposes so that the charitable corporation has the whole indefeasible equitable interest, it may compel the conveyance to it of the legal title, and active duties imposed on the trustees will be disregarded.[21]

The Maryland courts hold charitable trusts void under the common law.[22] But gifts directly to a corporation organized for charitable purposes are good even though they are made on conditions subsequent, or to constitute a perpetual fund for some only of the charitable purposes of the corporation.[23] Consequently a gift directly to the Society would have been good although coupled with a direction that the income only be expended. The difficulty lay in the trust for the Society. But had the general common law principle been applied, the Society would have been entitled to a conveyance of the legal title and the active duties imposed on the trustees disregarded. And this would have brought the case within the principle of a direct gift to a charitable corporation. But the Maryland courts hold that even in non-charitable trusts the cestui of an indefeasible equitable fee cannot get in the legal title from a trustee with active duties to perform, and that consequently the trust is perpetual and void.[24] Instead of disregarding the restraints of the donor and sustaining the gift, the restraints are sustained and the gift is destroyed.[25]

CONSTITUTIONAL LAW—MINIMUM WAGE—MASTER AND SERVANT—FREEDOM OF CONTRACT.—The Massachusetts Minimum-Wage law, establishing a minimum wage commission to disseminate information as to wages of women and minors, is *Held* not violative of the Bill of Rights, Arts. 1, 10, 12, freedom of contract in the constitutional sense not being infringed. *Holcombe v. Creamer,* (Mass. 1918) 120 N. E. 354.

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[21] Wharton v. Masterman, ubi supra. But see Woodruff v. Marsh, (1893) 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; St. Paul's Church v. Attorney General, (1895) 164 Mass. 188, 41 N. E. 231.

[22] Missionary Society v. Humphreys, (1900) 91 Md. 131, 46 Atl. 320, 80 Am. St. Rep. 432.

[23] Bennett v. Baltimore Humane Society, (1900) 91 Md. 10, 45 Atl. 888; Peter v. Carter, (1889) 70 Md. 139, 16 Atl. 450.

[24] Lee v. O'Donnell, (1902) 95 Md. 538, 52 Atl. 979.

[25] For a decision under the Minnesota statutes contra to the principal case, see Young Men's Christian Association v. Horn, (1913) 120 Minn. 404, 139 N. W. 805.

The Massachusetts act differs radically from the Minnesota act in that it is not mandatory as to rates of wages. It is not in terms made obligatory either upon employer or employee to pay or to accept the rate of wages established by the commission. Any employer is at liberty to make any agreement respecting wages with his female or minor employees and such agreements are legally enforceable. The only compulsion aimed at by the statute is the pressure of public opinion. It is easily read between the lines that the legislature intended by means of publication of the names of employers disregarding the recommendations of the commission, to focus the public attention upon them, making them odius and unpopular, and thus establish a legislative blacklist. Freedom of contract literally is unhampered by the act, but the evident purpose of the act is to compel all employers to pay the wages established by the commission. The statute thus bears a strong resemblance to those workmen's compensation acts which in terms leave the employer free to come under its provisions or not, but by denying him the protection of common-law defenses in case he elects not to do so, reduce to a shadow his privilege of choice. *Young v. Duncan,* (1914) 218 Mass. 346, 106 N. E. 1; *Opinion of Justices,* (1911) 209 Mass. 607, 96 N. E. 308. The court in the *Holcombe* case takes considerable pains to point out that "The act does not purport to exercise any check with respect to liberty of contract, use of property, or management of business," but the act provides that "Any employer, who files a declaration under oath to the effect that compliance with the recommendations of the Commission would render it impossible for him to conduct his business at a reasonable profit, shall be entitled to a review of such recommendations by the Supreme Judicial Court or the Superior court according to equity procedure. If the court finds that the averments of the declaration are sustained, it may restrain the publication of the complainant's name. . . . ." It also exonerates the members of the commission and publishers of newspapers from actions for damages for publishing the names of employers "unless such publication contains some willful misrepresentation." The commission is authorized to make "decrees," but these decrees are "only the equivalent of a counsel succinctly stated." Obeying the decree "only means following its recommendations."

Having satisfied itself that the act does not in any way impair the freedom of contract, the court proceeds to show that impairing the freedom of contract by legislation enacted under the

police power is not necessarily unconstitutional. The opinion contains a collection of cases, cited "solely to indicate the range of the public interest respecting matters of private relations, and not to intimate whether they afford any foundation for a compulsory minimum wage law." Though mere dictum in the case, the list is so valuable that it is worth copying:

"Interference with liberty of contract by employer and employee to the extent of requiring weekly payment of wages (Opinion of Justices, 163 Mass. 589, 40 N. E. 713, 28 L. R. A. 344) and of limiting the hours of labor of women and minors (*Commonwealth v. Hamilton Manufacturing Co.*, 120 Mass. 383; *Commonwealth v. Riley*, 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388; *Commonwealth v. John T. Connor Co.*, 222 Mass. 299, 110 N. E. 301, L. R. A. 1916B, 1236, Ann. Cas. 1918C, 337) has been sustained. Freedom of contract as to small loans has been seriously curtailed by statutes which have withstood attacks upon their constitutionality. In *Commonwealth v. Danziger*, 176 Mass. 290, 57 N. E. 461, the requirement of a license for those making such loans was sustained. The rate of interest to be charged may be limited. *Dewey v. Richardson*, 206 Mass. 430, 92 N. E. 708. Statutes circumscribing the freedom of contract by wage-earners in assigning pay to be earned in the future, to the extent of restricting the time during which such assignments may run (*McCallum v. Simplex Electrical Co.*, 197 Mass. 388, 83 N. E. 1108), and requiring acceptance of assignment by employer and assent by the wife of employee (*Mutual Loan Co. v. Martell*, 200 Mass. 482, 86 N. E. 916, 43 L. R. A. [N.S.] 746, 128 Am. St. Rep. 446, affirmed in 222 U. S. 225, 32 Sup. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529), have been upheld. Usury laws have been recognized as valid, usually without discussion as to constitutionality, although an invasion of freedom of contract. Numerous of our own decisions proceed upon that footing. See, also, *Griffith v. Connecticut*, 218 U. S. 563, 31 Sup. Ct. 132, 54 L. Ed. 1151. It was decided in *J. P. Squire & Co. v. Tellier*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322, that St. 1903, c. 415, which provided that sales of merchandise in bulk, not in the ordinary course of trade, should be void against the creditors of the seller unless made after compliance with certain requirements for the information and protection of creditors, was not an unconstitutional interference with liberty of contract. To the same effect see *Lemieux v. Young*, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295. The opinion has been expressed that contracts for prices discriminating between different parts of the commonwealth, for the purpose of destroying competition, may be prohibited. Opinion of Justices, 211 Mass. 620, 99 N. E. 294. A decision to the same point is *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 33 Sup. Ct. 66, 57 L. Ed. 164. The prohibition of the sale of goods without license from stores temporarily leased

was upheld in *Commonwealth v. Crowell,* 156 Mass. 215, 30 N. E. 1015, R. L. c. 65, § 1. In *Commonwealth v. Strauss,* 191 Mass. 545, 78 N. E. 136, a statute making it a criminal offense to require as a condition in the sale of goods that the purchaser should not sell or deal in the goods of any other person than the seller was sustained.

"Scarcely any form of contract is more common than that of insurance. Yet a large variety of statutes interfering with freedom of contract upon that subject have been supported. For example, the form of the contract may be prescribed by the Legislature (*Considine v. Metropolitan Life Insurance Co.,* 165 Mass. 462, 466, 43 N. E. 201), or determined in the first instance by an administrative officer (*New York Life Insurance Co. v. Hardison,* 199 Mass. 190, 198, 85 N. E. 410, 127 Am. St. Rep. 478, and cases there collected). Parties may be forbidden to agree that misrepresentations in the negotiations for insurance made without intent to deceive and not increasing the risk of loss, shall avoid the policy (*Nugent v. Greenfield Life Insurance Co.,* 172 Mass. 278, 52 N. E. 440); and parties may be prohibited in casualty insurance from contracting that the insured must pay his loss before being permitted to recover from the insurer (*Lorando v. Gethro,* 228 Mass. 181, 117 N. E. 185).

"The Supreme Court of the United States has upheld statutes requiring employers who pay wages in scrip, store orders, or other evidence of indebtedness, to redeem them in cash (*Knoxville Iron Co. v. Harbison,* 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55; *Keokee Coke Co. v. Taylor,* 234 U. S. 224, 34 Sup. Ct. 856, 58 L. Ed. 1288), forbidding persons to deal in stocks on margin (*Otis v. Parker,* 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323), prescribing a fee in excess of $10 to any person for preparing and prosecuting a pension claim (*Frisbie v. United States,* 157 U. S. 160, 165, 15 Sup. Ct. 586, 39 L. Ed. 657), prohibiting contracts to pay wages less often than twice each month (*Erie Railroad Co. v. Williams,* 233 U. S. 685, 34 Sup. St. 761, 58 L. Ed. 1155, 51 L. R. A. [N.S.] 1097), making illegal the sale of lard in bulk in small quantities or except in containers holding designated weights (*Armour v. North Dakota,* 240 U. S. 510, 36 Sup. Ct. 440, 60 L. Ed. 771, Ann. Cas. 1916D, 548), inhibiting the sale of loaves of bread of other than standard weights fixed by the statute (*Schmidinger v. Chicago,* 226 U. S. 578, 33 Sup. Ct. 182, 57 L. Ed. 364, Ann. Cas. 1914B, 284; see *Commonwealth v. McArthur,* 152 Mass. 522, 25 N. E. 836), prohibiting washing and ironing in public laundries between specified hours (*Barbier v. Connolly,* 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923), requiring wages earned, but not due, to be paid immediately upon discharge, with or without cause, of any servant or employee, regardless of contract respecting the subject (*St. Louis, Iron Mountain & Southern Railway v. Paul,* 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed.

746), changing the rules of the common law as to fellow servants, assumption of risk, contributory negligence and recovery for death caused by negligence, and prohibiting contracts to avoid the effect of that change (Second Employers' Liability Cases, 223 U. S. 1, 49-52, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. [N.S.] 44; *Philadelphia, Baltimore & Washington Railroad v. Schubert,* 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911), and forbidding the manufacture of oleomargarine (*Hammond Packing Co. v. Montana,* 233 U. S. 331, 34 Sup. Ct. 596, 58 L. Ed. 985). Taxation to the extent of prohibition of contracts as to trading stamps has been upheld. *Rast v. Van Deman & Lewis,* 240 U. S. 342, 368, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455. A statute making it unlawful to pay miners employed at quantity rates upon the basis of screened coal, instead of its weight as originally mined, in mines where ten or more men were employed underground, has been decided not to violate the Fourteenth Amendment to the Federal Constitution. *McLean v. Arkansas,* 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315. An act of Congress prohibiting the payment in advance of seamen's wages to be earned in interstate or foreign commerce does not violate constitutional freedom of contract. *Patterson v. Bark Eudora,* 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002. The validity of legislation penalizing the sale of cigarettes without license (*Gundling v. Chicago,* 177 U. S. 183, 20 Sup. Ct. 633, 44 L. Ed. 725), prohibiting contracts for options to sell or buy grain or other commodity at a future time (*Booth v. Illinois,* 184 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623), barring the employment of women more than a limited number of hours per day or week in manufacturing or mechanical establishments (*Riley v. Massachusetts,* 232 U. S. 671, 34 Sup. Ct. 469, 58 L. Ed. 788; *Miller v. Wilson,* 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915F, 829), forbidding contracts between employer and employee limiting the right of the latter to recover damages at common law (*Chicago, Burlington & Quincy Railroad Co. v. McGuire,* 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328), and prescribing the particular method of compensation to be paid by employers to miners for the production of coal (*Rail Coal Co. v. Ohio Industrial Commission,* 236 U. S. 338, 349, 35 Sup. Ct. 359, 59 L. Ed. 607), has been sustained against attacks founded on interference with the freedom of contract secured by the Fourteenth Amendment of the United States Constitution. A statute imposing an absolute duty upon the owner to provide safeguards for machinery in manufacturing establishments has been held to prohibit a contract against liability arising from a failure to comply with the statute, even with one expressly employed to furnish and install such safeguards. *Bowersock v. Smith,* 243 U. S. 29, 37 Sup. Ct. 371, 61 L. Ed. 572. In most if not all of these cases it also was held that the statutes did not deprive anybody of property without due process of law, or of the equal protection of the law."

RECENT CASES

CARRIERS — INTERSTATE COMMERCE ACT — LIABILITY FOR VALUE AT POINT OF DESTINATION.—Where wheat was shipped in interstate commerce under the uniform bill of lading, issued pursuant to tariffs legally published and filed with the Interstate Commerce Commission, containing a clause stipulating that loss or damage "shall be computed on the basis of the value of the property at the place and time of shipment," *Held,* that under the Cummins Amendment of March 4, 1915, carrier is liable for the value of the grain at the point of destination. *McCaull-Dinsmore Co. v. Chicago, etc., R. Co.,* (D. C. 1918) 252 Fed. 664.

The provision of the Cummins Amendment affecting the case is as follows:

"Shall be liable . . . for the full actual loss . . . . caused by it . . . notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void." Act March 4, 1915, Chap. 176, 38 Stat. 1196, Comp. St. 1916 Secs. 8592, 8604.

The court (Morris, J.), cites no authorities, his position being that the Cummins Amendment was passed by Congress in view of the decisions of the Supreme Court under the Carmack Amendment, and for the express purpose of altering the rule established by them; that under the statute as it now stands the liability is for full actual loss as fixed by the rule of the common law, viz., at point of destination, and that the limitation of amount of recovery in the bill of lading, notwithstanding its approval by the Interstate Commerce Commission, is void. The opinion of the Commission is contra, (33 I.C.C. Rep. 693):

"The loss or damage must, apparently, be either as of the time and place of shipment, time and place of loss or damage, or time and place of destination. Where rates are lawfully dependent upon declared values, the property and the rates are classified according to the character of the property, of which the value of the property may constitute an element, and such classification is necessarily as of the time and place of shipment. It is therefore believed that the liability of the carrier may be limited to the full value of the property so classified and established as of the time and place of shipment."

CONSTITUTIONAL LAW—JUDGMENT — VALIDITY — JURISDICTION—SERVICE BY PUBLICATION ON RESIDENTS—DUE PROCESS OF LAW—BONA FIDE PURCHASERS.—In an action to foreclose a mortgage, a defendant who was a resident of the state was served by publication and judgment entered on default. The procedure was in all respects in conformity with the laws of the state, and in reliance thereon the property was sold to a purchaser in good faith. Nearly three years later the defaulting defendant filed a motion in the action to reopen the judgment and to be let in to defend. *Held,* the judgment is not void, and, as against such purchaser, the defendant cannot be permitted to assert the claim that he was in fact a resident of the state and by the exercise of due diligence could have been served with summons. *Moor v. Parsons,* (Ohio 1918) 120 N. E. 305.

This case is in direct conflict with the decision of the supreme court of Minnesota in *Bardwell v. Collins,* (1890) 44 Minn. 97, 46 N. W. 315, 9 L. R. A. 152, 20 Am. St. R. 547, followed in *McNamara v. Casserly,* (1895) 61 Minn. 335, 63 N. W. 880, and *Swanson v. Campbell,* (1915) 129 Minn. 72, 151 N. W. 534, and with that of the Nebraska court in *Herman v. Barth,* (1910) 85 Neb. 722, 124 N. W. 135, holding that such a judgment is an absolute nullity. The Ohio case is one of mortgage foreclosure; the Bardwell case in Minnesota is a mechanic's lien foreclosure, but arises upon a statute applying the mortgage foreclosure procedure to mechanics' liens; the Swanson case is one of elimination of right of redemption from tax sales where the owner served by publication was a resident. The Nebraska case involved the validity of a judgment in an action by the county to foreclose a tax lien in which service upon the resident owner of the land was made by publication based upon an affidavit of the county attorney that the defendant was a non-resident. Although the statute seems to have been followed, its constitutionality was not expressly passed upon by the court. In the instant case the constitutionality of the Ohio statute does not seem to have been challenged. The case seems to turn solely on the question of public policy—whether the importance of insuring the stability of titles and inspiring the confidence of good-faith purchasers in the verity of judgments where proceedings are apparently regular does not outweigh the equities of defendants. Emphasis is laid on the doctrine that "it is competent for each state to prescribe the mode of bringing parties before its courts, and that the legislature may prescribe such modes of judicial procedure as it may deem proper and also direct the manner of service of process and may declare also the effect of a judgment rendered in pursuance of such notice." The Ohio statute (Gen. Code 11292) authorizes service by publication in an action for foreclosure of mortgage "when the defendant is not a resident of this state or his place of

residence cannot be ascertained," and (Sec. 11293) requires an affidavit that service of summons cannot be made within the state; it provides for the opening of default judgments, but provides (Sec. 11633) that the title of property which is the subject of the judgment sought to be opened and which, by or in consequence of the judgment, has passed to a purchaser in good faith, shall not be affected by such opening.

The reasoning of the Minnesota court may be summarized: (1) An action to foreclose a mortgage is not an action in rem, but an action in personam. (2) Due process of law in actions in personam has always been considered as requiring personal service of process upon the defendant, or its equivalent, as by leaving a copy at his usual place of abode. (3) The right to resort to constructive or substituted service in personal actions rests upon necessity and "has always been limited to cases where personal service could not be made because the defendant was a non-resident, or had absconded, or had concealed himself for the purpose of avoiding service." The second and third propositions may be freely conceded; but as to the first, notwithstanding the great reputation of the justice who wrote the opinion (Mr. Justice Mitchell), its accuracy may perhaps be questioned. It is, of course, true that a foreclosure suit has always been equitable in character, and the maxim "Equity acts in personam" applies; the relief demanded consists in barring the equity of redemption. But in the larger sense a mortgage foreclosure by action is a proceeding in rem. This "larger sense" is thus indicated by Mr. Justice Field in the famous case of *Pennoyer v. Neff*, (1877) 95 U. S. 714, 24 L. Ed. 565, quoted with approval in *Arndt v. Griggs*, (1890) 134 U. S. 316 (326), 10 S. C. R. 557, 33 L. Ed. 918:

"It is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they affect property in the state, they are substantially proceedings in rem in the broader sense which we have mentioned." It is true *Pennoyer v. Neff* and *Arndt v. Griggs* were both cases of non-residents, but that circumstance can hardly affect the value of the opinion of that court as to the essential character of a foreclosure action.

In considering what is essential to due process of law, the question arises whether there is any difference between the rights of residents and non-residents; certainly it is not clear that a state is less competent to deal with the rights of residents respecting

property within its boundaries than with those of non-residents. Indeed the Minnesota supreme court seems to have had some misgivings as to the doctrine of *Bardwell v. Collins,* for in *Shepherd v. Ware,* (1891) 46 Minn. 175, 48 N. W. 743, it discusses again the theory of actions quasi in rem and announces in the clearest terms the rule as to the supremacy of the state (Vanderburgh, J.): "It is conceded that constructive or substituted service may be authorized by the state and resorted to in all actions or proceedings touching real property which are properly denominated proceedings 'in rem'. Such are actions to partition real estate, and for the condemnation of land, *Pennoyer v. Neff,* 95 U. S. 714, 727. Actions quia timet in respect to land, to remove a cloud, or to determine adverse claims, are equitable in their nature, and, strictly speaking, equity acts upon the person, and not upon the property; and in these actions the judgment affects the claim or title to the land, and they are not strictly actions in rem. But they concern real estate lying within the jurisdiction of the court, and the state may clothe the court with full power to inquire as to its status, title, and ownership; and it is now well settled that, as respects the procedure provided, and the constructive service of notice by publication upon non-resident defendants, at least, actions of this kind are to be classed with actions in rem. . . . The question is not what a court of equity, under its general powers as such, may do, but what the state may authorize in actions to adjudicate the title to real estate. Thus it is said in *Boswell v. Otis,* 9 How. 336, 348, 350: 'It is immaterial whether the proceedings against the property be by attachment or by bill in chancery. It must be substantially a proceeding in rem. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem in ordinary cases; but when such a proceeding is authorized *by statute,* on publication, without personal service of process, it is substantially of that character'."

If actions to remove a cloud, to determine adverse claims, for specific execution of contract to convey land, are "substantially in rem", it is impossible to deny the same character to foreclosure proceedings. And if so, it is a proceeding in rem as to residents, as much as to non-residents. The nature of an action is not determined by the place of residence of the defendants. Again, in the case quoted from, the court says: "Under the Constitution, legal proceedings in the courts are under the direction of the legislature, subject, of course, to the fundamental provisions of the bill of rights. But the guaranty of 'due process of law' does not *necessarily* require personal service of notice upon parties resident or non-resident. The legislature may, in its discretion, provide for substituted service in case of necessity, or where personal service is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction

of the court; and with a reasonable exercise of such legislative discretion the courts will not assume to interfere."

The doctrine of *Bardwell v. Collins,* then, comes to this: Although a mortgage foreclosure action is essentially quasi in rem, and hence publication is sufficient as against non-residents, it is not within the power of the legislature to provide for publication against residents whose residence is known. This was so held by the Ohio Court in *State v. Guilbert,* (1897) 56 Ohio St. 575, 47 N.E. 551, 60 Am. St. Rep. 756, 38 L.R.A. 519 (Torrens Act invalid).

Clearly there are differences between residents and non-residents with respect to the essentials of due process: The process of the court cannot run in a foreign state; substituted service is therefore a necessity. No such necessity exists as to residents whose name and residence is known or could with due diligence be ascertained. A non-resident acquiring land within the state knows that the courts of the state may assume jurisdiction through substituted service and is therefore on his guard: a resident has the right to assume that his interests are secure from attack so long as personal service can easily be made upon him. The right of the legislature to prescribe substituted service rests upon necessity. Cooley, Const. Lim., 7th ed. 582. No such necessity exists in the case of such a resident. On the other hand the sovereignty of a state over its own inhabitants and their property therein is so full and ample that it is not easy to see why a form of substituted service that is sufficient as to non-residents should be deemed repugnant to natural justice when applied to its own citizens.

In *Nelson v. C. B. & Q. R. Co.* (1906) 225 Ill. 197, 80 N. E. 109, 8 L. R. A. (N. S.) 1186 (action on the case for damages for personal injuries against a domestic railroad corporation having no officer in the county in which the action was brought) it was held that the legislature may provide for substituted service by publication and mail upon a resident of the state in an action for tort, who cannot be personally served in the county where the suit is brought. No distinction seems to be made on the ground that defendant is a corporation rather than a natural person, and the judgment is a money judgment and not merely one affecting property; hence the case goes to the extreme limit in upholding the power of the state to provide for jurisdiction over its own citizens by substituted service. Yet the court says that due process of law as applied to that case "clearly means according to the course of the common law and the common law has from time immemorial required that a defendant be personally notified of the pendency of an action if he was within the jurisdiction of the court and could be found before judgment or a decree were rendered against him." In *Bickerdike v. Allen,* (1895) 157 Ill. 95, 41 N. E. 740, 29 L. R. A. 782, the same court held that

service by publication alone as against a resident was unconstitutional, but mail and publication amounted to due process.

In the Nelson case (supra) the Illinois court reached the conclusion that personal judgment could be rendered against a resident upon constructive service where it appears that actual service could not be had, "if the constructive service provided for was required to be had in such manner that the reasonable probabilities were that the defendant would receive notice. . . ."

It seems to be a fair result of the cases that a judgment by publication against a resident is a nullity (1) when it is founded upon a false affidavit of non-residence (*Herman v. Barth,* Nebraska, supra), (2) when there is no showing that personal service cannot be made (*Bardwell v. Collins,* Minn., supra), (3) when there is such a showing but it is false (Contra the instant case). See *Brown v. Levee Comm'rs,* (1874) 50 Miss. 468, and notes in 35 L. R. A. (N.S.) 292, 50 L. R. A. 585.

If the judgment is void for want of jurisdiction of the defendant or because founded on an unconstitutional statute, can the legislature give an innocent purchaser any rights under it? If the judgment is void on its face, the answer clearly is no. *Webster v. Reid,* (1850) 11 How. (U.S.) 437, 13 L. Ed. 761. If, however, it is apparently valid on its face, the question is more doubtful. "The result deducible from a majority of the cases seems to be that it is only when the judgment appears upon its face to have been rendered without jurisdiction that it can be considered a mere nullity for all purposes." 1 Black, Judgments, 2nd ed. Sec. 218.

INSURANCE—PRINCIPAL AND AGENT —NEGLIGENCE—TORT—NEGLIGENT FAILURE OF INSURANCE AGENT TO ISSUE POLICY.—In an action for damages by the owner of a stock of merchandise destroyed by fire against an insurance company and its agent for negligently failing to issue a fire policy, the agent having solicited the business, agreed to issue a policy to take the place of expiring policies in other companies, and having access to funds with which to pay the premiums, and plaintiff having relied upon the agent's promise and having permitted the old ones to expire in reliance thereon, *Held,* both the insurance company and its agent are liable to plaintiff in tort. *Wallace v. Hartford Fire Ins. Co.,* (Idaho 1918) 174 Pac. 1009.

The court points out that the case is not an action brought upon an oral contract of insurance, because both plaintiff and the agent understood that there would be no insurance until the policy should actually be written and executed, but that the gist of the action is the negligent failure on the part of the agent to perform a contract based upon a valuable consideration. It is plain that an action in tort will not lie for a mere breach of contract; it is only in cases where there is an employment, which em-

ployment itself creates a duty, where the law imposes a duty growing out of the relationship—as in the case of common carriers and other bailees, factors, brokers, telegraph and telephone companies, physicians, surgeons, etc.,—that an action on the case will lie. See 38 Cyc. 426. Many cases declare the doctrine that where the injury is due to the negligent manner in which a contract is performed, the liability may be charged in tort; but where it consists in mere failure to do the thing agreed, the liability is solely in contract; in other words, that tort may grow out of misfeasance or malfeasance, but not nonfeasance. Thus embezzlement by an agent employed to collect money and turn it over to his principal was held to be a breach of contract, and an action ex delicto would not lie. *Royce v. Oakes,* (1898) 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845. The idea seems to be that if one sets about doing something which may cause injury to another he must act with due care, and his failure to exercise due care is a tort irrespective of his contract; but if (with certain exceptions) he totally omits to do the thing agreed, the fact that his omission is due to neglect or even fraud is immaterial; it is nothing but a breach of contract. The exceptions have reference to public employments. "If a man holds himself out as exercising one of these, the law casts on him the duty of not refusing the benefit thereof, so far forth as his means extend, to any person who properly applies for it. . . . In effect refusing to enter into the appropriate contract is of itself a tort." Pollock on Torts, 8th ed. 532. "It is a familiar doctrine that case will lie for a mere nonfeasance against persons exercising certain public trades or employments, where the contractual relation exists between them and the plaintiff, as where a common carrier, having the requisite means of transportation, refuses to carry passengers." *Nevin v. Pullman Co.,* (1883) 106 Ill. 222. "It is well settled the fact that there was a special contract between the company and the plaintiff, upon which an action of assumpsit might have been maintained, does not at all affect the right to recover in the present form of action, which is founded upon the defendant's common law liability . . ." *Id.* "The general principle seems to be this: where the duty for whose breach the action is brought would not be implied by law by reason of the relations of the parties whether such relations arose out of a contract or not, and its existence depends solely upon the fact that it has been expressly stipulated for, the remedy is in contract, and not in tort—when otherwise, case is an appropriate remedy." *Id.*

In the instant case if the action had been brought upon the oral contract of insurance, clearly the agent would not be liable—the failure of a principal to perform his contract does not render his agent liable,—for the reason that the obligation is the principal's and not the agent's; if upon the contract to issue a policy, the agent would not be liable, since the agreement was made with

him as agent and not as principal, *McCabe v. Aetna Ins. Co.*, (1899) 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641; and in such an action the question of negligence would not be involved. In order to hold both principal and agent, therefore, it was necessary to discover a theory upon which an action analogous to an action on the case would lie. This theory is found as to the liability of the company, since insurance is now held to be a business affected with a public interest as much as a common carrier's. The law may be said to raise a duty growing out of the relationship or out of the profession to serve the public. The negligent failure to act within a reasonable time upon an application for life insurance is held to create a tort liability. *Duffie v. Banker's Life Assoc.*, (1913) 160 Iowa 19, 139 N. W. 1087, 46 L. R. A. (N.S.) 25. The negligence of the agent in failing to forward the application is the negligence of the company. *Id.; Boyer v. State Farmers' Mut. Hail Ins. Co.*, (1912) 86 Kan. 442, 121 Pac. 329, 40 L. R. A. (N.S.) 164, Ann. Cas. 1915A 671. The case of *Chenier v. Ins. Co. of North America*, (1913) 72 Wash. 27, 129 Pac. 905, 48 L. R. A. (N.S.) 319, Ann. Cas. 1914D 649, cited by the court as an action in tort, was one for damages for breach of contract to issue an insurance policy. In the instant case there can be little doubt, in the light of the authorities, that the company is liable in tort; but its agent is liable only for a breach of his contract, unless it can be shown that he, also, sustains a relation to the applicant for insurance out of which the law raises a duty, analogous to that of a common carrier, etc. If, as is universally held, the engineer whose negligence renders the railroad company liable to a passenger for injuries sustained, in an action ex delicto, irrespective of contract, is also liable, it fairly may be argued that an insurance agent whose negligence in failing to forward an application or to issue a policy renders the company liable in tort, is himself liable in tort, notwithstanding it amounts also to a breach of contract.

MALICIOUS PROSECUTION—PROBABLE CAUSE — EVIDENCE — ABANDONMENT OF PROSECUTION AS EVIDENCE OF WANT OF PROBABLE CAUSE.—Plaintiff was arrested at the instance of an agent of defendant on a charge of embezzlement, locked up in a cell "with a score of other prisoners of various ages, colors, sizes, and degrees of personal cleanliness, or lack of it," and after four and one-half hours of confinement released, the charge against him having been dismissed at the instance of defendant. In an action for malicious prosecution, *Held*, that abandonment of the prosecution has no tendency to prove lack of probable cause. *Western Union Tel. Co. v. Thomasson*, (C. C. A. 1918) 251 Fed. 833.

It is familiar law that "malice may be presumed from lack of probable cause, but the lack of probable cause can never be in-

ferred, even from the most express malice. *Brown v. Selfridge,* (1912) 224 U. S. 189, 32 S. C. R. 444, 56 L. Ed. 727; *Eickhoff v. Fidelity & Casualty Co.,* (1898) 74 Minn. 139, 76 N. W. 1030. See *Hanowitz v. Great Northern R. Co.,* (1913) 122 Minn. 241, 142 N. W. 196, where the court say: "It is well established that in an action of malicious prosecution both malice and want of probable cause must be proven by the plaintiff as distinct issues. . . . . The jury *may,* in a proper case, infer malice from want of probable cause, but they are not bound to infer malice in every case where want of probable cause is proven."

"Whether particular facts constitute probable cause is a question exclusively for the court. What facts exist where there is a dispute as to them is a question for the jury. Therefore the question of probable cause will be reviewed on appeal as a legal conclusion, rather than as a mere question of fact." *Eickhoff v. Fidelity & Casualty Co.,* supra; *Williams v. Pullman Co.,* (1915) 129 Minn. 97, 151 N. W. 895. A criminal prosecution may terminate in acquittal, dismissal by the court at the close of the evidence for the prosecution, or by dismissal at the instance of the prosecutor, that is, abandonment of the charge. Acquittal is not prima facie evidence of want of probable cause, because of the requirement of an unanimous verdict based upon a belief in guilt beyond a reasonable doubt. The issue in the criminal case is entirely different from the civil. *Bekkeland v. Lyons,* (1903) 96 Tex. 255, 72 S. W. 56, 64 L. R. A. 474; *Singer Mfg. Co. v. Bryant,* (1906) 105 Va. 403, 54 S. E. 320; *Hanowitz v. Great Northern R. Co.,* (1913) 122 Minn. 241 (243), 142 N. W. 196; *Williams v. Pullman Co.,* supra.

But a discharge by the magistrate at the preliminary hearing is in Minnesota held to be prima facie evidence of want of probable cause. *Fiola v. McDonald,* (1901) 85 Minn. 147, 88 N. W. 431; *Chapman v. Dodd,* (1864) 10 Minn. 350, Gil. 277; *Williams v. Pullman Co.,* supra. In this instance the accused is entitled to discharge "if it shall appear that no offense has been committed, or that there is not probable cause for charging the prisoner with it." Minn. Gen. Stat. 1913 Sec. 9083. Contra, *Stone v. Crocker,* (1831) 24 Pick. 81; *Anderson v. Friend,* (1877) 85 Ill. 135; *Harkrader v. Moore,* (1872) 44 Cal. 144; *Heldt v. Webster,* (1883) 60 Tex. 207; and other cases collected in note, 64 L. R. A. 474. See 3 L. R. A. (N.S.) 929, where the annotator expresses the opinion (contrary to the statement in the case annotated) that the weight of authority is that a discharge by an examining magistrate is prima facie evidence of the want of probable cause. The case annotated is *Davis v. McMillan,* (1905) 142 Mich. 391, 105 N. W. 862, 3 L. R. A. (N.S.) 928, 113 Am. St. Rep. 585. In the instant case it is said that in at least five out of six jurisdictions dismissal by a magistrate whose power is limited to an inquiry as to whether reasonable cause had been shown to hold the cause

for trial is prima facie evidence that there never was any probable cause for the prosecution.

If discharge by the magistrate is prima facie evidence of the want of probable cause, it would seem that abandonment of the prosecution and consequent dismissal would be at least equally persuasive. In the instant case neither magistrate nor jury ever heard the evidence or passed upon the merits of the case in any form. The circuit court of appeals considers "that the safest rule is to hold that acquittal, dismissal, and abandonment are equally inadmissible to prove lack of probable cause, although, of course, always competent evidence to show that the prosecution has terminated favorably to the accused." The accused having at once turned over to the police the money he was charged with having embezzled, the court argues the hopelessness of securing a conviction, the tendency to regard further prosecution as persecution, the possibility that the prosecution may have been dropped from motives of pity, etc., as reasons for denying the dismissal any probative value whatever. It is submitted, however, that while not, of course, conclusive, the voluntary abandonment of a criminal prosecution by the person who instigated it has at least as much tendency to prove want of probable cause as discharge by a magistrate after a hearing, and that in jurisdictions where the latter is admitted the former should be. In *Messman v. Ihlenfeldt*, (1895) 89 Wis. 585, 62 N. W. 522, it is said that "the weight of authority seems to be that the abandonment of the criminal prosecution is prima facie evidence of the absence of probable cause." This is very doubtful; but in view of defendant's better knowledge of the facts upon which he acted, the difficulty in general of proving a negative, and the fact that the evidentiary value of the dismissal may always be overcome by defendant if he can show valid reasons for dismissal—as absence or defection of witnesses relied on,—proof of voluntary abandonment seems to be admissible.

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK.—In an action under the federal Employers' Liability Act for the death of a fireman, it appeared that while deceased was in a lunchroom eating a lunch the engineer of his train negligently started up the train without having his fireman on board; the deceased, seeing the train in motion, climbed on top of the car to go forward to his place in the engine cab, and in so doing stumbled and fell between the cars and was killed. The jury found as a fact that the deceased knew, or in the use of ordinary care should have known, the risks and dangers which he would normally and necessarily encounter in passing over the train. In view of this special finding, notwithstanding a general verdict for plaintiff, it was *Held* that deceased assumed the risk, and a judgment for defendant was affirmed. *Briggs v. Union Pac. R. Co.*, (Kan. 1918) 175 Pac. 105.

This case emphasizes the error of the notion frequently held that the federal Employers' Liability Act abolishes the defense of assumption of risk. Until recently it was a question whether the defense was wholly eliminated, or only in cases where the negligence charged is the violation of a duty specifically imposed by statute for the protection of the employee. The cases affirming both views up to 1914 are collected in a note in 47 L. R. A. (N.S.) 62. The Supreme Court of the United States had not then definitely passed upon it. But in *Seaboard Air Line Ry. v. Horton,* (1914) 233 U. S. 492, 34 S. C. R. 635, 58 L. Ed. 1062, L. R. A. 1915C 1, that court held that Congress eliminated the defense of assumption of risk only in certain specified cases, its intent being plain that in all other cases such assumption should have its former effect as a bar to an action by an injured employee. The language of section 4 of the act is: "Such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." The Court further held that by the phrase "any statute" Congress evidently intended federal statutes, such as the Safety Appliance Acts and the Hours of Service Act, and not acts of state legislatures. It follows, therefore, that an employee of a railroad engaged in interstate commerce assumes the normal and ordinary risks incident to his employment and risks arising out of the failure of the employer to exercise due care with respect to providing a safe place to work and safe appliances to work with, provided he was aware or ought as a prudent person to have become aware of the defect or disrepair and of the risk arising from it, unless he relies upon an assurance that the defect will be remedied, excepting where the failure to provide safe equipment or place to work amounted to a violation of an act of Congress enacted for his protection. *Seaboard Air Line v. Horton,* supra. Evidently this interpretation confines the benefits of the act within rather narrow limits, and when coupled with the rule that the passage of the federal act superseded all state law on the subject and that suit within two years is a condition precedent to recovery, it is questionable whether the employee has been as greatly benefited by it as Congress intended. In *C. & O. Ry. v. De Atley,* (1916) 241 U. S. 317, 36 S. C. R. 566, 60 L. Ed. 1016, it was held that a brakeman did not assume the risk that the engineer of his train might not exercise due care for his safety and might run the train at such a rate of speed as to make it unsafe for him to board the train in the performance of his duties, because the fellow-servant defense has been eliminated, but he does assume the risk normally incident to the performance of such duties.

PLEADING—AMENDMENT—FEDERAL EMPLOYERS' LIABILITY ACT—LIMITATIONS—DEFENSES.—Plaintiff sued defendant railroad company for damages for personal injuries sustained by plaintiff's assignor, an engineer, while running one of its locomotives. The complaint stated a case arising under the state law, and the case being tried on that theory a verdict was rendered in favor of plaintiff, which was reversed by the supreme court for error in the admission of evidence as to statements made by the defendant's surgeon. On a subsequent trial, in the course of cross-examination of the engineer, it transpired that the train of which he was engineer was at the time engaged in interstate commerce. At the close of plaintiff's case defendant moved for a directed verdict on the grounds, among others, of a variance between petition and proof and that the proved cause of action was barred by the federal limitation. The court refused plaintiff's motion to strike out the evidence tending to show that either the engineer or defendant was engaged in interstate commerce and refused to direct a verdict for defendant. A verdict being returned for plaintiff, it was set aside by the trial court and a new trial granted on the ground that the evidence showed a cause of action under the federal Employers' Liability Act and not one under the state law. Upon a third trial, defendant attempted to show in cross-examination that the train was engaged in interstate commerce, but objections as not proper cross-examination were sustained, and at the close of plaintiff's case that fact had not appeared. On its own part defendant then attempted to show it, but the offered evidence was excluded as irrelevant to any issue in the case; whereupon defendant filed an amended and substituted answer, alleging for the first time that the injured engineer was engaged in interstate commerce and that his cause of action was barred by section 6 of the federal act. The court struck out the answer, and a verdict was again rendered in favor of plaintiff. *Held,* the court did not err in excluding the evidence, nor in refusing to permit the new defense to be interposed at this stage. *Breen v. Iowa Central Ry. Co.,* (Iowa 1918) 168 N. W. 901.

The accident occurred Sept. 28, 1908; the action was begun August 10, 1910; the first trial was had in October, 1911. The action, therefore, under the federal law, was not barred when it was begun. Here it clearly appears that defendant's counsel knew at the time of the first trial of a perfect defense and deliberately refrained from pleading it until it should be too late for the plaintiff to shift his position from state to federal law; but it also clearly appears that plaintiff learned at the second trial of the defect in his case as pleaded and yet chose to go to trial again, relying on being able to exclude evidence which would disclose the defect by reason of the state of the pleadings. The plaintiff had a cause of action, but it was not the one he had pleaded.

Plaintiff's evidence, however, showed that the train was moving between two points within the state, and there was no legitimate way for defendant to prove that in fact it was an interstate train without pleading it, unless, as suggested below, the limitation is a condition precedent, non compliance with which defeats the action. and proof of the interstate character would amount to a denial of the cause of action which the plaintiff had set out. The first question is, was it an abuse of discretion in the trial court to refuse an amendment setting up a new defense involving the statute of limitations, when the pleader purposely waited until the statute had run in order to prevent the plaintiff from amending? In view of the discretionary power of a court in the matter of amendments, the question would seem to present little difficulty but for the fact that plaintiff also was apparently employing the strategy of practice to prevent defendant from availing itself of a known defense. The Iowa cases deny a defendant the right to interpose an amendment at a late day without a meritorious showing of reasons for the delay. *National Horse Imp. Co. v. Novak,* (1898) 105 Iowa 157, 74 N. W. 759. Minnesota cases accord: *Minneapolis, etc., Co. v. Fireman's Ins. Co.,* (1895) 62 Minn. 315, 64 N. W. 902; *Todd v. Bettingen,* (1907) 102 Minn. 260, 113 N. W. 906. Evidently the defendant can make no showing of ignorance, of having been misled, or other reason appealing to the court's sense of justice. Whatever may be thought of the technical questions of practice involved, the case illustrates a tendency among the courts to refuse to sit merely as umpire at a game, and rather to seek the substantial justice of the case.

Assuming that plaintiff misconceived his action, the question arises whether, after the lapse of two years from the date of the accident, plaintiff could have amended his complaint so as to allege a cause of action under the federal statute.

The conditions under which amendments are allowed are determined by the state practice, but the survival of the substantive right is a federal question. *Seaboard Air Lines Ry. v. Renn,* (1915) 241 U. S. 290, 36 S. C. R. 567, 60 L. Ed. 1006. It should be noted that the two-year limitation contained in the federal Employers' Liability Act differs from an ordinary statute of limitation in that the limitation inheres in the cause of action created by the statute and defeats an action brought after the lapse of that period whether pleaded or not. In *Atlantic Coast Line R. R. v. Burnette,* (1915) 239 U. S. 199, 36 S. C. R. 75, 60 L. Ed. 226, an action for personal injuries was brought more than two years after the day of the accident; the defendant's plea did not set this up. The Supreme Court, however, reversed a judgment in favor of plaintiff, saying (Holmes, J.): "It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did not govern the case, in a suit that the same act declared too late to be maintained. . . . But irre-

spective of the fact that the act of Congress is paramount, when a law that is relied on as a source of an obligation in tort sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther. *Davis v. Mills,* 194 U. S. 451, 454. *The Harrisburg,* 119 U. S. 199. There may be special reasons for regarding such obligations imposed upon railroads by the statutes of the United States as so limited. *Phillips v. Grand Trunk Western Ry. Co.,* 236 U. S. 662, 667. At all events the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source." The idea seems to be that since the enactment of the federal Employers' Liability Act all state statutes governing the liability of railroads engaged in interstate commerce to their employees, and the common law as well, are superseded, and the federal statute is the sole foundation of liability. Instead of merely eliminating the defenses of fellow-servant and assumption of risk and qualifying the defense of contributory negligence, Congress has wiped out all common law and statutory liability theretofore existing and substituted in its place a new liability which must be enforced by suit within two years, or never. If, then, the amendment would be setting out a new cause of action, it could not be allowed because the state practice did not permit a new or different cause to be stated, and further, the new cause to be stated no longer existed. An amendment which merely expands or amplifies what was alleged in support of the cause of action asserted in the original complaint relates back to the commencement of the action and is not affected by the intervening lapse of time; "but if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested." *Id.* It seems, therefore, that if the original complaint clearly stated a cause of action at common law, but not under the federal statute, it would be error to permit the amendment after the lapse of two years; but if, though not in terms alleging the interstate character of defendant and of plaintiff's employment, the allegations of the complaint are consistent with such a claim, an amendment distinctly alleging it and claiming the benefit of the federal act does not state a new cause of action. *Eskelsen v. Union Pac. R. Co.* (Neb. 1918) 167 N. W. 408. In the instant case, the court treated the petition as stating a cause of action solely under the state law. The plaintiff, therefore, could not have amended after two years.

Did the court err in excluding evidence of the interstate character of the transaction? On the theory that proof of its interstate character would amount to a denial of the cause of action which the plaintiff had set out, it would seem proper to be given in evidence under a general denial and hence may be elicited by cross-

examination of plaintiff's witnesses by way of showing that the plaintiff had not the cause of action that he set out. If the theory of the federal act stated in the last paragraph be the true one, the Iowa court in the instant case erred in excluding the evidence sought to be brought out by cross-examination, that the parties were engaged in interstate commerce. Such evidence was not offered in support of an affirmative defense, not pleaded, but to show that the cause of action had no existence, although a different cause might exist. Right or wrong, however, its decision appears not to be the subject to review by the United States Supreme Court, since the case of *Atlantic Coast Line R. Co. v. Mims,* (1917) 242, U.S. 532, 37 S. C. R. 188, 61 L. Ed. 476, holding that the question of the admissibility of such evidence under such a state of the pleadings is not a federal but a state question, and the exclusion by the state court is not reviewable by the federal Supreme Court. In that case action was brought for the death of a car inspector, the complaint showing nothing tending to state a cause of action under federal law; the answer raised no such issue. On a second trial, after plaintiff had rested, defendant for the first time offered testimony tending to prove that deceased was engaged in interstate commerce. It was rejected as coming too late and as not being relevant to any issue tendered by the pleadings. If, as suggested above, the evidence offered was admissible under general denial, the state court erred; but the Supreme Court of the United States held that it was without jurisdiction to review a judgment of a state court upon the ground that a federal right was denied, when the claim of federal right relied on was refused consideration in that court because it was not asserted at a proper time or in a proper manner under the established state system of pleading and practice.

On general principles, it would seem that the action for personal injuries not resulting in death, brought under the federal act, does not found itself upon the federal act exclusively, but rather upon the common law as modified by the act, while the action for death is strictly one created by the act; hence, in the former case the defense of the limitation bar would have to be pleaded, while in the latter the principle applies which makes the limitation of time not merely a statute of limitation but "a condition of the right of action, which if unperformed extinguishes the cause completely." 18 R. C. L. Sec. 320; *American R. Co. v. Coronas,* (1916) 230 Fed. 545, 144 C. C. A. 599, L. R. A. 1916E 1095. But, as noted above, the United States Supreme Court in the Burnette Case treated the action for personal injuries not resulting in death as one arising solely out of the federal act. This of course is on the theory that when Congress chooses to take over the field of liability of interstate carriers to their employees it first wipes out all existing law, common law as well as

statutory, on the subject and then substitutes a new law in its place. See note 47 L. R. A. (N.S.) 38 (47); *Mondou v. N. Y., N. H. & H. R. Co.*, (1912) 223 U. S. 1, 32 S. C. R. 169, 56 L. Ed., 38 L. R. A. (N.S.) 44; *Mich. Cent. Ry. Co. v. Vreeland,* (1913) 227 U. S. 59, 33 S. C. R. 192, 57 L. Ed. 417. Most of the cases declaring the paramountcy of the federal act are death cases, and as to these the principle is clear; but to apply it to the employee's action for personal injuries is something of a novelty. It first destroys his common law action and then creates a new one with a condition precedent embedded in it, the net effect of which is that if his counsel erroneously supposes the injury to have occurred in the course of intra-state commerce and frames his complaint accordingly, not discovering the error until two years have elapsed from the date of the injury, his cause of action is gone, even though the defendant did not plead it. The Iowa court in the instant case, however, solves the difficulty by refusing to permit the defendant to show, either by cross-examination or by belated pleading, the fact which defeats the plaintiff's case. Thus the court reaches substantial justice at the expense of technical logic.

STIPULATIONS VOID BECAUSE CONTRARY TO PUBLIC POLICY.—In a quo-warranto proceeding against a board of education brought to test the validity of a high school district organization, a stipulation was made that defendants would at the close of the year waive the benefit of validating legislation that might be enacted, and permit the validity of the organization to be determined upon the constitutionality of the act under which the district was organized, the stipulation also covering the collection of taxes, payment of teachers, and payment of attorneys' fees out of public moneys, in consideration of which the proceedings were to be continued until the close of the school year. The cause was so continued from the January to the April term, when the defendants refused to be bound by the stipulation. *Held,* the stipulation was in contravention of public policy and not binding upon the school district or the courts. *People v. Herrin,* (Ill. 1918) 120 N. E. 274.

The relators in this case were taxpayers; the case therefore affected private individual interests; but fundamentally it involved the validity of the organization of a public school. Assuming the probable unconstitutionality of the original act, the legislature passed an act intended to cure the defect. The purpose of the stipulation, in part, was to thwart the will of the legislature and lay down the law which the court must apply in the decision of the case. ". . . Stipulations involving matters of public interest, or which affect the interests of individuals, which cannot be ascertained in advance of the adjudication in the cause, are invalid. Thus courts will disregard stipulations in-

volving the validity or constitutionality of a statute, ... and, generally, it may be stated that no valid agreement can be made as to a question of law. . . ." 36 Cyc. 1285. A stipulation that an anticipated curative act shall not have the effect intended by the legislature, that the court in deciding the case shall disregard binding law, that taxes of parties not before the court shall be collected not according to law but according to stipulation, that attorneys' fees shall be paid out of public funds, and that the management of the public schools shall be settled not by law but by agreement—contains about all the objectionable features imaginable in a stipulation.

The doctrine of the instant case is recognized to the fullest extent by the supreme court of Minnesota. *State ex rel. City of St. Paul v. Great Northern R. Co.,* (1916) 134 Minn. 249, 158 N. W. 972; *St. Paul v. C. St. P. M. & O. R. Co.,* (1918) 139 Minn. 323, 166 N. W. 322. In these cases, however, the court went so far as to hold that a judgment founded on a void stipulation was itself void. "This judgment was the act of the parties, not the act of the court; and whatever effect such a judgment might have upon the personal rights of parties thereto who possessed the power to make such an agreement, neither the state nor the governmental agencies of the state can be shorn of their governmental powers by any such device." Taylor, C., in *State ex rel. St. Paul v. Great Northern R. Co.,* supra. "A judgment against a municipality, not rendered as the judicial act of a court but entered pursuant to a stipulation of the officers of the municipality, is of force and effect only so far as such officers had authority to bind the municipality." *St. Paul v. C. St. P. M. & O. R. Co.,* supra. The cases relied upon are: *Kelley v. Milan,* (1887) 127 U. S. 139, 8 S. C. R. 1101, 32 L. Ed. 77, in which it was held that where certain municipal bonds were ultra vires and void, and where in a chancery suit brought by the town authorities to have them declared invalid a decree was entered declaring them valid on a consent to that effect signed by the mayor of the town, the decree was not an adjudication of the question of such validity; *Lawrence Mfg. Co. v. Janesville Cotton Mills,* (1890) 138 U. S. 552, 11 S. C. R. 402, 34 L. Ed. 1005, holding (in a suit between rival manufacturing companies) that a party returning to a court of chancery to obtain its aid in executing a former decree of that court, the court is at liberty to inquire whether the decree was or was not erroneous, and if erroneous, it may refuse to execute it; that the previous decree having been the result of the agreement of parties, and not the judgment of the court, the court may refuse its aid to enforce the decree contrary to what it finds to be the right of the case; and *Union Bank v. Commissioners,* (1896) 214 N. C. 214, 25 S. E. 966, to the effect that where municipal bonds are ultra vires because of the unconstitutionality of the act under which they were issued, a consent judgment against the

municipality is also void. Judgments entered not as the judicial act of the court but solely upon consent are merely contracts of the parties, acknowledged in open court and ordered to be recorded, and when on the face of the record they are made by parties acting in a representative capacity they bind only to the extent of the authority of those making them. *Union Bank v. Commissioners,* supra; *Tex. & Pac. R. R. Co. v. So. Pac. Co.,* (1890) 137 U. S. 48, 77 S. C. R. 10, 34 L. Ed. 614; *Lamb v. Gatlin,* (1838) 22 N. C. 37.

So far as these cases suggest that a judgment by consent between parties competent to consent is not the judgment of the court and not as conclusive as if made by the court upon a full consideration of the matters litigated, the point seems untenable. "In regard to the conclusiveness of agreed judgments there is some difference of opinion. But the majority of cases in this country hold that a judgment is none the less effective as a bar because its merits were determined in whole or in part by the agreement of the parties." Black, Judgments, 2nd ed., Sec. 705. Contra, in England, *Jenkins v. Robertson,* (1867) 2 H. L. Scotch App. 1443; but the opinion in *Re South American & Mexican Co.,* (1895) 1 Ch. Div. 37 is in accord with the prevailing American rule. As a rule, judgments by stipulation are no more open to collateral attack than other judgments. *Morris v. Travelers' Ins. Co.,* (1911) 189 Fed. 211. In cases where the parties stipulate in a representatitve capacity, however, the judgment, being avowedly based upon the stipulation, should have no greater effect as estoppel than the stipulation had; and if that is tainted with illegality the judgment itself is a nullity.

In the instant case the court refused to be bound by the stipulation even though the defendants had received the benefit of it, and in this seems well supported in reason and authority.

STOCK—CORPORATIONS—RIGHT OF PREFERRED STOCKHOLDERS TO PARTICIPATE EQUALLY WITH COMMON STOCKHOLDERS IN DIVIDENDS.—The certificates of preferred stock of a corporation entitled the holders to receive "a fixed yearly cumulative dividend of six per cent . . . before any dividend shall be set apart on the common stock." No dividend was declared on either until, at the end of the ninth year, fifty-four per cent was declared on both preferred and common out of the earnings of that year. On complaint of the preferred holders, *Held,* that the payment of the dividend on the common should be enjoined, as the preferred holders were entitled to share in all profits distributed in any year after the common holders had received for that year an amount equal to the dividend on the preferred stock for the same year. *Englander v. Osborne et al.,* (Pa. 1918) 104 Atl. 614.

Prima facie, all the shareholders of a corporation stand on an equality. *In re South Durham Brewery Co.,* (1885) 31 L. R. Ch.

D. 261, 55 L. J. Ch. 179, 53 L. T. 928, 34 W. R. 126, 2 T. L. R. 146. But the rule of equality may be altered by the shareholders' mutual agreement, and special privileges or preferences may thereby be conferred upon some of their number. Machen, Corporations Sec. 525. But preferred shareholders have the same rights and liabilities as other shareholders except as otherwise provided for. *Grover v. Cavenaugh,* (1907) 40 Ind. App. 340, 82 N. E. 104. Their special rights and limitations are to be determined by the construction of the statute, incorporation paper, by-law, or agreement, by which they are created. Machen, Corporations Sec. 549. In the instant case the terms of the preferred stock certificates were apparently the only thing pertinent to a determination of the special rights or limitations created. Where the preferred stockholders were entitled "to receive a cumulative yearly dividend of five per cent, . . . before any dividends shall be set apart or paid on the common stock," it was held that they were not limited to the amount of their preference, but were entitled to participate in dividends in excess of five per cent on each class of stock. Their priority was a preference and involved no limitation, none being expressed. The court quoted approvingly 2 Clark and Marshall, Private Corporations, (1901) Sec. 417c. "In the absence of special provisions, the holders of preferred stock in a corporation are in precisely the same position, both with respect to the corporation itself and with respect to the creditors of the corporation, as the holders of the common stock, except only that they are entitled to receive dividends on their shares, to the extent guaranteed or agreed upon, before any dividends can be paid to the holders of the common stock." *Sternbergh v. Brock,* (1909) 225 Pa. 279, 74 Atl. 166, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877; contra, semble, *Scott v. Baltimore, etc., R. Co.,* (1901) 93 Md. 475, 49 Atl. 327. The instant case goes further in two respects. In *Sternbergh v. Brock* the common holders had from the start received dividends apparently equal at least to the preferred dividends, while here neither had received anything for nine years. The preferred holders were entitled to the fifty-four per cent before the common received anything; but were not the common holders then entitled to fifty-four per cent? But the common holders had no right of cumulation, and consequently could not go back of the current year. The court said: "To do so would render such dividends cumulative in effect without agreement. Accordingly, when during previous years no dividends were earned, this was conclusive as to the right of all stockholders, both preferred and common, except for the contractual right of the former to payment out of future profits to the extent of their preference before the latter would be entitled to participate in the earnings. So far as the holders of the common stock were concerned, their status was finally determined when, during any current year, there were no profits to be divided. The profits so lost are lost forever, and each new year marks the beginning of a

new dividend paying period." This reasoning seems sound. The second difference was that the preferred holders were to receive a *fixed* yearly cumulative dividend of six per cent. Does not the word "fixed" create a special limitation? By the ordinary rule of construction, it should be given some meaning. Omitted, the right to the cumulative six per cent would not be affected. It is difficult to give it a meaning other than limiting the dividend. To hold it qualifies the cumulation only is treating it as surplusage, for "six per cent" does that. It is difficult to justify this construction even on the perhaps doubtful principle that "equality between the shares being the legal conception of equity, provisions altering the legal rule of equality must be construed strictly, so as not unduly to enlarge the difference in the rights attaching to the different classes of shares." Machen, Corporations Sec. 554. The opinion of the court contains no express reference to the word. See *Scott v. Baltimore, etc., R. Co.,* ubi supra

TRUSTS—SPENDTHRIFT TRUSTS—RESTRAINT UPON ALIENATION OF AN EQUITABLE FEE SIMPLE.—A devised real estate to B for life and immediately upon B's decease, upon trust (in effect) for C, D and E, daughters of B living at the devisor's death, in equal shares, in fee simple; the trustees to pay directly to each daughter her share in the rents and profits "during all the period of her natural life, for her separate use and benefit, the said income to be and at all times to remain free . . . from liabilities for any debts or engagements." After the death of A and B, C attempted to convey her interest absolutely. *Held,* that the intent of the will was to create a spendthrift trust, that the intent was effective, and, consequently, the interest which the grantee received continued subject to the trust in favor of C, the grantor, for her life. *Hopkinson et al. v. Swain et al.,* (Ill. 1918) 119 N. E. 985.

By the older common law a restraint upon the alienation of an estate in fee simple, whether legal or equitable, was void. Gray, Restraints On Alienation, 2nd ed., 279; even though the restraint was limited in time, *Roosevelt v. Thurman,* (1814) 1 Johns Ch. 220; *Potter v. Couch,* (1891) 141 U. S. 296. Likewise any provision merely restraining (as distinguished from forfeiture on) the alienation of a life estate, whether legal or equitable, was void. Gray, Restraints On Alienation, 2nd ed., 280. The only exception was that married women might be restrained from alienating their estates in fee or for life. *Baggett v. Meux,* (1844) 1 Coll. 138, 63 Eng. Rep. 355, 8 Jurist 391, 41 Eng. Rep. 771, 10 Jurist 213, 13 L. J. Ch. 228, 15 L. J. Ch. 262. The general common law rule was placed on the grounds of repugnancy and of public policy which favored alienation. But in many states, the allowance of spendthrift trusts has broken in upon the older rule and permits restraints on

the alienation of equitable estates. These decisions assert that the power of alienation is not a necessary incident of an estate, and if the estate is thus qualified in its creation, there is no repugnancy. *Nichols v. Eaton,* (1875) 3 Cliff. 505, 23 L. Ed. 254, 91 U. S. 716; *Broadway Bank v. Adams,* (1882) 133 Mass. 170, 43 Am. Rep. 504, and consequently no reason why the intention of one who makes a gift of property to another and attempts to ensure the donee's personal enjoyment by securing it against assignment, voluntary or involuntary, should not be given effect. The reasoning ignores or denies the public policy ground for avoiding restraints. Kales, Future Interests, Secs. 291, 292. Restraints on the alienation of the interest of the beneficiary of a spendthrift trust were first allowed where the interest was a life estate, *Nichols v. Eaton,* ubi supra, and many courts have asserted that they are invalid when attached to an equitable fee. *Potter v. Couch,* ubi supra. In the instant case the court purports to allow restraint of an equitable fee by way of a spendthrift trust. The language of the court, however, is broader than the case calls for. The decision was that the purchaser of the beneficiary's interest got the fee subject to the right of the beneficiary to receive the income from the trustee during her lifetime. There was, then, no restraint on the alienation of the fee during the life of the beneficiary, but a requirement that a life estate be retained on the alienation. The restraint was not in respect to the time of alienation, but was in respect to the interest that might be aliened. The case is a slight extension of the doctrine of spendthrift trusts in carving a life estate out of the fee by force of the restraint, but does not in fact, although it does in dictum, extend the doctrine to make equitable fees inalienable.

In Minnesota a restraint on the alienation of a legal fee is void by the common law, *Morse v. Blood* (1897) 68 Minn. 442, 71 N. W. 682; even though the restraint is limited in time, *Hause v. O'Leary* (1917) 136 Minn. 127, 161 N. W. 392. The validity of restraints on alienation of land by way of spendthrift trusts has not been passed upon by the supreme court, but they would seem to be authorized for lives at least, by Minn. G. S. 1913, Secs. 6710, 6712, 6718. See also *Simpson v. Cook,* (1877) 24 Minn. 180; *Hause v. O'Leary,* 136 Minn. at 131.

TRUSTS—VALIDITY OF A PERPETUAL TRUST—RULE AGAINST PERPETUITIES—ADVERSE POSSESSION BY TRUSTEES—ESCHEAT—ESTATE OF THE TRUSTEE.—In 1886 A executed a deed of trust of real estate to trustees and their heirs, in trust, to pay to the American Colonization Society the net income, rents and profits, to be used for the transportation of colored persons to Liberia, for which purpose the Society had been incorporated. The trustees entered into possession and carried out the trust for over twenty years. Then, on complaint of the heirs and residuary devisees of

A, the court declared the deed of trust invalid as contrary to the rule against perpetuities, but denied the complainants any relief on the ground that their claim was barred, under the Statute of Limitations, by the adverse possession of the trustees. *American Colonization Society v. Soulsby et al.,* (1917) 129 Md. 605; 99 Atl. 944, L. R. A. 1917C 937; on second appeal (1917) 131 Md. 296, 101 Atl. 780. Thereupon proceedings were brought by the State and by the Society, the former claiming the property by escheat, and the latter seeking a conveyance from the trustees of the legal fee. Both petitions were dismissed; the State's on the ground that A left heirs and residuary devisees, and that the trustees were competent to hold the property as against the State, because they could render the service required by the feudal principle of tenure; the Society's on the ground that if reference be had to the deed creating the trust, it is an active one; or if, more properly, the title of the trustees be considered dehors the deed, they were not agents of the Society in acquiring the title and their possession was in no manner the possession of the Society. *American Colonization Society v. Latrobe et al., State v. American Colonization Society et al.,* (Md. 1918) 104 Atl. 120.

For a discussion of some principles involved, see NOTES p. 39.

BOOK REVIEWS

THE GOVERNMENT OF THE BRITISH EMPIRE. By Edward Jenks. Boston: Little, Brown & Co. 1918. Pp. viii, 369. Price, $2.00.

The British constitution, as the late Professor Hearn well said, "is a law of political conditions." It has grown out of and reflects the social and economic life of the nation in each successive period of its history. For this reason it is at once the oldest and newest, the most stable and progressive, of living constitutions. Age has lent it dignity but has not diminished its vitality. The tense partisan struggles and still more desperate international conflict of the last few years have put it to the severest test. During the early period of the war the British government appeared strikingly weak and inefficient when compared with the powerful organization of the German Empire. The constitution, in truth, was essentially a peace constitution and did not work well under war conditions. It was soon found necessary, therefore, to discard some of the old political machinery of the state and to set up new machinery in its place. But such has been the flexibility of the constitution that this has been accomplished without serious disturbance to the regular operations of the

government. In the progressiveness of the constitution no less than in its historical character lies the secret of its strength.

So rapid have been the changes in government in the last few years that almost all the standard works on the constitution are already out of date. The constitution has been remade in many important respects, and a new interpretation of its provisions was urgently required. Such an interpretation has been afforded us by Professor Jenks in his recent work, "The Government of the British Empire"; and it is fortunate indeed that the task has fallen to the hands of a master craftsman. This little book is of a truth thrice blest; it is excellent in form, original in conception, and scholarly in content.

The most distinctive feature of this study is its imperial point of view. The political world had already awakened to the fact that England had ceased to be a small insular state and had become the center of a great confederation of self-governing dominions. But the historians and jurists of England have been slow to realize the change. For the most part they have remained hopeless provincialists. It is both fitting and natural in these circumstances that the new imperial outlook should have been championed by an English scholar who spent a number of years in an important educational position in one of the Australian colonies. Herein may be found an interesting example of the growing reaction of colonial thought upon English life and politics. Thanks to this strong colonial impulse we may look for the appearance of an imperial school of historians and political scientists.

But notwithstanding his staunch imperialism, Professor Jenks has not been able to free himself entirely of certain parochial traditions which have played a large part in the life of the mother state. The chapter on the "Established Churches," for example, is of local historical interest only; it has little or no imperial significance save in so far as the colonies are endeavoring to forgive and forget the unfortunate attempts of the mother country to force a like ecclesiastical establishment upon them.

Equally significant of the changing character of the political institutions of the Empire is the care and attention which the author has devoted to the administrative side of the constitution. The formal structure of the constitution counts for little in modern politics. The true character of the government is determined by the actual working of the administration. Professor Jenks has been singularly successful in describing this phase of the growth of the constitution.

It is greatly to be regretted, however, that he did not see fit to deal at greater length with some of the more important developments in war administration, especially in relation to economic matters. Many important innovations which are closely bound up with the social well-being of the people, such as the creation of Trade Boards, have undoubtedly come to stay and are of sufficient political and economic significance to warrant detailed treatment. An analysis of the economic activities of the govern-

ment would be the more desirable at this moment, in view of the problems of reconstruction. It is in this direction, moreover, that we may look for the largest expansion of the constitution in the next few years.

It is equally unfortunate that the author has failed to follow up his description of the administration by a discussion of the political forces which bring the machinery of government into action and keep it going. Notwithstanding the temporary adjournment of politics during the war, the party system still remains the most vital factor in the British government. To leave the several parties and political organizations out of consideration is to give an imperfect if not distorted picture of the governments both of England and the Colonies. The author, it is true, does devote a few sections to the caucus and party government in relation to imperial politics, but these short paragraphs are undoubtedly the least satisfactory portion of the book. The discussion in question is not only inadequate but serves to throw but little light upon the subject.

Throughout the book the author has been singularly fortunate in maintaining a proper balance between the historical and the administrative phases of his subject. Each institution is presented in due historical perspective so that a view of the whole organism may be obtained. But perhaps the most satisfactory feature of the whole work to the student of government is the high standard of scholarship which it exemplifies. In this respect it is a model of presentation. It embodies the latest researches in the field of both Colonial and English government. The need for compression has in one or two instances led to generalizations which are somewhat broader than the actual facts of the case warrant. One illustration will suffice. The members of the Canadian senate will doubtless be surprised to learn that the chief function of an upper house is "to guard the independence and equality of each member of the federal group." This principle has been incorporated into a majority of modern federations, including Australia, but it has been singularly lacking in the organization and working of the Canadian upper chamber. But such slight faults are practically negligible in the light of the superior excellence of the whole study.

In brief, it may be safely asserted that this is the best single volume on the British constitution which we today possess.

UNIVERSITY OF MINNESOTA. C. D. ALLIN.

HANDBOOK OF MILITARY LAW. By Austin Wakefield Scott. Cambridge, Harvard University. 1918. Pp. 104.

This little book, as indicated by its Preface, was prepared by Professor Scott to serve as a textbook in the Military Law courses of the Harvard unit of the S. A. T. C. It was designed for use in place of the Manual for Courts Martial, which was not available. Original treatment is not attempted; the order of topics of the Manual is closely followed; indeed,

the Manual is copiously quoted. The last two chapters give textually, and without comment, the Selective Service Act, approved May 18, 1917, and its amendments, and the opinion in *Matter of Falls* and *Cox v. Wood,* both decided in 1918.

The courses in Military Law were, of necessity, hastily organized wherever units of the S. A. T. C. were established. Instructors and students were handicapped by lack of copies of the Manual. This Handbook, therefore, is a very convenient stop-gap. Texts on Military Law are all out of date, since even Davis' Treatise on Military Law is, in its third edition, dated 1915, whereas the present Articles of War were enacted in 1916, and the Selective Service Acts in 1917 and 1918, and of course many decisions of the courts and opinions of the Judge Advocate General have appeared since April, 1917. The limited scope of the Handbook has made it impossible to include such material, except the bare text of the Selective Service statutes and of the two opinions mentioned. Instructors and students must, therefore, await with interest the publication of Colonel Wigmore's promised Source-Book.

UNIVERSITY OF MINNESOTA. W. H. CHERRY.

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THE JUDICIAL SYSTEM OF ONTARIO

WHEN, in 1791, the Province of Upper Canada began its separate existence, it consisted in fact of considerably more territory than the present Province of Ontario. The Royal Proclamation of October, 1763,[1] had created a "Government" of Quebec, the western boundary of which was a line drawn from the southern end of Lake Nipissing to the point at which the present international boundary crosses the St. Lawrence. But the Quebec Act of 1774[2] much enlarged the Province of Quebec; the southern boundary was extended along the St. Lawrence, Lake Ontario, the Niagara River, the south shore of Lake Erie to the western limit of Pennsylvania, then south along the western limit to the Ohio River and down the Ohio to its junction with the Mississippi, then "northward" to the Hudson's Bay Company's Territory. (The word "northward" was long afterwards authoritatively interpreted as meaning "up the Mississippi.")[3]

[1] This Proclamation may be read in Shortt & Doughty's Constitutional Documents 1759-1792, published by the Dominion Archives or in the Report for 1906 of the Ontario Archives.

[2] 14 George III Chap. 83 (Imp.).

[3] The Dominion of Canada made as the eastern boundary of the new Province of Manitoba the western boundary of the Province of Ontario (formerly Upper Canada), and claimed with Manitoba that "Northward" meant due "North" so that the boundary line would intersect Lake Superior. Ontario claimed that "Northward" meant up the Mississippi to its headwaters. An arbitration decided that Ontario's contention was sound and this was approved by the Judicial Committee of the Privy Council. We must therefore consider the western boundary of the Province of Quebec as fixed by the Quebec Act as running up the Mississippi to the northwest angle of the Lake of the Woods and thence due north.

When Quebec was divided into two Provinces, Upper Canada and Lower Canada, all to the east and the west of a certain line[4] and the Ottawa River became the Provinces of Lower Canada and Upper Canada respectively. Before this, however, the Treaty of 1783 had given to the United States the territory to the right of the Great Lakes and connecting rivers. But Britain held the military posts Michillimackinac, Detroit, Niagara, Oswego, Oswegatchie, etc., until August, 1796, when they were given up under Jay's Treaty of 1794, thereby reducing the de facto Upper Canada to the Upper Canada de jure, now the Province of Ontario.[5]

The English Law, civil and criminal, had been introduced into Quebec by the Proclamation of 1763; but the Quebec Act of 1774 had displaced the English civil law by the previously existing Canadian law, in substance the Coutume de Paris, while the English criminal law remained in full force.[6]

The Canada Act or Constitutional Act of 1791[7] provided for a Parliament of two Houses for each of the new Provinces with full power to determine and enact such laws as should be thought advisable for the Province.

At the time of the passing of this Act the territorial unit for the administration of justice was the District.[8] In 1763 the whole "Government of Quebec" was divided into two Districts;[9] in 1788 the territory afterwards Upper Canada, theretofore part of the District of Montreal,[10] was divided into four Districts,[11]

[4] Still the boundary line between the Provinces of Ontario and Quebec.

[5] These posts were retained by Britain until the agreement in the Treaty of 1783 was implemented that British creditors should not be prevented from recovering the debts lawfully due them by citizens of the new nation. By Jay's Treaty of 1794, the United States agreed to pay these debts, and the posts were delivered up in August, 1796.

[6] Except as modified by statute, the English criminal law as it stood in 1763 is still in force throughout Canada.

[7] 31 George III, Chap. 31 (Imp.). It was during the debate on this statute in the House of Commons at Westminster that the historical quarrel between Burke and Fox took place.

[8] There were during the latter part of the French regime three divisions or districts for judicial purposes in Canada; viz., those of Quebec, Trois Rivières, and Montreal. The first British Governor formed only two, as there were not enough English speaking persons at Trois Rivières who could be made Justices of the Peace.

[9] Those at Quebec and Montreal.

[10] The District of Montreal stretched from the River St. Charles westward as far as the Province reached.

[11] Luneburg, Mecklenberg, Nassau and Hesse, being the territory round Cornwall, Kingston, Niagara, and Detroit respectively; the names of these were changed by the first Parliament of Upper Canada (1792) into Eastern, Midland, Home (Niagara being then the capital of the Province), and Western.

and another District (Gaspé) was formed of the eastern part of the District of Quebec; while afterwards a District of Three Rivers was formed between those of Montreal and Quebec.

In each District there was a Court of Common Pleas of unlimited civil but no criminal jurisdiction[12] and a Prerogative Court for probate of wills, etc. There was also a Court of General (or Quarter) Sessions of the Peace, composed of all the Justices of the Peace in and for the District, which sat quarterly and tried criminal cases with a jury[13] and which had certain administrative jurisdiction; these did not try capital cases.

The French Canadian never tired of wondering that the English preferred an adjudication of their rights by tailors and shoemakers rather than by their judges, and consequently most of the civil cases were tried by judges without the intervention of a jury; but some concession was made by Ordinances of Quebec to the love of the English speaking for the jury system.

There was also a Court of King's Bench for the Province which had full criminal jurisdiction, but only appellate jurisdiction in civil matters. This was presided over by the Chief Justice of the Province who had no seat in the Courts of Common Pleas. There were also Courts of Oyer and Terminer and General Gaol Delivery in each District once a year or oftener to try criminal cases including capital cases;[14] these were all jury courts.

The first Parliament of Upper Canada met in the summer of 1792 at Newark (now Niagara-on-the-Lake) and by the very first chapter of its first statute it made the English law the rule of decision in all cases of property and civil rights,[15] and since that time in this Province the law has been and is the English law,

[12] The Judges of the Courts of Common Pleas, three in each Court (except that of Hesse), were all laymen, except the Judge of the Hesse Court who lived at Detroit. He was the only Judge of that Court and was the well-known William Dummer Powell, born in Boston, Massachusetts, who afterwards became Chief Justice of Upper Canada. These Judges were all justices of the peace, and in that capacity sat in the General Sessions of the Peace with extensive criminal jurisdiction; some of them also received commissions of Oyer and Terminer and General Gaol Delivery, from time to time, which empowered them to preside at the Criminal Assizes.

[13] Theoretically the General Sessions could try all felonies and misdemeanors, and in the Tudor and Stuart times many thousands of culprits were hanged on the order of such Courts; but by the time of which we are now speaking capital offences were left for the Assizes to try.

[14] There were the Courts generally called "Criminal Assizes" presided over by Judges who received a special commission for the purpose.

[15] (1792) 32 George III Chap. 1 (U. C.). The English rules of evidence were also introduced by the same Act.

civil and criminal, as it was in 1792 and as modified by local legislation. The second chapter[16] directed all issues of fact, also all assessments of damages, to be determined by a jury. As this would prove a serious burden to litigants in cases of small importance, Courts of Requests were provided[17] in every locality, presided over by two or more Justices of the Peace with jurisdiction up to forty shillings ($8.00); the four Courts of Common Pleas were left standing until two years later.

In 1793 the Prerogative Courts were abolished and a Court of Probate erected, with Surrogate Courts in each District.[18]

But the whole system was revolutionized in 1794 when the Courts of Common Pleas were abolished and a Court of King's Bench erected with a Chief Justice and two puisne Justices and with full jurisdiction, civil and criminal, for the whole Province.[19] This sat at the Capital of the Province "in term," but Commissions of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery issued to the Judges of this Court to hold trial Courts in each District,[20] generally twice a year.

By an Act of the same year[21] a Court of Record was established in each District called the District Court, with limited jurisdiction. This was presided over by a District Court judge. The Court of Quarter Sessions was not interfered with.

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[16] 32 George III Chap. 2 (U. C.).

[17] 32 George III Chap. 6 (U. C.). The shilling in Canada until the sixth decade of the last century was according to the Halifax, Quebec, Provincial, or Canadian Currency and was worth 20 cents. In some parts of the Upper Province the York shilling was recognized (equal to 12½ cents) but it almost invariably received the full name "York shilling," i.e., the shilling of New York currency.

[18] The Prerogative Courts were not much frequented by the English speaking Canadians, while in the French Canadian law there was no necessity for proving wills at all. But the Prerogative Courts sometimes appointed curators and guardians, etc. The Act establishing the Court of Probate and its Surrogate Courts was (1793) 33 George III Chap. 8 (U. C.).

[19] 34 George III Chap. 2 (U. C.).

[20] While the names of others continued to be contained in the Commission of Oyer and Terminer and General Gaol Delivery for the trial of criminal cases, the Judges of the Court of King's Bench were the real judges of these Courts. The English system of Commissions of Assize and Nisi Prius for the trial of civil cases was now introduced for the first time and the Judges of the Court of King's Bench sitting under these commissions took the place of the Judges of the Courts of Common Pleas who sat under the authority of permanent commissions.

[21] (1794) 34 George III Chap. 3 (U. C.). The jurisdiction was from 40 shillings ($8.00) to £15 ($60); the jurisdiction was increased by subsequent legislation.

The Court of King's Bench (with its subordinate Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery), the District Court, the Court of Requests, the Court of Probate (with its Surrogate Courts) and the Court of Quarter Sessions may be considered the original of our present judicial system.

While it was considered that the delivery to the Lieutenant Governor of the Great Seal of the Province ipso facto made him keeper of the Seal for the Province with the powers of the Lord Chancellor therein, and while it is certain that a Court of Chancery had been held occasionally by the Governor of Quebec, the Lieutenant Governor of Upper Canada never held a Court of Chancery.[22]

In 1837 a Court of Chancery was erected, with the Lieutenant Governor as Chancellor, and one Vice Chancellor.[23] This Court was reorganized in 1849,[24] with a Chancellor and two Vice Chancellors, and so continued until its merger in 1881.

The business of the Court of King's Bench had increased so much that in 1837[25] provision was made for two more judges. This was, however, a temporary measure, and in 1849 a new Common Law Court was erected, the Court of Common Pleas,[26] with precisely the same jurisdiction and powers as the Court of Queen's Bench.[27] These two Courts of King's Bench and Common Pleas each had a Chief Justice and two puisne justices, and so continued until their merger in 1881.

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[22] Several cases of the Governor sitting as a Court of Chancery at Quebec are of record in the Canadian archives. Chief Justice Powell tried to get the Lieutenant Governor of Upper Canada to act as a Chancellor in an action brought against him (Powell) by Sir James Monk, Chief Justice in Lower Canada, but without success.

[23] 7 William IV Chap. 2 (U.C.). The Lieutenant Governor did not in fact officiate as Chancellor: the Vice-Chancellor was Robert Sympson Jameson, the husband of the well-known authoress, Mrs. Anna Jameson.

[24] 12 Vic. Chap. 64 (Can.).

[25] By the Act (1837) 1 Will. IV Chap. 1 (U.C.).

[26] 12 Vic. Chap. 63 (Can.).

[27] The Court of Queen's Bench had a sentimental precedence—for a time the Chief of that Court was Chief Justice of the Province; and so long as there was any division of the High Court of Justice into Divisional Courts, the list of judges began with those of the Queen's Bench Division, the successor of the former Court of King's Bench (I was the last to be appointed to the King's Bench Division—in 1906), then followed the names of those of the Chancery Division, the successor of the Court of Chancery (founded in 1837), and those of the Common Pleas Division, the successor of the Court of Common Pleas (founded in 1849). Later a fourth Division was formed, i.e., the Exchequer Division; but this did not represent any previously existing Court.

Before considering the fusion of the Courts in 1881, we must say something of the Courts of Appeal.

Before the Act of 1794, creating the Court of King's Bench (see n. 19), appeals were taken from the Courts of Common Pleas to the old Court of King's Bench (none ever existed in the Province of Upper Canada); by that Act, the Lieutenant Governor or Chief Justice and two or more members of the Executive Council were made a Court of Appeal in matters over £100, a further appeal being allowed to the Privy Council at Westminster where more than £500 sterling was involved. This same Court of Appeal was given jurisdiction in appeals from the Court of Chancery in 1837; but the Court was abolished in 1849, and a new Court of Error and Appeal constituted to hear appeals from the two Common Law Courts and the Court of Chancery. It was composed of all the Judges of the then Courts of first instance,[28] and this Court was in 1874 re-constituted and thereafter consisted of five Judges, permanently of the Court of Appeal, and so continued until the merger of 1881.

The District Courts dating back to 1794, one in each District, with purely civil jurisdiction, became County Courts in 1849;[29] these were presided over by barristers.

The Courts of Requests originally erected in 1792 were at first presided over by Justices of the Peace virtute officii, but in 1833[30] it was provided that Commissioners to be appointed by the Governor should hold these courts and in 1841[31] it was enacted that Courts to be called Division Courts presided over by the Judge of the District Court should take the place of these Courts of Requests, thus putting an end to non-professional judges in these the lowest courts.[32]

The Court of Probate, with its Surrogate Courts created by the Act of 1793 (see n. 18), was abolished in 1858[33] and a Surro-

[28] (1849) 12 Vic. Chap. 65 (Can.). It will be seen that this Court had a strong resemblance to the English Court of Exchequer Chamber.

[29] (1849) 12 Vic. Chap. 78 (Can.). The Districts had become so multiplied that their boundaries in many cases became identical with the boundaries of the Counties, and it was not thought worth while to retain the District.

[30] 3 William IV Chap. 1 (U. C.).

[31] 4 & 5 Vic. Chap. 3 (Can.).

[32] In Ontario every civil suit is tried before a Judge who must have been a member of our Bar for at least seven years (ten years in the case of a Judge of the Supreme Court). An exception lies in certain disputes between master and servant, which may be tried by Magistrates.

[33] 22 Vic. Chap. 93 (Can.). This Act formally repealed 33 George III Chap. 8 (U. C.).

gate Court for each County, presided over by a judge with same powers as a Judge of a County Court, was provided for.[34] The County Courts, Division Courts, Surrogate Courts, and Courts of General Sessions (these are now presided over by a Judge of the County Court) still continue.

But in 1881 the Courts of Appeal, Queens Bench,[35] Chancery, and Common Pleas were united and consolidated into one Supreme Court of Judicature for Ontario[36] composed of two permanent divisions: (1) the Court of Appeal for Ontario and (2) the High Court of Justice for Ontario; of this High Court there were at first three Divisions, i.e., Queen's Bench, Chancery, and Common Pleas Divisions—later a fourth, the Exchequer Division, was added. Each Division had a Chief Justice (the Chancery Division a Chancellor) and two puisne Justices. The Court of Appeal had a Chief Justice (the Chief Justice of Ontario) and four puisne Justices. These four Divisional Courts of the High Court Division sat alternately in term to hear appeals. This was found inconvenient; and an act was passed in 1909, brought into force January 1, 1913, which erected a Supreme Court with two Divisions, (1) the Appellate Division for appeals only, and (2) the High Court Division for trials.

The Appellate Division at present consists of two Divisional Courts, each of five members with co-ordinate and co-equal authority and jurisdiction, each bound by the decision of the other. The First Divisional Court consists of the Chief Justice of Ontario and four Justices appointed to the Appellate Division; it is the successor of the Court of Appeal for Ontario and its members cannot without their consent be required to try cases. The Second Divisional Court is made up of five Justices of the High Court Division who have been elected by the Justices of that Division in December of each year to constitute the Second Divisional Court for the coming year—the personnel of this Court changes

[34] The Judges of the Surrogate Court are appointed by the Province, those of all other Courts by the Dominion. Almost invariably, at least in later years, a Judge of the County Court has been appointed Judge of the Surrogate Court.

[35] The Court of King's Bench became, of course, the Court of Queen's Bench in 1837 on the accession to the throne of Queen Victoria, but the Statute formally changing the name was not passed till 1839, 2 Vic. Chap. 1 (U. C.).

[36] This was effected by the Ontario Judicature Act (1881), 44 Vic. Chap. 7 (Ont.).

from year to year.[37] The other members of the High Court Division are supposed to preside in trial Courts and as Judges of first instance.

But every Justice of the Supreme Court has the same powers as every other and any one may sit in any Court whether of appeal or of first instance.[38] From every Judgment at the trial before a Supreme Court Judge an appeal lies to the Appellate Division. The Divisional Courts generally sit on alternate weeks, but sometimes when work is pressing they sit concurrently, four being a quorum in a Divisional Court.[39]

An appeal also lies to the Appellate Division from the County[40]

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[37] The reason for this rather odd method of forming Appellate Courts is of course historical. It would not have been devised had the matter been tabula rasa. The members of the First Divisional Court do frequently take trial Courts, and the Members of the High Court Division frequently sit in the First Divisional Court.

[38] The work to be done by the several Judges is a matter of arrangement amongst themselves and there never has been the slightest difficulty or want of harmony: appointments are made or exchanged at will to suit the convenience, health, or desire of the various Judges—no litigant or lawyer can ever be sure who will try his case or hear his appeal.

[39] Provision is made in the Act for an additional Divisional Court, if necessary.

[40] The jurisdiction of the County Court is given by the Revised Statutes of Ontario (1914) Chap. 59, sec. 22, as follows:

"22. (1) The County and District Courts shall have jurisdiction in:

(a) Actions arising out of contract, expressed or implied, where the sum claimed does not exceed $800;

(b) Personal actions, except actions for criminal conversation and actions for libel, where the sum claimed does not exceed $500;

(c) Actions for trespass or injury to land where the sum claimed does not exceed $500, unless the title to the land is in question, and in that case also where the value of the land does not exceed $500, and the sum claimed does not exceed that amount;

(d) Actions for the obstruction of or interference with a right of way or other easement where the sum claimed does not exceed $500, unless the title to the right or easement is in question, and in that case also where the value of the land over which the right or easement is claimed does not exceed that amount;

(e) Actions for the recovery of property, real or personal, including actions of replevin and actions of detinue where the value of the property does not exceed $500;

(f) Actions for the enforcement by foreclosure or sale or for the redemption of mortgages, charges or liens, with or without a claim for delivery of possession or payment or both, where the sum claimed to be due does not exceed $500. 10 Edw. VII, c. 30, s. 22 (1) part; 1 Geo. V, c. 17, s. 48;

(g) Partnership actions where the joint stock or capital of the partnership does not exceed in amount or value $2,000;

(h) Actions by legatees under a will for the recovery or delivery of money or property bequeathed to them where the legacy does not exceed in value or amount $500, and the estate of the testator does not exceed in value $2,000;

(i) All other actions for equitable relief where the subject matter involved does not exceed in value or amount $500; and

and Surrogate Courts and from the Division[41] Courts in certain

(j) Actions and contestations for the determination of the right of creditors to rank upon insolvent estates where the claim of the creditor does not exceed $500. 10 Edw. VII, c. 30, s. 22 (1) part."

[41] The jurisdiction of the Division Court is given by the Revised Statutes of Ontario (1914) Chap. 63, Secs. 61 and 62, as follows:

"61. The Court shall not have jurisdiction in

(a) An action for the recovery of land, or an action in which the right or title to any corporeal or incorporeal hereditaments, or any toll, custom or franchise comes in question;

(b) An action in which the validity of any devise, bequest, or limitation under any will or settlement is disputed;

(c) An action for malicious prosecution, libel, slander, criminal conversation, seduction or breach of promise of marriage;

(d) An action against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto;

(e) An action upon a judgment, or order of the Supreme Court or a County Court where execution may issue, upon or in respect thereof. 10 Edw. VII, c. 32, s. 61.

"62. (1) Save as otherwise provided by this Act, the Court shall have jurisdiction in:

(a) A personal action where the amount claimed does not exceed $60;

(b) A personal action if all the parties consent thereto in writing, and the amount claimed does not exceed $100;

(c) An action on a claim or demand of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100; provided that in the case of an unsettled account the whole amount does not exceed $600;

(d) An action for the recovery of a debt or money demand where the amount claimed, exclusive of interest whether the interest is payable by contract or as damages, does not exceed $200, and the amount claimed is

(i) Ascertained by the signature of the defendant or of the person whom as executor or administrator he represents or—

(ii) The balance of an amount not exceeding $200 which amount is so ascertained or—

(iii) The balance of an amount so ascertained which did not exceed $400 and the plaintiff abandons the excess over $200.

An amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it.

The jurisdiction conferred by this clause shall apply to claims and proceedings against an absconding debtor.

(e) An action or contestation for the determination of the right of a creditor to rank upon an insolvent estate where the claim of the creditor does not exceed $60;

(2) Claims combining

(a) Causes of action in respect of which the jurisdiction is by subsection 1 limited to $60, hereinafter referred to as class (a);

(b) Causes of action in respect of which the jurisdiction is by subsection 1 limited to $100, hereinafter referred to as class (b);

(c) Causes of action in respect of which the jurisdiction is by subsection 1 limited to $200, hereinafter referred to as class (c),

may be joined in one action; provided that the whole amount claimed in

cases. In certain cases of importance an appeal lies to the Supreme Court of Canada or to the Privy Council.[42]

The Practice (Civil).—In the lowest Court, the Division Court, the forms are of the simplest character, and pleading in any proper sense there is not. In the Supreme Court and County Courts the keynote is to be found in one of the Consolidated Rules:

"A proceeding shall not be defeated by any formal objection; but all necessary amendments shall be made upon proper terms as to costs and otherwise to secure the advancement of justice, the determining the real matter in dispute and the giving of judgment according to the very right and justice of the case."

In the Supreme Court and the County Court all actions and suits are begun by writ of summons, indorsed with the cause of action. The defendant has ten days to appear by filing a formal appearance. If he does not, then judgment may be entered, final or interlocutory, as the case may be, according as the claim is such as permits a special endorsement (e.g., a promissory note, etc.) or not. If interlocutory, and a question of damages is involved, then the case goes to trial for assessment—in the case of other claims, e.g., upon a mortgage, other provisions are made. Upon appearance, unless the defendant waives the right to a statement of claim, the plaintiff files and serves a statement of the facts which he alleges and upon which he bases his right of action—this must be done within three months of appearance;

respect of class (a) does not exceed $60; and that the whole amount claimed in respect of classes (a) and (b) combined, or in respect of class (b) where no claim is made in respect of class (a), does not exceed $100; and that the whole amount claimed in respect of classes (a) and (c), or (b) and (c) combined, does not exceed $200, and that in respect of classes (b) and (c) combined, the whole amount claimed in respect of class (b) does not exceed $100.

(3) The findings of the court upon claims so joined shall be separate.

(4) The Court shall also have jurisdiction in actions of replevin, where the value of the goods or other property or effects distrained, taken or detained, does not exceed $60, provided in The Replevin Act.

(5) The Court shall also have jurisdiction in actions between teachers and School Boards as provided by The High Schools Act, The Public Schools Act, and The Separate Schools Act. 10 Edw. VII, c. 32, s. 62."

[42] The Supreme Court of Canada sits at Ottawa and is the Appellate Court for all Canada; the cases are few in number, but often of great importance, in which an appeal is taken to that Court from the Appellate Division of The Supreme Court of Ontario.

The Judicial Committee of the Privy Council is composed of Privy Councillors from all over the British Empire (including Canada) and is the final Court of Appeal for all the British world except the Islands of Great Britain and Ireland, appeals from which go to the House of Lords. It is generally constitutional questions that go to that tribunal—not more than half a score a year from Ontario.

if not, the defendant may move to dismiss the action. If a statement of claim is served, the defendant has eight days to file and serve his defence. He may with his defence set up any claim he has against the plaintiff; the plaintiff replies if so advised. When the pleadings are closed, a notice of trial may be given at least ten days before the day of trial. The parties are entitled before the trial to have produced under oath by their opponent all documents and copies of documents bearing upon the causes of action; and also to examine under oath the opposite party before a Master or Special Examiner. Certain actions, such as libel, must be tried by a jury unless both parties waive the right to a jury; certain others, which are purely equitable, by a Judge, unless the Judge otherwise orders. In all other kinds of actions, if either party desires a jury he files and serves a jury notice, but the Judge at the trial may in his discretion try any such case without a jury, upon or without the application of either party.[43] The

[43] I have in an address on the Jury System of Ontario, prepared at the request of the Bar Association of the State of New York, January, 1914, given an outline of the evolution in our practice of the Jury system.

The first break in the jury system was made by the Law Reform Act of 1868, 32 Vic. Chap. 6 (Ont.), which directed actions to be tried by a Judge unless either party filed a notice for a jury—this provision was extended by the Administration of Justice Act of 1873, 36 Vic. Chap. 8 (Ont.). The Act of 1896, 59 Vic. Chap. 18 (Ont.), required actions against municipalities to be tried by a Judge without a jury.

As the law now stands, there are these classes of cases in the Supreme Court and County Court:

1. Those which must be tried by a jury unless the parties in person or by solicitors or counsel consent. These are cases of libel and slander.
2. Those which must be tried by a Judge: i.e., actions against a municipal corporation for non-repair.
3. Those which are tried by a Judge unless he otherwise orders:
   (a) Equitable issues,
   (b) See class 4.
4. In other cases, if either party desire a jury, he files and serves a jury notice within four days of the close of the pleadings. If the other party submit, the case goes on the jury list for trial. If the other party object, he may move in Chambers before a single Judge. For a long time there was a conflict of judicial opinion as to the principle to be followed in striking out a jury notice. Finally we made a rule making it obligatory upon the Judge in Chambers to strike out the jury notice "when . . . . it appears to him that the action is one which ought to be tried without a jury." It is expressly provided, however, that the refusal of a Judge in Chambers to strike out the jury notice shall not interfere with the right of the Trial Judge to strike it out; nor does the order of the Judge in Chambers striking out a jury notice interfere with the right of the Trial Judge to have the case tried by a jury.

If a jury notice is not served, the case goes on the non-jury list and will be tried by a Judge without a jury unless the Judge himself prefers it to be tried with a jury.

At every Assize town for the jury sittings there are two lists prepared. one a jury list (which is placed first) and the other a non-jury list. It is

civil jury is twelve in number; ten may find a verdict. In many cases, indeed in most cases except those of the simplest character, the trial judge instead of taking a general verdict requires the jury to answer questions of fact submitted to them and upon these answers directs the judgment to be entered according to his own view of the law. The jury agreeing, the trial judge cannot grant a new trial; if the jury disagree, he may traverse the case or call another jury and proceed with the trial afresh. The party discontented with the result of a trial may appeal within thirty days to the Appellate Division. The Court may order a new trial or direct the judgment to be entered which should have been entered. Amendments may be made at any time as may be just. In a few cases an appeal lies to the Supreme Court of Canada, sitting at Ottawa, composed of six Judges—and in a limited number of cases the final appeal from the Court of Appeal or even (upon leave) from the Supreme Court of Canada to the King in Council in Westminster—"The Judicial Committee of the Privy Council." The party failing may be ordered to pay the costs of the successful party, including most of his solicitor and counsel fees.

Costs.—In the Supreme Court and County Courts on the civil side there is a fixed tariff of fees for the various services to be rendered by Solicitor and Barrister, also for witness fees, etc. The Judge before whom any action is tried has the right, and generally exercises it, to direct the losing party to pay the costs of the winning party. A Court also very generally directs the payment of costs by a party in default when extending time, making amendments, and the like. In very few cases on the criminal side

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a common practice for the Trial Judge at the beginning of the sitting to run over the records and strike out the jury notice in such cases as he thinks proper. It is not uncommon to place the records in such instances where they should have been in the first instance on the non-jury list; thereby the offender may be penalized, losing time waiting for his action to be tried.

In most of the Assize towns there are also non-jury sittings; at these no jury cases are entered, but if a case should appear which the Judge thinks should be tried with a jury, he may adjourn it to the jury sittings. (I have never known a case of this kind.)

At Toronto there are separate sittings for jury and non-jury cases, the non-jury sittings being practically continuous and the jury sittings six to ten weeks in the year. If a case comes before the Judge presiding at the jury sittings which he thinks should not be tried with a jury, he sends it across the hall to the Non-Jury Court. No doubt if the reverse were to happen the record might be transferred in the opposite direction; but, as I have said, I never knew a case of that kind.

is there any provision for costs. Where, however, a defendant applies to have the conviction of a Magistrate quashed for want of jurisdiction or want of evidence, or the like, he must put up security for the costs, and if he fails may be ordered to pay them.

Appeals are generally decided within three months of the trial —a trial should be had within six months of the issue of the writ.

Criminal Procedure.—At the conquest of Canada by the British, 1759-60, the English criminal law was introduced by the conquerors; though (with the exception of a few years) the French-Canadians were permitted to retain their own law in civil matters, the English criminal law continued to prevail in both Canadas except as modified by Provincial Statutes—and these Statutes in general closely follow the legislation in the mother country. This last statement also applies to the Provinces of Nova Scotia and New Brunswick. Accordingly, at Confederation in 1867 the criminal law of all the confederating colonies was almost identical—while the civil law of Lower Canada (Quebec) was markedly different from that of Upper Canada (Ontario), Nova Scotia, and New Brunswick, the Lower Canadian law being based upon the custom of Paris and ultimately upon the Civil Law of Rome, while that of the others was based upon the Common Law of England. Accordingly, the British America Act which created (1867) the Dominion of Canada gave to the Parliament of the Dominion jurisdiction over the criminal law including the procedure in criminal matters. The Provinces, however, retained jurisdiction over the constitution of the Courts of Criminal Jurisdiction as well as over property and civil rights.

For some years there were statutes passed from time to time amending the criminal law; and at length Sir John Thompson, who had been himself a Judge in Nova Scotia, and who became Prime Minister of Canada, brought about a codification of criminal law and procedure. He received valuable assistance from lawyers on both sides of the House, and the Criminal Code of 1892 became law. This with a few amendments made from time to time is still in force.

The distinction between felony and misdemeanor has been abolished; and offences which are the subject of indictment are "indictable offences." Offences not the subject of an indictment are called "offences" simply. Certain offences of a minor char-

acter are triable before one or two Justices of the Peace as provided by the Code in each case. In such cases there is an appeal from a Magistrate's decision adverse to the accused to the County Court Judge both on law and fact; or the conviction may be brought up on certiorari to the High Court on matter of law.

But offences of a higher degree are indictable.

If a crime, say of theft, is charged against anyone, upon information before a Justice of the Peace, a summons or warrant is issued and the accused brought before the Justice of the Peace. In some cases he is arrested and brought before the Magistrate without summons or warrant; but then an information is drawn up and sworn to. The Justices of the Peace are appointed by the Provincial Government and are not, as a rule, lawyers.

Upon appearance before the Justice of the Peace, he proceeds to inquire into the matters charged against the accused; he causes witnesses to be summoned, and hears in presence of the accused all that is adduced. The accused has the fullest right of having counsel and of cross-examination, as well as of producing any witness, and having such evidence heard in his behalf as he can procure. All the depositions are taken down in shorthand or otherwise, and if in long hand signed by the deponent after being read over to him.

After all the evidence for the prosecution is in, the Magistrate may allow argument, or he may proprio motu hold that no case has been made out—in which case the accused is discharged—or he may read over aloud all the evidence again (unless the accused expressly dispenses with such reading), and address the accused, warning him that he is not obliged to say anything, but that anything he does say will be taken down and may be given in evidence against him at his trial, and asks, "Having heard the evidence, do you wish to say anything in answer to the charge?" Then, if desired by the accused, the defence evidence is called.

If at the close of the evidence the Magistrate is of opinion that no case is made out, he discharges the prisoner, but the accused may demand that the accuser be bound over to prefer an indictment at the Court at which the accused would have been tried if the Magistrate had committed him.

If a case is made out, the accused is committed for trial with or without bail, as seems just, the witnesses being bound over to give evidence.

Police Magistrates are appointed for most cities and towns, who are generally Barristers; these have a rather higher jurisdiction than the ordinary Justice of the Peace—in some cases with the consent of the accused.

The Courts which proceed by indictment are the Supreme Court and the General or Quarter Sessions. Judges of these Courts are appointed by the Crown (i.e., the Administration at Ottawa) for life and must be Barristers of ten (or seven) years' standing.

The Supreme Court can try any indictable offence; the Sessions cannot try treason and treasonable offences, piracy, corruption of officers, etc., murder, attempts and threats to murder, rape, libel, combinations in restraint of trade, bribery, personation, etc., under the Dominion Elections Act.

Within twenty-four hours of committal to gaol of any person charged with any offence which the Sessions could try, the Sheriff must notify the County Court Judge, who acts as Judge in the Sessions, and with as little delay as possible the accused is brought before the Judge. The Judge reads the depositions, and tells the prisoner what he is charged with and that he has the option of being tried forthwith before him without a jury or being tried by a jury. If the former course is chosen, a simple charge is drawn up, a day fixed for the trial, and the case then disposed of.

If a jury trial be chosen, at the Sessions or the High Court (Assizes), a bill of indictment is laid before a Grand Jury (in Ontario of thirteen persons) by a Barrister appointed by the Provincial Government for that purpose. The Indictment may be in popular language without technical averment; it may describe the offence in the language of the statute or in any words sufficient to give the accused notice of the offence with which he is charged. Forms are given in the statute which may be followed. Here is a sample:

"The Jurors for Our Lord the King present that John Smith murdered Henry Jones at Toronto on February 13th, A. D., 1912."

No bill can be laid before the Grand Jury by the Crown Counsel (unless with the leave of the Court) for any offences except such as are disclosed in the depositions before the Magistrate. But sometimes the Court will allow other indictments to be laid.

The Grand Jury has no power to cause any indictment to be drawn up.

Upon a true bill being found, the accused is arraigned; if he pleads "Not Guilty," the trial proceeds.

He has twenty peremptory challenges in capital cases; twelve if for an offence punishable with more than five years' imprisonment, and four in all other cases; the Crown has four, but may cause any number to stand aside until all the jurors have been called.

I have never, in thirty years' experience, seen it take more than half an hour to get a jury even in a murder case—and I have never but once heard a juryman asked a question.

In case of conviction, the prisoner may ask a case upon any question of law to be reserved for the Appellate Division, or the Judge may do that proprio motu. The Appellate Division may also direct a new trial upon the ground that the verdict is against evidence; but I have never known that to be done.

No conviction can be set aside or new trial ordered even though some evidence was improperly admitted or rejected, or something was done at the trial not according to law, or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned at the trial. If the Court of Appeal is unanimous against the prisoner, there is no further appeal, but if the Court is divided, a further appeal may be taken to the Supreme Court of Canada. I have never known this to be done.

A wife or husband is a competent witness in all cases for an accused. He or she is compellable as a witness for the prosecution in offences against morality, seduction, neglect of those in one's charge, and many others. The accused is also competent, but not compellable in all cases. If an accused does not testify in his own behalf, no comment can be made upon the fact by prosecuting counsel or the Judge.

No more than five experts are allowed on each side—four in civil cases.

I have never known a murder case (except one) take four days—most do not take two, even with medical experts.

WILLIAM RENWICK RIDDELL.*

TORONTO.

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INTERSTATE COMMERCE AND CHILD-LABOR

THE reception which has been generally accorded to the recent so-called Child-Labor Decision of the Supreme Court of the United States[1] and the caustic if not contemptuous references in the magazines and public press to the majority that concurred therein,[2] can only be explained on the theory that desire often outruns judgment and that when one feels deeply it is difficult to pause and to think. It is but another example of the present-day tendency to forget that a rule of constitutional construction which is adopted for good and meritorious purposes and on the theory that the end justifies the means is none the less a rule of law and a precedent and may later be relied upon to accomplish that which may be pernicious in its consequences and subversive of all law and of all government. The act under consideration[3] provided that:

"No producer, manufacturer or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom, children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock post-meridian, or before the hour of six o'clock ante-meridian."

The majority of the members of the Supreme Court held that this statute was invalid and that it could not be sustained as an exercise by Congress of its power to regulate commerce. They also held that the act could "not be justified on any supposed theory of the right of the state to protect its manufacturers, who themselves were subject to the local laws which denied them the privilege of employing children under certain circumstances or under certain conditions, against the competition of goods which

[1] Hammer v. Dagenhart, (1918) 38 S. C. R. 529.
[2] Justices Day, Pitney, Van Devanter, McReynolds, and Chief Justice White.
[3] Act of Sept. 1, 1916, 39 Stat. 675, Chap. 432, Comp. Stat. 1916, Secs. 8819a-8819f.

were manufactured in another state and under less drastic enactments." They held, in short, that Congress could not, under its delegated power to regulate commerce, *destroy* commerce; nor could it by this indirect method impose its theories of sociology or public policy upon the several states. They explicitly stated that:

"The grant of power over the subject of interstate commerce was to enable it to regulate such commerce and not to give it authority to control the states in their exercise of the police power over local trade and manufacture," and that:

"The grant of power over a purely federal matter was not intended to destroy the local power, always existing and carefully reserved to the states in the Tenth Amendment to the Constitution" which provides that:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people."

They quoted with approval the language of Chief Justice Marshall when in the Dartmouth College Case[4] he said:

"That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed may be admitted."

The minority opinion,[5] though expressly affirming the proposition "That the states have exclusive control over their methods of production and that Congress cannot meddle with them, taking the proposition in the sense of direct intermeddling," took the position, and this unhesitatingly, that the power to regulate commerce involved the power to prohibit and to destroy, and that Congress had an unlimited discretion in such matters and regardless of what might be the effect upon the industries and social policies of the several states. It closed with the following remarkable statement:

"The Act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress, their

[4] Dartmouth College v. Woodward, (1819) 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

[5] Written by Mr. Justice Holmes and concurred in by Justices McKenna, Brandeis and Clarke.

power to cross the line would depend upon their neighbors. Under the constitution such commerce belongs not to the states but to Congress to regulate. *It may carry out its views of public policy whatever indirect effect they may have upon the activities of the states.* Instead of being encountered by a prohibitive tariff at her boundaries the *state encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole.* If, as has been the case within the memory of men still living, a state should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames.* Yet in that case it would be said with quite as much force as in this, that Congress was attempting to intermeddle with the state's domestic affairs. *The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to be entirely constitutional for congress to enforce its understanding by all the means at its command."*

Though, indeed, asserting at the outset a doctrine of state's rights and state home rule, the opinion insists upon a United States as opposed to a state public policy, and though it admits that the furtherance of this policy can not be the subject of direct legislation, it withdraws the admission, as far as any practical value is concerned, by insisting that it may be the subject and object of that which is indirect. It in effect asserts that by these indirect methods a temporary political majority in Congress may superimpose its conception of public policy upon all of the states, may destroy their industries, and may control their social policies. It even goes so far as to intimate that over the exercise of these powers there is no judicial control, save only to ascertain whether the acts affect commerce or are enacted under the mantle of the taxing or treaty-making powers or the power to regulate the currency or to establish post roads. "But I had thought" says the writer of the opinion, "that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this court always had disavowed the right to intrude its judgment upon questions of policy or of morals. It is not for this court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible against strong drink but not as against the product of ruined lives."

If this minority opinion states what is to be the law of the land, (and if it be true that the Supreme Court of the nation ultimately voices the public opinion and the public desires, it is soon destined to become so,[6]) it is well that we should realize what that law would mean.

It would mean that before the Civil War a northern majority could have settled the slavery question by excluding from the avenue of commerce the products of slave-labor, especially cotton, and that in our own time a northern majority of wool producers and woolen goods manufacturers could shut out from commerce cotton-made goods, or a southern majority woolen ones, just as to greater or lesser extent has the butter maker, by the exercise of the taxing power, driven oleomargarine from the market.[7] It would mean that a labor-vote awed congressional majority, such as passed the Adamson Bill, could exclude from transportation all articles of whatever nature or kind that did not bear the union label or were not made in closed shops. It would mean that a political majority, gathered together temporarily at Washington, and thousands of miles away from and utterly ignorant of the local and economic conditions of the states over which they were legislating, could dictate their social and economic policies, and this, if the opinion of the minority is correct, without even the opportunity to those states of a judicial review.

This is the law which is announced in the minority decision, and which has won so much journalistic applause. We hardly believe, however, that it is justified by the authorities which are cited, and it is a noticeable fact that the opinion advances but little reason or argument itself, but seems to rely upon authority and authority alone.

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[6] That is to say if the journalistic comment really expresses that opinion, for a change in the vote of but one member of the court would affect the result.

[7] According to Congressman Burton of Texas, in 1901, before the passage of the law, 130,000,000 pounds were produced in the United States. This on the old basis of taxation of 2 cts. per pound produced a revenue of $2,600,000. Within two years after the passage of the recent law raising the tax to 10 cts. per pound, the production had fallen off 66⅔%, and the revenue derived even from the 10 ct. tax was only $160,000. According, also, to Representative Burton, before the passage of the act, oleomargarine sold at from 15 cts. to 18 cts. per pound in Washington, and butter at from 20 cts. to 30 cts., while two years later butter sold in Washington at from 48 cts. to 60 cts., an absolutely prohibitory price both for export purposes and as far as the poor man is concerned.

It is true, as stated by Mr. Justice Holmes, that in the case of *Veazie Bank v. Fenno,*[8] and "fifty years ago, a tax on state banks, the obvious purpose and actual effect of which was to drive them or at least their circulation out of existence, was sustained by the national court, although the result was one that Congress had no constitutional power to require" and that in its opinion the court said that "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers."

It is also true that in the case of *McCray v. The United States*[9] a federal corporation tax was sustained although, according to ex-President, then President Taft, and the minority opinion in the present case, among its primary purposes was the purpose to secure a control over a method of scrutinizing the affairs of these corporations.[10]

It is also true, as stated in the minority opinion, that "the manufacture of oleomargarine is as much a matter of state regulation as the manufacture of cotton cloth, but that the Supreme Court none the less sustained an act of Congress which levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale."[11]

These acts and these opinions, however, appear to the writer to have been the result of popular pressure and of political exigency rather than of sober judicial thought. In them also the taxing power alone was involved,—a power which has generally been deemed arbitrary in its nature, and, if revenue is its object, practically to know no limits but the governmental needs. In any

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[8] (1869) 8 Wall. (U. S.) 533, 19 L. Ed. 482.

[9] (1904) 195 U. S. 27, 24 S. C. R. 769, 49 L. Ed. 78, 1 Ann. Cas. 561.

[10] In a message to Congress recommending the imposition of this tax, President Taft used the following language: "Another merit of this tax is the federal supervision which must be exercised in order to make the law effective over the annual accounts and business transactions of all corporations. While the faculty of assuming a corporate form has been of the utmost utility in the business world, it is also true that substantially all of the abuses and all of the evils which have aroused the public to the necessity of reform were made possible by the use of this very faculty. If now, by a perfectly legitimate and effective system of taxation, we are incidently able to possess the Government and the stockholders and the public of the knowledge of the real business transactions and the gains and profits of every corporation in the country, we have made a long step toward that supervisory control of corporations which may prevent a further abuse of power."

[11] See McCray v. United States, (1904) 195 U. S. 27, 24 S. C. R. 769, 49 L. Ed. 78, 1 Ann. Cas. 561.

event, neither they nor the other cases which are cited in the opinion of Mr. Justice Holmes appear to be in any way conclusive of the controversy which is before us.

In the Veazie Bank case the court laid particular emphasis upon the fact that the tax which was laid upon the state banks was levied for the purpose of protecting the national currency, and that that currency was within the exclusive control of the federal government; while in the Lottery Case, the Pure Food and Drug Act Case,[12] and the White Slavery Cases,[13] the decisions dealt with things or articles of commerce, or with commercial practices, which in themselves were nuisances and inherently harmful and therefore not property at all, or whose production was tainted with fraud which would everywhere be condemned and everywhere be deleterious. The things themselves in short were outlaws or were branded with the brand of Cain.[14]

The so-called Lottery Case, indeed, which is so strongly relied upon and which Senator Beveridge[15] so strongly emphasized before Congress, though perhaps not erroneous in its judgment, contains absolute contradictions and is extremely vulnerable in its reasoning and in its argument.

Although, indeed, the court at one place in its opinion, states that these tickets were the subject of interstate commerce and therefore under the control of Congress, the underlying and controlling theory of the case appears to have been not so much that

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[12] Hipolite Egg Co. v. United States, (1911) 220 U. S. 45, 55 L. Ed. 364, 31 S. C. R. 364.

[13] Hoke v. United States, (1913) 227 U. S. 308, 57 L. Ed. 523, 33 S. C. R. 281, Ann. Cas. 1913E 905, 43 L. R. A. (N.S.) 906; Caminetti v. United States, (1917) 242 U. S. 470, 61 L. Ed. 442, 37 S. C. R. 192, L. R. A. 1917F 502.

[14] The theory of the cases of Hipolite Egg Co. v. United States and Hoke v. United States, was not that Congress was directly naming or defining an evil and then legislating against it under its power to regulate commerce, but that it was simply supplementing the powers of the states and aiding them in the enforcement of their laws and in the control of the articles or practices which they and not congress had first outlawed. Thus in the case of Hoke v. United States, the court says: "There is unquestionably a control in the states over the morals of their citizens, and it may be admitted it extends to making prostitution a crime. It is a contol, however, which can be exercised only within the jurisdiction of the states; but there is a domain which states cannot reach and over which congress alone has power; and if such power be exerted to control what the states cannot, it is an argument for and not against its legality. Its exertion does not encroach upon the jurisdiction of the states."

[15] The grandfather if not the father of the present act. See Vol. 41, p. 2153 Congressional Record.

they were the subjects of interstate traffic and property and that Congress had the power to destroy as well as to regulate commerce (for this was not held at all), as that they were common nuisances in which there were no property rights whatever, and that, being nuisances and not property, the owners of them had no rights which Congress was bound to respect.

"If," the court said, "the carrying of lottery tickets from one state to another be interstate commerce, and if Congress is of the opinion that an effective regulation for the suppression of lotteries carried on through such commerce is to make it a criminal offense to cause lottery tickets to be carried from one state to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both state and national legislation in the early history of the country, has grown into disrepute and has become offensive to the *entire* people of the nation."

The opinion, in short, when properly analyzed, takes the position that the lottery ticket is a nuisance much to the same extent as a disease-infected article of clothing, that it has become offensive to and has been condemned by the *entire people* of the nation, and that Congress, as a sort of a trustee of the welfare of all, when that all has expressed its opinion and formulated its public policy and as the only agency which has direct supervision over interstate lines of communication, has the power if not the duty to supplement the police activities of *all* of the states and to prohibit the transportation of such articles as *all* have outlawed and all have condemned. The case falls far short of holding that Congress may deny the use of the interstate lines of communication to goods or articles which are not, as lottery tickets or disease-infected articles of clothing, useless or inherently harmful, and whose sale or manufacture is not forbidden by the laws of all of the states, or at any rate between two states in neither of which are they outlawed or condemned.[16]

[16] During the argument on the so-called Beveridge Bill in the United States Senate, Senator Knox said: "I had something to do with the Lottery case. The final argument was made when I was attorney general and I had something to do with the preparation of the case, and the reason why I say I would be under a personal obligation for a direct decision upon the proposition that the control over interstate commerce is just the same as it is over foreign commerce is because we used every one of those cases which the Senator has cited and we worked every one of those statements for all they were worth in order to get the court to base the decision in the Lottery case upon

There is, in short, no authority cited in the minority opinion, which, on the right to regulate commerce alone, would induce us to believe that Congress may forbid the carriage of the products of child-labor out of a state where the employment of children is not forbidden and into states where it is also not forbidden, and, if the case of *Leisy v. Hardin*[17] still announces the law, into any state whatever.

Nor is there any support, in the Lottery case, for the proposition that by means of the commerce clause of the constitution Congress may superimpose its conception of public policy upon the public policy of the several states and may accomplish by indirect means that which it cannot or dare not accomplish by direct. The difficulty in the way of the national state agency or trustee theory suggested in the Lottery case, when applied to the bill which is before us, lies in the fact that few of the states have adequately legislated against the evils of child-labor,[18] and that such laws as have been adopted are by no means uniform as to the ages at which children may be employed or the hours that they shall work, and that the confessed purpose of the so-called Beveridge bill and the primary purpose of the present act is to force a uniformity in these matters. We must remember that though the lottery ticket is a nuisance and an article of no intrinsic value, the coat, the axe handle, or the other manufactured product is a legitimate article of commerce and is useful, and that it is its method of manufacture alone that is reprehensible, and that, in the majority of states where it is manufactured, even its method of manufacture is not condemned by the law.

We must not be misled by the so-called fraud order cases[19] for these were decided entirely upon the theory that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that congress was given the power to create a postal system which it should itself operate and that, being the creator, it could neces-

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that ground, which would have been conclusive ground and would not have necessitated the court going elsewhere. But if the Senator will examine that decision he will see that they put it on other grounds." Congressional Record Vol. 41, p. 2180.

[17] (1889) 135 U. S. 100, 10 S. C. R. 681, 34 L. Ed. 128.

[18] For a summary of laws see Congressional Record Vol. 41, p. 2152.

[19] Ex parte Jackson (1877) 96 U. S. 727, 24 L. Ed. 877; In re Rapier, (1892) 143 U. S. 110, 36 L. Ed. 93, 12 S. C. R. 374; Horner v. United States, (1892) 143 U. S. 207, 36 L. Ed. 126, 12 S. C. R. 407; No. 2, same case, 143 U. S. 570, 36 L. Ed. 266, 12 S. C. R. 522.

sarily regulate the use of that which it had created. In the case of interstate commerce, however, Congress has created and was given the power to create nothing. It was given the power merely to regulate that which was before in existence and that which itself neither owned nor operated. The leading case on the subject, indeed, expressly repudiates the idea that the same power of exclusion can be exercised in interstate commerce generally that can be exercised in the case of the postal system. "We do not think, (the court says), that Congress possesses the power to prevent the transportation in other ways as merchandise that which it excludes from the mails. To give efficiency to its regulations and to prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter in the sense in which those terms were used when the constitution was adopted—consisting of letters and newspapers and pamphlets when not sent as merchandise—but further than this, its power of prohibition cannot extend."[20]

It is noticeable indeed that the minority opinion lays no stress upon and, with the exception of the Lottery case, nowhere cites the authorities which were relied upon by Senator Beveridge when he urged the parent act upon the Congress, and this perhaps for the reason that they contained dicta merely which were uttered in cases where the total destruction by Congress of interstate commerce in any article or thing was not sought to be justified, but in which the imposition of restrictions by the states was sought to be prevented. In the case of *Stockton v. Baltimore R. R. Co.*,[21] for instance, from which the Senator quoted the following language: "We think the power of Congress is supreme over the whole subject of interstate commerce uninterrupted and unembarrassed by state lines or state laws; that in this matter the country is one and the work to be accomplished is national, and that state interests, state jealousies and state prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no states," the question before the court was not as to the power of Congress to prohibit or destroy commerce, but its right and power to extend and to promote it. It was whether Congress had the power to authorize two railroad companies to construct a bridge across Staten Island Sound and to

[20] Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877.
[21] (1887) 32 Fed. Rep. 9.

establish the same as a post road. In other words, whether Congress could legally provide for commercial intercourse between two states by land as well as by water, by rail as well as by steamboat.

So, too, in the case of *Brown v. Houston*,[22] from which the Senator also quoted, "the power to regulate commerce among the several states is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations," the language was used merely in connection with a discussion concerning the power of a state to levy a tax on interstate commerce and not in connection with a consideration of the power of Congress to destroy it. While in the case of *Crutcher v. Kentucky*,[23] on which perhaps more stress was laid than on any other, unless it was the Lottery Case, the language quoted was used in connection with a discussion of the right of a state to require foreign express companies to pay local license fees and to make a deposit with the state officers.

The writer is willing to concede that a state has the inherent right to self-protection, that it should be allowed to exclude from its borders that which brings pestilence either to the body or to the mind, that it should be allowed, by child-labor or other laws, to protect the morals and the health and to promote the educational welfare of its children, and that to this end it should have the power to call upon Congress for the exercise and Congress should be and is permitted to exercise its powers of interstate commerce control to prevent the introduction of whatever would be injurious to that self-protection, such as intoxicating liquors or the products of child-labor manufactured in a state where child-labor is less rigorously controlled than in its own borders and the competition of which would make it impossible for its manufacturers to continue in business if they obeyed the local laws;[24] but beyond this he believes Congress cannot constitutionally go, at least under its interstate commerce powers.

There would seem indeed to be but little doubt that the theory of the constitution was that of a complete commercial freedom between the several states, and even a practically complete freedom of exportation to foreign countries. It is true that the right to enforce an embargo as a sort of war measure was from

[22] (1885) 114 U. S. 622, 5 S. C. R. 1091, 29 L. Ed. 257.
[23] (1891) 141 U. S. 47, 11 S. C. R. 851, 35 L. Ed. 649.
[24] And in this I respectfully differ from the principal opinion.

an early time conceded to the national government, and was no doubt contemplated by the framers of the constitution, but an embargo is at the most a suspension of commerce rather than a destruction of it—a suspension imposed as a retaliatory war measure, not that commerce may be destroyed but that it may ultimately be the freer. The primary idea was that the power to control commerce was to be used by the federal government to promote and not to destroy, that it was to be used for commercial purposes and not to dictate local policies. Although, in the Federalist and other literature of the day, the right to restrict commerce is spoken of and conceded, it is treated of in the light of a protective tariff or of an embargo and as a weapon of defense in the commercial warfare of the nations. It was to be used as a temporary restriction in order that greater freedom might result and as a weapon by which to prevent the crushing out of our industries by the hostile legislation or other hostile acts of foreign powers. Why, indeed, if the power over the commerce between the several states and with foreign nations was to be all-inclusive and to involve the powers of inhibition and of destruction, did the constitution expressly provide that "no tax or duty shall be laid on articles exported from any state?"[25]

The only theory, indeed, on which legislation of the kind that is before us can be logically sustained as between states where no anti-child-labor legislation exists or where the restrictions are not as drastic as those imposed by Congress is that the United States is of itself a parens patriae and that from the very fact of a United States citizenship and of a nationality there arises the power to protect and watch over the individual citizen wherever he may be found. Drastic and far reaching as this theory would be it is not nearly as dangerous or revolutionary as the theory of the power of destruction by indirect means and without the opportunity for judicial review that has been asserted by the promoters of the bill and by the minority opinion.

It would involve a broad construction of the fourteenth amendment and a holding that this amendment qualified if not amended the ninth and the tenth. It would have to be argued that, although prior to the Civil War and prior to the adoption of the fourteenth amendment there was no specific reference to or recognition of a citizenship of the United States, as distinguished from a citizenship of a particular state, and although

[25] Sec. 9, Art. I, Const.

Congress was given the power to establish a uniform system of naturalization, citizenship of the United States arose from citizenship in the several states and was not superimposed upon it, that amendment and the logic of the Civil War created a nation rather than a confederation of states, and in providing that "Every person born or naturalized in the United States shall be a citizen [first of the United States and then] of the state in which he resides," pushed into the foreground the question of United States citizenship and the power of the federal government in relation thereto. It would then have to be argued, since the whole can be no greater or stronger than the sum of all of its parts and the strength of a nation depends upon the strength and intelligence and morality of its individual citizens and the child is after all but the future citizen and the future soldier whom the federal government may draft into its service in time of war,[26] that government is not only vitally interested in his welfare but may take whatever means are necessary for his protection, and that just as in times of war it may prohibit him from cutting off his fingers and otherwise maiming himself so that he cannot handle a rifle, so in times of peace it may see to it that he does not lose in strength, intelligence and morality.

This is the real theory which underlies the argument of the minority and which lay beneath the arguments in the national Congress when the present act and the so-called Beveridge bill were under discussion. It is true that in both these arguments and in the minority opinion it was virtually repudiated, but the logical necessity of its recognition is none the less apparent. Surely the framers of the constitution never intended that an indirect power of regulation could accomplish that which a direct action could not constitutionally accomplish, and that local self-government could be overthrown by indirection but not by direction.

Congress then, it would seem, if it should act at all in the matter, should act directly. It should take the broad position that the protection of the health and of the lives and of the morals of its citizens is as much a matter of national concern as the protection of the currency and of the flag; that the protection of the health and lives of its citizens while at home is as much within its province as their protection while abroad. It should directly

[26] See opinions in Holden v. Hardy, (1898) 169 U. S. 366, 18 S. C. R. 383, 42 L. Ed. 780.

prohibit the employment of child-labor and establish as far as possible a uniform rule in relation thereto, a rule, however, which should adapt itself to climatic and other conditions. Whether this action would be wise or not, we do not pretend to say, nor do we attempt to say whether we are so far a nation that this can be done. All we do say is that this is the real theory of the child-labor legislation that is now before the country, only that its promoters have chosen the indirect method so that a court review may be impossible. If the legislation was direct, the courts could be resorted to[27] and it could not be said that the measures were adopted under a power which knew no limits but the discretion of Congress.

The direct attack is certainly just as constitutional and defensible as is the indirect. In fact the indirect method can only be justified on the assumption that the direct could be made, and it stretches the constitution just as far as does the direct attack itself. It is dangerous because it is covert, because if we but once establish the precedent and grant to Congress the unlimited right to destroy commerce, not as a punishment for crime or because the thing transported is injurious, but because it enters into competition with other articles or its method of manufacture is not approved by a temporary majority in Congress, we place in the hands of that majority a power which may prove absolutely subversive of individual liberty and of the freedom of commerce, which the constitution was above all other things created to preserve.

Equally vicious and we believe equally historically and legally indefensible is the threatened attempt by Senator Lenroot of Wisconsin to overcome by an excise tax the difficulties presented by the majority decision and opinion in the case which is before us, and thus to deprive the persons interested of an appeal to the courts and a reliance on the fifth amendment to the constitution, and thus to test the reasonableness and necessity of the legislation.

The claim, we believe, is made by the Senator[28] that not only is the taxing power of the federal government arbitrary and practically unlimited in its objects and its scope, but that the clause "and provide for the common defense and general welfare of the United States" in first paragraph of Section 8 of Article I of the

[27] And the 5th Amendment be relied upon.
[28] We rely upon the press reports alone.

constitution gives to Congress the power to tax anything out of existence and by this indirect means absolutely to dictate the domestic policies of the several states. He takes, in short, the absurd position that though at the time of the adoption of the federal constitution the several states were extremely jealous of each other and fearful of the new government which they were about to create, so much so that some of them refused to ratify the constitution at all until a promise had been made that the first ten amendments should be incorporated therein, and though in these amendments they reserved to themselves the right of local home rule, and expressly stated that the powers not granted should be reserved to them, and in the constitution itself expressly provided that Congress should not have the power to levy any tax upon exports and thus interfere with the marketing of their domestic products, they nonetheless so construed the paragraph in question as to confer upon a temporary majority in the national Congress by means of the taxing power alone the right to destroy all of these safeguards and all of these liberties. The proposition appears to the writer of this article to require merely to be stated in order to be refuted.

It is clear to him that the purpose of conferring the taxing power upon the federal government was that it might be able to raise money to be used for the purposes of the public defense and the promotion of the public welfare, and not that it could use the power as a club in order to force its will upon the states regardless of whether it raised any money or not. The money, in short, and not the taxing power, was to be used to pay the debts and provide for the common defense and general welfare. The taxing power was merely to be an incident and a means for paying for and carrying out the projects and purposes which the federal congress had provided for by direct legislation and on which the constitution authorized it to legislate. It is true that in many cases the courts have said that the power to tax involves the power to destroy, but this has been said as a warning against an unwise and indiscriminate use of the power rather than a sanction for its use as an agency of destruction. It is true that the Congress and the legislatures may tax again and again, and may, if the exigencies of the government require it, tax the public so heavily that many may be unable to pay, but this power is con-

ceded merely that the government may live and that it may have money.[29]

It may be that under the holding of the United States Supreme Court in the case of *Veazie Bank v. Fenno,* the courts cannot inquire into the motives of Congress in these matters nor seek to discover whether the purpose of the tax was to destroy rather than to raise revenue,[30] but honorable men should hardly legislate upon this theory. It is well indeed to remember that the same oath to support the constitution which is required of the judges of our courts is required of our senators and representatives also, and that if one votes for a measure knowing that it is unconstitutional and relying on the fact that the presumption of legislative good faith is so great that no court will inquire into his purposes and his motives, he violates his oath of office to the same extent as does the judge who knowing that an act is unconstitutional affirms and enforces it.

Have we not already carried the practice of destruction by indirection too far? Would it not be much more honest and much more in accordance with the principles of orderly government to legislate directly against the evils we condemn, and thus allow an appeal to the courts and a determination of reasonableness

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[29] "Chief Justice Marshall says in McCullough v. Maryland, that 'the power to tax involves the power to destroy.' And again, 'If the right to tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent within the jurisdiction of the state or corporation which imposes it, which the will of such state or corporation may prescribe.' Weston v. Charleston, 2 Pet., 499. The learned Chief Justice in these cases was arguing against the existence of the power; and the idea he expresses so forcibly is that the power to tax is so vast, and rests upon reasons which at times are so imperative that it may be exercised again and again, as the exigencies of the state may demand, until the property taxed is exhausted or the privilege taxed can no longer be exercised. This statement has abundant illustrations in history, of people absolutely impoverished by taxation, and even, in individual cases, sold into slavery because they could not meet the demands of the state upon them. It may justly be questioned, whether this strong statement, which was put forth as a defense against an injurious tax, will fairly justify an affirmative exercise of power that has not revenue in view, but is only called a tax in order that it may be employed as an instrument of destruction. In other words, whether the unavoidable incident to the exercise of a power to demand and collect revenue, can lawfully be the inducement to the exercise of the power when revenue is not contemplated or sought." Cooley, Taxation, p. 10, note 2.

[30] Cooley, Principles of Constitutional Law 58.

and necessity and power under the fifth amendment, rather than to destroy at will under the theory that none can call us to account? We have been fighting for a government by law in Europe. Let us take care that we preserve that government at home and that our constitution be not turned into a mere scrap of paper.

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CIVIL AUTHORITY VERSUS MILITARY

THE constitution of each state in the Union, except New York, provides for the subordination of the military to the civil power.[1] Two state constitutions provide that the military shall be subordinate to and governed by the civil power.[2] Five commonwealths have constitutions providing that the military ought to be under strict subordination to and control of the civil power.[3] The exact significance of these constitutional provisions is a subject of controversy.

An excellent example of the issues involved is found in the case of *State v. Brown*.[4] The constitution of West Virginia states that "no citizen, unless engaged in the military service of the state, shall be tried or punished by any military court, for any offence cognizable by the civil courts of the state."[5] Nevertheless this provision of the constitution did not prevent the declaration of martial law by the executive and legislative departments of the state government. This action virtually suspended the constitution. A governor became dictator. He decided the duration and extent of his authority. The military became the instrument to enforce his will. The danger is self-evident. Citizens were placed at the mercy of the military authorities during the period of an emergency, the existence of which was not the subject of judicial determination.

The United States war department has published the syllabi of the opinion in the West Virginia case "for the information of the service in general," as follows:[6]

"The governor of this state has power to declare a state of war in any town, city, district, or county of the state, in the event of an invasion thereof by a hostile military force or an insurrec-

[1] Columbia Digest; Index Digest of State Constitutions, p. 980; Stimson, Federal and State Constitutions Sec. 292.

[2] Massachusetts, Pt. I, 17; South Carolina, I, 26.

[3] Maryland, Decl. R., 30; New Hampshire, I, 26; North Carolina, I, 24; Vermont, I, 16; Virginia, I, 13.

[4] State ex rel. Mays v. Brown, (1912) 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N.S.) 996.

[5] West Virginia, III, 12.

[6] Dig. of Ops. of Judge Adv. Gen., etc., July 1, 1912, to April 1, 1917, pp. 208, 209.

tion, rebellion, or riot therein, and in such case, to place such town, city, district or county under martial law.

"The constitutional guaranties of the subordination of the military to the civil power, . . . are to be read and interpreted so as to harmonize with other provisions of the Constitution, authorizing the maintenance of a military organization," [and the presumption against] "intent on the part of the people, in the formulation and adoption of the constitution, to abolish a generally recognized incident of sovereignty, the power of self preservation. . . ."

This view, that martial law is "a generally recognized incident of sovereignty," is of great interest when compared with the express provisions of several of the state constitutions forbidding or limiting the scope of martial law. Thus the Tennessee constitution provides that:

"Martial law, in the sense of the unrestricted power of military officers . . . is inconsistent with the principles of free government, and is not confided to any department of the government of this state."

It is true that the Tennessee constitution also states that no citizen is subject to martial law except those in "the army of the United States, or militia in actual service."[7]

The constitutions of Massachusetts and New Hampshire provide that the government may use and exercise "martial law in time of war or invasion, and also in time of rebellion, declared by the Legislature to exist."[8]

Three states expressly recognize the extension of martial law to civilians, by legislative approval of the executive declaration; but only members of the naval force and militia in active service are punishable under martial law except by the consent of the legislature.[9] Most of the state constitutions make no reference to martial law. Rhode Island appears to recognize the true situation with the statement: "The law martial shall be used and exercised in such cases only as occasion shall necessarily require."[10]

What is the significance of the few constitutional references to martial law? Was it confused by the framers of the state constitutions with military law? Or was it tacitly recognized that a

[7] Tennessee, I, 25. See also, Vermont, I, 17; Maryland, Decl. R., 32.
[8] Massachusetts, Pt. II Chap. 11 Sec. 1, 7; New Hampshire, II, 50.
[9] Massachusetts, Pt. I, 28; New Hampshire, I, 34; South Carolina, I, 27.
[10] Rhode Island Const., Art. I, 18.

sovereign state has the right of self defense? Certainly the distinction between martial and military law is of great importance and fundamental in the consideration of this constitutional question.

Martial law as a domestic fact presupposes a condition in which the civil courts are unable to enforce their processes and is justified by the necessity of society protecting itself during an emergency period until the civil courts may again resume their proper functions. It is "the suspension of all law but the will of the military commanders entrusted with its execution, to be exercised according to their judgment, the exigencies of the moment, and the usages of the service, with no fixed or settled rules or laws, no definite practice, and not bound even by the rules of the military law."[11] "When martial law prevails the civil power is superseded by the military power, and the ordinary safeguards to individual rights are for the time being set aside, but it is incumbent on those who administer it to act in accordance with the principles of justice, honor, and humanity and the laws and usages of war."[12]

Military law must be carefully distinguished from martial law, which applies to civilian persons not ordinarily subject to military authority. Martial law may exist under a military government, established in hostile or occupied territory.[13] It may also exist as a domestic fact within the boundaries of the United States. Military law ordinarily applies to military persons only (with exceptions as to retainers to the camp, spies, etc.), and is applicable in time of peace as well as in time of war. Martial law is temporary in character. It exists only to combat an emergency condition. It applies to all persons and things within the area under control, and during such emergency period the will of the commander is supreme, except in so far as international law may restrain his conduct in hostile or occupied territory. It was used in the Revolutionary War by Washington at Valley Forge. It was declared by General Jackson at New Orleans. Martial law existed in Rhode Island in 1842.[14] During the Civil War the President, under legislative authority, repeatedly de-

[11] Pomeroy, Constitutional Law Sec. 712.
[12] Dig. of Ops. of Judge Adv. Gen., 1912, p. 1079.
[13] Moore, International Law Dig., VII, Sec. 1147.
[14] Luther v. Borden, (1848) 7 How. (U. S.) 1, 12 L. Ed. 581.

clared martial law to exist in enemy territory.[15] During the past five years martial law has been actually declared in six states of the Union.[16] A condition of quasi-martial law has also been declared in other instances; as in Minnesota, October, 1918, when the militia was called out to maintain order and do relief work necessitated by a great forest fire.

When courts have been destroyed or made incompetent to act, does the military in its own right take the place of the authority that has disappeared and for the period of the emergency supersede the civil authority? There can be no doubt concerning the possibility of martial law in the United States. The four dissenting judges in *Ex parte Milligan* held that "it is within the power of congress to determine in what state or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses" against public safety. This means that it is possible to place civilians on trial before military tribunals although they are not members of the "land or naval forces" and have not been held to answer "on a presentment or indictment of a grand jury."[17] Even the Kentucky court, which has limited the authority of the military most closely in the United States, says: "We have not in mind a state of case in which actual war . . exists . . ."[18]

Yet Willoughby writes: "There is then strictly speaking no such thing in American law as a declaration of martial law whereby the military is substituted for civil law."[19] Nevertheless a number of states have legislated to protect the soldier from both civil and criminal liability for his acts when in active military

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[15] Ford v. Surget, (1878) 97 U. S. 594, 24 L. Ed. 1018.

[16] Colorado, Georgia, Montana, Ohio, Texas, West Virginia.

[17] Const., Fifth Amendment. Is the provision in the fifth amendment surplusage in so far as it excepts "cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger"? All court-martial proceedings, of course, deny the accused a jury trial as provided for in the sixth amendment. It would appear more logical to consider court-martial proceedings as a part of the military powers of the executive department, non-judicial in character, and hence the accused has no constitutional right to the protections guaranteed in the case of judicial criminal proceedings. If this is true, why make the exception referred to in the fifth amendment?

[18] Franks v. Smith, (1911) 142 Ky. 232, 134 S. W. 484, L. R. A. 1915A 1141, 1163.

[19] Willoughby, Const. Law, II, Sec. 727.

service pursuant to duty.[20] These statutes apply to a case arising either under martial law or military law. A typical statute is the existing Minnesota law:

"The commanding officer of any militia force engaged in the suppression of an insurrection, the dispersion of a mob, or the enforcement of the laws shall exercise his discretion as to the propriety of firing upon or otherwise attacking any mob or other unlawful assembly; and, if he exercise his honest judgment thereon, he shall not be liable in either a civil or a criminal action for any act done while on such duty. But no officer, under any pretense or in compliance with any order, shall direct or permit his men, or any of them, to fire blank cartridges upon any mob or unlawful assemblage, under penalty of dishonorable dismissal from the service. No officer or enlisted man shall be held liable, in either a civil or a criminal action, for any act done under lawful orders and in the performance of his duty."[21]

But it may be seriously questioned whether such a statute does not attempt to deprive a citizen of his property without due process of law so far as the tort action for damages is concerned.[22] Under a statute similar to the Minnesota section quoted it would be impossible successfully to prosecute a military officer or soldier in a civil court for an alleged crime committed in the honest and faithful performance of duty. It is thus evident that the military is not at all times subordinate to the civil authority. Although the tort action may be successfully maintained, as held in the Louisiana case cited, at least so far as superior officers are concerned, yet the possibility of a civil action could hardly restrain financially irresponsible members of a military organization who are practically immune from punishment so long as military orders are obeyed.

The possible relation between the military authority and the civil courts is well illustrated in the letter of Chief Justice Chase to President Johnson, October 12, 1865.[23] The Southern states were under martial law in a part of the Chief Justice's circuit and for that reason he wrote to the executive objecting to the holding of the circuit court: "A civil court in a district under martial

[20] Consol. Laws N. Y., p. 2339, military code, Sec. 14. Revised Laws of Hawaii, 1915, Sec. 208: "Members of the militia ordered into active service of the Territory by any proper authority shall not be liable, civilly or criminally, for any act or acts done by them in pursuance of duty in such service."

[21] G. S. 1913, Sec. 2379.

[22] O'Shee v. Stafford, (1908) 122 La. 444, 47 So. 764, 16 Ann. Cas. 1163.

[23] In re Davis, (1867-71) Fed. Case No. 3621a, 7 Fed. Cases 63, 66.

law can only act by the sanction and under the suspension of the military power, but I cannot think it becomes justices of the Supreme Court to exercise jurisdiction under such conditions." Justice Wayne, whose circuit was also partly within the Southern states then in rebellion, also concurred in the views expressed by the Chief Justice.

There are three general conditions under which the relation between the civil and military authority may be discussed: (A) military government, (B) martial law, (C) military law.

(A) When a military government replaces the existing sovereign power in invaded or occupied territory the military is supreme and remains in control until withdrawn by the President or superseded by civil authorities established by legislative action.[24] The power of the military government is complete during the period of the war, limited only by international law. When peace returns and the occupied territory is not returned to the former sovereign the military government becomes merely the agent of the new sovereign civil authority about to be established.[25] During the war, however, the courts are merely the agents of the military government and in the opinion of the Supreme Court they are subject to the military power, and their decisions are under its control, whenever the commanding officer thinks proper to interfere.[26] Upon the restoration of peace the military government is subject to congressional control and the relation between the military and civil courts is subject to legislative enactment.

(B) Martial law becomes a necessity when civil authorities prove unable to control domestic or foreign occupied territory within a given locality. The sovereign power is not questioned. Civil authority has, however, disappeared within the area in question. Constituted authority is not overthrown by the declaration of martial law. An existing fact is merely given executive or legislative recognition. A great calamity such as an earthquake, flood, or fire may close the civil courts as effectively as an insur-

[24] Magoon, Reports on the Law of Civil Government in a Territory Subject to Military Occupation, p. 17.

[25] See also, in Santiago v. Nogueras, (1909) 214 U. S. 260, 265, 53 L. Ed. 989, 29 S. C. R. 608: "The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander-in-Chief."

[26] Jecker v. Montgomery, (1851) 13 How. (U.S.) 498, 515, 14 L. Ed. 240.

rection or a riot. All the constitutional and other rights of citizens become for the time being unenforceable. A necessity therefore exists for prompt and efficient action to restore civil authority and constitutional rights. Experience has demonstrated the necessity and wisdom of the use of martial law in such emergencies. Furthermore, the civil branch of the government displaced by disaster, or demonstrated to be incapable of controlling a mob, should not seek to embarrass the military authority which is endeavoring to restore order and the rights of citizens who have looked in vain to the courts for relief.[27]

The United States constitution clearly recognizes the possibility of a state becoming involved in war.[28] If actually invaded by a foreign power, the state has the right to engage in war and this as a consequence may result in the declaration of martial law.[29] "Unquestionably, a state may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government . . . and if the state required the use of military force and the declaration of martial law, we see no ground upon which this court can question its authority."[30]

It is sometimes said that the provision of the United States constitution that states may engage in war when "in such imminent danger as will not admit of delay" refers to danger from a foreign force or from Indians. That was undoubtedly the correct interpretation of Article VI, Section 5 of the Articles of Confederation. But the wording of the United States constitution amply justifies the construction placed upon it by the court in *Luther v. Borden:* "It was a state of war and the established government resorted to the rights and usages of war." A group of insurrectionists in a border state might invite foreign assistance and organize to co-operate with such foreign power. The real danger might well be from within and not admit of delay. Surely in such a case a state is authorized to act, even if the strug-

[27] Wallace, 8 Journal of Crim. Law and Cr., pp. 167, 406.

[28] Art. I Sec. 10, Cl. 2.

[29] But see the dissenting opinion of Justice Woodbury in Luther v. Borden, supra; and also Willoughby, Const. Law, II, p. 1239: "Indeed, it may be said that a state of the Union has not the constitutional power to create, by statute or otherwise, a state of war, or by legislative act or executive proclamation to suspend, even for the time being, all civil jurisdiction."

[30] Luther v. Borden, supra, majority opinion, by Taney, C. J.

gle develops into actual warfare. Would a state like West Virginia, threatened by insurrection and sedition, be powerless to act and dependent upon federal aid only? Such a doctrine would deprive the states of the right of self-defense.[31] A state may declare martial law in time of insurrection or invasion and such a crisis may result in war as truly as the Civil War thus developed within the nation.

Martial law recognizes an emergency during which the military is superior to the civil authority. "If the inhabitants of the state, or a great body of them, should combine to obstruct interstate commerce, or the transportation of the mails, prosecution for such offences had in such a community would be doomed in advance to failure."[32] Thus the governor of Idaho, facing a condition of civil incompetency in Shoshone County which had extended over a period of several years, very properly restored civil authority by temporarily establishing martial law.[33] Likewise when the governor of Colorado acted in the crisis which had arisen in that state as an outgrowth of strikes and disorders he substituted the military for the powerless civil authority. The Supreme Court of the United States recognized and approved this action and declared that "public danger warrants the substitution of executive process for judicial process."[34]

The case of *Hatfield v. Graham*[35] illustrates the possibilities of martial law. It was alleged that war and insurrection existed in Fayette, Kanawha, and Boone counties, that many lives were lost, much property destroyed, and that the state spent five hundred thousand dollars in suppressing it. Under these circumstances the governor alone was the judge of the necessity of declaring martial law, and the fact that the courts were in session did not prevent the establishment of martial law within the same area.

In his strong dissenting opinion Judge Robinson stated that the majority opinion denied to the plaintiff the constitutional right to a judicial determination of the justifiableness or maliciousness of the acts of the military. He also held that it was a judicial question as to whether the governor had acted within

[31] Wallace, 8 Jour. of Crim. Law and Cr. 406.
[32] In re Debs, (1895) 158 U. S. 564, 39 L. Ed. 1092, 15 S. C. R. 900.
[33] In re Boyle, (1899) 6 Idaho 609, 57 Pac. 706.
[34] Moyer v. Peabody, (1908) 212 U. S. 78, 53 L. Ed. 410, 29 S. C. R. 235.
[35] (1914) 73 W. Va. 759, 81 S. E. 533, Ann. Cas. 1917C 1.

his political jurisdiction; that the decision of the majority "permits a governor to deal with private rights as he pleases. He need only answer that he does so officially. . . . Such a view is wholly un-American, and inconsistent with constitutional government; reason and authority condemn it; and the administration of even-handed justice cries out against it."[36]

Yet there seems to be no escape from the conclusion that martial law becomes a necessity in time of emergency. But the liability of the military officer or the subordinate after the emergency has passed remains to be considered. Inasmuch as the standing of the military person before a civil court, in such case, is the same whether the act in question was committed under military law or martial law, this subject is treated under military law in relation to civil courts.

(C) The relation between civil courts and the military on questions of military law may well be considered under the following divisions: (a) The military person who seeks relief in the civil courts from the action of a military tribunal; (b) the military person who pleads as his defense before a civil court his military status or a military order; (c) the military person who is charged with having violated the civil law and is demanded by the civil authorities.

(a) Courts-martial are not a part of the judiciary of the United States. They are created by orders. To convene such courts and to act upon their proceedings is an attribute of command. The legal sentence of a court-martial when duly executed, as by discharge from the army, cannot be "reached by pardon, nor revoked, recalled, or modified, either by Congress or by the Executive."[37] If jurisdiction of the subject matter and person by the military tribunal exist, no court of any state or of the

[36] See the address of W. G. Mathews, president of the West Virginia Bar Association (Proceedings, 1913, p. 16). He not only condemned the majority opinion of the supreme court in State v. Brown and the doctrine sustained by the court in Hatfield v. Graham, but the action of the governor in preventing a decision by the Supreme Court of the United States on the issues involved. "By the subsequent pardon of those convicted by the military commission and denied relief by our supreme court their cases cannot be reviewed by the Federal Supreme Court." The discussion of the above address by the Bar Association appears on pages 58 to 85. The address being referred to a committee, their report adverse to any action appears in the proceedings for the following year, 1914, pp. 110, 111. It is thus evident that Judge Robinson's dissenting opinion was approved by many members of the Association.

[37] Dig. of Ops. of the Judge Adv. Gen., 1912, p. 577.

United States can revise, set aside, or review the judgment of the military court. "It is not the office of the writ of habeas corpus to perform the functions of a writ of error in reviewing the judgment of a court-martial . . . There must be jurisdiction to hear and determine, and to render the particular judgment and sentence imposed; but, if this exists, however erroneous the proceedings may be, they cannot be reviewed collaterally, or redressed by habeas corpus. These principles have been repeatedly declared by the authorities."[38] The decision, therefore, of a military tribunal acting "within the scope of its lawful powers . . . cannot be reviewed or set aside by the civil courts."[39]

The authority to establish courts-martial and the powers of such courts are derived from the military powers of Congress and the Executive Department. "The power is given without any connection between it and the third article of the constitution defining the judicial power of the United States; indeed, the two powers are entirely independent of each other . . . If it were otherwise, the civil courts would virtually administer the Rules and Articles of War, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts."[40] This statement is, of course, based upon the assumption that jurisdiction of both subject matter and person was obtained by the court-martial.

The recent case of *Higgins v. Stotesbury*[41] is in conflict with this general doctrine of the independence of military tribunals from judicial review. The court said: "The first charge, on which the accused was found guilty, is that having received a lawful command from his superior officer . . . to assist in the preparation of the muster rolls, did wilfully neglect to comply with such order." The court discovered no evidence whatever of either refusal or neglect, and therefore considered itself

[38] Rose v. Roberts, (1900) 99 Fed. 948, citing Ex parte Yarborough, (1884) 110 U. S. 651, 28 L. Ed. 274, 4 S. C. R. 152; United States v. Pridgeon, (1894) 153 U. S. 48, 59, 38 L. Ed. 631, 14 S. C. R. 746.

[39] Johnson v. Sayre, (1895) 158 U. S. 109, 39 L. Ed. 914, 15 S. C. R. 773; Reaves v. Ainsworth, (1911) 219 U. S. 296, 304, 31 S. C. R. 230. See also, Winthrop, Military Law 55-57; Clode, Military Law 58; Greenleaf, Evidence 470.

[40] Dynes v. Hoover, (1857) 20 How. (U.S.) 65, 79-82, 15 L. Ed. 838.

[41] (1918) 169 N. Y. Supp. 998.

competent to review and to revise the findings of the court-martial.

In *Smith v. Hoffman*,[42] the only authority cited in *Higgins v. Stotesbury*, the court held that a military board of examination is a judicial body whose determination may be reviewed by a common law writ of certiorari. The court stated that there is a conflict in the American state authorities on this point.[43] But the only case cited, other than the New York decisions, to sustain the position of the court was a Tennessee case, where the court, without any authorities to support it, starts with the assertion, "All inferior courts are erected by statute . . . and subject to the superintendence of our circuit courts."[44] The court then made the assumption that courts-martial are inferior to judicial courts and reached the natural conclusion that there was a right of appeal to the civil courts. The fallacy of the above assumption is evident when the fact is considered that courts-martial are the creatures of orders; the power to convene them, as well as the power to act upon the proceedings, being an attribute of command.[45] They are merely instrumentalities of the executive power. Though acting judicially, they are not in any sense judicial bodies.

The New York cases are consistent and sound if one first accepts the reasoning in *Garling v. Van Allen*.[46] The right to counsel in court-martial proceedings was upheld in this case on the theory that a military tribunal was a court within the meaning of the New York constitution. The chief justice commented upon the "former" extensive powers of courts-martial resulting in arbitrary decisions condemned by Blackstone: "How much is it to be regretted that a set of men whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of free men!"[47] It

[42] (1901) 166 N. Y. 462, 476, 60 N. E. 187, 54 L. R. A. 597.
[43] Encyc. of Pl. & Pr., IV, 40.
[44] Durham v. United States, (1817) 4 Hay. (Tenn.) 54, 69.
[45] Davis, Military Law, 1915 ed., p. 15.
[46] (1873) 55 N. Y. 31.
[47] 1 Blackstone 416. The New York court in Smith v. Hoffman, 166 N. Y. 462, 473-74, supra, recognizing the military and civil authorities contrary to their decision, observed: "The subject, however, is treated with reference to a standing army rather than the militia of the various states. . . A member of the state militia belongs to civil life, has a civil avocation, and only occasionally engages in the exercise of arms. A member of the United States army, on the other hand, has no employment except that of a soldier, and arms constitute the business of his life. Hence, more rigid rules and a higher state of discipline are required in one case than in the other."

was the judgment of the court that the powers of courts-martial had been restricted and limited. How or when they did not indicate.[48] The New York court had previously denied the constitutional right to a jury trial in court-martial proceedings.[49]

The New York courts have simply followed in the more recent cases the doctrine as laid down in *Garling v. Van Allen*. If that case could be supported as properly stating the doctrine of common law, which it did not,[50] then of course *Higgins v. Stotesbury* would be sound law.

Inasmuch as courts-martial merely make findings which have no effect until approved by the proper superior in command, and dissolve upon making findings, it is an interesting question as to whose duty it would be to make a return on certiorari proceedings.[51]

Any decision which purports to uphold the authority of the civil court to review or revise the findings of the military tribunal ignores the fact that courts-martial are courts of honor. The 95th Article of War reads: "Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service," and the 96th Article of War provides: "All disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service" shall be punished at the discretion of the military tribunal. Thus it is evident that standards of conduct unknown to the common law courts are established in the army. Usages and customs peculiar to army life are a part of the system. If the civil court attempted to review the findings of military tribunals it would be incompetent to act, for the simple reason that it would be compelled to apply a standard of conduct with which it is unfamiliar and which is inconsistent with the principles and doctrines of the common law. "In military life there is a higher code termed honor which holds its society to stricter accountability, and it is not desirable that the standard of the army should come down to the requirements of the criminal code."[52]

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[48] Smith v. Hoffman, supra.
[49] People v. Daniell, (1872) 50 N. Y. 274.
[50] Dynes v. Hoover, supra.
[51] Winthrop, Military Law 55.
[52] Fletcher v. United States, (1891) 26 Ct. of Cl. 563.

(b) We have considered the military person who seeks relief in the civil court from the military tribunal. Let us now consider the military person who pleads as his defense before a civil court his military status or the order of a superior officer.

The soldier establishes a new status by his enlistment. But he cannot and does not discard the obligations, rights, and duties of citizenship. "The soldier is still a citizen, and as such is always amenable to the civil authority."[53] In the absence of statutory provisions he is, in general, subject to the same liability for his torts, crimes, and contracts as other citizens.[54] This is true although the action in a civil court be brought by a soldier against his superior officer. A marine sued his commanding officer for an alleged illegal flogging inflicted for disciplinary purposes while on shipboard in a foreign port. The officer acted within the scope of his authority, but was declared to be liable if the punishment which was inflicted was in the opinion of the jury "in any manner or any degree increased or aggravated by malice or a vindictive feeling." The Supreme Court fully realized the necessity for maintaining the security and efficiency of the Navy, but "at the same time it must be borne in mind that the nation would be equally dishonored if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice."[55] It is thus evident that the status of a soldier does not prevent his seeking relief in the civil courts even against those who are his superiors in command and for acts which they have done in the execution of their office.

The more common case arises when the soldier pleads his military orders as justification in the defense of a civil or criminal action. Let us first consider the action in tort. In the case of *Bates v. Clark*[56] the captain and lieutenant in command at Fort

[53] State v. Sparks, (1864) 27 Tex. 627, 632.

[54] But see Minn. G. S. 1913, Sec. 2379, and similar statutes existing in many of the states.

[55] Dinsman v. Wilkes, (1851) 12 How. (U.S.) 390, 402, 405, 13 L. Ed. 1036.

[56] (1877) 95 U. S. 204, 24 L. Ed. 471. See also, Clark v. Cumins, (1868) 47 Ill. 372. But see dictum. Herlihy v. Donohue, (1916) 52 Mont. 601, 611, 161 Pac. 164, Ann. Cas. 1917C 29. ". . . the inferior military officer may defend his acts against civil liability by reference to the order of his superior, unless such order bears upon its face the marks of its own invalidity or want of authority."

Seward, acting under the orders of the commanding general of the Department of Dakota, seized and destroyed liquor which they had good reason to believe, and which they in good faith did believe, was in Indian territory, but which under the interpretation of the Supreme Court was not within Indian territory. Both officers were held liable for damages as trespassers. Said the Court: "Whatever may be the rule in time of war, and in the presence of actual hostilities, military officers can no more protect themselves than civilians for wrongs committed in time of peace under orders emanating from a source which is itself without authority."

It is clearly established that the order of the superior which is illegal in fact cannot be successfully pleaded as a defense in an action for damages. If an officer executes an illegal sentence of court-martial, he is liable for damages.[57] Chief Justice Marshall in *Wise v. Withers*[58] observed: "It is a principle that a decision of such a tribunal in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers."

In time of actual warfare, when necessity requires such action, the military commander may seize or destroy private property and he incurs no personal liability. The burden of proving the state of actual necessity, however, rests upon the military person when sued for such an act. Confederate soldiers incurred no liability for destroying property in line with their military duty.[59] But where Confederate officers, acting under orders, took two mules and a wagon for the transportation service of the army they were held liable for damages because "no pressing necessity, in which they were compelled to act promptly, having no time to acquire the property according to law," was shown to exist.[60]

[57] But not for punitive damages, if he acts in good faith. Johnson v. Jones, (1867) 44 Ill. 142.

[58] (1806) 3 Cranch (U. S.) 331, 2 L. Ed. 457; Milligan v. Hovey, (1871) 3 Biss. (U.S.C.C.) 13; Barrett v. Crane, (1844) 16 Vt. 246; Mills v. Martin, (1821) 19 John. (N.Y.) 7; Duffield v. Smith, (1818) 3 Serg. & R. (Pa.) 590. But see Shoemaker v. Nesbit, (1828) 2 Rawle (Pa.) 201; and Savacool v. Boughton, (1830) 5 Wend. (N.Y.) 170, 180. The soundness of Wise v. Withers was questioned and it was held that if the court has jurisdiction of the subject matter, but not the person of the accused, and its proceedings were in regular course of law, a ministerial officer who executes the sentence will be protected.

[59] Freeland v. Williams, (1889) 131 U. S. 405, 33 L. Ed. 193, 9 S. C. R. 763.

[60] Bryan v. Walker, (1870) 64 N. C. 141; Mitchell v. Harmony, (1851) 13 How. (U:S.) 115, 14 L. Ed. 75.

There has been considerable conflict in the decisions of American courts upon the criminal liability of a soldier who acts in good faith in obedience to the orders of a superior officer, which are apparently valid. It has been held that "the order of a superior will be full protection in a criminal prosecution unless the illegality of the order is so clearly shown on its face that a man of ordinary sense and understanding would know it was illegal."[61] Clark and Marshall state the rule as follows: "An order given by an officer to his private, which does not expressly and clearly show on its face its own illegality, the soldier is bound to obey and such order is his full protection."[62] On the other hand, Bishop takes the extreme position that "the command of a superior to an inferior—as, of a military officer to a subordinate, or of a parent to a child—will not justify a criminal act done in pursuance of it; . . . the person doing the wrongful thing is guilty, the same as though he had proceeded self-moved."[63] Hence the position of a soldier may be, both in theory and practice, a difficult one. He may, as it has well been said, be liable to be shot by a court-martial if he disobeys an order, and be hanged by a judge and jury if he obeys it.[64]

What, then, is the legal duty of the soldier? Dicey says: "The matter is one which has never been absolutely decided."[65] A soldier cannot, in all cases, be held to blind obedience to superior orders. Such a doctrine would destroy the very discipline of the army which it seeks to protect. "It would justify the private in shooting his colonel by the orders of the captain, or in deserting to the enemy on the field of battle by order of his immediate superior."[66] Unless the soldier is bound to disobey or justified in disobeying any order, it would appear that the correct rule is that the soldier must obey, "except in a plain case of excess of authority, where, at first blush, it is apparent and palpable to the

[61] Re Fair, (1900) 100 Fed. 149. See also United States v. Clark, (1887) 31 Fed. 710, 717: "Unless the act was manifestly beyond the scope of his authority, or . . . was such that a man of ordinary sense and understanding would know that it was illegal, it would be a protection to him if he acted in good faith and without malice."

[62] Law of Crimes, 2nd ed., Sec. 83.

[63] New Criminal Law, 8th ed., Vol. I Sec. 355. And see Rex v. Thomas, (1815) 4 Maule & Selwyn 442.

[64] Dicey, Law of the Constitution, 4th ed., p. 282.

[65] Dicey, Law of the Constitution 283.

[66] Stephen, History of Criminal Law of England, I, p. 205.

commonest understanding that the order is illegal."[67] This rule is objected to as too indefinite. Military orders are frequently communicated orally. They are very difficult to prove in their exact form. It may be almost impossible to prove that the subordinate received the order in the exact form which is necessary for his defense.[68]

The illegal orders of a superior officer can never justify the destruction of property or injury to the person in a civil action for damages.[69] But an illegal order of a superior "may excuse subordinates who are honestly and reasonably misled thereby," in a criminal action.[70]

(c) An enlisted man, or officer, may be punished by civil authority for violating any law of the land, including a municipal ordinance. It is the duty of the military to deliver over such accused soldier to the civil authority "upon application duly made," except in time of war, or when the person demanded is under court-martial charges "awaiting trial or results of trial, or who is undergoing sentence."[71] When the military jurisdiction has actually attached in the manner stated, the commanding officer may in his discretion deliver the accused soldier to the civil authority. It is, of course, his duty to deliver the accused soldier to the civil authority if court-martial proceedings have not yet begun. The utmost endeavor of the commanding officer to apprehend and secure the accused is required under the Articles of War. Even in time of actual warfare the commanding officer in the absence of special orders may deliver the accused to the civil authority. If the person desired is already undergoing sentence of court-martial, he may be delivered for trial and if convicted the civil sentence merely interrupts the execution of the military sentence, which must be completed when he is returned to the military jurisdiction.

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[67] "Unless the order is plainly illegal, the disobedience of it is punishable under the general article, i. e., the 96th Article. To justify from a military point of view a military inferior in disobeying an order of a superior, the order must be one requiring something to be done which is palpably a breach of law and a crime or an injury to a third person, or is of a serious character (not involving unimportant consequences only) and if done would not be susceptible of being righted." Manual for Courts-Martial, United States Army, 1917, p. 210.

[68] Brown, 8 Jour. of Crim. Law and Cr. 190, 205.

[69] 5 Corpus Juris 366.

[70] Ballentine, Proposed Military Code, 14 Mich. Law Rev. 213

[71] 74th Article of War.

This entire question has been modified by the new section in the Articles of War (117):

"When any civil suit or criminal prosecution is commenced in any court of a state against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status . . . such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States."

This act does not affect those cases in which no claim of defense is made on account of the military status of the accused. It does, however, provide a means of preventing the state courts from deciding whether the accused was acting properly in the execution of his office.

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WALDRON M. JEROME, professorial lecturer in the law school of the University of Minnesota, died at his home in Minneapolis on Sunday the 22nd of December, 1918. Pneumonia developed from influenza and caused death so suddenly as greatly to surprise and shock a very large circle of friends who were scarcely aware of his illness. He was a graduate of the University of Minnesota and of Harvard Law School. Besides being actively engaged in practice, as a member of the law firm of Ueland and Jerome, and apparently destined to a career of marked distinction in the profession, Mr. Jerome had for six years preceding his death taught the law of Evidence in this law school most acceptably. He had an unusually sound legal judgment, a habit of judicial fairness, a noble conception of duty as a lawyer, and in his private character an elevation of spirit, a charity, tolerance, and generosity which impressed his personality deeply upon all who came within the circle of his influence.

NOTES

PROXIMATE CAUSE IN RELATION TO THE WORKMEN'S COMPENSATION ACTS.—The comparatively recent legislation defining in statutory terms the employer's liability to his employee has given rise to many interesting and varied decisions as to the nature and scope of that liability. The purpose and general effect of the acts are fairly well recognized, it being conceded that the liability arises out of the contract relation of employer and employee and that the compensation is awarded not so much for the wrong done as for the injury sustained in the course of that relation. The law, in other words, now looks upon the workman as a machine of the employer, which, if broken, industry must replace by adequate compensation the same as it must needs do as to its other mechanical devices.

Thus, negligence as the gist of the recovery has been abandoned,[1] the intent of the legislature, in this instance, being to simplify the means of recovery for injuries sustained while working for the employer. Ancillary to this abandonment, the defenses of contributory negligence, fellow servant, and assumption of risk are abrogated as a matter of course.[2] What, then, is the scope or extent of the employer's liability under these acts? The employer has never been an insurer.[3] He was liable only for negligent acts or omissions,[4] the principles of negligence being followed in the determination of his liability.[5] The question at once arises how far those principles have been carried in the construction of the Workmen's Compensation Acts.

Certainly, it would be opposed to any possible conception of justice that anyone should be required to answer for harm unless he had actually caused it. As to what is to be regarded as

[1] Bradbury, Workmen's Compensation Law Chap. 1 Sec. 1.
[2] Minn. G. S. 1913, Sec. 8196; Opinion of Justices, (1911) 209 Mass. 607, 96 N. E. 308.
[3] Blick v. Olds Motor Works, (1913) 175 Mich. 640, 141 N. W. 680, 49 L. R. A. (N.S.) 883, and note.
[4] Ward v. Ely-Walker Dry Goods Building Co., (1913) 248 Mo. 348, 154 S. W. 478, 45 L. R. A. (N.S.) 550.
[5] Miller v. Kelly Coal Co., (1909) 239 Ill. 626, 88 N. E. 196, 130 Am. St. Rep. 245.

the cause of any given result admits of much difference of opinion, and the decisions on this point in cases of negligence are too numerous for citation. In other words, it is quite obvious that the troublesome problem of proximate cause is bound to be carried from cases involving negligence to cases covered by the compensation statutes.

The question of proximate cause is usually one for the jury, solved according to what men like themselves would actually foresee as a result likely to take effect from the given cause or the conduct in question. So, if the wrongfulness of the act be admitted, it is the actual course of nature depending on the orderly operation of natural forces, never forgetting the usual and customary habits of mankind in the premises and under the given circumstances, by which the proximity of the act to the injury is ascertained. The doctrine of novus actus interveniens always asserts itself in these cases, because it forms the basis of the controversy, viz., the more immediate cause of the injury; but the weight of authority is to make the liability of the original actor depend upon whether such negligent or even wilful act of the intervening third party was foreseeable.[6] Summed up, the real question always is whether the act caused the injury,[7] in which case the act is considered the proximate cause of the resulting injury.[8] These are familiar principles of the law of negligence upon which it is not necessary to elaborate.

But in workmen's compensation cases the liability is founded, not on negligence, but on the idea that industry, rather than the injured employee, should bear the burden. The inquiry in such cases, therefore, is not so much whether the injury ultimately sustained resulted directly or proximately from a negligent act of the employer, as whether the injury resulted from an accident arising "out of and in the course of" the employment.

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[6] Pollock, Torts 37; note 8, infra; Stone v. Boston, etc., R. Co., (1898) 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; Burrows v. March Gas & Coke Co., (1872) L. R. 7 Exch. 96, 41 L. J. Ex. 46, 26 L. T. 318, 20 W. R. 493; Englehart v. Farrant & Co., (1897) L. R. 1 Q. B. 240, 66 L. J. Q. B. 122, 75 L. T. 617, 45 W. R. 179; McDowall v. Great Western Ry. Co., (1903) L. R. 2 K. B. 331, 72 L. J. K. B. 652, 88 L. T. 825. See Green-Wheeler Shoe Co. v. Chicago, etc., R. Co., (1906) 130 Iowa 123, 106 N. W. 498.

[7] Pierce v. Michel, (1895) 60 Mo. App. 187.

[8] Fraser v. Chicago, etc., Ry. Co., (1917) 101 Kan. 122, 165 Pac. 831; Wegner v. Kelly, (Iowa 1917) 165 N. W. 449; Walmsley v. Rural Telephone Ass'n of Delphos, (1917) 102 Kan. 139, 169 Pac. 197.

More specifically stated: Where, in the course of his employment, an employee sustains an accidental injury which is, in itself, trifling, but, by reason of an intervening agency, is aggravated and converted into a totally different and more serious injury, is the doctrine of proximate cause, as expounded in cases of negligence, applicable so as to hold the employer under these statutes?

It is obviously necessary to show that the aggravated condition is one "arising out of and in the course of the employment."[9] There are innumerable decisions as to the scope of this phrase, but, broadly speaking, the courts have leaned toward a liberal construction of this section of the statute.[10] In *Re McNicol,*[11] the following test was laid down: "It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation, as a result of exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment."

If the above test is law, it is not unfair to assume that the causal relation necessary to be established in cases of negligence is also indispensable under the Workmen's Compensation acts in cases of aggravation of a previous physical condition traceable to an accident suffered in the course of the employment and growing out of it and in cases of disease contracted in consequence of conditions created in the course of employment. Assuming, now, that a slight accident occurs to an employee while in the course of his employment and the slight injury sustained therefrom is aggravated by some outside agency producing a serious result, what, if any, liability have the courts in this country and England imposed upon the employer under the statute?

[9] Bradbury, Workmen's Compensation Law Chap. 2 Sec. 5; Casualty Co. of America v. Industrial Accident Commission, (Cal. 1917) 169 Pac. 76.

[10] Holland-St. Louis Sugar Co. v. Shraluka, (Ind. 1917) 116 N. E. 330.

[11] (1913) 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A 306.

There are a number of so-called "infection cases" in which there exists a wide contrariety of result, but even in those cases which deny liability the courts apparently apply the principle of liability where a causal connection is shown. In a very recent English case,[12] where gonorrhæal infection set in from contact with some unknown third person or thing in an effort to get relief from a chip of brick which accidentally flew in plaintiff's eye during the course of employment without inflicting injury, it was held that the workman could not recover, as there was novus actus interveniens, which was the sole cause of the injury. And so in a Michigan case,[13] it was held that the loss of an eye through infection carried to it by the fingers of the workman himself, when attempting to allay irritation caused by steel splinters which lodged in it from a machine on which an employee was working, was not an injury arising out of and in the course of employment. The L. R. A. annotation to this case[14] confirms this ruling as the general trend of authority in cases of this class; but such a decision cannot and does not countenance the idea that an injury suffered in the course of employment is outside the pale of the statute, when such injury is aggravated by a supervening cause which might reasonably have been anticipated. In fact, the supreme court of Michigan, in a case with the same principles involved, came to an opposite finding one year later.[15] The court say that infection which destroys the sight of the eye is not reasonably accounted for except as coming through or resulting from the accident. True, they do not overrule the *McCoy* case, supra, but justify it on the ground that the plaintiff therein had a latent disease. Many courts in this country and England draw this distinction, some holding a latent disease defeats recovery, and others allowing recovery even though the evidence discloses the existence of such disease before the accident.[16]

[12] Doolan v. Henry Hope & Sons, Limited, (1918) 119 L. T. Rep. 14.

[13] McCoy v. Michigan Screw Co., (1914) 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A 323, and note.

[14] L. R. A. 1916A at page 326.

[15] Cline v. Studebaker Corporation, (1915) 189 Mich. 514, 155 N. W. 519, L. R. A. 1916C, 1139.

[16] The following authorities hold the employer liable even if there exists a latent disease: Miller v. St. Paul City Ry. Co., (1896) 66 Minn. 192, 68 N. W. 862; Lloyd v. Sugg & Co., (1900) L. R. 1 Q. B. 481, 69 L. J. Q. B. 190, 81 L. T. Rep. 768, 48 W. R. 257; Indianapolis Abattoir Co. v. Coleman, (Ind. App. 1917) 117 N. E. 502. Contra: Blair v. Omaha Ice & Cold Storage Co., (Neb. 1917) 165 N. W. 893; Stombaugh v. Peerless Wire Fence Co., (Mich. 1917) 164 N. W. 537.

Minnesota is definitely committed to the doctrine of *Cline v. Studebaker.*[17] The authority, generally speaking, by dicta and decision is all in favor of this conclusion, the only limitation being that it is a question of fact for the jury to determine.[18]

Clearly, it is the injury which is sought to be recompensed by the statute; and where the injury results from an accident suffered in the course of employment, even though there be concurring agencies aggravating it, and but for those concurring agencies it would have been trivial, the employee should not be confined to his common law remedy. The Acts provide for accidents suffered in the course of employment, and where such an accident is the proximate cause of the injury, the injured workman should be allowed compensation under the statute. As the "infection cases" (and they are border line cases, even where recovery is based on negligence,) were decided principally on their own peculiar facts, and as it is easy to reconcile their contradictory decisions as not being repugnant to the principles here urged, it may be said that the law of proximate cause is applicable in determining the question of the employer's liability under the Workmen's Compensation Acts.

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[17] State ex rel. Adriatic Mining Co. v. District Court of St. Louis Co., (1917) 137 Minn. 435, 163 N. W. 755, L. R. A. 1917F 1094.

[18] Kiser, Workmen's Compensation Cases 73, 74, and cases cited; Elk Grove Union High School District v. Industrial Accident Comm'n, (Cal. 1917) 168 Pac. 392; In re Harraden, (Ind. App. 1917) 118 N. E. 142; Larke v. John Hancock Mutual Life Ins. Co., (1916) 90 Conn. 303, 97 Atl. 320; In re Sponatski, (1915) 220 Mass. 526, 108 N. E. 466; Archibald v. Workmen's Compensation Commn'r, (1916) 77 W. Va. 448, 87 S. E. 791; Sullivan v. Modern Brotherhood, (1911) 167 Mich. 524, 133 N. W. 486, 42 L. R. A. (N.S.) 140, Ann. Cas. 1913A 1116.

RECENT CASES

FRAUD—BROKERS—MISREPRESENTATION OF VENDOR'S MINIMUM PRICE.—Plaintiff represented to defendant that he was acting as agent for the vendor to sell certain real estate and that $15,000 was the lowest cash price which the vendor would accept. Defendant purchased and gave notes sued on in part payment. In fact, plaintiff was not an agent, but held an option from the owner. whose real price was $11,000. Plaintiff sues on the notes. *Held,* plaintiff was guilty of fraud and can not recover. *Norris v. Home City Lodge,* (Mich. 1918) 168 N. W. 935.

It is now well-established law that to sustain an action in deceit for fraud three things must concur: (1) there must be a false representation as to a material fact; (2) complaining party must have believed it to be true, and relied and have had a right to rely upon it, and have been deceived thereby; (3) it must appear that the representation was of some matter relating to the contract, which being false resulted in damage and injury to the complaining party. 23 Cent. Dig. Fraud. Par. 1.

The instant case and *McGough v. Hopkins,* (1912) 172 Mich. 580, 138 N. W. 210, have sustained defenses of fraud where a broker or one representing himself to be a broker misrepresented to a purchaser the vendor's minimum price, which was larger than the vendor's actual price. In both cases the court held that the purchaser, although satisfied with the subject of his purchase, could escape payment above the actual listed price of the vendor. Applying the rule above stated, it clearly appears that there was a false representation. But did the purchaser have a right to rely upon the broker's representation, and did he suffer damage? The law governing a purchaser's right to rely upon the representation of the seller may be generally stated as follows: Misrepresentation as to a fact the truth or falsehood of which the other party has equal opportunity of ascertaining, or the concealment of a matter which a person of ordinary sense, vigilance, or skill might discover, does not in law constitute a fraud. But if a person misrepresents or conceals a material fact which is peculiarly within his own knowledge, or, if also within the reach of the other party, a device is used to induce him to refrain from inquiry, such transaction will be void on the ground of fraud. *Andrus v. St. Louis Smelting and Refining Co.,* (1889) 130 U. S. 643, 32 L. Ed. 1054, 9 S. C. R. 645; *Atwood v. Small,* (1838) 6 Cl. & F. 232, 2 Jur. 200, 226, 246, 8 L. J. Ch. 145, 7 Eng. Rep. 684.

In the cases decided by the Michigan court the purchaser refrained from inquiry not by any ruse of the broker. It is difficult to see any difference between this and the ordinary case of every-day bargaining. Suppose an attorney says to the person with whom he seeks to settle that his client absolutely will not accept less than a certain sum, whereas he knows that the client is willing to settle for half that sum if necessary.

Or, a railway claim agent declares that the company will pay no more than a certain maximum, although his instructions are to pay twice that amount if necessary. By pursuing the idea to its logical conclusion, our law would attain some very nice complexities. If the railway company is allowed to sue because later it discovers that it might have settled for less money, or the claimant because the company would in fact have paid more, or the purchaser of land because the vendor would have sold for less, or the vendor because the purchaser would have paid more, why could not every party to a bargain and sale—or in fact any controverted claim—sue the other party on the discovery that he could have made a better bargain? A Kentucky case, *Ripy v. Cronan,* (1909) 131 Ky. 631, 115 S. W. 791, and a Missouri case, *McLennan v. Investment Exchange Co.,* (1913) 170 Mo. App. 389, 156 S. W. 730, hold that the case is governed by the ordinary rule of caveat emptor, viz., the purchaser has a right to buy at as low a price as his skill will secure, and the vendor has the corresponding right to sell at the best price he can obtain, and therefore the representation of either that he has made his best offer can not be said to be a representation of a material fact. Such dickering for trade advantage is included within the term "trade talk" upon which the other party has no right to rely.

The question whether the purchaser had sustained damage was not discussed by the court in the instant case. The cases cited, *Ripy v. Cronan* and *McLennan v. Investment Exchange Co.*, and *Merryman v. David,* (1863) 31 Ill. 404, refused to sustain an action, on the ground that the purchaser was not damaged.

Though the authorities are few, it seems that the majority of cases reject the Michigan doctrine. The case of *Kice v. Porter,* (1901) 21 Ky. L. 1704, 61 S. W. 266, upon which the Michigan court relied, can be distinguished, for there the purchaser was led to refrain from inquiry as to the vendor's price by a ruse of the broker. Logically, the doctrine of the Michigan decisions can not be supported, for it sustains an action in deceit where the purchaser has not the right to rely and where he has suffered no damage. It is inconsistent with the rule of caveat emptor, which governs in every-day practice between buyer and seller. In the instant case, the plaintiff was in fact not the agent of the vendor, as he pretended. That, however, seems to be of little importance, if the purchaser got what he bargained for at a price he was content to pay.

JURY TRIALS—CRIMINAL LAW—MISCONDUCT OF COUNSEL—EXPRESSION BY PROSECUTING ATTORNEY OF BELIEF IN GUILT IN ARGUMENT TO THE JURY.—Prosecution for the crime of the carnal knowledge of a girl under eighteen years of age. The only direct evidence of guilt was furnished by the prosecutrix herself, and the corroboration was merely to the effect that the prosecutrix had difficulties at home and had been committed by her parents to the State Girls' Home and while there had sent for the defendant and asked to see him alone, and that, while they were separating, the defendant said, "Goodbye, Sis. You know enough now to keep your mouth shut, don't you?" This testimony was positively denied by

the defendant and contradicted by other witnesses as to various details. In his argument to the jury, counsel for the state said: "I believe every word that the girl has said and believe it from the bottom of my heart, because she has no interest in the case." *Held*, that this statement did not constitute reversible error. *State v. Wassing*, (Minn. 1918) 169 N. W. 485.

The court in its opinion said: "The objection is not well taken. As stated in *People v. Wirth*, 108 Mich. 307, 66 N. W. 41: 'We are not aware of any decision which holds that an attorney may not state to the jury his belief that a witness is or is not entitled to credence, in a case where the testimony is conflicting, and the result depends upon which witnesses the jury find are truthful. A broad latitude must be allowed in such cases.' See also *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221; 16 Corpus Juris Sec. 2246. This rule is analogous to the rule that the prosecutor has the right to argue that in his opinion the defendant is guilty where he states, or it is apparent, that such opinion is based on the evidence, and this rule is well settled. *Kulp v. United States*, 210 Fed. 249, 127 C. C. A. 67; *Ogletree v. State*, 115 Ga. 835, 42 S. E. 255; *People v. Boos*, 155 Mich. 407, 120 N. W. 11; *State v. Norman*, 135 Iowa 483, 113 N. W. 340; *Riggins v. State*, 125 Md. 165, 93 Atl. 437, Ann. Cas. 1916E 1117; *Reed v. State*, 66 Neb. 184, 92 N. W. 321; *Fertig v. State*, 100 Wis. 301, 75 N. W. 960; 16 Corpus Juris Sec. 2257. 'What the law condemns is the injection into argument of extrinsic and prejudicial matters which have no basis in the evidence.' *Floyd v. State*, 143 Ga. 289, 84 S. E. 972. But the law does not deny to the prosecutor the right to draw deductions from the testimony and the appearance of the witnesses in court. He may do this, and in so doing he may express the conclusion which his mind has reached, and which he has a right to presume others will reach therefrom, as to the truthfulness of the testimony of any witness. See *Fertig v. State*, 100 Wis. 308, 75 N. W. 960. We do not understand that the court in *State v. Clark*, 114 Minn. 342, 131 N. W. 369, intended to adopt any different rule."

Although at the first glance one might be inclined to doubt the correctness of this holding and fail to reconcile it with other decisions and authorities, there can be little doubt both of its wisdom and of its legal support. The line between legitimate argument and argumentative testimony is often a difficult one to trace, but it none the less exists. The question to be determined is whether the attorney speaks within or without the record, and the case at bar is clearly to be distinguished from that of *State v. Clark*, (1911) 114 Minn. 342, 131 N. W. 369, where the jury were asked to make use of their local knowledge of the character of two girls and to base their verdict and judgment thereon and not on the testimony in the case concerning them. It is also distinguishable from the case of *State v. Gunderson*, (1913) 26 N. D. 294, 144 N. W. 659, 39 Ann. Cas. 429, where the state's attorney said: "I do not come here to try a case unless the defendant is guilty," and thus sought to influence the jury, not by his conclusions from the evidence introduced on the trial, but by his conclusions and belief which were based on what he had learned outside of the courtroom. The rule indeed seems to be that: "It is not proper for the prosecuting officer to tell the jury that he believes

the defendant guilty, as his belief is not evidence in the case; but he has the right to argue from the testimony that the defendant is guilty, and to state to them what evidence before them convinces him, and should convince them, of such guilt." *People v. Hess,* (1891) 85 Mich. 128, 48 N. W. 181. For a prosecuting attorney to assert in argument a belief in the guilt of the accused otherwise than as a result of the evidence in the case is improper, and unless it is clear that no prejudice results such an argument constitutes a ground for a new trial. *Ross v. State,* (1899) 8 Wyo. 351, 57 Pac. 924; *Hammock v. State,* (1913) 7 Ala. App. 112, 61 So. 471; and note to *State v. Gunderson,* in Ann. Cas. 1916A 431.

MASTER AND SERVANT—ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT—PROXIMATE CAUSE—WORKMEN'S COMPENSATION ACT.—Plaintiff, a hot water fitter employed by the respondents, was engaged in making a hole in a brick wall for the purpose of inserting some hot water fittings. While so engaged a chip of brick dust struck him in the left eye, causing it to be inflamed and watering. During the course of treatment by a fellow-workman, plaintiff's mother and brother and a chemist, gonorrhæal infection set in, from which plaintiff lost the sight of his eye. He brings this action under the Workmen's Compensation Act to recover for the loss of sight. *Held,* that the workman had not established his claim to the compensation, as there was novus actus interveniens, which was the sole cause of the injury. *Doolan v. Henry Hope and Sons, Limited,* (1918) 119 L. T. Rep. 14.

For a discussion of the principles involved see NOTES, 3 MINNESOTA LAW REVIEW p. 123.

MORTGAGES—FORECLOSURE—POWER OF SALE MORTGAGE—SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.—In a bill brought in behalf of an officer in the military service of the United States to enjoin the completion of a mortgage foreclosure sale by conveyance of the property to the purchaser, no order of sale having been previously granted by a court, as provided by the federal Act of March 8, 1918, Sec. 302, *Held,* the sale was invalid and plaintiff is entitled to the relief demanded. *Hoffman v. Charlestown Five Cents Savings Bank,* (Mass. 1918) 121 N. E. 15.

The plaintiff, "expecting to be called for service in the army," caused the property to be transferred to his mother through the foreclosure of a third mortgage. Defendant held the first mortgage. Plaintiff's mother orally agreed to hold the property for him in case he returned from the war, otherwise it was to be hers. On March 8, 1918, he reported for active duty and has ever since been in service as a lieutenant in the United States Army. The federal Act applies "only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the military service and still so owned by him"; permits

a stay of proceedings to be ordered by a court in which proceedings may be begun to enforce such obligation; and declares that:

"No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court."

This seems to be the first case in a court of last resort applying the federal Act to a mortgage foreclosure, and it suggests somewhat startling considerations. The defendant had no notice or reason to suppose that plaintiff was the owner of the property, and hence no reason to suspect that the owner was in the military service; yet the court obliges him to ascertain that fact at his peril. Should this interpretation prevail, it would seem that no person can safely acquire a title based on a foreclosure under power of sale made since March 8, 1918, and until the last soldier or sailor is discharged from service, without ascertaining whether the owner was in the service; and no reliance apparently can be placed on the records in determining who is the owner. The statute forbids such a sale without an order of court: how the order is to be served upon a soldier in France or a sailor on the ocean is not specified in the Act. An order of court seems to contemplate a suit in equity. If so, foreclosure under a power is prohibited. In the instant case the court draws within the protection of the Act equitable owners as well as legal; owners holding under oral trusts voidable by the statute of frauds; and declares that there can be no question of the constitutionality of the Act or its applicability to mortgage foreclosures within the state. The Act is an exercise of the war power, and therefore is the supreme law of the land.

PLEADING—AMENDMENT—DEPARTURE FROM LAW TO LAW.—A complaint in a suit begun in Minnesota stated a cause of action for damages, under the federal Employers' Liability Act, for death by wrongful act occurring in Iowa, and plaintiff recovered a judgment which was reversed upon appeal. Plaintiff then amended the complaint by eliminating all allegations relating to interstate commerce and the application of the federal Act, pleading in lieu thereof certain Iowa statutes. *Held*, such amendment does not constitute a departure from law to law and the pleading of a new cause of action. *Nash, Admx. v. Minneapolis, etc., R. Co.*, (Minn. 1918) 169 N. W. 540.

The defendant claimed that the amendment stated a new cause of action, barred by the two-year limitation under the Iowa statute. This raises again the oft-recurring question: What is a cause of action? —since a complaint must set forth the facts constituting it. A cause of action for wrongful death has been stated by the Minnesota court (*Mayberry v. N. P. Ry. Co.* (1907) 100 Minn. 79, 110 N. W. 356, 12 L. R. A. [N.S.] 675), to be "the wrongful acts of defendants in causing the death of her intestate." This definition is adopted in the opinion in the instant case. It seems, however, to be unsatisfactory. An act alone can hardly constitute a cause of action. It is requisite that the act be an invasion

of some legal right, causing damage: the cause of action embraces the act, the law creating the duty, and the damage. This is recognized in *Tuder v. Oregon, etc., R. Co.* (1915) 131 Minn. 317, 155 N. W. 200, where the court uses this language: "That cause of action is the alleged violation by defendant of its duty to exercise proper care to avoid injury to plaintiff."

It has often been noted that a complaint is in effect a logical syllogism—in which the law constitutes the major, the facts the minor, proposition (Gould's Pleading, 4th ed., Chap. 1 Sec. 7 et seq.). When the law is such that the court can take judicial notice of it, it need not be pleaded, as when it is domestic common or statutory law; but when it is the statute law of another state it becomes a fact, which must be pleaded like any other fact. In the instant case, therefore, the amendment setting up the Iowa statute was the averment of a new fact essential to the cause of action in substitution for the averment of another fact which could not be proved and had to be dropped. If, then, the applicable law is an essential element in a cause of action brought from another state, it would seem that the cause of action set forth in the amendment is different from that in the original complaint. Without the averment of the Iowa law the amended complaint would have been demurrable. Had the cause of action originated in Minnesota the court would have taken judicial notice of the law governing the case, but not when the case is brought from another state. Plaintiff's cause of action consisted of a violation by defendant of a primary right of the next of kin of plaintiff's intestate and the resulting damage—the primary right being grounded upon a statute of which the court could know nothing unless it was pleaded.

In a case originating in Minnesota the plaintiff in a Minnesota court may perhaps shift from law to law without setting up a new cause of action—e.g., from common law to federal Employers' Liability Act; but see, contra, *Railway Co. v. Wyler*, (1895) 158 U. S. 285, 286, 39 L. Ed. 983, 15 S. C. R. 877; *Whalen v. Gordon*, (C. C. A. 1899) 95 Fed. 305, 309, Sanborn, J.; *Bravis v. Chicago, etc., Ry.*, (1914) 217 Fed. 234, 237, Sanborn, J.; *Galesburg, etc., Co. v. Hart*, (C. C. A. 1915) 221 Fed. 7, 12, Baker, J.; *Walker v. Iowa Central Ry. Co.*, (1917) 241 Fed. 395. If, despite the authority cited, such a change of position is not a departure, it must be because plaintiff is entitled to recover if the facts alleged show a cause of action under any aspect of the law; but when his cause of action is imported, and he shifts to an imported law under which it is in terms barred, the question arises—How can he get the benefit of the law as an ingredient of his cause of action and escape the bar?

In the *Wyler* case, supra, the United States Supreme Court seems to have covered nearly all the points above adverted to. The original petition was for negligence of the railway company in employing and retaining a fellow servant who was known to be incompetent, by means of whose incompetence and negligence a heavy iron dump was permitted to fall upon the plaintiff. The amendment counted upon the negligence of the same fellow servant and the statute of Kansas, which charged a railroad with the negligence of fellow servants. The original

petition counted upon a liability under the common law; the amendment upon a liability under the Kansas statute. Both causes of action were based on the same transaction and resulted from the same facts. The supreme court held that the amendment stated a new cause of action, and that it was barred by the Kansas statute of limitations, the court pointing out (p. 295) that, as the action was brought in the Missouri state court, its conclusion was strengthened by the fact that in most of the states the laws of other states are treated as foreign law, which must be pleaded and proven.

It can hardly be doubted that in the federal courts, at least, the cause of action set up by the amendment in the instant case would be held to be different from the original one, and barred by the Iowa statute.

POWERS—GENERAL POWER OF APPOINTMENT BY WILL—RULE AGAINST PERPETUITIES.—A devised property to trustees, to pay the income to B, a minor, then unmarried, for life and on her death to convey the property in fee to such persons as B should by her last will appoint, and in default of such will to her children, if any, surviving her. B afterwards married a man born in A's lifetime, and on her death this husband and seven children survived her. She left a will by which she appointed the property to her husband for life and on his death the income on a certain part to her son S for life and at his decease to the issue, if any, of S living at his death, and in default of issue, to the other children. *Held*, that in determining the validity of the limitations, they must be regarded as created at the death of A, and that, consequently, the appointments to the surviving issue of S, and in default of issue over to the other children, were void for remoteness. *Minot v. Paine*, (Mass. 1918) 120 N. E. 166.

By the common law, limitations of property which by the terms of their creation might remain contingent more than twenty-one years after the termination of lives in being at their creation are void. *Cadell v. Palmer*, (1833) 1 Cl. & F. 372, 7 Bli. N. S. 202, 10 Bing. 140, 6 Eng. Rep. 956. The time of creation, where the limitations are created by will, is the death of the devisor. *Southern v. Wollaston*, (1852) 16 Beav. 166, 21 L. J. Ch. 456, 1 W. R. 86, 51 Eng. Rep. 740. Where the devisor gives a power of appointment, the question is whether the limitations made under it are to be regarded as created at the time of the creation of the power or at the time of the exercise of the power by the donee.

A power of appointment is quasi a delegation of authority of a principal to an agent. *Bartlett v. Sears*, (1908) 81 Conn. 34, 70 Atl. 33. The donee does not act as an owner of the property which is subject to the power. As said in the instant case: "He is speaking for the original testator in directing the devolution of the property of the latter. The nature of the power is to express by his own will a disposition of the property of the donor who by the terms of his will adopted in advance these subsequently written words of the donee as disclosing his ultimate testamentary purpose." If no appointment is made, the property subject to appointment cannot be taken in payment of the donee's debts. *Holmes v. Coghill*, (1802) 7 Ves. 499, 32 Eng. Rep. 201. And though property ap-

pointed under a general power to a volunteer may be taken in payment of the donee's debts, this liability is a peculiar rule of equity and not an incident of ownership of the property. *Hill v. Treasurer and Receiver General,* (1918) 229 Mass. 124, 118 N. E. 891. The validity and effect of the appointing instrument is to be determined according to the law of the domicile of the donor of the power and not that of the donee. *Sewell v. Wilmer,* (1882) 132 Mass. 131. The appointed property is not subject to inheritance taxes as the property of the donee, even though after appointment it became, in equity, assets for the benefit of the donee's creditors. *Hill v. Treasurer and Receiver General,* ubi supra. So, generally, in applying the rule against perpetuities, the limitations are regarded as if created at the time of the creation of the power. The rule holds for all powers special in respect to appointees. Gray, Perpetuities, 3rd ed., Sec. 514.

The instant case holds that a power general in respect to appointees, but exercisable only by will, is within the general rule. On this there is a conflict of authority. See 26 Harv. Law Rev. 64, 720; 27 idem 708. General powers unrestricted as to the mode of exercise are an exception to the general rule. The donee of such a power could appoint the property to himself and then make the limitations as of his own property. And although he appoints directly to others, the courts, in applying the rule against perpetuities, will treat the appointment as of his own property and regard the limitations as created at the time of the exercise of the power. Gray, Perpetuities, 3rd ed., Sec. 524; 30 Cyc. 1495. But a power to appoint by will cannot be exercised by deed. *Reid v. Shergold,* (1805) 10 Ves. 379, 32 Eng. Rep. 888. The donee of the power cannot, therefore, appoint the property to himself, since the appointment is operative only upon his death. And consequently limitations made by the donee do not come within the reason of the exception of appointments under a general power exercisable by any mode. Nor is it expedient that they should, for otherwise "estates for life with powers of appointment by will might be created; the tenants for life might appoint for life, with powers to the appointees to appoint by will; these appointees might, in their turn, appoint in like manner, and so an indefinite series of life estates might be created." Gray, Perpetuities, 3rd ed., Sec. 514.

It is probably law in Minnesota that the time allowed by the statutory rule against perpetuities will begin to run from the creation, and not from the exercise, of a general power to appoint by will. Minn. G. S. 1913 Secs. 6780, 6781. It was so held in New York under similar statutory provisions. *Genet v. Hunt,* (1889) 113 N. Y. 158, 21 N. E. 91. But compare reasoning in *Hershey v. Meeker County Bank,* (1898) 71 Minn. 255, 73 N. W. 967.

REAL PROPERTY—TERMINATION OF CONTINGENT REMAINDER AFTER LIFE ESTATE BY MERGER OF LIFE ESTATE AND REVERSION.—A devised real estate to B for life and (in legal effect) remainder to his children. B was heir at law of the devisor. Before he had any children, he conveyed all his interest in the property to C. *Held,* that B's life estate and the reversion

in fee coming to B by descent passed to C by the deed, that the two merged, and that by the merger the contingent remainder to B's children was destroyed. *Lewin v. Bell,* (Ill. 1918) 120 N. E. 633.

There were two principles of feudal tenures, one of which long hindered the creation of contingent remainders, and the other of which both hindered their creation and hastened the destruction of such as were allowed to be created. The early law conceived that there must be an immediate transference of all interests created by a conveyance. Coke's statement that "Every remainder which commenceth by a deed ought to vest in him to whom it is limited, when livery of seisin is made to him that hath the particular estate," Co. Litt. 378a, had reference to this rule. As a contingent interest must be in nubibus pending the contingency, there could be no immediate transference. So contingent remainders could not be created. This metaphysical conception was worn away by judicial decision, and the legal validity of contingent remainders "was finally established by the reign of Henry VIII." Fletcher, Contingent and Executory Interests in Land 33.

The other doctrine was that the seisin must never be in abeyance. This rule was to ensure at all times a tenant of the freehold to meet adverse claims to the land and to render the feudal services due to the lord of whom it was held. Challis, Real Property 78. This rule, perhaps supplemented by the other, required that for the creation of a freehold contingent remainder there must be created at the same time a particular estate of freehold to support it. 2 Bl. Comm. 167. The livery to this particular freehold tenant was effective for himself and for those in remainder, and his seisin answered the requirements of the rule while his estate lasted. But the rule further required that the contingent remainder be vested eo instanti that the particular estate determined; otherwise the next vested estate in remainder or reversion at once became a right in possession and the contingent remainder became impossible of ever taking effect. Fearne, Contingent Remainders 307 et seq. The particular estate might, moreover, be terminated prematurely by tortious conveyances by the present tenant, or by merger, with like result to the contingent remainder as arose from a natural ending. 4 Kent. Comm. 253. Tortious conveyances have been put an end to by statute, 1 Stimson's Am. St. Law Sec. 1402; and in most states the statutes save contingent remainders generally from the effects of the feudal rule, Minn. G. S. 1913 Secs. 6682, 6683, 6684; but in several they are still destructible by the termination of the supporting freehold estate, by death of the tenant, or by merger, before they vest.

After contingent remainders were allowed, it was a question, when they were created by conveyances at common law, where the inheritance was in case of a contingent remainder in fee, pending the happening of the contingency. Gray, Perpetuities Sec. 11; Tiffany, Real Property Sec. 124. But when the conveyance was by way of use or devise, it was established that it remained in the grantor or in the residuary devisee or heirs of the devisor. Gray, Perpetuities Sec. 113; Tiffany, Real Property Sec. 124; *Egerton v. Massey,* (1857) 3 C. B. N. S. 338, 27 L. J. C. P. 10, 3 Jur. N. S. 1325, 6 W. R. 130, 140 Eng. Rep. 771. Where, as in the principal

case, the particular tenant was also heir and had the reversion in fee by descent, it might have been expected that merger would result immediately and that, the particular estate being "drowned" in the reversion, the contingent remainder dependent on it would be destroyed eo instanti that it was created. But the courts held that where the two estates came together at one time from the creating source (although one came by devise and the other by descent), with the contingent remainder interposed, there would be no merger, since it would defeat the intention of the devisor. *Bowle's Case,* 11 Co. 79b, 80a, 77 Eng. Rep. 1252; Fearne, Contingent Remainders 341-345; Challis, Real Property 137. This is, indeed, a strange concession to the intention of the devisor, for the rules of seisin and of merger were not dependent on intention, but more often defeated it. If, however, they came from different sources, or, coming from the same source, were passed on to another, the devisor's intention ceased to operate, and merger resulted. Fearne, Contingent Remainders 346; Tiffany, Real Property, I, Sec. 123. Such is the holding of the principal case.

The common way of preventing this premature destruction by the particular tenant, or, when the particular tenant and reversioner were different persons, by the concerted action of the two, was to interpose a trustee after the particular estate to preserve the contingent remainder. Challis, Real Property 103; 2 Bl. Comm. 172; 4 Kent Comm. 256. Thus if the estate to be created were to B for life and then to his unborn children, there would be interposed at the same time an estate to trustees for life of B, to preserve the contingent remainder. This remainder to the trustees was vested, and on A's destruction of his estate it came into possession and supported the contingent remainder. It effectually prevented merger, since the particular estate could not merge in the reversion where a vested remainder was interposed. This plan, the court points out, must still be followed in Illinois to prevent the active destruction of contingent remainders by merger.

TAXATION—INHERITANCE TAX—DEDUCTION OF FEDERAL ESTATE TAX.—Under the Illinois Inheritance Tax law, whereby all debts and claims against the deceased's estate and the expenses of administration must first be deducted from the gross value of the decedent's property transferred, before the state inheritance tax shall be computed, *Held,* the federal estate tax on the net estate of a decedent is to be so first deducted. *People v. Pasfield,* (Ill. 1918) 120 N. E. 286.

This decision, following that of the Minnesota supreme court in *State v. Probate Court,* (1918) 139 Minn. 210, 166 N. W. 125, probably settles this interesting question. Incidentally, these cases call attention to the anomalous fact that the federal government apparently has priority over the state in the field of inheritance taxation, notwithstanding the fact that the privilege which gives rise to the tax is one conferred exclusively by the state and in no respect by the federal government. It is well settled that the theory of inheritance taxation is that it is not a tax upon property but a tax upon the power to transmit, or a tax upon the transmission

of property from the dead to the living, a right not natural and inherent, but granted by the state for reasons of public policy. *Knowlton v. Moore,* (1900) 178 U. S. 41, 44 L. Ed. 969, 20 S. C. R. 747. The state confers and controls this right and the federal government has nothing to do with it. Far from holding that the United States cannot tax a privilege conferred by the state, the state courts now yield precedence to the United States in a province which would seem to be the special property of the state. Inasmuch as "the power to tax involves the power to destroy," it may be argued that by the extreme exercise of this power the federal government might not only dry up the fountain at its source, but indirectly coerce the states in respect to the devolution of estates of deceased persons. The anomaly seems the more marked, since, as the court in the instant case points out, the present federal tax "resembles very closely the old English probate duty established in 1694, and the probate duty of 1862 and 1864 levied by the acts of Congress of the United States." A "probate duty" would seem to be peculiarly a duty leviable by the sovereignty concerned in probating the estate.

The case also points out the difference between the former federal inheritance tax (construed in *Knowlton v. Moore,* supra) and the present estate tax. The former tax was imposed progressively, not upon the whole mass of the estate, but upon the separate legacies, separately, and hence each one was subject to the rate of taxation applicable; the present law imposes a tax "upon the transfer of the net estate" before any distribution is made to the legatees or distributees. 6 U. S. Comp. Stat. Ann. 1916, p. 7364. The difference is important because, the tax being progressive, the estate as a whole carries a higher rate than the separate legacies would bear. In line with the instant case, see *Re Knight's Estate,* (Pa. 1918) 104 Atl. 765.

BOOK REVIEWS

THE ARMY AND THE LAW. By Garrard Glenn. New York: Columbia University Press. 1918. Pp. 190. Price $2.00.

This small book serves fittingly as an introduction to a surprisingly large body of law, which the standard legal digests relegate to many scattered subheadings. Military law, including not only military law proper but also martial law and the law of military occupation, is usually regarded by the common law practitioner as a highly exceptional, unimportant, exotic region of legal study. The impression that it is unimportant is now in the course of being dispelled. The fact that it has its roots in the very same fields of English history from which grow the main stems of Anglo-American constitutional jurisprudence deserves to be better appreciated. The misimpression that this branch is an exotic graft upon our tree, to be viewed as something abnormal, may well be dispelled by a study of this book. In a year when our army became larger than ever before in the nation's history, it is most appropriate to have an essay pointing out the legal consequences of a man's acquisition of military status and defining the boundaries which separate common law and military jurisdiction.

Professor Glenn's method of treating his subject reminds one of Langdell's little classic on equity pleading. He proceeds from case to case, never losing sight of the implications of the decisions nor of the way in which their doctrines fit together to form a coherent body of law. The tyro in the subject will be surprised to discover how much of the field has been covered by judicial pronouncements. These judicial pronouncements, however, would be almost a meaningless collection of single instances except for such thoughtful comment, by a scholar able to achieve the true perspective. Although in essence a discussion of selected cases, the book is organic, almost lively. It leads the reader cleverly from one part of the field to another, in a logical, orderly manner and with an intelligent breadth of view, which gives him the feeling that he is surveying a well ordered region, where the parts have each an appropriate place in the whole and the boundaries can be rather definitely ascertained.

Such chapter-headings as "The Constitution of the Army," "The Army's Right of Self-Regulation," and "Relation of the Soldier to the Civilian in Time of War" will probably suffice to show that the book contains new points of view and many points of constructive thinking. One of the most helpful pieces of analysis will be found in the author's differentiation of "preventive martial law" and "punitive martial law." The distinction, which the author so clearly expounds by the use of those terms, proved the key to some legal puzzles with which the reviewer had been troubled.

"The municipal law, as we have just seen, has a choice of two methods, prevention and punishment. Martial law acts in exactly the same way.

There are, in short, two kinds of martial law, the punitive type and the preventive.

"Punishment is inflicted through the sentence of a military commission. A court martial, as such, would have no jurisdiction, inasmuch as the accused would not be members of the army, . . .

"The preventive method is of the simplest nature; it means either the forcible breaking up of assemblies, protecting public places by force, or removing the person of a wrong-doer to a place of restraint and keeping him there, without the warrant of any court.

" . . . there can be no martial law without a suspension of the writ of habeas corpus.

"Such are the two independent phases of martial law: First, prevention, including the suspension of the writ of habeas corpus, and, second, punishment, involving the trial and judgment of civilians by a military commission." (Glenn, pp. 166-167).

So far as concerns the "preventive" phase, the author's attempt to demonstrate that martial law has a firmly established place in our jurisprudence is completely successful. (See pp. 179-184, citing *Luther v. Borden*, 7 How. 1, and *Moyer v. Peabody*, 212 U. S. 78, among other cases.)

The great defect of the book, however, is its hasty reasoning upon the thesis concerning punitive martial law, which fills its last five pages and was apparently conceived by the author as the climax of his essay. The book gives many indications of having been written at a time when we all overestimated the menace of the German spy. Its parting words are (page (190):

"The question, in any such case, is simply whether the government is powerless, because of fancied limitations inherent in our Constitution, to take the necessary steps to protect the Constitution itself. It can hardly be doubted that, in any such case, the view of the minority in the Milligan case will prevail. Opposition to that view rests on superstition rather than sound tradition; and superstition is not a part of the common law, of whose very life is historical truth."

Is it scholarly to characterize as "superstition" a famous majority opinion of the United States Supreme Court (*Ex parte Milligan*, 4 Wall. 2), even though it was an obiter opinion? It might be, if the characterizer has first demonstrated, by careful elimination, that the opinion has no tenable legal foundation. The author has not done that. His antithesis between "superstition" and "tradition" is significant of his failure to exhaust the question. His defense of the minority opinion in the *Milligan* case is based almost exclusively on the history of the Petition of Right of 1628 times and some twentieth century decisions of British courts unhampered by our basic written law of 1787. (See pages 188-190.) He ignores the possibility that the framers of our constitution may not have understood history and tradition in the way he does and the certainty that, when they said—

"The *privilege* of the writ of habeas corpus *shall not be suspended except* . . in cases of *rebellion* and *invasion*. . . . The trial of *all crimes*, except in cases of impeachment, shall be *by jury*. . . Treason against the United States shall consist only in levying *war* against them, or in adhering to their *enemies*. . . *No person shall be convicted of treason unless* on the testimony of two witnesses to the same overt act,

or on confession *in open court*. . . . No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, *except* in cases arising *in the land or naval forces*, or *in the militia* when in actual service in time of war or public danger"—

they said something—something which needs to be discussed, at least.

The author of "The Army and the Law" would probably be surprised to learn that *Rex v. Halliday*, (1917) A. C. 260, does not receive unanimous approval in those army circles where his pro-military views might be expected to receive especial welcome. Professor Glenn thinks the concurring opinion of Lord Atkinson in that case "particularly to be commended" (page 178). At least one of the most distinguished judge advocates in our regular army has been heard to say that "a mere reading of the opinions will convince one of the soundness of the dissenting view."

Professor Glenn has misgivings (page 189) about the three-hundred mile sweep given to punitive martial law in the case of *Ex parte Marais*, (1902) A. C. 109, though he approves of the decision on the facts. Those misgivings may cause the reader to ponder on the dangerous practical consequences of the reasoning (page 188) that, in public danger, all citizens' "constitutional rights must yield to the peril." Perhaps the constitution's clause concerning "rebellion and invasion" was wisely designed to fix the tests of such extreme peril.

A few minor defects of the book should be corrected in a second edition. Citation of cases with the lazy label "supra" frequently wastes the student's time by requiring him to turn back over several pages. There are some unguarded observations about the constitutional and property status of alien enemies, which might be misleading to one who has not studied our statutes. Many laymen suppose that they need not pay their debts to "alien enemies," lawfully and peaceably going about their business in this country. The author knows better than this, as he shows in many places. But his assertion on page 88, for instance, that the Trading with the Enemy Act "takes care of the situation by vesting title to the local property of enemy aliens in an official custodian" ought to be qualified, so as to show that he is talking about enemies abroad or interned alien enemies—not the ordinary "enemy aliens" who by hundreds of thousands have been properly allowed to keep their business in this country throughout the war. On page 51 there is an erroneous statement made in a very emphatic tone. The author says: "There was never a doubt that an acquittal by a civil court could be pleaded in bar to a subsequent proceeding by courts martial." He should, at least, note the following authorities to the contrary: *Re Stubbs*, 133 Fed. 1012; *Re Esmond*, 5 Mackey (D. C.) 64; *Steiner's Case*, 6 Ops. Atty. Gen. 413.

When all is said, however, the book is an excellent little book. And the author deserves gratitude from both the legal and the military professions. "The Army and the Law" should be read by every judge advo-

cate as an introduction to Winthrop's, Davis', and Birkheimer's more ambitious works; and it is well worth reading by any lawyer who desires to understand American jurisprudence, as a system which has its military side and has to adapt itself to war as well as peace.

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THE DEVELOPMENT OF GERMAN PRIZE LAW. By Charles Henry Huberich and Richard King. New York: Baker, Voorhis and Company. 1918. Pp. 61. Price $1.00.

The authors of this short monograph have already rendered a valuable service to Anglo-American students of International Law by bringing out a translation of the German Prize Code of 1914. Since that date this Code has undergone many important modifications and it is the purpose of the present study to bring it up to date. In this study may be found a brief but critical analysis of the decisions of the German Prize Courts upon some of the most important topics of International Law, including the legal nature of Prize Courts, the law administered by and the jurisdiction of these courts, the national character of ships, transfers of property in transitu, contraband, enemy destination, unneutral service, destruction of vessels and cargo, and the seizure of neutral cargo on enemy vessels. An appendix sets forth the amended contraband lists of 1917.

In form, the brochure partakes rather of the character of a commentary than of a treatise. It is an interpretation of the existing body of law and does not concern itself with the origin or juristic significance of the principles therein enunciated. Here and there a reference may be found to similar or conflicting decisions of English or American Prize Courts, but no attempt is made to elaborate these points of difference or to treat the subject comparatively. On this account the study will doubtless prove more serviceable to the practitioner than to the student or instructor of International Law. The authors have strictly limited the scope of their task, but within this limited field they have succeeded in turning out an admirable piece of work. The treatment throughout is scholarly, as is well evidenced by the frequent references to the opinions of the leading German jurists as well as to the most recent decisions of the German Prize Courts.

The need for such a study as this has long been manifest. The provincialism of Anglo-American jurists has been made an occasion of reproach among continental students of International Law. And the criticism, it must be admitted, has been largely justified. The courts of England and the United States have too often manifested an unfortunate indifference to the development of international principles in European countries. On some important questions, as for example Blockade, they have worked out certain legal principles as distinctly national in character as the common law itself. Much of the learning of the continent has been foreign or inaccessible to Anglo-Saxon jurists. Their European contem-

poraries, on the other hand, have been almost equally at fault. In truth, the term "International Law" had become a misnomer. That law had ceased to be international in theory or in fact.

For this reason the appearance of the present study is doubly welcome. With the restoration of peace, the time has come for a general recasting of the principles of International Law in the light of the experience of the great war. The belligerents must now prepare to set up, if possible, a body of law of universal character and application. But before this can be successfully accomplished, it will be necessary for the respective parties to understand the existing conflicting rules of law. To this end it is sincerely to be hoped that the authors will find time to follow up this preliminary study with a comprehensive comparative examination of the prize laws of the several belligerent states. Such a study would be a boon to Anglo-Saxon and Continental jurists alike and could not fail to be of great value to the delegates at the next world conference on International Law.

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AMERICANIZATION IN MINNESOTA*

The total population of Minnesota in 1910, according to the United States Census, was 2,075,708. Of the total population 575,081, or 27.7 per cent are native whites of native parentage; 941,136, or 45.4 per cent are native whites of foreign or mixed parentage, and 543,010, or 26.2 per cent are foreign born whites. The corresponding percentages in 1900 were 24.3, 46, and 28.8 respectively, the proportion of native whites of native parentage having increased during the decade. The percentage of Indians is .4; of Negroes, .3. In only one of the 86 counties is the percentage of foreign born whites less than 15. In 56 counties it ranges from 15 to 25; in 22 counties from 25 to 35, and in 7 counties exceeds 35. In 35 counties the proportion of native whites of foreign or mixed parentage exceeds one-half. Out of the total native population, that is, population born in the United States, 73.2 per cent were born outside of the state. Of the native white population 26.7 per cent were born outside of the state; of the native Negro 77.4 and of the native Indian 5.7. The persons born outside of the state constitute a much larger proportion of the native population in urban than in rural communities. Of the foreign born white population of Minnesota the persons born in Sweden represent 22.5 per cent, Germany 20.2, Norway 19.4, Canada 7.5, Austria 6.8, Finland 4.9, Russia 3.2, Denmark 3, Ireland 2.9, England 2.2, all other countries 7.4. Of the total white stock of foreign origin, which includes persons born abroad, and also natives having one or both parents born abroad, Germany contributes 26.7 per cent, Norway 18.8, Sweden 18.1, Canada 7.5, Austria 5.1, Ireland 4.9, Finland 3, Denmark 2.5, England 2.5, Russia 2.

Since 1910 no detailed figures are accessible other than a compilation from reports of the Commissioner General of Immigration for each of the years 1911 to 1917, respectively. From these latter reports the number of immigrants admitted into the United States, with Minnesota their objective, since 1910, was 93,380, and the number deported 17,699, leaving a net number of foreign born who have come into this state since 1910 of 75,680. Of this number the Scandinavians, covering Norway, Sweden and Denmark, made a net contribution of 27,060 and Germany 6,116.

The state of Minnesota failed, through lack of appropriation, to make a census in 1915. The state government should not fail to embrace every intelligent method necessary to know its people; to secure not only data in connection with the number of its inhabitants, nationality, and vocation of its people, but other basic data from which an intelligent comprehension may be exercised, to the end that the state may be better enabled to extend its help in many directions. The scope and work of its Bureau of Immigration already established may be wisely extended.

*From the Annual Address delivered by the President of the State Bar Association at the meeting held at Faribault, Aug. 13, 1918.

FOREIGN LANGUAGES IN THE SCHOOLS.—In this Americanization process the public schools are perhaps the greatest agency to meet the problem. According to the United States census, the number of persons in Minnesota from six to twenty years was 648,775, out of which 443,761, or 68.4 per cent, attend school. Of these, 154,844 are of native parentage and 270,175 are foreign and mixed parentage and 15,648 are foreign born. Americanism implies a common language for America, a common vehicle of thought exchange. Recognizing that English is our national language, and that a thorough familiarity with the English language is essential to American citizenship, the law of this state should require that the English language shall be used as the only medium of instruction in all branches of study in elementary, secondary, and all schools, including public, private, and parochial, except, of course, that another language may be taught and studied for cultural purposes. Section 2797 of the General Statutes of Minnesota for 1913, under the subhead of "Instruction in Public Schools," provides that—

"The books used and the instruction given in public schools shall be in the English language, but any other language may be used by teachers in explaining to pupils who understand such language the meaning of English words; and in high and graded schools other languages may be taught, when made part of a regular or optional course of study. Instruction may also be given in such languages in common schools, not to exceed one hour each day, by unanimous vote of the trustees."

The latter clause of the statute, "Instruction may also be given in such languages in common schools not to exceed one hour each day, by unanimous vote of the trustees," has been abused. Teachers with a tendency towards teaching a language other than the English have construed the time limit in an elastic sense and, in fact, have exceeded the time limit. In addition, trustees in certain cases do not have due regard for the strict interpretation of this law. The statute referred to ought to be repealed, and one whose language is plain and specific substituted therefor.

We have 307 parochial and private schools in this state, with an enrolment of 38,853. Of this class of schools 94 are using English only, 195 using English-German, principally German. The private and parochial schools should be required to employ teachers qualified to give instruction in the English language and the state superintendent of education should be empowered to enforce the use of the English language in all schools as the only medium of instruction in the sense indicated.

NATURALIZATION.—The fundamental evil in this country is the lack of real appreciation of the responsibility of citizenship. Since the war started, it is apparent that there has been an awakening of our own people to the idea that they have some duty to perform in connection with the making of an American citizen. Before a certificate of citizenship is handed to an immigrant the courts of this state should be sure that the alien has in his heart the seed of American national spirit, a real conception of the fundamental principles of our government. The procedure should be vested with dignity and impressiveness; any method in the way

of a short talk by the judge, or in the swearing in process, that would disclose the great privilege bestowed should be emphasized.

Prior to the Naturalization Act of August, 1906, there had been many abuses in connection with naturalization. The enforcement of the law throughout the country had become so lax and perfunctory that the act of being naturalized as an American citizen was in many places regarded as an almost meaningless procedure, and a large number of aliens were admitted to citizenship without in any sense being prepared therefor. By the Act of Congress of June 29th, 1906, important changes in the naturalization law, both in substance and procedure, resulted. Since the Act of 1906, the Bureau of Naturalization has had administrative charge and has sought to bring about a strict enforcement of the law and a compliance on the part of the alien with the conditions laid down by Congress as a prerequisite to their naturalization. The courts continue, as prior to the Act of 1906, to naturalize aliens, but now have the assistance of the naturalization service in developing the facts and bringing about enforcement of the law. In the year 1915 the Bureau of Naturalization entered upon a comprehensive scheme to get the public schools throughout the United States in all communities which contain adult aliens to organize for evening classes for this purpose and to co-operate with the Bureau in securing the attendance in such classes of all aliens not yet fully prepared for citizenship, both men and women. There is in this state an act—Chapter 356 of the Laws of Minnesota for 1917—providing as follows:

"Section 1. The school board of any common or consolidated school district or the school board of unorganized territory may establish and maintain public evening schools as a branch of the public schools, and such evening schools when so maintained shall be available to all persons over sixteen years of age who, from any cause, are unable to attend the public school of such district; and the branches taught at such evening schools and the general conduct thereof shall be subject to the direction and control of the state superintendent of education.

"Sec. 2. The state superintendent of education is hereby authorized and directed to make such investigations as may be necessary to advance the purposes of this act and to carry out the provisions thereof, and to that end he may appoint such additional assistants as may be necessary.

"Sec. 3. One-half the salary of all teachers who teach in evening schools in common, independent, or consolidated school districts shall be paid by the state, as appropriations are made by the legislature for that purpose which payment shall be made upon verified statements of account presented by the respective school districts and approved by the local superintendent of schools in all districts maintaining a state high school, or by the county superintendent of schools in the case of districts which do not maintain such state high schools."

The Act passed by our legislature unfortunately did not carry with it an appropriation in furtherance thereof. I advise that an effort be made towards securing appropriation to carry out the purposes of this Act.

The courts may have inherent power to cancel the certificate of citizenship of a naturalized disloyalist, and if they do not have such power, then a law should be placed upon our statute books empowering the court to cancel or vacate a certificate of citizenship of a naturalized person who

has been proven disloyal. The federal court in New Jersey has cancelled the citizenship papers of one Frederick W. Wursterbarth, a German, who became naturalized thirty-five years ago. His violent pro-German and anti-American attitude attracted wide attention some weeks ago and action was taken which resulted in a test of his fitness to retain the privileges of American citizenship. The court found that Wursterbarth had taken the oath of allegiance with a mental reservation, reserving his true allegiance to the country of his birth and thus failing to comply with the true intent of the law. He never was, in fact, an American citizen giving full allegiance to the United States and renouncing allegiance to the German Emperor. There are thousands of such citizens in the United States. Such men are as German in spirit as they were when they left Germany. At heart they are opposed to the United States and all that it has been fighting for in this war. They are far more dangerous than German subjects, for all our enemies are under close surveillance, while German-born persons if naturalized are presumed by law and by custom to be law-abiding and loyal. Under this cloak of protection the disloyal ones are carrying on their sinister work of sedition and treason. Canada was compelled to revoke the citizenship of German foreign-born persons naturalized during the last fifteen years. It was found that these persons as a rule were loyal only to Germany, having no regard whatever for the obligation of their oath of allegiance to their adopted country. Those Germans who are loyal need not fear that they will be made to suffer and if under suspicion can easily prove their loyalty. All governments are aware that it is a settled rule of German government to regard its subjects as subjects forever, without regard to their patriotism in other countries. The Delbrueck Law, in fact, enables Germans to perform dishonorable feats of pretended allegiance to two countries.

The facts developed during this war have proved conclusively that the German government has utilized this perfidious action as a method of propagandizing in enemy and neutral countries as well as a cloak for such crimes as arson, bomb throwing, and sabotage.

Professor Julius Goebel, of the University of Illinois, writes in a German paper: "The use of the German language is sufficient to prevent the Americanization of the German citizens of the United States."

The German church, the German schools, the German social clubs, the German language press, and the National German-American Alliance are described by Karl Junger of Germany, as means of promoting Germanization of America. Says Junger: "The value of the National German-American Alliance has been shown by the war."

The evidence before the Senate committee investigating the Alliance shows that Germanization in this country is not directed in the interest of the United States or in accordance with American culture, ideals, and traditions. It shows that Germanism here is directed towards supporting of Germany and in the furtherance of German aspirations, ideals, traditions, and domination. What the value of German culture is of itself is one question. How it is employed in this

country is quite another. To lose any culture is a loss, of course, but we can pay too great a price for foreign culture. We can afford better to be without German music and art, never to have heard of Goethe and Lessing, than we can afford to be disintegrated as a people and emasculated as a nation by any foreign culture howsoever meritorious of itself. The German is not here of natural right. He has been admitted as a privilege and when he becomes a citizen he makes a contract and takes an oath. When in spirit or in deed he violates his obligations he is forsworn. And everybody born here like everybody who comes here is bound in duty and in interest to help build up our nationality and in no manner or degree to tear our nationality down. Amalgamation is the constructive process in our nation building. It is a spiritual as well as a material process.

THE MINNESOTA BAR IN THE WAR.—There is no question about the loyalty of the Minnesota Bar. During the past year lawyers of our state have demonstrated their loyalty in a practical way. There must be always progressive work undertaken. As a definite step in the progress of action to be taken by our Bar, I recommend that this Association establish either a standing committee or a special committee of "standing size" on Americanization. Such a committee could accomplish much good for the state and country. Each year it could report the result of its work at the annual meeting and receive from members of the Association helpful suggestions. The members of this committee and members of the Association could actively interest themselves in the Americanization of our citizens. I further advise the Minnesota lawyer to familiarize himself with the naturalization law, with the alien custodian law, Soldiers' and Sailors' Civil Relief Act, and all recent laws prompted by the war that have to do with the welfare of the men in service and the people generally, in order to be equipped to give intelligent and practical service,—a service that will materially aid the foreign born and those of foreign parentage and the native born who have not felt the touch or absorbed the spirit of true national obligation.

GEORGE W. BUFFINGTON.

MINNEAPOLIS.

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THE MINNESOTA "BLUE SKY" LAW

PRIOR to 1910 a person could engage in the business of selling stocks, bonds, and other securities without limitation or restriction, except with reference to those of certain public service corporations. There were no statutes regulating either the seller or the sale of such property. Under this situation, people throughout the country lost each year thousands of dollars, by investing in stocks, bonds, and other securities offered by unscrupulous or misguided dealers and by dreamers and promoters of worthless enterprises. To remedy the evil and to protect the public from fraud, the legislatures of at least thirty states have enacted in recent years statutes known as "Blue Sky Laws," providing in some instances for the regulation of sellers of such securities, in others, of the sale of such property, and in still others, for both purposes. Prior to the enactment of these statutes, three or more persons could organize a corporation by filing articles of incorporation with the officer designated by law and paying the required fee. Thereupon they could proceed to issue and sell the corporate stock regardless of the value thereof, or whether the corporation had any future prospects, bright or otherwise. As a consequence the following conditions existed:

1. Numerous promotions were in progress in which commissions and other expenses incidental to the sale of the stock amounted to thirty, forty, or fifty per cent, and even more, of the selling price of the stock.

2. Mining and oil companies and various other fictitious enterprises were selling stock to secure money with which to develop properties not worth developing.

3. Many stocks and other kinds of securities were sold at grossly excessive prices and without regard to their actual value.

4. Men with "ideas" formed companies and took fifty-one per cent of the stock for their "ideas," the other forty-nine being sold to finance the project. Very often the "ideas" proved mere dreams and valueless, and only served to swell the sum total of business failures and the number of stock purchasing victims.

5. Companies were formed to manufacture or exploit patented appliances, articles and devices which were mechanically imperfect or impracticable.

6. There was no one to question the propriety or legality of the issuance of large blocks of stock for "good-will" or other similar intangible assets, and it was not uncommon to find new concerns whose only asset consisted of "good-will."

7. Stocks of concerns which were insolvent could be legally offered and sold, subject only to the restrictions against actual fraud.

8. Grossly excessive valuations were claimed for assets in order to justify a given price for the stock or to cover up losses in operation or other impairments.

9. Enterprises which were impossible of success were being promoted.

10. Foreign corporations which had no offices or places of business or permanent representative within a state sent their glib-tongued agents therein to sell their stocks and securities, and were often successful to a remarkable degree. If an investor found that he had been defrauded by false and fraudulent representations, he was compelled to seek redress in some foreign jurisdiction, or submit to his loss without complaint.

11. Deliberately planned frauds were common and often very remunerative to the promoters.

It was to guard against the evils growing out of such conditions, and thereby protect the public against the various brands of fraud arising therefrom, that the "Blue Sky Laws" have been enacted in so many states. The reasons for the legislation are well stated in the opinion of the Court in the case of *Standard Home Co. v. Davis*,[1] in these words:

[1] (1914) 217 Fed. 904.

"Experience has demonstrated the fact that some of the grossest frauds have been perpetrated on the public by investment companies by extravagant expenditures for salaries, agents' commissions, and other apparently legitimate purposes through officers who had practically nothing invested in the association, and whose character and reputation stamped them as adventurers and cheats. . . The dockets of the national courts have been crowded for the past few years with criminal prosecutions of persons charged with the use of the mails of the United States in carrying out fraudulent schemes by so-called investment companies and persons offering allurements to get rich quick. But those courts are only clothed with jurisdiction to prosecute those who, in carrying out their fraudulent schemes, make use of the mails, and then only after the commission of the offense. This necessarily affects only a small portion of those engaged in such schemes, and can in no wise act as a preventive. The states alone can provide for the prevention and punishment of all who commit frauds, although the mails are not used for their accomplishment, and enact laws to prevent the commission of these crimes. Legislation to prevent crime is of greater benefit to society than the punishment of the offender after the crime has been committed and innocent persons have been made to suffer."

The legislature of Minnesota enacted a "Blue Sky Law" at its session in 1917.[2] Those who drafted this act were fortunate in having before them the decisions of the Supreme Court of the United States, holding constitutional the statutes of the states of Ohio, South Dakota, and Michigan, in the cases of *Hall v. Geiger-Jones Co.*,[3] *Caldwell v. Sioux Falls Stock Yards Co.*,[4] and *Merrick v. Halsey & Co.*[5]

Prior to those decisions, many of the courts of the country, both federal and state, quite uniformly had held the "Blue Sky Laws" of the various states unconstitutional, on one or the other or all of the following grounds: (1) That such a law placed a burden upon interstate commerce; (2) that it deprived a person of liberty or property without due process of law; and (3) that it abridged the privileges of citizens of the United States. Typical of these decisions are those in the cases of *William R. Compton Co. v. Allen*,[6] *Alabama & N. O. Transp. Co. v. Doyle*,[7] and *Bracey*

[2] Laws of Minnesota 1917 Chap. 429.
[3] (1917) 242 U. S. 539, 61 L. Ed. 480, 37 S. C. R. 217.
[4] (1917) 242 U. S. 559, 61 L. Ed. 493, 37 S. C. R. 224.
[5] (1917) 242 U. S. 568. 61 L. Ed. 498, 37 S. C. R. 227.
[6] (1914) 216 Fed. 537.
[7] (1914) 210 Fed. 173.

v. Darst.[8] In the *Allen* case the Iowa statute was declared unconstitutional in that it unlawfully imposed a direct burden on interstate commerce and denied privileges to citizens of other states which were not imposed upon and which were granted to citizens of the state of Iowa. The Michigan law was held unconstitutional in the *Doyle* case, for the reason that it imposed a burden upon interstate commerce which was beyond the limits of the police power of the state. In the *Darst* case, the West Virginia statute was held unconstitutional, in that it denied the right of citizens of the United States to buy and sell property in the state, deprived them of their property without due process of law, denied them the equal protection of the laws, and imposed an unlawful restraint and burden upon interstate commerce. Although the statutes so declared invalid were amended or new ones enacted, seeking thereby to obviate the constitutional objections raised by the courts, the decisions continued along the same line, until the question was presented to and finally disposed of by the Supreme Court of the United States in the cases cited.

The Supreme Court in the cases involving the statutes of Ohio, South Dakota, and Michigan held that a law enacted by a state legislature, regulating the seller and sale of stocks, bonds, and other securities, for the purpose of preventing fraud, and the enforcement thereof constitute a proper exercise of the police power of the state, even though business purely private in its character may be regulated thereby; and that no right granted by the fourteenth amendment to the federal constitution is thereby violated or impaired. The court in its opinion in the Ohio case, (*Hall v. Geiger-Jones Co.,* supra), said upon this subject:

"It will be observed that these cases bring here for judgment an asserted conflict between national power and state power, and bring, besides, power of the State as limited or forbidden by the National Constitution.

"The assertion of such conflict and limitation is an ever-recurring one; and yet it is approached as if it were a new thing under the sun. The primary postulate of the State is that the law under review is an exercise of the police power of the State, and that power, we have said, is the least limitable of the exercises of government. *Sligh v. Kirkwood,* 237 U. S. 52. We get no accurate idea of its limitations by opposing to it the declarations of the Fourteenth Amendment that no person shall be deprived of his life, liberty or property without due process of law or denied

[8] (1914) 218 Fed. 482.

the equal protection of the laws. *Noble State Bank v. Haskell,* 219 U. S. 104, 110. A stricter inquiry is necessary, and we must consider what it is of life, liberty and property that the Constitution protects. . . We know that in the concept of property there are the rights of its acquisition, disposition and enjoyment—in a word, dominion over it. Yet all of these rights may be regulated. Such are the declarations of the cases, become platitudes by frequent repetition and many instances of application."

And after stating the terms and provisions of the Ohio law, which are substantially those of the Minnesota law, the court continued:

"It will be observed, therefore, that the law is a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them. Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties or other repressive measures. The name that is given to the law indicates the evil at which it is aimed, that is, to use the language of a cited case, 'speculative schemes which have no more basis than so many feet of "blue sky" '; or, as stated by counsel in another case, 'to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines and other like fraudulent exploitations.' Even if the descriptions be regarded as rhetorical, the existence of evil is indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government and that the appreciation of the consequences of it is not open for our review. *The Trading Stamp Cases,* 240 U. S. 342, 391."

In disposing of the contention that the Ohio statute was a burden on interstate commerce and therefore contravened the commerce clause of the federal constitution, the court in the same case said:

"There is no doubt of the supremacy of the national power over interstate commerce. Its inaction, it is true, may imply prohibition of state legislation but it may imply permission of such legislation. In other words, the burden of the legislation, if it be a burden, may be indirect and valid in the absence of the assertion of the national power. So much is a truism; there can only be controversy about its application. The language of the statute is: 'Except as otherwise provided in this act, no dealer shall, *within this state,* dispose' of certain securities 'issued or executed by any private or quasi-public corporation, co-partnership or association (except corporations not for profit) . . . without first being licensed to do so as hereinafter provided.'

"The provisions of the law, it will be observed, apply to dispositions of securities *within* the State and while information of those issued in other States and foreign countries is required to be filed (Secs. 6373-9), they are only affected by the requirement of a license of one who deals in them *within* the State. Upon their transportation into the State there is no impediment—no regulation of them or interference with them after they get there. There is the exaction only that he who disposes of them there shall be licensed to do so and this only that they may not appear in false character and impose an appearance of a value which they may not possess—and this certainly is only an indirect burden upon them as objects of interstate commerce, if they may be regarded as such. It is a police regulation strictly, not affecting them until there is an attempt to make disposition of them within the State. To give them more immunity than this is to give them more immunity than more tangible articles are given, they having no exemption from regulations the purpose of which is to prevent fraud or deception. Such regulations affect interstate commerce in them only incidentally. *Hatch v. Reardon,* 204 U. S. 152; *Ware & Leland v. Mobile County,* 209 U. S. 405; *Engel v. O'Malley,* 219 U. S. 128; *Brodnax v. Missouri,* id. 285; *Banker Brothers Co. v. Pennsylvania,* 222 U. S. 210; *Savage v. Jones,* 225 U. S. 501; *Standard Stock Food Co. v. Wright,* id. 540; *Trading Stamp Cases,* supra. With these cases *International Text Book Co. v. Pigg,* 217 U. S. 91, *Buck Stove & Range Co. v. Vickers,* 226 U. S. 205, and the *Lottery Case,* 188 U. S. 321, are not in discordance."

The court in the opinion in the South Dakota and Michigan cases, *Caldwell v. Sioux Falls Stock-Yards Co.,* supra, and *Merrick v. Halsey & Co.,* supra, referred to that which was said in the Ohio opinion, in answer to the contentions that the laws in those states did violence to the commerce and other clauses of the federal constitution.

In view of these decisions of the United States Supreme Court, it is settled that no "Blue Sky Law" patterned in all essential respects after the laws of the states of Ohio, South Dakota, and Michigan, having for its purpose the prevention of fraud by regulating transactions in securities, will be held to contravene any of the provisions of the federal constitution. The Minnesota law in all essential respects is the same as the laws passed upon and declared constitutional in the Ohio, South Dakota, and Michigan cases. It has not been called in question in the courts. But in view of the decisions referred to, it would seem that no question can well be raised as to its constitutionality,

and, if raised, surely will be disposed of in harmony with the principles laid down in those decisions.

Under the Minnesota law, a commission of three members, the Public Examiner, Insurance Commissioner, and Attorney General, or an assistant Attorney General appointed by him, was created, and designated as the State Securities Commission of Minnesota. The commission is given power thereunder to employ a secretary and such other assistance as it may deem necessary to enable it to carry out the provisions of the law. It has been in existence since July 1, 1917, and the work thereof, involving the solution of problems in a new field of governmental and administrative endeavor, affords an interesting subject for review in connection with a consideration of the law itself.

Certain securities and transactions are excluded from the operation of the law. These are enumerated in Section 2 thereof and are:

"(a) securities of the United States; or any foreign government; or of any state or territory thereof; or of any county, city, township, district or other public taxing subdivision of any state or territory of the United States or any foreign government; (b) commercial paper, or unsecured negotiable promissory notes, due in not more than eighteen months from their date; (c) securities of public or quasi-public corporations, the issue of which securities is regulated by a public service commission or board of supervising authority of this state or of any state or territory of the United States, or securities senior thereto; (d) securities of federal reserve banks, federal farm loan banks, state, savings or national banks or trust companies, or building and loan associations of this state, or of co-operative associations organized under sections 6479 to 6490 inclusive, general statutes 1913, for operating creameries, cheese factories, or rural telephone lines, where the authorized capital stock never exceeds fifteen thousand dollars, or of insurance companies under the control of the commissioner of insurance complying with chapter 385 General Laws 1913; (e) securities of any domestic corporation organized without capital stock and not for pecuniary gain, or exclusively for educational, religious, benevolent, charitable or reformatory purposes; (f) authorized securities as specified and defined by section 6393 of the General Statutes of 1913 and any amendment thereof, or securities of the classes specified and defined in section 3313, General Statutes 1913; (g) mortgages and notes or bonds secured by mortgage upon real or personal property where the entire mortgage is sold and transferred with the note or notes or bonds secured by such mortgage, or where the indebtedness secured is not more than seventy per cent of the fair value

of the property mortgaged; (h) increase of stock sold and issued to stockholders, or stock dividends; (i) securities sold pursuant to the order of any court; (j) isolated or single transactions."

In discussing stocks, bonds, and other securities, of course reference will be made only to such thereof as are not included within this list.

Investment company and dealer are defined in Section 3. An investment company is declared to be:

"Every person, firm, co-partnership, corporation, company or association (except those exempt under the provisions of this act) whether unincorporated or incorporated, under the laws of this or any other state, territory or government, which shall either himself, themselves or itself, or by or through others engage in the business within the state of Minnesota of selling or negotiating for the sale of any stocks, bonds, investment contracts or other securities, herein called securities, issued by him, them or it, except to a bank or trust company."

A dealer is defined in these words:

"Every person, firm, co-partnership, company, corporation or association, whether unincorporated or incorporated under the laws of this or any other state, territory, or government, not the issuer, who shall within the state of Minnesota sell or offer for sale any of the stocks, bonds, investment contracts, or other securities, herein called securities, issued by an investment company, except the securities specifically exempt under the provisions of this act, or who shall by advertisement or otherwise profess to engage in the business of selling or offering for sale such securities within the State of Minnesota, shall be known for the purpose of this act as a dealer. The term dealer shall not include an owner, not issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature, nor one who in a trust capacity created by law lawfully sells any securities embraced within such trust."

The law is framed to give the commission supervision over investment companies and dealers, as just defined, and the sale by them of stocks, bonds, and other securities, sufficient to enable the commission to prevent the perpetration of fraud in the sale thereof within the state; and, to this end, the violation of any of the provisions of law is made by Sec. 17 thereof a crime, punishable by a fine, imprisonment, or both.

The work of the commission has to do largely with investment companies. Under the definition given in the law, as above

set forth, any person or concern not included within the exemptions heretofore referred to, no matter how or where organized and no matter in what business engaged or where, selling or offering for sale, stocks, bonds, or other securities issued by him or it, in this state, except to a bank or trust company, is an investment company. A mining corporation, organized under the laws of Delaware, operating a mine in Montana, upon sending its agents into this state and through them offering shares of its capital stock for sale, becomes an investment company. A corporation organized under the laws of this state, operating a small manufacturing plant in some rural community, upon selling or offering for sale its corporate stock within the state, becomes an investment company. Investment company as so defined includes all forms of business, industrial, and commercial enterprises, except those exempt, selling or offering for sale their stocks, bonds, or other securities within the state.

A dealer is required to register, apply to the commission for a license to sell securities in the state, and in connection therewith furnish certain information, the same as an investment company, but, if he is of good business repute and the securities which he has to sell are those of licensed investment companies, he encounters no difficulty in securing a license. If, however, he has for sale the stock of an unlicensed company, which has never itself made application for a license, it is necessary for him to conduct proceedings through the commission the same as though the investment company itself were the applicant. With this statement relative to a dealer, we will henceforth confine our attention to the investment company.

An investment company, desiring to sell its stock or other securities in the state, must under Sections 4 and 6 register with the commission and make application for a license to so do, and in connection therewith furnish the commission with the information therein required. These sections, so far as they relate to information to be furnished, read as follows:

"Sec. 4. . . . The investment company's . . name, residence and business address, the general character of the securities to be sold or dealt in, the place or places where the business is to be conducted within this state, and where the business in this state is not to be conducted by the investment company . . . in person, then the names and addresses of all the persons in charge thereof. Said investment company shall . . . furnish said

Commission with such other information in addition to that above specified as said commission shall deem necessary in order to thoroughly acquaint such commission with the honesty and good faith of such . . . investment company, and the character of the business of said investment company. . . ."

"Sec. 6. Every investment company . . . who shall . . . promote . . . the sale or distribution of any such securities . . . shall . . . file a statement in writing . . . describing fully such securities, and furnishing to said commission true copies of all prospectuses, circulars, and advertisement used, or to be used in such sale or promotion, and said commission may make such investigation thereof and require such further information or proof with respect thereto as it may deem necessary to determine the character of such securities or of such promotion."

In addition to the information required under these two sections of the law, the investment company is always called upon to file copies of its articles of incorporation, by-laws, stock subscription contract, stock certificate; a list of officers, directors, and of promoters who each own more than five per cent of the capital stock; a statement showing the consideration received for the securities issued, and subscribed but unissued; a statement of assets and liabilities; and a profit and loss statement. The information required to be furnished both by the law and the commission, exclusive of such as might be contained in documents, is furnished upon blanks prepared by the commission and supplied to the applying investment company.

Upon receiving such application and information, the commission considers the same and either grants or denies the application or defers action until the applicant or securities offered or both have been further investigated, and in this connection the commission, under Sec. 7:

"may also make such special investigations as it may deem necessary in connection with the promotion or sale of any such securities to the end that the commission may be put in possession of all facts and information necessary to qualify it to properly pass upon all questions that may properly come before it, and to determine if the same is in violation of this act or of any of the acts of the legislature described in section 9 hereof, and to that end it shall have power to issue subpoenas compelling the attendance of any person and the production of any papers and books for the purpose of such investigation, and shall have power to administer oaths to any person whose testimony may be required in such investigation. It may also make or have made

under its direction a detailed examination and report of the property, business and affairs of such investment company, which investigation and examination shall be at the expense of such investment company, or of the dealer seeking to sell such securities. It may cause an appraisal to be made at the expense of said investment company or dealer, of the property of said investment company."

The ultimate question for determination in considering an application is always: Will the sale of the particular security work a fraud on the purchaser? The commission has interpreted the law to mean that the sale of a security must be classed as fraudulent where the purchaser thereof does not have a fair chance to gain by the investment. It is not sufficient that the money invested be secure against loss; there must be a fair chance to gain. A fair chance to gain may be precluded by the fact that the security purchased represents simply the device used by one with no assets of any kind, but with a visionary gold mine or something equally as attractive to delude the public, in furtherance of a deliberately planned fraud to enable him to accumulate wealth. There may be no chance to gain by reason of the fact that there is no possible chance of success on the part of the issuer of the securities, even though the same may be sold in the best of good faith. It is for the commission to ascertain the non-existence of such facts, before permitting the sale of securities. When an oil company applies for a license to sell its stock, the first question for the commission to determine is whether the company owns land containing oil, in such quantity as to justify the development of the property. Other questions must also be considered. To determine these matters, a geologist familiar with oil geology is employed. He goes to the land in question, determines the prospects with reference to the presence, quantity, and depth of oil; ascertains the cost of drilling and other details; and submits a written report to the commission. The same plan is carried out with reference to a mining company, applying for a license to sell stock. A mining engineer is employed, who investigates and reports to the commission relative to the quantity and grade of ore in the land of the company, the experience and ability of the manager, transportation facilities, location as to markets and labor supply. A man builds a farm tractor, organizes a corporation, and applies to the commission for a license to sell the stock thereof, to enable him to manufacture and place his tractor on the

market. The commission sends a mechanical engineer to inspect the tractor, and he reports with reference thereto. A man engaged in business, incorporated, a "going concern," may desire to sell stock to increase his business or for other reasons. The commission, in such case, wants to know all about the business, its past experiences, present condition, and future prospects. The commission obtains this information. The purpose in mind in all these investigations is to place before the commission the facts in a particular case, so that the commission may determine that the investor in the securities offered may not only not lose what he puts in but have a fair chance to make a reasonable profit on the investment. If the commission can not so determine, it refuses to permit the securities to be sold, for to sell the same would work a fraud on the investor. This does not mean that the commission attempts to remove ordinary business hazards, or limits the right to engage in speculative ventures so long as they are fairly conceived and honestly conducted.

After a license to sell securities has been issued, the commission may at any time, by reason of a violation of the law or some lawful order of the commission, suspend and in some cases revoke such license. Upon a denial of an application or a suspension or revocation of a license, the applicant or licensee, as the case may be, may request a hearing. The commission is required to grant such request. If the commission decides against the applicant or licensee, the matter may be taken to the supreme court of the state on certiorari proceedings.

The commission always, in case it issues a license to a company, issues the same upon one or more conditions. The amount of stock which may be sold is always limited. A company may apply for a license to sell a half-million dollars worth of stock. If upon investigation it is found that one hundred thousand dollars is all the company actually needs, it is licensed to sell not to exceed one hundred thousand dollars worth of its stock. Frequently it happens that a company's condition is such as not to justify a sale of its common stock, but to justify a sale of its preferred stock, the same being preferred as to dividends, and assets in case of liquidation. The company is licensed to sell a certain amount of preferred stock only. A company may ask to be permitted to sell its stock for an amount considerably above par value. An examination discloses that the stock is worth par and no more.

The company is permitted to sell its stock at par, but for nothing in excess thereof. Other conditions are sometimes imposed, two of which deserve special mention.

The commission, while recognizing that those who are promoting a legitimate enterprise are entitled to compensation for their services in that behalf, also recognizes that they should not be paid more than the reasonable value of such services. The custom among many promoters, prior to the enactment of the "Blue Sky Law," was to take fifty per cent, or even more, of the amount obtained from the sale of stock, to cover promotion expenses. This meant that only half of the selling price was used to develop and promote the business. A company which commenced business under such circumstances had an impairment of fifty per cent of its capital at the outset; naturally it was difficult to overcome such impairment and many failed to do so. Consequently the commission, when issuing a license, fixes the amount which may be charged for promotion, in the case of mining and oil companies, not to exceed twenty per cent of the sale price of the stock; industrial concerns, not to exceed fifteen per cent; and financial corporations, not to exceed ten per cent.

The commission, before issuing a license to sell a given security, must find that the same is worth the price at which it is to be sold. This necessitates a careful consideration of the assets of the applying company. At what figures can assets be valued? Where they consist in a large part of intangible assets, such as patents, secret processes, or good will, it is nearly always difficult, if not impossible, to determine the value thereof. Applicants always have exaggerated ideas with reference to the value of such assets. They place the value thereof at big figures and issue large blocks of stock in payment therefor. In such cases, the commission usually requires one of two things before issuing a license, either the cancellation of a large part of such stock or the placing thereof in the hands of a trustee, under a written agreement, to be held by him until the value of the assets for which the stock was issued has been established on an earnings basis; while the stock remains in the hands of the trustee, the owners thereof are not permitted to participate in the earnings of the company. As soon as such earnings show that the intangible assets referred to are worth an amount equal to the par value of the stock issued therefor,

the trust agreement is terminated. The effect of requiring the escrowing of stock, if it may be termed as such, is to protect investors and at the same time not work an injustice on the persons holding the stock issued in payment of assets of unknown but occasionally of great value.

The investigations referred to are made and the conditions imposed by the commission under authority conferred by the "Blue Sky Law." As heretofore stated, the principle upon which legislation of this kind is sustained is that such legislation is a proper exercise of the police power of the state, its right to protect its citizens against fraud growing out of the sale of securities. That inconveniences may result from the enforcement of such legislation was recognized by the United States Supreme Court in its opinion in the case of *Merrick v. Halsey & Co.*, supra, but in that connection the court said:

"It burdens honest business, it is true, but burdens it only that under its forms dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and provision made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the State by such considerations would make it impotent to discharge its functions. It costs something to be governed."

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JUDGES IN THE PARLIAMENT OF UPPER CANADA.

WHEN Pitt in 1791 introduced in the House of Commons the Canada Act or Constitutional Act, which he afterwards declared to be the object of his greatest pride, and under which the division of the old Province of Quebec into two Provinces of Upper and Lower Canada was to be effective, with almost his first word[1] he declared that the Bill was intended to give Canadians "all the advantages of the British Constitution." Lord Grenville in the House of Lords used much the same language.[2] Burke, Fox, and some others were not convinced that the Act in reality carried out the expressed intention; but there can be no doubt of the general object of the Bill.[3]

The first Lieutenant Governor of Upper Canada (which with Lower Canada was organized under the Constitutional Act in 1792), John Graves Simcoe, in his Address to the Houses of Parliament of Upper Canada at their first meeting, September, 1792, spoke of the Act as establishing the British Constitution and its forms in the Province;[4] at the close of the Session his address stated that the Constitution of the Province was "the very image and transcript of Great Britain."[5]

In analogy to the British form, there were two Houses of Parliament in each Province, the Legislative Council and the Legislative Assembly.[6]

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[1] See "The Parliamentary History of England" published by Hansard and often quoted by his name. Volume 28, p. 1377. (I shall use the convenient form of citation, "28 Hans. 1377.") The Act was (1791) 31 Geo. III Chap. 31 (Imp.).

[2] 29 Hans. 656, 657.

[3] The debate in the House of Commons lasted five days; it was during this debate that the historic quarrel took place between Burke and Fox; it is difficult to make out the real cause of the rupture—probably there was much more than appears on the surface; if not, Burke acted most childishly. See 29 Hans. 103-113; 359-430.

[4] Sixth Report of the Bureau of Archives for the Province of Ontario, Toronto, 1911, pp. 2, 3; Seventh ibid., 1911, pp. 1-3. (These very valuable reports will be cited "6 Ont. Arch. Rep. 2, 3," etc.)

[5] 6 Ont. Arch. Rep., 18; 7 ibid., 1-3.

[6] Before this time there had been only one legislative body. In the Royal Proclamation of 1763 a promise was contained that an elective Assembly would be called when the time came; and the early Governors had instructions to call such an Assembly at the proper time. But this was not found practicable; the Quebec Act

The Legislative Council corresponded to the House of Lords, appointive, but without the hereditary feature.[7] The Legislative Assembly elected by the people corresponded to the House of Commons and not unfrequently claimed the name and privileges.

In England there never was any objection to Judges becoming members of the Upper House. In early times, e. g., in the reign of Edward I, and for long afterwards, the Judges were regularly summoned to Parliament and had their places assigned among the Lords. Their summons differed, indeed, from that to the "Lords Spiritual and Temporal" (the Prelates, the Earls, and Barons), but they were none the less members of the House. Whether they lost their right to a place in Parliament when in the reign of Richard II the Council was separated from Parliament, or at what later time, is uncertain; but certainly it was gone before the reign of Henry VIII. When they lost their seats in the House of Lords, they were not relieved from the duty of attending the House to give their opinion on matters of law if and when called upon; and at length in 1660, at the time of the Restoration, the House of Lords decided that writs should be issued "to the Judges whereby they may attend in the House as *Assistants.*"[8]

This was conclusive of the functions, with respect to the House of Lords, of the Judges as such; but it did not prevent a Judge from being a Member of the House or "Peer of Parliament."

William Murray was in 1756 appointed Chief Justice of the King's Bench and contemporaneously created a Peer by the title

of 1774, 14 Geo. III, Chap. 83, put a stop to the scheme and made the Council the legislating body. The members of the Council were appointed by the Crown either immediately or through the Governor —see my paper on "Pre-Assembly Legislatures in British Canada." Trans. Royal Society of Canada for 1918, Sec. II. pp. 109-134.

[7] There was in the Act, indeed, a provision for hereditary seats on the Legislative Council, but it was never brought into force; and so Canada escaped the curse of hereditary legislators.

[8] Journals of the House of Lords, Vol. XI, p. 52, June 4, 1660. This was, of course, the "Convention Parliament" which was ostensibly called merely to secure the return of the King; but it was found (or at least considered) necessary and expedient that it should undertake other labours, and its acts were afterwards recognized as lawful. The curious will find all the learning on the subject in Pyke's "Constitutional History of the House of Lords," London and New York, 1894, pp. 47, 48, 195, 196, 246, 247, 248. Anson points out in his "Law and Custom of the Constitution," 2nd ed., Vol. 1, pp. 179, 180, that the common idea that the "Peerage" and the "House of Lords" mean the same thing is an error; there are Peers who are not Lords of Parliament and Lords of Parliament who are not Peers.

of Baron Mansfield, and from that time the Chief Justices of the King's Bench have generally been made Peers.[9]

The first Chief Justice of the Common Bench to become a Peer was Sir Charles Pratt who was created Lord Camden in 1765; some of his successors have also been Peers of Parliament.[10]

The first Chief Baron of the Exchequer who was a Peer was Sir John Singleton Copley, who became Lord Lyndhurst when he was appointed Lord Chancellor in 1827, but did not become Chief Baron until 1831; only one of his successors became a Peer.[11]

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[9] The first Chief Justice of the King's Bench to become a Peer was Sir Robert Raymond who became Baron Raymond in 1731. Sir Phillip Yorke became Lord Hardwicke on being appointed Lord Chancellor. Sir William Lee was never a Peer, nor was Sir Dudley Ryder. Mansfield was followed by Sir Lloyd Kenyon who became Lord Kenyon on his appointment as Chief Justice in 1788; Sir Edward Law, Lord Ellenborough on his being appointed Chief Justice in 1802; Sir Charles Abbott, Lord Tenterden, 1827, having become Chief Justice, 1818; Sir Thomas Denman, Lord Denman, 1834, having become Chief Justice in 1832; Sir John Campbell, Lord Campbell, 1850; Sir Alexander J. E. Cockburn, Chief Justice, 1859, never became a Peer; Sir John Duke Coleridge, Chief Justice and Lord Coleridge, 1880; Sir Charles Russell became a Life Peer, Lord Russell of Killowen, on being appointed Lord of Appeal in Ordinary, May, 1894, and became Chief Justice two months later. Sir Richard Webster became Lord Alverstone and Master of the Rolls in 1899, Chief Justice, 1900; Sir Rufus Isaacs, Chief Justice, 1913, Lord Reading, 1914.

Chief Justices Coke, Hale, and Holt are often styled Lord Coke, Lord Hale, Lord Holt, (especially by American writers—I have seen even "Lord Cockburn" in one American legal journal)—this was the custom of their day. Judges were at that time often styled "Reverend," "Very Reverend," "Most Reverend," etc., titles now reserved for the clergy. The address "My Lord," "Your Lordship," "Their Lordships" is still used in the English Courts and our own.

[10] Sir John Eardley Wilmot and Sir William de Grey followed; the latter became Lord Walsingham, 1780, after his resignation. Then came Sir Alexander Wedderburn, Chief Justice and Lord Loughborough, 1780; Sir James Eyre; Sir John Scott, Chief Justice and Lord Eldon, 1799; Sir Richard Pepper Arden, Chief Justice and Lord Alvanley, 1801; Sir James Mansfield; Sir Vicary Gibbs; Sir Robert Dallas; Sir Robert Gifford, Chief Justice and Lord Gifford, 1824; Sir William Draper Best, Chief Justice, 1824, Lord Wynford on his resignation in 1829; Sir Nicolas Conyngham Tindal; Sir Thomas Wilde, Chief Justice, 1846, Lord Truro, 1850; Sir John Jervis; Sir Alexander J. E. Cockburn; Sir William Erle; Sir William Bovill; Sir John Duke Coleridge, Chief Justice, 1873, Lord Coleridge, 1874.

[11] They were Sir James Scarlett, Chief Justice, 1834, Lord Abinger, 1835; Sir Frederick Pollock, Chief Baron, 1844; Sir Fitzroy Edward Kelly, Chief Baron, 1866.

The Masters of the Rolls were early in the House of Lords; Sir John Colepeper became Lord Colepeper in 1644, the year after his appointment to the Mastership, but he had no successors in the House for nearly a century and three-quarters. Of late years it has rather been customary to raise the Master to the Peerage.[12] But a number of Masters never became Peers, even for life.[13]

There never has been an instance of a puisne Judge (or Baron) being raised to the Peerage, but there is a modern instance of a Peer of the Realm being appointed a puisne Judge.[14] There never was any objection in law to either proceeding, and occasionally the puisne either when made Chief or later was elevated to the Peerage.[15]

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[12] Sir Lloyd Kenyon, M. R., 1784, became Lord Kenyon when he was appointed Chief Justice of the King's Bench, 1788. Sir Richard Pepper Arden, M. R., 1788, became Lord Alvanley when appointed Chief Justice of the Common Bench, 1801; Lord Gifford became M. R., 1788, after his elevation to the Peerage the same year; Sir John Singleton Copley, M. R. in 1826, became Lord Lyndhurst in 1827, when made Lord Chancellor; Sir Charles Christopher Pepys, M. R., 1834, became Lord Chancellor and Lord Cottenham, 1834; Henry Bickersteth became Lord Langdale when appointed M. R. in 1836. Sir John Romilly, M. R., 1851, became Lord Romilly, 1866; Sir William Balliol Brett, M. R., 1883, became Lord Esher, 1885; Sir Nathaniel Lindley, M. R., 1897, became a Baron for life when made Lord of Appeal in 1899; Sir Richard Everard Webster, M. R., May 10th, 1899, was made a Peer, Lord Alverstone, a month afterwards and became Lord Chief Justice in four months thereafter. Sir Richard Henn Collins, M. R., 1901, became a Baron for life when made Lord of Appeal in 1907; Sir Herbert Hardy Cozens-Hardy, M. R., became a Baron in 1914.

[13] William Lenthall, 1643; Sir Harbottle Grimston, 1660; John Churchill, 1685; Sir John Trevor, 1685 and 1693; Sir Henry Powle, 1689; Sir Joseph Jekyll, 1717; John Verney, 1738; William Fortescue, 1741; Sir John Strange, 1750; Sir Thomas Clarke, 1754; Sir Thomas Sewell, 1764; Sir William Grant, 1801; Sir Thomas Plumer, 1818; Sir John Leach, V. C. E., 1827; Sir George Jessel, 1873 (perhaps the greatest of all the Masters of the Rolls); and Sir Archibald Levin Smith 1899.

[14] Bernard John Seymour Coleridge, a practising Barrister, who on the death of his father, Chief Justice John Duke, Lord Coleridge, 1894, had succeeded to the Peerage, was on October 12, 1907, appointed a Justice of the King's Bench Division of the High Court of Justice.

[15] There is one rather curious instance of promotion. Sir John Fortescue Aland, a puisne Judge of the Queen's Bench, 1718, was transferred, 1729, to the Common Bench and created Baron Fortescue of Credan in Ireland, 1746.

It will be seen that there was no objection to a Judge sitting as a Peer of Parliament in the House of Lords, but that he had as Judge no right to a seat.

In the English House of Commons the case was different. So long as the Judges sat in the House of Lords they were necessarily excluded from the Lower House. There is no known instance of an English Common Law Judge sitting in the House of Commons except during the time of the Commonwealth; they were considered disqualified at the Common Law, and a resolution was passed by the House of Commons in 1605 excluding them, "they being Attendants as Judges in the Upper House."[16]

The Scottish Judges had no such duty in the House of Lords; and they continued to be qualified to sit as members of the House of Commons of Great Britain for several years after the Union in 1707, but they were excluded by Statute in 1734.[17] Ireland had not been united to Great Britain with one Parliament when the Constitutional Act was passed in 1792; and consequently the constitutional rules of that Island were not considered in determining the constitution of the Canadas.[18]

On the Chancery side, of course, the Lord Chancellor could not be a member of the House of Commons; but the Master of the Rolls, not being a member of or attendant in the Upper House, was not disqualified at the Common Law; it required a statute, and no statute was passed disqualifying him until the general Act of 1875.[19]

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[16] 1 Commons Journal, p. 257; Anson's Law and Custom of the Constitution, 2nd ed., 1892, p. 76; Porritt's "The Unreformed House of Commons," Cambridge, 1903, Vol. 1, p. 220. The recent legislation (1875) 38, 39 Vict. Chap. 77, Sec. 5 (Imp.) has taken the place of this rule.

[17] 7 Geo. II, Chap. 16, Sec. 4. "The legislation was then hurriedly brought about to meet a political emergency growing out of the Earl of Islay's management of Scotland for Walpole." Porritt, Vol. 1, p. 220.

[18] It may, however, be said that Judges were allowed to become members of the Irish House of Commons; even after the Union and notwithstanding the far reaching statute of 1801, 41 Geo. III, Chap. 52, Irish Judges were not excluded until 1821 when the Statute, 1, 2, Geo. IV, Chap. 44 was passed which by Sec. 1 provided for their exclusion.

[19] 38, 39 Vict., Chap. 77, Sec. 5. See Taswell Langmead's "English Constitutional History," 1905, p. 339; May's Parliamentary Practice, 11th ed., p. 30; also the Debates on the Judges' Exclusion Bill, 1853, 125 Hans. (3rd ser.) p. 1080; 127 ibid., 993. The Judge of the High Court of Admiralty was excluded by (1840) 3, 4, Vict., Chap. 66

By the Constitution of Britain, then, at the time of the institution of the Province of Upper Canada, there was no objection to any Judge, Common Law or Equity, sitting as a member of the Upper House; no Common Law Judge could sit as a member of the House of Commons, but there was no objection to an Equity Judge, if he was not connected with the House of Lords as Peer or Speaker.

There was, however, another body at Westminster, the Cabinet, to which anyone a member of either House could belong. In the Province the correlative of this was the Executive Council, but there was no necessity for an Executive Councillor belonging to either House of Parliament.

UPPER CANADA—THE LEGISLATIVE COUNCIL.—The Legislative Councillors were nominated by the Crown and held their office for life; from the beginning the Chief Justice of the Province was a member of this House and Speaker appointed as such by an instrument under the Great Seal of the Province.[20] This was by analogy to the duties of the Lord Chancellor; the Chief Justice of the Province was, indeed, a Common Law Judge, but the Lieutenant Governor was himself the Chancellor of the Province, being entrusted with the Great Seal, and he could not sit in the Legislative Council. Accordingly the highest judicial officer in the Province was made Speaker. This practice continued during the whole of the separate existence of Upper Canada and until the union of the Canadas by the Union Act of 1840.[21]

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[20] It is sometimes said that the Chief Justice filled this office (and that of President of the Executive Council) ex officio—see, for example, General Robinson's "Life of Sir John Beverley Robinson, Bart,," etc., Edinburgh and London, 1904, at pp. 199, 200—but this is an error. The Constitutional Act (1791) 31 Geo. III, Chap. 31, by sec. 12 provides "that the Governor or Lieutenant Governor of the . . . Province . . . or the Person administering His Majesty's Government therein . . . shall have power and authority from time to time by an Instrument under the Great Seal of such Province to appoint and remove the Speakers of the Legislative Councils . . ."

[21] 3, 4, Vict., Chap. 35. This continued the power of the Governor to appoint and remove the Speaker of the Legislative Council, Sec. 9. Sir John Beverley Robinson was Chief Justice of the Province until 1862, and by that time the Act of (1857) 20 Vict., Chap. 22 (Can.) prevented anyone (not being a Minister of Crown or a Member of the Executive Council) who held any office at the nomination of the Crown with an annual salary from being eligible as a Member of either House.

The first seven Chief Justices of the Province were Members and Speakers of the Legislative Council and were undoubtedly most useful in promoting useful legislation.

The first Chief Justice, William Osgoode, (1792) an English Barrister, was warmly praised by Lieutenant Governor Simcoe, although Simcoe had serious doubts "whether any of the gentlemen of the Law (excepting the Chief Justice) should have a seat in the Executive or even in the Legislative Council, unless in the latter it be necessary to prevent the Judges from being elected in the House of Assembly as is now the practice in New Brunswick."[22] Osgoode is believed to have drawn the Act for abolishing slavery in 1793; and it is certain that he drew the Acts introducing the English civil law, 1792, and establishing a Court of King's Bench in 1794; he also drafted a Marriage Act in 1792. When Osgoode left Upper Canada in the summer of 1794 to become Chief Justice of Lower Canada, Simcoe wrote to King, the Under Secretary at Westminster, "I shall feel an irreparable loss in Mr. Chief Justice Osgoode; I hope to God he will be replaced by an English lawyer."[23] John Elmsley (also an English Barrister) was appointed in 1796; he came to Upper Canada after Simcoe had left the Province and before his successor, General Peter Hunter, arrived in 1799; until the arrival of Hunter, Peter Russell, the President of the Executive Council, was Administrator of the Government and he appointed Elmsley to the Legislative Council and as Speaker thereof. Elmsley also took an active part in framing legislation and guiding it through the Upper House. During his time the Executive Council decided that

[22] Letter, Simcoe to Secretary Dundas, London, August 12th, 1791, Can. Arch., Q. 278, pp. 283 et seq. He lived up to his views; while he appointed several to the Councils none of them was a lawyer except (Sir) David William Smith and he was a lawyer only in name, having received his licence to practise as an Advocate under the Act of 1794 which authorized the Lieutenant Governor to license not more than sixteen persons to act as Advocates and Attorneys. He had no legal training and was one of the four Advocates who did not become Barristers when the Law Society of Upper Canada was organized in 1797.

Simcoe also appointed Richard Cartwright, John Munro, Richard Duncan and Robert Hamilton who were judges of one or other of the Courts of Common Pleas, and also Peter Russell who afterwards acted as a Judge of the Court of King's Beach, but none of them was a "man of law."

[23] Letter, Simcoe to King, Navy Hall, June 20, 1794. Can. Arch. Q. 280 pt. 1, p. 176; he did not want a Chief Justice from the American Colonies—such as were Peter Livius and William Smith in Lower Canada with whom the Governors found it hard to get along.

the Reports of Legislation for the Home Government should be prepared by the Chief Justice and the Attorney-General, concerning the Bills originating in the Legislative Council and the Legislative Assembly respectively. Elmsley's reports are most instructive and should be read by all who would understand our early legislation.[24]

When in 1802 Chief Justice Elmsley left the Province to become Chief Justice of Lower Canada, he was succeeded as Chief Justice of Upper Canada by Henry Allcock,[25] another English Barrister who had been appointed a puisne Judge of the Court of King's Bench of Upper Canada in 1798 on the recommendation of Elmsley.[26] Allcock was summoned to the Legislative Council in January, 1803, and made Speaker.[27] While Allcock was puisne Judge, a scheme of establishing a Court of Chancery was in the air. He desired to be Master of the Rolls in the Court to be established, the Lieutenant Governor of course

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[24] See, for example, his report, July 23, 1799, of the Acts of 1799, Can. Arch., Q. 287, pt. 1, pp. 1-6. The Report is made to his Honour the Administrator, Peter Russell (General Peter Hunter, the second Lieutenant Governor, did not arrive until August 1799), and points out that one of the Acts had been prepared by him "in obedience to verbal instructions from" His Honour; another was "verbatim the same as that drawn by the Attorney General (John White) and transmitted to Europe in 1797 except that the passages objected to by His Grace the Duke of Portsmouth are omitted," etc., etc.

[25] The name is almost invariably spelled "Alcock" by our historians and legal writers. He always spelled it "Allcock," as will be seen on the Records of the Court of King's Bench. He was remotely related to the family of Pepys, the well-known diarist.

[26] In a letter to King, the Under Secretary, dated from Upper Canada, October 25th, 1797, Elmsley recommends for the third seat on the King's Bench (he himself occupying the first, and William Dummer Powell the second) "Henry Alcock of Lincoln's Inn, formerly a pupil and still an intimate friend of your Brother Edward; Richard Grisley of the Midland Circuit . . . ; Samuel Rose of Chancery Lane, Editor of the late edition of Comyn's Reports; Benjamin Winthrop and John Williams, both of Lincoln's Inn and both well known to your brother Edward." Can. Arch., Chap. 283, p. 302. Of these Samuel Rose is the only one known to fame; he was Cowper's friend. Williams was not the John Williams who with Burn brought out the 10th and 11th editions of Blackstone's Commentaries. That John Williams was of the Inner Temple and was a Serjeant from 1794.

[27] The Journal of the Legislative Council notes that at York on Thursday the 27th, January, 1803, "the Honourable Henry Allcock produced his Writ of Summons to attend the Legislative Council under the Great Seal of the Province" and that he was sworn in. Then "he also produced a Commission under the Great Seal of the Province appointing him Speaker of the Legislative Council. Which was likewise read and he took his seat accordingly." 7 Ont. Arch. Rep., (for 1910) p. 175.

being the Chancellor.[28] He drew up in 1801 an admirable plan for such a Court which was submitted to and approved of by the Chief Justices Osgoode and Elmsley; the Home Authorities did not look upon the scheme with enthusiasm and it was not carried into effect.[29]

Chief Justice Allcock went to England in 1804 and in his absence the Honourable Richard Cartwright, a layman, but who had been one of the Judges of the Court of Common Pleas for the District of Mecklenburg (renamed the Midland District in 1792), was given a Commission as Speaker and officiated for the Sessions of 1805 and 1806; Allcock did not attend at either session.

In the latter year, Allcock succeeded Elmsley as Chief Justice of Lower Canada and was succeeded as Chief Justice of Upper Canada by the Attorney General, Thomas Scott, a Scotsman, but a member of the English bar.[30] Having employment under the Crown in Lower Canada, he was in 1800 on the death of John White, the first Attorney General of the Province of Upper Canada, appointed his successor.[31]

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[28] Elmsley, writing to King from York, February 1, 1799, about Allcock, "my friend . . . appointed at my request" goes on to say, "Alcock hears that a Court of Equity is to be established with a Master of the Rolls and he wants it in lieu of the King's Bench."

[29] See letter, Lieutenant Governor Hunter to the Duke of Portland, York, August 1, 1801, Can. Arch. Q. 290, pt. 1, pp. 88 et seq. Portland's answer, Downing Street, October 13th, 1801, Can. Arch., Q. 290, pt. 1, pp. 95-112; Hobart's letter to Hunter, Downing Street, April 8, 1802, criticised the scheme, Can. Arch. Q. 292, pp. 22 et seq., and it was revised. A carefully prepared scheme was again submitted to the Home authorities: letter, Hunter to Lord Hobart, York, November 18, 1802, Can. Arch., Q. 293, pp. 105 et seq.; letter Allcock to Hunter, York, November 17, 1802, Can. Arch., Q. 293, p. 111,—but it does not seem to have been approved. When Allcock was going to England in 1804, it was revived, but apparently it fell through, as we hear nothing further of it; Hunter to Lord Camdon, York, September 15th, 1804, Can. Arch., Q. 297, pp. 140, 141, 164.

[30] He was the son of the Reverend Thomas Scott, a Minister of the Kirk of Scotland, and intended to follow the same sacred calling. Like many other "probationers," he became a tutor; and while such in the family of Sir Walter Riddell, a noted Advocate of Edinburgh, he was persuaded by his employer to study law.

[31] John White was killed in a duel in York (Toronto) January, 1800; Hunter wrote to the Duke of Portland from Quebec, February 10, 1800, (Can. Arch., Q. 287, pt. 1, p. 106) that "Mr. Gray the solicitor General being a very young man not as yet possessing sufficient professional knowledge and there being no person in either of the Canadas who I could recommend as well qualified to fill that Station, I must therefore rely upon Your Grace sending out as soon as possible a Gentleman sufficiently qualified in all respects to fill that

On being appointed Chief Justice, he received a summons to attend the Legislative Council as a Member, and also a Commission under the Great Seal from the new Lieutenant Governor, Francis Gore;[32] and he continued to be Speaker until his resignation in 1816.

Thus far it cannot be said that the Judges who were members of the Legislative Council played any part in the government of the Province except as carrying out the policy determined on by the Governor; except in mere matters of detail there is no evidence that any of them had any influence with the Governors in determining their policy. They were all members of the Executive Council, which to a certain extent corresponded to the Cabinet in England; but "Governor" was not a lucus a non lucendo; the Governor actually governed and his Executive Councillors were responsible to him and to the King only.

Of the next incumbent of the Chief Justiceship of the Province, William Dummer Powell, the same cannot be said. Born in Boston, Massachusetts, before the Revolution, of Loyalist stock, educated in Boston, in England, and in the Low Countries, a practising lawyer in Montreal, he was in 1789 appointed First Judge of the Court of Common Pleas for the District of Hesse (Detroit) and in 1794 became the first puisne Judge of the Court of King's Bench. A man of great ability and learning, of more energy and ambition, he in 1816 after many years of waiting, when often hope deferred made the heart sick, attained one of the objects of his desires, the Chief Justiceship of the Province. He was summoned to the Legislative Council and received a Commission as Speaker.[33] His appointment as Chief Justice was due to the recommendation of Lieutenant Governor, Francis Gore,

important office," to which Portland replied from Whitehall, July 24th, 1800, (Can. Arch., Q. 270, A. p. 209) that "Thomas Scott, Esquire, of Lincoln's Inn" had been appointed.

[32] At the opening of the Session of 1807, he produced his Writ of Summons to attend the Legislative Council and also his Commission as Speaker, York, February 2, 1807, 7 Ont. Arch. Rep. 275.

[33] Powell had headed the list of persons recommended by Lord Dorchester for both the Executive and Legislative Councils, but for some reason, still not clear, he was not appointed. It seems not improbable that a suspicion of his wholehearted loyalty had something to do with this: this suspicion was undoubtedly entertained in many quarters for years. It apparently began with an illtempered remark of the Scottish Surgeon-Judge Mabane, Judge of the Court of Common Pleas in the old Province of Quebec and was originally based upon Powell's going to and remaining for some months in Boston, after the peace of 1783, in the attempt to get back his father's

who had a high opinion of his merits and to whom he had been useful as a member of the Executive Council—especially in the storm in a mustard pot of the quarrel with William Firth who had succeeded Scott as Attorney General.[84]

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confiscated property. A more precise accusation was afterwards made against him at Detroit, based upon a letter found in his room which he always (and apparently with truth) contended was forged. He, however, went to England to clear himself of the suspicion. Powell also was first on Dorchester's list of Legislative Councillors, but did not appear on the list of Executive Councillors recommended by Sir John Johnson (son of the celebrated Sir William Johnson) Superintendent of Indian Affairs in Canada, who expected himself to be appointed the first Lieutenant Governor of Upper Canada. When Powell was absent in Spain in 1807 Lieutenant Governor Francis Gore was urged to appoint him to the Executive Council; but Powell did not accept at the time because there was no seat with a salary attached; later on he received an appointment with a salary.

[84] Some account of this row is given in Kingsford's History of Canada, Vol. VIII, pp. 113, 114. The following is an account given by Powell himself, taken from a MSS in the Toronto Public Library:

"From this period (i. e., from his appointment to the Executive Council) Mr. P. was much in the confidence of the Lt. Governor, who engaged him in various attempts to correct abuses which had been long sanctioned. The first was a gross injustice to the Secretary of the Province, who was the organ for issuing Patents to the Grantees of Land, and who, as a remuneration, had been assigned a due proportion of the fee allowed by the King to be taken on each Patent.

In this distribution of the fee, the Atty. General's claim to any was questioned by the Secretary of State, as all the Patents were printed from one form, but at the same time, upon a representation by the Atty. General that it was his duty to Engross on each Patent, his Grace consented that an adequate fee for that Service should be carved out of the various proportions of the other Patent Officers. Under pretext of this Sanction one-half the fee assigned to the Secretary of the Province was taken from him for the Atty. General, and a further deduction was made from the Secretary's Share, for the Clerk of the Council, who had really no privity with the Patent, his duty being concluded with the order made on the Petition for a Grant. The Attorney had not long enjoyed the claim to engross the Patent, for which duty he received half the Secretary's fee, before he represented to his friends in the Council that the engrossing the Patent, which he claimed as a right, was in fact the Duty of the Secretary, and prayed that it might be transferred to that Officer. The Secretary made no Objection to the Service, but very naturally demanded that his full fee should be restored to him; this just demand was refused, and he was peremptorily required to engross the Patents and leave the half fee with the Attorney. The undivided fee on ordinary Grants was small, and scarcely compensated the Stationer, but the major part of the Patents were gratuitous from the Crown, and the half fee only was accounted for to the Secretary, who was out of pocket by each half fee Patent four shillings, for in addition to the hurt proceeding on the division of the fee, the Patent was required to be engrossed on parchment by the Secretary though the Attorney General had been allowed to use Paper. This Course could not escape animadversion, and the Executive Council strongly recommended relief to the Secretary, declaring that the further imposition upon that officer must be ruinous, as he actually lost six shillings by each half fee Patent, and they amounted to many thous-

Powell was of great assistance to Gore also in his controversy with Wyatt, the Surveyor General, which was to a great extent on a line with the Firth squabble.[35] Gore was not easily led, but generally he was guided by Powell's advice, which caused Powell to be regarded as the real master of the administration; and consequently he has been credited with some proceedings as to which he was wholly innocent.[36]

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and in each year. It will scarcely be credited that the Officer to whom this report was made, Lt. Governor Hunter, who actually profited by each Patent in the proportion that the Secretary lost, took no other notice of this representation than to procure from the Secretary of State permission to augment the gross fee on the Patent, leaving the division as before. Lt. Gov. Gore was sensible of this Injustice, and the first duty in the Executive Council imposed on Mr. P. was to probe the Evil and devise a remedy. In the progress of his Obedience to this Command, it was unavoidable that offence should be given to some, but finally the whole Council acquiesced that in issuing of Patents the Secretary had incurred very great loss out of Pocket, amounting to about £2,000, that there remained of engrossed Patent not issued from the office from various causes as many as amounted to £400, for his share of the fees, which last sum was advanced to him by Lt. Gov. Gore, and the gross loss recommended to the notice of His Majesty's Government, who paid to the Secretary £1,000 on account; and for his relief in future Mr. P. suggested a very simple mode of relief, which was to estimate the actual charge on each Patent for stationery and deduct that amount from the gross fee before division amongst the Patent Officers, which it was surprising had not been recurred to before, for the Secretary only disbursed anything towards the Patent.

The result of this Effort was not favorable to Mr. Powell's popularity at the Council board, however it might recommend him to the Head of the Government, who had most excellent dispositions towards a just and impartial administration. He was susceptible to a degree to any Insinuation of personal Disrepute, which subjected him to be played upon by pretended friends who knew his weakness. Upon more than one occasion such ridiculous suggestions interrupted for a time the harmony between him and Mr. P." [largely over fees]

[35] This is also referred to by Kingsford, Hist. Can., Vol. VIII, p. 94. At our Bar it is remembered by the fact that in the report of the trial of an action for libel brought by Wyatt against Gore in the King's Bench in England, Holt's Nisi Prius Cases (1816) p. 299, the Province of Upper Canada is at p. 300 called "the Island." The case is still a leading case on privilege and publication.

[36] For example, Gore's extraordinary Act of proroguing the House in February, 1817, (as to which see Kingsford, Hist. Can. Vol. IX, p. 206) was certainly against Powell's advice. "This Gentleman (i. e., Gore) in the last act of his Government, which was not satisfactory at home, had acted in direct opposition to the most urgent advice and Intreaty of Mr. P., in dismissing his Assembly from apprehension of some expected Resolutions. He had from this very Assembly received the most handsome Expression of Regard and Confidence in several Votes, one of three thousand pounds for a Service of Plate to himself, and the vote of one thousand pounds on his recommendation to Mr. Powell for services long since rendered extra-judicially, and which had never been compensated."

When Gore left for England, June, 1817, he was succeeded for a time by Samuel Smith (as Administrator); and he by Sir Peregrine Maitland in August, 1818. Maitland remained Lieutenant Governor until 1828, though Smith acted as Administrator for a few months in 1820 during his absence. Maitland never placed any confidence in Powell, but Powell has been charged with some of his acts which have been considered most reprehensible.[37] Powell on more than one occasion differed from the administration of Maitland and, although he was Speaker of the Council, he caused "Dissents" to be entered on the Records.[38]

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[37] In my "Robert (Fleming) Gourlay as shown by his own Records," published by the Ontario Historical Society, 1916, in their Papers and Records Vol. XIV, I have given the story of his alleged persecution of Gourlay. The fact is that Powell had nothing to do with the passing of the legislation under which Gourlay was prosecuted; he advised Gore against prosecuting Gourlay; and after Gore's term when he was prosecuted by Maitland's Government, Powell was not even consulted. By that time Powell was wholly out of favour, and the trusted advisers of the Government were Dr. Strachan (the Anglican divine) and the able and vigorous Attorney General, John Beverley Robinson.

[38] His story of these "Dissents" is as follows: "In 1821 . . . he perceived a spirit of intrigue had obtained access to the Legislature, and had been constrained to enter on the Journals his dissent to certain measures carried in opposition to him. . . .

The various dissents so entered on the Journals are here transcribed, that they may speak for the truth and justice of him, who in the conflict of opinions stood almost alone in the House he presided in. His chief opposer was the Reverend friend who had influence to persuade the Governor that the measures dissented to by the Speaker on the Journals were most wise, useful, and loyal; and that the Speaker was moved thereunto by base and personal considerations, reflecting not only upon the majority in both Houses but on his Excellency and his legal advisers, who signified his assent to the Law; but as the Journals were transmitted to the Secretary of State, it was thought proper to remove from them the obnoxious dissents, lest they might have more influence in Downing Street than York; and as inducement to remove them before they reached England His Excellency was persuaded to command the Speaker to withdraw from the Journals the several dissents he had entered while Speaker, as being a breach of privilege of that office to oppose the majority of that House whose servant he was.

He, having discharged his duty, as he thought, in those dissents, consented to their abolition rather than quit his station as Speaker and Chief Justice—the threatened penalty of his refusal, and the Governor engaged two Members to move and second their removal from the Journals, which was carried without opposition.

Such a transaction, it may be supposed, did not conduce to harmony or kind feeling among the leading parties; but he, conscious of no offence to his King or Country, still struggled to preserve his station to the age of seventy, to which he had ever limited his public services, and which was fast approaching.

Nevertheless he continued to be Speaker until his resignation in 1825.[39]

He was succeeded by William Campbell, the first of our Judges to be knighted. He was a Scotsman who had come to this continent during the American Revolution, as a private in a Highland Regiment, and was taken prisoner at Cornwallis' surrender of Yorktown in 1781. On peace being declared in 1783, he went to Nova Scotia, was called to the Bar and became a Member of the Legislative Assembly of that Province and Attorney-General of Cape Breton; he was appointed a puisne Judge of the Court of King's Bench, Upper Canada, in 1811 and proved himself a

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DISSENTS OF 1821.

Dissentiet—From the Bill passed yesterday entitled "An Act to repeal the Laws now in force granting poundage to the Receiver General of this Province and to provide a salary for that officer in lieu of such poundage."

(Signed) W. D. P.

Entered on the Journals 21st December, 1821.

Dissentiet—To the Bill entitled "An Act to appoint Trustees to the Will of William Weeks, late of York, Esquire, deceased, to carry into effect the provisions thereof;" because there is not before the House sufficient inducement to justify such an Enactment.

(Signed) W. D. P.

Entered on the Journals 4th January, 1822.

Dissentiet—From the vote to concur in the Resolution sent up to this House from the Commons House of Assembly to address His Excellency the Lieutenant Governor to transmit, by a particular individual, to the foot of the Throne the joint Address of the Legislative Council and House of Assembly to His Majesty, because, however glossed I consider it an undue interference with His Majesty's Representative in the exercise of a Right admitted and declared to exclude all participation by any other branch of the Legislature.

(Signed) W. D. P.

Entered on the Journals 8th January, 1822.

Dissentiet—To the Bill entitled "An Act to authorize the appointment of a Commissioner for the purposes therein mentioned;" because the provision of the Bill is unusual, and unnecessary to enable the Executive branch of the Constitution to exercise its powers in such manner as its own discretion may direct.

(Signed) W. D. P.

Entered on the Journals 16th January, 1822.

Dissentiet—To the Bill entitled "An Act granting to His Majesty a sum of Money to provide for the appointment of a Commissioner for the purposes therein mentioned;" because it is unasked, and unnecessary to enable His Majesty's Representative to transmit duly to the foot of the Throne the sentiments of the other branches of the Legislature.

(Signed) W. D. P.

Entered on the Journals 16th January, 1822.

[39] His correspondence with Gore after the latter's removal to England should be read by everyone wishing to understand the inner politics of the period. The letters are in the Toronto Public Library.

sound lawyer. On Powell's retirement, Campbell was appointed to the Legislative Council and received a Commission as Speaker.

At that time, in great measure owing to an almost entirely erroneous impression of Powell's influence and to some extent to the influence of a similar movement in Lower Canada, there was an agitation against the Chief Justice of the Province being a member of the Executive Council; but there was no objection taken to his being a member of the Legislative Council. Notwithstanding this agitation, Campbell was appointed to the Executive Council as well as to the Legislative Council. His incumbency of these positions was during a period of considerable public turmoil. He seems to have kept aloof from prominence in the contentions raging about him; to a certain extent this was due to age and ill-health, but not wholly. While he was a man of resolute spirit, he was also cautious and conciliatory.[40]

The agitation against the Chief Justice being a member of the Executive Council did not die down with Campbell's appointment. We find the House of Assembly, January 13, 1826, passing a Resolution against the practice.[41] It is likely that the corresponding agitation in Lower Canada had its influence on the Upper

[40] He was sixty-six when appointed Chief Justice, and it was common knowledge, at the time, that he was appointed to keep the place warm for John Beverley Robinson, the Attorney-General and quite the ablest man in the Province—who was supposed to be too young for the appointment.

The Rev. Dr. Strachan, writing to Lord Bathurst from London, November 10, 1826, speaks of Campbell thus: "The Chief Justice is an old man and though of resolute spirit and apt to labour far beyond his strength is liable to sudden attacks of the most alarming nature and from which persons of less energy of mind would not soon recover." Can. Arch., G. 63, pt. 1, p. 54.

[41] Campbell presented his Commission as Speaker November 7, 1825 (Journals Leg. Col. U. C. p. 3); he became a member shortly afterward—this being the only instance of a Speaker who was not a member of the Legislative Council. The House of Assembly January 13, 1826, passed a Resolution by a large majority "that the connection of the Chief Justice . . with the Executive Council wherein he has to advise His Excellency upon Executive measures, many of which may bear an intimate relation to the Judicial duties he may have thereupon to discharge is highly inexpedient tending to embarrass him in his Judicial functions and render the Administration of Justice less satisfactory if not less pure." Carried, 23 to 14. A resolution was also carried to render the Judges of the King's Bench "as independent of the Crown and of the people as are the Judges of England." Carried unanimously.

The final Resolution was that an humble address should be presented to His Majesty "to discontinue to impose on the Chief Justice duties so incompatible with his judicial character and so ill suited to the present state of this Province; and that the Judges in this Province may be rendered . . . as independent of the Crown

Province; but the Home Authorities were not convinced,[42] and the system continued until the period of responsible Government. A similar address passed in the House of Assembly, March 15th, 1828, met the same fate as its predecessor.[43] On Campbell's resignation in 1829, he received the honour of knighthood and was succeeded by the first Canadian-born Chief Justice, John Beverley Robinson, the Attorney-General. He also succeeded to the Speakership in the Legislative Council[44] and the Presidency of the Executive Council.

The life of Sir John Beverley Robinson for thirty years, from the time he fought as a young man of 21 at Queenston Heights, may almost be said to be the history of the politics and government of the Province. An absolutely honest and consistent Tory of the old school in Church and State, he never failed to uphold the cause of his Church and his conception of the State. He consistently fought Responsible Government, equality of religious denominations, democratic innovations. His life has been writ-

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and of the people as are the Judges in England." Journals of Assembly p. 72. The Petition will be found at p. 76 and also Can. Arch. Q. 340, p. 39. Maitland agreed to transmit the address, but said, "I am not enabled to explain to His Majesty's Government what there is peculiar in the present state of this Colony which you allude to in the conclusion of your address as inducing you to desire the change which you solicit." In his letter to Lord Bathurst, March 7, 1826, Maitland says, "It is scarcely necessary to remark that if the Chief Justice were not a member of either Council, the Government and the Province would lose the advantage of the experience and legal knowledge of an officer who it must be presumed is in general best qualified to advise in measures of importance . . ." Can. Arch. Q. 340, p. 41.

[42] Bathurst wrote to Maitland from Downing Street June 6, 1826, that "it is highly expedient that the Governor should have the advice and assistance of the first Law authority of the Province for his guidance in the administration of his Government; that the greatest advantage has been derived throughout the Colonies from this assistance and it does not appear that there is anything peculiar in the state of the Province of Upper Canada, which should make it advisable that this system should be changed." Can. Arch. G. 62, p. 158.

The movement to exclude the Chief Justice from the Executive Council was parallel to and in a sense a part of the wider movement for Responsible Government.

[43] This may be conveniently found in Read's "Lives of the Judges of Upper Canada and Ontario," Toronto, 1888, pp. 127, 128; it was carried 16 to 6.

[44] A little before the resignation of Campbell, the Hon. James Baby was commissioned Speaker. He presented his Commission January 8, 1829. (Jour. Leg. Col. U. C. for 1829 p. 6). He was Speaker during that Session, January 8-March 20, 1829. At the opening of the next Session the new Chief Justice presented his Summons and Commission, January 3, 1830.

ten from one point of view by his son; various parts of it from another point of view by the historians, Kingsford, Dent and others, and no attempt will be made here to retell it.[45] He continued to be Speaker of the Legislative Council until he went to England in 1838, at the request of Lord Glenelg who wished to consult him on Canadian affairs; and he never again took his seat in the House.

When the Legislative Council began its session in 1838, the Honourable Jonas Jones, puisne Judge of the Queen's Bench, presented his Commission as Speaker.[46] He had been appointed to the King's Bench in March, 1837, while King William IV was still alive.

Jones was, like Robinson, of United Empire Loyalist stock, a Tory of the stern, unbending, even violent kind. He had played a prominent and in the main useful part in the House of Assembly from 1821, and was a keen-minded, clear-headed man, who had the courage of his convictions and never had any doubt as to what they were.

The Legislative Council under his speakership bent every energy to prevent the impending union of Upper and Lower Canada, and the Speaker fully approved; but it was in vain. The Union Act of 1840 became law, and Upper Canada lost its independent provincial existence.

Jonas Jones was the last Speaker of the Legislative Council of the Province of Upper Canada; and also the only puisne Judge ever summoned as a Member.[47]

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[45] Major General C. W. Robinson, "Life of Sir John Beverley Robinson, Bart., C. B., D. C. L.," Edinburgh and London, 1904; Dent, Story of the Upper Canadian Rebellion, Toronto, 1885, see Index Vol. II, p. 375; Kingsford, Hist. Can., see Index Vol. X, p. 644; Read "Lives of the Judges," pp. 122-148, etc.

[46] Jour. Leg. Col. U. C. 1839, p. 5.

[47] While it is beyond my present thesis, I may say that when the Legislative Council of the new Province of Canada met for the first time, June 14, 1841, Robert Sympson Jameson, Vice Chancellor of the Court of Chancery of Upper Canada presented his Summons as a member and his Commission as Speaker of the Council (Jour. Leg. Col. Can. 1840, pp. 13, 19). He continued to be Speaker till the Session of 1843; his resignation tendered early in the Session the Governor Sir Charles Metcalfe refused to accept and Jameson took his seat to secure a regular adjournment of the House and give the Government time to consider (Jour. Leg. Col. Can. 1843, p. 42, Monday, Oct. 16, 1843). This was part of the general agitation over Responsible Government; but what impelled Jameson to insist on resigning was the proposal to remove the Capital to Montreal, which he opposed in common with most of the other Councillors

Of every one of the Judicial Members of the Legislative Council except the last named it may be said that he was most useful and efficient in framing and correcting ordinary legislation. Of not one without any exception can it be said that he ever suggested or promoted any measure looking to reform or to a more democratical government. Without exception they were conservative and aristocratical to a degree and none could find anything wrong in the existing state of affairs. All men of fine minds, good intentions, they all were reactionaries and at least passively, if not actively, set themselves against the current of democracy and popular government which must needs prevail if Canada was to be saved for the Empire.

(To be concluded)

WILLIAM RENWICK RIDDELL.*

TORONTO.

*Justice of the Supreme Court of Ontario.

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from Upper Canada. His resignation tendered again was accepted; Monday, November 6, 1843, he announced the resignation and acceptance and two days afterwards, the Hon. Réné E. Caron presented his Commission as Speaker (Jour. Leg. Col. Can. 1843, p. 75). Jameson continued to be a private member of the Council till his death in 1854, but as vice-chancellor he was not considered a Judge; e. g., he was a Bencher and Treasurer of the Law Society of Upper Canada for years after being appointed Vice-Chancellor.

The Statute of 1857, 20 Vict. Chap. 22 (Can.), made all Judges, Chancellors, Vice-Chancellors, etc., ineligible to vote, and all persons (except certain Ministers of the Crown) who accepted or held any office, commission, or employment at the nomination of the Crown, with an Annual Salary, ineligible as a Member of either House.

DOUBLE JEOPARDY AND COURTS-MARTIAL

CONGRESS is empowered under the constitution:[1] "To make rules for the government and regulation of the land and naval forces." Under this authority, Congress has established a system of criminal law for the regulation of members of the army and a system of military courts for its administration. The substantive law is to be found in the Articles of War,[2] other congressional statutes, Army Regulations and Orders, and the customs of the service. The courts wherein this law is administered and the procedure therein are provided for by the Articles of War and the Manual for Courts-Martial, which is issued by authority of the Secretary of War and has the effect of army regulations.

The principal military courts, the courts-martial, have jurisdiction over all persons subject to military law, including not only officers and soldiers of the army, but officers and soldiers of the marine corps, detached for service with the army, and, in time of war, retainers and persons accompanying or serving with the army in the field or abroad.[3] This jurisdiction is personal rather than territorial; that is, the court-martial convened by the proper authority and duly constituted may try a person subject to military law for an offense made punishable by the Articles of War, no matter where the offense is committed. A person subject to this military jurisdiction, however, is not immune from the territorial jurisdiction of the civil courts of the states.[4] This is recognized expressly in the Articles of War, No. 74, which makes it obligatory upon the military authorities to deliver over to the civil authorities offenders against the civil law.

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[1] Art. I Sec. 8, cl. 14.

[2] 4 U. S. Compiled Stat. 1916 Chap. 5 Sec. 2308a (Rev. Stat. 1878 Sec. 1342 as amended by Act of August 29th, 1916, Chap. 418 Sec. 3).

[3] Article of War 2.

[4] Franklin v. United States, (1910) 216 U. S. 559, 54 L. Ed. 615, 30 S. C. R. 434; Grafton v. United States, (1907) 206 U. S. 333, 51 L. Ed. 1084, 27 S. C. R. 749, 11 Ann. Cas. 640; Coleman v. Tennessee, (1878) 97 U. S. 509, 24 L. Ed. 1118.

The Articles of War make punishable by courts-martial both offenses of a strictly military nature and non-military offenses,[5] though the capital offenses of murder and rape, committed within the territory of the states of the Union and the District of Columbia, are excluded from jurisdiction of courts-martial in time of peace.[6] This concurrent jurisdiction of the civil courts and courts-martial extends to all crimes punishable under the criminal laws of the states where committed, with the exception noted above.

In time of peace, as has been stated, provision is made for turning over by the military authorities to the civil authorities all offenders against the criminal law of the states.[7] In time of war, such delivery by the military authorities obviously might interfere with the efficiency of the army and is not universally required, but it appears to be the policy of the War Department to make such delivery where the offense is of a serious character and military exigencies do not make it inexpedient.[8] In time of peace the usual rule would probably prevail, that the court first taking jurisdiction would be permitted to proceed without interference by the other court having concurrent jurisdiction, and this is implied in Article of War No. 74; but in time of war, military exigencies require that the military authorities should be able to demand that an offender who is subject to military law be handed over by the civil authorities for punishment, and that the military jurisdiction have priority, and this has been recently so decided.[9] There is, however, no reason why a state court should not exercise jurisdiction over a discharged soldier for an offense against the criminal law of the state, committed by him in time of war while a member of the army. In such case, if the matter has already been dealt with by a court-martial, a question of double jeopardy might arise; and, conversely, a person who has been tried and acquitted, or convicted, in a civil court, might afterwards be tried by a court-martial for the same offense and in such proceeding raise the question of double jeopardy.

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[5] Articles of War 93 and 96.
[6] Article of War 92.
[7] Article of War 74.
[8] See Judge Advocate General's Opinions: "Delivery of Accused Soldier to Civil Authorities," Oct. 30, 1917, and "Jurisdiction of Offenses by Selective en Route to Camp," March 6, 1918.
[9] (1917) Ex parte King, 246 Fed. 868.

That no one shall twice be put in jeopardy for the same offense is a familiar common-law doctrine. As to the federal courts, it has the sanction of the United States constitution.[10] Many states have similar constitutional provisions and, even without such provision, the rule against double jeopardy has been applied by state courts as a common-law rule.[11]

A crime is a violation of a rule of conduct imposed by a sovereign having the right to prescribe the conduct of an individual by reason of territorial or personal jurisdiction. If a person is subject with respect to certain conduct, at the same time, to the jurisdiction of two sovereigns, he may, by the same act, violate the rules of both and so commit two crimes. If the offender is tried and convicted, or acquitted, by one sovereign, and subsequently tried by the other, it is not a case of double jeopardy, for he is being tried by the second sovereign for a different crime. This principle has been applied in several instances, as, for example, where the same act is a violation of the law of two states, and has been held to be subject to prosecution by both, without involving double jeopardy.[12] The same is true where the act is an offense against the laws of a state and of the United States.[13] It has also been held that no double jeopardy is involved in a prosecution for violation of a criminal statute of a state, after the accused has been convicted for violation of a city ordinance framed in substantially similar terms, making punishable the same act as did the state statute.[14] The soundness of this latter rule seems to be questionable, inasmuch as the city is merely a municipal corporation established by the state, exercising delegated powers, and is not itself a sovereign, but rather the agent of the state. This rule appears to be inconsistent with the cases to the effect that where an act violates the laws of the United States and of a governmental agency thereof, such as the Hawaiian

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[10] U. S. Constitution, Fifth Amendment.

[11] State v. Lee, (1894) 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202.

[12] Strobhar v. State, (1908) 55 Fla. 167, 47 So. 4; Marshall v. State (1877) 6 Neb. 120, 27 Am. Rep. 363.

[13] State v. Moore, (1909) 143 Iowa 240, 121 N. W. 1052, 21 Ann. Cas. 63; United States v. Cruikshank, (1875) 92 U. S. 542, 23 L. Ed. 588; Moore v. Illinois, (1852) 14 How. (U.S.) 13, 14 L. Ed. 306.

[14] State v. Lee, (1882) 29 Minn. 445, 13 N. W. 913; and for other cases see 16 Corpus Juris 282.

Islands,[15] or the Philippine Islands,[16] there would be double jeopardy if prosecution were had by both governments, because only one sovereign is involved, namely the United States.

In the case of an act committed by a person subject to military law, which offends against the Articles of War or other military law and against the criminal law of the state, would there be double jeopardy if the offender were tried both by the courts-martial and by the civil court of the state? There is very little direct authority. The most important case is *Grafton v. United States.*[17] In that case a soldier was tried and acquitted by a court-martial for violation of the then 62nd Article of War, for killing a person in the Philippine Islands. He was later tried in a civil court and pleaded in bar the acquittal by the court-martial. The plea was overruled and he was convicted. He carried an appeal to the Supreme Court of the United States, claiming double jeopardy under the Fifth Amendment. The court stated the issue as follows:

"We are next to inquire whether, having been acquitted by a court-martial of the crime of homicide as defined by the penal code of the Philippines, could Grafton be subjected thereafter to trial for the same offense in a civil tribunal deriving its authority, as did the court-martial, from the same government, namely, that of the United States? That he will be punished for the identical offense of which he has been acquitted, if the judgment of the civil court, now before us, be affirmed, is beyond question, because, as appears from the record, the civil court adjudged him guilty and sentenced him to imprisonment specifically for 'an infraction of Article 404 of said Penal Code and of the crime of homicide'."

The court decided that the plea of double jeopardy was valid, but its opinion carefully distinguishes the principal case from one in which the offense was an offense against the laws of a state, using the following language:

"The same act, as held in *Moore's* case,[18] may constitute two offenses, one against the United States and the other against a state. But these things cannot be predicated of the relations between the United States and the Philippines. The government

[15] United States v. Perez, 3 Hawaii Fed. 295; but see, contra, United States v. Lee Sa Kee, 3 Hawaii Fed. 262; State v. Norman, (1898) 16 Utah 457, 52 Pac. 986.

[16] Grafton v. United States, (1907) 206 U. S. 333, 51 L. Ed. 1084, 27 S. C. R. 749, 11 Ann. Cas. 640.

[17] Supra.

[18] Moore v. Illinois, (1852) 14 How. (U.S.) 13, 14 L. Ed. 306.

of a state does not derive its powers from the United States, while the government of the Philippines owes its existence wholly to the United States, and its judicial tribunals exert all their powers by authority of the United States...So that the cases holding that the same acts committed in a state of the Union may constitute an offense against the United States and also a distinct offense against the state do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government—that of the United States."

As far as this case goes, it is not an authority to the effect that there would be double jeopardy in a case where the laws of a state were violated and a trial had in a state court; but in its manner of reaching its decision and distinguishing such a case, it is rather a strong authority that no double jeopardy would exist.

Another authority to the same effect is *In re Fair*.[19] In that case a soldier who killed an escaping prisoner was tried and acquitted by a court-martial and afterwards arrested for this act on a charge of murder by a civil court of Nebraska. A proceeding in habeas corpus was instituted by the accused in the federal circuit court and the petition was granted because the court found that the act was done in the performance of military duty by the accused, and therefore the release of the accused from the jurisdiction of the state court could be obtained through this proceeding in the federal court. The court said, however, that trial and acquittal by the court-martial was not a bar to the inquiry and prosecution by the proper civil authorities. A similar dictum was expressed in the opinion in *United States v. Clark*.[20]

In *State v. Rankin*,[21] the accused was indicted for murder committed during the Civil War, while he was a soldier in the Union Army. In the state court he pleaded acquittal by a general court-martial for the same offense. The supreme court of Tennessee held that this was not a valid plea and the case was remanded to the trial court for trial on its merits. The opinion, it is submitted, stated the correct doctrine—that the same act was two distinct crimes, one against the United States and the other against the state to whose territorial jurisdiction the offender was subject. The authoritative value of this decision is perhaps lessened by the fact that the prisoner could have avoided the

[19] (1900) 100 Fed. 149.
[20] (1887) 31 Fed. 710.
[21] (1867) 4 Coldw. (Tenn.) 145.

proceedings in the state courts at any time by habeas corpus in the federal courts, according to *Coleman v. Tennessee.*[22] In the latter case it was held that the courts of Tennessee had no jurisdiction over offenses by soldiers in the Union Army during the Civil War, since Tennessee was at that time not a state but an insurgent community in military occupation, having no jurisdiction over members of the Union Army. The opinion in the *Coleman* case, however, endorsed the doctrine that acquittal by a court-martial would be no defense in a trial by a *state* for the same offense.

It is provided by Article of War 40 that "No person shall be tried a second time for the same offense." Is trial in a court-martial, for an offense on which there have been previous proceedings in a civil court, a second trial? It seems to be the opinion of the military authorities that it is not. "Although the same act when committed in a state might constitute two distinct offenses, one against the United States and the other against the state, for both of which the accused might be tried, that rule does not apply to acts committed in the Philippine Islands."[23]

In the case of *In re Stubbs,*[24] (a habeas corpus proceeding in the federal court) the petitioner had been acquitted in a civil court on a charge of murder and was arrested and charged by the military authorities and was about to be tried by a general court-martial for "conduct to the prejudice of good order and military discipline." He claimed that the surrender of his person to the civil authorities by the military authorities for the purpose of being tried for murder was a complete relinquishment of military jurisdiction over the offense, so that "no other court or special tribunal can lawfully assume jurisdiction to try the prisoner again upon a criminal charge based upon the same facts." The court decided against the petitioner on the ground that the court-martial proceeding was for a distinctly military offense and for military aspects of the act, for which there had been no trial in the civil court, stating that "the elements constituting the offense charged are radically different." The opinion contains a dictum that "after having surrendered him to the civil author-

[22] (1878) 97 U. S. 509, 513.

[23] Manual for Courts-Martial, p. 69; see, also, to the same effect, Davis, Military Law of the United States 534; 6 Ops. Attys. Gen. 506, 513. But see Winthrop, Military Law 371.

[24] (1905) 133 Fed. 1012.

ities, his military superiors could not lawfully deal with the petitioner for murder, manslaughter or criminal assault, considered as a crime against society in general." It is uncertain whether the court means by this statement that habeas corpus would lie had the court-martial done what this court says it could not lawfully do. That the surrender to civil authorities is not a waiver or final surrender of jurisdiction seems to follow from *Ex parte King*.[25] Even assuming that in the opinion of the federal court the court-martial was submitting the accused to double jeopardy, in violation of Article of War 40, it does not seem that the prisoner would have any remedy in the civil court, since the court-martial duly constituted by the proper authorities has jurisdiction over the person of the accused and of the offense of which he was charged, and assumed error by the courts-martial in applying the law to the facts does not destroy their jurisdiction or justify appeal to civil courts.[26]

Our conclusion is that where an act is an offense against the laws of the state territorially applicable to the offender and to his act and also against the military law to which he is personally subject, two distinct offenses are committed and there is no double jeopardy in proceedings against him in both the civil and military tribunals.

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[25] (1917) 246 Fed. 868.
[26] Ex parte Tucker, (1913) 212 Fed. 569.

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RECEIVERS' SUITS IN FOREIGN JURISDICTIONS.—Decisions of federal courts have clearly established the test by which to determine when a receiver of a defunct corporation may and when he may not sue in a foreign jurisdiction. He may, when the statutes under which he is appointed vest the title to the corporate property in him substantially as an assignee or statutory successor of the corporation, or when the statute expressly authorizes him to do so; he may not, when his appointment, whether with or without statutory authority, merely constitutes him an agent of the court for the exercise of the judicial power. The latest application of this test is found in *Sterrett v. Second National Bank*.[1] The receiver of an Alabama trust com-

[1] (1918) 39 S. C. R. 27.

pany sued the bank in the federal court for the Southern District of Ohio to recover money which he alleged was due from the bank to the trust company. The money was asserted to be assets of the insolvent corporation, and the case was therefore not like those in which a receiver seeks to enforce a stock liability where the rights sought to be enforced are those of creditors in which the corporation had no interest, such as *Hale v. Allinson.*[2] Yet the court decided that the action could not be maintained, because the Alabama statutes, as construed by the courts of that state, did not vest title "in the receiver as assignee or as statutory successor of the insolvent corporation in such wise as to authorize the action to recover in a foreign jurisdiction. Collectively, these sections provide for a receivership to administer the property and assets of the insolvent corporation under the authority and direction of the appointing court. The statutes do not undertake to vest in the receiver an estate in the property to be administered for the benefit of creditors as was the case in *Bernheimer v. Converse,*[3] and *Converse v. Hamilton,*[4] in which the right to sue in the courts of a foreign jurisdiction was sustained."

The Alabama statutes[5] declare that the assets of insolvent corporations constitute a trust fund for the payment of creditors, which may be marshalled and administered in courts of equity; and that the court shall appoint a receiver who "shall, under direction of the court, collect all debts due the corporation, and sell all the property, real and personal, of the corporation," pay the debts, etc. The receiver is to be merely the court's custodian and administrator of the property, not the owner.

It would seem to follow from this that to entitle a receiver in right of the corporation to sue in a foreign jurisdiction two things must concur: (1) the cause of action must be assets of the corporation; (2) the receiver must be invested with title. This excludes cases where (a) the cause of action belongs to the creditors and not to the corporation, and (b) where the receiver has authority only, without title. Yet, in *Converse v. Hamilton* the court, though holding that the double liability under the Minnesota constitution "is not to the corporation but to the creditors collectively,"[6] held the receiver appointed by the Minne-

[2] (1902) 188 U. S. 56, 47 L. Ed. 388, 23 S. C. R. 244, 249.
[3] (1907) 206 U. S. 517, 51 L. Ed. 1163, 27 S. C. R. 755.
[4] (1911) 224 U. S. 243, 56 L. Ed. 749, 32 S. C. R. 415.
[5] Code 1907, Vol. II, Secs. 3509, 3511.
[6] 224 U. S. 253.

sota court was entitled to sue in Wisconsin; and further held that the Minnesota statute expressly authorized the appointment of a receiver with power to bring suit or suits against stockholders, severally, in any state or country where they might be found; that such receiver "is not an ordinary chancery receiver or arm of the court appointing him, but a quasi-assignee and representative of the creditors' rights of action against the stockholders and with full authority to enforce the same in any court of competent jurisdiction in the state or elsewhere." Evidently the statute[7] did not invest the receiver with title any more than did the Alabama statutes in *Sterrett v. Second National Bank*. It solved the difficulty met with in the previous Minnesota cases, viz., that the prior statute only authorized a suit in which all the stockholders should be sued—which obviously was limited to a suit in Minnesota—and it undertook to authorize the receiver, as representative, not of the corporation, but of the creditors, to sue in foreign jurisdictions wherever one or more stockholders might be found. *Converse v. Hamilton* therefore seems to support the proposition that a legislature may, without vesting corporate title or any title in a receiver, give him authority to sue in a foreign state in behalf of creditors: an exercise of extra-territorial power not easy to justify in theory. It seems also to decide (1) the cause of action need *not* be assets of the corporaiton, and (2) the receiver need *not* be invested with title, provided he have express statutory authority to sue in the foreign juris-

[7] Chap. 272, enacted in 1899, apparently to meet the difficulty disclosed in Hale v. Allinson, supra, and several Minnesota cases which it followed.

Sec. 1 provides that when a corporation "has heretofore made or shall hereafter make any assignment for the benefit of its creditors under the insolvency laws of this state; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any district court of this state, whether under or pursuant to...any statute of this state or under the general equity powers and practice of such court," the court may proceed as directed. Secs. 2 and 3 provide for the levy of an assessment upon the stockholders; Sec. 4 provides for an order to the assignee or receiver to proceed to enforce payment of the amount assessed by suit, if not paid. Sec. 5 makes the assessment conclusive upon all parties as to all matters relating to the amount of and the necessity for the assessment. Sec. 6 makes it the duty of the assignee or receiver to sue "in Minnesota or in any other state or country," etc. This was the characteristic feature of the act. The act will be examined in vain for anything indicating an intention to vest title to the double stock liability in the assignee or receiver; as is said in Bernheimer v. Converse, 206 U. S. at p. 534, "The statute confers the right [to maintain an action in another jurisdiction] upon the receiver as a quasi-assignee, and representative of the creditors, and as such vested with the authority to maintain an action. In such case we think the receiver may sue in a

diction. The same rule is applied nearly universally in state courts.

The whole doctrine was developed in the leading case of *Booth v. Clark*.[8] The Supreme Court in *Great Western Mining Co. v. Harris*[9] summarized *Booth v. Clark* as holding, "that a receiver is an officer of the court which appoints him, and, in the absence of some conveyance or statute vesting the property of the debtor in him, he cannot sue in courts of a foreign jurisdiction upon the order of the court which appointed him, to recover the property of the debtor. While that case was decided in 1854, its authority has been frequently recognized in this court, and as late as *Hale v. Allinson,* 188 U. S. 56, it was said by Mr. Justice Peckham who delivered the opinion of the court: 'We do not think anything has been said or decided in this court which destroys or limits the controlling authority of that case.'" In *Booth v. Clark* a receiver appointed by a New York court in a creditors' suit brought suit in the District of Columbia to reach a fund which was claimed also by the debtor's assignee in bankruptcy. The underlying reason for the decision denying his right to sue seems to be that every jurisdiction has a right to protect local creditors by refusing permission to a foreign receiver to prejudice their interests by removing their assets from the local jurisdiction. That is doubtless the reason why the practice of ancillary receiverships has grown up, each ancillary receiver acting under the orders of the local courts, but in harmony with and ultimately accounting to the principal receiver. Both in *Great Western Mining Co. v. Harris* and *Sterrett v. Second National Bank,* supra, the court say that "if the powers of chancery receivers are to be enlarged in such wise as to give them authority to sue beyond the jurisdiction of the appointing court, such extension of authority must come from legislation and not from judicial action."

The right of a receiver in whom the title to assets of a defunct corporation is vested by statute to recover its property in a

foreign jurisdiction." On the other hand, it may be contended that such title flows as a matter of law from the authority conferred upon him, which "has resulted in taking away the right of the individual creditor to so proceed and vesting the same exclusively in the receiver." (See opinion of Holt, J., in Shearer v. Christy, [1917] 136 Minn. 111, 113, 161 N. W. 498.) But, on this theory, why does not the Alabama statute in the Sterrett case equally vest title in the receiver?

[8] (1854) 17 How. (U.S.) 322, 15 L. Ed. 164.

[9] (1905) 198 U. S. 561, 49 L. Ed. 1163, 25 S. C. R. 770.

foreign jurisdiction is illustrated in *Relfe v. Rundle*[10] where the entire property of an insolvent insurance company was vested by statute in the state superintendent of insurance. In the *Sterrett Case* the court brackets *Relfe v. Rundle* with *Converse v. Hamilton;* but the diversity is very manifest, since in the latter case the receiver is empowered by statute to enforce stock liability which formed no part of the corporation's assets.

The foregoing discussion raises the question whether the cases growing out of the failure of the Minnesota Thresher Company (*Bernheimer v. Converse*[11] and *Converse v. Hamilton*[12]) can be reconciled with the principle of cases beginning with *Booth v. Clark* and ending with *Sterrett v. Second National Bank. Hale v. Allinson*[13] arose under the earlier Minnesota statute. That case was completely in accord with the general rule. Can a legislature, without investing a receiver with title to assets of the corporation, give him authority or empower a court to give him authority to go into a foreign jurisdiction and there enforce rights of the corporation's creditors? These creditors may be persons residing within or without the territorial jurisdiction of the legislature; but by no stretch can such a receiver be deemed (in respect of this function) the successor of the corporation. If the attempt of a court to give its receiver extra-territorial authority fails because its own authority ends at the state line, is not the authority of the legislature similarly circumscribed? It would seem that the general rule would apply, which, while granting full force to state laws affecting rights and titles within the state, denies any such force beyond its boundaries.

The explanation may perhaps be that, while no state is bound to permit a foreign chancery receiver to come in and carry off assets of the corporation upon which its own citizens have a claim, state comity should allow a receiver authorized by the statute of a foreign state to enforce contractual liabilities of its citizens where the rights of local creditors of the corporation are not in any way prejudiced. This is the ground of the decision of the New Jersey court in *Hurd v. Elizabeth*[14] in which, while approv-

[10] (1880) 103 U. S. 222, 26 L. Ed. 337.
[11] (1907) 206 U. S. 516, 51 L. Ed. 1163, 27 S. C. R. 755.
[12] (1911) 224 U. S. 243, 56 L. Ed. 749, 32 S. C. R. 415.
[13] (1902) 188 U. S. 56, 47, L. Ed. 388, 23 S. C. R. 249.
[14] (1879) 41 N. J. L. 2.

ing *Booth v. Clark,* it was held that a receiver of a New York bank might sue for and receive in New Jersey debts due the bank where it did not appear that there were any resident creditors asserting claims in opposition to those of the receiver. This view makes the question turn not upon whether the receiver's authority comes from statute or from the general equity powers of the court, but upon whether any state policy is going to be interfered with by permitting the foreign receiver to sue as a matter of comity. In fact, it is not easy to see any sound distinction between the status of a receiver authorized by a court of equity to sue in a foreign jurisdiction and that of a receiver similarly authorized by statute where no title to corporate assets is vested in him. This, however, is the distinction recognized by the federal Supreme Court. In *Sterrett v. Second National Bank*[15] the difficulty with plaintiff's case was that the statute, while authorizing the appointment of a receiver, neither vested title in him nor authorized him to sue outside of the state.

A study of the cases in the United States Supreme Court shows, it is believed, that, though steadily adhered to, the doctrine of *Booth v. Clark* was too narrow: the necessities of modern business required that stock liability should be enforced by receivers' suits in foreign jurisdictions. Accordingly, while still insisting that a court may not exercise its authority through its receiver outside of its territorial jurisdiction, it is permitted to do so provided a legislature will either vest the title to the corporate assets in a receiver, or, when the stock liability was not a corporate asset, invest the receiver with the character of a quasi-assignee and expressly empower him to sue in foreign jurisdictions. These concessions have whittled away most of the substance of the original doctrine, leaving the residue merely a stumbling block. The principles of comity should have suggested that a chancery receiver appointed by a foreign court may be permitted to sue unless his doing so will prejudice the rights of resident creditors or conflict in some way with the public policy of the state.[16] This appears to be the attitude of the Minnesota court.[17]

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[15] (1918) 39 S. C. R. 27.

[16] See Howarth v. Lombard, (1900) 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Howarth v. Angle, (1900) 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725.

[17] Stevens v. Tilden, (1913) 122 Minn. 250, 142 N. W. 315.

CHATTEL MORTGAGE ON UNPLANTED CROPS—FILING AS CONSTRUCTIVE NOTICE.—No principle is better established at the common law than that a chattel mortgage on property subsequently to be acquired, in which the mortgagor has no present or potential interest, is void as against any subsequent purchaser or attaching creditor without notice. The rule being founded on the fundamental maxim that one cannot grant that which he has not. Qui non habet, ille non dat.[1] The reason for this rule is that at law a mortgage is a conveyance of the title to the mortgagee, and title cannot be conveyed to the mortgagee where the mortgagor has none or where the property is not in esse.[2] And while a contrary view prevails in many jurisdictions, the recognized weight of authority sustains the proposition that a mortgage of future property, although invalid at law, is good in equity as against the mortgagor and all persons with notice.[3]

The conflict in authority is due, in a large measure, to disputes over fundamental legal principles. One line of authority contends that the intent of the parties is to convey eo instanti; while those courts which support the equitable doctrine say that there is a promise to mortgage when the goods come into existence or are acquired. It would seem from the case of *Grantham v. Hawley*[4] that mortgaging of future goods would be allowed, any period of time in advance, and that such a mortgage would be

[1] Zartman v. First National Bank of Waterloo, (1906) 189 N. Y. 267, 273, 82 N. E. 127, 12 L. R. A. (N.S.) 1083; Jones v. Richardson, (1845) 10 Metc. (Mass.) 481; Ludlum v. Rothschild, (1889) 41 Minn. 218, 43 N. W. 137, 19 L. R. A. (N.S.) 911; In re Thompson, (1914) 164 Iowa 20, 145 N. W. 76, Ann. Cas. 1916D 1210, and note; Low v. Pew, (1871) 108 Mass. 347, 11 Am. Rep. 357; New England National Bank v. Northwestern National Bank, (1902) 171 Mo. 307, 323, 71 S. W. 191, 60 L. R. A. 256; 11 C. J. 434, 435.

[2] Richardson v. Washington, (1895) 88 Tex. 339, 344, 31 S. W. 614; Barnard v. Eaton, (1848) 2 Cush. (Mass.) 294, in which Chief Justice Shaw said: "A mortgage is an executed contract; a present transfer of title, although conditional and defeasible; it can therefore only bind and affect property existing and capable of being identified at the time it is made; and whatever may be the agreement of the parties, it cannot bind property afterwards to be acquired by the mortgagor."

[3] Mitchell v. Winslow, (1843) 17 Fed. Cas. 527, Fed. Case No. 9673, 2 Story (U. S. C. C.) 630, 6 Law Rep. 347; Holroyd v. Marshall, (1861-62) 10 H. L. Cas. 191, 33 L. J. Ch. 193, 7 L. T. R. 172, 9 Jur. (N.S.) 213, 11 Wkly. R. 171, 11 Eng. Rep. 999; Walter A. Wood M. & R. M. Co. v. Minneapolis & N. Elev. Co., (1892) 48 Minn. 404, 51 N. W. 378; Central Trust Co. v. Kneeland, (1891) 138 U. S. 414, 34 L. Ed. 1014, 11 S. C. R. 357; Wheeler v. Becker, (1886) 68 Iowa 723, 28 N. W. 40. Contra: Jones v. Richardson, note 1, supra; Moody v. Wright, (1847) 13 Metc. (Mass.) 17, 46 Am. Dec. 706; Case v. Fish, (1883) 58 Wis. 56, 15 N. W. 808.

[4] (1616) Hobart 132; Williston, Cases on Sales, p. 1.

good as against bona fide purchasers for value. Few states in this country would go that far, however, contenting themselves with applying the equitable doctrine as advanced by the later English case of *Holroyd v. Marshall.*[5] In this, the leading case on the subject in England, it was finally established that a mere agreement to mortgage personal property, subsequently to be acquired, gave to the mortgagee a lien upon the property as soon as it should come into existence, good against all but the innocent purchaser for value. The majority of the American courts hold to this doctrine.[6]

There is reason and good sense in this rule; and Mr. Justice Story in deciding the case of *Mitchell v. Winslow,*[7] in which he reviews the authorities, says: "It seems to me a clear result of all the authorities that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily, or with notice, or in bankruptcy." A few American jurisdictions, notably Massachusetts, refuse to accept the equitable doctrine, demanding that some further act of affirmance be made after the goods are acquired or possession taken, before the mortgage is at all valid, with or without notice.[8] But conceding, as we must needs do, the logical strength of that rule, the better view seems to be to regard the transaction as a contract, and give that to the mortgagee which the mortgagor intended that he should have, providing, always, that the rights of third parties have not intervened. A well known text writer thus states the rule: "A mortgage of future property is void, at law, as against others acquiring an interest in it, except in case the mortgagee takes possession of such property before any adverse interests have been acquired. A different rule, however, prevails in equity. There, while such mortgage itself does not pass the

[5] Note 3, supra. See Williston, Transfers of After-Acquired Property, 19 Harv. L. Rev. 558, for a full discussion of the principles here involved.

[6] Pennock v. Coe, (1859) 23 How. (U.S.) 117, 16 L. Ed. 436; Ludlum v. Rothschild, note 1, supra; Jones, Chattel Mortgages, 4th ed., Sec. 173, p. 203.

[7] Note 3, supra.

[8] Note 3, supra.

title to such property, it creates in the mortgagee an equitable interest in it, which will prevail against judgment creditors and others, although the mortgagee has not taken possession of the property, and the mortgagor has done no new act to confirm the mortgage. The ground of the doctrine is, that the mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and in equity, transfers the beneficial interest to the mortgagee, the mortgagor being regarded as a trustee for him, in accordance with the familiar maxim that equity considers that done which ought to be done."[9]

There has undoubtedly been much discussion on this topic. For a great many years the courts of the different states have upheld the lien against the property when it came into existence or was acquired, provided that at the time the mortgage was given the property not acquired had potential existence. And the courts of many states recognize the validity at law of a mortgage given upon property not then owned by the mortgagor, but which is in existence, and also recognize mortgages upon property not in existence where the mortgagor is the owner of the source from which this property must come.[10] The great confusion results from a seeming inability to determine just what constitutes potential existence. It has been said by one note-writer that while the thing mortgaged itself need not have identity or separate entity, yet it must at least be the product or growth or increase of property which has at the time a corporeal existence, and in which the mortgagor has a present interest, more than a belief, hope, or expectation that he will in the future acquire some interest.[11] It is sometimes said that the courts attribute potential existence only to crops which will develop and come to maturity without the aid of the husbandman.[12] In the absence of express statutory provisions to the contrary, therefore, it may be stated as a general rule that most courts hold that a mortgage of unplanted crops

[9] Jones, Chattel Mortgages, 4th ed., Sec. 170; Pingrey, Chattel Mortgages, Secs. 213, 248; 6 Cyc. 1041, 1032.

[10] Iverson v. Soo Elevator Co., (1909) 22 S. D. 638, 642, 119 N. W. 1006.

[11] 11 C. J. 437.

[12] See First National Bank v. Felter, (Colo. 1918) 176 Pac. 496.

is void at law as being a mortgage of future property.[13] As to crops that are already planted and growing, the courts have not much trouble in listing them as property, potentially in existence.[14]

But, whatever viewpoint is accepted, it nevertheless remains the law that to make these mortgages effectual against third parties there must be actual or constructive notice of the existence of such mortgage.[15] The rule is well settled that, if the third party interested has had actual notice that there is a mortgage, his rights will be subordinated to that of the mortgagee.[16] The question is therefore presented whether a mortgage on future goods with the possession in the mortgagor is good as against subsequent mortgagees with only constructive notice. Generally speaking, the filing of a mortgage on future goods in accordance with the rules and provisions of the statute will operate as constructive notice to subsequent purchasers, mortgagees, and attaching creditors.[17] In such a case the filing is deemed to have taken the place of the actual taking of possession, and the courts then follow the rule of equity. Filing is so regarded by the supreme court of Minne-

[13] Bank of Cusseta v. Ellaville Guano Co., (1915) 143 Ga. 312, 85 S. E. 119; Stowell v. Bair, (1879) 5 Ill. App. 104, (not potential until the seed is in the ground). See Bidgood v. Monarch Elevator Co., (1900) 9 N. D. 627, 84 N. W. 561, 81 Am. St. Rep. 604, for a discussion in which the statute is involved. See, also, Iverson v. Soo Elevator Co., note 10, supra; Minn. G. S. 1913 Sec. 6966; cf. Hogan v. Atlantic Elevator Co., (1896) 66 Minn. 344, 69 N. W. 1; also Keene v. Jefferson Co., (1902) 135 Ala. 465, 36 So. 738, in which it was held that a mortgage of an unplanted crop, made after Jan. 1 of the year in which it is to be grown, conveys legal title thereto as already planted. Under this statute, mortgages prior to Jan. 1 convey only an equitable right to enforce a lien. Anders Merc. Co. v. Rice Bros., (1914) 187 Ala. 468, 65 So. 388. One year is allowed in Minnesota. G. S. Minn. 1913 Sec. 6980.

[14] 11 C. J. 442; Briggs v. United States, (1892) 143 U. S. 346, 36 L. Ed. 180, 12 S. C. R. 391; (growing from the time the seed is in the ground) Ford v. Sutherin, (1876) 2 Mont. 440.

[15] Gettings v. Nelson, (1877) 86 Ill. 591; Cressy v. Sabre, (1879) 17 Hun. (N.Y.) 120.

[16] Ludlum v. Rothschild, note 1, supra: Pennock v. Coe, note 6, supra, and other cases there cited.

[17] Recording of a chattel mortgage in the county of mortgagor's residence operates as notice of its contents and of the lien. Kilgore v. Jones, (Ala. App. 1917) 73 So. 832; Davis v. Caldwell, (1917) 37 N. D. 1, 163 N. W. 275; Slimmer v. Meade County Bank, (1917) 38 S. D. 311, 161 N. W. 325; Boeringa v. Perry, (1917) 96 Wash. 57, 164 Pac. 773; Hourigan v. Home State Bank, (Okla. 1917) 162 Pac. 699.

sota.[18] In a very recent case,[19] however, in a state having no such statute, it was held that filing of a mortgage of an unplanted crop was not constructive notice to a subsequent mortgagee taking his mortgage after the crop was planted. The doctrine of potential existence or the equitable doctrine would have made the mortgage valid except as against subsequent purchasers and incumbrancers without notice.

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[18] Keenan v. Stimson, (1884) 32 Minn. 377, 20 N. W. 364; cf. Wheeler v. Becker, note 3, supra.

[19] First National Bank of Montrose v. Felter, (Colo. 1918) 176 Pac. 496.

RECENT CASES

CHATTEL MORTGAGES—MORTGAGE ON UNPLANTED CROPS—EFFECT OF FILING.—Plaintiff leased a farm to one Allen and took a promissory note for the rent, secured by a chattel mortgage on the crops grown or to be grown on the land. Subsequent to the making of said mortgage, the defendant made a loan to Allen and took as security therefor a chattel mortgage on the same personal property, already planted. Plaintiff brought suit. Defendant answered, setting up its debt and a chattel mortgage to secure it, and alleged that the property covered by plaintiff's mortgage was not in existence when said mortgage was executed and recorded, and hence not subject to the lien. It also alleged that it had not actual notice of the mortgage. *Held*, filing is not notice of a mortgage to a subsequent mortgagee whose mortgage was executed and filed after the crop was planted. *First National Bank of Montrose v. Felter*, (Colo. 1918) 176 Pac. 496.

For a discussion of the principles involved, see 3 MINNESOTA LAW REVIEW p. 194.

CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—PUBLIC UTILITIES—WATER RIGHTS—IRRIGATION AS PUBLIC USE.—A water company whose system is the sole source of supply of irrigation and domestic water for a town of 1,500 people and a surrounding district occupied by 300 land owners and embracing some 6,000 acres, operated in conjunction with a land company originally owning the land, so that with each parcel of land sold by the land company was also sold a certificate by the water company entitling the purchaser of land to receive a specified quantity of water for irrigation and domestic purposes, perpetually, at certain fixed rates. Of the total volume of water supplied by the water company from one and one-half to three per cent went to the municipality and its inhabitants, and ninety-four per cent to outside land owners. The contracts bound all assignees or successors in interest, but could not be assigned by the purchaser without written consent of the company. The water company, finding that it was losing $30,000 a year, petitioned the railroad commission for an increase in rates, which the commission granted. On appeal to the supreme court, *Held*, the company is not a public utility, and the order of the commission is void for want of jurisdiction. *Allen v. Railroad Commission*, (Cal. 1918) 175 Pac. 466.

Further facts are that one W. and his associates in 1887 organized two corporations, a land company and a water company, with identical ownership and control. The former acquired the land in a certain arid area; the other acquired the water previously appropriated to the use of said land and developed a diverting and distributing system for the purpose of supplying said land with water.

Some three hundred landowners, holders of water certificates, appealed from the decree of the public utilities commission on the grounds that, while conceding that as to the inhabitants of the town-site, the water company was a public utility, as to the petitioners the contract was private and individual, and that the provisions of the California constitution and statute, if held to declare the company a public utility and subject to public regulation, violated the contract clause of the federal constitution. On the part of the commission and of the corporation it was claimed that the corporation was from the start a public service corporation, having dedicated its waters and properties to public use, and hence all of the contracts were issued subject to the power of the state to raise or lower the rates, and the commission in doing so has not impaired the obligation of the contracts in the constitutional sense. The constitution of California, Art. 12, Sec. 23 (amendment adopted Oct. 10, 1911), declares that every private corporation, individual, or association of individuals furnishing water "either directly or indirectly, to or for the public . . . is hereby declared to be a public utility" subject to control and regulation by the railroad commission; and that "every class of private corporations, individuals, or association of individuals, hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation." It also declares that the right of the legislature to confer powers upon the railroad commission respecting public utilities is plenary and unlimited by any provisions of the constitution. (For discussion of the California constitution and legislation creating the public utilities commission, see article by Max Thelen, 2 MINNESOTA LAW REVIEW 479.) Acting upon the constitutional definition and authority, the legislature (G. S. 1913, Chap. 80 p. 84) declared:

"Whenever any . . . corporation sells, leases, rents or delivers any water to any person, firm, private corporation, municipality, or any other political subdivision of the state whatsoever except as limited by Section 2 hereof, whether under contract or otherwise, such person, firm or private corporation is a public utility, and subject to the provisions of the public utilities act of this state and the jurisdiction, control and regulation of the railroad commission of the State of California."

This is an attempt on the part of the state by means of constitutional definition and legislative enactment to put out of existence all private rights in the sale of water. In substance it makes the water company in the instant case a public utility if it is within the competency of the state to do so. Two questions therefore arise: (1) Was the corporation originally a public utility? (2) If it was a private corporation selling its water to purchasers of land, can the state by its sovereign decree convert it into a public service corporation? Certain propositions may be taken as established law: (a) If the water company and its plant was a public utility at the time it made its contracts with purchasers of land securing to the latter water privileges attached as easements, those contracts could not stand in the way of a rate regulation by the proper authorities. If it was a public utility, the commission might lawfully *raise* the rates in spite of the contracts, or *lower* them. (b) If it was not a public utility at the date of the contracts, the rates could neither be raised nor lowered without consent of both parties, unless the mere legislative

decree converting a private business into a public utility deprives the contract of the constitutional protection.

Following are a few illustrations of proposition (a): The act of Congress of 1906, in the exercise of power over interstate commerce, could prohibit the charging of greater, less, or different rates of fare than those fixed by the published tariffs filed with the Interstate Commerce Commission, and this prohibition rendered unenforceable a prior contract, valid when made, by which a carrier agreed to issue annual passes for life in consideration of a release of claim of damages. *Louisville & N. R. Co. v. Mottley,* (1911) 219 U. S. 467, 55 L. Ed. 297, 31 S. C. R. 265, 34 L. R. A. (N.S.) 671. The reason given is that the constitutional power to regulate commerce is complete in itself and subject to no restrictions except those contained in the constitution. Contracts for the payment of money, made before the passage of the Legal Tender Act, were held not to be unconstitutionally impaired by those acts, since all "contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority." *Legal Tender Cases,* (1870) 12 Wall. (U. S.) 457, 550, 551, 20 L. Ed. 287.

A contract between an interstate railway and a brewery to transport beer in barrels, etc., and to return the empty barrels at certain rates, was overridden and rendered illegal by the passage of the interstate commerce act of February 4, 1887; thereafter the carrier had the right and duty to ignore the contract and charge the brewery the same rates as other parties without discrimination. *Bullard v. Northern Pac. R. Co.,* (1890) 10 Mont. 168, 25 Pac. 120, 11 L. R. A. 246.

The foregoing cases were instances of the effect of acts of Congress in incidentally nullifying contracts between carriers and private persons. It might be argued that the contract clause of the federal constitution applies only to states; but the following are instances in which state legislation having the same effect upon contracts has been upheld: A contract between a railroad company and a transfer company giving the latter exclusive privileges with respect to solicitation of business in the station and trains of the former was rendered invalid by a subsequent city ordinance prohibiting the solicitation of business from passengers in railway stations, but the obligation of the contract was not unconstitutionally impaired. *Seattle v. Hurst,* (1908) 50 Wash. 424, 97 Pac. 454, 18 L. R. A. (N.S.) 169; *Lindsay v. Anniston,* (1894) 104 Ala. 257, 16 So. 545, 27 L. R. A. 436, 53 Am. St. R. 44. A contract between two street railway companies for the interchange of passengers and providing that no change shall be made in the rates of fare to be charged, though valid when made, was rendered unenforceable by a subsequent city ordinance, legally adopted, reducing fares, such ordinance not impairing the obligation of the contract. *Buffalo East Side Ry. Co. v. Buffalo St. R. Co.,* (1888) 111 N. Y. 132, 10 N. E. 63, 2 L. R. A. 384. A state statute authorizing individuals to dam up the waters of a river, the effect of which would be to overflow riparian lands, compel the owner to incur expense in strengthening dikes, and nullify a contract between him and others for the removal of obstructions in the stream, was a valid exercise of the state police power

though it destroyed the effect of a previous valid contract. *Manigault v. Springs,* (1905) 199 U. S. 480, 50 L. Ed. 274, 26 S. C. R. 127. Notwithstanding a five-year contract stipulating rates between an electric light and power company and a consumer, a higher rate imposed by the public utility commission, with three years of the life of the contract yet to run, may be enforced without unconstitutionally impairing the obligation of the contract. *Union Dry Goods Co. v. Georgia Public Service Corp.,* U. S. Sup. Ct. Jan. 7, 1919. These cases are, of course, to be distinguished from those which hold that a contract between a state or a municipality and a public service corporation fixing the rates which the latter may charge is irrepealable. *Minneapolis v. Minneapolis St. Ry. Co.,* (1910) 215 U. S. 417, 54 L. Ed. 259, 30 S. C. R. 118; *Home Tel., etc., Co. v. Los Angeles,* (1908) 211 U. S. 265, 53 L. Ed. 176, 29 S. C. R. 50; *Detroit United Ry. v.* Michigan, (1916) 242 U. S. 238, 61 L. Ed. 268, 37 S. C. R. 87. For further recent illustrations of the power of public utility commissions to raise rates, see *Interurban, etc., Co. v. Public Utility Com.,* (Ill. 1918) 120 N. E. 831; *Robertson v. Wilmington & P. Traction Co.,* (Del. 1918) 104 Atl. 839; *Milwaukee, etc., Co. v. R. R. Commission of Wisconsin,* (1914) 238 U. S. 174, 59 L. Ed. 1254, 35 S. C. R. 820. See, also, *Columbus, etc., Co. v. Columbus,* (Ohio 1918) 253 Fed. 499.

It seems clear under the foregoing authorities that if the water company was a public utility when it made the contracts in question in the instant case, such contracts could not prevent the railroad commission from raising the rates. On the other hand, it is equally clear that such interference with the obligation of the contracts could only be justified on the ground that, being a public utility, the possibility of change of rates by the public authority was within the contemplation of the parties. The constitutional amendment above referred to was adopted long after the rights of the land owners under their contracts accrued. The pivotal question, therefore, is, was the company a public utility at the time the contracts were made? The court finds as a fact that the water, at that time, was held in private ownership, had not been dedicated to public use, and the rights of the landowners to whose land the water was made appurtenant were private property. A somewhat singular admission is made by the landowners (confirmed by the court as correct) that as to the town supplied with water from the company's system, the company is a public utility. It is rather difficult to see a reason for distinguishing between the inhabitants of the town and those outside. It is true the former require the water for domestic consumption, the latter for irrigation. The water-right contracts were not assignable without the written consent of the company, but it is scarcely conceivable that the company could arbitrarily refuse to furnish water to any assignee of a purchaser of the land who bona fide stands ready to pay the contract rates and perform the duties incident to ownership. The company undoubtedly had the right at the beginning to refuse to sell the water privilege to any individual or to enter into a water-right contract with any purchaser, but, having sold the water privilege and made it appurtenant to the land, its reserved right to refuse assent to assignment must be of nominal value. The company's system is the sole source of supply of the entire population of that por-

tion of the valley, and every landholder seems to be entitled to receive the water. Regardless of the company's intention, it may be seriously questioned whether it did not in fact cease to be a mere private proprietor selling water, and become a public purveyor to that portion of the public within the area of its service. In *Thayer v. Cal. Dev. Co.*, (1912) 164 Cal. 117 (128), 128 Pac. 21, the supreme court (before the adoption of the present constitutional provision) held to be private an irrigation company supplying water to owners of 400,000 acres of irrigable land, because not every *inhabitant* can make use of the water for irrigation—"only those occupying land can do so;" hence, "the use of water for irrigation is not public unless the water is available, as of right, upon equal terms to all landowners of the class and within the area to be benefited who can get water from the ditches to their lands. If the dispenser of water has the right to say who shall have it, and upon what terms, selling to one and refusing to sell to another at will, it is not devoted to public use." In the instant case, if the company may not arbitrarily refuse its consent to an assignment of a water privilege and thereby totally destroy the value of the land to which it is appurtenant, the test stated in the *Thayer* case seems to determine the use to be public. In that case the plaintiff holding land within the irrigable area, but no stock in the irrigation company (an indispensable requisite under the original scheme), demanded water. The court refused to compel the company to furnish it. The Supreme Court of the United States in *Fallbrook Irr. Dist. v. Bradley,* (1896) 164 U. S. 112 (161), 41 L. Ed. 369, 17 S. C. R. 56, discussing the question whether or not the water belonging to an irrigation district was dedicated to a public use, said: "The fact that the use of the water is limited to the landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water. It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water. The water is not used for general, domestic, or for drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who expect to use it on their lands. . . . We think it clearly appears that all who by reason of their ownership of or connection with any portion of the lands would have occasion to use the water would in truth have the opportunity to use it upon the same terms as all others similarly situated. In this way the use, so far as this point is concerned, is public because all persons have the right to use the water under the same circumstances."

Applying this test in the instant case, it is not easy to escape the conclusion that the water system was a public use. Had there been one company instead of two, selling its land and water simultaneously until all its land was sold, it seems fairly plain that the company could have refused to sell either land or water to any individual, thereby clearly putting itself outside the accepted common-law definition of a public utility. Such a company would not offer to serve the public generally, but only such

individuals as it could make a satisfactory bargain with. It would be under no obligation to treat all alike. But when a company owning no land proposes to supply water to all who buy land from another company, at uniform prices, under assignable contracts, and the physical conditions are such as to create a practically complete monopoly, the situation seems to be materially altered. The original promoters chose to organize two corporations, as if for the express purpose of negativing the idea that a sale of a tract of land with water privilege was to be a single transaction. They purposely built up a community, the land company ceasing to function when all the land should be sold, while the water company should remain in perpetuity as the sole purveyor of a prime necessity to the community. Under these circumstances it seems that the water company did dedicate its properties to public use in such manner that they became "affected with a public interest." Whether or not this conclusion is correct, it is apparent from the foregoing discussion that the constitutional and legislative attempt by the state to stamp the character of a public utility upon enterprises intrinsically private is futile where doing so will impair the obligation of contracts. See further, *Del Mar Water Co. v. Eshleman,* (1914) 167 Cal. 666, 140 Pac. 591, 948; *Franscioni v. Soledad Land & Water Co.* (1915) 170 Cal. 221, 149 Pac. 161; 32 Harv. Law Rev. 74. See *De Pauw Univ. v. Public Service Com.,* (1918) 253 Fed. 848.

Finally, there remains the contention of the friends of the California constitutional amendment: (a) that a business which is private at one time in a nation's history may thereafter become in fact public in character (*Munn v. Illinois,* [1876] 94 U. S. 113, 24 L. Ed. 77; *German Alliance Ins. Co. v. Kansas,* [1914] 233 U. S. 389, 58 L. Ed. 1011, 34 S. C. R. 612); (b) that the legislative department of the government may declare the fact that the business has become public in character and provide for its regulation as such; and (c) that after such declaration, private contracts, valid when made, are no longer protected by the contract clause of the constitution. It is believed that the courts have not, thus far, taken this last step. Certainly *Munn v. Illinois* and the *German Alliance Insurance* case did not involve the question of the inviolability of contracts made prior to the legislative declaration. It is hard to believe that insurance premiums stipulated in a policy may be raised or lowered without mutual consent in consequence of a subsequent legislative declaration that insurance has become a business "affected with a public interest."

CORPORATIONS—STOCK DIVIDENDS AS INCOME OR CORPUS OF A TRUST FUND.—Testator gave in trust certain stocks, with directions to the trustees, after payment of certain annuities, "to pay the balance of the income" to his wife, son, and daughter, and upon the determination of the trust to distribute the remainder in the manner indicated in the will. The will was executed in 1906; it does not appear when testator died. The directors of the corporation, in 1916, declared from earnings a stock dividend of 33⅓ per cent, and fifty shares of the capital stock, representing that percentage, were delivered to the trustees. In a suit by trustees for instructions, *Held,* the stock dividend is a part of the capital or corpus, the

income alone being payable to the life tenant. *Thatcher v. Thatcher,* (1918) 117 Me. 331, 104 Atl. 515.

By this decision the Maine court definitely aligns itself with the courts adopting the so-called Massachusetts rule, which it considers supported by the decided weight of authority as well as the better reason. Those authorities are fully collated in the opinion. The court epitomizes the three rules which have been recognized in different jurisdictions, viz., the so-called Kentucky rule, the Pennsylvania rule, and the federal or Massachusetts rule, as follows: "Roughly, the Kentucky rule gives to the life tenant all dividends accruing from earnings, whenever made and in whatever form declared, while the Pennsylvania rule makes the same disposition of such dividends, except those accruing from earnings made before the death of the testator, when apportionment is made. The third rule, known as the Massachusetts rule, holds that ordinarily cash or money dividends are the property of the life tenant, and that stock dividends belong to the remainderman." According to this rule, earnings of the corporation are not necessarily earnings or income of the trust. The directors, having supreme control of the company's affairs, may treat the earnings as suitable for distribution in cash, or for increase of capital, and their determination is final.

This view is totally rejected in the recent case of *United States Trust Co. v. Heye,* (N. Y. Court of App. 1918) 120 N. E. 646. In making distribution of the stocks of constituent companies, upon the dissolution of the Standard Oil Company of New Jersey in 1911, stocks of all the companies which had been turned over to that company were returned to the former owners and in addition thereto stocks of several companies which had been absorbed by the Standard Oil and paid for out of profits accumulated since its formation. One Heye died in 1899, leaving in trust a quantity of stock of the numerous companies previously constituting the Standard Oil Trust; his trustee was directed to pay and apply "the net income, rents, issues and profits" to certain life tenants, the principal to be paid over as provided in the will. The court directs the trustee to treat the stocks of the original constituent companies as principal, regardless of the fact that they have greatly increased in value since the creation of the trust fund; the stocks of the new companies acquired by the Standard Oil Company (New Jersey) out of its accumulated profits were apportioned, the part so acquired subsequent to the creation of the trust being deemed income upon distribution to the trustee, while that which had been merely transferred from other corporations owned by the holding company at the time of the creation of the trust was capital.

This view refuses to treat the action of the board of directors as conclusive. "Investigation is always permissible, and sometimes necessary, to determine whether or not the corporate property is being distributed or accumulations divided. The ground upon which the apportionment rule is based is that the life tenant ought to have the earnings when the company makes a disposition of them." *United States Trust Co. v. Heye,* supra. Whether the distribution of earnings takes the form of cash or stock is not decisive. Prior to this case, the last expression of the rule

adopted by the New York courts is found in *Matter of Schaefer,* (1917) 178 App. Div. 117, 122, 165 N. Y. Supp. 19, 23, and 222 N. Y. 533, 118 N. E. 1076, as follows:

"Where the trust fund consists of corporate stock, the life tenant will ordinarily be limited to receiving only so much of the profits as the corporation sees fit to distribute in dividends, but when the accumulated profits come into the hands of the trustees in any form or manner, the life tenant is entitled to receive them."

In view of the sharp diversity in the rules adopted in different states, it is evidently of great importance that the language used in any instrument creating a trust in stocks, where a provision is made for life tenants and remaindermen, should show distinctly which of those rules the trustor prefers to have applied. For a discussion of some of the principles involved, see 2 MINNESOTA LAW REVIEW 284; also *Rhode Island Hospital Trust Co. v. Bradley,* (R. I. 1918) 103 Atl. 486.

CORPORATIONS—ULTRA VIRES—DENIAL OF CORPORATION'S RIGHT TO SUE OFFICER FOR LOSSES IN ULTRA VIRES TRANSACTIONS BECAUSE OF ASSENT OF DIRECTORS.—The president and directors of the plaintiff, a national bank, for several years engaged with its cashier, the defendant, in buying and selling cotton on the market, the plaintiff receiving the benefits and profits during that period until a loss of $3000 accrued and the overdrafts resulting were discovered by the bank examiner, whereupon the president persuaded the defendant and his wife to execute notes and mortgages, with the agreement that the bank would not require the notes to be paid and with the understanding that such notes and mortgages were made for the purpose of deceiving the bank examiner. *Held,* that the bank, being a party to the unlawful transactions by which the loss occurred, cannot enforce the notes and mortgages based thereon against its joint tortfeasor. *First National Bank of Maud v. McKown,* (Okla. 1918) 176 Pac. 245.

Where directors of a corporation intentionally do what is beyond their authority they are personally liable to the corporation, stockholders, and general creditors for the damages resulting. *Williams v. McDonald,* (1886) 42 N. J. Eq. 392, 7 Atl. 866; Machen, Private Corporations, II, p. 1267. This is especially true of national banks because of the statutory provision, U. S. Compiled Statutes 1918, Sec. 9831, which expressly makes each director personally liable for all the damages the bank, stockholders, and general creditors shall have sustained. The statute was held to be only a restatement of the common law liability of directors. *Cockrill v. Cooper,* (1898) 29 C. C. A. 529, 86 Fed. 7. The instant case admits this, but states that the plaintiff's rights are barred because the action was brought at the instance of the president of the bank who was a party to the unlawful transactions. It differentiates this case from *City National Bank v. Crow,* (1912) 27 Okla. 107, 111 Pac. 210, where the plaintiff was allowed to recover, on the ground that in that case the action was instituted by new officers of the bank against the former officers. It states further that the effect of enforcing the notes and mortgages would be to make a

scapegoat out of one party to the wrong and to permit another, under whose advice and direction the wrong was done, to reap an unconscionable advantage. The first of these reasons does not seem to be supported by the decisions of the courts. In England the consent of all members of the corporation to ultra vires actions of the directors will not prevent the corporation as a distinct entity from holding the directors liable. *London Trust Co., Ltd. v. McKenzie,* (1893) 62 L. J. Ch. 870, 68 L. T. 380. semble; *Society of Practical Knowledge v. Abbott,* (1840) 2 Beav. 559, 9 L. J. Ch. (N.S.) 307, 4 Jur. 453; Machen, II, p. 1290. In the United States, however, when the officers of a corporation engage in an ultra vires business for the benefit of the corporation and the corporation has the actual benefit, and when the business is so carried on with the acquiescence of the stockholders, it actually although illegally becomes the business of the corporation and an action cannot be maintained against such officers by the corporation. *Holmes v. Willard,* (1890) 125 N. Y. 81, 25 N. E. 1083, 11 L. R. A. 170.

The consent of a mere majority of stockholders is held to be no defense to a director. Machen, II, p. 1290, *Sieyman v. Electric Vehicle Co.,* (1907) 72 N. J. Eq. 403, 65 Atl. 910. Ratification by the directors is held to be insufficient to relieve of liability those who committed the ultra vires act. *Seventeenth Ward Bank v. Smith,* (1900) 51 App. Div. (N.Y.) 259, 64 N. Y. S. 888. Although it is true both in the United States and England that a shareholder who assented to ultra vires acts on the part of directors would be precluded from maintaining a shareholder's bill to make them liable, *Alexander v. Searcy,* (1888) 81 Ga. 536, 8 S. E. 630, 12 Am. St. Rep. 337; *Pinkus v. Minneapolis Linen Mills,* (1896) 65 Minn. 40, 67 N. W. 633, this is a personal right of the shareholder; and the corporation as a separate entity, from the reasoning of the above cases, is precluded from recovering only when all of the stockholders have consented to or acquiesced in the acts of the directors and thereby made the acts of the directors the acts of the corporation. The courts seem to hold that it is immaterial that the officer who instigates the suit was involved in the ultra vires transaction.

The directors of a bank who consent to the use of the funds of the bank for ultra vires purposes are jointly and severally liable for the loss resulting to the bank. *Cooper v. Hill,* (1899) 94 Fed. 582. The same rule applies to other corporations. *Horn Silver Mining Co. v. Ryan,* (1889) 42 Minn. 196, 44 N. W. 56. If there is recovery against one of the directors, he cannot sue the others for contribution; for the right of action against directors of national banks for violation of the national banking act is for tort, *Cockrill v. Butler,* (1897) 78 Fed. 679; and the parties being in pari delicto there will be no contribution between them. *Churchill v. Holt,* (1881) 131 Mass. 67; *Andrew v. Murray,* (1861) 33 Barb. (N.Y.) 354. The cashier, therefore, in the instant case, could have been sued for the whole loss without joining the other tort-feasor even though no mortgages or notes had been executed; and although it would seem harsh, having no right of contribution from the other party, yet the courts would not listen to his complaint. However, as the action was on

the note and mortgage, the decision might, perhaps, be rested on the understanding of the parties that they were given for color only and would not be enforced.

GRANT IN FEE—PERPETUAL RENT CHARGE.—The state of New Jersey granted certain submerged lands in fee to Morris & Cumings Dredging Co., its successors and assigns, subject to the payment of a perpetual rent to be paid annually, with a right on part of the state to re-enter for nonpayment. *Held,* that grant and rent charge were valid. *Leary v. Jersey City,* (U. S. Sup. Ct., Jan. 7, 1919).

Authorities are all agreed that A can grant land to B in fee with a perpetual, inheritable rent to be paid to A. *Van Rensselaer v. Hays,* (1859) 19 N. Y. 68, 75 Am. Dec. 278; *White v. Fuller,* (1865) 38 Vt. 193; *Minneapolis Mill Co. v. Tiffany,* (1876) 22 Minn. 463. *Wallace v. Harmstad,* (1863) 44 Pa. St. 492, decided on same point, contains dicta to the effect that this perpetual rent may rest on contract or on the feudal nature of the tenure. The Minnesota case held that a grant of a parcel of land with a mill-power of water, for manufacturing purposes, subject to a fixed, perpetual, annual rent was valid. The constitution of this state provides: "All lands within this state are declared to be allodial, and feudal tenures of every description, with all their incidents, are prohibited." Art. I, Par. 15. A grant in fee with a perpetual rent charge does not come within this prohibition, because "fealty, which was the essential and distinguishing feature of feudal tenure," is lacking. *Minneapolis Mill Co. v. Tiffany,* supra. Nor is it prohibited by the rule against perpetuities, for "rights of escheat in realty . . . are not within the Rule." Gray, Rule against Perpetuities, 3rd ed., p. 175.

LIMITATION OF ACTIONS—TITLE TO PERSONAL PROPERTY BY ADVERSE POSSESSION.—In 1911, plaintiff took a Jersey heifer to the pasture of one House. A few months later, the heifer disappeared from the pasture, and her whereabouts was unknown to the plaintiff until July, 1916, when plaintiff found her in the pasture of the defendant. Plaintiff demanded possession of the cow from defendant, and on refusal brought action for the return of the property. Defendant pleaded the two-year statute of limitation. *Held,* the action is barred. *Torrey v. Campbell,* (Okla. 1918) 175 Pac. 524.

The question in this case is whether the true owner of personal property is forever barred from asserting title to personal property where it has been lost or stolen and finder or thief takes and retains open, notorious, and exclusive possession for the statutory period. There is very little law on this question, owing, no doubt, to the infrequency of such a state of facts. The instant case seems to be in accord with the weight of authority. It follows the case of *Gatlin v. Vaut,* (1906) 6 Ind. Terr. 254, 91 S. W. 38, in which the court say:

"We therefore hold that the statute of limitations as to personl property in the hands of a thief who has removed it from the vicinity of the

owner or secreted it from him does not begin to run until he returns the property to that vicinity, or openly and notoriously holds it, so that the owner may have a reasonable opportunity of knowing its whereabouts and of asserting his title. And when he does this, the statute begins to run, although the proof may show it to have been stolen property, not on the theory that the thief is to be protected, but because of the laches of the owner in not asserting his title for so long a period as the statute gives him. A grantor can convey no better title than he has himself; and if the statute has not begun to run, his grantee can claim nothing by virtue of his possession. If the thief, after having concealed the property, has done nothing in relation to it to start the statute in his favor, his grantee cannot tack the thief's possession, or any part of it, to fill out his unexpired time. It is otherwise if the statute began to run while the property was in the hands of the thief. Then the purchaser may tack to his unexpired time, the time the property was in the thief's possession after the statute began to run. If the statute did not begin to run while the property was in the possession of the thief, and if it were bought by an innocent purchaser, it commenced at the time the purchaser took possession by virtue of the sale. And if the buyer be not an innocent purchaser, if he knew it to be stolen property, he was but the receiver of stolen property, and the statute would not begin to run as to him until he should have done with it what a thief is required to do in order to bring it within the operation of the statute."

This doctrine is affirmed in several cases. *Dee v. Hyland,* (1883) 3 Utah 308, 3 Pac. 388; *Wells v. Halpin,* (1875) 59 Mo. 92; *Adams et al. v. Coon,* (1913) 36 Okla. 644, 129 Pac. 851, 44 L. R. A. (N.S.) 624; (Defendant's removing from the locality did not bar the running of the statute.) 34 Cyc. 1423. Contra, *Duryea v. Andrews,* (1890) 58 Hun. (N. Y.) 607, 34 N. Y. St. R. 774, 12 N. Y. Supp. 42; (In contemplation of law, plaintiff is the legal owner of the property until demanded of defendant, following *Wood v. Cohen,* [1855] 6 Ind. 455, in which the question of the statute of limitations was not taken up.) *Daniel v. McLucas,* (1899) 8 Kan. App. 299, 55 Pac. 680, following *Duryea v. Andrews,* supra. In Kentucky, it seems that the plaintiff must have notice. *Fidelity & Columbia Trust Co. v. McCabe,* (1916) 169 Ky. 613, 184 S. W. 1124. Another limitation, not in conflict with the instant case, is that where demand is a prerequisite to the bringing of the action, the statute begins to run from that time. *Torian v. McClure,* (1882) 83 Ind. 310. And it follows from this that an action for conversion by a life tenant will not accrue until the death of the life tenant, although the authorities are in conflict on this point. See note, 16 Ann. Cas. 540, and cases cited. Barring these few exceptions, the instant case seems to state the rule followed on this point. See *Shelby v. Shaner,* (1911) 28 Okla. 605, 115 Pac. 785, 34 L. R. A. (N. S.) 621; Wood, Limitation of Actions, 4th ed., I, Sec. 57d; Buswell, Limitations and Adverse Possession, Sec. 4; G. S. Minn. 1913, Secs. 7701-7709. And, as collaterally in issue, it may be interesting to note that where there are statutes providing for a suspension of the operation of the statute in question, the aggrieved owner, obviously, would be entitled to all the benefit thereof. See G. S. Minn. 1913, Sec. 7708.

MORTGAGES—SALE OF THE MORTGAGED LAND—ASSUMPTION OF THE MORTGAGE DEBT BY THE GRANTEE—EXTENSION AGREEMENT MADE BETWEEN

THE MORTGAGEE AND GRANTEE WITHOUT THE CONSENT OF THE MORTGAGOR—RELEASE OF MORTGAGOR.—Defendant executed a note secured by a mortgage on real estate. Before maturity he conveyed the premises to another, who assumed the mortgage debt. On maturity the mortgagee and grantee entered into a formal extension agreement, by which the mortgagee extended the time and the grantee agreed to a higher rate of interest and paid part of the principal. The mortgage was foreclosed and the premises sold for less than the mortgage debt. Suit by the mortgagee against the mortgagor to recover the deficiency. *Held,* the mortgagor became the surety only, and the extension agreement, without his consent, released him. *Codman v. Deland,* (Mass. 1918) 121 N. E. 14.

When the grantee in a deed assumes the mortgage debt, although there is no mention of the fact in the deed, the grantee becomes, as between themselves, the principal debtor, and the mortgagor the surety. Jones, Mortgages, 7th ed., II, Sec. 741. When notice of the agreement is given the mortgagee and he assents to the agreement, the grantee becomes the principal as to him also. *Dean v. Walker,* (1883) 107 Ill. 540, 47 Am. Rep. 467; *Thorp v. Keokuk Coal Co.,* (1872) 48 N. Y. 253. The mortgagee may bring an action in his own name and in a court of law against the grantee, *Dean v. Walker,* supra; *Starbird v. Cranston,* (1897) 24 Colo. 20, 48 Pac. 652; on the ground that he is the third party for whose benefit the contract is made. *Follansbee v. Johnson,* (1881) 28 Minn. 311, 9 N. W. 882. The rule of the federal courts, however, is that the mortgagor remains the principal, and the action against the grantee can only be brought in a court of equity, *Willard v. Wood,* (1890) 135 U. S. 309, 34 L. Ed. 210, 10 S. C. R. 831; *Keller v. Ashford,* (1890) 133 U. S. 610, 33 L. Ed. 667, 10 S. C. R. 494, on the ground that the mortgagee is subrogated to the equities of the mortgagor who as between himself and the mortgagee has become the surety only. [dictum] *Knapp v. Conn. Mutual Life Insurance Co.,* (1898) 85 Fed. 329, 40 L. R. A. 861. *Keller v. Ashford,* supra. In Massachusetts the mortgagee has no remedy, in his own name, against the grantee, Jones, Mortgages, II, Sec. 761d, and the relation of principal and surety does not arise between the mortgagor and grantee in relation to the mortgagee, *Mellen v. Whipple,* (1854) 1 Gray (Mass.) 317, unless the grantee and mortgagee enter into a separate and independent stipulation by which the mortgagee accepts the grantee as principal and on which he can sue. *Franklin Savings Bank v. Cochrane,* (1903) 182 Mass. 586, 66 N. E. 200.

In the instant case, the mortgagee made a valid and binding agreement by which he accepted the grantee as the principal debtor, so that he took the case out of the general rule of the relation of grantee and mortgagee and brought it within the rule governing principal and surety. In this same agreement he extended the time of payment without the consent of the mortgagor, the surety. When the creditor extends the time of payment to the principal debtor, without the consent of the surety, the surety is discharged. *Franklin Savings Bank v. Cochrane,* supra; *Allis v. Ware,* (1881) 28 Minn. 166, 9 N. W. 666. The agreement must be of a binding character and capable of being enforced. De Colyar, Law of Guarantees, 3rd ed., 422 (E).

The decision in this case is not contra to that of other states, although the Massachusetts rule is contra to that of the New York and federal courts as to the relation of the mortgagee to the grantee and mortgagor.

NAVIGABLE WATERS—TITLE TO LAND UNDER WATER—RIGHT OF A STATE TO PREVENT REMOVAL OF SAND.—A corporation of Illinois was engaged in dredging sand and gravel from the bed of Lake Michigan within the territory of Indiana. Navigation was not affected, but the sand and gravel were valuable. On complaint of the state of Indiana, *Held,* that the corporation should be enjoined. *Lake Sand Co. v. State,* (Ind. 1918) 120 N. E. 714.

The decision is sound. A state should have prima facie title to the beds of its navigable waters. There are presumptions of the English common law that the Crown owns the bed of tidal waters, and the riparians the beds of non-tidal waters. These are presumptions of fact and arose from the general state of the title to these two classes of lands. The tidal lands had rarely been granted, and consequently, in a particular case, title was presumed to be in the Crown until the contrary was shown; the non-tidal lands were generally in the enjoyment of the riparians by early grant or possession from time immemorial, and consequently, in a particular case, title was presumed to be in the riparian until the contrary was shown. The first presumption is applicable to all lands under navigable waters in the United States, since that is the state of the title to them generally. They have seldom been expressly granted by the state, and nothing passes by implication on a grant from the sovereign. And riparians generally have not been in possession of them. The state has, therefore, prima facie title. *Wear v. Kansas,* (1917) 245 U. S. 154, 38 S. C. R. 55, Ann. Cas. 1918B 586. For full discussion and authorities, see 2 MINNESOTA LAW REVIEW 313.

The opinion contains dicta that the state could not part with its title or prevent citizens of the state from removing sand and gravel so long as they did not interfere with use by other citizens. This is the trust theory of state ownership and, it is submitted, is wrong on principle and authority. It arose from the manner by which the later-admitted states acquired title to these lands from the United States on their admission to the Union. They were held to pass to the states as a sovereign right. But they were never impressed with a trust by Congress or by the federal courts. The public have a common law right of navigation and perhaps of fishing; but they have no common law right in the soil. The state should have the same power of disposition of these lands, subject to the public right, as it has in any of its public lands. *Wear v. Kansas,* ubi supra. For full discussion and authorities, see 2 MINNESOTA LAW REVIEW 429.

Assuming that the state holds the lands in trust, the case decides that the trust is for the benefit of the citizens of the state, and not for citizens or corporations of other states. The right to take sand differs in this respect from the right of navigation which is secured to all citizens of the United States by the federal constitution.

SECONDARY BOYCOTT—CLAYTON ACT.—Plaintiff, a manufacturer and employer operating an open shop in Michigan, sold his printing presses in New York. To compel plaintiff to establish a closed shop, defendants, an organization of labor unions, caused all union labor engaged in trucking and installing presses purchased by customers of plaintiff to strike. Consequently, plaintiff lost many sales. *Held,* plaintiff can not enjoin defendants from instituting a secondary boycott. *Duplex Printing Press Co. v. Deering,* (1918) 252 Fed. 722 (C. C. A. 2nd cir.).

The legality of the strike by labor unions has been recognized in most courts within certain limits. It is almost generally conceded that members of a labor union may refuse to work in an "open shop." *Pickett v. Walsh,* (1906) 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N.S.) 1067, 116 Am. St. R. 272, 7 Ann. Cas. 638; *J. F. Parkinson Co. v. Building Trades Council,* (1908) 154 Cal. 581, 98 Pac. 1027. Also see 16 R. C. L. 438. This is the case of A, a union man, refusing to work for B, his employer, unless the latter will discharge C, a non-union man. The instant case raises this situation: A, a union man, refuses to work for B, with whom he has no dispute but who has dealings with D, because the latter employs C, a non-union man. The greater weight of authority holds that such a strike can be enjoined, on the ground that the purpose of forcing D to yield to A's demands is without legal justification. *American Federation of Labor v. Buck's Stove & Range Co.,* (1909) 33 App. D. C. 83; *Pickett v. Walsh.* supra; *Burnham v. Dowd,* (1914) 217 Mass. 351, 104 N. E. 841, 51 L. R. A. (N. S.) 778. The secondary boycott has been declared illegal and enjoined in various other forms. *Loewe v. Lawlor,* (1914) 235 U. S. 522, 35 S. C. R. 170, 59 L. Ed. 316; *Loewe v. California State Federation of Labor,* (1905) 139 Fed. 71. See *Burnham v. Dowd,* supra. Other courts have upheld the legality of the secondary boycott on the ground that the primary object of such a strike was to advance the interests of the union and its members. *Bossert v. Dhuy,* (1917) 221 N. Y. 342, 117 N. E. 582; *National Protective Assn. v. Cumming,* (1902) 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. R. 648; *Grant Construction Co. v. St. Paul Building Trades Council,* (1917) 136 Minn. 167, 172, 161 N. W. 520. See 1 MINNESOTA LAW REVIEW 437 for a further extended discussion of the question. In the instant case the court decides the question entirely under the Clayton Act (U. S. Comp. St. 1916, Sec. 1243d). In the words of the court (p. 748), "the designed, announced, and widely known purpose of section 20 (perhaps in conjunction with section 6) was to legalize the secondary boycott, at least in so far as it rests on, or consists of, refusing to work for any one who deals with the principal offender." The portion of the Clayton Act particularly considered is: "No restraining order or injunction shall be granted . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application . . ." It is interesting to note that this interpretation of the statute seems directly

contra to opinions in two previous cases decided under the same statute. Justice Pitney in *Paine Lumber Co. v. Neal*, (1917) 244 U. S. 459, 61 L. Ed. 1256, 37 S. C. R. 718, says: "Neither in the . . . section, nor in the committee reports, is there any indication of a purpose to render lawful or legitimate anything that before the act was unlawful, whether in the objects of such an organization, or its members, or in the measures adopted for accomplishing them." The judge writing the majority opinion in the instant case regards this statement as purely obiter. Likewise in *Stephens v. Ohio State Telephone Co.*, (1917) 240 Fed. 759, Judge Killits declares: "The statute but enacts the position which courts have universally taken; there is nothing new in it," etc. Therefore, if the instant case shall establish the law for the future, it is patent that all the judicial decisions representing the weight of authority are of no effect. Practically, it means that the strike will be lawful for almost all purposes; it follows that the prevailing order will be unionism.

VENDOR AND PURCHASER—TITLE BY ADVERSE POSSESSION—MARKETABILITY.—Defendant agreed to sell and plaintiff to purchase an estate. Before and on execution of the contract, $25,000 was paid by the plaintiff. Defendant tendered deed at proper time, but plaintiff, entertaining doubt as to the validity of title, which was based on an alleged adverse possession, desired additional time for investigation. Defendant proffered no proofs, by affidavit or otherwise, saying in effect that plaintiff could take the deed or leave it. Plaintiff then demanded repayment of money paid down, which was refused. In an action to recover this amount, with interest, the defendant was allowed at the trial to perfect evidence of title and plaintiff given option of accepting it or of having suit dismissed. Appeal. *Held*, title when tendered was, for purposes of marketability, a doubtful one, and plaintiff, upon refusal of adjournment to investigate, could treat the contract as at an end, and sue for money paid down. *Crocker Point Ass'n, Inc., v. Gouraud*, (N. Y. 1918) 120 N. E. 737.

There remains little doubt that a title by adverse possession is a marketable title, as between vendor and vendee. *Foreman v. Wolf*, (Md. Ct. of App. 1894) 29 Atl. 837; *Austin v. Barnum*, (1892) 52 Minn. 136, 53 N. W. 1132; *Barnard v. Brown*, (1897) 112 Mich. 452, 70 N. W. 1038, with which compare *Thompson v. Dickerson*, (1897) 68 Mo. App. 535. One court even has gone so far as to say that a title by adverse possession is as "high as any known to the law. A marketable title cannot be said to be more." *Tewksbury v. Howard*, (1893) 138 Ind. 103, 37 N. E. 355. It is elsewhere stated that a good title of record is of a higher character and more desirable than one dependent upon extrinsic circumstances to be established by parol evidence. *Bear v. Fletcher*, (1911) 252 Ill. 206, 96 N. E. 997. Practically speaking, the latter view is preferable. The Oregon court has held that a marketable title is one appearing to be such by record of conveyances, or other public memorials, and not resting on parol. *Lockhart v. Ferrey*, (1911) 59 Ore. 179, 115 Pac. 431. *Watson v. Boyle*, (1909) 55 Wash. 141, 104 Pac. 147, is substantially in accord. Undoubtedly, titles by adverse possession are in disfavor with persons contemplating

the purchase of property and with the courts. *Heller v. Cohen,* (1897) 154 N. Y. 299, 311, 48 N. E. 527. And, in *Simis v. McElroy,* (1899) 160 N. Y. 156, 161, 54 N. E. 674, 73 Am. St. Rep. 673, it is said that a party ought not to be made to take a title to premises where he must defend his title by parol evidence. But a later New York case holds that a title by adverse possession that is established on satisfactory undisputed parol evidence is marketable. *Freedman v. Oppenheim,* (1907) 187 N. Y. 101, 79 N. E. 841, 116 Am. St. Rep. 595. The courts, whether in suits to recover money paid down, or in suits to compel specific performance, uniformly hold that title by adverse possession, to support a marketable title, must be reasonably free from doubt. *Shriver v. Shriver,* (1881) 86 N. Y. 575; *Holmes v. Woods,* (1895) 168 Pa. St. 530, 32 Atl. 54; *Townshend v. Goodfellow,* (1889) 40 Minn. 312, 41 N. W. 1056, 3 L. R. A. 739, 12 Am. St. Rep. 736. However, the doubt must be more than a mere suspicion, in the opinion of the New York and Minnesota courts in the above decisions. In a recent Texas case, which involved specific performance, it was stated that unless vendor's title by limitation is so clearly established as to make it a matter of law, as distinguished from a question of fact, the contract will not be enforced. *Greer v. International Stock Yards,* (1906) 43 Tex. Civ. App. 370, 96 S. W. 79. In the principal case, though the doubt was ultimately resolved on a reopening of the case in the lower court, it was felt that, in view of the refusal of the defendant to grant an adjournment for purpose of examination of the title, rescission by plaintiff and suit for down payment were justified. While the case not only holds that title must be reasonably free from doubt, but that evidence thereof must be tendered to the vendee, it is submitted that it is a wholesome decision.

BOOK REVIEWS

CASES ON PROPERTY: FUTURE INTERESTS. By Albert M. Kales. American Casebook Series. St. Paul: West Publishing Company. 1918. Pp. xxix, 729. Price $4.50.

The volume is the fourth of five volumes of cases on the law of property in the American Casebook Series. Its subject matter is future interests in property,—their creation, classification, construction, and validity; illegal conditions, and restraints on the alienation of property. It covers the same ground as Volume V and the first part of Volume VI of Gray's Cases on the Law of Property.

The collection is, as the editor states in the preface to the larger edition previously published, a revision of Professor Gray's collection. The pioneer work in the field was admirably done by Professor Gray. It is no disparagement of his splendid effort to say that his successor has improved on it. The revision has profited by the editor's years of experience in teaching from the older collection. Approximately one hundred and thirty cases have been omitted or are only referred to in footnotes, and thirty others, including several late decisions, inserted. The substitution tends to enliven the subject by more modern cases, and the reduction rather to increase than to lessen the value of the collection for classroom use. On so difficult a subject there should be intensive study of principles rather than extensive study of details. The time usually allotted to the subject in law schools is too short for the discussion of many cases. The larger collection is a temptation to the inexperienced to attempt too much. The volume contains as much of the best material as can be successfully studied in two hours a week for an academic year. Moreover, the reduction has enabled the matter to be contained within the compass of a single volume of convenient size.

There are but few changes in the plan of the collection, but they make for clarity of the subject. The treatment of contingent remainders in a separate chapter emphasizes their peculiar distinctness from all other classes of limitations. The devotion of a separate part to Construction prevents confusing these rules with absolute rules of law.

Perhaps the most important change is in the arrangement of the cases within the chapters. Professor Gray used the chronological order, no doubt with the double purpose of enabling the student to see the development of the law as the courts saw it and also requiring him to rearrange the matter for himself in its topical order. This order made the collection strong meat, and meet only for the strong. Mr. Kales puts the cases in topical order. Probably many teachers of Gray's cases have been doing this for their students out of sympathy for the weak. Opinions will differ according to the viewpoint. Vigorous minds will lose a virile exercise; weaker minds will acquire more knowledge. Certainly for those who may study the subject without the aid of a teacher the change is most helpful.

The footnotes are a valuable part of the book. The editor's notes are learned and suggestive. They open up many matters of which students should have some knowledge, but which instructors have not time to discuss in the classroom. There are enough citations to guide ambitious students to further study.

Future interests is one of the most difficult topics of the common law. It has its roots in the distant past and can be understood only through historical study. In no other branch of the law is the study of cases more essential. The law of future interests is in force in almost all common law jurisdictions. And even in states that have made the largest statutory changes, such as New York and Minnesota, a knowledge of the common law principles is indispensable. The statutes are based on the common law and are construed by common law principles. A knowledge of the law is of increasing importance. Attempts to tie up property become more frequent as wealth increases. A thorough knowledge of the subject is necessary to the drafting of all but the most simple wills and settlements. This volume furnishes the best way of approach to the subject by students or lawyers. It should be supplemented by a study of local statutes and cases.

The work leaves little cause for criticism. In the discussion of the validity of contingent remainders (p. 41) reference might have been made to the exhaustive and fruitful researches of Shaw Fletcher in his Contingent and Executory Interests in Land (London, 1915). The statute on contingent remainders referred to as in force in Massachusetts (footnote p. 58) was superseded by Massachusetts General Acts 1916, Chap. 108, the most enlightened statute on the subject in any jurisdiction. In editing the cases, the names of counsel have been generally but not always omitted!

A word should be said of the larger volume of cases previously published by the same editor, and of which the present volume is an abbreviated edition. It contains too many cases for law school use. It has too large a proportion of Illinois cases to be suitable for other jurisdictions. Its use will probably be confined to Illinois, for which it is an excellent text of both the general and the local law.

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MINNESOTA LAW REVIEW

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SITUS OF PERSONAL PROPERTY FOR PURPOSES OF TAXATION

Necessity for Taxing Personal Property: One of the objections to a system of taxation is the ease with which it may be dodged by the taxpayer, or, to be more accurate, the supposed taxpayer. If any considerable portion of the property subject to taxation may by secreting from the assessor escape taxation, this means that the property which is taxed must bear more than its fair share of the burden. This gives the dishonest property owner, the tax dodger, an advantage over the honest taxpayer. In other words, it puts a premium upon dishonesty and cleverness in secreting property from the gaze of the assessor. The form of property in which this can be successfully done is personal property. In the case of real estate, the ownership of which must be a matter of record and the locality a constant one, secreting from the assessor is impossible and tax dodging is limited to under valuation. For this reason, many favor the tax on real property as a more workable system of taxation than any other, and the extremist, the single taxer, insists that it should be applied to the exclusion of all other forms of property tax. But with the rapid increase in the value of personal property, due in large part to the growth of corporations, some of which, e. g., insurance companies and express companies, have millions of dollars' worth of personal property and practically no real estate, the propaganda of the single taxer has been confined to academic discussion and stands little chance of being adopted by taxing bodies. That per-

sonal property must for some time at least continue subject to taxation may be taken as an established fact. It is therefore necessary to meet and solve as best we may the difficulties in the way of applying a system of taxation to this transitory and more or less elusive and evanescent form of property.

Forms of Personal Property: For purposes of taxation we may divide personal property into two forms, tangible and intangible. The former being corporeal, such as live stock, implements, merchandise, is much less readily secreted than the latter, which consists of such property as shares of stock in corporations, notes, debts, and choses in action in general. From the standpoint of taxation the latter have therefore presented the greatest difficulty, and our attention will for that reason be given mainly to these.

Mobilia Sequuntur Personam: The common law fiction that movables follow the person and that therefore they should be taxed at the domicile of the owner has caused no small amount of confusion because of the inherent difficulty in applying it and the tendency upon the part of some courts to force to the point of interfering with justice a mere fiction which could have been intended merely as a means of furthering justice. If an assessor finds a herd of cattle permanently located within his taxing district on the date when the assessment roll is completed, it does not accord with common sense to say that he shall not assess them unless he can find that the owner is domiciled within the district, rather than leave their assessment to the assessor in the district where the owner is domiciled, which assessor will in all probability not know anything of the existence of the herd, provided the owner is not truthful enough to report the fact. It can readily be seen that a strict adherence to this fiction would greatly facilitate the escape of a vast amount of personal property from assessment anywhere.

Story's View: In discussing this fiction, Justice Story says: "The exceptions to the maxim mobilia sequuntur personam have become so numerous that it cannot be safely invoked for the decision of any but the simplest cases at the present day; if indeed a case can ever be safely decided upon a maxim. The exceptions would probably be less frequent if the maxim were lex *situs* mobilia regit."[1]

View of the Supreme Court: In discussing this same question the Supreme Court of the United States, speaking through

[1] Conflict of Laws, 8th Ed., p. 543 (a).

Chief Justice Waite, says: "The power of taxation by any state is limited to persons, property, or business within its jurisdiction. Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its situs at his domicile. But for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have often been acted upon in this court and in the courts of Illinois. If the state has actual jurisdiction of the person of the owner, it operates directly upon him. If he is absent, and it has jurisdiction of his property, it operates upon him through his property."[2] And in a later case, the court, speaking through Justice Bradley, says: "If the owner of personal property within a state resides in another state which taxes him for that property as part of his general estate attached to his person, this action of the latter state does not in the least affect the right of the state in which the property is situated to tax it also. It is hardly necessary to cite authorities on a point so elementary."[3] And in a still later case, Justice Gray, in delivering the opinion of the court, discusses the origin and decadence of the fiction with a conciseness leaving nothing to be desired: "The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in the amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used."[4]

Reasons for Departure from the Fiction: It may therefore be taken as an established rule of American law that personal property may acquire a situs of its own for the purpose of taxation. Nor are there wanting sufficient practical reasons why this should be so. When property of any kind is located in a state, legal protection must be given to it by that state. This protection may involve considerable expense and it follows that the

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[2] Tappan v. Merchants' National Bank, (1873) 19 Wall. (U. S.) 490, 499, 22 L. Ed. 189.

[3] Coe v. Errol, (1886) 116 U. S. 517, 29 L. Ed. 715, 6 S. C. R. 475.

[4] Pullman's Palace Car Co. v. Pennsylvania, (1891) 141 U. S. 18, 35 L. Ed. 613, 11 S. C. R. 876, 3 Inters. Com. Rep. 595.

state should be allowed to provide for this by levying on said property reasonable taxation, i. e., the same rate of taxation as levied on like property owned by its own residents. A disregard of the fiction is also necessary at times to prevent large corporations, whose property consists in large part of franchises, to escape taxation on millions of dollars' worth of property productive of immense dividends used for the purpose of doing business in states other than the one in which their main office is situated. As said by Justice Brewer in *Adams Express Co. v. Ohio*:[5] "In conclusion let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about situs should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."

Situs of Tangible Personal Property of Common Carriers: Where the tangible personal property of a common carrier is employed entirely within a state and not in interstate or foreign commerce the situs as well as the form of taxing it is a question for the state. But where it is engaged in interstate or foreign commerce the question of its situs is then one which must be determined so as not to conflict with the power of Congress to regulate interstate and foreign commerce. In this case the states may tax it only where it has a taxable situs and the form must not be one which discriminates against it as compared with other property of the state.

Taxable Situs of Ships: The fact that a steamboat or other vessel is used in interstate or foreign commerce does not prevent its being taxed by a state, but its situs for purposes of taxation is its home port, and what is its home port is determined by its registry.[6] The act of Congress[7] requires that every vessel shall be registered at the port nearest to the place where its owner resides, and the name of this port must be painted on its stern, in large letters. In the case just cited it was held that vessels registered at the custom house in New York and engaged in transporting passengers and freight between San Francisco and

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[5] (1897) 166 U. S. 185, 41 L. Ed. 965, 17 S. C. R. 604.

[6] Hays v. Pacific Mail S. S. Co., (1854) 17 How. (U. S.) 596, 15 L. Ed. 254.

[7] 1 U. S. Stat. at L., p. 287, Sec. 3, R. S. Secs. 4141, 4178.

Panama had no taxable situs in San Francisco. Nor does the fact that she is subsequently enrolled in another state as a coaster affect her situs for purposes of taxation.[8] So long as the vessel is engaged in interstate commerce, the mere physical presence of it in a state no more fixes its situs there than does the physical presence of a passenger on an interstate train passing through the state. While the state having jurisdiction may tax vessels as other personal property of the state in proportion to their value, it may not levy a tonnage tax, which is specifically prohibited by the constitution of the United States[9] and where the vessels are engaged in interstate or foreign commerce, they may not be required to pay a license tax or any other tax which would be a regulation of commerce.

Ferry-boats: Where ferry-boats operate between ports of different states it becomes important to determine which state has jurisdiction to tax them. This question came before the Supreme Court of the United States in *St. Louis v. The Ferry Co.*[10] The ferry company owning the boats was incorporated in Illinois. The boats operated between East St. Louis, Ill., and St. Louis, Mo., and when not in use were laid up on the Illinois side of the river. Under these circumstances the court decided that, although registered in St. Louis, their home port and hence their situs for purposes of taxation was in Illinois, not in Missouri, and that the latter state had no jurisdiction over them for purposes of taxation.

Rolling Stock: But a matter which has caused much more difficulty and is more important because it affects more property and more states is the determination of the taxable situs of the cars and engines of railway companies where such property is used in interstate commerce and remains in no one state during the whole year. As the states within which such property was used during a considerable portion of the year were compelled to give it protection, they very naturally felt that such property was subject to their powers of taxation. Their first attempt at a solution of the problem was the imposition of a license tax on such property for the privilege of operating within the state. But in *Pickard v. Pullman Southern Car Co.*[11] it was held that this was

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[8] Morgan v. Parham, (1872) 16 Wall. (U. S.) 471, 21 L. Ed. 303.
[9] Const., Art. I, Sec. 10 (2). Inman Steamship Co. v. Tinker, (1876) 94 U. S. 238, 24 L. Ed. 118.
[10] (1871) 11 Wall. (U. S.) 423, 20 L. Ed. 192.
[11] (1886) 117 U. S. 34, 29 L. Ed. 785, 6 S. C. R. 635.

an unconstitutional exercise of the taxing power of the state, as it was a direct interference with interstate commerce. The tax in this case did not purport to be a property tax but a privilege tax of fifty dollars for each car operated over any railway lines within the state. In delivering the opinion of the court, Justice Blatchford said: "The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit, the car, so far as it was engaged in interstate commerce, was not taxable by the state of Tennessee; because plaintiff had no domicile in Tennessee and was not subject to its jurisdiction for purposes of taxation; and the cars had no *situs* within the state for purposes of taxation; and the plaintiff carried on no business within the state, in the sense in which the carrying on of business in a state is taxable by way of license or privilege."

This sweeping decision made it look discouraging for the states, but they had not as yet exhausted their ingenuity as to method of taxing such property or their logic in convincing the Supreme Court that the property under such circumstances might have a taxable situs within the state. The state of Pennsylvania hit upon a theory which, though not entirely logical and accurate, is, nevertheless, not so illogical and inaccurate as to make it unconstitutional. It levied a tax upon the capital stock of Pullman's Palace Car Company, an Illinois corporation, some of whose cars were engaged in the transportation of passengers to and fro through Pennsylvania. The basis for the assessment on the capital stock was such proportion of the capital of the company as the number of miles of railway in Pennsylvania over which the cars of the company were run bore to the total mileage of track in that and other states over which its cars were run. This is not strictly accurate because the number of cars per thousand miles of road may be considerably greater in one state than in another. But the rule nevertheless furnishes a fairly practical working basis. In sustaining the constitutionality of the law, the court says: "The tax on the capital of the corporation, on account of its property within the state, is, in substance and effect, a tax on that property. . . . The cars of this company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and

jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that instead of stopping at the state boundary, they cross that boundary in going out and coming back cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. . . . This was a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more."[12]

Undoubtedly a state may tax in proportion to its value the average amount of the rolling stock of a railway which is in habitual use within the state even though some or all of it may at times pass out of the state and their places be taken by others. In the case of *Marye v. B. & O. R. Co.*,[13] the court, discussing a tax on railway rolling stock, said: "And such a tax might be properly assessed and collected in cases like the present where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that at any time might be found." The same rule has been applied to refrigerator cars owned by independent companies and leased to the railroads.[14]

These numerous decisions of the court of last resort may be said to have established this as a principle of American law. It is interesting to note the progress made since the strong dissenting opinion by Justices Bradley, Field, and Harlan in *Pullman's Palace Car Co. v. Pennsylvania*, cited above, in which we find the following language: "It seems to me that the real question in the present case is as to the situs of the cars in question. They

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[12] Note 4, supra, 141 U. S. at pp. 25, 26.

[13] (1888) 127 U. S. 117, 32 L. Ed. 94, 8 S. C. R. 1037.

[14] Union Refrigerator Transit Co. v. Lynch, (1900) 177 U. S. 149, 44 L. Ed. 708, 20 S. C. R. 631.

are used in interstate commerce between Pennsylvania, New York and the Western States. Their legal situs no more depends on the states or places where they are carried in the course of their operations than would that of any steamboats employed by the Pennsylvania Railroad Company to carry passengers on the Ohio or Mississippi."[15] But the distinction made by the majority of the court between land and water transportation, as regards the taxable situs of the instruments used, is, we think, sound legally and practical economically.

Express Companies: The personal property of an express company, such as office fixtures, horses, wagons, and cars which do not go outside of the state present little difficulty, but express cars and other movable property used in interstate commerce present the same difficulties as the Pullman and refrigerator cars and are governed by the same rules. Where an express company is a purely domestic corporation the taxable situs for its personal property would be the principal place of business of the corporation; this would apply to its cars as well as to the rolling stock of a railway company, but the legislature may vary this.[16] With express companies, the larger question in regard to taxation is the taxation of its intangible personal property which is usually several times as large as that of its tangible property, and the question of its taxable situs will be dealt with later.

Telegraph and Telephone Companies: With reference to telegraph and telephone companies, there is not so much of their tangible personal property moving from state to state and hence the question of the taxable situs of such property is not so much a question of adjusting the taxing powers of the state to the federal regulation of interstate commerce. It is mainly one of adjustment between the local units of the states. In *Western Union Tel. Co. v. Borough of New Hope*[17] the court sustained a license tax of one dollar per pole and two dollars and a half per mile of wire on the telegraph, telephone, and electric light poles and wires within its limits, notwithstanding the fact that this was proven by the company to be more than the total income from the business done by the company in the borough. But with these, as with express companies, the larger part of their property is usually intangible. As to their tangible property the difficult ques-

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[15] Note 4, supra, 141 U. S. at p. 34.

[16] Adams Express Co. v. Ohio, (1897) 165 U. S. 194, 41 L. Ed. 683, 17 S. C. R. 305.

[17] (1903) 187 U. S. 419, 47 L. Ed. 240, 23 S. C. R. 204.

tions arise in fixing the valuation rather than in determining their situs.

Timber: While growing timber is a part of the realty and the question of its situs presents no difficulty, being that of the land on which it grows, when severed it becomes personal property and like other personal property can acquire a situs of its own. Logs or lumber, unless actually in transit in interstate commerce, would be subject to taxation wherever it might be when the assessment roll is completed. If in transit it would not have a situs of its own and would be taxed at the domicile of the owner, unless before shipment it had acquired a situs different from that of the domicile of the owner.[18]

Coal: Until mined, coal is a part of the realty and is taxed as such, but as soon as it is mined it becomes personalty and would be taxable where taken to the surface through the main workings, unless as a result of transportation it has acquired a situs at another place. The same principles determine the taxable situs of ore.[19] As to when coal shipped from one state into another ceases to be in transit and acquires a taxable situs, the case of *Brown v. Houston*[20] is interesting. It was held in this case that a cargo of coal shipped from Pittsburgh, Pa., and offered for sale in New Orleans had a taxable situs there even though it might later be exported to another state, as claimed by the plaintiffs would be done.

Live Stock: This is a form of tangible personal property which may readily acquire a situs of its own and does if permanently located in a taxing district other than that of the owner's domicile. Though live stock does not acquire a situs of its own during continuous transit in interstate commerce, it does when unloaded at stockyards and offered for sale there;[21] or if shipped under a bill of lading which allows of the animals being fed for an indefinite time at an intermediate point and then shipped to a point in another state without a new bill of lading, they acquire a taxable situs at their feeding station.[22] In the Maryland case the court stated with clearness the principle on which the cattle

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[18] Osterhout v. Jones, (1884) 54 Mich. 228, 19 N. W. 964. As to when lumber is constructively in transit, see Corning v. Masonville Twp., (1889) 74 Mich. 177, 41 N. W. 831.

[19] Eureka Hill Mining Co. v. Eureka, (1900) 22 Utah 447, 63 Pac. 654.

[20] (1885) 114 U. S. 622, 29 L. Ed. 257, 55 S. C. R. 1091.

[21] Myers v. Baltimore County, (1896) 83 Md. 385, 35 Atl. 144, 34 L. R. A. 309, 55 Am. St. Rep. 349.

[22] Waggoner v. Whaley, (1899) 21 Tex. Civ. App. 1, 50 S. W. 153.

are held to have acquired a taxable situs in Baltimore County: "In this case the place of destination, upon their shipment from the west, is Baltimore County; and in the latter place the owners keep them until they shall have determined what disposition shall be made of them. The property, then, not being in transit, either through the state or from a point in the state to a point outside, is property within the state within the meaning of the statute."[23] "It then quotes with approval from *Carrier v. Gordon*:[24] "The safer rule is to consider property actually in transit as belonging to the place of its destination, and property not in transit as property in the place of its situs, without regard to the intention of the owner, or his residence in or out of the state." Clearly the intention to ship at a future time cannot determine the situs, as that would make the taxation of most movable property depend upon the mere intention of the owner, a fact too difficult of ascertainment to furnish a workable basis for deciding whether or not the state may collect revenue for its support.

In the Texas case the cattle were shipped to Chicago, Kansas City, etc., from Oklahoma, but were held for feeding at the defendant's cotton-seed mill in Montague County, Texas. We quote from the opinion of the court: "We are not inclined to hold that cattle in Texas while being fattened in the owners' pens for the outside markets are too transient to have a situs and to be taxable here. Indeed, feeding cattle for such markets has become, as grazing cattle has long been, a permanent as well as extensive and profitable pursuit of the Texas people. It is a local industry, and during the feeding season the cattle, from whatever source they may come, become an important part of the mass of the personal property of the state, enjoying alike the protection of our laws and subject to the common burden of taxation. Still less are we inclined to hold that cattle so situated are exempt from local taxation in consequence of the commerce clause of the Federal Constitution. If it should be so held, then to what movable property in the states may not this ever-expanding clause be extended? The paper cloak of an adjustable through bill of lading, like those found in this record, may thus be easily made broad enough to cover from local taxation all the cattle of Texas, whether grazing in pastures, or on the open range, or feeding in pens. To the feeding in transit privilege, need only be added

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[23] Note 21, supra.
[24] (1871) 21 Ohio St. 605.

the grazing in transit privilege, and all will be covered. If the owner may be allowed ninety days for feeding, why may he not be allowed six months or a year or two for grazing? In both cases the cattle may be said, figuratively speaking, to be on their way to Chicago or other market, but not in the sense of interstate commerce or tax laws."[25]

In *Nolan v. San Antonio Ranch Co.*,[26] it was held that where a herd of cattle pastures in more than one county the percentage of the herd taxed by each county shall be the same as the percentage which the pasture in that county is of the whole pasture, and that the location of the general management of them was immaterial. This is, of course, a proper matter for control by the state legislature, and the statute providing for the above distribution among the subordinate taxing units would be clearly constitutional. Where a farm is partly in one township or county and partly in another, other factors than the extent of land in each may determine the taxable situs of stock kept thereon. For instance, where the barn is in one taxing district and the house in another, and the live stock is kept or fed in the barn during part or all of the year, the subdivision in which the barn rather than the one in which the house is located would be the taxable situs of the stock kept on such farm.[27]

Dogs: There is conflict of authority as to whether or not dogs are property at all. If property, they are, of course, personal property and if taxed for purposes of revenue the same rule as to situs would hold in regard to them as in regard to other domestic animals. In *Mullaly v. People*,[28] the court, after examining the old rules under which dogs were considered ferae naturae, said: "The artificial reasoning upon which these rules were based is wholly inapplicable to modern society. Tempora mutantur et leges mutantur in illis. Large amounts of money are now invested in dogs, and they are largely the subjects of trade and traffic. In many ways they are put to useful service, and so far as pertains to their ownership as personal property, they possess all the attributes of other personal property." It was held in this case that they came under the statutory designation of personal property. Even though not looked upon as property, they may still be taxed for regulative purposes. It is then in the nature of a

[25] Note 22, supra.
[26] (1891) 81 Tex. 315, 16 S. W. 1064.
[27] Pierce v. Eddy, (1891) 152 Mass. 594, 26 N. E. 99.
[28] (1881) 86 N. Y. 365.

license or privilege tax and the situs would naturally be that of the owner's domicile.

Intangible Personal Property

Public Stocks and Bonds: We will not discuss here the right of the state to tax evidences of public indebtedness, but will confine ourselves to the question of their situs when taxable at all. That the taxable situs of such property is the domicile of the owner may be regarded as fairly well settled in this country since the decision of the Supreme Court of the United States in the case of the *State Tax on Foreign-Held Bonds,*[29] cited with approval in *Erie Railroad Co. v. Pennsylvania.*[30] Thus a resident of Nebraska could not be taxed in Illinois on bonds of the city of Chicago held by him.

Shares of Stock in Private Corporations: Contrary to the rule as to public stock, private corporation stock may be taxed in the state of the incorporation regardless of the residence of the owner of such stock, as this class of stock has a taxable situs at the domicile of the corporation. In *Tappan v. Merchants' Bank,*[31] the court, speaking through Chief Justice Waite, said: "Shares of stock in national banks are personal property. They are made so in express terms by the act of Congress under which such banks are organized. They are a species of personal property which is in one sense intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purposes of taxation, and give them a situs of their own. This has been done. . . . The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is protected at the place where the bank transacts his business. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly cannot be an abuse of legislative discretion to require him to do so."

In corporations over which the states have control, their legislatures may fix the situs of their stock for purposes of taxation, as Congress has done in the case of the stock in national banks.[32]

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[29] (1872) 15 Wall. (U. S.) 300, 21 L. Ed. 179. [Cleveland, etc., R. Co. v. Pennsylvania.]
[30] (1894) 153 U. S. 628, 38 L. Ed. 854, 14 S. C. R. 952.
[31] Note 2, supra.
[32] St. Albans v. National Car Co., (1884) 57 Vt. 68.

The fact that the stock is taxed at the domicile of the corporation does not, however, prevent the state in which the stockholder resides from taxing it there as a part of his personal property.[33] Whether or not the legislature will exercise this power is a question of expediency, not one of legal right. As said by the supreme court of Ohio in *Bradley v. Bander*:[34] "The constitutional power to tax shares of stock, owned by our citizens in corporations located without the state, does not depend on whether or not the capital of the corporation is or is not taxed in the state where the corporation is created. The power is the same, whether the capital of the corporation is taxed there or not." The Ohio statute taxing residents on shares of stock in non-resident as well as in domestic corporations was held constitutional by the Supreme Court of the United States in *Sturges v. Carter*.[35] This may safely be regarded as an established principle.

Corporate Franchises: There is pretty general agreement in this country that corporate franchises are personal property and not mere naked powers, but rather powers coupled with an interest which vest in the corporation by virtue of its charter.[36] Whatever may be the form of the balance of its property, the franchises of a corporation are personalty.[37] There is also general agreement that they are taxable just as much as any other property, unless specifically exempted.[38] Nor is it necessary that they be mentioned eo nomine, but are taxable under a statute requiring all property in the state, not exempt, to be taxed.[39] Of course, the states may not without the consent of Congress tax the franchises granted by the federal government; hence the franchise of a national bank is not taxable by a state. The taxable situs of this species of personalty (the franchises of a corporation) is the domicile of the corporation, i. e., where its principal office is located.[40] The question of situs does not occasion as much difficulty as does the question of valuation.

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[33] Bacon v. Board of State Tax Commissioners, (1901) 126 Mich. 22, 85 N. W. 307, 60 L. R. A. 321, 86 Am. St. Rep. 524.

[34] (1880) 36 Ohio St. 28, 38 Am. Rep. 547.

[35] (1885) 114 U. S. 511, 29 L. Ed. 240, 5 S. C. R. 1014.

[36] Society for Savings v. Coite, (1867) 6 Wall. (U. S.) 594, 18 L. Ed. 897.

[37] Monroe County Sav. Bank v. Rochester, (1867) 37 N. Y. 365.

[38] New Orleans, etc., R. Co. v. New Orleans, (1892) 143 U. S. 192, 36 L. Ed. 121, 12 S. C. R. 406.

[39] Fond du Lac Water Co. v. Fond du Lac, (1892) 82 Wis. 322, 52 N. W. 439, 16 L. R. A. 581.

[40] See Minn. G. S. 1913, Sec. 1999. As to what is a franchise tax, see Cooley, Taxation, I, 3rd ed., 676 et seq.

The certificate of a corporation is not necessarily final as to the domicile of a corporation. In Wisconsin the location designated in its articles of incorporation is not conclusive as to its principal office or place of business so as to enable it to escape the fair burdens of taxation, but the state may inquire whether or not the designation in its charter conforms to the facts.[41] In Michigan, also, the place where its actual business is transacted and not the place named in the charter, where the two do not corrrespond, is considered the situs for purposes of taxation.[42] The purpose of this is clearly to prevent a corporation from dodging its fair share of taxation by naming a small town, where the tax rate is low, as its principal place of business, notwithstanding the fact that its actual business is done in a large city where the rate is much higher.

However just and practical this view may seem, it is not the one held by the New York courts. In *Western Transp. Co. v. Scheu*[43] it was held that the principal office of a domestic corporation was conclusively fixed by its articles of incorporation, that this was as true for purposes of taxation as for other purposes, and that only in that place could it be lawfully taxed on its personal property. And in a later case[44] it was held that the place designated by the articles of incorporation was no less conclusive, even though it appeared that it was deliberately chosen to avoid taxation in the place where the actual operations were intended to be conducted. In this case the place named in the articles was Clarkstown, a little inland village in Rockland County, which could not possibly be the principal place of business of this corporation. But this did not trouble the court, which disposes of the matter in the following cavalier way: "If the company had a principal office so located by its certificate, then it was to be taxed where its financial concerns were transacted. It is urged that the purpose for which the principal office of the plaintiff was located in the county of Rockland was to avoid taxation. That may be. . . . We held that to be immaterial in the case of the *Western Transportation Company*. We have nothing to do with the motive. We deal only with the fact." But it would seem to

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[41] Milwaukee S. S. Co. v. Milwaukee, (1892) 83 Wis. 590, 53 N. W. 839, 18 L. R. A. 353.

[42] Detroit Transp. Co. v. Board of Assessors, (1892) 91 Mich. 382, 51 N. W. 978.

[43] (1859) 19 N. Y. 408.

[44] Union Steamboat Co. v. Buffalo, (1880) 82 N. Y. 351.

one possessed of average common sense that they dealt only with the fiction and not with the fact. The fact was—and this is undisputed—that their principal place of business was in Buffalo, regardless of where they said it was.

In the case of corporations not under the control of the federal government, either by virtue of their creation or the character of their business, it is competent for the legislature of the state to make of a foreign corporation doing business within it a domestic corporation for purposes of taxation. In *Young v. South Tredegar Iron Co.*,[45] Judge Lurton, later of the Supreme Court of the United States, says: "It is not, in our judgment, optional with such corporations as to whether they will or will not become domestic corporations as required by this act. Sound reasons of public policy, in view of the rapid increase of the number of corporations, and the vast amount of wealth engaged in corporate business, demanded legislative regulation as to the terms upon which corporations of other states should be suffered to carry on business within this state. The legislation by which the corporations of other states are made corporations of this state is clearly within the legislative power." Where the only franchise granted to a foreign corporation is not the right to exist, i. e., the right to become a domestic corporation, but is merely the right to do business, the form of taxing this franchise is a license tax and the situs of the property for the purposes of levying this tax is the principal place of business of such foreign corporation within the state. Foreign insurance companies may be so taxed.[46]

Tax on Gross Receipts: Closely related to a franchise tax on a corporation is a tax on its gross or net receipts. It is more commonly levied on gross receipts so as to prevent the corporation from reducing the taxable fund by unnecessary expenses. Though a state may tax a corporation engaged in interstate commerce on receipts derived from local business, it may not tax it on receipts derived from interstate commerce. Although this statement conflicts with the decision in the case of the *State Tax on Railway Gross Receipts*,[47] it is undoubtedly in accord with the weight of authority in this country.[48] It will be noted that the cases cited

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[45] (1886) 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752.

[46] Ducat v. Chicago, (1870) 10 Wall. (U. S.) 410, 19 L. Ed. 972.

[47] (1872) 15 Wall. (U. S.) 284, 21 L. Ed. 164. [Philadelphia & Reading R. Co. v. Pennsylvania.]

[48] Fargo v. Michigan, (1887) 121 U. S. 230, 30 L. Ed. 888, 7 S. C. R. 857; Philadelphia, etc., S. S. Co. v. Pennsylvania, (1887) 122 U. S. 326, 30 L. Ed. 1200, 7 S. C. R. 1118; Ratterman v. Western Union Tel. Co.,

include steamship, express, telegraph, and railway companies, and substantially overrule the decision in the *State Tax on Railway Gross Receipts.* In fact, the court says in *Steamship Co. v. Pennsylvania:* "A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything decided in *Brown v. Maryland;* but, on the contrary, that the reasoning in that case is decidedly against it. The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the state. If intended as a tax on the franchise of doing business,—which in this case is the business of transportation in carrying on interstate and foreign commerce—it would clearly be unconstitutional."[49] Where the state has jurisdiction to levy a franchise tax, and it undoubtedly has in the case of corporations created by it, the gross receipts may be taken as a measure for determining the value of the franchise. The situs for taxing gross receipts would be the principal place of business of the corporation, as in the case of franchises already discussed.

Good Will: The taxation of the good will of the business of a private individual or partnership corresponds to the taxation of the franchise of a corporation. Though it has been held by the courts of New York and Indiana that good will is neither real nor personal property,[50] it has market value and is the subject of purchase and sale as other personal property and has been decided

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(1888) 127 U. S. 411, 32 L. Ed. 229, 8 S. C. R. 1127; Pacific Express Co. v. Seibert, (1892) 142 U. S. 339, 35 L. Ed. 1035, 12 S. C. R. 250; New York, etc., Ry. Co. v. Pennsylvania, (1895) 158 U. S. 431, 39 L. Ed. 1043, 15 S. C. R. 896; McHenry v. Alford, (1898) 168 U. S. 651, 42 L. Ed. 614, 18 S. C. R. 242. These cases are not to be confounded with such cases as United States Express Co. v. Minnesota, (1912) 223 U. S. 335, 56 L. Ed. 459, 32 S. C. R. 211, aff'g 114 Minn. 346, 131 N. W. 489; Maine v. Grand Trunk Ry. Co., (1891) 142 U. S. 217, 35 L. Ed. 994, 12 S. C. R. 121, holding that a state tax upon the property within the state of a foreign corporation engaged in interstate commerce is not invalid though the value of the property is calculated upon the amount of its gross receipts. In the latter case the tax was called a franchise tax. It was held not to be a tax upon gross receipts. See, also, Western Union Co. v. Taggart, (1896) 163 U. S. 1, 41 L. Ed. 49, 16 S. C. R. 1054; Adams Express Co. v. Ohio State Auditor, (1897) 165 U. S. 194, 41 L. Ed. 683, 17 S. C. R. 305; Galveston, etc., Co. v. Texas, (1908) 210 U. S. 217, 52 L. Ed. 1031, 28 S. C. R. 638.

[49] Note 48, supra, 122 U. S. at p. 342.

[50] People v. Dederick, (1900) 161 N. Y. 195, 55 N. E. 927; Hart v. Smith, (1902) 159 Ind. 182, 64 N. E. 661, 58 L. R. A. 949, 95 Am. St. Rep. 280.

to be such by the courts of England and the United States.[51] In a note to the latter case cited the authorities on the subject are given. The situs is the place where the business is carried on.

Debts: Debts, whether due from an individual, a private corporation, a state, or one of its subdivisions, unless exempted by statute, constitute a form of personal property which is subject to taxation and its situs is the domicile of the one to whom such debt is owed.[52] In the case cited the debt was to be paid to a resident of Connecticut and it was contended that this tax was unconstitutional because it was a regulation of interstate commerce, abridged the "privileges or immunities of citizens of the United States," taxed property situated outside the state, violated the sovereignty of Illinois over property within her borders, impaired the obligation of contracts, deprived plaintiff of his property without due process of law.

In disposing of these objections, Justice Harlan, speaking for the court, said: "Plainly, our only duty is to enquire whether the Constitution prohibits a state from taxing in the hands of one of its resident citizens a debt held by him upon a resident of another state, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the state in which the debtor resides. The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same state, to contribute for the support of the government whose protection he enjoys. That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond wherever actually held or deposited is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for purposes of taxation, affected by the fact that it is secured by a mortgage on real estate situated in Illinois. It may undoubtedly be taxed by the state when held by a resident therein."

Nor is the taxing power of the state in which the creditor is

[51] Crawshay v. Collins, (1808) 15 Ves. Jr. 218, 1 J. & W. 267, 2 Russ. 325; Barber v. Insurance Co., (1883) 15 Fed. 312.

[52] Kirtland v. Hotchkiss, (1879) 100 U. S. 491, 25 L. Ed. 558.

located affected by the fact that the same property is taxed in another state. Whether the former state shall on this account exempt such property from taxation by it is a question of expediency which it alone must determine, as there is no federal question involved. For, as said by the court in the case just cited, this "is a matter which concerns only the people of that state, with which the federal government cannot rightly interfere." Neither does the fact that the debt is one against another state affect its situs, or the right of the state in which the creditor resides to tax the property.[53] Where there is but one state involved and it is a question between different taxing units within it as to the taxable situs of bonds, notes, credits, and choses in action in general, the matter is regulated by statute, but in the absence of statutes, the domicile of the owner, not that of the agent, governs, although there is conflict of authority on this point.[54] In the case cited, which was one involving the situs of promissory notes, the court says: "The thing taxed is the debt, a species of intangible property incapable of an actual situs independent of the owner." The opposite view is taken in *People ex rel. Jefferson v. Smith.*[55]

That the domicile of the creditor rather than that of the debtor should be the situs for taxing debts seems clear. For as said by the Supreme Court of the United States in *Railroad Co. v. Pennsylvania:*[56] "Debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property and in their hands they may be taxed. To call debts the property of debtors is simply to misuse terms." In accord with this line of reasoning the supreme court of Montana in construing a statute requiring property to be taxed in the county "where the same may be found," held that a mortgage is not taxable in the county where it is recorded, unless the mortgage itself is owned there.[57]

The argument in favor of taxing mortgages and choses in action, which are required to be recorded in order to maintain priority as a lien, at the situs where they are recorded is an administrative rather than a logical one. Undoubtedly fewer such in-

[53] Bonaparte v. Tax Court, (1881) 104 U. S. 592, 26 L. Ed. 845.
[54] Boyd v. Selma, (1891) 96 Ala. 144, 11 So. 393.
[55] (1882) 88 N. Y. 576.
[56] Note 30, supra.
[57] Gallatin County v. Beattie, (1878) 3 Mont. 173.

struments would escape taxation under this method than under the one providing for their taxation at the domicile of the creditor. If, however, the place of record is made the situs for purposes of taxation, as may be provided by the legislature, and the tax is collected from the mortgagor, provision should be made allowing him to deduct this from the amount due on the mortgage.

Bank Deposits: Money deposited in bank, unless it is a special deposit which calls for the return of the identical pieces of money deposited and makes the bank a mere bailee, is not tangible property for purposes of taxation, but for this as for commercial purposes is a mere credit and the relation between the depositor and the bank is that of debtor and creditor rather than that of bailor and bailee.[58] Being a debt, their situs for purposes of taxation follows the rule of mobilia sequuntur personam and hence is at the domicile of the creditor. In *Pyle v. Brenneman,* just cited, the Circuit Court of Appeals says: "A deposit in bank to the credit of a depositor, and subject to his check, is not a bailment. It is a loan. The depositor does not retain a property in any particular funds, but the money which he deposits goes into the funds of the bank. The bank owes him the amount, and the relation of debtor and creditor is created by the transaction. . . . This is the law as it is declared by both the federal and the state courts in this country, and in obedience to it we hold that the deposits of Brenneman in the banks of Sistersville are debts due him by the banks, and that the situs of the property is the domicile of the creditor." In this case, diversity of citizenship gave the federal courts jurisdiction.

But this rule makes it possible for most depositors to escape taxation on their deposits in banks. Where but one state is involved, if the legislature would make the location of the bank

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[58] San Francisco v. Lux, (1884) 64 Cal. 481, 2 Pac. 254; Pyle v. Brenneman, (1903) 60 C. C. A. 409, 122 Fed. 787. Clason v. New Orleans, (1894) 46 La. Ann. 1, 14 So. 306; Pendleton v. Commonwealth, (1909) 110 Va. 229, 65 S. E. 536.

In Fidelity, etc., Trust Co. v. Louisville, (1917) 245 U. S. 54, 62 L. Ed. 145, 38 S. C. R. 40, a taxpayer domiciled in Kentucky carried on business in Missouri, depositing his gains therefrom in banks in Missouri. After his death, a claim was made upon his estate by the city of his domicile to recover omitted taxes in respect of those deposits. It was held by the Supreme Court of the United States that, conceding without argument that the deposits could have been taxed by Missouri, under the authority of Liverpool, L., & G. Ins. Co. v. Orleans Assessors, (1911) 221 U. S. 346, 55 L. Ed. 762, 31 S. C. R. 550, L. R. A. 1915C 903, and Metropolitan Life Ins. Co. v. New Orleans, (1907) 205 U. S. 395, 51 L. Ed. 853, 27 S. C. R. 499, the deposits were also taxable in Kentucky, and that such double taxation is not subject to any constitutional objection.

the situs and where more than one state is concerned an interstate agreement to that effect were made, this would establish a rule under which it would be very difficult for bank deposits to escape taxation. The daily, weekly, or monthly averages could be taken as the basis for valuation. Even in the absence of specific legislation on the point, there are cases which hold that the location of the bank is the proper situs.[59]

Annuities: Though an annuity, if given with words of inheritance, will for purposes of descent be treated as real estate, for purposes of taxation it is treated as personal property. Its situs is that of the domicile of the annuitant, and for the same reason that the taxable situs of a debt is the domicile of the creditor. An annuitant can be assessed only on the amount due and unpaid at the date of assessment and not on the principal sum producing the annuity.[60].

Seats in Stock Exchange: A seat, which is equivalent to membership, in a stock or produce exchange, although intangible, is a right which has marketable value, can be bought and sold, and is a species of personal property. Yet it was held in *Thompson v. Adams*[61] that "the seat is not property in the eye of the law, . . . It is the mere creation of the board, and, of course, was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chooses to put upon it." But the Supreme Court of the United States in *Page v. Edmunds*[62] says: "Undoubtedly the seat in the board 'was to be held and enjoyed with all the limitations and restrictions which the board choses to put upon it.' We expressed that limitation in *Hyde v. Woods*, 94 U. S. 525, but we decided nevertheless that a seat was property."

As a valuable form of personal property there is no reason why it cannot or should not be taxed by the state legislature; although it was held in *People v. Feitner*[63] that a seat was not taxable under the general statute taxing personal property; a like decision was rendered by the Maryland supreme court in *Baltimore v. Johnson*,[64] and the supreme court of California in *San*

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[59] New Eng. Mut. Life Ins. Co. v. Board of Assessors, (1908) 121 La. 1068, 47 So. 27, 26 L. R. A. (N. S.) 1120.
[60] State v. Cornell, (1865) 31 N. J. L. 374.
[61] (1880) 93 Pa. St. 55.
[62] (1903) 187 U. S. 596, 47 L. Ed. 318, 23 S. C. R. 200.
[63] (1901) 167 N. Y. 1, 60 N. E. 265, 82 Am. St. Rep. 698.
[64] (1903) 96 Md. 737, 54 Atl. 646, 61 L. R. A. 568.

Francisco v. Anderson,[65] that a seat "has no such qualities as make it assessable and taxable as property. It is a mere right to belong to a certain association with the latter's consent, and to enjoy certain personal privileges and advantages which flow from membership of such association. . . . It is too impalpable to go into any category of taxable property." But this reasoning, or rather dogmatic form of assertion, is not convincing and does not square with present-day standards of justice in the distribution of the burdens of taxation. In Minnesota, it is settled that membership in a board of trade is property, and taxable.[66] As the right can be exercised only at the place where the exchange is located and there receives its protection, that is naturally its situs for purposes of taxation.

Copyrights and Patent Rights: While the states may not tax the incorporeal right of an author or inventor to his idea or invention or discovery, which right is conferred by the federal government,[67] they may tax the tangible articles in which the ideas, invention, or discovery are embodied. Thus it was held in *Weber v. Virginia,*[68] that letters patent granted by the United States did not exempt from the tax or license laws of Virginia the tangible articles produced in accordance with the rights conferred by these letters patent. As said by the court: "It is only the right to the invention or discovery—the incorporeal right—which the state cannot interfere with. Whatever rights are secured to inventors must be enjoyed in subordination to the general authority of the state over all property within its limits." It then quotes with approval the language of Justice Harlan in *Patterson v. Kentucky:*[69] "The right of property in the physical

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[65] (1894) 103 Cal. 69, 36 Pac. 1034, 42 Am. St. Rep. 98.

[66] State v. McPhail, (1914) 124 Minn. 398, 145 N. W. 108.

[67] People ex rel. Edison Elec. Illum. Co. v. Assessors, (1898) 156 N. Y. 417, 51 N. E. 269, 42 L. R. A. 290; Commonwealth v. Westinghouse, etc., Co., (1892) 151 Pa. St. 265, 24 Atl. 1107; Commonwealth v. Phila. Co., (1893) 157 Pa. St. 527, 27 Atl. 378; People ex rel. A. T. Johnson Co. v. Roberts, (1899) 159 N. Y. 70, 53 N. E. 685, 45 L. R. A. 126 (copyright). It seems to be established that when the tax is not upon the property of the corporation, but is in the nature of a privilege tax, the fact that a part of the capital is invested in patents or copyrights is not a reason for exemption. State ex rel. Marsden Co. v. State Board, (1898) 61 N. J. L. 461, 39 Atl. 638. That practically the whole capital of a corporation is represented by patent rights which are not subject to taxation does not prevent the assessment against it of a franchise tax regulated by the amount of the capital which is employed within the state. People ex rel. U. S. Aluminum Printing Plate Co. v. Knight, (1903) 174 N. Y. 475, 67 N. E. 65, 63 L. R. A. 87.

[68] (1880) 103 U. S. 344, 26 L. Ed. 565.

[69] (1878) 97 U. S. 501, 24 L. Ed. 1115.

substance of the discovery is altogether distinct from the right in the discovery itself, just as the property in the instruments or plates by which copies of a map are multiplied is distinct from the copyright of the map itself." The taxable situs of the tangible property is the same as that of other tangible property already discussed.

The Right to Bequeath and Inherit Property: The right or privilege to bequeath property is not generally looked upon as a natural right inherent in one by reason of his membership in human society, but is rather an artificial, conventional right or privilege conferred upon one by the state to say who shall enjoy the use of his property after his death. The same is true of the right or privilege of taking property by will or inheritance. As the state confers this right, it may say under what conditions or restrictions and subject to what burdens it shall be exercised. Hence the right of the state to levy inheritance or succession taxes. This is not a tax on property but upon its transmission. Hence the states may tax a bequest of property to the United States, notwithstanding the fact that it cannot tax the property of the United States.[70]

After deciding that "the tax is not a tax upon the property itself, but upon its transmission by will or by descent," the court quotes with approval the language of Chief Justice Taney in *Mager v. Grima*:[71] "The law in question is nothing more than the exercise of the power which every state and sovereignty possesses of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. . . . If a state may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy." The situs for the taxation of this incorporeal right of transmitting and receiving property is the domicile of the decedent and, unless otherwise provided by statute or agreement, the place where the property transmitted is located. Thus New York may levy an inheritance tax on money deposited in its banks, even though Pennsylvania, in which the

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[70] United States v. Perkins, (1896) 163 U. S. 625, 41 L. Ed. 287, 16 S. C. R. 1073; Plummer v. Coler, (1900) 178 U. S. 115, 44 L. Ed. 998, 20 S. C. R. 829.

[71] (1850) 8 How. (U. S.) 490, 12 L. Ed. 1168.

decedent was domiciled, has levied a like tax on the right to bequeath the money.[72]

SITUS OF TANGIBLE AND INTANGIBLE PROPERTY IN CASE OF QUALIFIED OWNERSHIP

Trust Property: In general, the taxable situs of trust property is the residence of the trustee. This is the rule laid down in *Smith v. Byers.*[73] And in *People v. Albany Assessors*[74] it was held that the trustee was liable for the taxes on trust property even though the property was located in a foreign jurisdiction. And in *Dorr v. Boston*[75] it was held that shares of stock in a corporation held by non-resident trustees are not taxable to resident beneficiaries. But, as in the case of personal property held directly by the owner, it is competent for the legislature to fix the situs of trust property, when such property consists of personalty, but not, of course, unless it has jurisdiction over the trustee or property. Thus it was held by the Rhode Island court that a statute providing that personal property held in trust should be taxed at the residence of the beneficiary was inoperative where both the trustee and property were outside the state.[76] Where there are several trustees and they do not all reside in the same jurisdiction, the weight of authority is that they are taxed pro rata as to the personal property held in trust, as neither jurisdiction can tax the trustee residing outside of it.[77] The fact that a majority of the trustees reside within the jurisdiction would not give it authority to tax the whole fund.

Decedents' Estates: The personal property of a decedent has its situs for purposes of taxation at the domicile of the executor or administrator.[78] But there is some conflict on this point. The Missouri court holds that the taxable situs of the personal property of a decedent is his last place of residence rather than the residence of his personal representative.[79] A like decision was reached by the Connecticut court in the case of *Cornwall v.*

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[72] In re Burr's Estate, (1895) 38 N. Y. Supp. 811, 16 Misc. Rep. 89, 74 N. Y. St. Rep. 490. For a full discussion of Jurisdiction for Inheritance Taxation, see article, W. J. Stevenson, 1 MINNESOTA LAW REVIEW 314.

[73] (1871) 43 Ga. 191. So declared in State v. Willard, (1899) 77 Minn. 190, 79 N. W. 829.

[74] (1869) 40 N. Y. 160.

[75] (1856) 6 Gray (Mass.) 131.

[76] Anthony v. Caswell, (1885) 15 R. I. 159, 1 Atl. 290.

[77] Trustees v. City Council of Augusta, (1892) 90 Ga. 634, 17 S E. 61.

[78] State v. Corson, (1888) 50 N. J. L. 381, 13 Atl. 265.

[79] Stephens v. Booneville, (1864) 34 Mo. 323.

Todd.[80] The New Jersey holding would seem to be the more logical, as for purposes of taxation the personal representative is looked upon as owner; he is constructively in possession; and where listing is required, as is usually the case with personal property, he is the one legally required to do the listing. This view accords with the weight of authority. In Minnesota, by statute, the personal property of the estate of a deceased person is listed and assessed at the place of listing at the time of his death.[81]

Infant's Property: Although not entirely free from conflict, it is a general rule that the situs for purposes of taxation of the personal property of an infant in the custody of a guardian is the residence of the guardian rather than that of the infant.[82] But where the infant acquires a separate domicile with the consent of the guardian, it was held, in *Kirkland v. Whately*,[83] that the taxable situs of his personal estate becomes that of the infant. In the case of the death of an infant, still having a guardian, the situs of his personal property for purposes of taxation shifts from the guardian's domicile to that of the administrator.[84]

Double Taxation

In General: In devising a system of taxation there are two main considerations which must never be lost sight of—adequacy of revenue and justice in the distribution of the burden. A failure to meet the first requisite will cripple the activities of the state, and a disregard of the second will cause dissatisfaction and demoralization. Double or duplicate taxation does not accord with our sense of justice in the distribution of the burden, in that the property of some is compelled in this way to bear more of the burden than an equal amount of the same class of property owned by others. The injustice of this readily appears when we reflect that if all the property were owned by the state no one would contend for a rule which would require some of the tenants to pay rent twice while others were assessed but once on the same kind of property. In the case of real property, double taxation is not resorted to where the whole interest is held by the same person. But in the case of personal property, double taxation is not uncom-

[80] (1871) 38 Conn. 443.
[81] Minn. G. S. 1913, Sec. 2008.
[82] Tousey v. Bell, (1864) 23 Ind. 433; Minn. G. S. 1913, Sec. 2009.
[83] (1862) 4 Allen (Mass.) 462.
[84] Sommers v. Boyd, (1891) 48 Ohio St. 648, 29 N. E. 497.

mon, and however unfair it may be, it is not, apart from a constitutional prohibition, illegal. We are here concerned with double taxation of personal property only, and with reference to this species of property only in so far as double taxation results from double situs. This may happen where the property has a taxable situs in more than one subdivision of the same state or where it has a taxable situs in more than one state.

Where More than One Situs in Same State: As already suggested, double taxation in the same state may be prevented by a provision in the constitution prohibiting it. In many cases where there is no constitutional provision the statutes provide that a receipt for taxes paid on person or property in one part of the state shall be good throughout the state against demands for taxes on the same person or property for that year. A failure on the part of the legislature seems inexcusable. And this is equally true whether the question of double situs results from a moving about of the property or from the fact that the owner is domiciled in one part of the state and the personal property located in another part. Where the statute has not dealt with the question of the situs of personal property located in one district and the owner domiciled in another, the courts usually hold that the domicile of the owner is the situs for purposes of taxation. This is particularly so of intangible personal property.[85] Where it is a dispute between different districts of the same state, there is no federal question involved so as to bring it into the United States courts. Double taxation within a state does not violate the provision of the federal constitution in the Fifth Amendment requiring due process of law, or the Fourteenth Amendment. In discussing this question the Supreme Court of the United States says, in *Davidson v. New Orleans:*[86] "Whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnox-

[85] Boyd v. Selma, note 54, supra.
[86] (1877) 96 U. S. 97, 24 L. Ed. 616.

ious it may be to other objections. It may violate some provisions of the state constitution against unequal taxation; but the federal Constitution places no restraints on the states in that regard."

Where Situs in Different States: When double taxation results from the fact that personal property has a taxable situs in more than one state the question becomes more complicated. It then requires intervention by the federal courts or interstate comity. Until recent years it was held that taxation of the same property during the same year by more than one state was something which the federal courts were powerless to prevent. It has also been held by a number of the state courts that this is not double taxation;[87] but this distinction is one of form, not of substance. In substance it is double taxation, because the burden upon the property is double, notwithstanding the fact that the provisions in the state constitutions against double taxation are construed to mean a duplication of burdens by the taxing authorities of the same state. The decisions of the Supreme Court of the United States have now established the principle that where tangible personal property is taxed at the place where it is permanently located, i. e., where it has a situs of its own, it cannot be also taxed at the domicile of the owner in another state, but this is because of a lack of jurisdiction of the state of the domicile, rather than because it would result in double taxation. In *Delaware, etc., R. Co. v. Pennsylvania,*[88] decided in 1904, the court, speaking through Justice Peckham, says: "It is plain that in the case at bar the coal had lost its situs in Pennsylvania by being transported from that state to foreign states for the purposes of sale, with no intention that it should ever return to its state of origin. Taxation of the coal in this case deprived the owner of its property without due process of law, and the owner is entitled to the protection of the Fourteenth Amendment, which prevents the taking of its property in that way." This decision was approved in *Ayer & Lord Tie Co. v. Kentucky.*[89]

This principle has not as yet been extended by the Supreme Court to intangible personalty, and in *Union Refrigerator Transit*

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[87] Griggsby Constr. Co. v. Freeman, (1902) 108 La. 435, 32 So. 399, 58 L. R. A. 349.

[88] (1905) 198 U. S. 341, 49 L. Ed. 1077, 25 S. C. R. 669.

[89] (1906) 202 U. S. 409, 50 L. Ed. 1082, 26 S. C. R. 679.

Co. v. Kentucky[90] it suggests the reason for not doing so: "There is an obvious distinction between tangible and intangible property, in that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs, except, perhaps, in the case of mortgages or shares of stock. So, if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicile or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authority is to follow the maxim mobilia sequuntur personam." In *Selliger v. Kentucky*[91] the court refused to allow the taxation of warehouse receipts at the domicile of the owner, where the tangible personal property for which they were a receipt was outside the jurisdiction of the taxing state, which meant that the situs for taxation of the receipt was the same as the property and that taxing the property taxed the receipt. The same had already been held with regard to bills of lading.[92]

The determination of situs of personal property where the property is in one state and the owner in another is a subject which for its satisfactory settlement requires an agreement between the states. In other words, it is a question for settlement by interstate comity, which would bring about the adoption of a uniform rule throughout the United States, rather than for each state to adopt whatever rule seems necessary in order to give it the largest possible amount of property subject to taxation by it. The fact that absolute justice and equality can never be reached in taxation ought not to discourage the attempt to make reasonable efforts to remove manifest evils.

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[90] (1905) 199 U. S. 194, 50 L. Ed. 150, 26 S. C. R. 36, 4 Ann. Cas. 493. This case fully affirms the doctrine that a state cannot tax a domestic corporation upon its tangible personal property permanently located in other states.

[91] (1909) 213 U. S. 200, 53 L. Ed. 761, 29 S. C. R. 449.

[92] Almy v. California, (1860) 24 How. (U. S.) 169, 16 L. Ed. 644; Fairbank v. United States, (1901) 181 U. S. 283, 45 L. Ed. 862, 21 S. C. R. 648.

JUDGES IN THE PARLIAMENT OF UPPER CANADA*

The Legislative Assembly

We have seen that the Common Law rule that Judges could not in England be Members of the House of Commons was based upon the fact that they were at first Members of and afterwards attendants on the House of Lords. Cessante ratione cessat ipsa lex.[48] The Canadian Judges not being called upon to attend any other House, there was no reason in law why they should not be elected to the House of Assembly.

In Lower Canada, which had precisely the same Constitution as Upper Canada, the Judges from the very beginning took an active interest in politics and were elected to the House of Assembly. This in the first decade of the nineteenth century created much dissatisfaction amongst the French Canadian portion of the community, as the Judges were all opposed to the majority of the House and their views of government by the people. In Upper Canada there was no instance of a Judge offering himself as a candidate for election until 1800. This was Henry Allcock, afterwards Chief Justice and Legislative and Executive Councillor. At the election for the third Parliament for the Province he was elected member of the House of Assembly for the East Riding of York and the Counties of Durham and Simcoe. He was nominated for the Speakership, but was defeated by the Honourable (afterwards Sir) David William Smith by a vote of 10 to 2, Allcock voting with the majority and afterwards with another member leading the new Speaker to the chair. There was little contentious business, and politics had as yet scarce made its appearance above the surface. But in any case Allcock did not have much opportunity to show his colours. The House met

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*Continued from 3 Minnesota Law Review 180.

[48] "When the reason of any particular law ceases, so does the law itself." The maxim would be quite true were the word aliquando inserted—"sometimes." The story of Mr. Justice Allcock's career in the Lower House can be read in the Proc. Leg. Assy. U. C. 1801, 6 Ont. Arch. Rep. 1909, 176, 183, 186, 192-195, 237. The Petitioners against him were of the official set, which rather indicates reforming tendencies in Allcock, but nothing in his career before or after suggests such sentiments.

May 26, 1801; June 1, a petition was presented by seven of the Freeholders of his constituency that, while Allcock was a gentleman of acknowledged respectability, he had not been chosen by the Petitioners or a majority of the electors; June 10 and 11 the Petition was considered; on the latter day he was declared not duly elected and a writ for a new election was ordered. At this election Allcock was not a candidate. Angus Macdonell was elected and took his seat July 4, 1801, which he kept until his death by drowning in the "Speedy" disaster, 1804, to be succeeded by William Weekes, and Weekes by the Judge now to be spoken of.

The next Judge candidate was a Radical and took a stand against the Government and ruling classes from the beginning to the end of his very interesting and varied judicial career.

Robert Thorpe was a member of the Irish Bar who through the influence of his patron, Castlereagh, was in 1802 appointed Chief Justice of the Supreme Court of Prince Edward Island. Quarrelling with the Governor, he received an appointment in 1805 as a puisne Judge of the Court of King's Bench for Upper Canada.

The Province at that time was in an uneasy condition politically. For the first decade or so of the separate Provincial existence of Upper Canada, the settlers were too busy clearing land, building houses and barns, and making a living for themselves and their families to pay much attention to the government of the Province. The administration of affairs was in the hands of a Governor responsible to the Home Government and an Executive Council responsible only to the Governor. Legislation was made by the House of Assembly and the Legislative Council, the Legislative Council being appointed and always in accord with the Governor.

But settlers were coming in constantly. Land was given free to almost all comers till 1798 when the price was fixed for future grants at 6 pence Halifax (10 cents) per acre and the usual expense of survey.[49] At that very time thousands of acres were being granted to members of the Executive Council and other favourites of the administration free (except for expenses). A grant of 1,200 acres was by no means uncommon, and on one day

[49] See the Proclamation, October 31, 1798, Can. Arch., Q. 288, p. 192.

11,400 acres were so granted.[50] The official class had many squabbles over the division of the fees for the grant of land, and it was too often the case that the man with the money to pay fees for land would receive attention to the neglect of bona fide settlers less fortunate and even to the Loyalist entitled to a patent without payment of fees.

These and some others were legitimate subjects of complaint; but there was much factious agitation, due to a certain extent to restiveness under autocratic rule, but also to some extent (not now determinable) to treason. Joseph Willcocks who had been a member of the "United Irishmen" and who, emigrating, had been made Sheriff of the Home District by Chief Justice Allcock, and William Weekes, also Irish, who had been a student of Aaron Burr and who was the first law student called to the Bar by the young Law Society of Upper Canada, being now a member of the Lower House, were the leaders of the Radicals. But the House was itself restive and no longer looked with equanimity upon acts which would not be tolerated in England. An opposition was evolving: one example will suffice to show the trend. Governor Hunter in 1803 and 1804 used some of the money raised by the Parliament for public purposes indeed, but without the assent of Parliament. Administrator Grant, his successor in 1805, followed his example, and in 1806 the Assembly made a formal protest and demand that the money should be replaced.

Thorpe "agin' the Gover'ment" as always, joined himself to the Radicals and on the meeting of Parliament in February, 1806, took the leadership of the group of that way of thinking.[51] He

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[50] I. e., on January 9, 1797, Can. Arch., Q. 289, pt. 1, pp. 3-8, January 3, 1797, the wife and children of Mr. Justice William Dummer Powell received 9600 acres, 1200 acres each, Can. Arch., Q. 289, pt. 1, p. 1. January 9, Chief Justice Elmsley got 5000 acres, and Mrs. Gray, mother of the young Solicitor General, "1200 acres as a small mark of respect for her own character and that of her deceased Husband." Ibid., pp. 3, 47. January 17, the six sons of the Hon. Robert Hamilton (of course a Councillor) "All born in this country" got 1200 acres each, with an expression of regret that more cannot be given, "considering the great benefit Mr. Hamilton has been to this infant Colony and the high Rank he holds." Ibid., p. 10. The list is by no means exhausted.

[51] Writing to Edward Cooke, the Under-Secretary for War and Colonies from York, Upper Canada, under date January 24, 1806, after five months in the Province, he says in a Postscript of date February 5 (Parliament met the previous day): "The Houses of Assembly are sitting and from want of a person to direct, the Lower one is quite wild; in a quiet way I have the reins so as to prevent mischief though like Phaeton I seized them precipitately. I shall

seems to have been the moving spirit in much of the opposition shown to the Administration and probably incited the protest against the unauthorized expenditure by Grant.[52] He inveighed against the Government in his addresses to Grand Juries and welcomed addresses from Juries in the same sense.[53] Weekes having been killed[54] in a duel which he forced on his fellow-barrister, William Dickson, his seat in the House became vacant, and Thorpe became a candidate for the representative of the East Riding of the County of York and the Counties of Durham and Simcoe in the Assembly. The election coming off December 29, 1806, Thorpe obtained 269 votes and his opponent, Thomas Barnes Gough, 159. The returning officer, William Allan, a thorough Tory if there ever was one, returned Thorpe as elected.

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not burn myself and hope to save others." Can. Arch., Q. 305, p. 86, et seq. Report of Can. Arch. for 1892, p. 39. "Never prophesy unless you know" is a maxim he forgot.

[52] It was his intimate friend, William Weekes, who reported, February 25, 1806, from the Select Committee appointed February 10 to examine the Public Accounts that £617.13.6 had been expended without the authority of Parliament. 8 Rep. Ont. Arch. (for 1911), pp. 79, 90-92.

[53] An attack by Colonel Joseph Ryerson, a Tory United Empire Loyalist, upon Thorpe for his address to the Grand Jury for the London District at Charlotteville in October, 1806, resulted in the only action of Scandalum Magnatum ever taken on this Continent. It is an action based upon the Statute of Gloucester (1378) 2 Richard II, Stat. 1, cap. 5, which forbids "false News, Lyes and other such false things" to be said against "Justices of one Bench or the other" and certain others. Although the action had become obsolete in England,—the latest known case was in 1710—Thorpe brought proceedings against Ryerson for Scandalum Magnatum, but failed. See my article "Scandalum Magnatum in Upper Canada," 4 Jour. Am. Inst. Crim. Law (May, 1913) pp. 12-19. Dent (U. C. Rebellion. Vol. 1, p. 87), with that want of common fairness which disfigures a work otherwise valuable, says: "His brother Judges, however, some of whom were members of the Executive Council and all of whom were subject to strong influences from that quarter, ruled that the proceeding could not be maintained . . ." A more offensive and unfounded insinuation could hardly be made. The case was argued twice and was finally decided by Scott, C. J., and Powell, J., January 15, 1808, on the simple and obvious ground that the Statute of Gloucester was speaking of the Judges of either Bench in England and not of a Bench in Upper Canada which did not come into existence for over four hundred years later. I have never heard a lawyer express a contrary view; and it is monstrous to suggest that the judgment was the result of influence from any quarter.

We shall see that the view that Judges of the Court of King's Bench in Upper Canada are not in the same case as the Judges of the Bench, King's or Common, in England is that held by the House of Assembly in the petition against Thorpe's return as a member of the House.

[54] See my article "The Duel in Early Upper Canada" (1915), 35 Can. Law Times pp. 726 et seq.; also in the Jour. Am. Inst. Crim. Law of the previous month.

When Parliament opened its next session February, 1807, Gough promptly petitioned against the Return, as did a number of the Freeholders of the Constituency. The grounds alleged are the same in both Petitions: "That Robert Thorpe at the time of such election was and still is one of His Majesty's Judges of the Court of His Bench in this Province," "that in England none of the Judges of the Court of King's Bench, Common Pleas, Barrons of the Exchequer who have judicial places, can be chosen Knight, Citizen or Burgess in Parliament . . . that this procedure is unconstitutional, inasmuch as being an attempt to clothe, arm and blend in one person the conflicting powers authorities and jurisdiction of the Legislative and Judicial functions, contrary to the spirit of good government and the immemorial usage and custom of the Commons of England."

The Statute of 1805[55] had provided that on the consideration of a Petition complaining of an undue Election or Return, the House should be cleared and all the members (except him against whose return the Petition was made), with the Speaker, should be sworn and then, the Speaker taking the chair, the doors should be opened and the trial proceed. But there was always the preliminary question, viz: "assuming the facts alleged to be true, should the election be voided and the return set aside?"

Accordingly, the House went into Committee of the Whole on the Petition of the Freeholders to determine "whether the grounds contained in the Petition. . . if true are sufficient to make the election of the sitting member void?" After three sessions, the Committee of the Whole reported that the grounds alleged, if true, were not sufficient to make the election void. The Petition of Gough was given three months' hoist; Gough petitioned that his Petition should be heard, as he had "at great expense procured a Counsel from a distant part of this Province to support the grounds and prayer of his Petition." An attempt to give this new petition the three months' hoist failed. The House went into Committee of the Whole on it and reported that the further consideration of it should be deferred for three months. The Solicitor General, Mr. (afterwards Mr. Justice) D'Arcy Boulton, moved that the report be not received, but was voted down on a division 8 to 6. The division list is instructive as indicating the politics of the members. All the six were Tories,

[55] (1805) 45 Geo. III, Chap. 3 (U. C.).

one of them afterwards a Judge of the King's Bench; most of the eight were Radicals and at least one of them afterwards strongly suspected of actual treason.[56]

There can be no doubt of the correctness of the decision. Thorpe, no mean lawyer himself, had pointed out to Lieutenant Governor Gore that in England "Judges are considered in the Legislature for which reason many are created Peers, and all Judges have sat in the Commons except such as are constitutionally to attend the Lords to assist when a Court of Justice." He also pointed out that "the Master of the Rolls, the Judges of the Admiralty and Ecclesiastical Courts, the Chief Justices of Ely, Chester and the Welsh Judges, etc., etc., the Judges in Canada and in the other Colonies have constantly sat in the House of Assembly."[57]

Thorpe took a very active part in the Legislative Assembly during the whole of this session, but failed to obtain a majority in any of his attempts to embarrass the Government. He was too radical for the Upper Canada Radicals and sometimes could not obtain a single supporter.

The Lieutenant Governor complained of him to William Windham, the Secretary of State;[58] and Castlereagh, who re-

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[56] The proceedings in this unique case will be found in the Proceedings of the Leg. Assy. U. C. for 1807, most conveniently in 8 Rep. Ont. Arch. (1911) pp. 127, 128, 129, 134, 135, 154, 155; the Division List on p. 155. See also Doughty & McArthur Documents relating to the Constitutional History of Canada 1791-1818 pp. 325 et seq.

[57] Can. Arch., Q. 310, p. 83; also letter Castlereagh to Craig, September 7, 1809, ibid., p. 36 in D. & McA. Documents, etc., p. 326, note 2. It is hard to see how men like Boulton and Sherwood could justify their votes.

[58] Letter, Francis Gore to William Wardham, Secretary of State for War and Colonies from York, Upper Canada, March 13, 1807. Can. Arch., Q. 306, pp. 59 et seq.; D. & McA. pp. 327 et seq.; Can. Arch. Rep. for 1892, pp. 61 et seq. His offences are detailed thus:

"Very soon after the arrival of Mr. Thorpe in this Province, his Public Conduct attracted the notice of all considerate men: the Publication purporting to be an Address from the Grand Jury of the Home District on the first Public exercise of his Functions as a Judge, evinced a strong disposition to make the Courts of Justice, the Theatres for Political harangues, and a subsequent one from the Petty Jury (a thing heretofore unknown in this Country) afforded a sufficient proof of a desire in the Judge, to encourage Strictures on the Government from every description of persons, however incompetent they might be to form any correct opinion upon the subject, or however foreign such a subject might be from the occasion for which they were convened. . .

"Mr. Thorpe's conduct, since he has been elected a Member of the House of Assembly, has been most inflammatory—and however it is to be lamented that the Government have not greater influ-

placed Windham, directed Gore to suspend him.[59] In anticipation of such a direction, Gore with the approval of his Executive Council had left Thorpe's name off the Commission of Assize and Nisi Prius, inclusion in which was at that time necessary to enable Judges to try cases at "the Assizes," their commission as Judges of the Court of King's Bench not extending to the trial of cases civil or criminal at the Assizes or elsewhere than in Banc.[60] This course was absolutely necessary to prevent Thorpe spreading discontent, the charge made against him being none too strong from the Governor's stand-

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ence in the House of Assembly, during the Session which has just closed, he had been unable to carry any one point, to embarrass the Government. He moved an Address, which was most insidious, and inflammatory, on the subject, of those Persons who had adhered to the Unity of the Empire—which was rejected. In his proposal for vesting the Power of Appointing Trustees to the Public Schools, in the House of Assembly instead of the Lieutenant-Governor, after a violent Declamation, and abuse of the Executive Government, he asserted, that it was . . . the privilege of The House of Assembly to nominate to office. In this attempt, he was supported by two only. And on a Question relating to the Duties, imposed by the 14th of the King (which Mr. Thorpe contended was at the disposal of the Provincial Legislature) he stood alone! and I am happy to observe, that in the instance of a Judge of the Court of King's Bench, making an attempt to derogate from the authority of the British Parliament, he could not in a popular Assembly, prevail on a single person to join him, notwithstanding, his Pathetic allusion to the Revolt of the American Colonies.

"When the business of the Session was nearly concluded, an address was moved in the House of Assembly, to relinquish their claim to about six hundred pounds, which had been taken out of the Provincial Funds, and appropriated, by the late General Hunter (to particular Colonial purposes) without the concurrence of the other branches of the Legislature, this measure was opposed by Mr. Thorpe with his usual violence, but without effect."

[59] Robert (Stewart) Viscount Castlereagh, who had been Secretary of State for War and Colonies in 1805 was followed by William Windham, February 14, 1806, but regained his place March 25, 1807; this he kept till forced out of the Cabinet by Canning in 1809, when he was succeeded by the Earl of Liverpool.

Castlereagh's letter to Gore, June 19, 1807, is in D. & McA., p. 330. Can. Arch., G. 55, pt. 1, p. 115.

[60] See my articles in the Yale Law Journal, "New Trial at the Common Law," November, 1916, and "New Trial in Present Practice," January, 1918:

"It was not until 1855 (18 Vict. c. 93, s. 43, Can.) that commissions of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery were rendered unnecessary, Parliament providing that such courts should be held at such times as the judges of the courts of common law (by this time a Court of Common Pleas had been formed by (1849) 12 Vict. c. 63 (Can.) with the same powers as the Court of Queen's Bench) should appoint. The judges of the courts of common law were to sit in these courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery with the same powers as though they had commissions as formerly.

point—"That the progress of one of His Majesty's Justices of the Court of King's Bench through the Province in his routine of duty should be dangerous to the peace of the colony may indeed seem strange but it is most certainly true with regard to Mr. Thorpe who appears to consider his character as a Judge but a matter of secondary consideration and to be chiefly ambitious of the character of a Factious Demagogue."[61]

On Thorpe being informed of his omission, he thought he should ask permission to go to England and lay the matter before the Privy Council; but afterwards repented and determined to remain. A meeting of some of his constituents was held at York, which presented an address to him expressing unfeigned sorrow that thereby the eastern part of the Province would be deprived of the instructive lessons and philanthropic instructions flowing from his lips. They also offered, if any attempt should be made to lessen his income, to contribute to alleviate the sufferings of their benefactor. Thorpe declined the present, said that his conduct had been approved of by the Secretary of State and his labours rewarded by the Sovereign, and confidently expected a favourable termination of the matter.[62]

Powell, who had been in England on the way to and from Madrid where he obtained the release from a Spanish American prison at Omoa of his son Jeremiah, had there heard that it was intended to suspend Thorpe. With Gore's perfect approbation, Powell before the arrival of Castlereagh's despatch called

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"By the Common Law Procedure Act of 1856 (19, 20 Vict. c. 43, ss. 152, 153, Can.) the times of the sittings of these trial courts were to be fixed by the judges, and the judges might sit with or without commissions, as the Governor (i. e., the Ministry) should deem best. In 1874 the Administration of Justice Act (37 Vic. c. 7, Ont.) provided for Courts of Assize and Nisi Prius to be held without commissions and that any judge or Queen's Counsel presiding at any court of Assize, Nisi Prius, Oyer and Terminer and General Gaol Delivery should have all the powers which he would have had under commissions under the former practice.

"It may be said that since the act of 1856 we have not had in Ontario commissions for trial courts, except special commissions of Oyer and Terminer, etc., the power to issue which is still continued and has been exercised."

[61] Letter, Gore to Castlereagh, York, Upper Canada, August 21, 1807, Can. Arch., Q. 306, p. 212: Can. Arch Rep. for 1892, p. 81. The report of the Executive Council is ibid., p. 82.

[62] Can. Arch., Q. 306, pp. 212, 222, 223, 224. Some of Thorpe's constituents did not approve, ibid., p. 328, and indeed they strongly doubted that any such meeting had ever taken place—in which doubt Gore shared, ibid., p. 312. See Can. Arch. Rep. for 1892, pp. 81 et seq., Can. Arch., Q. 310, pp. 87 et seq., 100, 101.

on Thorpe and told him what was coming. He also told him that if he would ask Gore for leave of absence before the matter became public, he would receive it and money to convey him to Europe. That he at once refused, said that he could not be removed without a hearing before the Privy Council, and claimed that everything he had done was by direction of the Secretary of State. He left the Province without leave of absence and without the knowledge of the Governor, believing firmly that Castlereagh would justify him. In an address to his constituents written at Niagara just as he was leaving the Province to go to New York on his way to England, he expressed the hope that his return should be as rapid as his departure was unexpected.[63] His hopes were vain: his suspension was made final and he was succeeded in his Judgeship by Campbell: he never again appeared in Canada; and no other Judge has ever offered himself for election to the Lower House of Upper Canada.[64]

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[63] Can. Arch. Rep. for 1892, p. 89: Can. Arch. Q. 310, p. 24, a contemporary letter (Powell MSS) speaks of him forlorn and in despair leaving Niagara and wonders what will become of his poor wife and children—his wife and helpless children he had expressed his willingness to sacrifice only with his life in doing his duty to England, to the Colony and to the patronage of Sir George Shee, Bart. (Under Secretary for the Home Department 1800-1803). Letter, Thorpe to Shee, Can. Arch., Q. 310, p. 34; Can. Arch. Rep. for 1892, p. 89.

[64] In my article "Scandalum Magnatum in Upper Canada," 4 Jour. Am. Inst. Cr. Law, May, 1913, pp. 12 et seq., already referred to, I give the subsequent career of Mr. Justice Thorpe in the following words:

"Mr. Justice Thorpe, returning to England, was appointed Chief Justice of Sierra Leone; after a residence there for some years he brought from that Colony to London a budget of complaints from the people there. He was cashiered for this, and he passed the rest of his life in obscurity and neglect, dying a poor man.

"It was not the mere bringing of complaints to London which proved fatal to Thorpe. He made a most vigorous, if not virulent, attack in print against the African Institution and its predecessor, the Sierre Leone Company, organized for the benefit of free blacks on the west coast of Africa. Neither Director nor Manager escaped the lash of his pen. Wilberforce was by implication charged with hypocrisy, Zachary Macaulay (father of Lord Macaulay) with making money out of the pretended charity, and all implored to let the unfortunate blacks alone. Perhaps his worst offense was making public that while a poor old black settler, Kisil, could not get his pay for work and labor done long before for the Company, Macaulay (then lately Secretary and always Director) received fifty guineas for importing ten tons of rice into England from the West Coast of Africa; and while £14.5.4 was spent "for clothing African boys at school," £107.12.0 went "for a piece of plate to Mr. Macaulay." Thorpe was unwise enough to expose the seamy side of charitable institutions; and when we consider that H. R. H., the Duke of Gloucester, was president; Lords Lansdowne, Selkirk, Grenville, Cal-

I speak only of the Judges of the Supreme Courts, the Courts or King's (Queen's) Bench, Common Pleas, and Chancery. There were two Judges of the old Courts of Common Pleas who became members of the first House—Nathaniel Pettit and Benjamin Pawling, of Niagara (Nassau District), and possibly a third, John Macdonell, of Luneburg District. After the abolition of these Courts in 1794, one of the former Judges, Edward Jessup of Luneburg, became a member of the Assembly in the second Parliament and John Macdonell was re-elected.

Of the District Courts (now County Courts) instituted in 1794 and of the Surrogate Courts, there were many Judges Members of the House, many of them laymen. There never was an agitation against Judges being elected at all like that which raged in Lower Canada. The first legislation in this respect in Upper Canada did not pass until 1837 when it was enacted that any member of the House who should become Judge of the Court of King's Bench, of a District Court or any Court of Record to be established (or accept other named offices), should vacate his seat, but it should be no bar to re-election. The curious clause was added that nothing in the Act should be construed to author-

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thorpe, Gambier, and Teignmouth were vice presidents; members of parliament like Wilberforce, Babington, Horner, Stephen, Wilbraham, etc., were members of the Institution; and that Wilberforce was a bosom friend of Pitt's, we need not wonder at Thorpe's dismissal—Don Quixote had quite as good a chance with the windmills. Nevertheless it must be said that his charges in some respects are very like those made a short time before by Dr. and Mrs. Falconbridge.

"Thorpe's pamphlet went through at least three editions; my own copy (of the third edition) is dated 1815.

"Perhaps one moral of this story is that judges should keep out of politics."

It was Lord Bathurst, Secretary of State for War and the Colonies in Liverpool's "purely Tory" Administration of 1812, who gave Thorpe his congé. Gourlay in his "Statistical Account of Upper Canada," Vol. II, pp. 322 et seq., has something to say about Mr. Justice Thorpe. Dent in his U. C. Rebellion Vol. 1 pp. 86-90 gives an account of this "honorable and highminded man whose only fault was that he was too pure for the times in which he lived and for the people among whom his lot was cast." (The author could not have read Thorpe's own letters, copies of which are in the Can. Arch. printed in the Can. Arch. Reports for 1892), Kingsford, Hist. Can. Vol. VII, p. 524; Vol. VIII, pp. 87-103, is less favorable. There is no doubt as to Thorpe's actions. His motives are differently interpreted—**sub judice lis est.** Those interested in Thorpe's charges about Sierra Leone will find them discussed in the Imperial House of Commons (1815) 29 Hans. Deb. 1005, (1815) 30 Hans. Deb. 612.

ize the election to the House of a Judge of the Court of King's Bench, thus leaving the eligibility of such a Judge at large.[65]

After the Union, the Parliament of Canada in 1843 passed a statute which rendered ineligible as members of the Assembly all Justices and Judges of any Court of Queen's Bench or of King's Bench, the Vice-Chancellor of Upper Canada . . all District Judges or Circuit Judges . . the Official Principal of the Court of Probate and the Surrogate Court in Upper Canada and many others.[66]

In 1857 the final blow was given to judicial legislators.[67] Of the other Judges appointed during Upper Canada's separate existence, Thomas Cochrane, 1803-1804, is not known to have taken part in politics. D'Arcy Boulton, 1818-1829, was successively Solicitor General and Attorney General and a strong supporter of the Government; Levius Peters Sherwood, 1825-1840, had been a Member and Speaker of the House of Assembly, a Tory—neither of these was an active, or at least an open, politician after his elevation to the Bench. John Walpole Willis, 1827-1828, deserves a chapter to himself. He came from England and quarrelled with everyone in authority, meddled with the House of Assembly, and generally made so much trouble with the Government and its officers that he was "amoved."[68] James

[65] (1837) 7 Wm. IV, Chap. 114, Secs. 1, 2 (U.C.) reserved for the Royal Assent, promulgated April 20, 1838.

[66] (1843) 7 Vict. Chap. 65 (Can.), reserved for the Royal Assent and proclaimed May 25, 1844. There were subsequent enlarging and explanatory acts (1853) 16 Vict. Chap. 155 (Can.) and (1855) 18 Vict. Chap. 86 (Can.).

[67] (1857) 7 Vict. Chap. 22 (Can.).

[68] "Amoved" is the technical expression always used in this connection. Willis was afterwards sent as a Judge to Demerara and then to New South Wales. He had trouble with the Governor there and was again amoved; this time, however, irregularly, and the Privy Council allowed his appeal (1846, Willis v. Gipps, 5 Moo. P. C. 379). But he was forthwith regularly removed and failed to obtain further employment; he died in 1877.

"The statement of the Lord Chancellor (Lord Lyndhurst) at p. 388 of the report in 5 Moore that on the previous occasion 'the order on a motion then appealed from was set aside because the appellant was not heard in Canada' is an error. Sir George Murray said in his place in Parliament, May 11th, 1830, when the matter was brought up by Lord Milton on the occasion of Willis petitioning for redress on the ground that he had acted in good faith: 'The Government had taken the expense (of an appeal to the Privy Council) on itself. The case was argued before the Privy Council. . . . Mr. Willis' complaint amounted to this, that his removal was unwarranted, illegal and ought to be void; and the decision of the council was that it was not unwarranted, not illegal and that it ought not to be void.' (24 Hans. N. S., pp. 551 et seq. [1830]).

Buchanan Macaulay, 1829-1849 (J. K. B.), 1849-1856 (C. J. C. P.), while an Executive Councillor before his appointment to the Bench, was not at all a partisan. Archibald McLean, 1837-1850 (J. K. B.), 1850-1856 (J. C. P.), 1856-1862 (again J. Q. B.), 1862-1863 (C. J. Q. B.), 1863-1865 (Prest. E. & A.), who had been long a member and twice Speaker of the House of Assembly, was then a strong Tory and gave his whole-hearted support to the policy of the Attorney General John Beverley Robinson. Jonas Jones, 1837-1848, was also a member of the House, a still stronger Tory and much more virulent than McLean. Christopher Alexander Hagerman, 1840-1847, had been successively Solicitor General and Attorney General; in the House he had been the protagonist of rule by Executive Council, denial of Representative Government, donation of the Clergy Reserves to one favoured church, and of conservative measures generally. It is said of him that he was so much of a Tory that he would not

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"There has been only one other instance of amoval of a judge of a Superior Court in Upper Canada (Ontario)—that of Mr. Justice Thorpe in 1807. Other troubles of Mr. Justice Willis may be seen in the report of Willis v. Bernard, 5 C. & P. 342; 8 Bing. 376. His wife, left behind in Canada, consoled herself with Lieutenant Bernard; and the injured husband brought a successful action of crim. con."

See my articles, "The Court of King's Bench, 1824-1827," 49 Can. Law Jour. 45, 98, 126, 209 (1913).

An incident in the Court of King's Bench in England exhibits Thorpe in a more favorable light:

"The King vs. Francis Gore Esq., 1820.

This was an indictment against Francis Gore, late Lieutenant Governor of Upper Canada, for publishing a libel affecting the character of Judge Thorpe. On motion of Mr. Scarlett, the defendant was brought up for judgment.

The evidence of publication was the fact of the defendant, having submitted the libellous pamphlet in question, to the perusal of Mr. Sergeant Firth, then Attorney General of Upper Canada for his official consideration. The Solicitor General said he understood the case was to go before the Master, in consequence of the affidavits, which the defendant agreed to file. These affidavits stated that the defendant, in submitting the pamphlet to Mr. Sergeant Firth, did so solely in order to consult him officially as a public officer touching the matters it contained; that he had no intention of circulating the libel; that he was not the author of it; that he had no intention of injuring the character of the prosecutor; and that he had not in any manner given his sanction or authority to any publication, prejudicial to the reputation of that gentleman.

Mr. Scarlett, after communicating with his client, announced that the latter was perfectly satisfied with the defendant's declaration, and wished it understood that he had never entertained the slightest personal ill-will towards the defendant.

The defendant was consequently dismissed."

(Quebec Gazette, 3 April, 1820.)

allow himself to be called a Conservative, but a *Tory out and out,* and he undoubtedly lived up to his appellation. None of these when on the Bench interfered in political matters; and no one but extreme partisans has ever seriously charged any of them with partiality arising from political creed or alignment.[69]

WILLIAM RENWICK RIDDELL.*

TORONTO.

*Justice of the Supreme Court of Ontario.

[69] I have gone over the names of all the Judges of the three Superior Courts and of their successor, the Supreme Court of this Province, who have passed over; and I find only very few who had not taken a prominent part in politics before their elevation to the Bench; Sir John Hawkins Hagarty, John Douglas Armour, Sir John Alexander Boyd, Vice-Chancellor James C. P. Esten are perhaps the best known.

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TAXATION—EXEMPTION OF LIBERTY BONDS—PROPERTY INTEREST OF STOCKHOLDERS.—Is the property of a corporation separate and distinct from the interest of the individual stockholder in the shares for purposes of taxation? The fiction of corporate entity recognizes two entirely separate interests, at least for some purposes. The United States Supreme Court has held that the exemption from taxation of the stockholder's interest in shares does not exempt the surplus or capital stock of the corporation.[1] The Iowa court in the case of *Cook v. City of Bur-*

[1]Shelby County v. Union and Planters' Bank, (1896) 161 U. S. 149, 40 L. Ed. 650, 16 S. C. R. 558.

lington[2] ruled that it was not double taxation to tax the bridge owned by a corporation and also levy a tax upon the shares of stockholders in said bridge company. This doctrine was the basis of the decision in *Van Allen v. Assessors*,[3] holding that the value of the shares of stock in a corporation may be assessed to the individual shareholder without deducting from the value of such shares the bonds of the national government constituting a part, or all, of the value of the corporate property. Since that case "numerous states have, under the guise of imposing taxes upon shares of capital stock, actually assessed the value of government bonds, and in many cases such proceedings have been sustained upon the theory, which is now settled, that the stock of a bank and the property of the bank may be separate subjects of taxation."[4] The recent federal case cited gives the stockholders, as well as the corporation, the benefit of the exemption secured to holders of Liberty Loan bonds. The great increase in government securities and their wide distribution make this case one of great interest.

Iowa was one of the states which attempted indirectly to tax national securities. Exempt government bonds were included in the assessed value of shares of stock and under the state statute the tax was assessed to the corporation. This practice was clearly illegal.[5] In order to evade this decision the legislature amended the statute by providing that the shares "shall be assessed to the individual stockholders,"[6] instead of the corporation. This was held to be a valid tax by the state court,[7] in reliance upon the decision of the Supreme Court of the United States. Pursuant to the amended statute and in reliance upon the state and federal decisions, the assessor and board of equalization of the city of Des Moines included Liberty bonds owned by the state banking associations in the value of the shares of stock assessed to the individual stockholders as subject to taxation. The federal district court in *Iowa Loan & Trust Co. v. Fairweather*[8] has adjudged

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[2](1882) 59 Iowa 251, 13 N. W. 113, 44 Am. Rep. 679.

[3](1865) 3 Wall. (U.S.) 573, 18 L. Ed. 229.

[4]Wade, J., in Iowa Loan & Trust Co. v. Fairweather, (1918) 252 Fed. 605, 608.

[5]Home Savings Bank v. Des Moines, (1907) 205 U. S. 503, 51 L. Ed. 901, 27 S. C. R. 571.

[6]Laws of Iowa 1911, Chap. 63 Sec. 4; Code 1913 Sec. 1322.

[7]Head Case, (1915) 170 Iowa 300, 152 N. W. 600; First National Bank of Council Bluffs v. City, (1917) 161 N. W. 706.

[8]Note 4, supra.

this assessment invalid as a tax upon the exempt Liberty bonds. An effort is made by the court to distinguish the *Van Allen* case on two grounds: first, there was no specific exemption by Congress of the bonds issued in the Civil War; second, Congress had expressly consented to the taxation of the value of shares in national banks. But as to the first, the specific exemption of Liberty bonds was immaterial, since no express exemption of national securities is necessary to prevent taxation;[9] and as to the second ground, the *Van Allen* case can be distinguished only if the consent of Congress added anything to the state's power to tax the shares; which it did if there be identity between corporation and shareholder, and not otherwise. This identity or lack of identity for purposes of taxation is the precise point in question in the recent Iowa case. "The *Van Allen* case has settled the law that a tax upon the owners of stock in a corporation in respect of that stock is not a tax upon the United States securities which the corporation owns. Accordingly, such taxes have been sustained by this court, whether levied upon the shares of national banks by virtue of congressional permission, or upon the shares of state corporations by virtue of the power inherent in the state to tax the shares of such corporations."[10] In fact, the Supreme Court in *Farmers & Mechanics Savings Bank v. Minnesota*[11] holds there is nothing novel about this doctrine of the *Van Allen* case. It "is an apparent, not a real, exception" to the rule so ably expounded in *McCulloch v. Maryland,* and the chief justice in that famous case stated that his opinion did "not extend . . . to a tax imposed on the interest which the citizens of Maryland may hold in this institution."

The decision of Judge Wade in the *Iowa Loan & Trust* case seems to be strongly supported by the opinion of the Supreme Court of the United States in the very recent case of *Bank of California v. Richardson,*[12] holding that Congress, in permitting the states to tax the shares of national banks, "treated the stock interest, that is, the stockholder, and the bank as one and subject to one taxation by the methods which it provided," and hence that

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[9]Weston v. City Council of Charleston, (1829) 2 Pet. (U.S.) 449, 7 L. Ed. 481, 488; McCulloch v. Maryland, (1819) 4 Wheat. (U.S.) 316, 4 L. Ed. 579.

[10]Note 5, supra. 205 U. S. at p. 512.

[11](1914) 232 U. S. 516, 34 S. C. R. 354.

[12]U. S. Sup. Ct., decided Jan. 27, 1919.

the state, having once taxed A, a national bank holding shares in B, another national bank (tax paid by B and charged to its shareholders), cannot impose upon the shareholders of A another tax based upon its entire net assets without deducting the amount of the tax already paid by it through B. This decision, while not admittedly overruling the *Van Allen* case, appears to recognize the identity of the corporation and its stockholders. Three dissenting judges consider that the decision overrules the *Van Allen* case and all the others which follow it. Justice Pitney, dissenting, points out that the value of a bank's taxable property is arrived at without regard to its liabilities, while the stockholders' property is the net value of the bank's property after paying its debts and winding up its business, and may therefore represent only a fraction of the bank's taxable property; that "the stockholders and the bank are entirely different entities, not merely in form but in substance." (Indeed the shares might be practically worthless while the bank might be owner of a large amount of taxable property.) He shows that in the case under consideration, while the value of the stock held by bank A in bank B was four per cent of the total value of the B stock, it was only one per cent of the total value of the taxable property of bank B.

An early Minnesota case decided that a tax upon the real estate of a national bank, assessed against the corporation, was double taxation, as under the then existing statute the real estate of the bank was included in the value of the shares assessed and taxed to the individual stockholders but paid by the bank. The attorney general cited the *Van Allen* case to sustain his contention as to the distinct property interests subject to taxation. But the court ruled that the same property was doubly taxed.[13] The decision was greatly affected by the fact that state banks were taxed only upon the valuation of their taxable property, their shares of stock not being subject to taxation. The legislature must be presumed not to have intended to discriminate between national and state banks. But the federal court, in *People's National Bank v. Marye*,[14] held that U. S. Rev. Stat. Sec. 5219 contemplates that the tax on real estate may be imposed independently of the tax on the shareholders; and the Supreme Court, in *Amoskeag Savings Bank v.*

[13]Commissioners of Rice Co. v. Citizens' National Bank, (1877) 23 Minn. 280.

[14](1901) 107 Fed. 570, 579.

Purdy,[15] sustained a tax imposed upon a shareholder under a statute which taxed the shareholders in a bank without allowing any deduction for the value of its real estate which was also taxed. Certain railroad corporations in Minnesota owned all the stock in the St. Paul Union Depot Company. As railroads they paid a gross earnings tax in lieu of all other taxes. When the state attempted to tax the property of the Union Depot Company, Judge Mitchell, writing the opinion of the court,[16] held that the stockholders had paid the tax upon the corporate property. This case expressly recognizes the identity of interests of corporation and stockholders. The Minnesota court cited the case of *Farrington v. Tennessee*.[17] But the majority in that case recognized that there are two distinct properties subject to taxation and based their opinion upon the charter provision as a contract exempting the stockholders from taxation. The strong dissent of three judges questions the court's decision on the contract theory, but none of the judges adopted the view of the eminent Minnesota justice that "The identity of the property taxed is not affected by the fact that in the one case the tax is paid by the stockholder and in the other by the corporation. The thing taxed is still the same."[18]

The recent Minnesota case of *State v. Barnesville National Bank*[19] holds that the tax to be collected by the corporation from the dividends of the shareholders under the state statute is a tax against the stockholders only, and therefore if the bank becomes insolvent the tax cannot be enforced against the assets of the bank. This case apparently accepts the distinct property theory.

The Minnesota statute imposing a tax upon the stockholders' interest in a bank has been recently interpreted in the case of *State v. Security National Bank*:[20] "We hold that the statute in question imposes the tax upon the stock as the property of the shareholders and as representing their interest in the bank." The court, moreover, clearly recognized the absolute incapacity of a state to tax a national bank upon its capital.

If in taxing the shares the property taxed is really the corpo-

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[15](1913) 231 U. S. 373, 34 S. C. R. 114.
[16]State v. St. Paul Union Depot Co., (1889) 42 Minn. 142, 43 N. W. 840.
[17](1877) 95 U. S. 679, 686, 23 L. Ed. 558.
[18]Note 16, supra.
[19](1916) 134 Minn. 315, 159 N. W. 754.
[20](1918) 139 Minn. 162, 165 N. W. 1067.

rate property, then all national government bonds must be deducted; if the two interests are distinct, one or the other escapes taxation. Judge Wade identifies the two interests. He asks: "What is taxed in any case? Not the thing but the value of the thing. A tax is assessed against the owner of property, but the tax is based upon not the property, but the value of the property." If the value of stock were based exclusively upon the corporate property, all exemptions of such property should be given effect whether the tax be assessed against the corporation or the shareholder; but, as above shown, the stock represents the value of the residue only, after the debts are paid and the business closed.

In *Home Savings Bank v. Des Moines*[21] the Supreme Court seems to distinguish between the two interests: "It is said that where a tax is levied upon a corporation, measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. . . *But the two kinds of taxes are not equivalent in law, because the state has the power to levy one and has not the power to levy the other.*[22] The question here is one of power and not of economics." It would have been more logical to say the state has the one power and not the other, the two kinds of taxes not being equivalent.

The decisions of the Minnesota court in the *Union Depot*[23] case and *Commissioners v. Citizens' National Bank*[24] seem more in harmony with the last expression of the United States Supreme Court than do those in the *Barnesville Bank*[25] and *Security Bank*[26] cases, but it is difficult to escape the reasoning of Justice Pitney (dissenting) in the *California Bank*[27] case. On the other hand, if the government's power to borrow money is equally hampered whether the state tax be levied upon the corporation's capital invested in national securities or upon the shares of the stockholders—a proposition which is perhaps open to question—the exemption should in practice apply in the one case as well as in the other.

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[21] (1907) 205 U. S. 503, 51 L. Ed. 901, 27 S. C. R. 571.
[22] Italics are the writer's. [Ed.]
[23] Note 16, supra.
[24] Note 13, supra.
[25] Note 19, supra.
[26] Note 20, supra.
[27] Note 12, supra.

EMINENT DOMAIN—RIGHTS ACCRUING TO PROPERTY OWNER UPON VOLUNTARY ABANDONMENT BY CONDEMNOR.— Theoretically, eminent domain proceedings should be completed in one day. Practically, however, these proceedings are often extended over years. As a result, even though there has been no disturbance of the actual possession of the land, the owner often suffers severe pecuniary loss during the pendency of the proceedings. It is difficult to find tenants and unsafe to build on the land; the owner may stop work on a partly constructed building or adapt it to the proposed improvement; he is almost certain to have incurred an attorney's fee; but it is held that, in the absence of unreasonable delay or bad faith on the part of the party who instituted the proceedings, the condemnor may abandon the proceedings where not prevented by statute without being in any way liable.[1]

In the absence of statute fixing the time within which a discontinuance may be had, the general rule is unquestioned that an eminent domain proceeding may be discontinued at any time before the rights of the parties become reciprocally vested.[2] Although the time when the rights become so vested is governed by local statutes, there are two distinct lines of cases. In a majority of states the rights of the parties are not reciprocally vested so as to amount to a taking at any time before the amount of the award is paid; and in a minority of states there are no vested rights until the confirmation of the award.[3] The condemnor, therefore, could defeat the owner's right to compensation by abandoning the proceedings prior to these respective times, inasmuch as there would be no taking. It is also well settled that expenses to which the owner of land has been put because of the proceedings cannot be included as taxable costs.[4] An action in tort, therefore, can be the only basis for the recovery by the landowner against the condemning party who has voluntarily abandoned the proceedings.

As a general rule, when condemnation proceedings are dismissed or abandoned in good faith and without unreasonable

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[1] Nichols, Eminent Domain, 2nd ed., Sec. 420; United States v. Dickson, (1903) 127 Fed. 774; Feiten v. Milwaukee, (1903) 47 Wis. 494, 2 N. W. 1148.

[2] Note, Ann. Cas. 1918E 1062.

[3] Note, Ann. Cas. 1918E 1062 and cases cited. In Minnesota the condemnor may discontinue or abandon at any time prior to judgment. Dunnell, Digest Sec. 3091.

[4] McCready v. Rio Grande, etc., R. Co., (1905) 30 Utah 1, 8 Ann Cas. 32.

delay, the owner of the land sought is not entitled to be made whole for the loss which he may have suffered by the removal of tenants or interference with his plans in regard to the use of the property.[5] These decisions appear to be based upon the ground that in the absence of conduct on the part of plaintiff in the condemnation proceedings that would give rise to a cause of action in tort, the condemning party cannot be held guilty of a legal wrong in bringing an action authorized by law and bona fide dismissing it. They say that if the landowner necessarily incurred expenses in preparing his defense to the condemnation proceedings, it is a case of damnum absque injuria, for which no recovery can be had.[6] The damage which these owners suffer is said to differ only in degree from that suffered by every other landowner because of threatened condemnation.[7]

A series of decisions in Missouri, however, has settled the law of that state to be, that in cases of proceedings by railroads and other private corporations the owner may recover in a separate action for costs, expenses, and loss of time incurred by him in proceedings that have been dismissed or abandoned by the company.[8] This rule no longer applies to municipal corporations in that state, because the clause giving them the right to abandon proceedings has been construed to mean without liability unless there is tortious conduct.[9] The rule in the Missouri cases is based on the ground that "the power conferred is an extraordinary power and it will be strictly limited."[10] Whether that is a valid ground for tort seems questionable. It might be a valid reason for refusing the corporation the right of condemning in a certain case, but in the absence of other acts it seems to be no basis for tort. Judge McFarlane, in *St. Louis Ry. Co. v. Southern Ry. Co.*,[11] said that, if the question was a new one in the state, "we might hesitate in sustaining the action." From an equitable stand-

[5] McCready v. Rio Grande, etc., R. Co., supra; Bergman v. St. Paul, etc., R. Co., (1875) 21 Minn. 533; Note, 8 Ann. Cas. 732.

[6] Note, 8 Ann. Cas. 732; Bergman v. St. Paul, etc., R. Co., supra; Andrus v. Bay Creek Ry. Co., (1896) 60 N. J. L. 10, 36 Atl. 826.

[7] Nichols, Eminent Domain, 2nd ed., Sec. 420.

[8] Lewis, Eminent Domain, 3rd ed., p. 1695; Leisse v. St. Louis, etc., R. Co., (1876) 2 Mo. App. 105, aff'd 72 Mo. 561; Owen v. City of Springfield, (1900) 83 Mo. App. 557.

[9] St. Louis Brewing Association v. St. Louis, (1902) 168 Mo. 37, 67 S. W. 563.

[10] Owen v. City of Springfield, note 8, supra.

[11] (1896) 138 Mo. 591, 39 S. W. 471.

point there is much to be said in favor of compelling a corporation clothed with such extraordinary power to reimburse the property owner for expenses caused by it for the purpose of its private gain. Such liability, however, should be created by the legislature and not by the courts. Statutes of this sort have been passed and they have been held constitutional.[12]

In New York, the court, having the right in its discretion to dismiss the proceedings, may impose terms beyond the taxable costs as a condition of a discontinuance of the proceedings.[13] In several other states it has been held that, the condemnor having an absolute right to abandon, the court could not impose any conditions upon his doing so.[14]

When proceedings were not instituted in good faith or were kept alive for an unreasonable length of time and finally abandoned, it is generally held that the owner is entitled to be compensated for his expenses and loss, either as an incident or condition of the abandonment, or in a separate action sounding in tort.[15] In *Ford v. Board of Park Commissioners,*[16] Deemer, C. J., citing a number of cases holding for and against recovery on account of unreasonable delay, said that prior to statutory enactments giving a right of action plaintiff could recover only if the condemnor was actuated by bad faith and proceeded with the malicious or wrongful intent of injuring the plaintiff. By this rule (which is no longer the law in most jurisdictions) unreasonable delay could only be used to show malice. A series of decisions in Maryland has settled the law of that state to be that the owner of property may recover for damages caused by any unreasonable delay either to prosecute or abandon proceedings.[17] In *Carson v. City of Hartford*[18] it was held that mere length of time was insufficient to create liability, but in *St. Louis Ry. Co. v.*

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[12] Lewis, Eminent Domain, 3rd ed., p. 1700; Drury v. Boston, (1869) 101 Mass. 439; Sanitary District v. Bernstein, (1898) 175 Ill. 215, 51 N. E. 720.

[13] In the Matter of Waverly Waterworks Co., (1881) 85 N. Y. 478, reversing 16 Hun. (N.Y.) 57.

[14] Nichols, Eminent Domain, note 7, supra; Winkelman v. Chicago, (1905) 213 Ill. 360, 72 N. W. 1066.

[15] 10 R. C. L. p. 238. McLaughlin v. Municipality, (1850) 5 La. Ann. 504. Condemnor held liable on the ground that great delay is prima facie evidence that proceedings were unnecessary. Winkelman v. Chicago, supra. Wrongful delay was held to be damage to property.

[16] (1910) 148 Iowa 1, 126 N. W. 1030, Ann. Cas. 1912B 944.

[17] Lewis, Eminent Domain, 1689.

[18] (1880) 48 Conn. 68.

Southern Ry. Co.[19] delaying nine years was held prima facie to give the property owner the right to recover.

In the cases where the attempted taking is really for private purposes, although ostensibly for public purposes, the mere fact that it is for private purposes should not, from the reasoning of all the cases cited, be sufficient to give rise to a cause of action in tort. Malice or bad faith seems to be the basis of the right, and a party attempting to condemn for purposes which turn out to be private may be pressing what he considers a bona fide and valid claim. However, the attempt being for private purposes, this might be evidence showing lack of probable cause from which the jury might infer malice.[20] The case of *Sidelinker v. York Shore Water Co.*[21] seems to be a case of first impression on that point. In that case the question of malice or bad faith was not considered and the case rested on the ground that because the condemnor was given such extraordinary power he should be held strictly to account if the proceedings were improperly instituted.

The Maine case just cited is also interesting because of the damages which were awarded. It gives the plaintiff damages for "two years' deprivation of his land." As a matter of fact, there was no deprivation of the land, because, as before stated, there is no taking until the rights become reciprocally vested.[22] The inception of condemnation proceedings does not impose any restrictions on the land; the owner can sell it,[23] and in the absence of statutes to the contrary he is entitled to compensation for buildings started with knowledge of the situation.[24] The measure of damages is directly contrary to the rules laid down in *Musgrave v. Mayor of Baltimore*[25] and *North Missouri R. Co. v. Reynal*,[26] in each of which it was held that after notification that the property was wanted, and in the latter case even after it had been

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[19] Note 11, supra. In Black v. Baltimore, (1878) 50 Md. 235, four years was held unreasonable; in Feiten v. Milwaukee, note 1, supra, lapse of between six and seven months was held not unreasonable.

[20] Price v. Minnesota, etc., Ry. Co., (1915) 130 Minn. 229, 153 N. W. 532; 18 R. C. L. p. 30 Sec. 17.

[21] (Me. 1918) 105 Atl. 122.

[22] See note 3, supra.

[23] Duluth Transfer Co. v. Northern Pacific R. Co., (1892) 51 Minn. 218, 53 N. W. 366.

[24] New York v. Mapes, (1822) 6 Johns. Ch. (N.Y.) 46; Nichols, Eminent Domain 1106.

[25] (1877) 48 Md. 272.

[26] (1857) 25 Mo. 534.

assessed by the commissioners, the owner did not have the right to abandon the premises and if he did he could not recover for the loss and inconvenience, because it was self-imposed. The latter decision is extremely significant in that the same court allowed recovery "for rent and other losses and expenses due to the threat of subjecting the property to condemnation."[27]

Under the statutes providing for compensation when the proposed taking is abandoned, the amount recoverable is of course determined entirely upon the wording and construction of the statute. Under a statute in Massachusetts giving indemnity for "trouble and expense" occasioned to the owner by proceedings, no recovery can be had for "disquietude, vexation, and annoyance" to which he has been subjected or for uncertainty as to whether the improvement would be made. The word "trouble" in the statute refers to trouble from which some material or pecuniary injury results.[28]

The state of the law shows the desirability and even the necessity of statutory enactments to protect the property owner. These statutes, however, must be so framed as to compensate the owner only for actual loss and not make the condemnor liable to such great damage upon abandonment as to make the exercise of the right of eminent domain precarious.

EQUITABLE ESTOPPEL—AGENCY—ATTORNEY AND CLIENT—SATISFACTION OF MORTGAGE BY ATTORNEY WITHOUT AUTHORITY. —Estoppels by matter in pais, or equitable estoppels, although originating in courts of equity, are now available in courts of law and are of very frequent application in some classes of cases. Grounded on the theory that no man shall construct a right on his own wrong, they tend in practice as in theory to promote justice in the highest degree. Estoppel does not lend itself readily to definition and its purpose is best served when no attempt is made to confine it within a fixed rule. "Estoppel is a rule of evidence in the same way that conclusive presumptions are rules of evidence. An estoppel, like a conclusive presumption, is a rule of substantive law masquerading as a rule of evidence."[1]

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[27] Leisse v. Railroad, note 8, supra.

[28] Lewis, Eminent Domain 1699; Whitney v. Lynn, (1877) 122 Mass. 338, 343.

[1] 24 Harv. Law Rev. 425.

There are three necessary elements which must all be present in a transaction, to give the right to invoke this equitable principle. They are: first, ignorance in the one seeking to take advantage of it; second, acts or representations by the party estopped which mislead; and third, a change of position of one acting in good faith in reliance upon such representation.[2]

Applying the theory of estoppel to agency, wherein these three essential elements are all present, we have a situation "where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with the usages and nature of the particular business, is justified in presuming that such agent has authority to perform, on behalf of his principal, a particular act, and such particular act having been performed, the principal is estopped, as against such innocent third person, from denying the agent's authority to perform it."[3] To constitute an estoppel the conduct of the principal must be clearly inconsistent with the claim which he makes.[4] Where the agent was also an attorney at law that fact seems to have had considerable weight.

Scriveners in England are usually attorneys and solicitors and their work is of a highly valuable character. They look up investments, perfect the securities, collect interest, and very often collect the principal debt also. Their clients impose in them very great trust and confidence and it was well settled by the early English cases that because of this faith and confidence, and their authority to collect moneys due their clients, if the scrivener had in his possession the securities for the debt and had been originally authorized to place the loan, he was prima facie his client's agent for the purpose of collecting the principal, and payment to him under those circumstances would release the debtor. It was said in a New York case that where an agent made an investment in a bond and mortgage for his principal and attended to the execution of the securities, his agency in this investment was the same as that of the money scrivener in England, and it was held that so long as he had the securities in his hands the debtor had a right to rely on his authority to collect the demand, but that as soon as the bond and mortgage passed out of his possession into the custody

[2] Williams v. Neely, (1904) 134 Fed. 1, 11, 69 L. R. A. 232.

[3] Johnston v. Milwaukee, etc., Investment Co., (1895) 46 Neb. 480, 64 N. W. 1100.

[4] Klindt v. Higgins, (1895) 95 Iowa 529, 64 N. W. 414.

of the mortgagee, his authority was gone and further payments to him would be void as against the mortgagee, because she had ceased to trust her agent, and payments to him thereafter would be as the agent of the mortgagor and at his risk.[5]

As regards negotiable paper, there is little doubt that the weight of authority holds the principal estopped to claim as against a bona fide purchaser, where the one by whom the transfer is made came rightfully into possession and the paper was endorsed in blank.[6] We have the rule laid down in New York as to a promissory note that where the agent acted for the principal at the inception of the business and retained the note in his possession, he has authority to collect the principal. "The reason of the rule that one who has made the loan as agent and taken the security is authorized to receive payment when he retains possession of the security, is founded upon human experience, that the payer knows that the agent has been trusted by the payee about the same business, and he is thus given a credit with the payer."[7] This is followed by more recent decisions in the same state, holding the same to be true with regard to a mortgage and bond, and in each case the agent was an attorney at law, showing that there is still some connection in the line of reasoning between the English scrivener and our attorneys at law, while acting in the capacity of agents.[8] It might be added with regard to negotiable paper that an agent having in his possession for safe keeping notes endorsed in blank, so as to permit transfer of title by mere delivery, may be regarded by strangers, having no notice of the extent of the agency, as the owner, and the real owner will be estopped to deny the existence of the agency. Owing to the peculiar nature of such paper, possession of it is evidence of title thereto in the possessor.[9]

The same rules do not apply to non-negotiable paper, as, for instance, a bond and mortgage. In the absence of evidence showing the custom for such instruments to pass from hand to hand,

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[5] Williams v. Walker, (1844) 2 Sandf. Ch. (N.Y.) 325.

[6] Morris v. Preston, (1879) 93 Ill. 215, 221; Voss v. Chamberlain, (1908) 139 Iowa 569, 117 N. W. 269, 19 L. R. A. (N.S.) 106; Richard v. Charlot, (1908) 122 La. 492, 47 So. 841.

[7] Doubleday v. Kress, (1872) 50 N. Y. 410.

[8] Crane v. Gruenewald, (1890) 120 N. Y. 274; 24 N. E. 456; Central Trust Co. v. Folsom (1901) 167 N. Y. 285; 60 N. E. 599.

[9] Merchants' & M. Nat. Bank v. Ohio Valley Furniture Co., (1905) 57 W. Va. 625, 70 L. R. A. 312, 50 S. E. 880.

like negotiable paper, the real owner who has caused them to be endorsed in blank will not be estopped from asserting his ownership as against a pledgee of one to whom the instrument was intrusted for safe keeping.[10] The very fact that such paper is not intended to circulate as negotiable paper puts it on an entirely different footing, but "the owner of property may by his conduct so clothe another with the *indicia* of ownership, and the right to dispose of it, that he would be estopped from asserting his actual ownership against an innocent purchaser for value; but it was never held that such an estoppel would arise from the mere fact that the rightful owner had intrusted the possession of personal property to another. If such were the law it would . . . render the employment of an agent so hazardous that a prudent man would hardly dare employ one."[11] Clearly, then, before the aid of estoppel can be invoked, something more than mere possession of the security is necessary. Authority of an agent to receive payment of a demand may under some circumstances arise by implication, and this when the authority may be reasonably inferred,[12] as where it appears that the alleged agent has performed acts similar to the one in question, which have been ratified by the principal either expressly or by implication.[13] Here the courts apply the rule that whenever one of two innocent persons must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it.

There is considerable authority to the effect that when an agent who is an attorney at law has negotiated a loan, has authority to collect the interest, and is intrusted with the bond and mortgage, he is also the agent in collecting the principal. In a much quoted case, a son who was an attorney placed a loan for his father, and afterwards, the father being ill, the bond and mortgage were delivered to the son for the purpose of collecting the interest due. The son collected part of the principal and endorsed the payment on the bond, which he kept in his possession, returning the mortgage to his mother with the interest due

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[10] Scollans v. Rollins, (1898) 173 Mass. 275, 60 N. E. 983.

[11] Warder B. & G. Co. v. Rublee, (1889) 42 Minn. 23, 43 N. W. 569; Lawson v. Nicholson, (1894) 52 N. J. Eq. 821, 31 Atl. 386; Cox v. Cutter, (1877) 28 N. J. Eq. 13.

[12] Mechem, Law of Agency, 2nd ed., I, pp. 674, 675.

[13] Adiorne v. Maxcy, (1818) 15 Mass. 39; Wilcox v. Chicago, etc., R. Co., (1877) 24 Minn. 269.

and keeping the balance. It was held that possession of the securities at the time of the payment, coupled with his connection with their inception and his office as an attorney at law, was sufficient to warrant the mortgagor in making the part payment to the agent.[14] Soon after, it was decided in the same state that the negotiation of the loan, together with the possession of the securities, by an attorney at law having authority to collect the interest, as a matter of law authorized the collection of the principal also, and the loss must fall upon the plaintiff who employed and continued to trust him.[15] Again nearly fifteen years later the principle is emphatically laid down and, in fact, it is stated that it is well settled that the debtor is authorized to infer that an attorney or scrivener who has been empowered to negotiate the loan is authorized to receive both principal and interest, from his having possession of the bond and mortgage given for the bond, or of the former only.[16] In a very recent case where a loan of the principal's money was made through her agent, an attorney, who kept in his possession by the consent of his principal the mortgage and bond, then collected the debt and did not remit to his principal, the court stated that the decisions of the courts of equity were not binding on this court; but showed that there has been a marked tendency to refuse to recognize the rule that those facts constitute such a situation that the law will presume the agency for that purpose to exist, "and that it is at all times to be regarded as a fact to be ascertained by a construction of the given circumstances, and not, as seems to be indicated in some of the authorities, as a thing to be regulated in some instances, by legal definitions."[17]

The placing of the loan by the agent who had authority to collect the interest but who was not intrusted with the securities, according to decisions in Minnesota does not carry with it authority to collect the principal,[18] and furthermore does not give the agent authority to foreclose the mortgage for the purpose of collecting such interest even though the mortgage provided that it might be foreclosed by the mortgagee, her "attorney or agent."

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[14] Megary v. Funtis, (1852) 5 Sandf. (N.Y.) 376.

[15] Hatfield v. Reynolds, (1861) 34 Barb. (N.Y.) 612.

[16] Haines v. Pohlmann, (1874) 25 N. J. C. C. 179.

[17] Dorman v. West Jersey Title & Guaranty Co., (N.J. 1918) 105 Atl. 195.

[18] Park v. Cross, (1899) 76 Minn. 187, 78 N. W. 1107.

This rule has been systematically followed in this state in the famous "Kelley cases" and others.[19] Also where the agent collected the mortgage and forged his principal's name to the satisfaction, it was held that the release and satisfaction were void.[20] In still another of the "Kelley cases," where a bank acting for the plaintiffs paid to the Kelleys the amount of one of the mortgages, in the hands of the principal, on the promise that the Kelleys would obtain and send the release and satisfaction to the bank, the court said: "The bank or plaintiffs should have acted more prudently, and obtained a release of the mortgage before paying it, as there does not appear to have been sufficient ground for their doing it safely without such release or satisfaction."[21] Two years later our supreme court in another of these cases decided that the Kelleys had authority to make collections on due and past due loans and implied authority to collect loans before they became due, without having in their hands the securities. This decision, however, was based on general agency, the Kelleys having full control and management of the plaintiff's interests in this state.[22] It has also been decided here that the fact that a note is made payable at the office of the agent does not warrant the payment of the principal to the agent. It is added by way of dictum that if the note and mortgage were in the hands of the agent or attorney when such note or mortgage became due, the debtor might be authorized to infer that such authority existed.[23]

The Minnesota statute provides that "a mortgage may be discharged by filing for record a certificate of its satisfaction executed and acknowledged by the mortgagee, his personal representative, or assignee, as in the case of a conveyance. . . A discharge may also be made by an entry in the margin of the record of the mortgage, acknowledging its satisfaction, signed by the mortgagee, his personal representative or assignee, without further formality."[24] Under the statute, it is doubtful if the

[19] Burchard v. Hull, (1898) 71 Minn. 430, 74 N. W. 163; Dexter v. Morrow, (1899) 76 Minn. 413, 79 N. W. 394.

[20] Trull v. Hammond, (1898) 71 Minn. 172, 73 N. W. 642.

[21] Schenk v. Dexter, (1899) 77 Minn. 15, 79 N. W. 526.

[22] Springfield Savings Bank v. Kjaer, (1901) 82 Minn. 180, 84 N. W. 752.

[23] Dwight v. Lenz, (1898) 75 Minn. 78, 77 N. W. 546.

[24] Gen. Stat. Minn. 1913 Sec. 6853.

mortgagor would be protected by a payment of principal made to the mortgagee's agent, even though in possession of note and mortgage, unless the latter could produce express authority.

ENFORCEABILITY OF THE CONTRACTS OF INFANTS BY WAY OF ESTOPPEL.—The effect to be given to contracts of infants has caused more apparent as well as real conflict of opinion than almost any other subject of the law. Some of the earlier erroneous basic views have been abandoned,[1] but there is yet much inconsistency and difference of opinion. This is, however, always the case when sound legal principles are allowed to be overshadowed with the idea that one of the parties in a controversy must be favored. While the infant should be accorded a measure of protection from the consequences of immature judgment and inexperience, the rights of the adult who deals with him should not be overlooked.

The question is here presented whether an infant will be estopped to deny a contractual liability, by a representation that he was of full age. Two principles, equally well-settled and equally ancient, have probably given rise to that confusion which is so apparent in the law on that subject. The first of these doctrines is that the law, in order to protect a minor from improvidence and lack of judgment, makes an infant's contract voidable, at his instance, upon reaching majority. And the second is a limitation of the first, viz: this right of disaffirmance shall be used as a shield to protect the indiscretion of the immature and not as a sword to perpetrate fraud.

Obviously, it is most difficult to give each of these principles the force intended and yet keep them from trenching upon each other. Where, for instance, an infant, in order to induce the other party to enter into a contract, falsely asserts that he is over age, and the adult, believing him, is induced to make the contract, it becomes necessary to determine whether the infant, when sued on that contract, can set up his infancy as a defense, and whether he can sue to avoid the contract or assert rights contrary to it. The question, therefore, is not the liability of the infant for the tort,

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[1] Johnson v. Pie, 1 Lev. 169; 1 Keb. 905, 83 E. R. 353, 1312; doctrine rejected in Eckstein v. Frank, (1863) 1 Daly (N.Y.) 334; Badger v. Phinney, (1819) 15 Mass. 359, 8 Am. Dec. 105.

but his liability on that contract, because of his representations concerning his age. In other words, is he estopped to plead infancy as a defense to an action on the contract, under the circumstances?

It is evident that, if the infant is so estopped, the law is creating an implied contract against the infant of greater effectiveness than the one actually made. And this result occurs in the teeth of that policy of the law which throws the mantle of protection about one of immature years, declaring his contracts voidable at his election. While the weight of authority in this country seems to be that an infant is not estopped by his false representations from using his infancy as a shield against the contract induced by fraud, there is a very respectable minority holding the other way.[2] The reason assigned for this rule is, that if an infant can give vitality to his contract through the doctrine of estoppel, the protective and salutary rule of the common law disabling him from contracting at all would be abrogated and the right of disaffirmance would be of no practical value. It is, of course, obvious that if the fraudulent representation will estop the infant, the deceit gives practical validity to a voidable contract, with the result that the protection which the law has seen fit to give one of immature years would be of little value.

It is submitted that the above rule is fairly salutary, inasmuch as any adult who deals with an infant should do so at his peril, and if any effect is to be given to the rule allowing infants to repudiate, an estoppel in pais should not be allowed to negative that doctrine. It is true that an infant may, by reason of his personal appearance, family, surroundings, and business activities, coupled with active representation that he is of age, lead a cautious man into a situation involving undeserved loss. But this must be considered one of the wrongs left without a remedy for the sake of sounder policy, if the rule is adhered to that an infant may avoid his contracts at law. The supreme court of Illinois, in the case of *David-*

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[2] Sims v. Everhardt, (1880) 102 U. S. 300, 313, 26 L. Ed. 87; Merriam v. Cunningham, (1853) 11 Cush. (Mass.) 40; Wieland v. Kobick, (1884) 110 Ill. 16, 51 Am. Rep. 676; Millsaps v. Estes, (1905) 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496; Kirkham v. Wheeler-Osgood Co., (1905) 39 Wash. 415, 81 Pac. 869, 4 Ann. Cas. 532; Conrad v. Lane, (1880) 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; Whitcomb v. Joslyn, (1878) 51 Vt. 79, 31 Am. Rep. 678; Wright v. Leonard, (1861) 11 C. B. N. S. 258, 30 L. J. C. P. 365, 5 L. T. 110, 8 Jur. N. S. 415, 142 E. R. 796; Brown v. McCune, (1851) 5 Sandf. (N.Y.) 228; Miller v. St. Louis, etc., R. Co., (Mo. 1915) 174 S. W. 166.

son v. Young,[3] says: "If others seek to acquire a title to their property while within that age, they must act with the full knowledge that their contract has no binding force—that they place themselves substantially at the mercy of the infant, and that the law cannot aid them merely because in the particular case, the infant may have had so much intelligence when the contract was made, as to render it morally wrong in him to repudiate it on arriving at majority." And in the case of *Brown v. McCune*[4] it is said: "We are not aware that any case has gone the length of holding a party estopped by anything he has said or done while he was under age and we think that it would be repugnant to the principle upon which the law protects infants from civil liabilities in general."

In equity, however, the right of the infant to disaffirm his contract is not so unqualifiedly declared. If, for instance, he fraudulently represents that he is of full age, or actively conceals his minority, whereby the adult dealing with him is induced to enter into a contract, the infant will be estopped to set up his infancy on account of the active fraud.[5] The reason is that equity will always look to the substance instead of the mere form and while the rule obtained and still obtains in law that an infant is not estopped to plead infancy as a defense in an action on the contract, the unquestioned general rule is that an infant is liable, in the same manner as an adult, for his torts. The rule in law was that the liability extended only to those torts not connected with or arising out of contract.[6] A court of equity, on the other hand, will recognize this fraud, even though it does arise out of contract. And it is due to the fact that this fraud predicates the

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[3] (1865) 38 Ill. 145.

[4] Note 2, supra.

[5] Kirkham v. Wheeler-Osgood Co., note 2, supra; Charles v. Hastedt, (1893) 51 N. J. Eq. 171, 26 Atl. 564. (The privilege of infancy is a legal privilege; it cannot be used for fraud.); Ferguson v. Bobo, (1876) 54 Miss. 121; Commander v. Brazil, (1906) 88 Miss. 668, 41 So. 497, 9 L. R. A. (N.S.) 1117; Pomeroy, Eq. Jur., 3rd ed., Sec. 945; see 18 Am. St. Rep. 573, et seq.; Bigelow, Estoppel, 3rd ed., p. 516; Millsaps v. Estes, note 2, supra; Collins Inv. Co. v. Beard, (Okla. 1915) 148 Pac. 846; County Board of Education v. Hensley, (1912) 147 Ky. 441, 144 S. W. 63.

[6] Cooley, Torts, 2nd ed., p. 120; Tyler, Infancy and Coverture, 2nd ed., Sec. 123; Davidson v. Young, note 3, supra; New York Building, Loan & Banking Co. v. Fisher, (1897) 26 App. Div. 363, 48 N. Y. Supp. 152; note 1, supra; 16 Am. & Eng. Ency. of Law, 2nd ed., pp. 291, 292; Ferguson v. Bobo, note 5, supra; Studwell v. Shapter, (1873) 54 N. Y. 249; Gilson v. Spear, (1884) 96 Ind. 1.

injury that relief is had through equitable estoppel. In the case of *Commander v. Brazil*[7] it is said: "We do hold, however, that when an infant has reached that stage of maturity which indicates that he is of full age, and enters into a contract falsely representing himself to be of age, accepting the benefits of the contract, he will be estopped to deny that he is not of age when the obligation of the contract is sought to be enforced against him." This case, as many others, shows that the modern view has revolted at the attempt to place immunities which exist only by reason of some slight technical defect on absolutely the same grounds as those which are fundamental. So with the maxim that he who seeks the aid of equity must come with clean hands. The infant often has more discretion than the adult, and it is a wise rule that makes him liable for his torts. There is no case that goes so far as to deny the infant the right of disaffirmance under the law for mere silence or inactive misrepresentation.[8] These courts only assert his non-contractual liability in case of palpable fraud.

In a recent case in New Jersey[9] the court applied the rule of equitable estoppel to an action at law, where the misrepresentation was express. This decision seems in line with the modern tendency to apply equitable rules where they conflict with the corresponding rules at law. By the English Judicature Act of 1873[10] the systems of law and equity have been so far amalgamated that the tendency noted has been made a matter of statute. As this is the apparent aim and tendency of many of the American state courts,[11] it is interesting to speculate on the possible effect such a doctrine would have on the law of infants in relation to the subject now under discussion. The Minnesota decisions[12] were not rendered in cases manifestly calling for the application of equitable

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[7] Note 5, supra.

[8] As said in Ferguson v. Bobo, note 5, supra: "If, however, an infant is guilty of something more than a mere failure to disclose his infancy at the time the contract is entered into, and fraudulently represents that he is of full age, or actively conceals his minority whereby the other party is induced to enter into the contract, then it is held in equity that the infant will be estopped by his fraud from avoiding the contract on the ground of infancy, to the prejudice of the other contracting party." See Baker v. Stone, (1884) 136 Mass. 405.

[9] La Rosa v. Nichols, (N.J. 1918) 105 Atl. 201.

[10] 36 and 37 Vict. Chap. 66 Sec. 25 (11).

[11] See 10 R. C. L. pp. 254-260. Minn. G. S. 1913 Sec. 7673.

[12] Conrad v. Lane, note 2, supra; Alt v. Graff, (1896) 65 Minn. 191, 68 N. W. 9; Folds v. Allardt, (1886) 35 Minn. 488, 29 N. W. 201.

principles, and the court, while holding the infant not estopped under the facts of those cases, might not feel itself bound in a case of active misrepresentation where the equities were strongly on the side of the adult.

RECENT CASES

CONSTITUTIONAL LAW—JURISDICTION—SERVICE ON AGENT OF NON-RESIDENT—DUE PROCESS—FULL FAITH AND CREDIT.—Action on a judgment rendered in an action against an Illinois partnership doing business in Kentucky through an agent, where service was on their agent, under a Kentucky statute (1893 Civ. Code Prac. Ky. Sec. 51) authorizing that summons of non-residents and partnerships of which the members are non-residents, doing business in Kentucky, be by service on their agent. *Held,* that the statute providing for service on non-resident partnership through an agent was unconstitutional. *Flexner v. Farson,* (1915) 268 Ill. 435, 109 N. E. 327, Ann. Cas. 1916D 810. Upheld on appeal to the United States Supreme Court, (1919) 39 S. C. R. 97.

Similar provisions in other states have been held unconstitutional, *Cabanne v. Graf,* (1902) 87 Minn. 510, 92 N. W. 461, 59 L. R. A. 735, 94 Am. St. Rep. 722, and *Caldwell v. Armour,* (1899) 1 Penn. (Del.) 545, 43 Atl. 517, as was this statute in an earlier case, *Moredock v. Kirby,* (1902) 118 Fed. 180. The Kentucky supreme court later held it constitutional in its application to partnerships and individuals. *Guenther v. American Steel Hoop Co.,* (1903) 116 Ky. 580, 25 Ky. Law Rep. 795, 76 S. W. 419; *Johnson v. Westerfield's Adm'r,* (1911) 143 Ky. 10, 135 S. W. 425; *Carpenter v. Laswell,* (1901) 23 Ky. Law Rep. 686, 63 S. W. 609. Indiana follows this line of cases. *Rauber v. Whitney,* (1890) 125 Ind. 216, 25 N. E. 186. The cases on both sides cite *Pennoyer v. Neff,* (1877) 95 U. S. 714, 24 L. Ed. 565, as authority for their position. In the *Pennoyer* case the action was brought on a judgment obtained against a non-resident, notified only by "the substituted service of process by publication allowed by the law of Oregon"; held that the judgment so obtained was invalid. The Kentucky supreme court relies on a statement found in that case that they did not mean "to assert that a state may not require a non-resident entering into a partnership. . . within its limits to appoint an agent in the state to receive service of process." An individual only was involved, so this was mere dictum. There can be no distinction between a partnership and its members for matters of service, as a partnership cannot be sued as such. *Dunham v. Shindler & Co.,* (1889) 17 Ore. 256, 20 Pac. 326; *Fox v. Blue Grass Grocery Co.,* (1901) 22 Ky. Law Rep. 1695, 60 S. W. 414. As it is not shown that the statutes have changed this rule, the dictum is based on an imaginary difference. The general rule is that an action in personam can be supported against a non-resident only by actual service on him in the state. *Pennoyer v. Neff,* (1877) 95 U.

S. 714, 24 L. Ed. 565; *Brooklyn v. Ins. Co.*, (1878) 99 U. S. 362, 25 L. Ed. 416; *Hart v. Sansom*, (1884) 110 U. S. 151, 28 L. Ed. 101, 3 S. C. R. 586, 21 R. C. L. 1270. Valid judgment cannot be given where there was constructive service on a non-resident. *Plummer v. Hatton*, (1892) 51 Minn. 181, 53 N. W. 460; *Pennoyer v. Neff*, supra. Knowledge of suit before trial is not sufficient, without service of process. *Woodward v. Tremere*, (1828) 6 Pick. (Mass.) 354; *Ewer v. Coffin*, (1848) 1 Cush. (Mass.) 23, 48 Am. Dec. 587. Due process is necessary to give jurisdiction. *King Tonopah Mining Co. v. Lynch*, (1916) 232 Fed. 485. Constructive service on a non-resident is not due process on which to base a personal judgment. *Plummer v. Hatton*, supra; *Pennoyer v. Neff*, supra.

The courts seek to justify the constitutionality of such statutes on the ground of—(1) a distinction between constructive and substituted service; (2) consent to statute implied from their doing business in the state. "There is a vital distinction between constructive service of process and substituted service" for "substituted service is equivalent to personal service." *Guenther v. American Steel Hoop Co.*, supra. In support of this, reference is made to *Sturgis v. Fay*, (1859) 16 Ind. 429, 79 Am. Dec. 440, in which we find this language: "Persons thus notified are not regarded in law as constructively, but actually summoned." Nowhere in the opinion do the words "substituted service" appear, nor do they in the other cases cited: *People of Utah Territory ex rel. Jones v. House*, (1886) 4 Utah 382, 10 Pac. 843; *Rauber v. Whitney*, supra; *Burbage v. American National Bank*, (1894) 95 Ga. 503, 20 S. E. 240. However, these cases fall within the definition that "substituted service is a constructive service made upon some recognized representative." Bouvier Law Dict. 3048. From this language it is evident that substituted service is only a subdivision of constructive service. Nowhere except in the Kentucky cases do we find an intimation that there is such a difference between constructive and substituted service with respect to service upon non-residents as makes them subject to different rules. A corporation cannot do intrastate business without the consent of the state. *Bank of Augusta v. Earl*, (1839) 13 Pet. (U.S.) 517, 10 L. 5d. 274; hence the state may impose any conditions to its admittance that are not unconstitutional. *Paul v. Virginia*, (1868) 8 Wall. (U.S.) 168, 19 L. Ed. 357. That it agree to service on an agent as sufficient is such a condition. *Lafayette Ins. Co. v. French*, (1855) 18 Howard (U. S.) 404, 15 L. Ed. 451. As a partnership enters the state to do business under the constitutional right of the members to all the "privileges and immunities of citizens in the several states," Art. IV Sec. 2, and not as a special privilege, no assent can be implied therefrom. *Caldwell v. Armour*, supra.

The appellant urges that, admitting that the judgment sued upon was rendered by a court lacking jurisdiction, still it cannot be attacked by the Illinois court, but must be recognized under the "full faith and credit" clause of the United States constitution, Art. IV Sec. I. This position is not sustained by the authorities. *Davis v. Davis*, (1908) 164 Fed. 281. That clause is not a criterion of jurisdiction, *De Vall v. De Vall*, (1910) 57 Ore. 128, 109 Pac. 755, nor does it require recognition of a void judgment. *Western Assur. Co. v. Walden*, (1911) 238 Mo. 49, 141 S. W. 595.

When an action is on a foreign judgment, the court may inquire into the jurisdiction of the court giving the foreign judgment. *Mottu v. Davis,* (1909) 151 N. C. 237, 65 S. E. 969; *Thompson v. Whitman,* (1873) 18 Wall. (U. S.) 457, 21 L. Ed. 897; *Holcomb v. Kelly,* (1907) 114 N. Y. Supp. 1048. To be enforceable the judgment must have been according to the law of the state rendering it, and also due process. *Bryant v. Shute's Ex'r,* (1912) 147 Ky. 268, 144 S. W. 28.

CORPORATIONS—FORFEITURE OF FRANCHISE—FAILURE TO OBEY STATUTE REQUIRING MAIN OFFICE IN STATE.—Action brought at the instance of a dissatisfied shareholder, to annul and forfeit the franchise of defendant, a corporation organized under the laws of South Dakota, on the ground that defendant failed to make annual reports and to maintain an office or transact business within the state. The statute provides that "Every corporation of this state which is not doing or carrying on business within this state, shall appoint a resident agent, who shall reside at the place of business or domiciliary office of such corporation in this state designated in the articles of incorporation. . . ." Laws 1907, Chap. 104 Sec. 3. And also that "Every such corporation [i. e., created under the laws of South Dakota] having a business office outside of this state, must have its main office for the transaction of business, within this state, . . ." Laws 1907, Chap. 104 Sec. 7. *Held,* the charter of a corporation failing to comply with the statute is forfeitable. (Polley, J., dissenting) *State v. Public Drug Co.,* (S.D. 1918) 170 N. W. 161.

Whenever the statute expressly provides that the doing or failure to do an act shall cause a forfeiture of the corporate franchise, forfeiture must be declared on proof of violation of the statute. *State v. The Topeka Water Co.,* (1898) 59 Kan. 151, 52 Pac. 422; *State v. Syndicate Land Co.,* (1909) 142 Iowa 22, 120 N. W. 327; *People v. Buffalo Stone & Cement Co.,* (1892) 131 N. Y. 140, 29 N. E. 947, 15 L. R. A. 240, 10 Cyc. 1279. ". . . though it would seem that even in this case there must be wilful abuse or improper neglect, unless a contrary intention is manifest," 7 R. C. L. p. 714, Sec. 721. When, however, the violation is of a statute only forbidding the act, a different rule applies; there must be some injury to the public before forfeiture will be declared. *State v. Cumberland T. & T. Co.,* (1905) 114 Tenn. 194, 86 S. W. 390; Morawetz, Corporations, II, Sec. 1024; Green's Brice, Ultra Vires, 708, 709; Taylor, Corp., Sec. 457; 7. R. C. L. Sec. 717. Or the act must tend to injure the public. *People v. North River Sugar Refining Co.,* (1889) 54 Hun (N.Y.) 354, 7 N. Y. Supp. 406, 27 N. Y. St. Rep. 282, 5 L. R. A. 386; affirmed, (1890) 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. Rep. 843; *State v. Central Lumber Co.,* (1909) 24 S. D. 136, 123 N. W. 504, 42 L. R. A. (N.S.) 804; *People v. Live-Stock Exchange,* (1897) 170 Ill. 556, 48 N. E. 1062, 39 L. R. A. 373, 62 Am. St. Rep. 404. The act or omission must be of the essence of the contract, *Thompson v. People,* (1840) 23 Wend. (N.Y.) 537; *State v. Minn. Central Ry. Co.,* (1886) 36 Minn. 246, 7 R. C. L. Sec. 721; 10 Cyc. 1279; thus defeating the purpose of the grant. *State v. Minn. Thresher Mfg. Co.,* (1889) 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510. There must also be a

wilful abuse or improper neglect of statutory duty, *People v. Bristol, etc., Turnpike R. Co.,* (1838) 23 Wend. (N.Y.) 222, 7 R. C. L. Sec. 721, and not merely a violation through mistake or accident. *United States v. Eighty-four Boxes of Sugar,* (1833) 7 Pet. (U.S.) 453, 8 L. Ed. 745; *People v. North River Sugar Refining Co.,* supra; note, 8 Am. St. Rep. 183. The difference between the rules arises from the fact that in the latter class of cases the court is vested with discretion in declaring a charter forfeited. *State v. Portland Natural Gas & Oil Co.,* (1899) 153 Ind. 483, 53 N. E. 1089, 74 Am. St. Rep. 314; *State v. Standard Oil Co.,* (1892) 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541; note, 103 Am. St. Rep. 65. The court should, if possible, so construe a statute that it will not work forfeiture of property, *Enos v. Hanff,* (1915) 98 Neb. 245, 152 N. W. 397; *United States v. Athens Armory,* (1868) Fed. Cases No. 14473, 2 Abb. (U.S.) 129, 35 Ga. 344, or cause the dissolution of a corporation, *Flowing Wells Co. v. Culin,* (1908) 11 Ariz. 425, 95 Pac. 111; for statutes penal in their nature should be construed in favor of defendant. *Taylor v. United States,* (1845) 3 How. (U.S.) 197, 11 L. Ed. 559. Thus it has been held that failure to comply with the exact letter of the statute is not ground for dissolution; *State ex rel. Weatherly v. Birmingham Waterworks Co.,* (1913) 185 Ala. 388, 64 So. 23; *Bixler v. Summerfield,* (1904) 210 Ill. 66, 70 N. E. 1059; that substantial performance is sufficient, *North and South Rolling Stock Co. v. People,* (1893) 147 Ill. 234, 35 N. E. 608; *People v. Kingston T. R. Co.,* (1840) 23 Wend. (N.Y.) 193, 35 Am. Dec. 551; High, Extr. Leg. Rem., 3rd ed., Sec. 651. It would seem that the right to declare forfeiture would accrue immediately on breach, but it has been held that refusal to comply on request was necessary, *State v. Birmingham Waterworks Co.,* supra, or that the act be repeated. *Commonwealth v. Tenth Mass. Turnpike Corp.,* (1853) 11 Cush. (Mass.) 171. Forfeiture will not be declared if the statute be complied with before the time of trial, *Big 4 Advertising Co. v. Clingan,* (Ariz. 1913) 135 Pac. 713; *Flowing Wells Co. v. Culin,* supra; although failure to appoint an agent as required by statute is a ground for forfeiture. A cause of forfeiture exists where there has been a failure to make annual reports, *People v. Buffalo Stone & Cement Co.,* (1892) 131 N. Y. 140, 29 N. E. 947; but this may be waived, *State v. Fourth N. H. Turnpike Co.,* (1844) 15 N. H. 162, 41 Am. Dec. 690; also where a corporation has entered a combination contrary to statute, *People v. North River Sugar Refining Co.,* supra; *State v. Central Lumber Co.,* supra; where the corporation has failed to pay a license tax, *Lewis v. Curry,* (1909) 156 Cal. 93, 103 Pac. 493; *H. Scherer & Co. v. Everest,* (1909) 168 Fed. 822 (dictum); and when the corporation has not kept its books and place of business within the state as required by statute. *State v. The Milwaukee, Lake Shore & W. Ry. Co.,* (1878) 45 Wis. 579; *State v. Park & Nelson Lumber Co.,* (1894) 58 Minn., 330, 59 N. W. 1048, 49 Am. St. Rep. 516; contra, *N. & S. Rolling Stock Co. v. People,* supra, in which case the court found substantial performance. Breach will not be interpreted as ipso facto forfeiture unless necessary to carry out the intent of the statute. *Kaiser Land & Fruit Co. v. Curry,* (1909) 155 Cal. 638, 103 Pac. 341; *Maloney Mercantile Co. v. Johnson County Savings Bank,* (1909) 56 Tex. Civ. App. 397, 121 S. W. 889. If the majority view in the instant case

is correct that "the legislature intended to require every corporation organized in this state to maintain its 'main office' within this state," the court clearly reaches the right conclusion in the light of the authorities, and the resident agent clause, accordingly, is without apparent effect.

CORPORATIONS—STOCKHOLDERS OF GOING CONCERN NOT LIABLE TO PAY IN FULL FOR STOCK ISSUED AT LESS THAN PAR.—A corporation having an authorized capital stock of $1,000,000, issued at organization $700,000 in exchange for property. Subsequently, for the purpose of obtaining needed funds, the corporation, while in active operation, from time to time issued the remaining $300,000, some of it at less than par. Upon the bankruptcy of the corporation, the trustee in bankruptcy, in behalf of the creditors, sought to compel the holders of stock issued below par to pay for the same in full so far as might be necessary to satisfy claims of creditors. *Held,* the stock having been issued on account of the impairment of the capital and not as an original issue, stockholders who purchased it at the market value are not liable for the difference. *Thoms & Brenneman v. Goodman,* (1918) 254 Fed. 39 (C. C. A. 6th Cir.).

Notwithstanding the inroads made (e. g., *Hospes v. Northwestetrn, etc., Co.,* [1892] 48 Minn. 174, 50 N. W. 1117) upon the trust fund theory of corporate stock, it has been the settled doctrine of the United States Supreme Court since the case of *Sawyer v. Hoag,* (1873) 17 Wall. (U.S.) 610, 21 L. Ed. 731. In pursuance of this theory it is held by that court that the original subscribers of stock who did not pay for it in money or property impliedly agree to pay for it upon the demand of creditors; and that a contract between themselves and the corporation that such stock shall be treated as fully paid and non-assessable is void as against creditors. The Supreme Court, while reaffirming the general doctrine, in the case of *Handley v. Stutz,* (1891) 139 U. S. 417, 35 L. Ed. 227, 11 S. C. R. 530, drew a distinction between stock originally subscribed at the time of organization, and stock subsequently issued in consequence of impairment of capital, holding that as to the latter, as it is impossible to issue bonds and stocks at par while outstanding issues can be bought in the market for much less than par, a purchaser may buy the new issue at its fair market value without being compelled, in case of the insolvency of the company, to pay the difference. Apparently not all subsequent issues are entitled to this protection. "If it be merely for the purpose of adding to the original capital stock of the corporation and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained." *Handley v. Stutz,* supra. The instant case does not draw this latter distinction, but broadly adopts and applies the rule that the stock necessarily issued by a "going concern" on account of impairment of capital may be sold at whatever it will bring, and that purchasers thereof from the company cannot be compelled to pay for it in full, either by the corporation or its creditors. Prior to *Handley v.*

Stutz, supra, it was held by federal courts that where subscribers contracted to take increased stock in such a corporation at a price below par and the stock was delivered to them on that understanding, the assignee in bankruptcy might collect the balance up to par for the benefit of creditors. *Flinn v. Bagley*, (1881) 7 Fed. 785. The court felt bound by the decision in *Hawley v. Upton*, (1880) 102 U. S. 314, 26 L. Ed. 179, in which one who signed an agreement to take stock paying therefor one-fifth of the par value in instalments, though the stock was never delivered to him, was held liable upon the theory that the company could not sell its stock for less than par, and his agreement amounted to a subscription. In *Clark v. Bever*, (1890) 139 U. S. 96, 35 L. Ed. 88, a railroad (under Iowa law) having contracted with a construction company to build its road, and being unable to pay, compromised with its creditor by delivering shares of its stock at twenty cents on the dollar, which was accepted in full satisfaction; the stockholders receiving it were held not liable to creditors. (Contra, on the same facts, *Jackson v. Tracr*, [1884] 64 Iowa 469.) And in *Fogg v. Blair*, (1890) 139 U. S. 118, 35 L. Ed. 104, the court, applying the same principle, held that in the absence of fraud the company is only bound, in such a case, to get a fair equivalent for the then market value of its stock.

The Minnesota court, rejecting the trust fund theory, holding the company to its bargain and giving a remedy to creditors solely upon the ground of fraud, recognizes only the equities of subsequent creditors, and of these only such as can claim to have become such in reliance upon an express or tacit representation that the stock has been fully paid for. *Hospes v. Northwestern, etc., Co.*, supra. The only statute apparently applicable is G. S. 1913, Sec. 6193 (Sec. 163, Ch. 34, G. S. 1866): "Save as otherwise specially limited or provided, no corporation shall issue any share of stock for a less amount to be actually paid in than the par value of those first issued." This language is a clear prohibition upon the company, but does not explicitly declare that stock issued in violation of its terms must be paid for at par. It is held that bank stock duly authorized but illegally issued without actual payment is not absolutely void as ultra vires, having no legal existence (according to the English doctrine), but in the event of insolvency subsequent creditors are entitled to compel payment in full. *Olson v. State Bank*, (1897) 76 Minn. 267, 69 N. W. 904. In *Shaw v. Staight*, (1909) 107 Minn. 152, 119 N. W. 951, 20 L. R. A. (N.S.) 1077, stock issued at the first meeting of the board of directors was sold to plaintiffs by the corporation at ten cents on the dollar of its par value; defendant's transferor fraudulently induced the corporation to issue stock to him without any actual consideration. In an action by plaintiffs to compel the cancellation of defendant's stock it was held that plaintiffs' stock, though issued in violation of the statute, was not so tainted with illegality as to render it void, and thereby deprive plaintiffs of standing in a court of equity. It was said (dictum): "The agreement that it should be fully paid stock was undoubtedly voidable and could be so adjudged at the suit of creditors, but until set aside and declared void at their instance, it is valid . . ." These cases seem to settle the question as to original issues

of stock, but as to subsequent issues, necessarily made in consequence of an impairment of stock and fairly sold at the best price obtainable, these cases do not furnish a guide. In *Olson v. State Bank* the stock was never paid for at all; in *Shaw v. Staight* the issue was an original one, and the rights of creditors were not involved. In *Rogers v. Gross,* (1897) 67 Minn. 224, 69 N. W. 894, it was held that an agreement entered into by subscribers for stock shares that for each share paid for, a certificate for two or more shares should be issued to the shareholders, was void, but the court was careful to say: "We are not considering the rights of creditors where, in pursuance of an unlawful agreement, stock certificates have been actually issued to and accepted by shareholders." In *Wallace v. Carpenter, etc., Co.,* (1897) 70 Minn. 321, 73 N. W. 189, it was held that bonus or "watered" stock, issued at the time of the organization of the company, for a consideration much below par, but satisfactory to the directors, was chargeable, in favor of a creditor who became such after the stock was issued, with the difference between the par value and the amount paid, notwithstanding it was issued as fully paid up; but the decision does not touch the question raised by the instant case. *Hospes v. Northwestern, etc., Co.,* supra, involves only the liability of holders of bonus stock issued at organization, but the court (Mitchell, J.) comments upon the decisions of the United States Supreme Court in *Clark v. Bever,* supra, and *Handley v. Stutz,* supra, noting the difficulty of perceiving "any difference between the original stock of a new corporation and additional stock issued by a 'going concern,'" and also the difficulty, if not impossibility, of reconciling those cases upon the "trust fund" doctrine. The court seems to think those cases more reconcilable with the fraud theory than with the trust fund doctrine, upon which the United States Supreme Court expressly plants them. It is believed that no case in Minnesota commits the court to an interpretation of the statute opposed to the doctrine of the instant case; but the language of the statute is so unqualified as to leave little room for doubt. See *Richardson v. Green,* (1890) 133 U. S. 30, 45, 33 L. Ed. 516, 10 S. C. R. 280.

But if the creditor can be deemed to have had no reasonable ground for believing that the stock was really paid up, he cannot demand payment in full, either upon the trust fund or the fraud theory of liability. If he knew that fresh stock had been issued at a time when the market price of the outstanding stock was below par, he must as a reasonable man have known that the parties taking it were paying only what it was worth. If he knew that it was issued when the corporation was in difficulties, to a creditor, in satisfaction of his debt (*Clark v. Bever,* supra; *New Albany v. Burke,* [1870] 11 Wall. [U.S.] 96), or that stock had been used as a bonus in order to make bonds sell at par, as in *Handley v. Stutz,* supra, the Minnesota court would probably refuse him the benefit of the statute.

EMBANKMENT CONSTRUCTED UNDER LICENSE FROM CITY—DAMAGE TO ADJOINING PROPERTY OWNERS—CITY NOT LIABLE FOR DAMAGES.—The Burlington, etc., R. Co. obtained a franchise to construct its road across the end of Corbett Street in the city of Denver. An embankment five feet high was erected across the end of Corbett Street, with no culvert or other

means of drainage, although that was expressly stipulated in the franchise. A heavy rainfall caused Cherry Creek to overflow, and the stream of water flowing down Corbett Street, being stopped by the embankment, backed up into the basement of a warehouse, causing injury to goods stored therein. Action against the city to recover for the damage. *Held*, the city is not liable. *Luxford v. City and County of Denver*, (Colo. 1918) 176 Pac. 833.

The use of a city street for railroad purposes under legislative grant or license is a proper use. *State v. Louisville, etc., Ry. Co.*, (1882) 86 Ind. 114. And if built under legislative authority, unless negligently constructed, is neither a public nor a private nuisance. Wood, Law of Nuisances, 2nd ed., p. 75. As long as grantee limits such occupancy to proper railway purposes, conducting the same in accordance with the provisions of the ordinance, this is not a nuisance. *Denver, etc., Ry. Co. v. Hannegan*, (1908) 43 Colo. 122, 95 Pac. 343, 127 Am. St. Rep. 100. But where a bridge was erected under legislative authority, but did not fulfill the requirements of the grant, it was considered as much a nuisance as if erected without authority. *Healy v. Joliet, etc., R. Co.*, (1878) 2 Ill. App. 435. In the instant case the railroad did not fulfill the requirements of the franchise and so was a nuisance by the definition in *Healy v. Joliet, etc., R. Co.*, supra. Although continued for the prescriptive period, it did not and could not acquire a prescriptive right to maintain a nuisance. *Commonwealth v. Upton*, (1856) 6 Gray (Mass.) 473.

One line of authorities holds that a city is liable for its failure to abate a nuisance, *State v. Shelbyville*, (1856) 4 Sneed (Tenn.) 176, as it is a right and duty of the municipality, *Parker v. Macon*, (1869) 39 Ga. 725, 99 Am. Dec. 486. The better opinion and the weight of authority is that municipal corporations are not liable to indictment or to be sued for failure to abate a nuisance merely because they have the power to abate, the abatement of a nuisance being a public or governmental function. *City of Georgetown v. Commonwealth*, (1903) 115 Ky. 382, 1 Ann. Cas. 961, 964.

The city cannot be held liable for a nuisance the construction of which is not subject to the control of the city. *City of Denver v. Bayer*, (1883) 7 Colo. 113, 2 Pac. 6. The city was held liable where it had control of the work and should have exercised supervision, *Fink v. St. Louis*, (1879) 71 Mo. 52, and when it actually participated in the construction. *Crawfordsville v. Bond*, (1884) 96 Ind. 236.

In the instant case the city participated in no way in the action of the railroad company and is not liable for its acts.

EMINENT DOMAIN—RECOVERY IN TORT FOR WRONGFUL INSTITUTION OF CONDEMNATION PROCEEDINGS.—Defendant corporation claiming the right of eminent domain, attempted to condemn and take timber owned by the plaintiff. Before the time set for hearing, plaintiff obtained a temporary injunction on the ground that the taking was for private purposes. After the enjoining of an attempt to take similar lands of another person was made permanent for that reason, defendant corporation gave notice of abandonment. From the autumn of 1913 until the autumn of 1916 the

plaintiff suspended operation on his land because of the pending proceeding. *Held,* the defendant is liable in tort for plaintiff's deprivation of the use of his land for a period of about two years because of the wrongful institution of proceedings. *Sidelinker v. York Shore Water Co.,* (Maine 1918) 105 Atl. 122.

For a discussion of the general principles involved see NOTES, 3 MINNESOTA LAW REVIEW p. 263.

FOOD—SALE OF DISEASED PORK—NEGLIGENCE—IMPLIED WARRANTY.—Plaintiff became ill from eating diseased pork sold by defendant, which, it is averred, contained a parasite known as trichina. Defendant produced evidence to the effect that parasites known as trichinae are invisible to the naked eye and can be discovered only by microscopic inspection; that no system of inspection is known to science by which the presence of trichinae can be detected with certainty in all cases; that the United States inspectors omit inspection for trichinae so as not to mislead the public to neglect to take proper precautions; that practice in other packing establishments was to make no inspection. *Held,* the action being in trespass for negligence and not for breach of implied warranty, the evidence was competent and sufficient to sustain the conclusion of the jury that the defendant omitted no precaution or duty it owed the plaintiff. *Tavani v. Swift & Co.,* (Pa. 1918) 105 Atl. 55.

The same court had held in *Catani v. Swift & Co.,* (1915) 251 Pa. 52, 95 Atl. 931, L. R. A. 1917B 1272, that a prima facie case of negligence in selling meat unfit for food is made out by proof that the meat sold by defendant was diseased and caused the death of plaintiff's husband, and that the case thus made out was not overcome by merely showing an inspection and approval by the United States government inspectors. A retail dealer in meats and provisions impliedly warrants the soundness and wholesomeness of meat and provisions sold for domestic use and is liable on the warranty although he was not aware that it was diseased when he sold it. *Wiedeman v. Keller,* (1897) 171 Ill. 93, 49 N. E. 210. In that case the court distinguished the case from *Sheffer v. Willoughby,* (1896) 163 Ill. 518, 45 N. W. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483, where relief was denied the plaintiff because he predicated his case on the sole ground of negligence of the defendant, which was not proved. In the case of a retail dealer selling diseased pork infected with trichinae, it was held that the government stamp adds nothing to the dealer's position, for he has warranted the goods, and whether he has been careful or careless is of no concern. *Rinaldi v. Mohican Co.,* (1916) 157 N. Y. Supp. 561, affirmed, Court of App., (1918) 121 N. E. 471. Where plaintiff bases his case on the negligence of the defendant he cannot recover on the theory that a breach of the implied warranty of wholesomeness is negligence per se.

It is now fully settled in New York, independent of statute, that accompanying all sales by a retail dealer of articles of food for immediate use there is an implied warranty that the same is fit for human food—an exception to the general rule regarding the sale of other chattels, based on grounds of public policy. *Race v. Krum,* (1918) 222 N. Y. 410, 118 N. E.

853. In *Rinaldi v. Mohican Co.*, (N. Y. 1918) 121 N. E. 471, the opinion states that the present Personal Property Law of New York (Consol. Laws, Chap. 41, Sec. 96, as added by Laws 1911, Chap. 571) is intended to make the law of that state uniform with the legislation and laws throughout the country; that the distinction between sellers who were growers and manufacturers and others was abrogated; that although in general there is no implied warranty of quality or fitness for any particular purpose, there may be "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not)." Applying this statute, the court holds that in the case of an ordinary purchase of a portion of unwholesome meat at a market, the buyer not having examined the goods, or having examined them has failed to discover defects (trichinae), there is an implied warranty of wholesomeness.

The rule of implied warranty of wholesomeness and fitness of food is carried to a questionable extreme when applied to dealers selling goods in cans, where the buyer must know that the seller has not inspected and is entirely ignorant of the contents of the can; yet in such a case the dealer was held liable on his implied warranty, in *Ward v. Great Atlantic & Pacific Tea Co.*, (Mass. 1918) 120 N. E. 225; *Chapman v. Roggenkamp*, (1913) 182 Ill. App. 117. Contra. *Bigelow v. Maine Cent. R. Co.*, (1912) 110 Me. 105, 85 Atl. 396. In such a case the question whether the buyer "relies on the seller's skill or judgment" as to the condition of the contents of a particular can might well be answered in the negative. Even as to meat, where the diseased condition is due, as in the case of trichinae, to the presence of bacteria which no inspection within the power of the dealer could discover and no precautions prevent, or, as in the case of canned goods, the goods are in the original packages, never having been opened, it seems almost absurd to assume that the buyer relies upon his skill and judgment. Such a rule makes the seller an insurer, contrary to the spirit of the statute. If it is desirable to make the industry carry the risks of injuries which no diligence on the part of the dealer can prevent, it should be done by statute rather than by the courts.

The statutes interpreted by the New York court are part of the Uniform Sales Act which has been passed by the Minnesota legislature (1917) and sixteen other states, as follows: Connecticut and New Jersey, 1907; Ohio, Massachusetts, and Rhode Island, 1908; Maryland, 1910; New York and Wisconsin, 1911; Michigan and Arizona, 1913; Pennsylvania, Illinois, and Nevada, 1915; North Dakota, Utah, and Wyoming, 1917.

HEALTH—PEST-HOUSES—POWERS OF BOARD OF HEALTH.—The board of health of the city of Lansing, having by charter all the powers and authority vested in the health boards and health officers by the general laws of the state, established a pest-house in a thickly populated residential district of the city. *Held*, that the board of health could be restrained from maintaining such an establishment, where by reason of its location it would be a nuisance. *Birchard v. Board of Health of the City of Lansing*, (Mich. 1918) 169 N. W. 901.

"As a general proposition, whatever laws or regulations are necessary to protect the public health and secure public comfort is a legislative question, and appropriate measures, intended and calculated to accomplish these ends are not subject to judicial review." *Blue v. Beach*, (1900) 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195. But courts can declare void any legislative exercise of the police power which they deem unreasonable and arbitrary. *Ex parte Whitwell*, (1893) 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152.

"A hospital is not prima facie or per se a nuisance, though it might under some circumstances become such," and since this is true it cannot be made a subject for license under guise of regulation. *Bessonies v. The City of Indianapolis*, (1880) 71 Ind. 189. When the location for a hospital is left to the discretion of a board of health by the legislature, the fair inference is that that body intended the discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit a nuisance in any place which might be selected for the purpose. *Hill v. Managers, etc.*, (1879) L. R. 4 Q. B. D. 433, 6 App. Cas. 193, 48 L. J. Q. B. 562, 40 L. T. 491. The right given the city to locate a pest-house does not of itself give the city the right to locate it where it will be a nuisance. *Baltimore City v. Fairfield Imp. Co.*, (1898) 87 Md. 352, 39 Atl. 1081, 40 L. R. A. 494, 67 Am. St. Rep. 344. Regardless of the fact that a hospital was managed in the most approved manner, and the fear of contracting the disease, according to medical experts, rested only in the minds of the people, it may still, under certain circumstances, be regarded as a nuisance. *Everett v. Paschall*, (1910) 61 Wash. 47, 111 Pac. 879.

Where the courts have refused to lend their aid in enjoining a board of health from establishing a pest-house or hospital, the facts have proved conclusively that such board was acting in good faith and clearly within its powers. Whenever, therefore, it is distinctly shown that the locating of such an establishment will work injury to the health of individuals, decrease the value of their property, and make their homes undesirable places in which to dwell, such act, whether by a corporation, *Hospital v. Bontjez*, (1904) 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215; by a county board, *Haag v. Vanderburg County*, (1878) 60 Ind. 511, 28 Am. Rep. 654; by a health officer having power of locating pest-houses, *Thompson v. Kimbrough*, (1900) 23 Tex. Civ. App. 350, 57 S. W. 328; or by a private individual, *Stotler v. Rochelle*, (1910) 83 Kan. 86, 109 Pac. 788, will be deemed a nuisance and courts will grant relief to the injured parties.

INFANTS—ESTOPPEL—MISREPRESENTATION AS TO AGE.—The defendant, a garage keeper, stored, furnished supplies for, and did work on the plaintiff's automobile. Default being made in payment of the bill, defendant asserted a lien on the car. Plaintiff brought replevin, setting up that he was an infant and repudiating the contract. *Held*, that having represented himself as being of age, the infant was estopped to plead his infancy in a court of law as well as a court of equity. *La Rosa v. Nichols*, (N. J. 1918) 105 Atl. 201.

For a discussion of the principles here involved, see NOTES, 3 MINNESOTA LAW REVIEW p. 273.

MILITARY LAW—CIVILIANS—SERVING IN THE FIELD.—Petitioner was a civilian stenographer employed by military authorities at Camp Jackson to check vouchers and accounts of constructing contractors. He was discharged from his employment, arrested and confined by the military authorities, who also proposed to try him by court-martial for rendering false claims against the United States. *Held*, petitioner was not subject to military law. *Ex parte Mikell*, (1918) 253 Fed. 817.

Article 2 of the Articles of War designates those persons of the civil population who shall be subject to military law, as follows: "All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles." The instant case holds that the words "'in the field' . . . mean in the actual field of operations against the enemy; not necessarily the immediate battle front, nor necessarily the immediate field of battle, but . . . the territory so closely connected with the absolute struggle with the enemy that it is a part of the field of contest." Previously it was decided that "the words 'in the field' do not refer to land only, but to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted." *Ex parte Gerlach*, (1917) 247 Fed. 616; *Ex parte Falls*, (1918) 251 Fed. 415. In the *Gerlach* case a discharged sailor returning as a civilian aboard an army transport, who first volunteered and later refused to stand watch, was held to be subject to jurisdiction of court-martial. It was decided in the latter case that a civilian cook employed aboard an army transport was liable to trial by court-martial. The court in the instant case seeks to distinguish the *Gerlach* decision on the ground that the perils of submarine warfare brought that case into the "actual field of operations." But it is significant to note that the courts in both the other cases base their decisions entirely upon the interpretation that "in the field" means everywhere on land or sea apart from cantonments or fortifications. The interpretation in the present case raises some very interesting questions. If Mikell had been employed in the same work by military authorities at Bordeaux, France, would he have then been considered "in the field"? If he were not in the field, where should the line be drawn; or, if he were in the field, should the physical fact that the ocean rolls between alter the case when he comes on this side of the water? Authority and reason would seem to favor the broader interpretation. Otherwise, there is also the possibility that many civilians may have been wrongly tried by court-martial.

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THE NATIONAL POLICE POWER UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION

To point out to the man in the street that while the Congress of the United States may pass laws to suppress the white slave traffic or the sale of adulterated food, it has no power to prohibit child-labor or to regulate marriage and divorce, does not add much to his understanding of American constitutional law. Too often it merely decreases his respect for the constitution and the courts which construe it. His feeling is one of exasperation that any truly national need should exist, any national problem should cry for solution, and the national legislature should lack the authority to deal with it.

The point of view of the layman emphasizes in striking fashion the completeness with which, as a people, we have been won over more or less unconsciously to the belief that Congress has, or ought to have, authority to pass any salutary law in the interest of the national welfare. Instead of surprise that Congress should have the temerity to penetrate into a new field of legislation, there is impatience to find that there is any such field into which Congress may not penetrate. It is the purpose of this article to restate some fundamental doctrines of our constitutional law and review some of the steps in our constitutional history with a view to making clear the somewhat precarious trial and error process by which Congress has come gradually to legislate in affairs over which it has been supposed to have no jurisdiction

—to assume responsibility for the safety, health, morals, good order, and general welfare of the nation, and thus to exercise what may be called a national police power.

It seems clear that it is entirely proper to use the term "national police power." To borrow a definition of the police power from the authority perhaps most competent to lend,[1] it is that power of government which "aims directly to secure and promote the public welfare" by subjecting to restraint or compulsion the members of the community. It is the power by which the government abridges the freedom of action or the free use of property of the individual in order that the welfare of the state or nation may not be jeopardized. It is obvious, then, that when Congress places a prohibitive tax upon poisonous matches, excludes obscene literature from the mails, or enacts an employers' liability law, it is exercising police power. What is the source and nature of this police power which Congress enjoys and what are the limitations upon it?

Theory of the National Police Power

Principle of Enumerated Powers of Congress

To understand clearly the nature of the national police power it is necessary to bear in mind one of the a b c's of our constitutional law, namely, that Congress enjoys those powers of legislation, and only those, which are positively given to it by the constitution. Unlike the states, which enjoy all powers which have not been taken away from them, it has only the powers which are delegated to it. The subjects over which it may exercise control are carefully enumerated. It would be useless to argue a point so firmly established. Nothing is clearer than that the purpose of the Convention of 1787 was to confer upon the new Congress a certain group of powers definitely delimited and to leave the other powers of government in the hands of the states. Hamilton's famous argument in the *Federalist*[2] against the adoption of a bill of rights to the new constitution urged, it will be recalled, that to add to the constitution a list of things which Congress might not do, when Congress had never been given power by the constitution to do them, savored of the dangerous

[1] Freund, Police Power, Sec. 3.
[2] Federalist, No. 84.

doctrine that Congress enjoyed powers not positively granted to it provided they had not been specifically denied to it. Any such danger was, of course, obviated by the Tenth Amendment declaring that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; and since that time commentators and courts have joined with complete unanimity in making the doctrine that the powers of Congress are enumerated powers a constitutional axiom.[3]

The effect of this doctrine of enumerated powers upon the right of Congress to exercise a national police power is perfectly plain. The enumeration of congressional powers in the constitution does not include any general grant of authority to pass laws for the protection of the health, morals, or general welfare of the nation.[4] It follows, then, that if Congress is to exercise a police power at all it must do so by a process something akin to indirection; that is, by using the powers which are definitely confided to it, for the purposes of the police power. If it would enter upon an ambitious program to protect public morals or safety or health or to promote good order, it must cloak its good works under its authority to tax, or to regulate commerce, or to control the mails, or the like, and say, "By this authority we pass this law in the interest of the public welfare." In short, Congress exercises a generous police power not because that power is placed directly in its hands but because it has the power to regulate commerce, to lay taxes, and to control the mails, and uses that authority for the broad purposes of the general welfare.[5]

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[3] "The constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers. This is apparent, as will presently be seen from the history of the proceedings of the convention which framed it; and it has formed the admitted basis of all legislative and judicial reasoning upon it ever since it was put in operation, by all who have been its open friends and advocates as well as by all who have been its enemies and opponents." Story, Constitution, 5th ed., I. Sec. 909.

[4] Sec. 8, Art. I, of the constitution reads: "The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; . . ." It has been generally agreed, however, that this clause does not confer a general police power upon Congress, but merely the power of levying taxes, etc., *for the purpose of* paying the debts and providing for the common defense and general welfare of the country. For elaborate review of the authorities on this point, see Watson, Constitution, I, p. 390 et seq.

[5] This point is further emphasized and the practice severely criticized in an illuminating article by Judge Charles M. Hough, Covert Legislation

That Congress can exercise police power only in so far as it is possible to utilize one of its enumerated powers for that purpose is not due to accident or inadvertence. The limited nature of that police power has been emphasized and re-emphasized by the unsuccessful efforts of those who from 1787 to the present time have sought to secure its enlargement and invest Congress with a power adequate to deal with any truly national problem. The earliest of these efforts was made in the Convention of 1787. Four resolutions were introduced during the sessions of that body, varying somewhat in phraseology but similar in purpose.[6] That purpose, to quote the language of the one introduced by Mr. Bedford, was to confer upon Congress the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are severally incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." In defeating these resolutions the Convention passed squarely upon the question whether or not Congress should enjoy a general police power for the protection of the national welfare apart from its specifically enumerated powers and decided that it should not.

There is a difference of opinion among historians and commentators as to whether James Wilson actually held to the doctrine that Congress possessed any general unenumerated powers. Certain utterances of his have, however, been quoted to prove that he held this view; and more than a century later President Roosevelt used him as an authority in support of his famous doctrine of "New Nationalism." In 1785 Wilson referred to the powers of Congress under the Articles of Confederation in the following language: "Though the United States in congress assembled derive from the particular States no power, jurisdiction, or right which is not expressly delegated by the confederation, it does not thence follow that the United States in congress have no other powers, jurisdiction, or rights, than those delegated by the particular states. The United States have general rights, general powers, and general obligations, not derived

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and the Constitution, (1917) 30 Harv. Law Rev. 801. See also an article by Paul Fuller, Is There a Federal Police Power? (1904) 4 Col. Law Rev. 563.

[6] Farrand, Records of the Federal Convention of 1787, I, p. 229; II, pp. 25, 26, 367. The first of these was the sixth resolution in the report of the Committee of the Whole; the others were introduced by Sherman, Bedford, and Rutledge, respectively.

from any particular state, nor from all the particular states, taken separately; but resulting from the union of the whole. . . . To many purposes the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, and powers, and properties by the law of nations incident to such. Whenever an object occurs, to the direction of which no particular state is competent, the management of it must, of necessity, belong to the United States in congress assembled. There are many objects of this extended nature."[7] If such a construction could be placed upon the powers of the congress of the Confederation, powers which were not only delegated but *expressly* delegated, then surely the same construction could be placed, a fortiori, upon the powers of Congress under the present constitution, which omits the word "expressly." When the federal constitution was before the Pennsylvania convention for ratification Wilson, who was a member of that body, made a speech in which he declared that the framers of the constitution in drawing a line between the powers of the national government and those of the states had acted upon the principle that "Whatever object of government is confined in its operation and effect within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operations or effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States."[8] Although this statement might lend support to the view that Congress could deal with national problems because they were national even in the absence of a positive grant of authority to do so, it seems hardly necessary to regard it in any other light than as a simple statement of the object which the Convention tried to attain in the matter of distributing powers between the nation and the states. Without speculating further on the actual significance of the statements quoted, it may be noted that no trace is found of the so-called "Wilson Doctrine" in Wilson's judicial utterances, nor is there other evidence that he ever became an active exponent of that principle.[9]

[7] Considerations on the Power to Incorporate the Bank of North America, Wilson's Works, Andrews' ed., I, pp. 557, 558.

[8] Ibid., p. 533.

[9] In support of the so-called Wilson doctrine, see: L. H. Alexander, James Wilson, Patriot, and the Wilson Doctrine, North Am. Rev. vol. 183, p. 971; Governor Samuel W. Pennypacker, Address at Wilson Memorial

It remained for President Roosevelt to discover or at least to label the neutral or "twilight" zone in our constitutional system—a zone lying between the jurisdictions of the state and the nation, to which lawbreakers of great wealth might repair and be free from punishment or restraint. Large corporations had come to be beyond the reach of the state because they had grown to national dimensions; they were outside the effective control of Congress because the constitution does not confer upon Congress a positive grant of authority to deal with them directly. It was to meet this situation that President Roosevelt urged his doctrine of "New Nationalism," first as a principle of constitutional interpretation, and, failing in that, as a constitutional amendment. That doctrine may be best stated in his own words: "It should be made clear that there are neither vacancies nor interferences between the limits of state and national jurisdictions, and that both jurisdictions together compose only one uniform and comprehensive system of government and laws; that is, whenever the states cannot act, because the need to be met is not one merely of a single locality, then the national government, representing all the people, should have complete power to act."[10] In public addresses delivered after 1906 President Roosevelt reverted again and again to this subject, urging always that the federal government should be competent to deal with every truly national problem and expressing his impatience at "the impotence which springs from overdivision of government powers, the impotence which makes it possible for local selfishness or for legal cunning, hired by wealthy special interests, to bring national activities to a deadlock."[11]

But if this "New Nationalism" is ever to be incorporated into our constitutional law it will need to be by a constitutional amendment. In the case of *Kansas v. Colorado*, decided in 1907,[12] the Supreme Court was invited to adopt that doctrine in construing the powers of Congress, but it declined in no

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Services, (1906) 55 Am. Law Reg. p. 13; President Roosevelt, speech at dedication of Pennsylvania state capitol, quoted and discussed in Willoughby, Constitution, I, p. 48. The doctrine is criticized by Edward Lindsay in Wilson Versus the "Wilson Doctrine," 44 Am. Law Rev. p. 641.

[10] From his speech at Ossawatomie, Kansas, August 31, 1910.

[11] Idem. The doctrine of "New Nationalism" is discussed and criticized in Willoughby, Constitution, I, pp. 48-66.

[12] (1907) 206 U. S. 46, 51 L. Ed. 956, 27 S. C. R. 655.

uncertain language to do so. It was urged upon the court in that case that Congress had a paramount right to control the whole system of reclaiming arid lands in a state, whether owned by the United States or not, on the theory that "all powers which are national in scope must be found vested in the Congress of the United States." Such a view the court held to be in direct conflict with the general established doctrine that the national government is a government of enumerated powers and also with the specific provisions of the Tenth Amendment. "This amendment," declared the court, "which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted." It would seem from this opinion that President Roosevelt's "twilight zone" is firmly intrenched in our constitutional system and that those who hope to develop a national police power by interpretation or by any method but amendment are doomed to disappointment.[13]

Principle of Implied Powers

It is perfectly certain that under the doctrine that Congress has no powers which are not enumerated in the constitution it would have been quite impossible to develop a national police

[13] This doctrine of a general, inherent, unenumerated power of Congress is not to be confused with what Story termed "resulting powers," or those deduced from several or all of the enumerated powers of Congress. See Commentaries, 5th ed., II, Sec. 1256. Among the examples of such "resulting powers" are the power to exercise the right of eminent domain, Kohl v. United States, (1875) 91 U. S. 367, 23 L. Ed. 449; the power to issue legal tender notes, Juilliard v. Greenman, (1884) 110 U. S. 421, 28 L. Ed. 204, 4 S. C. R. 122; and the power to exclude aliens, Fong Yue Ting v. United States, (1893) 149 U. S. 698, 37 L. Ed. 905, 13 S. C. R. 1016. See Willoughby, Constitution, I, Secs. 37, 38.

power were it not for the fact that the scope of congressional authority was vastly increased, and the possibility of ever-multiplying extensions of power opened up, by the establishment upon a firm foundation of the so-called doctrine of implied powers. It will be recalled that under the Articles of Confederation "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation *expressly* delegated to the United States in Congress assembled."[14] When the Tenth Amendment was being debated by Congress in 1789 a motion was made to insert there also the word "expressly" before the word "delegated." This motion, however, was rejected.[15] The bitter controversy which raged between the Federalists and the anti-Federalists as to whether or not Congress might exercise powers which were not expressly conferred was not settled finally and authoritatively until Marshall's famous opinion in 1819 in the case of *McCulloch v. Maryland*.[16] It was in that opinion that Marshall gave his classic statement of the doctrine of implied powers: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional." Thus the ghost of strict construction was laid forever, at least so far as the Supreme Court was concerned; and in 1884 Mr. Justice Miller, by way of giving it a suitable epitaph, took occasion to allude to "the old argument, often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises the advocate of the power must be able to place his finger on the words which expressly grant it."[17]

Thus it will be seen that while the doctrine of enumerated powers imposes upon Congress the necessity of finding among its delegated powers what has been aptly termed "a definite constitutional peg" upon which to hang every exercise of the national police power, the doctrine of implied powers, or the liberal construction of congressional authority, has made it possible to hang upon those "pegs" an enormous amount of salutary legislation in the interest of the national health, safety, and well being. The

[14] Art. II. Italics are the author's.
[15] Annals of Congress, I, p. 768.
[16] (1819) 4 Wheat. (U.S.) 316.
[17] Ex parte Yarbrough, (1884) 110 U. S. 651, 658, 28 L. Ed. 274, 4 S. C. R. 152.

"pegs" themselves are few in number, the only important ones being the power to regulate commerce, the power to tax, and the power to establish and run the postal system; but the police legislation which they have been made to support deals with anything from the white slave traffic to speculation in cotton.

Limitations on the National Police Power

In the exercise of its police power Congress is subject to three definite constitutional limitations. The first of these limitations has already been outlined: Congress must, in passing police legislation, use an enumerated power; in other words, there must always be a constitutional peg. This would seem on first thought to be entirely obvious. Yet occasionally Congress has tried, always unsuccessfully, to do without the peg. In 1867 Congress forbade the sale of illuminating oils which were below a certain fire test.[18] The law was declared invalid because it was entirely unrelated to any of the delegated powers[19] of Congress. It was not a regulation of interstate commerce; it was not a tax; and Congress did not pretend that it was. For the same reason the act of 1876 punishing the counterfeiting of trademarks and the sale of counterfeit trademark goods[20] was declared unconstitutional.[21] The excerpt quoted above[22] from the opinion of the court in *Kansas v. Colorado* emphasizes the same point. In all of these cases Congress had tried to pass police regulations without finding a constitutional peg on which to hang them.

The second limitation requires that a real relevancy exist between the police regulation and the peg upon which it is hung. Assuming that Congress in exercising its police power uses one of its delegated powers and labels its act accordingly as a tax law, a regulation of commerce, or the like, the law must then pass the test: is there a reasonable enough connection between the law Congress has passed and the constitutional grant of power on which Congress has relied in passing it to warrant its being regarded as a regulation of commerce, or the mails, or the like? If our courts

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[18] Act of March 2, 1867, Chap. 169 Sec. 29, 14 Stat. at L. 484.

[19] United States v. De Witt, (1870) 9 Wall. (U.S.) 41. The title of the act was "An Act to amend existing Laws relating to Internal Revenue, and for other Purposes." The section involved here must have been one of those passed "for other purposes," for it made no reference to any tax.

[20] Act of August 14, 1876, 19 Stat. at L. 141.

[21] Trade-Mark Cases, (1879) 100 U. S. 82, 25 L. Ed. 550.

[22] Supra, p. 295.

in determining the validity of legislation took account of the motives of law-makers, these motives would in the main tend to become the test of the validity of the law; but since the courts ignore those motives and take legislation at its face value, the relevancy of the law to its label becomes the test. In other words, it is proper enough for Congress to use its power over interstate commerce as a means of protecting the national health or morals; but Congress must not get so absorbed in the work of protecting the national health or morals that it forgets that it is, after all, supposed to be regulating interstate commerce. When this test was applied to the law passed in 1907 by which Congress made it a felony for any person to harbor an alien prostitute within three years after her entrance into this country,[23] the court found that while the authority of Congress to regulate immigration was undoubted and while the law of which the provision in question was a part was entitled "An Act to Regulate the Immigration of Aliens into the United States," nevertheless that provision did not as a matter of fact regulate immigration.[24] "The validity of the provision in question," declared the court, "should be determined from its general effect upon the importation and exclusion of aliens. But it is sufficient to say that the act charged has no significance in either direction." The provision was invalid because it did not bear a sufficiently close relation to anything over which the constitution gives Congress authority to act. In a case which will be discussed at a later point[25] it was held that the provision of the Erdman Act forbidding interstate carriers to discharge employees because of membership in labor organizations was not a legitimate exercise of congressional authority because there was no connection between interstate commerce and membership in a labor union.[26] In the other cases which will be considered in the course of this article it will be seen that no law which Congress has passed in the exercise of a national police power has been upheld unless the court has, after careful scrutiny of this point,

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[23] Act of February 20, 1907, 34 Stat. at L. 898.

[24] Keller v. United States, (1909) 213 U. S. 138, 53 L. Ed. 737, 29 S. C. R. 470, 16 Ann. Cas. 1066.

[25] Adair v. United States, (1908) 208 U. S. 161, 52 L. Ed. 436, 28 S. C. R. 277, 13 Ann. Cas. 764. See infra, pp. 308, 317.

[26] Professor Goodnow takes the view that this part of the opinion is dictum, since the court had already declared the provision under consideration to be a violation of the due process of law clause of the Fifth Amendment. Social Reform and the Constitution, 81 et seq.

been convinced that the law was at the same time a real and substantial exercise of one of the enumerated powers of Congress.

The third limitation, or set of limitations, upon the national police power is to be found in the specific prohibitions upon congressional authority contained in the constitution and particularly in the bill of rights. These restrictions operate in a perfectly obvious and direct fashion. Congress may use its delegated powers for the protection of the national welfare; but in so doing it must not take life, liberty, or property without due process of law, take private property for public use without just compensation, interfere with religious liberty, or do any of those things which it is definitely forbidden by the constitution to do. This third limitation rests upon the well-established principle that the specific prohibitions of the constitution act as restraints upon the general grants of powers to Congress.[27] The restriction of due process of law is the one perhaps most commonly enforced against exercises of the national police power, particularly those passed under the commerce clause; but in the exercise of the power over the postal system for the protection of the national morals or safety the question has sometimes arisen whether or not Congress has violated the guarantees of freedom of the press, or the guarantee against unreasonable searches and seizures.[28]

In the light of the foregoing constitutional principles and limitations, it is the purpose of the present article to discuss the police power which Congress has exercised under the grant of authority to regulate commerce; and to mark out the scope and variety of the protection which has been accorded the national safety, health, morals, and general welfare in this somewhat indirect and roundabout way.

General Nature and Scope of the Commerce Power

If one were obliged to name the most potent cause leading to the calling of the Convention of 1787 he would not hesitate in choosing the need for a national control over foreign and inter-

[27] Story, Constitution, II, Sec. 1864 et seq. Monongahela Navigation Co. v. United States, (1893) 148 U. S. 312, 336, 37 L. Ed. 463, 13 S. C. R. 622.

[28] Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877; In re Rapier, (1892) 143 U. S. 110, 36 L. Ed. 93, 12 S. C. R. 374; Lewis Publishing Co. v. Morgan, (1913) 229 U. S. 288, 57 L. Ed. 1190, 33 S. C. R. 867; Public Clearing House v. Coyne, (1904) 194 U. S. 497, 48 L. Ed. 1092, 24 S. C. R. 789.

state commerce. That there was scant discussion of the problem in the Convention was perhaps due to the unanimity of conviction among the members of that body that the power to regulate commerce should unquestionably rest in the new Congress. Since the adoption of the constitution no small part of the time of Congress has been occupied with the exercise of this power, and no small part of the time of the Supreme Court has been spent in passing upon the constitutionality and meaning of those laws. Considering the wide range of instrumentalities and transactions which have come to be included in the term commerce it is but natural that the authority to regulate it should serve as the constitutional basis for the development of a wide national police power.

The constitution confers upon Congress the power to regulate three kinds of commerce: first, "with foreign nations," second, "among the several states," and third, "with the Indian tribes."[29] The power given in respect to each of these is the same, that is, the power to "regulate"; and there is nothing in the language used to indicate that the framers of the constitution had in mind any distinctions as to the extent of the power of Congress over each type. Congress early utilized its authority over these different classes of commerce, however, in different ways, to meet widely different problems, and apparently without stopping to discuss whether its power over one was greater than over another. It was not until railroad transportation reached a high point of development that Congress, a full century after the framing of the constitution, began to turn its mind seriously to the problems of interstate commerce regulation. But in the meantime the regulations of foreign and Indian commerce had been numerous and rigorous in character. The question has, therefore, become pertinent whether Congress actually does have exactly the same power over interstate commerce that it enjoys over commerce with foreign nations and with the Indian tribes, or whether that power is more restricted. Especially has it been repeatedly urged by those interested in the expansion of a national police power that Congress could exercise every power over interstate commerce which it could exert in controlling foreign commerce.[30]

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[29] Art. I, Sec. 8.

[30] This position has been taken, for instance, by those who believe that Congress may restrict child-labor by means of its control over inter-

It is possible to cite several cases in which the Supreme Court has expressed the opinion that there is no difference between the powers of Congress over foreign and interstate commerce.[31] Marshall voiced this view in *Gibbons v. Ogden*,[32] and in 1888 Mr. Justice Mathews in *Bowman v. Chicago, etc., Ry. Co.* declared, "The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character and equally extensive."[33] While these statements sound perfectly conclusive and final, the fact remains that in passing upon the validity of several of the congressional police regulations over interstate commerce the court, though urged to do so, has steadily declined to uphold such regulations on the ground that similar police restrictions applicable to foreign commerce have been sustained.[34] A substantial body of opinion has grown up in support of the view that there is, after all, a difference between the two powers. It is urged by an eminent authority that "although the three classes of commerce are thus included in the same clause and in the same terms in the enumeration of powers, they are clearly distinguishable in their historic setting and constitutional import, and the laws which are necessary and proper in regulating commercial intercourse with foreign nations and with the Indian tribes may not be necessary and proper in regulating such commercial intercourse between the states."[35] Without anticipating the more detailed discussion of this problem appropriate at a later point in this article, it may be suggested that Congress has actually exercised a police power over foreign commerce which there is reason to believe would be regarded as beyond its proper authority if applied to commerce among the several states. And while there is no authoritative judicial pronouncement upon this question, an authority over interstate commerce which does not

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state commerce. This point will be further considered in a later section of this article.

[31] For citation of these cases, with comment, see note by E. B. Whitney, 7 Yale Law Jour. 294.

[32] (1824) 9 Wheat. (U.S.) 1, 228, 6 L. Ed. 23.

[33] (1888) 125 U. S. 465, 482, 31 L. Ed. 700, 8 S. C. R. 689.

[34] This was true both in the Lottery Case and in the recent child-labor case; it will be treated more fully in connection with the latter case.

[35] Judson, Interstate Commerce, 3rd ed., Sec. 6.

extend to the exclusion from the channels of that commerce of the products of factories employing child-labor[36] can hardly be called co-extensive with an authority over foreign commerce which excludes from our shores the products of convict-labor.[37]

The relationship between the national government and the Indians has always been regarded as anomalous, and it would be unprofitable to enter upon any extended comparison of the power of Congress over interstate commerce with that over commerce with the Indian tribes. Our control over these people has been paternalistic in character.[38] Because of the importance and delicacy of the problem, Congress has regulated intercourse with the Indians with a rigorous hand. It has forbidden commercial dealings with them in certain commodities, as, for example, intoxicating liquors;[39] and has even gone to the length of forbidding any one to trade with them without a license issued by the federal government.[40] It seems probable that restraints have been placed upon commerce with the Indians which could not be imposed upon ordinary trade relations between citizens of the states.

The following discussion of the police power which Congress has come to exercise under the commerce clause may properly be confined, therefore, to the problems relating to interstate commerce. This is appropriate not only because it is in that field of regulation that the national police power has developed in most striking and most varied form, but also because the preceding paragraphs make it clear that if there is any constitutional distinction among the powers of Congress over foreign, interstate, and Indian commerce the power over interstate commerce is the most narrowly restricted; and accordingly whatever police power Congress may exercise over interstate commerce it may exercise over foreign and Indian commerce.

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[36] Hammer v. Dagenhart, (1918) 247 U. S. 251, 38 S. C .R. 529.

[37] Act of October 3, 1913, 38 Stat. at L. 195. The validity of this law has never been questioned and would seem, in the light of numerous precedents, to be unquestionable.

[38] Matter of Heff, (1905) 197 U. S. 488, 498, 49 L. Ed. 848, 25 S. C. R. 501 (overruled in United States v. Nice, [1916] 241 U. S. 591, 36 S. C. R. 696).

[39] Held valid in United States v. Holliday, (1866) 3 Wall. (U.S.) 407, 18 L. Ed. 182; United States v. Forty-three Gallons of Whiskey, (1876) 93 U. S. 188, 23 L. Ed. 846.

[40] Upheld in United States v. Cisna, (1835) 25 Fed. Cas. 422. See Act of March 3, 1903, 32 Stat. at L. 1009.

While the police regulations which Congress has passed under its authority to regulate interstate commerce have been exceedingly numerous and have dealt with a wide range of topics, from locomotive ashpans to obscene literature, they may all be placed for convenience in four groups, according to the general purpose of their enactment and the constitutional principles upon which they are based. (I) In the first group may be placed those regulations in which Congress has exercised police power for the protection and promotion of interstate commerce itself by the enactment of such laws as the safety appliance acts, the anti-trust acts, and other regulations designed to keep that commerce safe, efficient, and unobstructed. (II) The second group comprises the cases in which the law forbids the use of interstate commerce as a medium or channel for transactions which menace the national health, morals, or welfare. In this class would be placed the Pure Food Act, the White Slave Act, and other statutes by which Congress, instead of protecting commerce itself from danger, protects the nation from the misuse of that commerce. (III) The third group consists of the enactments by which Congress co-operates with the states by forbidding the use of the facilities of interstate commerce for the purpose of evading or violating state police regulations. Here would be found such laws as the Webb-Kenyon Act, excluding from interstate commerce shipments of liquor consigned to dry territory. (IV) In the last group should be placed the Keating-Owen Child-Labor Act of 1916, by which Congress attempted to deny the privileges of interstate commerce to articles produced under conditions which Congress disapproved but which it had no direct power to control. Careful consideration may profitably be given to each of these groups.

I. National Police Power for Promotion and Protection of Commerce

1. *Appliances and Physical Regulations Necessary for Safety.* It is but natural that Congress should feel that one of the most obvious and necessary duties imposed upon it by the grant of power to regulate commerce is the duty to pass police regulations to protect from destruction, loss, or damage the lives, limbs, and property of persons concerned in the processes or transactions of interstate commerce, whether as passengers, shippers, or em-

ployees. As early as 1838 laws were passed requiring the installation of safety devices upon steam vessels.[41] Beginning with a statute passed in 1866 Congress has rigorously controlled the transportation on land and water of explosives.[42] But it was not until 1893 that Congress began to enact the comprehensive set of safety appliance acts now applicable to interstate railroads.[43] The first of these acts was the Automatic Coupler Act,[44] which has been supplemented by more recent laws requiring, among other things, the use of ashpans[45] on locomotives, the inspection of boilers,[46] and the use of ladders, hand-brakes, drawbars, and similar devices on cars.[47] To the same general purpose are the statutes requiring railroads to make full reports to the Interstate Commerce Commission regarding all accidents.[48] A statute of 1913 protects interstate commerce from another type of loss by making criminal the unauthorized breaking of the seals of railroad cars containing interstate or foreign shipments.[49]

The purpose of Congress in passing these laws is perfectly plain. Most of them, following the pioneer Safety Appliance Act of 1893, declare specifically that their object is "to promote the safety of employees and travellers upon railroads." The courts have uniformly recognized this purpose. "The Safety Appliance Act," declares one federal judge, "is essentially a police regulation. Its general purpose is humanitarian—the safeguarding of employees from injury and death."[50] In the words of another court, "the object of Congress in passing the safety appliance acts was undoubtedly to safeguard interstate commerce, the life of the passengers, and the life and limb of the employees

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[41] Act of July 7, 1838, 5 Stat. at L. 304; Act of March 3, 1843, ibid., 626.

[42] Act of July 3, 1866, 14 Stat. at L. 81. For legislation on this subject now in force, see the U. S. Criminal Code of March 4, 1909, 35 Stat. at L. 1134, Secs. 232-236.

[43] Collected in Comp. Stat. 1918, Secs. 8605-8650; 3 U. S. S. A. 480-530.

[44] Act of March 2, 1893, 27 Stat. at L. 531.

[45] Act of May 30, 1908, 35 Stat. at L. 476.

[46] Acts of February 17, 1911, 36 Stat. at L. 913, and March 4, 1915, 38 ibid., p. 1192.

[47] Act of April 14, 1910, 36 Stat. at L. 298.

[48] Act of May 6, 1910, 36 Stat. at L. 351; Act of February 17, 1911, ibid., p. 216.

[49] Act of February 13, 1913, 37 Stat. at L. 670. Upheld in Morris v. United States, (1916) 229 Fed. 516.

[50] United States v. Philadelphia, etc., Ry. Co., (1915) 223 Fed. 215, 216.

engaged therein."[51] The Supreme Court itself has declared the purpose of this legislation to be "to promote the public welfare by securing the safety of employees and travellers."[52]

That these statutes designed to insure the physical safety of interstate commerce are police regulations falling well within the recognized limits of congressional power is too obvious to call for argument; so obvious, in fact, that the Supreme Court has never been asked to decide a case in which it was squarely contended that acts of this kind were not natural and legitimate regulations of commerce.[53] Moreover, in several cases involving the meaning and application of these statutes, as well as in cases involving analogous exercises of the commerce power, that tribunal has alluded to the safety appliance acts in terms which place the question of their validity in the realm of settled law.[54] And indeed if the power to regulate commerce does not include the power to make reasonable rules to secure the physical safety of the lives and property of travellers, shippers, and employees, it may well be inquired what conceivable kind of commercial regulation could be regarded as legitimate.

2. *Regulations of Labor Necessary for Safety of Interstate Commerce.* (a) *Hours of Service Act*: It came at last to be recognized that safety appliances and regulations were not enough in and of themselves to insure the physical safety of interstate commerce. There were plenty of gruesome proofs of the fact that life and property on interstate railroads were as much jeopardized by the deadening fatigue of a locomotive engineer as by the absence of block signals or automatic couplers. Accordingly, in 1907 Congress passed the Hours of Service Act,[55] making it unlawful for any interstate carrier to employ a train-

[51] United States v. Atl. Coast Line R. Co., (1913) 214 Fed. 498, 499.

[52] Johnson v. So. Pacific Co., (1904) 196 U. S. 1, 17, 49 L. Ed. 365, 25 S. C. R. 158.

[53] The validity of these laws has been passed upon squarely, however, in numerous decisions of the lower federal courts. For extensive citation of cases, see Thornton, The Federal Employers' Liability Act, 3rd ed., p. 334; Richey, Federal Employers' Liability, Safety Appliance, and Hours of Service Acts, 2nd ed., Sec. 215.

[54] Johnson v. So. Pacific Co., supra; Schlemmer v. Buffalo, etc., Ry Co., (1907) 205 U. S. 1, 51 L. Ed. 681, 27 S. C. R. 407; Employers' Liability Cases, (1908) 207 U. S. 463, 52 L. Ed. 297, 28 S. C. R. 141; Southern Ry. Co. v. United States, (1911) 222 U. S. 20, 56 L. Ed. 72, 32 S. C. R. 2; Second Employers' Liability Cases, (1912) 223 U. S. 1, 56 L. Ed. 327, 32 S. C. R. 169, 38 L. R. A. (N.S.) 44; Wilson v. New, (1917) 243 U. S. 332, 61 L. Ed. 755, 37 S. C. R. 298.

[55] March 4, 1907, 34 Stat. at L. 1415.

man for a period longer than sixteen consecutive hours and requiring definite rest periods in every twenty-four hours. The hours of train dispatchers and telegraphers were still further reduced, thirteen consecutive hours being the maximum where only day work was required and nine hours out of twenty-four where both night and day work was expected.

It is important to bear in mind that such a limitation upon hours of service as that provided for in the act of 1907 stands in sharp contrast, both in purpose and in constitutional justification, to such a statute as the Adamson Law providing for a standard eight-hour day on interstate railroads. While the employees affected by the Hours of Service Act would of course benefit by the relief granted from continuous labor for long hours, such relief constituted only a secondary motive for the passage of the act; certainly the legal authorization of a sixteen-hour day does not indicate a very vigorously humanitarian interest in the welfare of the workingmen affected. The object of the act was quite clearly to promote the safety of interstate commerce on railroads; and the title of the statute specifically declares it to be "An Act to Promote the Safety of Employees and Travellers upon Railroads by Limiting the Hours of Service of Employees Thereon." Viewed thus as a safety regulation, there could be no serious question as to the validity of the act; and in upholding it as a valid exercise of the power of Congress to regulate commerce Mr. Justice Hughes declared: "In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the clause defined by the act."[56] At a later point in this article[57] it will be made clear that no such argument as this was applied to the Adamson Law, and it was sustained by the Supreme Court on widely different grounds.

(b) *Employers' Liability Statutes*: When Congress, after considerable prodding by an energetic and persistent president,[58]

[56] Baltimore & Ohio R. Co. v. Int. Com. Comm., (1911) 221 U. S. 612, 55 L. Ed. 878, 31 S. C. R. 621.

[57] Infra, p. 315.

[58] President Roosevelt urged the passage of the act in various messages to Congress.

finally passed the first Employers' Liability Act in 1906,[59] there is every reason to believe that the members of that body were actuated by a humanitarian interest in the welfare of the workmen on interstate railroads. Like the state legislatures which had passed similar laws, they wished to take away the unjust and oppressive burdens which the common law doctrines of employers' liability had placed upon the shoulders of the injured workman. Senator Dolliver, who was a particularly vigorous proponent of the law, expressed in the senate his belief that there was not a single senator "who does not recognize the equity and justice involved" in such legislation, and added that "there is scarcely an American state in these recent years which has not taken this step forward in *industrial justice*."[60] The federal employers' liability laws were passed in order to guarantee to the men to whom they applied a reasonably square deal.

It must, therefore, have been something of a surprise to the members of Congress who had fought and voted for this legislation to learn from the Supreme Court that what they had really passed was not an act to secure economic justice in certain relations between employers and employees in interstate commerce, but a safety regulation.[61] It will throw some light upon the nature of the limitations resting upon the police power of Congress to understand why it is that from the standpoint of constitutional law there is no substantial difference between the Employers' Liability Act and the Boiler Inspection Act.

It is not difficult to follow the steps in the chain of reasoning which led the Supreme Court to this somewhat startling result. In the first place, the power under which Congress is purporting to act in passing the Employers' Liability Act is the authority to regulate commerce; Congress has no power to regulate labor as such. It follows, therefore, that only those regulations of the relations between master and servant which are at the same time

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[59] June 11, 1906, 34 Stat. at L. 232.

[60] Quoted by Thornton in his excellent summary of the legislative history of the act. See Thornton, Federal Employers' Liability Act, 3rd ed.

[61] The first Employers' Liability Act was declared unconstitutional by the Supreme Court in the Employers' Liability Cases, (1908) 207 U. S. 463, 52 L. Ed. 297, 28 S. C. R. 141, because its provisions extended to include the employees of interstate carriers even when such employees were not themselves engaged in any of the processes of interstate commerce. Congress remedied this defect in passing the second statute, April 22, 1908, 35 Stat. at L. 65, which was held valid in the Second Employers' Liability Cases, (1912) 223 U. S. 1, 56 L. Ed. 327, 32 S. C. R. 169, 38 L. R. A. (N.S.) 44.

regulations of commerce are within the power of Congress. Only three years before, the court, speaking through Mr. Justice Harlan in the *Adair* case, had declared that one of the reasons why Congress had exceeded its power when it forbade interstate carriers to discharge any employee because he belonged to a labor union was because "there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress" to pass such a law.[62] Now if the only object and result of the employers' liability statutes was to secure a more equitable incidence of the burden of industrial accidents between the employers and the employees in interstate commerce and thereby to protect the welfare of a certain economic group, then Congress in passing such an act had again exceeded its authority, since it could hardly be shown that the statute really regulated interstate commerce or bore any reasonable relation to it. But if, on the other hand, it could be shown that the act would promote or protect interstate commerce in some definite way, then, of course, it could be upheld. Counsel for the government therefore wisely urged upon the court with great vigor the view that "if the conditions under which the agents or instrumentalities do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce or make it less expeditious, less reliable, less economical, and less secure."[63] It is a well established principle of constitutional construction that a statute, when possible, should be so construed as to save it; and the court readily adopted the alluring argument which made it possible to sustain the validity of the act. It declared its belief that "the natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."[64] Thus a statute which, viewed merely as a measure to insure economic justice to the employees of interstate carriers,

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[62] Note 25, supra.

[63] Second Employers' Liability Cases, note 61, supra, 223 U. S. at p. 48.

[64] Ibid., p. 50. For a criticism of this point of view, see L. J. Hall, The Federal Employers' Liability Act, (1910) 20 Yale Law Jour. 122, in which

would doubtless have been invalidated, was enabled to pass the scrutiny of the courts by donning the somewhat transparent disguise of a regulation to prevent railroad accidents.

3. *Regulations Necessary to Prevent the Obstruction or Suspension of Interstate Commerce.* It has been suggested above that perhaps the most important cause for the formation and adoption of our federal constitution was the desire to establish a government with power to regulate foreign and interstate commerce according to a uniform rule and thereby to put an end to the chaos of obstructions, burdens, and inharmonious systems of control affecting that commerce which emanated from the jealousies of thirteen separate commonwealths. The very first case in which the commerce clause of the new constitution came before the Supreme Court for interpretation was a case in which the court refused to allow the state of New York to obstruct the freedom of interstate commerce by granting to one of its citizens an exclusive right to navigate the Hudson River by steamboat.[65] Since that time no small proportion of the judicial attention which the commerce clause has received has been directed to the problem of preventing state interference with interstate commerce. It would seem, therefore, that in exercising its delegated power to regulate commerce Congress could tread on no safer ground, could use its authority in no way more clearly in harmony with the purpose for which it was conferred, than when it passed regulations designed to prevent the obstruction or suspension of commerce.

And while, curiously enough, the positive enactments of this kind to be found in the federal statute books are not quite so numerous nor elaborate as one might expect, yet they present some problems of peculiar interest to those interested in the development of a national police power. They may be conveniently arranged in the following groups, each of which merits some comment.

(a) *Regulations to Prevent Physical Obstructions*: It is un-

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it is urged that "it is only by an indirect and unsatisfactory method of reasoning that it can be said that safety in transportation is promoted by increasing the amount of damages which a railroad company must pay for the acts of carelessness of its men in their relations to each other." It will be noted that the article was written before the Second Employers' Liability Cases were decided, but its reasoning is applicable to the doctrine of those cases.

[65] Gibbons v. Ogden, (1824) 9 Wheat. (U.S.) 1, 6 L. Ed. 23.

necessary to enlarge upon the fact that Congress has full authority to penalize any act which results in the physical obstruction or interference with commerce. "Any offense," declared Mr. Justice Story in 1838, "which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers."[66] Congress has accordingly enacted a fairly substantial penal code designed to preserve and protect navigable rivers and harbors from obstruction, to regulate the erection of bridges and piers, and in various other ways to keep commerce by water free and untrammeled.[67] There would seem to be no doubt as to the existence of similar congressional authority to afford this kind of protection to the facilities of interstate land commerce; but, with the exception of the Larceny Act of 1913, already mentioned above,[68] and some of the recent war legislation,[69] Congress has, except in emergencies which will be alluded to later,[70] preferred to rely upon the criminal laws of the several states to prevent the physical obstruction of interstate commerce by land.

(b) *Regulations to Prevent Economic Obstructions or Restraints of Commerce.* (1) *By combinations of capital*: It would not be relevant to the subject under consideration to launch out upon any extended discussion of the highly interesting and important laws Congress has passed for the purpose of solving the so-called trust problem. The fact that the policy of the federal government toward trusts and monopolies has not always been happy in its conception or successful in its administration has little to do with the fact that the general underlying motives of that policy have always been the same: namely, to keep interstate commerce free from the obstacles and interferences resulting from monopoly and other combinations and conspiracies designed to destroy free competition and restrain trade. It will hardly be

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[66] United States v. Coombs, (1838) 12 Pet. (U.S.) 72, 9 L. Ed. 1004.
[67] See U. S. Comp. Stat. 1918 Sec. 9909 et seq.
[68] Supra, p. 304, note 49.
[69] The War Materials Destruction Act of April 20, 1918. By the provisions of this act the instrumentalities and facilities of interstate commerce, or "war utilities" as they are called, are, along with "war materials" and "war premises," protected from wilful injury and destruction. The act rests, of course, upon the war power of Congress and not on the commerce power.
[70] Infra, pp. 314, 315, notes 87, 88.

denied that these acts are police regulations designed for the protection of commerce. The first of these statutes penalized certain specific acts, such as discriminations among shippers and rebating, which Congress deemed destructive to the freedom of competition desirable in interstate commerce. This type of regulation includes the Interstate Commerce Act of 1887 and the various amendments to it passed since that time.[71] Federal police regulations making certain acts criminal were soon found to be a very inadequate means of freeing interstate commerce from monopolistic obstructions; and so Congress, convinced that relief could be had by breaking up trusts, combinations, and conspiracies in restraint of trade, enacted the famous Sherman Act of 1890.[72] After two decades of sporadic and more or less ineffectual "trust-busting," Congress supplemented the Sherman Act by legislation designed to make the act more definite in meaning and effective in operation.[73] This supplementary anti-trust act, known as the Clayton Act, was accompanied by the passage of the Trade Commission Act.[74] By the passage of this latter act Congress embarked upon a new policy in respect to combinations of capital—the policy of administrative control. While this act must still be regarded as a federal police regulation for the protection of commerce, the method employed for that purpose was the creation of an administrative commission with power to investigate, advise, and issue

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[71] Act of February 4, 1887, 24 Stat. at L. 379. The text of this act and the amendments thereto are set forth and discussed at length in Judson, Interstate Commerce, 3rd ed. See also, Fuller, The Interstate Commerce Act, (1915). One striking instance of this type of police regulation over interstate commerce is to be found in the commodities clause of the Hepburn Act, June 29, 1906, 34 Stat. at L. 584. The purpose of this act was to compel the interstate railroads to dispose of such interests as they might have in the coal mining business by making it unlawful for them to carry in interstate commerce "any article or commodity other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have an interest, direct or indirect . . ." The legislative purpose, however, was not effectuated, because the Supreme Court in passing upon the constitutionality of the law construed it in such a way as to permit the railroad to transport coal from its own mines provided such coal had been sold by the railroad before such transportation took place. United States v. Delaware, etc., Co., (1909) 213 U. S. 366, 53 L. Ed. 836, 29 S. C. R. 527. For an excellent discussion of the history, interpretation, and operation of the clause, see Kibler, The Commodities Clause (1916); also Hand, the Commodities Clause and the Fifth Amendment, (1909) 22 Harv. Law Rev. 250.

[72] Act of July 2, 1890, 26 Stat. at L. 209.

[73] The Clayton Act of October 15, 1914, 38 Stat. at L. 731.

[74] Act of September 26, 1914, 38 Stat. at L. 719.

orders based upon definite findings of fact. Combinations of capital formerly in bad odor merely because of their size and importance were to be kept within the law and prevented from interfering with the freedom of commerce by an active governmental supervision and co-operation.

While the litigation which has arisen under these acts, or at least under the earlier ones, has been exceedingly voluminous and the courts have spent much time construing and applying them to the concrete problems which have arisen, there seems never to have been any serious question raised as to the authority of Congress to pass laws designed to accomplish the results which these acts sought to achieve. Such constitutional objections as have been urged against these enactments have been aimed at the details of method and procedure rather than at the validity of the legislative object.[75]

(2) *By combinations of labor*: While Congress seems never to have passed, under its commerce power, any police legislation which in express terms names labor organizations and forbids them to enter into conspiracies or to commit acts which would obstruct or suspend interstate commerce, several of its enactments are couched in terms broad enough to permit the courts to apply their restraints and prohibitions to combinations of laborers.

This is true, in the first place, of the Interstate Commerce Act of 1887.[76] This act makes it unlawful for any common carrier subject to the provisions of the statute "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage."[77] It is specifically made criminal under heavy penalty for "any common carrier subject to the provisions of this act, or, when such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, or lessee, *agent, or person acting for or employed by such corporation,*" to

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[75] Any doubt as to the validity of the Sherman Act was set at rest by the decision in Addyston Pipe and Steel Co. v. United States, (1899) 175 U. S. 211, 44 L. Ed. 136, 20 S. C. R. 96.

[76] Note 71, supra.

[77] Sec. 3.

do or conspire to do any of the unlawful acts above set forth.[78] In 1893 Judge Taft held that these provisions were applicable to the officers and members of a brotherhood of locomotive engineers who had induced the railroad for which they worked to join them in a boycott against a railroad which was engaged in a strike because of its refusal to meet certain demands of its men.[79] As long as the men remained in the employ of the railroad they were subject to injunctions to restrain them from violations of these provisions. Judge Taft also declared that a conspiracy on the part of the employees to violate these sections could be punished under the general provision of the Criminal Code penalizing those who "conspire to commit any offense against the United States."[80] It is thus clear that the Interstate Commerce Act is not only applicable to common carriers but imposes restraints and obligations for the protection of interstate commerce upon labor organizations as well.[81]

In like manner the Sherman Act[82] has been applied to acts of combinations of laborers when the effect of those acts was to interfere with interstate commerce or to restrain trade. It is unnecessary to enter here into a discussion of the question whether or not Congress actually intended to include the activities of labor organizations within the prohibitions of the act.[83] It is less important that Mr. Gompers and other labor leaders believed that Congress intended that labor unions should be outside the scope of the act than it is that the Supreme Court should have found the words of the statute so broad and inclusive that it could discover no legal basis for exempting labor unions from the operation of the act. The law declares in sweeping terms that "Every contract, or combination in the form of a trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." In

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[78] Sec. 10. Italics are the author's.

[79] Toledo, etc., Ry. Co. v. Penn. Co., (1893) 54 Fed. 730; same case, ibid., p. 746.

[80] Rev. Stat. Sec. 5440.

[81] For detailed discussion of this whole point, with citation of cases, see Judson, Interstate Commerce, 3rd ed., Chap. 6 and Secs. 408-417; Martin, The Modern Law of Labor Unions, Chap. 14.

[82] Note 72, supra.

[83] A clear statement of both sides of the question is found in Laidler, Boycotts and the Labor Struggle, 170 et seq.

construing that act, the courts, with practical unanimity,[84] have steadily refused to make any distinction between combinations of capital and combinations of labor which were in restraint of trade. In numerous cases injunctions have been issued by the United States courts against such restraints of trade, or against more direct obstructions of commerce by labor organizations;[85] while in the *Danbury Hatters* case the Supreme Court held squarely that the provisions of the Sherman Act were applicable to trade unions so as to permit the recovery from the members of the hatters' union of triple damages by their employers whose business had been injured by a secondary boycott.[86]

During the Pullman strike of 1893 a federal circuit court issued an injunction based upon the provisions of the Sherman Act, restraining Eugene V. Debs and other officers of the American Railway Union from interfering in any way with interstate commerce or the mails.[87] When the case came before the Supreme Court on appeal, however, the court declined to regard the Sherman Act as the necessary source of the authority of the court to issue the injunction (although not denying that it did confer such power), but declared that the broad grant of authority to the national government to regulate interstate commerce was sufficient in itself to warrant the granting by the courts of injunctive relief against those who obstructed or restrained such

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[84] The only exception seems to be United States v. Patterson, (1893) 55 Fed. 605, in which the court took the view that "restraints of trade" must be interpreted in the strict common law sense as meaning efforts to "monopolize or grasp the market."

[85] United States v. Workingmen's Amalgamated Council, (1893) 54 Fed. 994, 26 L. R. A. 158; United States v. Debs, (1894) 64 Fed. 724. Other cases in Martin, op. cit., 246, 247, note 81, supra.

[86] Loewe v. Lawlor, (1908) 208 U. S. 274, 52 L. Ed. 488, 28 S. C. R., 301, 13 Ann. Cas. 815. The result reached in this case would seem to be impossible under the existing law. The Clayton Act of October 15, 1914, specifically declares that the labor of a human being is not to be regarded as a commodity or article of commerce and that "nothing contained in the anti-trust law shall be construed to forbid the existence and operation of labor, agricultural, and horticultural organizations instituted for the purpose of mutual help and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof, nor shall such organizations or members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws." While this act legalizes certain activities of labor organizations before regarded as illegal, it does not, of course, have the effect of permitting any direct and substantial obstructions of interstate commerce.

[87] United States v. Debs, (1894) 64 Fed. 724.

commerce.[88] From this decision it would seem, therefore, to follow that specific police legislation by Congress to prevent the obstruction of interstate commerce is unnecessary to enable federal courts sitting in equity to prevent such obstruction.

To classify the Eight-Hour Law, popularly known as the Adamson Law,[89] which was passed by Congress in the autumn of 1916, as a police regulation to protect interstate commerce from obstruction and interference will seem at first a curious perversion of facts. But those who will recall the legislative history of the statute and examine carefully the opinion of the Supreme Court in the case in which the constitutionality of the law was upheld will be convinced that such a classification of the act is accurate from the standpoint both of legislative intention and of constitutional law. It seems perfectly clear that Congress passed the law at the request of President Wilson for the single purpose of averting the nation-wide railroad strike which there was every reason to believe would take place if the law were not passed. It is equally apparent that the Supreme Court upheld the law on the ground that its passage was necessary to accomplish this result and avoid the threatened suspension of interstate commerce. This remarkable decision merits some little comment.

In considering the validity of the Adamson Law, which was questioned in the case of *Wilson v. New*,[90] it was necessary for the court to apply the same tests which it has always applied to regulations of commerce enacted for police purposes.[91] In the first place, is the act a bona fide regulation of commerce; in the second place, assuming that it is, does it deprive any person of life, liberty, or property without due process of law? The court accordingly addressed itself to the question whether Congress was really regulating interstate commerce when it established an eight-hour day for trainmen on interstate railroads. The answer of the court to this question was that the act was a regulation of interstate commerce because its passage was necessary in order to prevent the complete suspension of that commerce. It alluded to the long list of acts, many of which have already been discussed in this article, by which Congress had sought to make interstate commerce safe and efficient. It mentioned par-

[88] In re Debs, (1895) 158 U. S. 564, 39 L. Ed. 1092, 15 S. C. R. 900.
[89] Act of September 3, 5, 1916, 39 Stat. at L. 721.
[90] (1917) 243 U. S. 332, 61 L. Ed. 755, 37 S. C. R. 298.
[91] Supra, p. 297 et seq.

ticularly the Hours of Service Act, the Safety Appliance Acts, and the Employers' Liability Act, in all of which the power to regulate commerce had been used to control various relations between employers and employees. It then pointed out "how completely the purpose intended to be accomplished by the regulations which had been adopted in the past would be rendered unavailing or their enactment inexplicable if the power was not possessed to meet a situation like the one with which this statute [the Adamson Law] dealt. What would be the value of the right to a reasonable rate if all movement in interstate commerce could be stopped as the result of a mere dispute between the parties or their failure to exert a primary right concerning a matter of interstate commerce? Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service if there was no power in government to prevent all service from being destroyed . . .? And finally, to what derision would it not reduce the proposition that government had power to enforce the duty of operation if that power did not extend to doing that which was essential to prevent operation from being completely stopped . . .?"

The question whether the statute was in violation of the due process of law clause of the Fifth Amendment was considered by the court in a portion of the opinion which need not be treated in detail here. It is sufficient to say that the abridgment of the freedom of contract which the act entailed upon employers and employees was found constitutionally permissible because both were engaged in a business charged with a public interest and therefore subject to types of congressional regulation which could not be imposed upon any business except public utilities.

It is important to notice that the opinion of Chief Justice White marks out an entirely new boundary line for the exercise by Congress of its police power over interstate commerce for the purpose of protecting that commerce from obstruction or suspension. In the earlier cases in which the court had been obliged to decide whether or not a statute purporting to regulate commerce actually did so, it was the subject matter of the regulation which was examined. If the provisions of the statute bore a reasonable and direct relationship to interstate commerce, then, in the absence of other constitutional defects, it was held a valid regulation of commerce; if not, it was held invalid. It will be recalled that

Mr. Justice Harlan in the majority opinion in the *Adair* case[92] expressed the view that the provisions of the Erdman Act which made it a penal offense for an interstate carrier to discharge an employee because of his membership in a labor organization did not have a sufficiently close relationship to interstate commerce to make it a valid regulation thereof. Various other attempts of Congress to regulate commerce have suffered the same fate.[93] But in considering whether or not the Adamson Act was a bona fide regulation of commerce the court paid practically no attention to what the law was about. The mind of the court was fixed upon what would happen if the law was not passed. It was urged upon the court that the law was, in effect, a regulation of wages and as such did not fall properly within the scope of the commerce power. The court disposed of this objection by declaring that "if it be conceded that the power to enact the statute was in effect the exercise of the right to fix wages where, by reason of the dispute, there had been a failure to fix by agreement, it would simply serve to show the nature and character of the regulation essential to protect the public right and safeguard the movement of interstate commerce, not involving any denial of the authority to adopt it." In short, it is difficult to escape the conclusion that the Supreme Court regarded the Adamson Law as a regulation of interstate commerce, not because it dealt with the wages or hours of labor of railroad employees, but because its passage was demanded by an organization which was in a position to bring about a total cessation of interstate commerce if its demand was not acceded to. If this is true, then it would seem to follow that any legislation which forms the subject matter of the demands of a body of individuals possessing the power to bring interstate commerce to a standstill if those demands are not granted, must be regarded as a legitimate exercise of the power of Congress to regulate commerce, provided such legislation does not violate the due process of law clause or any other specific constitutional prohibition. This startling doctrine without doubt opens up some rather interesting possibilities in the way of broadening the scope of the national police power under the commerce clause.

The majority opinion in *Wilson v. New* is also interesting

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[92] Note 25, supra.

[93] Supra, p. 298.

because it asserts unequivocally that Congress could, without exceeding its constitutional powers, enact a new type of police regulation under the commerce clause: namely, a law providing for the compulsory arbitration of disputes between interstate carriers and their employees. In fact, Chief Justice White took the point of view that the Adamson Act was in effect the award of a tribunal before which the railroads and the brotherhoods had been compelled to arbitrate their differences. Instead of creating special machinery for such arbitration, Congress itself served as the arbitral tribunal and enacted its award into law. "We are of opinion," declared the chief justice, "that . . . the act which is before us was clearly within the legislative power of Congress to adopt, and that, in substance and effect, it amounted to an exercise of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing as to the subject matter of that dispute a legislative standard of wages operative and binding as a matter of law upon the parties,—a power none the less efficaciously exerted because exercised by direct legislative act instead of by the enactment of other and appropriate means providing for the bringing about of such result." While it was unnecessary to the decision of the case for the court to state whether or not it would regard the general scheme of compulsory arbitration applicable to interstate carriers constitutional, the dictum was couched in such language and the underlying principle of the whole case is such as to leave little room for doubt that the court would regard such a system as a legitimate exercise of the power to regulate commerce. Congress has enacted several laws aimed to provide facilities for the arbitration of labor disputes affecting interstate commerce,[94] but it has never made it obligatory upon the parties to such disputes to arbitrate; these laws providing for mediation, conciliation, and voluntary arbitration are not, therefore, police regulations in the sense in which that term is used in this article, since they subject no one to restraint or compulsion. It seems clear, however, in light of the utterances of the court in *Wilson v. New*, that the continuance of the voluntary system of arbitration is a matter to be settled by legislative discretion alone, and that as soon as Congress deems it expedient an effective system of

[94] Act of October 1, 1888, 25 Stat. at L. 501; Act of June 1, 1898, 30 Stat. at L. 424; Act of July 15, 1913, 38 Stat. at L. 738.

compulsory arbitration could be put into force without violating any provision of the constitution.

By way of summary of the ground covered thus far, it is apparent that no insignificant amount of legislation, social and economic in character, legislation which may properly be called national police legislation, has been passed by Congress in pursuance of its authority to protect and promote interstate commerce. In order to protect the lives, limbs, and property of those who are concerned with interstate commerce as passengers, shippers, or employees, Congress has enacted a most elaborate series of provisions relating to the physical appliances and regulations necessary to insure such safety. For the same purpose Congress has regulated in various ways the conditions under which the employees engaged in interstate commerce shall do their work. And the courts have taken a rather generous view of the amount of such welfare legislation which may be justified constitutionally upon the theory that it promotes the safety, reliability, and efficiency of interstate commerce. Finally, in order to prevent the obstruction of interstate commerce, Congress has been forced to deal with the complex problem of monopolies and combinations in restraint of trade, has imposed restrictions upon the freedom of action of organized labor, and, where collective bargaining has broken down, has assumed the role of an arbiter in disputes between labor and capital. In short, congressional responsibility for the safe, free, uninterrupted flow of commerce between the states carries with it the constitutional authority to legislate upon a wide range of problems, not commonly regarded as commercial in character, which vitally affect the national safety and welfare.

(To be continued.)

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FUTURE INTERESTS IN PROPERTY IN MINNESOTA

"ORIGINALLY the creation of future interests at law was greatly restricted, but now, either by the Statutes of Uses and of Wills, or by modern legislation, or by the gradual action of the courts, all restraints on the creation of future interests, except those arising from remoteness, have been done away. . . . This practically reduces the law restricting the creation of future interests to the Rule against Perpetuities,"[1] Generally in common law jurisdictions today there is but one rule restricting the creation of future interests, and that rule is uniform in its application to real property and to personal property, to legal and equitable interests therein, to interests created by way of trust, and to powers.

In 1830 the New York Revised Statutes went into effect in New York state. The revision had been prepared by a commission appointed for the purpose five years before. It contained a code of property law in which "the revisers undertook to re-write the whole law of future estates in land, uses and trusts . . . . powers, perpetuities, and accumulations, and to abolish the common law rules on these subjects. . . . They undertook in like manner to re-write the law of personal property relating to future interests, perpetuities, accumulation of income, and . . . . to abolish the common law rules on these subjects."[2] The provisions of this code relating to future estates, uses, trusts, and powers in real property were adopted, with a few unimportant variations, in the Revised Statutes of Michigan of 1847, in the Revised Statutes of Wisconsin of 1849, and in the Revised Statutes of Minnesota of 1851, and are now, with some additions, Chapters 59, 60 and 61 of the General Statutes of Minnesota of 1913. But these states did not adopt the provisions relating to personal property at all.

What the New York Revisers hoped to accomplish may be seen from the following excerpts from their report to the legislature:

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[1] Gray, Perpetuities, 3rd ed., Sec. 98.
[2] Canfield, New York Cases and Statutes on Trusts, ii.

"The provisions in relation to expectant estates, contained in this Article, are the result of much and attentive consideration, aided by a diligent examination of elementary writers and adjudged cases. They are submitted by the Revisers in the confident belief that their adoption will extricate this branch of the law from the perplexity and obscurity in which it is now involved, and render a system simple, uniform and intelligible, which, in its present state, is various, complicated and abstruse. . . .

"The principles by which the Revisers have been governed, in proposing the alterations contained in this chapter, and indeed throughout the revision, may be briefly stated. If a rule of law is just and wise in itself, apply it universally, as far as the reasons upon which it is founded extend, and in no instance permit it to be evaded; if it is irrational and fanciful, or the reasons upon which it is rested have become obsolete, abolish it at once. By adhering to these principles, we are well persuaded that the noblest of moral sciences may be redeemed from the complexity and mystery in which it is now involved; an immense mass of useless litigation be swept away, and an intelligent people, instead of complaining of the laws by which their rights are determined, as capricious, unintelligible or unjust, be led to confess their wisdom, and to rejoice in their mild and beneficent sway. . . .

"We have no difficulty in believing, that every man of common sense may be enabled, as an owner of real property, to know the extent of his rights, and the mode of their exercise; and as a purchaser, to judge, with some assurance, of the safety of the title he is desirous to acquire."

The New York Revisers not only failed to attain their object but, on the contrary, they led the people of the state into a morass of litigation. The laity understands the law no better and the profession not so well. Their attempt to improve on the common law rule against perpetuities caused only a part of this litigation, but of that attempt alone the most learned American authority on the law of property has said:

"Upon considering the New York statutes two remarks suggest themselves. *First*. Those statutes evidently start with the theory that the immediate object of the Rule against Perpetuities is to limit restraints upon alienation. This idea has been common, and decisions have been based upon it; but the difficulties and confusion arising therefrom have caused the idea to be recognized as erroneous, and the decisions to be overruled or disapproved. This erroneous theory is crystallized in the New York Statutes.

"*Secondly*. The common-law Rule of Perpetuities grew out of the ordinary usages of the community, and is fitted to them. A will drawn as testators generally wish their wills drawn does

not violate the Rule. The limit of lives in being is a natural limit. The Rule strikes down only unusual provisions. But the limit of two lives, fixed by the New York Statute, is an arbitrary limit. It cuts through and defeats the most ordinary provisions. To allow future estates, and yet to confine them within bounds so purely arbitrary, would seem to be an invitation to litigation. And so the event has proved.

"The joint effect of these two causes is that in no civilized country is the making of a will so delicate an operation, and so likely to fail of success, as in New York. Before the passage of the Revised Statutes there seems to have been but one case before the courts in that State in which the remoteness of a limitation was called in issue, and that presented only a simple question of construction. From the passage of the Revised Statutes down to the publication of the first edition of this treatise in 1886 there had been over one hundred and seventy reported cases on questions of remoteness. During the twenty-eight years since 1886, there have been some three hundred cases more, making a total little short of, if not over, four hundred and seventy cases. This enormous amount of litigation is perhaps as striking an illustration as could be found of the dangers attending radical legislation. Such legislation is indeed sometimes necessary, but it is not the simple work those engaged in it often suppose."[3]

Minnesota has already had some unfortunate experience with the operation of these statutes.[4] But there has been little litigation in the past compared with what the future holds in store. In pioneer times when land is plentiful and cheap, and when accumulations of wealth are few and small, dispositions of property are generally made outright, and wills and settlements are in simple form. But as land becomes valuable by scarcity or improvements, and as wealth accumulates, the desire of the owners to devote their property to charitable objects or to tie it up for the enjoyment of future generations increases. It is safe to say that the state has reached the stage where these attempts will multiply rapidly. As the law stands many proper and even laudable dispositions will be defeated and some objectionable ones will be sustained. These statutes are not yet a great part of the history of titles, or interwoven into the structure of the law of the state, as they have become in New York, but they will become so, with all their defects, unless thought is taken in time.

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[3] Gray, Perpetuities, 3rd ed., Secs. 748-750.

[4] See, for examples an article, Charitable Gifts and The Minnesota Statute of Uses and Trusts, by Professor Edward S. Thurston, 1 MINNESOTA LAW REVIEW 201, 218.

The New York property statutes even when all questions under them shall be settled (assuming that is possible) create a system of law arbitrary and crabbed in its nature. The revision had its merits, but in parts it was obscure, contradictory, and arbitrary, and as a whole incomplete. The resultant law is necessarily illogical and unsymmetrical as a system. And in Minnesota there are additional difficulties. The personal property provisions of the New York statutes were not adopted, which results in a diversity of rules in respect to subject matter which ought to be governed, and which it is the tendency of modern law to govern, by uniform rules.

The object of this article is to compare the common law rules with the statutory rules on certain matters; to indicate points of uniformity as well as of diversity; and to raise the question whether some changes should not be made in the present law.

The common law of Minnesota is composed of the common law of England as modified and amended by English statutes passed prior to the Revolution.[5] This common law of the state is in force except insofar as it has been modified by the constitution of the United States and by the constitution and statutes of the state. To ascertain what future interests in property may be created in Minnesota it will be well to trace the development of the several future interests (1) under the common law of England; (2) under the English amendatory statutes; and (3) under the state constitution and statutes.[6]

A. In Real Property, at Law

At law, before the Statute of Uses (1535) the important rights in real estate, future in respect to the time of coming into possession, were: (1) Escheat; (2) Possibility of Reverter; (3) Reentry for Condition Broken; (4) Reversions; (5) Remainders. The future rights brought into the law by the Statute of Uses (1535) were: (6) Springing Uses and Shifting Uses. The Statute of Wills (1540) introduced: (7) Executory Devises. Of these, the first four were rights of the grantor or of the devisor's heirs; the others were generally rights to third persons. All of these still subsist in Minnesota, although sometimes modified in name and incidents.[7]

[5] Dutcher v. Culver, (1877) 24 Minn. 584, 617.
[6] The federal constitution does not affect the subject.
[7] Gray, Perpetuities, 3rd ed., Secs. 7, 52 et seq.

Escheat

Escheat under the common law is classed as a future interest. By the theory of the English common law there was no absolute ownership of land by subjects. The Crown held in allodial, that is, absolute ownership, but the most that a subject could have in land was a fee[8] estate held, mediately or immediately, of the Crown for some kind of service. This was feudal tenure and it was attended by various incidents.[9] One of these incidents was escheat. Escheat was the right of the lord of whom the fee estate was held to have the land back again on the termination of the tenant's estate. The fee estate might be terminated by the tenant's death without heirs of his blood, or by his committing a felony which worked a corruption of blood and blotted out its inheriting quality. The escheat was to the immediate lord of whom the fee estate was held.[10]

Originally the tenant of the fee estate could, by subinfeudation, grant to another a fee estate in the land to be held immediately of the grantor. Thus if the Crown granted a fee to A, A could in turn grant a fee to B, and B to C, each tenant holding immediately of his grantor, but mediately of the grantor's lord, and so ultimately of the Crown.[11] At this time one fee was not regarded as the exact equivalent of another. The practical possibility that one fee might terminate before another had recognition in the law. B or his heirs might become entitled to possession of the land by defect of heirs to C before the fee to B was determined. B had, in the meantime, the overlordship or seignory, and escheat was one of the rights of seignory.[12] The seignory of B might escheat to A in the same manner, but that was not so valuable a right as the escheat of the land itself. "Instead of

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[8] The word fee (feodum, feudum, feud, fief) has a double meaning. Originally it meant a parcel of land held as a reward for service. The fee was not necessarily held as an inheritance. 2 Bl. Com. 221. But when fees became inheritable, the word was used to denote the extent of the tenant's interest in them. It would not be incorrect to say that the tenant held his fee in fee. The word is here used in the latter sense. 2 Bl. Com. 104-106.

[9] Co. Lit. 65a; 2 Bl. Com. 59, 60.

[10] 2 Bl. Com. 72.

[11] Gray, Perpetuities, 3rd ed., Sec. 20; Digby, Hist. Law Real Prop., Chap. 4 Sec. 5; P. & M. Hist. Eng. Law, I, pp. 310-312.

[12] P. & M. Hist. of Eng. Law, II, p. 3; Leake, Law of Property in Land, 2nd ed., 20. "It has been truly said; in the beginning of feodal tenure this right was a strict reversion. The grant determined by failure of heirs; the land returned as it did upon the expiration of any less temporary

enjoying the land forever, he may get but a trifling rent."[13] This loss to the lords in the right of escheat and in other incidents of tenure, as Wardship and Marriage, led to the celebrated Statute *Quia Emptores*,[14] which prohibited further subinfeudation.[15] The statute permitted the tenant to alien, but provided that the alienee of the fee estate should hold not of the alienor, but of the alienor's lord. The statute made fees equivalent in law, substituted the new for the old, and wiped out the seignory of the alienor. Thereafter no more mesne lords could be interposed between the Crown and the ultimate fee tenant.[16] On future Crown grants the rights of escheat of the land would remain in the Crown.

Tenure as modified by the Statute *Quia Emptores* is the American common law.[17] On the Revolution the state succeeded to the rights of the Crown and of the proprietors.[18] . The right of escheat was therefore in the state.[19]

The constitution of Minnesota provides that "All lands within this state are declared to be allodial, and feudal tenures of every

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interest. 'Twas no fruit but the extinction of tenure (as Mr. Justice Wright says), 'twas the fee returned." Per Lord Mansfield in Burgess v. Wheate, (1759) 1 W. Blk. 123, 163. Compare the right of a tenant for life in reversion subject to a long term for years.

[13] P. & M. Hist. of Eng. Law, I, p. 311; Digby, Hist. Law Real Prop. Chap. 4 Sec. 5.

[14] (1290) 18 Edw. I Chap. 1.

[15] The statute did not abolish the subinfeudation already effected.

[16] The Crown was not within the statute. The immediate tenant of the Crown could not alien without license, but by license of the Crown he could alien the fee to be held of himself. Leake, Dig. Land Law 28; Challis, Real Prop., 2nd ed., 20. Some of the original proprietors in America were authorized by their charters to grant the land to be held of themselves. Lucas, Chart. 95, 117, quoted, Gray, Cases on Property, I, p. 330; The People v. Van Rensselaer, (1853) 5 Seld. (N.Y.) 334.

[17] Van Rensselaer v. Hays, (1859) 19 N. Y. Rep. 73. "Land was held of the Crown in Colonial times, and it does not seem that so fundamental an alteration in the theory of property as the abolition of tenure would be worked by a change of political sovereignty. Tenure still obtains between a tenant for life or years and the reversioner; and so in like manner, it is conceived, a tenant in fee simple holds of the chief lord, that is, of the State." Gray, Perpetuities, 3rd ed., Sec. 22.

[18] Kent, Comm., III, p. 509.

[19] Whether tenure ever existed in Minnesota is doubtful, and now immaterial. On this question see Gray, Perpetuities, 3rd ed., Sec. 23; an article, Land Tenure and Conveyances in Missouri, by Prof. M. O. Hudson, The University of Missouri Bulletin, Law Series 8; Cf. Minneapolis Mill Co. v. Tiffany, (1876) 22 Minn. 463; Dutcher v. Culver, (1877) 24 Minn. 584, 617.

description, with all their incidents, are prohibited."[20] This provision might have destroyed the state's right of escheat and enabled any occupant to hold lands of an intestate decedent with-

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[20] (1857) Art. 1, Sec. 15. Although courts have frequently referred to the abolition of tenure, it is doubtful if such legislation has any practical importance. Technically it changed the nature of escheat. Also a rent reserved by the state on the grant of a fee would be not a rent service but a rent charge or rent seck, which have somewhat different incidents from a rent service. But it has no other practical result. Tenure was originally attended by various services and burdensome incidents. But by Statute 12 Chas. II (1660) Chap. 24 military tenure was abolished and turned into socage, and several incidents of socage were abolished. Co. Lit. 93b, Hargrave's note 95. The tenure established in America was socage. Van Rensselaer v. Hays, (1859) 19 N. Y. Rep. 73. By force of *Quia Emptores*, the tenant in fee held, after the Revolution, directly of the state. On this tenure the only service was the fixed rent reserved by the state, and the only incidents that could remain to this tenure in America were reliefs, escheat, and fealty. Relief was a year's rent, and if no rent was reserved there was no relief. Co. Lit. 85a, Hargrave's note 55. A fee held of the state without reservation of rent is for practical purposes the equivalent of allodial ownership with escheat provided for by statute.

"This tenure (free and common socage) has all the advantages of allodial ownership. The dominium utile vested in the tenant comprises the sole and undivided interest in the soil. Escheat is the only material incident of this tenure beneficial to the lord; and while there is an heir or devisee, he can in no way interfere.

"The tenant in fee simple of socage land can of his own authority create in it any estates and interests not contrary to the general rules of law; he can alien it entirely or devise it to whom he pleases, and the alienee or devisee takes directly from him, so that the title is complete without the concurrence or privity of the lord." Real Prop. Comrs., Third Rep., (1833) 7.

The mere abolition of tenure did not affect the great structure of real property law which had been builded under its influence. A perpetual rent may still be reserved on the conveyance of a fee. Minneapolis Mill Co. v. Tiffany, (1876) 22 Minn. 463. (Quaere as to agricultural lands. Const., Art.1, Sec. 15, Clause 2.)

"The principles of the feudal system, in truth, underlie all the doctrines of the common law in regard to real estate, and wherever that law is recognized recourse must be had to feudal principles to understand and carry out the common law. The necessity of words of limitation in deeds—the distinction between words of limitation and words of purchase—the principle that the freehold shall never be in abeyance, that a remainder must vest during the continuance of the particular estate or eo instanti that it determines, that the heir cannot take as a purchaser an estate the freehold of which by the same deed is vested in the ancestor—and many more rules and principles of very great practical importance, and meeting us at every turn in the American as well as in the English law of real estate—are all referrible to a feudal origin. 'The principles of the feudal system,' said Chief Justice Tilghman, 'are so interwoven with our jurisprudence that there is no removing them without destroying the whole texture.' Lyle v. Richards, 9 S. & R. 333. 'Though our property is allodial,' said Chief Justice Gibson, 'yet feudal tenures may be said to exist among us in their consequences and the qualities which they originally imparted to estates; as, for instance, in precluding every limitation founded on an abeyance of the fee.' McCall v. Neely, 3 Watts 71." 2 Bl. Com. 78, Sharwood's note.

out heirs.[21] But the statutes provide that "if the intestate leave no spouse nor kindred, his estate shall escheat to the state."[22] This escheat by statute is a right of succession, instead of the reversionary interest which it was at common law. Escheat is therefore no longer a future interest in Minnesota.[23]

Possibility of Reverter

Possibility of reverter is the interest remaining in a tenant in fee simple after he has granted a fee determinable by a special or collateral limitation.[24] All estates in land may be made deter-

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[21] The Crown's right of escheat depended on tenure and extended only to lands held immediately of it. Williams, Real Prop., 17th ed., 60. Conversely, interests in lands not connected with tenure of the Crown did not escheat to the Crown. On this principle there was no escheat of an equitable fee. Burgess v. Wheate, (1759) 1 Eden 177. (Otherwise now in England by statute 47 & 48 Vict., Chap. 71 Secs. 4, 7. Challis, Real Prop., 3rd ed., 38.) So there was no right in the Crown to an estate pur autre vie on the death of the tenant before the other life, but it went to the first occupant. Co. Lit. 41b; See Lord Blackburn in Bristow v. Cormican, (1878) L. R. 3 App. Cas. 641, 647. The Crown succeeded to personal property on the death of the owner without kin, as ultimus haeres. Lord Mansfield in Burgess v. Wheate, (1759) 1 W. Black, 164, 2 Bl. Com. 505. This is a right of succession and is to be distinguished from escheat, or a "falling back" of the land to the lord. So the Crown succeeded to a trust of personalty on the death of the cestui que trust without kin. Gray, Perpetuities, 3rd ed., Sec. 205, note. It was said obiter in a celebrated case that tenure ceased ipso facto on the Revolution, and that, in the absence of statute, the state would succeed to land, on the death of the owner without heirs, not by escheat but as ultimus haeres; and on that principle should likewise succeed to an equitable fee. Matthews v. Ward, (1839) 10 Gill & J. (Md.) 443. But in a very recent case the same court decided that the state could not, without the aid of a statute, take an equitable fee owned by no one, because "under the common law the trustees were competent to receive and hold the property as against the state, and because they could render the services required by the feudal principles of tenure." State v. American Colonization Soc., (Md. 1918) 104 Atl. 120.

[22] G. S. Minn. 1913, Sec. 7238 (8). There was a statutory provision for escheat carried over from the Territory of Wisconsin, in force before the constitution was adopted. Laws of Minn. 1849, Chap. 63 Sec. 38. Whether there would be escheat of an equitable fee under the present statute is undecided. See note 21, supra. Cf. the right of a widow to dower in an equitable fee under the first part of the same section, which right would not exist at common law. Kasal v. Hlinka, (1912) 118 Minn. 37, 136 N. W. 569; 2 Minnesota Law Review 61. An equitable fee was held to escheat without express statutory provision, in Johnston v. Spicer, (1887) 107 N. Y. 185. 13 N. E. 753. There is no escheat for felony. Const., Art. 1, Sec. 11; G. S. Minn. 1913, Sec. 8499.

[23] Gray, Perpetuities, 3rd ed., Sec. 205, note.

[24] See Challis, Real Prop., 2nd ed., 251-262; Tiffany, Real Prop. p. 188-195.

minable by a special or collateral limitation.[25] When the estate created leaves a reversion in the grantor the future interest arising by force of the special limitation is incident to and merged in the reversion and is not regarded as a separate interest. Thus on an estate to B for life while she remains single, the reversion in the grantor may be accelerated by the special limitation, but the possibility of acceleration is not considered as an interest apart from the reversion. But a fee determinable by a special limitation is not regarded as leaving a reversion in the grantor, but only a possibility of reverter. These bare possibilities are here considered.

There is no doubt that by the early common law A might convey land to B and his heirs while they continue tenants of the Manor of Dale, or to B and his heirs so long as the land is used for the support of a school, or on other special limitations.[26] B's present estate is most accurately called a determinable fee.[27] This estate might come to an end by force of the special limitation and A be *in* of his former estate without entry or other act.[28] A had in the meantime a possibility of reverter.

Several learned writers maintain that fees could not, on principle, be created determinable by a special limitation after the passage of the Statute *Quia Emptores*, that the special limitation would be void, and the fee a fee simple absolute. The argument runs that the possibility of reverter is a reversionary interest which implies tenure; that the statute prevented tenure arising between the grantor of an estate in fee and his grantee; and that there can consequently be no possibility of reverter remaining in the grantor upon the conveyance of a fee, and the attempted limitation to that end is of no effect.[29] Two other opinions on

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[25] Tiffany, Real Prop. p. 190.

[26] See Challis, Real Prop., 3rd ed., 255, for many examples. Apt words to introduce the special or collateral limitation are, *while, so long as, until, during*. Mary Portington's Case, 10 Co. 35a, 41b, 77 E. R. 976.

[27] Sometimes called a base, or qualified fee, or a fee subject to a special or collateral limitation. The first two terms have other more proper uses. Tiffany, Real Prop. p. 192, note; an article, Determinable Fees in American Jurisdictions, by Mr. John Maxey Zane, 17 Harv. Law Rev. 297. *Special* or *collateral* limitation is also to be distinguished from *conditional limitation*, which in its proper signification is no part of the limitation of the grantee's estate, but cuts it short and substitutes another in its stead, in favor of a third party. Gray, Restraints on Alienation, 2nd ed., Sec. 22, note. For the difference between a determinable fee and a fee on condition subsequent, see post p. 335.

[28] Co. Lit. 214b.

[29] Gray, Perpetuities, 3rd ed., Sec. 31.

principle have been given, both sustaining the validity of determinable fees, and so of possibilities of reverter. They differ, however, as to the person in whom the possibility subsists. One claims "that when the limitation comes to an end the land will fall into the hands of the lord of the fee by a right somewhat in the nature of an escheat."[30] The other maintains that the Statute *Quia Emptores* applies only to a fee simple absolute; that a tenure still arises between the grantor of a determinable fee and his grantee, and that the possibility of reverter is in the grantor.[31] But whichever opinion is correct on principle, and whatever the holding of the English cases,[32] the last opinion coincides with the decisions of the American courts. Both in states where tenure exists and *Quia Emptores* is in force, and in states where tenure has been abolished, possibilities of reverter have been upheld by the courts.[33]

It is to be remembered that all three opinions make determinable fees depend upon tenure, and tenure is abolished in Minnesota. It might seem that, if *Quia Emptores* would prevent the creation of determinable fees in land because under the Statute no tenure could arise between the grantor and grantee thereof, the abolition of tenure would work a like result. And the late Professor Gray, the most earnest advocate of this view, so maintained.[34] But does this result necessarily follow? It might be argued that it was the new tenure created by the Statute *Quia Emptores* between the grantee and the grantor's lord, and not merely the prohibition of tenure between grantee and grantor, that prevented determinable fees, and that the entire abolition of tenure would leave the grantor free to create such estates upon such limitations as were allowed by the common law. There is a rule that estates unknown to the law cannot be created; but determinable fees were not unknown to the law. The abolition of tenure does not prevent the creation of estates less than absolute ownership held by an "imperfect" tenure[35] of the owner or held of no one.[36] If

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[30] Gray, Perpetuities, 3rd ed., Appendix E; 2 Law Quart. Rev. 394.
[31] 3 Law Quart. Rev. 399; Challis, Real Prop., Appendix IV.
[32] See Gray, Perpetuities, 3rd ed., Secs. 32-37.
[33] See Gray, Perpetuities, 3rd ed., Secs. 38-40a (collecting cases); Kales, Future Interests, Sec. 126.
[34] Gray, Perpetuities, 3rd ed., Sec. 39.
[35] Tiffany, Real Prop. p. 85, 271.
[36] At common law if A conveyed to B for life, B held of A; but if A gave remainder to C in fee, B did not hold of A or of C, but both B and

land is conveyed to A and his heirs so long as it is used for the support of a school, may there not be such an imperfect tenure between the grantor, tenant in fee simple absolute, and the grantee, tenant of a determinable fee? Or does the abolition of tenure make the interest conveyed, not only allodial ownership, but an unqualified allodial ownership? Professor Gray admitted that since rents charge are not held of anyone, an existing rent charge may be granted in fee simple determinable.[37] Does not the same reasoning apply to lands which are not, in the feudal sense, held of anyone?

In Minnesota, apart from the constitutional article abolishing tenure, there is no legislation to prevent the creation of determinable fees. The provision as to present estates reads: "Every estate of inheritance shall continue to be termed a fee simple, or fee; and every such estate, when not defeasible or conditional, shall be a fee simple absolute or an absolute fee."[38] This language is broad enough to permit of determinable fees. In *Flaten v. Moorhead*[39] land was conveyed to a municipal corporation "to be forever held and used as a public park" and it was held that "an absolute title in fee did not pass to the village." Cases in New York and Wisconsin, which have no tenure and have statutes identical with Minnesota's, sustain the validity of determinable fees, and the possibilities of reverter attendant upon them. In *Leonard v. Burr*[40] land was devised to A "until Gloversville be incorporated as a village," and it was held that on incorporation the land reverted to the devisor's heirs. And in *Daniels v. Wilson*[41] land was conveyed to a county for county purposes so long as the county seat remained in the village where the land lay, and it was held that on removal of the county seat the land reverted to the grantor. There would seem to be little doubt that land in

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C held of A's lord. Williams, Real Prop., 18th ed., 318. Tenure abolished, B can not hold of anyone.

[37] "Rents charge are not held of anyone; and if A, who has a rent charge in fee, grants it for a less estate to B, B does not hold of A; so it would seem that the statute *Quia Emptores* does not inhibit a rent charge being created de novo in fee simple determinable, nor an existing rent charge being granted in fee simple determinable; and that the law is the same as to other like incorporeal hereditaments, such as profits and easements in gross. There is next to nothing in the books on the subject; but cf. A. G. v. Cummins, [1906] 1 I. R. 406." Gray, Perpetuities, 3rd ed., Sec. 31, note 4.

[38] G. S. 1913, Sec. 6653.

[39] (1892) 51 Minn. 518, 53 N. W. 807, 19 L. R. A. 195.

[40] (1858) 18 N. Y. 96.

[41] (1871) 27 Wis. 492.

Minnesota may be limited in fee determinable by a special or collateral limitation, leaving a possibility of reverter in the grantor.

There is one class of cases in which the problem of determinable fees is of present practical importance. The Minnesota statutes have been construed to abolish charitable trusts.[42] So a gift of property to natural persons as trustees for a charitable purpose where the beneficiaries are indefinite is void.[43] But the courts, in their commendable endeavor to sustain charitable gifts, have held that gifts to a corporation organized, or about to be organized, for charitable purposes, to be applied to these purposes, are "valid not as a trust, but as a gift upon condition, though the ultimate beneficiaries of the gift are more or less uncertain."[44] Since the gifts are ex ratione not in trust, the limitations as to use must inhere in the legal title of the donee corporation.

The gifts upheld by this reasoning were of mutable personalty or convertible realty, and it is difficult to explain, on recognized principles, how either conditions subsequent or special limitations can be made to qualify the legal title not only to the original property, but also to the property that may be substituted in its stead.[45] But when the gift is of real property and the donor limits the very property donated (as distinguished from the proceeds) to be used only for the purpose specified on the donation, the problem offers no difficulty. Such gifts would, however, be fees determinable on a special limitation, leaving a possibility of reverter in the donor, rather than fees on condition subsequent, with a right of re-entry in the donor. It is contrary to all rules of construction to hold that a restric-

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[42] See article by Professor Edward S. Thurston, Charitable Gifts in Minnesota, 1 MINNESOTA LAW REVIEW 201, 224.

[43] Shanahan v. Kelly, (1903) 88 Minn. 202, 92 N. W. 948.

[44] Per P. E. Brown, J., in Young Men's Christian Ass'n v. Horn, (1913) 120 Minn. 404, 415, 139 N. W. 806; and see cases cited 1 MINNESOTA LAW REVIEW 224, note 100.

[45] In Cone v. Wold, (1902) 85 Minn. 302, 88 N. W. 977, it was held that there was a resulting trust of the funds when the corporation could no longer carry out the conditions annexed to the gift. But since there can be a resulting trust only when the trustee's legal title outlasts the equitable, the decision connotes that the corporation has the absolute legal title and that only the equitable title is qualified. And this qualification of the equitable title imports a trust in the corporation. (See Gray, Perpetuities, 3rd ed., Sec. 603i.) But the reasoning of the cases under discussion is that there is no trust at all.

tion as to use, without more, creates a condition subsequent.[46] It is, on the other hand, sound on principle, and supported by authority to construe such gifts as creating determinable fees.[47] Under such a construction the donor cannot insure that his purposes will be carried out, but he can secure to himself, or to his heirs, a right to recover the property, if the purposes for which it is limited are disregarded.

If the donor does not expressly limit the fee to determine upon cesser of the use, but conveys it to the charitable corporation without qualification, a different problem arises. It is said by Coke that the law will annex the purpose of the corporation to the fee, so that it will be determined by the dissolution of the corporation, and the land will not go to the lord by escheat but will revert to the donor. Professor Gray maintained that the lands escheat to the lord of whom they are held and that Coke was misled by the cases where the escheat was to the donors because the fees were held of them in frankalmoign tenure. And the English decisions support this view. But one American jurisdiction supports Coke's statement and holds that on the dissolution of a charitable corporation lands donated to it will revert to the donor or his heirs.[48]

The possibility of reverter was, at common law, inheritable and releasable, but not alienable or devisable.[49] It is a bare possibility, not an estate, but "the mere remembrance of a condition upon which a present estate may be defeated, and a future one

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[46] In Farnham v. Thompson, (1885) 34 Minn. 330, 26 N. W. 9, a deed of land to a charitable corporation "for the purpose of erecting a church thereon only" was held not to create a condition subsequent. The court said: "Such conditions are not favored in law because they tend to defeat estates vested and are in the nature of forfeitures. Therefore it is in such cases a rule recognized by all the authorities that an estate on condition cannot be created by deed except when the terms of the grant will admit of no other construction." The question whether the gift might not be construed as a determinable fee is not discussed.

[47] Flaten v. Moorhead, note 39, supra; Mott v. Danville Seminary, (1889) 129 Ill. 403, 21 N. E. 927; same case (1891) 36 Ill. 289, 28 N. E. 54; North v. Graham, (1908) 235 Ill. 178, 85 N. E. 267; First Universalist Society v. Boland, (1892) 155 Mass. 171, 29 N. E. 524; Pond v. Douglass, (1909) 106 Me. 85, 75 Atl. 320; Board of Chosen Freeholders v. Buck, (1912) 79 N. J. Eq. 472, 82 Atl. 418; Gray, Perpetuities, 3rd ed., Secs. 40 (2a), 40a, 41a, 51a, 601i; Kales, Future Interests, Sec. 126.

[48] Gray, Perpetuities, 3rd ed., Secs. 44-51a; Mott v. Danville Seminary, ubi supra; Kales, Future Interests, Sec. 126.

[49] Gray, Perpetuities, 3rd ed., Secs. 13, 14.

arise."[50] And as rights of re-entry for breach of a condition subsequent continue inalienable under the Minnesota statutes, possibilities of reverter are also likely to be so held.[51]

Possibilities of reverter are not affected by the common law rule against perpetuities (remoteness).[52] Neither does the statutory rule against perpetuities (restraints on alienation)[53] apply to them. They may be released by the donor or his heirs, and so there are always persons in being capable unitedly of conveying an absolute fee simple in possession, which satisfies the statutory rule.[54]

It is a question whether the power to create determinable fees is not contrary to sound public policy.[55] It has been said that the event upon which a determinable fee is limited "must be of such a kind that it may by possibility never happen at all."[56] The same learned author distinguishes fees determinable upon an event "which admits of *becoming impossible to happen,*" such as the marriage or death of a person, and those determinable upon an event "which must *forever* if it does not actually happen, remain *liable to happen,*" such as the fall of a particular building. Fees of the former class must either determine or become fees simple absolute at the death of the person named, and are not objectionable. But fees of the latter class can never be enlarged into fees simple absolute, except by a release of the possibility of reverter.[57] Such are open to the objection that the possibility hinders the full enjoyment and alienation of the estate by the tenant.[58] There is no limit in time either by the common law or by the statutes of Minnesota within which such fees must determine, or beyond which the possibility of reverter in the grantor, or his heirs, may not ripen into a right to possession of the land.[59]

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[50] Adams v. Chaplin, (1830) 1 Hill Ch. (S. C.) 265, 277; see Pemberton v. Barnes, (1899) L. R. 1 Ch. D. 544, 68 L. J. Ch. 192, 80 L. T. R. 181, 47 W. R. 444.

[51] See note 73, post.

[52] Gray, Perpetuities, 3rd ed., Secs. 41, 312.

[53] G. S. Minn. 1913, Secs. 6664, 6665.

[54] Mineral Land Investment Co. v. Bishop Iron Co., (1916) 134 Minn. 412, 159 N. W. 966, L. R. A. 1917D 900.

[55] Gray, Perpetuities, 3rd ed., Sec. 312.

[56] Challis, Real Prop., 3rd ed., p. 251.

[57] Ibid., p. 254.

[58] Determinable fees are alienable unless the alienation brings the special limitation into operation, in which case the fee will be determined. First Universalist Society v. Boland, note 47, supra. But they continue subject to the special limitation in the hands of alienees.

[59] In Attorney General v. Cummins, [1906] 1 I. R. 406, a possibility of

RIGHT OF RE-ENTRY FOR CONDITION BROKEN

All estates in land may be granted on condition subsequent. Such a condition does not hinder the creation of the estate, or its becoming a right in possession, but it introduces a contingent right in the grantor to end the estate before it would determine by the terms of its own limitation. This possibility ripens into a present right to end the estate upon breach of the condition. Thus the condition creates a possibility of a right of re-entry, which the breach turns into a present right, the exercise of which destroys the estate of the grantee and restores the grantor to his original relation to the land. As a future interest it would be more descriptively called a possibility of a right of re-entry.

A right of re-entry can be reserved only to the grantor and his heirs. And originally the right could not in any case be transferred to any other person. So if a lease were made for life or years on condition, an assignee of the reversion could not re-enter by force of the condition.[60] But by statute 32 Hen. VIII, Chap. 34, assignees of reversions on leases for life or years were empowered to re-enter for breach of the conditions in the leases.[61] The statute made the right of re-entry pass in these cases as incident to the reversion where there was one. The statute did not affect the right of re-entry in other cases. But no reversion is necessary to the reservation of a right of re-entry. It may be made on a conveyance in fee or on the assignment of any estate, which leave no reversion in the grantor or assignor.[62] It is with these bare rights of re-entry that we are here concerned.

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reverter in a rent became effective more than two centuries after the creation of the determinable fee therein.

[60] Lit. 346, 347.

[61] Co. Lit. 215a.

[62] In Ohio Iron Co. v. Auburn Iron Co., (1896) 64 Minn. 404, 67 N. W. 221, it is said, and in Cameron Tobin Baking Co. v. Tobin, (1908) 104 Minn. 333, 116 N. W. 838, it is decided, that a tenant of a term for years cannot create a condition subsequent, in the assignment of his term, because "The right of re-entry cannot exist as an independent condition, but only as an incident to an estate or interest for the protection of which it is reserved." This decision is opposed to the well-considered case of Doe d. Freeman v. Bateman, (1818) 2 B. & Ald. 168, 106 E. R. 328. The English court points out that as conditions subsequent on conveyances of the fee are valid, no reversion can be necessary to create them. As the assignor of a term usually continues under contractual liability to his landlord on the covenants in the lease, he has the greater need of a right of re-entry to save himself from the incidence of that liability through repeated acts of the assignee who may become financially irresponsible. As rights of re-entry on conveyances in fee are clearly valid in Minnesota, the

Courts often fail to distinguish fees determinable by a special limitation from fees on condition subsequent. The right created in the grantor by a condition subsequent in the grant is indiscriminately called a possibility of reverter and a right of re-entry.[63] They differ, however, somewhat in form[64] and greatly in legal effect. A special limitation is a part of the limitation of the estate itself marking the limit of it, while a condition subsequent is extrinsic to the limitation of the estate, but provides for cutting short the estate previously limited. It follows that the estate on special limitation is determined by the operation of the limitation itself, but the estate on condition is not ended ipso facto by the breach of the condition. The grantor must claim the forfeiture of the estate in the grantee before it is determined.[65] Estates may be made determinable by special limitations on an event which would be void as a condition subsequent. An estate to A so long as she remains single is good; but to A on condition she do not marry is void.[66] By the operation of a special limitation the grantor is *in* of his former estate without any act on his part, and can restore the estate to his grantee only by a reconveyance; but after breach of condition the grantee's estate continues until the grantor enters, or does some act necessary to perfect the forfeiture, and the grantor need only waive the forfeiture, to confirm the grantee in his former estate.[67] Again the grantor of the fee determinable by special limitation, being *in* by the operation of the limitation alone, may without entry convey his estate, a present one without entry, to another; but the grantor of the fee on condition subsequent cannot convey any interest until he has entered for the forfeiture.[68] Finally, although it has

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reasoning of Cameron Tobin Baking Co. v. Tobin seems unwarranted, and it is submitted that the decision cannot be supported.

[63] Rice v. Boston, etc., R. Corp., (1866) 12 Allen (Mass.) 141; Upington v. Corrigan, (1896) 151 N. Y. 143; 45 N. E. 359, 37 L. R. A. 794.

[64] See note 26, supra. "While certain words are said to be appropriate for the creation of a condition, such as 'on condition,' 'provided,' 'so that,' no particular words are required, it being purely a question of the intention of the grantor or devisor as gathered from the whole instrument. Nor does the presence of such conditional words necessarily create a condition. A reservation of the right of re-entry on the happening of a contingency will usually render the estate one on condition." Tiffany, Real Prop., p. 162.

[65] Tiffany, Real Prop., p. 188 et seq.

[66] See note, Gray, Cases on Property VI, p. 31; and an elaborate annotation, 4 B. R. C. 106, 128.

[67] McCue v. Barrett, (1906) 99 Minn. 352, 109 N. W. 594.

[68] Mott v. Danville Seminary, note 47, supra; Kales, Future Interests, Sec. 126.

been strongly urged that fees determinable by special limitation were rendered impossible by the Statute *Quia Emptores,* rights of re-entry were clearly not affected by the statute or by the abolition of tenure.[69]

Rights of re-entry reserved on conveyances of the fee are valid both by the common law and under the Minnesota statutes.[70] Re-entry is no longer necessary, but there must be some act to perfect the forfeiture.[71] The right of re-entry may be expressly or impliedly waived[72] or released, but it cannot be granted or devised either before or after breach at common law.[73] The attempted conveyance of the right destroys it.[74] It can only descend to the heirs of the grantor. The Minnesota statutes provide that: "Expectant estates are descendable, devisable, and alienable in the same manner as estates in possession."[75] Contingent remain-

[69] "The distinction between a right of entry for condition broken and a possibility of reverter is this: after the Statute, a feoffor by the feoffment substituted the feoffee for himself as his lord's tenant. By entry for breach of condition, he avoided the substitution, and placed himself in the same position to the lord which he had formerly occupied. The right to enter was not a reversionary right coming into effect on the termination of an estate, but was the right to substitute the estate of the grantor for the estate of the grantee. A possibility of reverter, on the other hand, did not work the substitution of one estate for another, but was essentially a reversionary interest—a returning of the land to the lord of whom it was held, because the tenant's estate had determined." Gray, Perpetuities, 3rd ed., Sec. 31.

[70] Dunnell, Digest, Secs. *2675-2679.*

[71] Sioux City, etc., R. Co. v. Singer, (1892) 49 Minn. 301, 51 N. W. 905; Little Falls Water Power Co. v. Mahan, (1897) 69 Minn. 253, 72 N. W. 69. Actual re-entry became unnecessary to maintain ejectment, because, by the procedure, entry had to be confessed by the defendant under the consent rule, in order to be admitted to defend. Abolition of livery of seisin also affected the matter, for, as the estate might thereafter begin without entry, it might be ended without it.

[72] McCue v. Barrett, note 67, supra.

[73] Rice v. Boston, etc., R. Corp., note 63, supra; Methodist Church v. Young, (1902) 130 N. C. 8, 40 S. E. 691; contra (as to devise), Austin v. Cambridgeport Parish, (1838) 21 Pick. (Mass.) 215. The cases are collected in 60 L. R. A. 750, 23 L. R. A. (N.S.) 938.

[74] Rice v. Boston, etc., R. Corp., note 63, supra; Wagner v. Wallowa Co., (1915) 76 Ore. 453, 148 Pac. 1140, L. R. A. 1916F 303. In a valuable note to the last named case in L. R. A. and in 23 L. R. A. (N.S.) 938 the learned annotators point out that before breach rights of re-entry were inalienable, because they were mere possibilities which the early law deemed incapable of transfer, and after breach because of the statutes against champerty and maintenance, and that in both cases they were destroyed by an attempted conveyance, by force of these statutes. The judicial attitude towards the assignment of choses in action and towards champerty and maintenance having changed, the reasons for the old rules have disappeared. Yet in most jurisdictions they continue inalienable and destructible. The whole doctrine, it is concluded, "should be consigned to the judicial junk heap."

[75] G. S. Minn. 1913, Sec. 6685.

ders are deemed expectant estates within the meaning of the statute and so are alienable, but it is held that rights of re-entry are not estates, but mere possibilities, and they continue inalienable as at common law.[76] The fee subject to the condition may be aliened, but "although the same do pass through the hands of an hundred men, yet it is subject to the condition still."[77]

There is a conflict of authority on the question whether rights of re-entry must be restricted as to time to satisfy the common law rule against perpetuities (remoteness). It has been urged that, as these rights were recognized centuries before the rule against perpetuities developed, it would be an anachronism to apply the rule to them.[78] But in England they have recently been held to come under the rule,[79] and consequently, where by their terms they might remain contingent more than twenty-one years after the termination of lives in being at their creation, they are void from the start. In America, however, the rule is not applied to them. After an exhaustive examination of the American cases Professor Gray says:

"Though rights of entry for condition broken are within both the letter and the spirit of the Rule against Perpetuities; though there is nothing in the history of the Rule to exempt them from its operation; though they are held to be subject to it in England; though the practical inconvenience of excluding them is very great; and though this inconvenience is especially great in America, where the heirs from whom a release must be sought may, and often do, multiply enormously with every succeeding generation,—yet in America conditions violating the Rule against Perpetuities have been repeatedly upheld, and forfeitures for their breach enforced. . . .

"This great consensus of authority, although without any consideration of the question involved, may perhaps be held to settle the law for the United States, and to create in this country an exception, arbitrary though it be, to the Rule against Perpetuities."[80]

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[76] Little Falls Power Co. v. Mahan, note 71, supra; Upington v. Corrigan, note 63, supra. They are now alienable and devisable in England by Statutes 1 Vict., Chap. 26 Sec. 3, and 8 & 9 Vict., Chap. 106 Sec. 6. Pemberton v. Barnes, note 50, supra. They are likewise alienable and devisable in several American jurisdictions, by force of statutes. Southard v. Central R. Co., (1856) 26 N. J. L. 13, and note in 23 L. R. A. (N. S.) 938.

[77] Shep., Touch. 120; Sioux City, etc., R. Co. v. Singer, note 71, supra.

[78] Challis, Real Prop., 3rd ed., 187-190.

[79] In re Hollis' Hospital, (1899) L. R. 2 Ch. 540, 47 W. R. 691; In re Da Costa, (1912) L. R. 1 Ch. 337.

[80] Gray, Perpetuities, 3rd ed., Secs. 304, 310.

In Minnesota it is clear that rights of re-entry are not affected by the statutory rule against perpetuities (restraints on alienation).[81] The rights may be released, and there are, consequently, always persons in being who may by releasing to, or joining with, the owner of the fee, convey a fee simple absolute.[82] There is, then, no restriction as to the time within which these rights must come to an end or beyond which they may not become rights to terminate the estate and to have possession of the land.

These perpetual rights of re-entry are open to the same objections as possibilities of reverter and to the additional one that they are more frequently created. They hinder, although they do not prevent, the use and, consequently, the alienation of the estates subject to them.[83] Reserved, perhaps, to protect some other interest of the grantor, they may become valueless to him, but yet remain encumbrances on the estate conveyed. While always releasable, it becomes increasingly difficult to procure a release, as the number of persons to whom they go by descent may greatly increase on each succession. There is one special statutory provision affecting them in Minnesota.[84] "When any conditions annexed to a grant or conveyance of lands are merely nominal, and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded; and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto." The statute as construed appears to be of little worth. It creates no presumption that the condition is merely nominal. The grantee, to defeat the condition, must apparently show that the grantor had no present or prospective substantial interest in the performance of the condition.[85] The statute would not literally apply to conditions originally of actual benefit to the grantor, which become in course of

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[81] G. S. Minn. 1913, Secs. 6664, 6665.

[82] See ante, p. 333; Sioux City, etc., R. Co. v. Singer, note 71.

[83] See Morse v. Blood, (1897) 68 Minn. 442, 71 N. W. 682.

[84] G. S. Minn. 1913, Sec. 6695.

[85] "It may be apparent, from the very nature of the condition, that it was not intended to confer or reserve any real benefit to the grantor or to any other person. Such, for instance, would be a condition annexed to the granting of a fee, that the grantee should yearly deliver an ear of corn to the grantor, or render any specified, but unsubstantial, service. To such a case the statute would apply. Again, a condition may be such that proof beyond the deed itself would be necessary to disclose the fact whether the expressed condition was or was not substantially beneficial. We will suppose that the owner of a lot conveys it with the express condition that

time merely nominal.[86] Besides it is a question of fact whether the condition is substantial or nominal, and a breach by the owner or purchaser always incurs the danger of litigation. An absolute restriction as to the time for which rights of re-entry shall be good would obviate this danger. In Massachusetts it is provided that restrictive conditions and covenants become inoperative thirty years after their creation.[87] Timely legislation of this kind would prevent evils which, once existing, might be difficult to remedy, under the constitution, by subsequent legislation.

Reversions

The statutes define a reversion as "the residue of an estate left in the grantor, or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised."[88] This definition conforms to the definition of a reversion by the common law.[89]

A reversion differs from a possibility of reverter in that the former is an estate while the latter is only a possibility of an estate. The former can only exist after a present estate, which, as an estate, is less than a fee; while the latter arises after a fee by force of a special limitation upon it.[90]

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no building shall be erected on it for a period of ten years. It cannot be said from its terms that this condition was not reasonably intended to be, or that it was not, actually beneficial to the grantor. To such a case, no more being shown, the statute is not applicable. The court cannot declare the condition to be 'merely nominal,' and to 'evince no intention of actual or substantial benefit.' It requires that the court be further informed as to facts not disclosed by the deed, before it can declare the condition, to which the parties have solemnly agreed, to be of no legal effect. If the grantor should be found to own adjoining lands which were so improved that the erection of a building upon the granted lot would seriously impair their value and usefulness, the condition would, without doubt, be valid. On the other hand, the grantee, to defeat the condition, might show that the grantor had no actual or prospective interest in the adjoining premises, was in no manner concerned in them or in their use, and that they were unimproved. He might thus show himself entitled to the benefit of the statute, if, indeed, the statute confers any benefit beyond what the common law would give." Per Canty, J., in Sioux City, etc., R. Co. v. Singer, note 71, supra. Cf. Barrie v. Smith, (1881) 47 Mich. 130, 10 N. W. 168; Daggett v. City of Fort Worth, (Tex. Civ. App. 1915) 177 S. W. 222.

[86] See Smith v. Barrie, (1885) 56 Mich. 314, 22 N W. 816, 56 Am. Rep. 391.

[87] R. L. Mass. 1902, Chap. 134 Sec. 20. See Riverbank Improvement Co. v. Bancroft, (1911) 209 Mass. 217, 221, 95 N. E. 216.

[88] G. S. Minn. 1913, Sec. 6662.

[89] Fowler, Real Prop. Law 228; Co. Lit. 22b.

[90] Challis, Real Prop. 3rd ed., 83. "The diversity appeareth between the quantity and quality of the estate." Co. Lit. 18a.

A reversion continues in a grantor unless he limits vested estates equal in quantum to his own. If A, tenant in fee simple, devises to B for life, and on the death of B to his children who survive him, and if B leaves no children surviving, to C and his heirs, the limitations to the children and to C are alternative contingent remainders at common law. The fee will vest in one or the other at B's death, but not before. The limitations are but possibilities while B lives, and the fee continues as a reversion in A's heirs pending the contingency.[91]

It is a rule of the common law that a grantor cannot limit an estate, which apart from the limitation would continue in him or his heirs as a reversion, so that he or his heirs should have it as a remainder. A man cannot convey to himself, or make his heirs, as such, take by purchase what they would otherwise take by descent.[92] The Court of Appeals in New York has lately held that the rule is still law.[93] It is also presumably law in Minnesota, the statutory provisions being the same.

Since reversions arise only when one conveys an estate less than he has, the power to create them is limited by the power to create present estates. Estates in fee-tail are abolished and a limitation which by the common law would have created a fee-tail leaving a reversion in the grantor now creates a fee simple,[94] on which no reversion can arise. Leases of agricultural lands for more than twenty-one years are void.[95] There are no other restrictions on the creation of reversions than existed by the common law. They are vested estates and are alienable, and consequently are not affected either by the common law rule, or by

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[91] Gray, Perpetuities, 3rd ed., Sec. 11, Note. The existence of the reversion made possible the destruction of the contingent remainders by the common law, for by the doctrine of merger if B surrendered his life estate to A's heirs, or the heirs released the reversion to B, the life estate which supported the contingent remainder was "drowned" in the fee and the contingent remainders dependent upon it failed. Egerton v. Massey, (1857) 3 C. B. N. S. 338, 27 L. J. C. P. 10, 21 Jur. 1325, 6 Wkly. Rep. 130; Lewin v. Bell, (Ill. 1918) 120 N. E. 633; see 3 MINNESOTA LAW REVIEW 135.

[92] "A man cannot, either by conveyance at the common law, by limitation of uses or devise, make his right heir a purchaser." Pibus v. Mitford, (1674) 1 Vent. 372, 86 Eng. Reprint 239.

[93] Doctor v. Hughes, (N. Y. 1919) 120 N. E. 221. A conveyed land to trustees on trust for A for life, and on the death of A to convey to A's heirs. Judgment creditors of A's heirs presumptive attempted to levy on the interest to the heirs while A lived. It was admitted that the levy was good if the interest to the heirs was well created, but it was held that the limitation to them was void, and the reversion was in A.

[94] G. S. Minn. 1913, Sec. 6654.

[95] Constitution of Minnesota, Art. I, Sec. 15.

the statutory rule, against perpetuities. Except in agricultural lands, terms for years may be created of any duration leaving a reversion in the lessor. There is no limit of time by the common law or by the statutes within which a reversion must vest in possession.[96]

(*To be continued.*)

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[96] For a criticism of this phase of the law see Gray, Perpetuities, 3rd ed., Secs. 970-974.

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BREACH OF EXECUTORY CONTRACT OF AFFREIGHTMENT AS GIVING RISE TO A MARITIME LIEN UNDER STATE STATUTE.—Among the problems arising out of the exclusive admiralty jurisdiction of the federal courts, none seems to have been accompanied with greater difficulty than that of maritime liens. Perhaps this is in a measure accounted for by the peculiar nature of the maritime lien which differs so radically from the liens arising at common law and in equity.[1] Furthermore, the situation has been

[1] The thing that distinguishes a maritime lien from a common-law lien is the fact that it exists without possession. Being more than a "charge or duty the performance of which is enforced by a court of equity," it differs from an equitable lien. "The maritime 'privilege' or lien is adopted from the civil law and imports a tacit hypothecation of the subject of it.

complicated by the fact that the federal courts were originally of the opinion that their maritime jurisdiction was based on the existence of a lien under the general maritime law in the particular case.[2] This idea has since been discarded, but traces of its influence are still to be found.[3]

To remedy the narrowness of the doctrine of the federal courts, the state legislatures have been from the beginning minded to pass laws giving maritime liens in cases not covered by the general maritime law.[4] Under a Minnesota statute of this nature,[5] a recent federal decision[6] has once more brought the question into prominence. The statute makes the following provision:

"Every boat or vessel used in navigating the waters of this state shall be liable for the claims or demands hereinafter mentioned, and which shall constitute liens thereon . . .

(3) For all demands or damages accruing from the nonperformance or malperformance of any contract of affreightment . . . entered into by the master, owner, agent, or consignee of the boat or vessel on which such contract is to be performed."

The decision in the case cited is that: "To sustain a state statute giving a lien on a vessel, the cause of action must be maritime in nature, and the breach of an executory contract [of affreightment] for the charter of a vessel is not maritime in nature, and therefore cannot be enforced in a proceeding in rem in an admiralty court, but the party injured must seek redress by a common-law action."

As is pointed out in the opinion, the statute is limited to "boats or vessels used in navigating the waters of this state." Similar limitations have been held to confine the operation of the statute to vessels "which are confined in their usual and substantial employment in the waters of the state."[7] No doubt, the case could

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It is a 'jus in re,' without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem. This sort of proceeding is unknown to the common law and is peculiar to the courts of admiralty." The J. E. Rumbell, (1892) 148 U. S. 1, 13 S. C. R. 498, 37 L. Ed. 345; The Yankee Blade, (1856) 19 How. (U.S.) 82, 89, 15 L. Ed. 554.

[2] 66 L. R. A. 214, and cases there cited.

[3] 66 L. R. A. 224, and cases there cited.

[4] N. Y., Laws of 1862, Chap. 482; see The Sea Witch, (1850) 1 Cal. 162, for mention of California statute; Wash., Ballinger's Ann. Codes and Stat., Secs. 5953 and 5954.

[5] Minn. Gen. Stat. 1913, Sec. 8318.

[6] Corsica Transit Co. v. Moore Grain Co., (C.C.A. 8th Cir. 1918) 253 Fed. 689.

[7] The Sea Witch, (1850) 1 Cal. 162; The Haytian Republic, (1894) 65 Fed. 120 (semble).

be disposed of in this manner, but the court chooses to place its decision on a different basis.

Two important questions are involved in this case, namely: (1) Does the breach of an executory contract of affreightment give rise to a cause of action maritime in its nature? (2) May a state statute grant a maritime lien against a foreign vessel for a cause of action which has never been recognized as maritime? Since the decision in *The Lottawanna,*[8] no question can arise as to the right of a state legislature to provide a lien for supplies furnished in a home port, since the contract for the supplies in such a case is admittedly maritime in its nature, though no lien for a breach thereof is enforceable or cognizable under the general maritime law. This decision undoubtedly gave rise to an anomalous situation, due to the conflicting holding that state legislatures could not restrict or extend the admiralty jurisdiction exclusively vested in the federal courts.[9] This anomaly was removed by a recent act of Congress.[10]

But, it is said, an executory contract of affreightment is not maritime in its nature. In support of this proposition, reliance is placed upon two early decisions of the Supreme Court: *The Schooner Freeman*[11] and *Vandewater v. Mills.*[12] In the *Freeman* case, Mr .Justice Curtis said: "Under the maritime law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, *and a cargo is shipped under it.*" In the first place, this statement does not declare an executory contract of affreightment to be non-maritime in its nature. It merely supports the proposition that no lien arises until a cargo

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[8] (1874) 21 Wall. (U.S.) 558, 22 L. Ed. 654.

[9] The San Rafael, (1905) 141 Fed. 270, quoting The H. E. Willard, (1891) 53 Fed. 599.

[10] Act of Congress, June 23, 1910, Chap. 373, 36 Stat. at L. 604, U. S. Comp. Stat. 1916, par. 7783, giving a maritime lien upon any vessel, whether foreign or domestic, to any person furnishing repairs, supplies, or other necessaries to such vessel, which lien may be enforced by proceedings in rem, without the necessity of alleging or proving that credit was given to the vessel; and Sec. 7787, superseding the provisions of all state statutes conferring liens on vessels so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessaries.

[11] (1855) 18 How. (U.S.) 182, 188, 15 L. Ed. 341.

[12] (1856) 19 How. (U.S.) 82, 90, 15 L. Ed. 554.

is shipped under the contract. Secondly, it is pure dictum, since no question of an executory contract of affreightment was even remotely involved in the case.[13] The following year, in the *Vandewater* case, which involved, not an executory contract of affreightment, but an "agreement for a special and limited partnership in the business of transporting freight,"[14] the court cited the dictum of the *Freeman* case, thereby compounding dictum.

Since the *Vandewater* case was decided, the question of the breach of an executory contract of affreightment has been squarely raised on several occasions,[15] though never, it seems, in the Supreme Court. The district courts have felt themselves bound by the dictum pointed out above, with the result that it has crystallized into a rule of law.[16]

It is difficult to see, in many cases, wherein an executory contract of affreightment differs materially from contracts which have been held maritime in their nature. For instance, the following are maritime in their nature, in the eyes of the court: charter-parties;[17] transportation of goods;[18] transportation of passenger upon an ocean voyage;[19] demurrage;[20] towage;[21] wages of seamen;[22] wharfage;[23] suretyship bond for performance of maritime services;[24] insurance;[25] contract for supplies, made before vessel is launched.[26] Admiralty jurisdiction was denied in the following cases because the contracts were not thought to be maritime: contract to procure a charter-party;[27] procuring marine insurance;[28] procuring crew;[29] commissions for procuring freight.[30]

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[13] "But the real question is, whether, in favor of a bona fide holder of such bills of lading [bills of lading issued when no goods had been taken on board] procured from the master by the fraud of the owner pro hac vice, the general owner is estopped to show the truth, as undoubtedly the special owner would be." The Schooner Freeman, supra.

[14] Vandewater v. Mills, see note 12.

[15] The Pauline, (1863) 1 Biss. 390, Fed. Cas. No. 10848; The Monte A, (1882) 12 Fed. 331.

[16] Scott v. The Ira Chaffee, (1880) 2 Fed. 401, 2 Flip. 650.

[17] The Tribune, (1837) 3 Sumn. 144, Fed. Cas. No. 14171.

[18] Morewood v. Enequist, (1859) 23 How. (U.S.) 491, 16 L. Ed. 516.

[19] The Moses Taylor, (1866) 4 Wall. (U.S.) 411, 18 L. Ed. 397.

[20] Wood v. Keyser, (1897) 84 Fed. 688.

[21] Boutin v. Rudd, (1897) 82 Fed. 685.

[22] The May Queen, (1861) 1 Sprague, 588.

[23] Ex parte Easton, (1877) 95 U. S. 68, 24 L. Ed. 373.

[24] Haller v. Fox, (1892) 51 Fed. 298.

[25] Insurance Co. v. Dunham, (1870) 11 Wall. (U.S.) 1, 20 L. Ed. 90.

[26] The Hiram R. Dixon, (1887) 33 Fed. 297.

[27] The Tribune, supra, note 17, semble.

[28] Marquardt v. French, (1893) 53 Fed. 603.

[29] The Morning Glory, (1859) Fed. Cas. No. 12452.

[30] The J. C. Williams, (1883) 15 Fed. 558.

From an examination of the above cases, the absence of any hard and fast rule is apparent. It would seem that in case the contract calls for some service to be performed to, for, or by the vessel, whereby she is made more able and efficient to perform her intended duties, it will be held maritime in its nature. Some such idea, rather liberally construed at times, runs through the cases. Additional support is accorded this idea from the consideration of the primary reason for the origin of the maritime lien, i. e., that the ship may take on supplies wherever she may be, upon her own credit, and then proceed as speedily as possible.[31]

Whatever be the theory upon which the courts proceed, no lien is recognized in the federal courts as arising on an executory contract of affreightment—and there is good reason for not allowing a lien. In *The Ira Chaffee*[32] the reasons are thus stated: "If the owner of a cargo has a privilege upon the vessel for a breach of his contract, the vessel would be entitled equally to a lien on the cargo for a refusal of the owner to put it on board, and it might be seized upon the dock or anywhere else for the satisfaction of such lien. If the jurisdiction is sustained in this class of cases, it ought also to include cases of contract to repair the vessel or supply her with stores, in which the material-man would be entitled to a lien, though nothing had been done under the contract." As it is put in *The Pauline*,[33] an agreement such as that in the instant case is "a mere executory contract; or rather, an agreement preliminary to a maritime contract." It may be added that the continental authorities are explicit to the effect that there is no privilege until the goods are laden on board.[34]

This being the situation under the general maritime law of the United States, of what effect is a state statute granting a lien for breach of an executory contract of affreightment? There is abundant authority for the proposition that a state has no power to grant a maritime lien against foreign vessels for causes of action which have never been recognized as maritime liens.[35] *The Lottawanna* case,[36] it is true, held that where the general

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[31] Jones, Liens, II, p. 591.
[32] See note 16.
[33] See note 15.
[34] See note 33.
[35] The Chusan, (1843) 2 Story 455, Fed. Cas. No. 2717; The Lundhurst, (1892) 48 Fed. 839, 841; The Roanoke, (1902) 189 U. S. 185, 47 L. Ed. 770, 33 S. C. R. 491.
[36] See note 8.

maritime law would not recognize a lien for supplies furnished to a vessel in its home port, a state statute giving such lien would be enforced in admiralty. It should be noted that a lien was cognizable in admiralty under similar circumstances in the case of a foreign ship; and that the statute in question did not apply to foreign ships.

One federal case has held that while a court of admiralty will not entertain a suit in rem for the breach of a purely executory agreement, because no lien is given by the maritime law, yet it has jurisdiction in personam of this class of cases, and when a state statute has annexed a lien to such contracts a court of admiralty will enforce the lien.[37] The same justice who wrote the opinion in this case subsequently wrote the opinion in *The Roanoke,*[38] where grave doubt was expressed as to the right of a state statute to give a lien affecting a foreign vessel. The only case to be found squarely in point, and contrary to the instant case is that of *The Energia.*[39] This case is based principally upon the decision in *The Warner* case,[40] and seeks to discredit the force of the doubt in *The Roanoke,* supra.

Though a state may not create a lien which will affect foreign vessels when no such lien has ever been recognized in admiralty, yet substantially the same remedy may be secured in a different sort of action. In an action in personam the *state court* has jurisdiction to issue an auxiliary attachment against the vessel whether or not the contract is maritime in its nature, even though such attachment runs specifically against the vessel under a state statute providing for a lien.[41] Thus, the fact that a maritime lien may not be provided results simply in barring one avenue of redress while leaving open another almost equally effective.

It may be worthy of note that the exclusive jurisdiction of admiralty to enforce liens by proceedings in rem extends to all navigable waters of the United States—even canals wholly within a state—and to vessels which never leave the state.[42] With the

[37] The J. F. Warner, (1883) 22 Fed. 342.
[38] See note 35.
[39] (1903) 124 Fed. 842.
[40] See note 37.
[41] Rounds v. Cloverport Foundry, (1915) 237 U. S. 303, 35 S. C. R. 596, 59 L. Ed. 966; Leon v. Galceran, (1870) 11 Wall. (U.S.) 185, 20 L. Ed. 74; The Hine, (1866) 4 Wall. (U.S.) 555, 18 L. Ed. 451.
[42] The Robt. W. Parsons, (1903) 191 U. S. 17, 23, 48 L. Ed. 73, 24 S. C. R. 8, in which it was held that a contract to repair a canal boat operating wholly within a state was a maritime contract and wholly within the admiralty jurisdiction of the federal courts.

establishment of the Twin Cities as the head of navigation on the Mississippi River, cases involving the jurisdiction of admiralty may come to be an important part of local practice.

JOINT TENANCY OF PERSONAL AND REAL PROPERTY—RIGHT OF SURVIVORSHIP—EFFECT ON INHERITANCE TAX.—At common law a conveyance to two or more persons of either real or personal property created a joint tenancy.[1] To create an estate in common, words indicative of such an intent were necessary.[2] Interrelated with joint tenancy is the doctrine of survivorship.[3] The courts early became antagonistic toward joint tenancy, chiefly because of the feature of survivorship. Thus, early in the history of the common law, the courts, whenever possible, construed a conveyance to several persons as a tenancy in common.[4] A few American state courts repudiated the doctrine from the start,[5] but the common law rule was followed in most states until their respective legislatures enacted statutes reversing the presumption and declaring, in effect, that unless expressly stating an intent to create a joint tenancy, a conveyance of lands shall be construed to create a tenancy in common.[6]

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[1] Coke, Littleton, 1st Am. from the 19th London ed., II, p. 180a, Sec. 277.

[2] Fisher v. Wigg, (1700) 1 P. Wms. 13, 24 E. R. 275; Reeves, Real Property, II, Sec. 685, p. 970.

[3] Williams, Personal Property, 16th ed., p. 411.

[4] Hawes v. Hawes, (1747) 1 Ves. Sen. 13, 27 E. R. 839; Campbell v. Campbell, (1792) 4 Bro. C. C. 16, 29 E. R. 755, states: "However the court might formerly lean to the construction of wills so as to create joint tenancy, it has now for many years found the inconvenience of that construction, and has laid hold of any words in a will that will favour the construction of tenancy in common."

[5] Dembit, Land Titles, II, Sec. 27, p. 198, reads as follows: "No such statute has ever been passed in Connecticut where in colonial times 'the odious and unjust doctrine of survivorship' was repudiated; nor in Ohio, which receives most of its land laws from that state; nor in Kansas or Nebraska; nor is such a clause in the present Idaho Revision. And in these states, as in Connecticut, it seems that survivorship is unknown and that a single joint tenant, like a single tenant in common, can bring or defend for his share of the land." Freeman, Cotenancy Sec. 35, says: "In Connecticut the judiciary, at a very early day, and apparently without any legislative authority, entirely ignored what they appropriately styled 'the odious and unjust doctrine of survivorship.'" Phelps v. Jepson, (1769) 1 Root (Conn.) 48, 1 Am. Dec. 33.

[6] C. L. Mich. 1915 Sec. 11562: "All grants and devises of land, made to two or more persons, except as provided in the following section, shall be construed to create estates in common and not in joint tenancy, unless expressly declared to be in joint tenancy."

A number of statutes remained silent as to the conveyance of personal property, while providing expressly that a conveyance of real estate to two or more persons should be construed as creating an estate in common[7] unless declared to be in joint tenancy. After such a statute was passed in Michigan, the court in *Wait v. Bovee*[8] promulgated the same rule with respect to personal property as the legislature had done with respect to real property. The Minnesota statute[9] relating to joint tenancies also is silent on the subject of personal property, but as to real property lays down the same rule as does the Michigan statute. The question of joint tenancies in personal property has never arisen in Minnesota. Should the court elect the old common law rule, it would be in disregard of modern tendencies and conditions,[10] but, on the other hand, to follow the doctrine of *Wait v. Bovee* might be an encroachment upon the field of the legislature. Some argument might be drawn from the fact that, knowing the existence of the common law rule with respect to both real and personal property, the legislature chose to abrogate the one but not the other. Yet the injustice and inconvenience of survivorship is so great it is not unlikely that the Minnesota court would refuse to recognize it unless in a case in which survivorship was plainly intended.

In its more recent decisions Michigan has completely repudiated joint tenancy in personal property,[11] rejecting even the inti-

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G. S. Minn 1913 Sec. 6694: "Estates in Common. All grants and devises of lands, made to two or more persons, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy. This section shall not apply to mortgages, nor to devises or grants made in trust, or to executors."

That joint tenancies may exist in personal as well as real property, see Attorney General v. Clark, (1915) 222 Mass. 291, 110 N. E. 299, L. R. A. 1916C 679; Phelps v. Simons, (1893) 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430; Boland v. McKowen, (1905) 189 Mass. 563, 76 N. E. 206, 109 Am. St. Rep. 663.

[7] See statutes, C. L. Mich. 1915 Sec. 11562 and G. S. Minn. 1913 Sec. 6694, supra.

[8] Wait v. Bovee, (1877) 35 Mich. 425.

[9] G. S. Minn. 1913 Sec. 6694, supra.

[10] Contra, see 23 Cyc. 485: "But notwithstanding this tendency of the courts, in the absence of statute a conveyance to several persons will still be construed to be a joint tenancy where there is no expression or words in the instrument creating it indicating an intention that the estate shall be divided." In connection with this, see ibid., note 28.

[11] Hart v. Hart, (1918) 201 Mich. 207, 167 N. W. 337; Ludwig v. Brunner, (Mich. 1918) 169 N. W. 890.

Express provision for joint tenancies with survivorship is made in Michigan and Minnesota by statute in the case of bank deposits. C. L. Mich. 1915 Sec. 8040: "When a deposit shall be made in any bank or trust

mation in *Wait v. Bovee* that it might exist.[12] In *Ludwig v. Brunner*[13] Justice Fellows affirms his previous holding in the following words: "These cases,[14] and others which might be cited, establish to my mind the doctrine in this state that joint tenancy in personal property with its right of survivorship does not exist."

If these decisions are to be understood as declaring that it is beyond the power of parties to create, by the use of any language, a joint tenancy in personal property, they appear to be unsupported by the cases and indeed to have gone far beyond the legislation in respect to real property, which has done nothing more than to reverse the old common law presumption.[15] The dissent of three justices indicates that the question is at least debatable.

The question is important in its bearing upon the inheritance tax. In cases of joint tenancy the survivor takes not by descent but by virtue of the contract. It is held that if both tenants contribute equally to the tenancy the inheritance tax does not apply.[16]

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company by any person in the name of such depositor or any other person, and in form to be paid to either or the survivor of them, such deposits thereupon and any additions thereto, made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named and may be paid to either during the lifetime of both, or to the survivor after the death of one of them, and such payment and the receipt or acquittance of the same to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposits prior to the receipt by said bank of notice in writing not to pay such deposit in accordance with the terms thereof." In re Rehfeld's Estate, (1917) 198 Mich. 249, 164 N. W. 372; Negaunee Nat. Bank v. Le Beau, (1917) 195 Mich. 502, 161 N. W. 974, L. R. A. 1917D 852.

G. S. Minn. 1913 Sec. 6390: ". . . And whenever any deposit shall be made by or in the names of two or more persons upon joint and several account, the same or any part thereof and the dividends or interest thereon may be paid to either such persons or to the survivor of them or to a personal representative of such survivor."

[12] Wait v. Bovee, note 8, supra: "The drift of policy and opinion as shown by legislation and judicial decisions, is strongly adverse to the doctrine of taking by mere right of survivorship, except in a few special cases, and it should not be applied except where the law in its favor is clear."

[13] Note 11, supra.

[14] Wait v. Bovee, note 8 supra; Luttermoser v. Zeuner, (1896) 110 Mich. 186, 68 N. W. 117; Burns v. Burns, (1903) 132 Mich. 441, 93 N. W. 1077; State Bank of Croswell v. Johnson, (1908) 151 Mich. 538, 115 N. W. 464.

[15] Arnold v. Jacks' Executors, (1855) 24 Pa. St. 57; Taylor v. Smith, (1895) 116 N. C. 531, 21 S. E. 202; Equitable Loan Co. v. Waring, (1903) 117 Ga. 599, 44 S. E. 320, 62 L. R. A. 93, 97 Am. St. Rep. 177.

[16] Attorney General v. Clark, (1915) 222 Mass. 291, 110 N. E. 299, L. R. A. 1916C 679.

The theory upon which the decisions are based is thus stated:[17] "If the transfer in question is for a valuable consideration, the transfer clearly is not taxable. This seems to dispose of the taxability of property acquired by the survivor in a joint tenancy created by contribution from both the joint tenants. While the survivor does acquire a greater interest in the joint property upon the death of the other joint tenant, that greater interest is acquired by virtue of the contract creating the joint tenancy, which is upon a valuable consideration. Each joint tenant contributes to the tenancy. He surrenders exclusive control over his property, but in return for that he obtains the right to the entire fund in case he survives." But as to a joint tenancy created by only one of the joint tenants the courts are at variance. Leaving out of consideration such tenancies as were entered into for the express purpose of defeating the inheritance tax, it would seem that the same result should be attained as if the several parties had contributed equally. When the joint tenancy was completed title vested in each tenant jointly, each had control over the tenancy, and the laws of succession are not called upon to vest title in the survivor.[18] A minority of the courts hold that title does not vest until after the death of one of the tenants;[19] that the laws of succession vest title, thus making the transfer subject to the inheritance tax.

THE EFFECT OF WAR ON THE RIGHT OF AN ALIEN ENEMY TO SUE AND BE SUED.—An alien enemy is one who owes allegiance to an adverse belligerent nation;[1] or one who adheres to the "King's enemies."[2] He is also defined as one who resides in a hostile state for commercial purposes.[3] The test of enemy alienage in the earlier decisions seems to be largely that of nationality; but in the modern cases, place of residence and business, not nationality, is apparently the criterion. The Georgia supreme

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[17] L. R. A. 1916C, note, p. 682—Succession tax upon the death of one joint tenant. See very recent case, Smith v. Douglas County, (1918 C.C.A.) 254 Fed. 244.

[18] See note 16, supra.

[19] Schouler, Personal Property, 5th ed., p. 153, note 7.

[1] Dorsey v. Brigham, (1898) 177 Ill. 250, 52 N. E. 303, 42 L. R. A. 809.

[2] Daubigny v. Davallon, (1793) 2 Anst. 462, 145 Eng. Reprint 936.

[3] Hutchinson v. Brock, (1814) 11 Mass. 119; McConnell v. Hector, (1802) 3 Bos. & P. 113, 127 Eng. Reprint 61.

court in a recent case says: "As affecting civil rights and liabilities, it is said to be clear law that it is not his nationality, but the fact that he carries on business or voluntarily resides in an enemy country, that makes an enemy alien."[4] Yet in a recent case in California the court said: "An alien enemy is one with whose country the United States is at war."[5] By bearing in mind the different bases used by the earlier courts and the later ones for determining who is an alien enemy, one can understand the reason for the present liberality of our courts in passing upon the right or standing of an enemy alien.

Under the early common law, generally speaking, the alien enemy had no rights whatever in the courts of the country with which his government was at war. "The fundamental rule as laid down in the books is that no action can be maintained, either by or in favor of an enemy alien."[6] While this is the rule, it has rarely been adhered to. An early exception was made in the case of a suit on a ransom bond on which even a non-resident enemy alien was permitted to sue.[7] The rule that the civil rights of enemy aliens are only suspended for the period of the war is found in *Ex parte Boussmaker*,[8] in which the Chancellor said: ". . . the contract being originally good, . . . the right would survive. It would be contrary to justice, therefore, to confiscate this dividend . . . The policy, avoiding contracts with the enemy, is sound and wise; but where . . . the remedy is only suspended, the proposition that therefore the fund should be lost is very different." That the remedy accorded an enemy alien is only suspended by war is generally recognized.[9] The rigor of the ancient rule (that of according an enemy alien no civil rights) is further abated in that it does not apply to an alien enemy who has a license to stay in the country and do business

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[4] Lutz v. Van Heynigen Brokerage Co., (Ga. 1918) 80 So. 72; adopted in The Oropa, (1919) 255 Fed. 132; acc. Janson v. Driefontein Consolidated Mines, [1902] A. C. 484, 505, 71 L. J. K. B. 857, 87 L. T. 372, 51 Wkly. Rep. 142.

[5] Taylor v. Albion Lumber Co., (1917) 176 Cal. 347, 168 Pac. 348, L. R. A. 1918B 185.

[6] Brandon v. Nesbitt, (1794) 6 T. R. 23, 2 Eng. Rul. Cas. 649, 101 Eng. Reprint 415. "Aliens adhering to the King's enemies shall derive no benefit through his courts." Daubigny v. Davallon, note 2, supra; Mumford v. Mumford, (1812) Fed Cas. No. 9,918, 1 Gall. 366.

[7] Ricord v. Bettenham, (1765) 3 Burr. 1734, 1 Bl. 563, 97 Eng. Reprint 1071; Daubigny v. Davallon, supra.

[8] (1806) 13 Vesey 71, 33 Eng. Reprint 221.

[9] Taylor v. Albion Lumber Co., note 5, supra; Paine v. Saler, (1917) 101 Misc. 693, 167 N. Y. Supp. 901; Hawes, Hyatt & Co. v. Chester & Co., (1861) 33 Ga. 89; Jackson v. Decker, (1814) 11 Johns. (N.Y.) 418.

therein.[10] When an enemy alien is permitted to remain in the country, many courts hold that one relying on the defense that the litigant is an enemy alien must plead that defense specially.[11] Some courts seem to hold that an enemy alien's lack of standing and inability is limited to his suing as a plaintiff; yet others hold that there is no difference between his rights as a plaintiff or as a defendant.[12] However, it is settled that an enemy alien may be sued;[13] but of course it is necessary to acquire jurisdiction in order to render a valid judgment. Inasmuch as intercourse with a non-resident alien is impossible, publication is resorted to. Whether or not this procedure gives jurisdiction, either in personam or in rem, is a mooted question.[14] Clearly the ends of justice cannot be met in recognizing the validity of judgments based on service by publication, when it is not only impossible but criminal for a non-resident enemy to seek or obtain information in a country with which his country is at war. The courts holding that such service is ineffectual are clearly right in principle.

As already stated, it appears to be undisputed law that war does not destroy a resident or non-resident alien enemy's civil rights; but only suspends them for the period of the war. Yet the courts do not lay down any clear-cut rule for determining who are alien enemies under the old common law rule. Erwin, J., in *The Oropa,* supra, says: "I think that the severity of the ancient rule, which decided the rights of an alien enemy in the courts of this country, has been moderated by trend of modern authorities and that the rule is at present more honored in the breach than in the observance." Unquestionably the courts consistently refuse to apply the ancient rule to citizens of an enemy nation, who are permitted to reside in the country and to carry on business without interference from the Government; this

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[10] Wells v. Williams, (1697) 1 Ld. Raym. 282, 1 Lutw. 34, 1 Salk. 46, 91 Eng. Reprint 45, 1086.

[11] Burnside v. Mathews, (1873) 54 N. Y. 78; Heiler v. Goodman's Motor Express, etc., Co., (N. J. 1918) 105 Atl. 233; L. R. A. 1918B 189, note.

[12] The Oropa, (1919) 255 Fed. 132; Johnson v. The Thirteen Bales, (1814) Fed. Cas. No. 7,415, 13 Fed. Cas. 839, 2 Paine 639. In the latter case the court said, "Adopting this as the law, it becomes immaterial to inquire whether the claimants must be viewed as plaintiffs or defendants—whether the proceeding is by or against them."

[13] Dorsey v. Thompson, (1872) 37 Md. 25; Russ v. Mitchell, (1865) 11 Fla. 80.

[14] The following hold service by publication sufficient: Seymour v. Bailey, (1872) 66 Ill. 288; Russ v. Mitchell, supra. Contra: Dorr v. Giboney, (1878) 3 Hughes 382, Fed. Cas. No. 4,006; Selden v. Preston, (1874) 11 Bush (Ky.) 191.

tolerance is construed as an implied license.[15] New York, New Jersey, and Michigan courts seem inclined to give an enemy alien who has his freedom and who conducts himself properly the same rights in court as are given to other aliens.[16] But where the enemy alien's property is taken over by the Alien Property Custodian, the Custodian may intervene and substitute as party to the action.[17] The New Jersey court in *Posselt v. D'Espard,*[18] took the extreme position of permitting a non-resident alien enemy to sue through a representative, although it declined to state whether or not a payment of the judgment should be decreed during the war. The federal courts seem to have adopted the policy of suspending the right of the alien enemy to obtain positive relief.[19] On the whole, this seems wise, since it is a matter of sound public policy to accord justice to all. Indeed, it is decidedly dubious if one domiciled here but of enemy nationality can get any measure of justice before a jury in time of war. What seems to be the modern test of enemy alienage is well expressed in *Tortoriello v. Seghorn,*[20] in which Vice Chancellor Foster says: "Congress, in the Trading with the Enemy Act, aside from the power thereby vested in the President, has made the test of enemy character depend upon residence, or official or agency relation, and not upon nationality, or mere alienage." It seems safe to conclude that only non-resident and resident aliens of enemy nationality who are interned or subject to arrest can be deemed alien enemies subject to the old common law rule; and that, as to these, their rights to appear in our courts are only suspended for the period of the war.

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[15] Otteridge v. Thompson, (1814) Fed. Cas. No. 10,618, 2 Cranch, C. C. 108; Clarke v. Morey, (1813) 10 Johns. (N. Y.) 69; Mittelstadt v. Kelley, (Mich. 1918) 168 N. W. 501.

[16] A resident subject of a country at war against the United States, "who is enrolled with her husband in the State military census and by the President's proclamation is virtually licensed to remain here, and entitled to continue to reside here so long as she conducts herself properly, must be considered a lawful resident of this country." Arndt-Ober v. Metropolitan Opera Co., (1918) 182 App. Div. 513, 169 N. Y. Supp. 944; Mittelstadt v. Kelley, note 15, supra.

[17] Rothbarth v. Herzfeld, (1917) 179 App. Div. 865, 167 N. Y. Supp. 199.

[18] (1917) 87 N. J. Eq. 571, 100 Atl. 893.

[19] Kaiser William II, (1918) 246 Fed. 786, 159 C. C. A. 88, L. R. A. 1918C 795; Watts, Watts & Co. v. Unione Austriaca Di Navigonione, (1918) 248 U. S. 786, 39 S. C. R. 1; Plettenburg, Holthaus & Co. v. Kalmon & Co., (1917) 241 Fed. 605.

[20] (N. J. 1918) 103 Atl. 393.

RECENT CASES

CONTRACT FOR REPAIR OF VESSEL—PERFORMANCE WITHIN REASONABLE TIME—PEACEABLE STRIKE AS AN EXCUSE.—A dry dock company had contracted, with no specification as to time, to repair a vessel. Later its employees demanded shorter working hours and struck because their demand was refused. The repair of the ship was delayed thirty-seven days. *Held*, that though the strike was not accompanied by violence, it was an excuse for delay in completing the repairs. *The Richland Queen*, (1918) 254 Fed. 668.

When a contract expresses no time for performance, a reasonable time is implied by law. *Atwood v. Cobb*, (1834) 16 Pick. (Mass.) 227, 26 Am. Dec. 657; *Whiting v. Gray*, (1891) 27 Fla. 482, 8 So. 726, 11 L. R. A. 526; *Northrup v. Scott*, (1914) 85 Misc. (N. Y.) 515, 148 N. Y. Supp. 846. There are few if any authorities directly in point with the instant case, but similar questions are involved in common carrier contracts. The duty owing from the defendants in the instant case to complete the contract within a reasonable time may be considered similar to that owing from common carriers to complete delivery within a reasonable time, since common carriers are not insurers of prompt delivery, but are only liable for ordinary care and diligence. So the decisions as to common carriers' liability for delay occasioned by strikes are applicable here. The law is clear that where a common carrier is ready and willing to carry and thus perform its contract and discharge its duty, it is not liable for damages caused by delay in transportation if the delay is caused by the violence of strikers which the carrier cannot overcome by reasonable effort. *Geismer v. Lake Shore, etc., Ry. Co.*, (1886) 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837; *Gulf, etc., Ry. Co. v. Levi*, (1890) 76 Tex. 337, 13 S. W. 191, 18 Am. St. Rep. 45, 8 L. R. A. 323. On the other hand, the previous law seems to have been equally well settled that a peaceable strike, a mere refusal to work, does not excuse delay on the part of the employer, *Blackstock v. New York, etc., R. Co.*, (1859) 20 N. Y. 48, 75 Am. Dec. 372; *Read v. St. Louis, etc., R. Co.*, (1875) 60 Mo. 199; and dicta to that effect in *Pittsburgh, etc., R. Co. v. Hazen*, (1876) 84 Ill. 36, 25 Am. Rep. 422; *Haas v. Kansas City, etc., R. Co.*, (1888) 81 Ga. 792, 7 S. E. 629. The theory upon which these cases were decided is that the employees, although they have refused to work, are still the servants of the carrier. *Weed v. Panama R. Co.*, (1858) 17 N. Y. 362, 72 Am. Dec. 474. Apparently there is no previous adjudicated case in which a peaceable strike has been held to be an excuse for delay. The federal court, however, has chosen to ignore these reasonings, saying, "We do not appreciate the distinction made in these cases, thinking that the difference between a peaceable strike and a violent strike as a defense is one of degree only, a strike with violence being more likely to be a good defense than a peaceable strike." In holding that a peaceable strike is an excuse for delay, the instant case presents a new development in the law of contracts.

EVIDENCE—PRESUMPTION OF DEATH FROM UNEXPLAINED ABSENCE.—In an action on an insurance policy by a beneficiary against the company, where the plaintiff relied on the presumption of death from an absence for seven years without being heard of, *Held* (1) the burden of establishing facts giving rise to the presumption is upon the person invoking it, and he must produce evidence to justify the inference that death of the absentee is the probable reason why nothing is known about him; (2) the presumption does not arise from an absence unheard of for seven years when there exist circumstances or facts reasonably accounting for lack of communication without assuming death; (3) whether the facts raise the presumption is usually a question for the jury, but where the evidence is uncontradicted and is incapable of creating in reasonable minds conflicting inferences, the question is one of law. Judgment for plaintiff reversed. *Butler v. Mutual Life Ins. Co.*, (N.Y. 1919) 121 N. E. 759.

Facts were that insured, an unmarried mechanic of twenty-two, of good habits and appearance, left his home in Rochester, New York, and wandered from place to place in the Southwest and West, communicating less and less frequently with his relations, giving indications of growing habits of thriftlessness and of consciousness of failure, and finally ceasing altogether to write; various efforts of his parents by letters and advertising to learn of his whereabouts failed; for more than seven years before the commencement of the action he had not been heard of by them and all trace of him was lost. The Court of Appeals rules in effect that plaintiff had so wholly failed to sustain the burden required to give rise to a presumption of death that the verdict of a jury could not stand; that the facts shown are entirely compatible with the theory that the absentee was alive, but neglected to communicate with his relatives through indifference or a sense of shame.

This seems to be a narrowing of the rule as generally stated. "A rebuttable presumption of death arises in the case of a person who has been absent from his home and from whom no tidings have been received for seven years." Start, C. J., in *Spahr v. Mutual Life Ins. Co.*, (1906) 98 Minn. 471, 472, 108 N. W. 4. "An absentee shown not to have been heard of for seven years by persons who, if he had been alive, would naturally have heard of him, is presumed to have been alive until the expiry of such seven years, and to have died at the end of that term." Lawson, Presumptive Ev., 2nd ed., 25. The latter part of this statement is not sustained by the better authority. *Spahr v. Mutual Life Ins. Co.*, supra; *McLaughlin v. Sovereign Camp, W. of W.*, (1914) 97 Neb. 71, 149 N. W. 112, L. R. A. 1915B 756. There is no presumption as to when, within the seven-year period, the death occurred. The presumption has to make its way against a counter-presumption in favor of the continuance of life, growing steadily stronger with lapse of time, as the latter grows weaker. Chamberlayne, Evidence, IV, Secs. 1090, 1091. Lord Ellenborough, in *Doe v. Jesson*, (1805) 6 East 81, 84, 102 E. R. 1217, states that "the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living." In *Cunnius v. Reading School District*, (1905) 198 .U S. 458, 49 L. Ed. 1125, 25 S. C. R. 721, sustaining the validity of a state

statute providing for administration upon the estates of persons presumed to be dead by reason of long absence, the Supreme Court states the rule in this simple form: "Under the law of England, as stated in that case [referring to *Scott v. McNeal,* (1894) 154 U. S. 34, 41, 38 L. Ed. 896, 900, 14 S. C. R. 1108] a presumption of death arose from an absence of seven years without being heard from." *Scott v. McNeal,* supra, illustrates the rebuttable character of the presumption. S having "mysteriously disappeared," and remaining unheard of seven years, his estate was administered upon as that of a deceased person; certain land was sold by the administrator and passed to an innocent purchaser. Later S returned and recovered the land in ejectment, the Supreme Court holding the proceedings absolutely void, because he was in fact alive, the sale for payment of his debts passing no title.

If the relatives of an absentee whose disappearance under equivocal circumstances raises a doubt as to the motive of his silence cannot sustain the burden of proof at the end of seven years, they cannot at twenty, or thirty, and the value of the rule, for practical purposes, is greatly limited. Indeed, it would seem that if there ever arises a presumption of death from mere absence without being heard of, the precise period must be fixed arbitrarily; and the courts have settled upon seven years. In view of the necessity of some definite rule to permit the distribution of the estates of absentees, it seems that the qualification under discussion puts a serious difficulty in the way of probate, since the heirs would be in possession of no more evidence of death after twenty years than after seven. In the case familiarly known to the divorce courts of the husband who "took his hat and went away and never came back," the wife could not safely remarry after seven years if his disappearance could be attributed to weariness of the matrimonial yoke, no matter what efforts she may have made to learn his whereabouts. In the light of the instant case, the following statement of the rule, taken from Stephen, Dig. Ev., Art. 99, seems to be accurate: "A person shown not to have been heard of for seven years by those (if any) who, if he had been alive, would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it." The presumption is declared to be one of law. *In re Phené's Trusts,* (1869) L. R. 5 Ch. App. 139, 39 L. J. Ch. 342, 22 L. T. R. 111, 18 W. R. 303. But whether the facts are such as to permit its application is ordinarily a matter for the jury. *Swanson v. Modern Brotherhood of America,* (1917) 135 Minn. 304, 160 N. W. 779. Verdict sustained on facts certainly no stronger than those of the instant case. See further, 1 MINNESOTA LAW REVIEW 522.

EXECUTORS—CONTRACT OF TESTATOR—LIABILITY OF EXECUTRIX WHO CARRIES ON CONTRACT.—Testator was a building contractor. At the time of his death a building was in progress. His wife was appointed executrix and to complete the building borrowed money from the bank, giving two

notes, signed, Lulu Betts, Administratrix. Later she abandoned the contract, and the bonding company completed it at a loss. The testator was insolvent. The bank brought this action against the estate to recover on the notes. *Held,* the administratrix carrying on a contract of testator does not bind the estate, but (dictum) is individually bound. *Exchange National Bank of Atchison v. Betts' Estate,* (Kan. 1918) 176 Pac. 660.

Contracts involving personal skill do not survive. Building contracts are an exception. Such are binding on the personal representative. Ann. Cas. 1912A 420, note. But the question as to whether the personal representative shall complete such contracts is discretionary with him. *Allam's Estate,* (1901) 199 Pa. St. 573, 49 Atl. 252. If he does complete the contract, he makes himself personally liable, and the estate is not bound. *Oram's Estate,* (1873) 9 Phila. (Pa.) 358, 31 Leg. Int. 244. If to carry on the work he draws, makes, accepts, or indorses a bill or promissory note, he makes himself liable. *Germania Bank v. Michaud,* (1895) 62 Minn. 459, 65 N. W. 70, 54 Am. St. Rep. 653, 30 L. R. A. 286. An administrator may not borrow money and charge the estate or his bondsmen: *Bank of Newton County v. American Bonding Co.,* (1914) 141 Ga. 326, 80 S. E. 1003, 50 L. R. A. (N. S.) 1089. although it is for the benefit of the estate only. *De Coudres v. Union Trust Co.,* (1900) 25 Ind. App. 271, 58 N. E. 90, 81 Am. St. Rep. 95. Nor will signing as administrator release him from personal liability. *De Coudres v. Union Trust Co.,* supra. The decisions are on the ground that an administrator cannot create a new liability, not founded on an obligation of the testator, and charge the estate with it. *Hayes v. Shirk,* (1906) 167 Ind. 569, 78 N. E. 653; *Austin v. Munro,* (1872) 47 N. Y. 360.

INDIAN TREATY—UNCONSTITUTIONAL STATUTE—RECOVERY OF LICENSE TAX.—Plaintiff brewing company operating in territory governed by the Indian Treaty of 1855 paid a license tax to defendant village under statute providing for licensing the sale of intoxicating liquors. Plaintiff's license was invalid because the statute was without effect in this territory, the sale of liquor therein being prohibited by the Indian Treaty. *Held,* plaintiff cannot recover amount of license fee. *Minneapolis Brewing Co. v. Village of Bagley,* (Minn. 1919) 170 N. W. 704.

The general rule is that in the absence of express statutory provisions therefor, recovery back of a license tax which was voluntarily paid under mistake of law will not be permitted. 25 Cyc. 631; *Custin v. Viroqua,* (1886) 67 Wis. 314, 30 N. W. 515; *Levy v. Kansas City,* (1909) 168 Fed. 524. Also see note, 22 L. R. A. (N. S.) 862. Kentucky holds contra. *Fecheimer v. Louisville,* (1886) 84 Ky. 306, 2 S. W. 65; *Bruner v. Stanton,* (1897) 102 Ky. 459, 43 S. W. 411. In the instant case the court relies, for the decision of the case, upon the rule of law stated above, viz., that a mistake of law is not a basis for a recovery of the license tax. However, there seems to be a more fundamental reason supporting this holding, which has as its basis the very nature of a liquor license. On this precise point the United States Supreme Court held that "the granting of a license [by the federal government], therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying noth-

ing except that the licensee shall be subject to no penalties under national law, if he pays it. . . . . Licenses . . . . conveyed to licensee no authority to carry on the licensed business within a state." *License Tax Cases,* (1866) 5 Wall. (U. S.) 462, 18 L. Ed. 497. These cases involved a federal license as opposed to a state law; the instant case is the converse, viz., a state license as opposed to a federal law. By parity of reasoning, therefore, the state license conveyed to the plaintiff licensee no authority to carry on the licensed business on the Indian reservation. State authorities are confused in their description of the nature of a license. The weight of authority is to the effect that a license is neither a contract nor grant. *McKinney v. Salem,* (1881) 77 Ind. 213; *Carbondale v. Wade,* (1902) 106 Ill. App. 654. The New York courts construe the license as a contract which gives the licensee the authority to sell liquors for the duration of the license. *Hillard v. Giese,* (1898) 25 App. Div. 222, 49 N. Y. Supp. 286. However, this last cited case does not involve the question of a federal law. A license is variously called a "permit" or "privilege" by the majority of the courts. *McKinney v. Salem,* supra; *McCoy v. Clark,* (1898) 104 Ia. 491, 73 N. W. 1050. On analysis it would seem that license in the terms "permit" and "privilege" is of no more significance than this: the licensing power, whether national or state, promises that the licensee shall not be prosecuted by it for carrying on the business so licensed. The instant case is rightly decided, but it is here submitted that it might have been decided the same way on the ground that a license does not grant to the licensee authority to carry on the licensed business.

MUNICIPAL CORPORATIONS—NEGLIGENCE OF SERVANTS—LIABILITY.—The plaintiff's intestate was killed in a collision by a car owned by the defendant city, negligently driven by the city's employee, while engaged in taking policemen to their patrols in outlying districts. *Held,* that the city, in so hauling the policemen, was not engaged in a governmental function and is accountable for injuries sustained by reason of such employee's negligence. *Jones v. Sioux City,* (Iowa 1919) 170 N. W. 445.

A municipality acts in a dual capacity: (1) in exercising governmental functions for the benefit of the public at large; (2) in exercising those powers conferred upon it by reason of its nature as a corporation and for its own benefit. *Johnston v. Chicago,* (1913) 258 Ill. 494, 101 N. E. 960, Ann. Cas. 1914B 339; *Lloyd v. New York,* (1851) 5 N. Y. 369, 55 Am. Dec. 347. In respect to the conduct of employees in the exercise of a governmental function, a municipal corporation is not accountable. *Hayes v. Oshkosh,* (1873) 33 Wis. 314, 14 Am. Rep. 760; *Evans v. Kankakee,* (1907) 231 Ill. 223, 83 N. E. 223, 13 L. R. A. (N. S.) 1190; *Kerr v. Brookline,* (1911) 208 Mass. 190, 94 N. E. 257, 34 L. R. A. (N. S.) 464; *Snider v. St. Paul,* (1892) 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151. Such conduct may consist of negligence, *Jewett v. New Haven,* (1871) 38 Conn. 368, 9 Am. Rep. 382, or may be willful wrongdoing. *Hathaway v. Everett,* (1910) 205 Mass. 246, 91 N. E. 296. Nor is that immunity from liability for torts, in respect to its governmental functions, destroyed by reason of the fact that the tort was committed by an employee of a violent temper

and of savage propensities, and that the city was fully acquainted with those dangerous propensities at the time the tort was committed, *Lamont v. Stavanaugh*, (1915) 129 Minn. 321, 152 N. W. 720, the maxim of respondeat superior having no application. *Jewett v. New Haven*, supra; Dillon, Municipal Corporations, 5th ed., Sec. 1655. and cases cited; *Paterson v. Erie R. R. Co.*, (1910) 78 N. J. L. 592, 75 Atl. 922. However, the aforementioned maxim—respondeat superior—does control a maritime right and prevails in a court of admiralty, although a governmental function is concerned. *Workman v. New York*, (1900) 179 U. S. 552, 45 L. Ed. 314, 21 S. C. R. 212, reversing 67 Fed. 347, 14 C. C. A. 530. The mere fact that a particular work may incidentally benefit the public does not necessarily exempt the city from liability for the tort committed by one of its employees. 20 Am. & Eng. Enc. of Law, 2nd ed., 1196; *Missano v. New York*, (1899) 160 N. Y. 123, 54 N. E. 744. But no immunity from liability for the torts of its employees in exercising those functions undertaken by it of a corporate or ministerial character accrues to a municipal corporation. *Bowden v. Kansas City*, (1904) 69 Kan. 587, 77 Pac. 573, 105 Am. St. Rep. 187, 1 Ann. Cas. 955, 66 L. R. A. 181; *Davoust v. Alameda*, (1906) 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536; *Piper v. Madison*, (1909) 140 Wis. 311, 122 N. W. 730, 133 Am. St. Rep. 1078, 25 L. R. A. (N. S.) 239; *Keever v. Mankato*, (1910) 113 Minn. 55, 129 N. W. 158, Ann. Cas. 1912A 216, 33 L. R. A. (N. S.) 339. Notwithstanding the fact that the basic principle of law controlling the liability or non-liability of a municipal corporation for torts is universally accepted, we have a diversity of conclusions involving facts not unlike those in the instant case. This diversity is not the result of any variance from the controlling principle, but is due wholly to the interpretation of courts as to what constitutes either a governmental or ministerial function, for the courts have been unable to formulate any principle, "which will precisely embrace the torts for which a civil action will, in the absence of a statute declaring the liability, lie against a municipal corporation." Dillon, Municipal Corporations, 5th ed., IV, Sec. 1625. Thus a municipality was held not immune from liability for injury occasioned by a policeman stretching a rope across a public street to stop traffic, *Shinnick v. Marshalltown*, (1908) 137 Ia. 72, 114 N. W. 542; nor for the negligence of a driver of an auto used for conveying books from the central library to sub-stations, *Johnston v. Chicago*, supra; but was held not accountable for the negligence of an employee driving an ambulance owned by the city, *Maxmilian v. New York*, (1875) 62 N. Y. 160; nor for injury sustained through negligence of a city fireman in exercising horses used for pulling fire wagons, *Gillespie v. Lincoln*, (1892) 35 Neb. 34, 52 N. W. 811, 16 L. R. A. 349, nor where the plaintiff was injured by the bursting of a hose lying on the pavement in front of the engine house and being used by one of the firemen for the purpose of sprinkling the street in front thereof, *O'Daly v. Louisville*, (1914) 156 Ky. 815, 162 S. W. 79. Again the same conclusion was reached where the injury was caused by the negligence of a police telegraph operator in leaving open a door to an elevator shaft in a police station. *Wilcox v. Rochester*, (1907) 190 N. Y. 137, 82 N. E. 1119, 17 L. R. A. (N. S.) 741.

In Dillon, Municipal Corporations, 5th ed., IV, Sec. 1655, a statement is made which has been cited with approval by the courts: "If the corporation appoints or elects them, can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if those duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest, they may justly be regarded as its agents or servants, and the maxim of respondeat superior applies."

WAR—EFFECT ON CIVIL RIGHTS—SUIT BY OR AGAINST ALIEN ENEMIES. —The libelant, a citizen of Austria, sued to recover his wages. He arrived in Mobile in March, 1918, and filed the libel against The Oropa in August, after he had declared his intention of becoming a citizen of the United States. The defense offered and the ground urged for dismissal was that the libelant was an alien enemy. *Held,* that the libel in rem for wages will not be dismissed, but will be continued until the termination of the war. *The Oropa,* (1919) 255 Fed. 132.

See NOTES, p. 351.

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POLITICAL CRIME AND CRIMINAL EVIDENCE

POLITICAL crime is beginning to be heard of in this country. I propose to examine the French theory and practice in respect to political crime, and compare them with the Anglo-American.

Garçon, the distinguished authority upon the criminal law of France, says that contemporary criminal law distinguishes felonies and misdemeanors that are political from those that are common.[1] To the same effect is Garraud, the classic writer on the criminal law of France.

"Political crimes [says the last named author] are to a less extent directed against the very bases of social life than they are against the established order. They have not, then, the same *nature* as the ordinary crimes. The motives which urge to action in political crimes are most often disinterested, sometimes they are even laudable. Political crimes have not, then, the same *immorality* as the common crimes. A rational legislation will repress these two classes of crime by different penalties, because political criminality is of an entirely distinct nature from that of ordinary criminality."[2]

The history of legislation on the subject of political crime is long and interesting.[3] We cannot, however, linger over this fascinating and instructive story. We may, in running, glance at the Revolution of 1830 and note that the distinction between

[1] Garçon, Code Pénal, annoté, Art. 1, No. 124.

[2] Garraud, Précis de droit criminel, onzième edition, Paris, 1912, p. 88 fol.

[3] The authorities will be found collected in Professor Garçon's Code Pénal, annoté, Art. 1.

political and common crimes comes into French legislation about 1830.[4] By 1848 the principle that no extradition will be *permitted* in political crimes is established.[5] Since the last named Revolution of 1848 no doubt upon the subject has ever been entertained that political crimes should be dealt with upon a different footing from that of ordinary crimes. The Constitution of 1849 also enshrined the principle that the jury and not the judge has jurisdiction of political felonies.[6] Some political misdemeanors go to the Correctional Courts (Tribunaux Correctionels), presided over by three judges without jury; others go to the Cour d'Assises—the court for the trial of common felonies, presided over by three judges and having a jury.[7] There are two exceptions to the principle just enunciated in that misdemeanors due to speech and press (delits de la parole et de la presse) are within the exclusive jurisdiction of the Cour d'Assises;[8] and in that the Senate may be constituted a High Court of Justice for the trial of certain political crimes—as in the recent Malvy case.[9]

The great problem is, of course, to determine what political crime is. There is little difficulty in deciding what is a *purely political crime.*

"A purely political crime is that which has not only as predominant characteristic, but draws along with it as an exclusive and single consequence, the destruction, modification or the troubling of the political order in one or more of its elements. This order includes: in regard to external matters, the independence of the nation, the integrity of its territory and the relations of the State with other States; in regard to internal affairs, it includes the form of the government, the organization of public powers, their mutual relations, in short, the political rights of citizens. We can recognize without dispute, purely political crimes in the following cases: communication with the enemy; the levying of arms against one's government; conspiracies and attempts to change the form of the government; affiliation with unlawful societies; press crimes (except attacks against private persons); violations of the laws relative to elections, public assemblies, etc. All these crimes offend only public law and interest."[10]

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[4] Garraud, op. cit. p. 84 note.
[5] Garçon, op. cit. Art. 1.
[6] Garçon, op. cit. Art. 1, No. 134.
[7] Garçon, ib. No. 135.
[8] Ib. 143.
[9] Ib. 143.
[10] Garraud, op. cit. p. 86 fol.

"All speech and press crimes are certainly not political. No one dreams, for example, of placing in the category of political crime the defamation and the injury of private persons. On the contrary, we do not doubt that the following must be considered, by their nature, political crimes: the defamation, in their public quality and by reason of their functions, of the ministers or the members of parliament; offenses against the President of the Republic, or against the Heads of foreign States; violence to foreign diplomatic agents."[11]

Again, crimes against the internal or external security of the State are political crimes;[12] crimes of association and combination and of unlawful meetings;[13] riotous assemblies;[14] espionage.[15]

"The difficulty of determining whether a crime is political or common commences [says Garraud] when the crime is a violation of law which without doubt, taken in itself, injures an individual or the State considered as a private person, but which, in the *intention* of the author, has a political motive, end or occasion. Crimes of this class are called, in technical language, *complex crimes* and *connected crimes*. The crime is *complex* or mixed, when the same criminal fact injures at the same time the political order and the ordinary penal law; or when a breach of the ordinary penal law is committed with a political intention. Such is the assassination of the Head of the State with the object of overturning the government. *Crimes* are called *connected* with a political fact when violations of the common penal law are committed in the course of political occurrences and have a certain relation with these occurrences. (Code d'instruction criminelle, Art. 227.) Such would be the pillaging of the shop of an armorer by political insurgents."[16]

A criterion is in these and similar cases most vital. There are the subjective and the objective theories. The former theory leads to the following consequence that—

"the intention, the motive, the end the actor proposed to reach, characterize the criminality of the act. According to this theory, murder, assassination, assault and battery, and theft would be considered political crimes. The latter theory conduces us to the proposition that the political or non-political character of an act which is legally criminal, is not to be considered as being determined by the existence of political motives; this character would depend upon the nature of the act considered in itself.

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[11] Garçon, op. cit. Art. 1, No. 179.
[12] Garçon, No. 176.
[13] Garçon, ib.
[14] Garçon, ib. No. 177.
[15] Garçon, No. 178.
[16] Garraud, op. cit. p. 86 fol.

These theories are exaggerated. The question cannot be resolved except by distinguishing two situations."[17]

The conclusion of Garraud is that periods of peace are to be differentiated from periods of war; and that, making this distinction, in time of peace an act which would be considered a violation of the ordinary penal law will be dealt with as such, notwithstanding that the end or the motive of the author was political. The objective theory is here put into effect, in accordance with which the character of the act is determined by the act itself and not by the motive, the intention, or the end envisaged by the author. But "the judge, in examining into the culpability of the individual, may take into account the more or less antisocial, and more or less odious motives of the criminal act. But this act remains, whatever the motive which has inspired it, that which it is in itself—an assassination, an arson, a theft, a destruction of buildings, that is, ordinary crime, a crime of the ordinary penal law."[18]

In time of war, however, acts which would be considered in times of peace to be common crimes may bear the character of political crimes. The distinction here is that—

"if the violation of law is committed in the course of political happenings, as an insurrection or a civil war, pillages, murders, burnings, which would be legitimate if produced in a state of regular war, would, in a measure, be absorbed by the political crime of which they are the necessary consequences or the accidents. This political crime must cover them from the point of view of extradition and from that of the application of the penalty of death. But if, in the course of the insurrection, crimes are committed against persons or property which would be condemned by the law of nations, even in a state of regular war, these crimes would come within the ordinary penal law. If it is just to recognize that all acts which are the direct consequences of the insurrection must be deemed to be political as the insurrection itself is political, it would be immoral to consider as political prisoners, malefactors who profit from the disorder to satisfy their vengeance or their cupidity."[19]

The French theory, therefore, is the objective.

The consequences that flow from political crime are concerned with the penalty,[20] with the treatment of the offender in prison, with the procedure in court. The death penalty cannot be

[17] Garraud, op. cit. p. 87.
[18] Garraud, op. cit. p. 88.
[19] Garraud, op. cit. p. 88.
[20] See Garçon, op. cit. Art. 86, No. 8. The penalty of death was abolished in France for political crimes after the Revolution of 1848.

imposed;[21] certain forms of imprisonment are not permitted; certain others are definitely prescribed. There is no incapacity after conviction to serve in the army;[22] there can be, for another example, no temporary suspension or dismissal from the medical profession.[23] Political amnesties are given[24] and are frequent and normal. The prison privileges are extensive;[25] political prisoners are not compelled to work; they do not wear the prison garb; they are kept in places separate from those where offenders of the ordinary penal law are kept; and may have their food brought in from outside. Extradition is not allowed.[26] The procedure at trial I have already pointed to in passing. All felonies go to the court with a jury, in which the jury is the judge of the law and the facts. Most misdemeanors also go to the same court.

These are for the most part special provisions not only in France, but in almost all Continental countries for the benefit of political prisoners and convicts. But there are some provisions of law which apply to political prisoners as well as to all other prisoners. They are, briefly, the theoretic impotence of the judges in jury trials. The President of the Court—there are three judges—does take an active part in all trials; but the effect of his participation and occasional partisanship is minimized, if not obliterated, by the independent and intelligent character of the juries. Both theoretically and practically, however, the jury is master of the law, and the facts; and this principle is carried so far as to exclude any charge by the judge. The defendant has the right in all criminal trials to present all the evidence in his favor, and against the prosecution, which he wishes. This principle is crystallized and consecrated in the formula that the defense must be free. This free defense means not only that the defendant himself shall be free to say anything in his favor, but that he may bring forward any witnesses he pleases who also shall be free to express themselves fully and unhindered. One of the implications of this freedom is that the testimony is to be given by *deposition*, that is, by narration. During this narration by the witness he is not interrupted. He must be allowed to continue in his own way. After the narration, he may be

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[21] Garraud, p. 84.
[22] Garçon, No. 141.
[23] Garçon, No. 142.
[24] Garçon, No. 137.
[25] Garraud, p. 84.
[26] Garraud, p. 89.

questioned by his side, by the other side, and by the court; but he always has the right of reply. It will be seen that the Continental theory is the reverse of the Anglo-American. The witness, in our system, is at the mercy of the court and of the attorneys. In a conflict with an attorney our judge takes the side of the attorney. But the spirit of independence is so high abroad that witnesses will not submit to ill treatment even at the hands of barristers and judges. One would think that under such a system of freedom to present evidence, trials would be interminable, and that, secondly, the absence of exclusionary rules of evidence would militate against the search for truth. But this is not so. Trials are much shorter than they are among us; they are much more interesting; they bring out many facts we exclude; they present a clearer and ampler view of the whole case; and they are not obnoxious because of the introduction of hearsay and other evidence which under our system would be inadmissible. Nauseating wrangles between opposing counsel on the admissibility of evidence are unknown. The prosecution is free to present its case as fully as it pleases; and the preliminary investigation by the juge d'instruction helps a great deal toward this object; and the defense is also free to explain as fully as it wishes. A complete presentation of the defendant's case is thereby assured. And especially is this so in political cases where the necessity seems to be greatest because of the character of the alleged unlawful acts committed. The defendant, again,—continuing the review of the general procedure in criminal cases on the Continent—has the right to close. He considers the right of the last word a precious one; and anyone who has seen an ordinary trial, or, in particular, a recent political trial in this country, will immediately concede the high importance of the final speech.

These general elements in criminal procedure should be pondered by us. They are all important, and especially are they so in cases of political crime, where it is vital to the defense to labor within a medium which gives free and full movement. We ought to recognize the distinction between political and other crime; we ought, in political cases, to give the right to the jury of deciding upon the law and the fact, and take away the power of the judge to instruct on the law.[27] To be sure, the jury is not much

[27] One or two judges in New York City made wonderfully courageous charges to juries; and one or two elsewhere gave the defendants a large latitude in the presentation of evidence. But this was, of course, a matter of discretion. What is needed is the *right* to free presentation.

to be depended on. But in numbers there is sometimes strength to the opponents of the established order, because of possible divisions in the ranks of standpatters and because of the possibility of hitting upon one man in twelve who may see the justice of the defendant's case, though that case may be in a hopeless minority. We ought to give the defendant the last word. We ought to make the defense free to introduce any and all the evidence it considers best to introduce. We should, as a consequence of this, hasten the ends of trials, by doing away with wrangling on the part of attorneys over rules of evidence. By abolishing the question and answer method of eliciting information from witnesses—a method which consumes a world of time—we should make the evidence, upon which the jury is to base its verdict, interesting, and, therefore, more intelligible and easily followed by that jury; we should follow the natural method of seeking truth, which in this case happens also to be the best method; and we should be doing the political prisoner the justice of drawing the logical conclusion from the premises that political crime is to be distinguished in our law from common crime, namely, that a distinction in the nature of the crime carries along with it a distinction in the nature of the court procedure. All these changes I urge primarily for political prisoners. But I do not hesitate to conclude that the rights of common criminals and *of society*—for society, in the case of these criminals, is now hampered a great deal more than is the defendant in our court procedure, due to the presumptions and the constitutional prohibitions, and we ought not to make the discrepancy between law and justice greater than it now is—will be better preserved by the introduction of these changes into our trials.

Certain objections ought now to be considered. It is said that the abolition of the rules of evidence is unthinkable; or, at any rate, that no precedent exists in our country. We have seen how utterly thinkable and, indeed, realizable the abolition of rules of evidence is, and we have glimpsed the operation of free proof on the Continent of Europe. But the ready response is at hand: "That is a foreign practice; what is good for them may not be good for us."[28] Wigmore, in his powerful introduction to the

[28] See my articles, "The American Student in the French Law School and the French Student in the American Law School," in "Le Bulletin de la Maison francaise de Columbia University"—March-April, 1918, New York City; "Le Secret Professionel," in "Le Bulletin de la societé des prisons," Oct.-Dec., 1907: "Comparaison du système des règles de preuve en France et

second edition of Volume V of the Supplement Index to his treatise on the Law of Evidence, says:

"A *complete abolition* of the rules is at least arguable, not merely in theory, but in realizable fact. They are today mostly ignored in the practice of four important jurisdictions—in the Interstate Commerce Commission, in Patent litigation, in Admiralty trials, and in (some of) the Juvenile Courts. This shows that, in the United States, and today, justice *can* be done without the orthodox rules of evidence.

"These four exceptional cases are of course explainable as abnormal. In the first place, there is in all four practices no separation of jury and judge; and the safeguarding of the lay jurors from misleading evidence is the main reason for the orthodox system of evidence. In the next place, there are no lawyers (ordinarily) in the Juvenile Court; while, on the other hand, the practice of the first three classes of cases named is chiefly in the hands of a select group of specialists, both judges and lawyers; and this makes for mutual confidence, discouraging petty evasions of the rules and also petty insistence on them."

The abolition of the rules would add to the strength of the movement for better jurors. Our present system of jury trials is marked by exemptions and by inferiority of jurors. The inferiority is due directly to two matters: first, the statutory exemptions allowed, and second, the practice of attorneys, connived in by the judges, of weeding out of the panel of jurors any persons who might by any possibility be intelligent and competent to pass upon the questions at issue. The more of a Tom Noddy the juror is, the less he knows about what is happening around him, the greater ignorance he has of history and human experience, and even of human nature, the more readily acceptable he is to the contending attorneys. The theory of our law that jurors are to be safeguarded from misleading evidence is based upon the paternal doctrine that a layman cannot reason upon the facts unless these facts be presented in a particular way. And by statute and by practice in our courts we declare by our acts the reason for such careful safeguarding. The cat's out of the bag. The reason is plain. We make the jurors incompetent, and then we must protect them—and ourselves from their ignorance. Evidence has therefore been influenced, in part, by our American practice of sifting out the strong and accepting

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aux États Unis," in "Le Bulletin de la societé des etudes Législatives," Paris, Janvier, 1918; "The Procedure in the Cour D'Assises of Paris," 18 Col. Law Rev. 43.

the weak. Herein, I should say, lies an interesting channel for speculation.

As for the other point touched on by Wigmore—the fact that the practice is in the hands of a group of specialists—it may be said that in Europe generally the problem is simpler than it is here. There there is a separation between office lawyers and trial lawyers, and specialization and expertness and breadth of mind in trying cases are the common possessions. But it should be noted that after the abolition of all rules of evidence in the trial court no expertness in the application of rules is required; no petty insistence on the rules is possible; no petty evasions of the rules are encouraged. I am arguing for the full and complete unshackling of the fetters from fact. There is no half measure. We must go to one extreme or the other. Quibbles and quirks will otherwise be the result.

I am aware that there will always, theoretically, be the problem of the judge of admitting certain evidence and excluding other evidence. This, though a problem frequently forgotten, is nevertheless one that is in theory possible, and sometimes arises in practice. But we should be astonished to see how few the occasions are which spring up to baffle judges or attorneys, and, indeed, how rarely the mere possibility comes to the surface at a trial that certain testimony will not be heard. Over and over again in my attendance at French trials I have prepared for an interesting "incident personnel" between the judge and the attorneys for the defense—only to be disappointed. Almost never is testimony rejected that can in even the remotest way throw light upon the case: and the Continental system is so liberal that on occasion individuals whose testimony will not—and it is previously known that it will not—throw any light upon the facts of the case are allowed to come to the stand and give their "depositions," that is, to make their declarations. The instance which most often produces such a proceeding is when a witness has made some remark derogatory to another who may not have anything to do with the facts at issue of a case, but who is permitted to take the stand in defense of his reputation. This may be going too far. But it is to be remarked that the occasions are rare, that when they do arise they are soon over, and that the spirit of independence is so great that a person may not be defamed even in a court of justice.

I do not follow Dean Wigmore when he says (p. xv) that

"to *abolish* the bulk of the rules, in the ordinary courts would be a futile attempt . . . . you cannot by fiat legislate away the brain-coils of one hundred thousand lawyers and judges; nor the traditions embedded in a hundred thousand decisions and statutes." I may appear to be wise after the event. But surely, whether or not we could from a study of past history deduce the proposition I am about to lay down, there does not seem to be much wisdom in *now* affirming that revolutionary changes utterly unthinkable a few years ago are now taking place all around us; and the comparatively simple matter of the abolition of a highly technical and intricate system of rules which have grown up through centuries from precedent to precedent in a wilderness of single instances, which Wigmore rightly says were not systematized till very recently, is a change we can bring about if we have the will to do it. The Continent of Europe had rules of evidence, and the transformation came. I fear we in America bank too little upon the resiliency of the human mind and too much upon stare decisis.

But Wigmore has this much right on his side that the force of circumstances and training is so great that lawyers keep on contending in the same old way for insignificant details concerning the introduction of insignificant facts long after the jury has passed out of their ken. Witness their bickerings and their insistence upon exclusionary rules even when the case is being tried before a judge acting as jury.

It is said by Wigmore that the growth through contact with human experience of the law of evidence gives the rules the weight of reality. But the system of rules in medieval times arouses—and justly—our mirth, though that system was also the result of contact with human nature. And despite the fact that that ridiculous system existed for long, human experience outlived it, and when the human mind saw its injustice and its inanity courageous peoples threw it over for a saner system. Now it is, according to the Continental peoples, the present free proof system that is in accord with the experience of human nature.

It would be interesting, though the length of the discussion would here be prohibitive, to follow the Anglo-American system of evidence into its details, compare it with the system of free proof, show for each of the many rules the value of the reasons adduced, and indicate how these reasons when sound are modified

by other reasons which favor the free proof method. But I cannot let this occasion go by without reference to what has been called—

"the greatest and most distinctive contribution of Anglo-American law (next after the jury trial) to trial procedure. Bentham thought this much of it and we can afford to continue in this conviction. But if it is the greatest and most valuable, it is also (like other great truths) overworshipped and overworked,—especially in its unessential details. The difficulty about it is that it has two principal aspects, one of which is vital and the other of which is not.

"The vital aspect is that we are *not to credit any man's assertion until we have tested it by bringing him into court (if we can get him) and cross-examining him.* Now, the development of this art of cross-examination, during two centuries, is the great valuable contribution of the rule. Here modern psychological science confirms emphatically this empiric result: for it has shown us something of the hundred lurking sources of errors that inhere in all testimonial assertions; and we now perceive that our traditional expedient of cross-examination was the true way to get at the sources of error, and that it owes its primacy to permanent traits of the human mind. To abandon our insistence on the necessity of this test would be to surrender the best expedient anywhere invented of getting at the truth of controversies. For this reason, the abandonment of the Hearsay Rule, in this vital aspect, is unthinkable."[29]

But we can, under the free proof system, cross-examine; and we can go further than the Continental peoples and insist, as we do now, upon the right, which, by the way, in this country in practice may be and is sometimes seriously trammelled by the judge. The Continental peoples have the right of cross-examination, theoretically, through the President; but I have seen questions put—of course with the consent of the President of the Court—directly to a witness on cross-examination. I did not see any prolonged cross-examinations; but I was assured that when the occasion requires it, extended, elaborate, and severe cross-examination does take place. And the records of trials prove that this is so. The reasons for the lack of frequent cross-examination are several, among which are the preliminary investigation, which is thorough and which has included cross-examination; and the previous examination by the court and the lawyers' of the dossier—the evidence presented before the examining and investigating magistrate.

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[29] Wigmore, op. cit. p. xxviii.

But there is yet more. The witness who makes the hearsay statement is subject to cross-examination, though the individual who is said to have made the statement extra-judicially is not brought before the court to give his testimony. And this hearsay witness may be examined as to his sources of knowledge; and evidence may be introduced to rebut the hearsay statement—a thing which is sometimes done. The hearsay statement is made and received for what it is worth. This is certainly done in actual life, and it is not a far cry—or ought not to be—from actual life to court trials. Further, if the hearsay statement is important, the man who made the statement extra-judicially is brought to court. It can be seen that it is to the interest of the parties to present important evidence by the mouths of the most competent witnesses; and we therefore find that as a result either the prosecution or the defense will not allow an important statement for its case to rest upon the unsupported word of a man who shows by hearsay testimony that the actual eye-witness to the facts of which he gives testimony is another. For instance, A takes the stand and says B said X struck Y. If the prosecution rests there, the weight of the testimony of A would not be great. The evidence would, under the Continental system, be admissible; but this is a long way from saying it would be sufficient proof of the fact that X struck Y. The prosecutor would bring on the witness B. Cross-examination of A would show, perhaps, that little if any weight was to be attached to B's statement, because, for instance, B was an enemy of X, or because A cannot hear well. This is the method we employ in our ordinary affairs, and it cannot well be maintained that in these affairs we are at a loss for a proper solution of many problems, any more, indeed, than we are in courts of law. What the hearsay rule does is this, in some cases: it prevents any evidence whatever from going to the jury and deprives the jury of any means of arriving at a proper conclusion. The discrepancy between court justice and extra-judicial justice is marked. What is produced on the offer of hearsay evidence is this: there is objection, there is discussion, there are obstructive tactics, there is confusion, there is uncertainty in the minds of the jurors, and, in short, there is great waste of time, confusion of issue and dissatisfaction on the part of the jury because of lack of full testimony.

The method of presenting evidence in the two contrasted systems is next to be inquired into. The Anglo-American method

is clear, simple, and logical: the Continental is involved and practical. Curious that the French, for example, who are known for logic and symmetry should be lacking in a logical and symmetrical system of presenting evidence. But in this case we find the Continental method fashioned after the practice outside courts of law. In our system—the product of a practical and analytical people—the method is fashioned logically and symmetrically: examination followed by cross-examination and this again followed by re-examination and recross-examination; and the evidence of the prosecution first presented, and then that of the defense; and this followed by rebuttal evidence and surrebuttal; and finally the summing up of the defense—the only breach in the regularity—followed by the summing up of the prosecution. And previous to the introduction of evidence at all, the exposition of the case by the prosecution and by the defense. Whereas on the Continent cross-examination may take place during examination; and so may rebuttal, and part of summing up, and confrontation—just as these things happen in life. And there is no clear exposition of the case by the prosecuting officer, but a reading of the indictment; matters of defense are put in during the case of the prosecution, and the prosecutor sums up first and the defense last.

The thing to note here is that while the evidence is presented in an Anglo-American court with strict logical regularity, abroad the evidence is presented in what seems to us a haphazard fashion. The defense of the Continental system may be made upon two grounds: first, it is the natural if not the logical, artificial system of searching out the truth; and second, as Wigmore says in his treatise—section 1368—speaking of the advantages of cross-examination in contrast to the adducing of proof by other witnesses called by the opponent:

"The cross-examination *immediately succeeds* in time the direct examination. In this way the modification of the discredit produced by the facts extracted is more readily perceived by the tribunal. No interval of time elapses to diminish or conceal their force. Proving the same facts by new witnesses, after others of the proponent have intervened might lose this benefit, and the counsel's argument at the close might not be able to replace it."

So it is that human experience has taught the Continental peoples to seek out truth in court as we seek it out in our daily life, and so it comes that the examination and cross-examination

and rebuttal and surrebuttal are mixed; and the presentation of the case for the prosecution is intermingled with the presentation for the defense. The evidence over there is introduced before other facts have intervened—after which that evidence might lose its force. Simplificative rules of evidence do not always simplify or clarify.

The third detail of the law of evidence I should like to discuss briefly is the giving of testimony. How the testimony is to be presented is a serious problem. Our system prescribes the question and answer method; the Continental, the deposition or narrative method. The advantages and disadvantages of the question and answer method, and the rules devised for the lessening of harm in the search for truth are known to every practicing lawyer and are admirably stated and commented upon in Wigmore's chapter on Testimonial Narration or Communication. The method of the direct and untrammelled narration by a witness is unknown to us. On the Continent the right of a witness to speak freely and fully is sacredly maintained. But it is not so generally known that *after* the narrative has been given, the witness may be examined and cross-examined. This method, therefore, presents us with the advantages of the question and answer method, and with the further great advantages of the direct method of narration. The saving of time is enormous, as I can testify from experience here and abroad. Any one of the interminable political trials held in the city of New York during the last year and a half, some of which took two weeks and one of which took eight weeks to try, could have been tried in much less time under the Continental system of free proof and direct narration. And yet we hear that to let in all testimony and evidence is to protract unduly the trial of actions. Moreover, it is said that free proof does not protect the parties, especially the prisoner, and that the rules of evidence are primarily to guard against the introduction of evidence harmful to the parties, and of course, and particularly harmful to the prisoner. The rules of evidence in the trials mentioned—as in all others—almost without exception did nothing else but prevent from going into evidence a great deal of testimony which would undoubtedly have added to the value of the trials as investigations into truth and might have changed the verdicts.

Nothing, again, can be less interesting or more sterile than examinations and cross-examinations in our courts. This is

partly due to our lack of skill, and partly to the inherent defects of the question and answer method of getting at facts. A narration that would take five minutes is drawn out into an examination that takes two hours; and the facts brought out are not only shockingly disproportionate to the effort and time, but positively fewer and less important than by way of unhindered narration.

I have ventured to question some of the conclusions of Wigmore. I cannot leave the subject to which he has given so much of his time and loving and fruitful thought without declaring my indebtedness to him as a writer and as a man. We all know he is a great authority. It remains yet to be generally recognized that he is an admirable citizen and a great man. It is the fact of his superb human quality that makes one diffident in questioning his conclusions, especially upon such a human subject as evidence.

Finally, I use the concluding words of Wigmore in the preface already quoted from:

"General denunciations against the system, and general denunciations against denunciations, will do little service either way. A great national and racial system cannot be easily set aside; and its historic growth indicates that it has at least some right to exist, as it is and where it is. What is needed rather is detailed study and concrete criticism."[30]

Many national and racial systems—thought to be such at any rate—have been recently swept aside; and history records others. The jury system is considered by Anglo-American writers as an Anglo-Saxon institution. Yet we find that this national and racial institution flourishes on the Continent where it is according to those writers an exotic: we find also that the institution is even more jealously guarded there than among us; and, lastly, we find that it works well among them. Dean Wigmore, himself, in his treatise, and elsewhere, has given us ample evidence of his broad human sympathy and lack of chauvinism. Differences between peoples we have in the past exaggerated. We ought now to emphasize the common racial traits of mankind. These traits, we shall discover, are many; and idiosyncrasies and peculiarities are few. We are beginning to become aware of the overweening power of circumstances, of environment. Change this environment, and the change in national and racial nature will be astounding. We must endeavor to approach to just relations in society, and these just relations will be repre-

[30] Wigmore, op. cit. p. xxxviii.

sented on the bench and at the bar. "Sound rules of evidence, in short, are as much a symptom as a cause of better justice."[31] No more profound truth was ever uttered. The kind of system of law we have, and of evidence, in particular, illustrates and exemplifies our social advance. Since I have been arguing for the abolition of all rules, I may be permitted to modify the quotation: A sound system of evidence is as much a symptom as a cause of better justice.

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[31] Wigmore, Vol. 5, op. cit. p. xxxix.

THE NATIONAL POLICE POWER
UNDER THE
COMMERCE CLAUSE OF THE CONSTITUTION*

II. Regulations Barring the Use of Interstate Commerce As a Conduit for Injurious Commodities and An Aid in Illicit Transactions

Although Congress in its efforts to protect the national health, morals, and general welfare has been compelled to use a process of indirection and has had to do good not merely by stealth but by subterfuge, the result has been that, under its specific grants of power to regulate interstate commerce, to tax, and to maintain a postal system, Congress has succeeded in laying a compelling or restraining hand upon numerous abuses, has wrestled with a considerable variety of economic and social problems, and has, accordingly, exercised a police power that has been real and substantial. By far the greatest number of those acts of Congress, which, even though labeled interstate commerce or tax or postal regulations, are really police enactments in disguise, have been passed under the authority to regulate commerce; a group of these, those passed to protect interstate commerce from danger or obstruction, have been discussed in the previous portion of this article. There remain still to be discussed three main groups of police regulations passed under the sanction of the commerce clause: those forbidding the use of interstate commerce as a channel for transactions that menace the national health, morals, or general welfare; those passed to co-operate with the states by forbidding the use of the facilities of interstate commerce for the purpose of evading or violating state police regulations; and finally the Child-Labor Law, by which Congress sought to deny the privileges of interstate commerce to articles produced under conditions of which Congress did not approve.

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* Continued from 3 Minnesota Law Review 319.

It has been made clear that Congress has full right under its power "to regulate commerce . . . . among the several states" to protect that commerce from danger and obstruction; and the Supreme Court has found it possible to uphold the Employers' Liability Act as necessary to protect commerce from railway accidents, and the Adamson Eight-Hour Law as necessary to keep commerce from being obstructed. But if Congress were limited in its power over interstate commerce merely to the protection of that commerce, then a good many abuses and dangers arising from or augmented by interstate commerce would be left unremedied. But Congress has not felt itself so circumscribed. It has regarded as a proper use of its authority over commerce not only the protection of commerce itself but also the protection of the public from the misuse of that commerce. One of the most interesting and important steps in the development of a national police power under the commerce clause has been the enactment of a group of laws by which the channels of interstate commerce have been closed to commodities or transactions which are injurious, not to that commerce or to any of the agencies or facilities thereof, but to the health, morals, safety, and general welfare of the nation. When Congress punishes the man who ships across a state line bottles of colored water declared by their labels to be a cure for cancer, it does so not because those bottles are a whit more dangerous to commerce than would be a consignment of shoes, but because it desires to prevent the facilities of commerce from being used as a means of distributing goods which are a fraud upon the people who buy and use them. When Congress makes it a felony to transport a woman from one state to another for immoral purposes, it does so not because it is more dangerous or injurious to an interstate carrier to carry a prostitute than to carry a clergyman, but because it is undesirable to have interstate carriers used as tools or agencies by those engaged in the white slave traffic.

There ought to be no difficulty in concluding that the authority to pass such laws is reasonably implied from the plenary power of Congress to regulate commerce. When a man is given charge of a gun or an axe he is expected not merely to keep it in repair and protect it from damage; he is expected also to see that it is not placed at the disposal of those who desire to use it in committing murder or in destroying other people's property. Whatever controversy may arise as to the power of Congress to pro-

hibit or restrict under certain circumstances the shipment in interstate commerce of commodities which are legitimate and wholesome and are destined for legitimate and wholesome uses, there ought to be no serious doubt about the congressional authority to keep "the arteries of interstate commerce from being employed as conduits for articles hurtful to the public health, safety, or morals."[1]

The police regulations thus enacted by Congress to prevent the use of commerce for improper purposes may be grouped under three heads: first, those designed to protect the public morals; second, those aimed to protect the public health; third, those intended to protect the public from deception and fraud. Each of these groups may be considered briefly.

1. *Acts Under the Commerce Clause Protecting Public Morals.* (a) *Exclusion of Lottery Tickets:* It would be difficult to point to any problem about which the moral judgment of the American people has changed so radically and in so short a time as it has in respect to lotteries. During the first few decades of our history lotteries were looked upon as perfectly proper forms of private enterprise, and even as useful fiscal agencies for augmenting the revenue of the state and nation.[2] At the present time lotteries are thoroughly and almost universally discredited; and rigorous provisions prohibiting them are to be found on the statute books and even in the constitutions of a great majority of the states.[3] In 1895 Congress lent its aid to the cause of the suppression of lotteries by passing an act which prohibited the introduction or the carriage of lottery tickets in the United States mails or in interstate commerce.[4] This interesting statute was apparently passed with two purposes in view. One purpose was the desire to strike a blow indirectly, through the power of Congress over interstate commerce and the mails, at an evil over which the constitution of the United States gave Congress no direct authority. A second purpose was to prevent the anti-

[1] This apt phrase is borrowed from the brilliant article by Senator Knox on Development of the Federal Power to Regulate Commerce. See 17 Yale Law Jour. 135 (1908).

[2] An elaborate account of this is to be found in an article by A. R. Spofford, Lotteries in American History, Annual Rep. of Amer. Hist. Assoc., 1892.

[3] An exhaustive analysis of these state provisions and the cases construing them is to be found in Horner v. United States, (1893) 147 U. S. 449, 13 S. C. R. 409, 37 L. Ed. 237. At present probably every American state forbids them. 17 R. C. L. 1212.

[4] March 2, 1895, 28 Stat. at L. 963. This now forms Sec. 237 of the criminal code of the United States, March 9, 1909, 35 Stat. at L. 1136.

lottery statutes of the various states from being rendered ineffective by permitting the introduction of lottery tickets into the states through interstate commerce and the mails, channels beyond the reach of the police power of any state legislature.

It was not until 1903 that the Supreme Court of the United States passed upon the constitutionality of the Lottery Act.[5] So important and difficult did the court regard the problems involved that it had the case argued three times before rendering its final decision, and then decided it by a vote of five to four. Some of the most distinguished members of the American bar appeared on the brief attacking the statute. Two distinct questions were raised in this case: first, are lottery tickets commodities or articles of commerce within the meaning of the constitution; second, granted that they are, does the power which Congress possesses to "regulate" commerce include the power to prohibit commerce in such commodities?

The court answered both these questions in the affirmative. It decided, first, that lottery tickets are articles of commerce, and, second, that their exclusion from interstate commerce is a proper exercise of the power to regulate that commerce. While it is unnecessary to the present discussion to comment upon the first of these questions, it will be interesting to examine briefly the reasons which led the majority of the court to this second conclusion. "In the first place," declared the court, speaking through Mr. Justice Harlan, "in determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of March 2, 1895, to suppress, cannot be overlooked." Then follow the views of the court upon the menace of lotteries. Quoting from one of its previous decisions,[6] it asserted that "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders

[5] The Lottery Case (Champion v. Ames), (1903) 188 U. S. 321, 23 S. C. R. 321, 47 L. Ed. 492. This case involved only the validity of the exclusion of lottery tickets from interstate commerce; their exclusion from the mails had been sustained in earlier decisions. See infra pp. 386-387 and note 7.

[6] Phalen v. Virginia, (1849) 8 How. (U. S.) 163, 168, 12 L. Ed. 1030.

the ignorant and simple." The second step in the court's argument is that Congress by virtue of its plenary power to regulate commerce among the states may "provide that such commerce shall not be polluted by the carrying of lottery tickets" unless some constitutional restriction can be found to stand in the way. "What clause," inquires Mr. Justice Harlan, "can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one state to another that which will harm the public morals?" The only possible clause of the constitution which might be so invoked is that which forbids the deprivation of any person's liberty without due process of law. "But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals. . . . . It is a kind of traffic which no one can be entitled to pursue as of right." In the third place, the court disposes of the contention that the Lottery Act, by establishing regulations of the internal affairs of the several states, violated the Tenth Amendment, which reserves to the states or to the people all powers not delegated to the United States. The court held, to begin with, that this contention overlooks the fact that the Lottery Act is a regulation of commerce and that the power to regulate commerce is specifically given to Congress by the constitution. But, aside from that, the act does not purport to suppress the traffic in lottery tickets which is carried on entirely within the limits of a state, but only that traffic which is interstate. Furthermore, instead of invading the proper field of police regulation and usurping the powers of control over the morals of the people of the state—

"Congress only supplemented the action of those states—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce."

After noticing as precedents or analogies some of the other instances in which congressional regulations of commerce have taken the form of prohibition,—namely, the prohibition of the interstate transportation of diseased cattle, the prohibitions comprising the Sherman Anti-Trust Act, and the prohibition resulting from the operation of the Wilson Act of 1890, which subjected to state police control interstate shipments of liquor upon their arrival within the state—the court takes particular pains to make clear the limited scope of this important decision. This case does not at all establish the right of Congress to "exclude from commerce among the states any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive. . . ." The court will consider such arbitrary exclusions from interstate commerce only when it is necessary to do so. "The whole subject is too important, and the questions suggested by its consideration are too difficult of solution to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that under its power to regulate commerce among the several states Congress—subject to the limitations imposed by the constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress."

The *Lottery Case* was decided by a divided court with four justices dissenting. The dissenting opinion, written by Chief Justice Fuller, was based on the conviction of the minority that lottery tickets were not articles of commerce and that, even if they were, the power to regulate interstate commerce does not carry with it the absolute power to prohibit the transportation of articles of commerce. It was pointed out that when the court held that exclusion of lottery tickets from the mails was a proper exercise of the power of Congress over the postal system it had been expressly said that Congress did not have the power to exclude from transportation in interstate commerce articles which

it might properly exclude from the mails.[7] This dissent is also interesting because it specifically states that Congress does not have as extensive power over interstate commerce as it does over foreign and Indian commerce. "There is no reservation of police power or any other to a foreign nation or to an Indian tribe, and the scope of the power is not the same as that over interstate commerce." Consequently the instances in which Congress has excluded various articles from importation or from traffic with the Indian tribes do not serve as precedents for similar restrictions upon interstate commerce.[8]

The decision in the *Lottery Case* has been discussed at length because it was in a sense a pioneer decision, because it has had a profound influence upon the subsequent development of the national police power, and because, in spite of Mr. Justice Harlan's warning against making unwarranted deductions from it, it has been regarded by many as establishing a doctrine regarding the power of Congress to prohibit various kinds of interstate commerce which is far more revolutionary than it was the expressed purpose of the court to sanction. It is quite as important to keep clearly in mind the things which the *Lottery Case* does not hold as it is to remember the things which it does. In the first place, it does not hold that Congress has the same power to exclude articles from interstate commerce that it has to exclude them from importation in foreign commerce. It already has been suggested that this view was urged upon the court by counsel for the government, but that the decision carefully avoided any expression of opinion regarding it.[9] In the second place, it does not hold that Congress may exclude anything from interstate commerce except those commodities the distribution of which menaces the public health, morals, or safety. Finally, it does not hold that Congress has the power to exclude harmless and legitimate commodities or transactions from interstate commerce merely because such exclusions would result in a needed or desirable protection to the public health, safety, or morals. It does not, therefore, establish a precedent for the recently invalidated Child-Labor Law. It merely upholds the exclusion of such com-

[7] In re Rapier, (1892) 143 U. S. 110, 12 S. C. R. 374, 36 L. Ed. 93. Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877.

[8] The Lottery Case is severely criticized in an article by W. A. Sutherland, Is Congress a Conservator of the Public Morals? (1904) 38 Amer. Law Rev. 194.

[9] See first section of this article, 3 MINNESOTA LAW REVIEW 301.

modities as are themselves by their nature and effects a menace to the public welfare.

(b) *Exclusion of Obscene Matter:* The use of the power of Congress to regulate commerce for the purpose of suppressing the circulation of obscene literature or pictures dates back to the year 1842.[10] However, this early statute merely forbade the importation of obscene matter into this country from abroad. As time went on the scope of this legislation was expanded to include within its prohibitions not only obscene literature and prints but also contraceptive devices, drugs, and information.[11] But it was not until 1897 that Congress finally penalized the distribution of such literature and articles through the channels of interstate commerce.[12] With some slight modifications, this statute forms a part of the present criminal code of the United States.[13] The act contains the two fairly distinct types of prohibition already in the earlier statutes. In the first place, it makes it a crime to deposit with any common carrier for the purpose of interstate transportation any obscene literature, pictures, images, or articles. In the second place, it excludes from interstate commerce in the same way all articles or drugs designed to prevent conception or to produce illegal abortions and all literature or advertisements containing contraceptive information or telling where the articles or information may be secured.

It is quite clear that the purpose of this legislation was to protect the public morals and not to protect interstate commerce. Certainly that commerce is in no greater danger of destruction, loss, or interference from the transportation of obscene literature than it is from the transportation of Bibles. In passing these laws Congress aimed to prevent interstate commerce from being used as a medium for distributing articles or printed matter which it regarded as morally degrading.

While the Supreme Court of the United States has never passed squarely upon the constitutionality of this legislation, it has cited with approval the decision of a lower federal court which held it valid,[14] so that the constitutional soundness of such

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[10] Act of August 30, 1842, 5 Stat. at L. 562, Sec. 28.

[11] Acts of March 2, 1857, 11 Stat. at L. 168; March 3, 1873, 17 Stat. at L. 598; March 3, 1883, 22 Stat. at L. 489; October 3, 1913, 38 Stat. at L. 194.

[12] Act of February 8, 1897, 29 Stat. at L. 512.

[13] March 4, 1909; 35 Stat. at L. 1138, Sec. 245.

[14] Hoke v. United States, (1913) 227 U. S. 308, 33 S. C. R. 281, 57 L. Ed. 523.

use of the commerce power may be said to have passed into the realm of settled law. That part of the statute which forbids the transmission through interstate commerce of contraceptive articles or information was the first to be subjected to judicial scrutiny, and its validity was sustained by the United States district court in the case of *United States v. Popper.*[15] The statute was attacked primarily upon the ground that Congress was without constitutional authority to pass it, since it dealt with the internal affairs of the states and invaded, therefore, the field of legislative authority reserved to the states by the Tenth Amendment. The court disposed of the contention with a confident directness and brevity of argument that is in striking contrast to the labored treatment which the principle involved usually received in other cases. The power to regulate commerce "includes power to declare what property or things may be the subjects of commerce." The power of Congress to prohibit commerce in certain commodities with the Indian tribes has long been recognized.[16] In the *License Cases* Chief Justice Taney asserted that the power of Congress to regulate the commerce with foreign nations conferred the authority to "prescribe what articles of merchandise shall be admitted and what excluded," and also declared that the power to regulate interstate commerce was equal in scope to the power to regulate foreign commerce.[17] It follows, therefore, that under its power over interstate commerce Congress has the power to prohibit the transportation of articles designed for immoral use.

It is interesting to notice that, while the result reached in the *Popper* case has been regarded as correct, the theory upon which the court relied in reaching that result has been tacitly if not openly discredited. That theory is that Congress may exclude things from interstate commerce because it may exclude them from foreign and Indian commerce; and it has already been made clear[18] not only that the Supreme Court in deciding the *Lottery Case* refused to make any use of the argument that the power of Congress over foreign and interstate commerce is the same, but also that a growing body of legal opinion has been won over to the view that the two powers are quite different in scope. No

[15] (1899) 98 Fed. 423.
[16] Citing United States v. Holliday, (1866) 3 Wall. (U. S.) 407, 18 L. Ed. 182.
[17] (1847) 5 How. (U. S.) 577, 12 L. Ed. 256.
[18] Supra, p. 387.

other case has been found in which the reasoning of the court in this case has been followed.

That portion of the act of 1897 relating to the exclusion of obscene literature from interstate commerce was held constitutional in a case in the United States circuit court of appeals in 1914.[19] The opinion in this case does not call for extended comment. The contention that congressional authority does not extend to the prohibition of commodities from interstate commerce was met by the citation of the cases in which the Supreme Court had upheld the power of Congress to prohibit the interstate transportation of lottery tickets, diseased cattle, and women for immoral purposes. The argument that the statute violated the First Amendment by abridging the freedom of the press was disposed of with the succinct remark that "we think that the freedom of the press has enough to answer for without making it a protecting shield for the commission of crime."

(c) *The White Slave Act:* In 1910 Congress enacted the famous Mann Act, which bore the title, "An Act Further to Regulate Interstate and Foreign Commerce by Prohibiting the Transportation Therein for Immoral Purposes of Women and Girls, and for Other Purposes."[20] Here again Congress was not protecting interstate commerce from any dangers, direct or indirect, which menaced that commerce; the safety and efficiency of interstate commerce is not dependent upon the private morality of the passengers on interstate trains. The purpose of the statute was to strike a blow at the white slave traffic by refusing to allow interstate commerce to be used any longer as a means of assisting those who promote the nefarious system of commercialized vice.

The Mann Act was held constitutional by the Supreme Court in 1913 in the case of *Hoke v. United States.*[21] The statute was attacked on the ground that it violated the privileges and immunities of citizens of the United States by denying free right of passage in interstate commerce; that it was a perversion of the power of Congress to regulate interstate commerce by exceeding unduly the proper scope of that power; and on the ground that it contravened the Tenth Amendment by invading the legitimate domain of the police power of the states in an attempt to regulate the private morals of the people.

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[19] Clark v. United States, (1914) 211 Fed. 916.
[20] June 25, 1910, 36 Stat. at L. 825.
[21] 227 U. S. 308, 35 S. C. R. 281, 57 L. Ed. 523.

In answer to the first objection, the court denied that any person enjoys a constitutionally protected right to use interstate commerce for the furtherance of immoral designs. "The contention confounds things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. . . . It is misleading to say that men and women have rights. Their rights cannot fortify or sanction their wrongs; and if they employ interstate transportation as a facility of their wrongs, it may be forbidden to them to the extent of the act of June 25, 1910, and we need go no further. . . ." The court also disposed of the other contentions by declaring the act to be a proper exercise of the power to regulate commerce. This being the case its effect on the normal scope of state police power is quite irrelevant. The court alluded in rather sweeping terms to the police power which Congress may legitimately exercise through its control over commerce:

"The powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions; and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls. . . .

"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several States'; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."

While the opinion of Mr. Justice McKenna in the *Hoke* case rests upon the same principle as that upon which the *Lottery Case* was decided, the language used in certain portions above quoted is broad enough in its implications to sanction the doctrine that the power to regulate interstate commerce may take the form of prohibition not merely when such prohibition is necessary to prevent the distribution of commodities or the consummation of transactions in themselves definitely injurious to the public health, morals, or safety, but it may also take the form of prohibition, regardless of the character of the things excluded,

when such prohibition will contribute substantially to the national welfare. It is not surprising, therefore, to find Mr. Justice McKenna one of the four who dissented from the opinion of the majority in the case in which the federal Child-Labor Law was held invalid;[22] for his opinion in the *Hoke* case reflects the view that Congress has broad authority to use the power to regulate interstate commerce in any manner which will "promote the general welfare, material and moral."

(d) *Exclusion of Prize Fight Films:* In 1912 Congress enacted a law excluding from foreign and interstate commerce and the mails all prize fight films or pictures.[23] This was, of course, merely another attempt to keep the postal service and commerce from serving as distributing agencies for goods which Congress regarded as demoralizing in effect.

The only portion of this act which has thus far been attacked in the courts is that which prohibits the importation of the objectionable films from abroad. This was upheld by the United States Supreme Court in 1915 in the case of *Weber v. Freed.*[24] In this case the court contented itself with the briefest possible comment on the argument that Congress had exceeded its delegated powers and had invaded the domain of state police legislation; comment which culminated in the statement, "But in view of the complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles recognized and enforced by many previous decisions of this court, the contentions are so devoid of merit as to cause them to be frivolous." While the court gave no hint of what its attitude would be toward the question of the validity of the provision of the act forbidding the shipment of prize fight films in interstate commerce, the act is so obviously identical in purpose and constitutional principle with the Lottery Act, the Obscene Literature Act, and the White Slave Act, as to leave no doubt whatever regarding its constitutionality.[25]

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[22] Hammer v. Dagenhart, (1918) 247 U. S. 251, 38 S. C. R. 529, 62 L. Ed. 1101.

[23] Act of July 31, 1912, 37 Stat. at L. 240.

[24] 239 U. S. 325, 36 S. C. R. 131, 60 L. Ed. 308.

[25] In two cases involving the validity of this law, Weber v. Freed, (1915) 224 Fed. 355, United States v. Johnson, (1916) 232 Fed. 970, the lower federal courts argued that Congress could exclude the films from foreign commerce because its power to exclude objectionable articles from interstate commerce had been so frequently sustained. Such an argument leaves little room for doubt as to the views of these courts on the question of the validity of excluding the films from interstate commerce. After the efforts which have been made from time to time to prove that the power of Congress to

2. *Protection to Public Health.* Congress has exercised a national police power by virtue of its authority to regulate interstate commerce nowhere more frequently and nowhere with more general public approval than in the enactment of laws designed to close the channels of commerce to impure, adulterated, or unhealthful products and to the possible breeders and carriers of disease. By far the greater portion of the rather voluminous legislation of this type which has been placed on the federal statute books has provoked neither serious discussion regarding its constitutionality nor actual litigation. And while in a few instances these laws have been squarely attacked in the courts, and decisions sustaining their constitutionality have been rendered, there have been other cases in which the court has found opportunity to give evidence of its approval of such legislation only in some collateral action. It is appropriate to the purpose of this article to consider only the more interesting and important of these laws and the cases construing them, rather than to attempt an exhaustive compilation. It seems natural to allow them to fall into two general classes: first, the acts excluding from interstate commerce impure, unwholesome, or adulterated food or drugs; and, second, the acts to prevent the spread through the channels of interstate commerce of disease, infection, or parasites.

(a) *Exclusion of Impure, Unwholesome, or Adulterated Food or Drugs:* The forerunners of the more recent acts excluding these objectionable commodities from interstate commerce are the laws forbidding the importation of such commodities from abroad. This power Congress has exercised since 1848. In that year it passed an act "to prevent the importation of spurious and adulterated drugs" and to provide a system of inspection to make the prohibition effective.[26] Such legislation guarding against the importation of unhealthfully adulterated food, drugs, or liquor has been on the statute books ever since.[27] In 1887 the importation by Chinese of smoking opium was pro-

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regulate interstate commerce is as broad as its power over foreign commerce, it is interesting to see the court in the Johnson case arguing the other way and urging that "the constitutional power of Congress over commerce extends, not only to interstate, but to foreign commerce, and what it may do with respect to the one it may do with respect to the other."

[26] Act of June 26, 1848, 9 Stat. at L. 237.

[27] See the following acts: March 1, 1899, 30 Stat. at L. 951; May 25, 1900, 31 Stat. at L. 196; March 2, 1901, 31 Stat. at L. 930; June 3, 1902, 32 Stat. at L. 296; March 3, 1905, 33 Stat. at L. 874; June 30, 1906, 34 Stat. at L. 684.

hibited,[28] and subsequent statutes passed in 1909[29] and 1914[30] made it unlawful for any one to import it. In 1897 Congress forbade the importation of any tea "inferior in purity, quality, and fitness for consumption" as compared to a legal standard.[31] The constitutionality of this provision was attacked in the courts, but the act was sustained by the Supreme Court in an opinion which has become one of the leading cases establishing the power of Congress to prohibit the importation of commodities.[32]

Ultimately Congress began to exclude from interstate commerce also various types of adulterated and unwholesome food and drug products. The earlier laws of this kind were not very comprehensive. In 1891 an act was passed which provided for the inspection of all live cattle destined for slaughter and intended for export or for shipment in interstate commerce, and the inspection of such cattle after slaughter, if that was considered necessary; and cattle or carcasses found to be unsound or diseased were not allowed to be shipped in interstate or foreign commerce.[33] However, the shipment of cattle or meat which had not been inspected at all was not forbidden; a fact which put very obvious limitations upon the scope and effectiveness of the act. In 1902 a statute was passed forbidding interstate commerce in all viruses, serums, toxins, antitoxins, and the like, "applicable to the prevention of the diseases of man," except when

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[28] Act of February 23, 1887, 24 Stat. at L. 409.

[29] Act of February 9, 1909, 35 Stat. at L. 614.

[30] Act of January 17, 1914, 38 Stat. at L. 275. The Supreme Court upheld this statute in Brolan v. United States, (1915) 236 U. S. 216, 35 S. C. R. 285, 59 L. Ed. 541. The court said: "The entire absence of all ground for the assertion that there was a want of power in Congress for any reason to adopt the provision in question is so conclusively foreclosed by previous decisions as to leave no room for doubt as to the wholly unsubstantial and frivolous character of the constitutional question based on such contention."

[31] Act of March 2, 1897, 29 Stat. at L. 605.

[32] Buttfield v. Stranahan, (1904) 192 U. S. 470, 498, 24 S. C. R. 349, 356, 48 L. Ed. 525, 536. The conclusiveness with which the court settled the case will be apparent from the following excerpt from Mr. Justice White's opinion: "Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power [to regulate commerce], resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion."

[33] Act of March 3, 1891, 26 Stat. at L. 1089.

such commerce is carried on by persons holding licenses from the Department of Agriculture, and except when the products mentioned conform to standards of purity and effectiveness established by the department.[34] A similar law was passed in 1913, applicable to serums used for domestic animals.[35] However, in 1906, Congress approached in earnest the problem of stopping the distribution and sale of impure food and drugs in so far as its power to regulate interstate commerce gave it authority to do so; and in that year it passed two comprehensive and far-reaching statutes known as the Pure Food Act[36] and the Meat Inspection Act.[37]

It is unnecessary to discuss in detail the provisions of these acts. The Pure Food Act excludes from interstate commerce all adulterated and misbranded food and drugs. Its definitions of the terms "adulterated" and "misbranded" are broad enough to include practically all unwholesome food and drug products and those fraudulently compounded or labeled. It seems clear that Congress had two purposes in mind in passing the Pure Food Act; one was to "protect the health of the people by preventing the sale of normally wholesome articles to which have been added substances poisonous or detrimental to health," the other was to "protect purchasers from injurious deceits by the sale of inferior for superior articles."[38] Without attempting to decide which, if either, of these purposes was paramount in the congressional mind, it is entirely proper to regard the act as one which aims to protect the health of the nation.

After the decision in the *Lottery Case*, it would hardly be expected that the question of the constitutionality of the Pure Food Act would prove difficult of solution. Several of the lower federal courts disposed of the question by reference to the authority of that case,[39] and in the two cases in which the validity of the act was touched upon by the Supreme Court such validity seems to have been assumed rather than established by elaborate

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[34] Act of July 1, 1902, 32 Stat. at L. 728.
[35] Act of March 4, 1913, 37 Stat. at L. 832.
[36] Act of June 30, 1906, 34 Stat. at L. 768.
[37] Act of June 30, 1906, 34 Stat. at L. 674.
[38] From the opinion of the court in Hall-Baker Grain Co. v. United States, (1912) 198 Fed. 614.
[39] Shawnee Milling Co. v. Temple, (1910) 179 Fed. 517; United States v. 420 Sacks of Flour, (1910) 180 Fed. 518; United States v. Seventy-four Cases of Grape Juice, (1910) 181 Fed. 629. For an elaborate discussion of the purpose and validity of the Act of 1906, with citation of cases, see Thornton, Pure Food and Drugs, (1912) Part II, Ch. II.

argument. In the first of these cases, *The Hipolite Egg Co. v. United States,*[40] the question arose whether the provisions of the act authorized the confiscation of adulterated food after it had reached its destination and was still in the original package. That there was no doubt in the mind of the court as to the validity of the law is evidenced by the language used in upholding the right of confiscation claimed by the government. The court said: "In other words, transportation in interstate commerce is forbidden to them [the adulterated products], and, in a sense, they are made culpable as well as their shipper. It is clearly the purpose of the statute that they shall not be stealthily put into interstate commerce and be stealthily taken out again upon arriving at their destination and be given asylum in the mass of property of the state." In the case of *McDermott v. Wisconsin*[41] the point at issue was whether the provisions of a Wisconsin statute relative to the labeling of food products conflicted with the federal law. While the constitutionality of the Pure Food Act was not squarely attacked, the Supreme Court took occasion to express itself clearly upon that point. It said:

"That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof. . . . The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food."

The Meat Inspection Act, as its name suggests, provides an elaborate system of government inspection of meat before and after slaughter and during the process of packing, as well as of the premises on which these processes are carried on, and forbids the shipment in interstate or foreign commerce of meat or meat products not so inspected. While applicable to a somewhat different set of conditions, it is quite clear that this statute is the same in purpose and rests upon exactly the same constitutional principles as the Pure Food Act. The validity of the act has never been questioned before the United States Supreme Court.

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[40] (1911) 220 U. S. 45, 30 S. C. R. 364, 55 L. Ed. 364.
[41] (1913) 228 U. S. 115, 33 S. C. R. 431, 57 L. Ed. 754.

(b) *Exclusion to Prevent the Spread of Disease, Infection, or Parasites:* Congress has imposed quarantine regulations upon foreign and interstate commerce to prevent the spread of human disease, diseases of livestock, and diseases and pests which attack plant and tree life. The more interesting and important of these acts may be briefly mentioned.

It is hardly within the scope of this article to allude to the numerous statutes whereby Congress has sought to prevent the introduction of human disease into this country through the channels of foreign commerce.[42] During serious epidemics laws have sometimes been passed to prevent the spread of disease from state to state by imposing restrictions upon the freedom of passage in interstate commerce. Thus in 1890 the President was authorized by law to take such measures as might be necessary to prevent the spread of cholera, yellow fever, smallpox, and the plague.[43]

Much more numerous have been the statutes aimed to prevent the spread of animal diseases through the channels of commerce. By the act of 1890 the President was given power to suspend entirely for a limited time the importation of any class of animals when necessary to protect animals in this country from diseases.[44] In 1884 the exportation or shipment in interstate commerce of livestock having any infectious disease was forbidden;[45] in 1903 power was conferred upon the Secretary of Agriculture to establish such regulations to prevent the spread of such diseases through foreign or interstate commerce as he might consider necessary;[46] in 1905 the same official was specifically authorized to lay an absolute embargo or quarantine upon all shipments of cattle from one state to another when the public necessity might demand it.[47] While the Supreme Court has held unconstitutional such federal quarantine regulations of this sort as have been made applicable to intrastate shipments of livestock, on the ground that federal authority

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[42] For existing regulations see Comp. Stat. 1918, Secs. 9150-9182. See article by Edwin Maxey, Federal Quarantine Laws, (1909) 43 Amer. Law Rev. 382.

[43] Act of March 27, 1890, 26 Stat. at L. 31.

[44] Act of August 30, 1890, 26 Stat. at L. 416.

[45] Act of May 29, 1884, 23 Stat. at L. 31.

[46] Act of February 2, 1903, 32 Stat. at L. 791.

[47] Act of March 3, 1905, 33 Stat. at L. 1264.

extends only to foreign and interstate commerce,[48] the general validity of this type of regulation has been tacitly assumed.[49]

A statute of 1905 forbade the transportation in foreign and interstate commerce and the mails of certain varieties of moths, plant lice, and other insect pests injurious to plant crops, trees, and other vegetation.[50] In 1912 a similar exclusion of diseased nursery stock was made effective,[51] while by the same act, and again by an act of 1917,[52] the Secretary of Agriculture was invested with the same powers of quarantine on interstate commerce for the protection of plant life from disease as those above described for the prevention of the spread of animal disease. All of this legislation has apparently gone unattacked in the courts, but no doubt can possibly exist as to the congressional authority to enact it.

3. *Protection of the Public Against Fraud.* In concluding the treatment of this general type of national police regulation under the commerce clause, some instances may be mentioned in which Congress has excluded commodities from commerce in order to protect the public from fraud and deception. These statutes are included for the sake of logical completeness rather than because they contribute anything new to the constitutional principles already discussed.

There is probably no question that the act of 1902 excluding from commerce food and dairy products falsely branded as to the state in which they were made or produced[53] was designed to prevent frauds upon the consumer rather than to protect him from any menace to his health. Butter made in Ohio does not become unwholesome because its label falsely states that it was made in Illinois; but the statute proceeds on the assumption that the purchaser has a right to know where it really was made.

As has already been suggested, when Congress passed the Pure Food Act of 1906[54] it desired not only to protect the public health but also to protect the public from fraud, by making it possible for persons who receive food or drug products through foreign or interstate commerce to be reasonably sure of knowing

[48] Ill. Cent. R. Co. v. McKendree, (1906) 203 U. S. 514, 27 S. C. R. 153, 51 L. Ed. 298.

[49] As in Reid v. Colorado, (1902) 187 U. S. 137, 23 S. C. R. 92, 47 L. Ed. 108, where the Act of May 29, 1884, supra, was construed and applied.

[50] Act of March 3, 1905, 33 Stat. at L. 1269.

[51] Act of August 20, 1912, 37 Stat. at L. 315.

[52] Act of March 4, 1917, 39 Stat. at L. 1165.

[53] Act of July 1, 1902, 32 Stat. at L. 632.

[54] Supra, note 36.

what they were getting. To this end the statute was made to include detailed provisions regarding the adequate and honest labeling or branding of food or drugs, and adulterations and false markings were forbidden even though the products might be perfectly harmless and healthful. The provisions of the act, aimed at fraudulent brands and labels, were further strengthened by the enactment in 1912 of an important amendment which stipulated that drugs should be held to be "misbranded" if the "package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."[55] An effective blow was thus struck at the advertising methods of the purveyors of "quack" medicines and nostrums. A still later amendment to the same act struck at a different sort of fraud by requiring that the net weight of the contents be marked on packages of food or drugs.[56]

Various other statutes have been passed to deny the privileges of commerce to other kinds of fraudulent products. Among these may be mentioned the act excluding from commerce "falsely or spuriously stamped articles of merchandise made of gold or silver, or their alloys,"[57] the act excluding adulterated or misbranded insecticides and fungicides,[58] and the recent Grain Standards Act[59] excluding all grain unless inspected and found to be of standard grade. None of this legislation calls for extended comment.

When one considers the wide scope of the police power which Congress has exercised by closing the channels of commerce to commodities and transactions which menace the public morals, health, and welfare, it is quite natural to let the highly important and salutary purposes which Congress has furthered by this legislation obscure the precise—and quite limited—methods by which Congress accomplished these ends. From the fact that Congress has excluded from commerce articles which if distributed and consumed would prove dangerous to the public health, it has been an easy step to conclude that Congress might

[55] Act of August 23, 1912, 37 Stat. at L. 416. This amendment was rendered necessary by the decision in United States v. Johnson, (1911) 221 U. S. 488, 31 S. C. R. 627, 55 L. Ed. 823, which held that the word "misbranded" as used in the Act of 1906 did not apply to false statements as to the curative properties of drugs.

[56] Act of March 3, 1913, 37 Stat. at L. 732.

[57] Act of June 13, 1906. 34 Stat. at L. 260.

[58] Act of April 26, 1910, 36 Stat. at L. 331.

[59] Act of August 11, 1916, 39 Stat. at L. 482.

exclude from commerce anything, regardless of its character or intended use, if by using such exclusion as a club or penalty there might result a still more adequate protection of the public health. Whether or not it is logically possible to infer the existence of this broader national police power from the cases which have thus far been discussed—and this has proved to be a highly controversial question—there is small reason to believe that the courts by which those cases were decided expected or desired any such inferences to be drawn from them. All that it is necessary to infer from the statutes and decisions thus far reviewed is that under its power to regulate interstate commerce Congress may properly be charged with the responsibility of seeing that the commerce so committed to its care is not used as a "conduit" for the distribution of injurious products or as a facility for the consummation of injurious transactions.

III. Regulations Barring the Use of Interstate Commerce For the Evasion or Violation of State Police Regulations

It will be noted that in the statutes discussed in the above section the articles or transactions which were barred out of interstate commerce were those which Congress itself regarded as injurious to the public welfare. A problem which has presented far greater difficulties both for Congress and the courts has been the problem of how to deal with the interstate transportation of commodities, such as intoxicating liquors, which Congress, instead of excluding from interstate commerce, has recognized as legitimate articles of that commerce,[60] but which have, at the same time, been regarded by some of the states as so harmful as to warrant the complete prohibition of their production, sale, and even possession. The problem has taken the form of a dilemma. To allow the individual states at their discretion to exclude from their borders legitimate articles of commerce, or to allow them to decide for themselves what articles of commerce are legitimate and to exclude the others,

[60] "By a long line of decisions, beginning even prior to Leisy v. Hardin, (1890) 135 U. S. 100, it has been indisputably determined that beer and other intoxicating liquors are a recognized and legitimate subject of interstate commerce," Louisville & Nashville R. Co. v. Cook Brewing Co., (1912) 223 U. S. 70, 32 S. C. R. 189, 56 L. Ed. 355. See the exhaustive citation of cases in 12 Corpus Juris 20.

would seem to be a reversion to the non-uniform, obstructive, and wholly unsatisfactory system of commercial regulation by the states which it was one of the primary purposes of the framers of the federal constitution to abolish forever. On the other hand, to pour intoxicating liquor through the channels of interstate commerce into a state which is struggling with the already difficult problem of making its prohibition laws effective seems to be very bad policy if not also bad law. It has taxed to the utmost the ingenuity of Congress and, it may be said, of the courts as well, to steer a middle course between the horns of this dilemma; to avoid forcing liquor down the throats of states which do not want it, without sacrificing the vital principle of uniformity in the regulation of interstate transportation of commodities. The steps in the development of this problem and the various efforts which Congress has made to solve it may properly claim some attention, inasmuch as these efforts may be regarded as exercises of a national police power under the commerce clause.

1. *The Original Package Doctrine.*[61] That goods imported from foreign countries do not become subject to the jurisdiction of the individual states so long as they remain in the original packages in which they were shipped and have not been merged in the general mass of the property of the state was settled in 1827.[62] But when twenty years later the question was presented to the Supreme Court in the *License Cases*[63] whether a state could prohibit or restrain by the requirement of a license the sale in the original packages of liquor brought in from other states or from abroad the court answered that it could. There was no act of Congress with which the state statutes in question could be said to conflict, and such regulation of interstate shipments of liquor could be held invalid only on the theory that the grant of power to Congress to regulate interstate commerce was exclusive and precluded any state regulation on the same subject even though Congress had not yet exercised its power over it. The leading opinion, which was written by Chief Justice Taney, definitely rejected this theory.

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[61] This problem is treated in detail in the first of a valuable series of articles by Lindsay Rogers on Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act, (1916) 4 Va. Law Rev. 174.

[62] Brown v. Maryland, (1827) 12 Wheat. (U. S.) 419, 6 L. Ed. 678.

[63] (1847) 5 How. (U. S.) 504, 12 L. Ed. 256.

"The mere grant of power to the general government [declared the chief justice] cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the states. The controlling and supreme power over commerce with foreign nations and the several states is undoubtedly conferred upon Congress. Yet, in my judgment, the state may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress."

The decision in the *License Cases* reflects not only the "state's rights" constitutional principles of the Supreme Court as then constituted but the very obvious concern of the court at the prospect that the prohibition laws which a number of states were beginning to enact should be rendered ineffective by a use of interstate commerce which those states were powerless to prevent.[64]

With the abatement of temperance zeal which followed the Civil War, it was more than twenty years before another grist of state laws purporting to restrain or prohibit the bringing of liquor into the state through the channels of interstate commerce claimed the attention of the Supreme Court. In 1888, however, the court threw consternation into the ranks of the prohibitionists by invalidating an Iowa statute which punished any railroad company for knowingly bringing into the state for any other person any intoxicating liquors without a certificate that the consignee was authorized to sell them. This was the case of *Bowman v. Chicago and Northwestern Ry. Co.*[65] It held that the statute was an attempt to exercise "jurisdiction over persons and property within the limits of other states" and, furthermore, "If not in contravention of any positive legislation by Congress, it is nevertheless a breach and interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations." The court did not cross any unnecessary bridges in the *Bowman* case, but merely held that even in the absense of conflicting federal legislation a state could not make it a crime to import an article of commerce within its borders.

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[64] An account of this ante-bellum prohibition movement is given in the Encyclopedia Britannica under Liquor Laws, Vol. XVI, p. 767. See also A. A. Bruce, The Wilson Act and the Constitution, (1909) 21 Green Bag 211.

[65] (1888) 125 U. S. 465, 8 S. C. R. 689, 1062, 31 L. Ed. 700.

While the friends of prohibition in Congress were still endeavoring to enact some sort of statute which would patch up the havoc wrought by the *Bowman* case,[66] a still greater calamity befell them in the decision of the Supreme Court early in 1890 in the case of *Leisy v. Hardin*.[67] This case, popularly known as the *Original Package Case,* overruled the decision in the *License Cases*[68] and held in substance that, even in the absence of congressional regulation of the subject, the police power of the state could not be exercised to prohibit the bringing of articles of commerce into the state and the selling of those articles in the original packages. An article of interstate commerce does not cease to be such until it has either been taken out of the original package or sold in that package; and until it ceases to be an article of interstate commerce it is beyond the reach of the state police power.

"Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles [said the court] we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character. . . . To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create."

Now it is perfectly clear that if a state cannot forbid the shipping in of intoxicating liquors from other states and cannot forbid the sale of those liquors in their original packages after they have been shipped in, then state prohibition becomes more or less of a farce. But close scrutiny of the opinion of Chief Justice Fuller in *Leisy v. Hardin* indicated to the friends of prohibition that there might still be a method of bettering this unfortunate plight of the prohibition states. Although it was unnecessary to the decision of the case, the Chief Justice had definitely

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[66] These efforts are described by Lindsay Rogers, op. cit., second article, 4 Va. Law Rev. 294.

[67] (1890) 135 U. S. 100, 10 S. C. R. 681, 34 L. Ed. 128.

[68] Supra, note 63.

suggested at several points in his opinion that this incapacity of the states to protect themselves against interstate shipments of liquor was due to the fact that Congress had not given the states permission to exert any authority over such shipments.[69] The inference from these dicta was perfectly plain: i. e., Congress might pass an act bestowing upon the states the power to pass the police regulations applicable to interstate consignments of liquor, which, in the absence of such permission, the court had held them powerless to enact. Congress, under pressure from the temperance forces, proceeded to give the states the desired permission, and the Wilson Act[70] became law within a year after the decision in *Leisy v. Hardin*.

2. *Congressional Permission to States to Protect Themselves from Certain Types of Interstate Commerce.* The Wilson Act provided that "intoxicating liquors . . . . transported into any State or Territory or remaining therein . . . . shall upon arrival . . . . be subject to the operation . . . . of the laws of such State or Territory enacted in the exercise of its police power . . . . in the same manner as though . . . . produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The Supreme Court promptly sustained the constitutionality of the act in the case of *In ré Rahrer*.[71] It is impossible to enter upon an extended discussion of the highly

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[69] 135 U. S. at page 109: "Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, *or allowing the states so to do*, it thereby indicates its will that such commerce shall be free and untrammelled."

At page 110: "If the importation cannot be prohibited *without the consent of Congress*, when does property imported from abroad, or from a sister state, so become part of the common mass of property within a state as to be subject to its unimpeded control?"

At page 114: "It cannot, *without the consent of Congress*, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be."

At page 119: ". . . . the states cannot exercise that power [to regulate commerce among the states] *without the assent of Congress*. . . . ."

At page 123: " . . . . the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, *to remove the restriction upon the State* in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

The italics are the author's.

[70] Act of August 8, 1890, 26 Stat. at L. 313.

[71] (1891) 140 U. S. 545, 11 S. C. R. 865, 35 L. Ed. 572.

controversial questions which came up in this case.[72] The statute was attacked primarily on the grounds, first, that in passing it Congress had delegated to the states a portion of its authority over interstate commerce; and second, that it established a regulation of that commerce which was non-uniform in character. The court denied that the states had been given by the act any power to regulate interstate commerce. "Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part," and it is entirely proper for Congress to "provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case." The court also denied that the act established a non-uniform regulation of commerce. Congress has "taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property."

There is every reason to suppose that Congress in passing the Wilson Act believed that it was giving the states adequate authority to protect themselves from interstate shipments of liquor. It was not until the case of *Rhodes v. Iowa*[73] was decided in 1898 that it became clear that the enactment of that statute and the decision of the Supreme Court sustaining its validity were but empty victories for the prohibition cause. In that case the Supreme Court decided that when the Wilson Act provides that intoxicating liquors brought into a state shall be subject to the state police power "upon arrival," the word "arrival" means, not arrival at the state line, but arrival in the hands of the one to whom they were consigned; and until such arrival they are exempt from state control or interference.[74] Under this

[72] See the second article by Lindsay Rogers, op. cit., 4 Va. Law Rev. 288; also A. A. Bruce, op. cit., note 64. The article by Judge Bruce is a vigorous criticism of the Rahrer case.

[73] (1898) 170 U. S. 412, 18 S. C. R. 664, 42 L. Ed. 1088. This case reversed the decision of the Iowa supreme court in State v. Rhodes, (1894) 90 Iowa 496, 58 N. W. 887, 24 L. R. A. 245, which held that under the Wilson Act shipments of liquor from other states became subject to the police power of the state as soon as they crossed the boundary line of the state.

[74] The decision in Rhodes v Iowa had been foreshadowed by the case of Scott v. Donald (1897) 165 U. S. 58, 17 S. C. R. 265, 41 L. Ed. 632,—see also Vance v. Vandercook Co.,(1898) 170 U. S. 438, 18 S. C. R. 674, 42 L. Ed. 1100,—which held that the South Carolina dispensary system could not ex-

construction it is apparent that the Wilson Act, instead of giving the states the virtual right to prohibit the importation of liquor by allowing them to confiscate it as soon as it reached the state line, merely gave them the right to forbid the disposition or sale of the liquor after the interstate carrier had actually delivered it to the consignee. By such a limitation on the scope of the prohibitive laws of the state so many opportunities for the evasion of those laws were opened up as to render the Wilson Act a very inconsequential gain to the temperance cause.

It may be noted in passing that in 1902 a statute practically identical in its terms with the Wilson Act was passed subjecting to the police legislation of the states, upon their arrival therein, interstate shipments of oleomargarine and other imitations of butter.[75] This statute has never attracted much attention and it presents no new constitutional problem.

3. *Making Articles Shipped in Interstate Commerce with Intention to Violate State Laws Outlaws of That Commerce.* (a) *The Webb-Kenyon Act:* No sooner had the Wilson Act been emasculated by the decision in *Rhodes v. Iowa* than agitation was begun in Congress for legislation which would actually give the prohibition states the protection against interstate shipments of liquor which that measure had been vainly supposed to provide. The problem, however, was growing increasingly difficult. Grave doubts were raised regarding the constitutionality of the various proposals for such legislation, but after considerable use of the trial and error method the Webb-Kenyon Bill was passed by Congress in 1913.[76] It was vetoed by President Taft on the advice of Attorney-General Wickersham, on the ground that it was unconstitutional;[77] but it was promptly passed over his veto. The title of the statute described it as "An Act Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases," and it proceeded to do this by prohibiting (without attaching any penalty) the shipment in interstate commerce of intoxicating liquors "intended, by any persons interested therein, to be received, possessed, sold, or in any manner used" in violation of

tend its monopolistic control of the liquor traffic in that state to the total exclusion of liquor from other states. See the third article by Lindsay Rogers, op. cit., 4 Va. Law Rev. 355, dealing with The Narrowing of the Wilson Act.

[75] Act of May 9, 1902, 32 Stat. at L. 193. The steps leading up to the passage of this act are set forth in the second article by Lindsay Rogers, op. cit., 4 Va. Law Rev. 288.

[76] Act of March 1, 1913, 37 Stat. at L. 699.

[77] The veto message and the opinion of the attorney-general are found in Sen. Doc. 103, 63rd Congress, 1st Session.

the law of the state of their destination. Hitherto the states had been unable to exclude shipments of liquor from other states because such action amounted to an unconstitutional prohibition of interstate commerce; under the Webb-Kenyon Act the exclusion of such liquors was made lawful by outlawing those shipments from interstate commerce and thereby depriving them of that federal protection from state regulation which articles of interstate commerce enjoy.

The Webb-Kenyon Act was held constitutional by the Supreme Court in 1917 in the case of *Clark Distilling Co. v. Western Maryland Ry. Co.*[78] The court pointed out that under the doctrine of the *Lottery Case* [79] *and Hoke v. United States*[80] no doubt remained as to the power of Congress to exclude intoxicating liquor from interstate commerce altogether. The objection raised to the act was not, therefore, "an absence of authority to accomplish in substance a more extended result than that brought about by the Webb-Kenyon Law, but . . . . a want of power to reach the result accomplished because of the method resorted to." This method was not unconstitutional on the ground that it delegated power to the state to prohibit interstate commerce in intoxicating liquors (the argument on which President Taft's veto was based) and thereby permitted the non-uniform regulation of such commerce; the court declared that the argument as to the delegation of power to the states rested upon a misconception: ". . . the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply." In regard to the alleged non-uniformity of commercial regulation the court declared: " . . . . there is no question that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the states—so that the question really is a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself." Having disposed of these objections the court could "see no reason for saying that although Congress, in view of the nature and character of intoxicants had power to forbid their movement in interstate commerce, it had not the authority so to deal with the subject as to establish a regulation (which is what was done by

[78] (1917) 242 U. S. 311, 37 S. C. R. 180, 61 L. Ed. 326.
[79] Supra, p. 386.
[80] Supra, p. 390.

the Webb-Kenyon Law) making it impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce."[81]

(b) *The Lacey Act:* In 1900 Congress passed a statute making it unlawful to ship from one state or territory to another state or territory any animals or birds killed in violation of the laws of the state.[82] It is quite clear that Congress was here using its power over interstate commerce for the purpose of co-operating with the states in the protection of wild game and birds. In fact, the first section of the statute declared frankly that its purpose was to "aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct." It should be noticed that this act differs in theory from the Webb-Kenyon Act, because the articles which are here outlawed from interstate commerce are not articles which when distributed through that commerce will menace the public welfare. They are outlawed because of their illegal origin and possession and because Congress desires to prevent interstate commerce from being used as an outlet or place of refuge for such illegal commodities. By passing the Webb-Kenyon Act Congress refused to allow itself to become an accessory before the fact, by declining to place the facilities of interstate commerce at the disposal of those who are about to violate the prohibition laws of the states; by passing the Lacey Act Congress refused to become an accessory after the fact, by declining to place those facilities at the disposal of those who have just violated the state law by affording them a means of disposing of their unlawful possessions. This difference, however, should have no bearing upon the question of congressional power to pass the Lacey Act, and the only court which has passed upon its validity has held it constitutional on the authority of the *Rahrer* case upholding the Wilson Act.[83]

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[81] The Webb-Kenyon Act and the Clark Distilling Co. case have been widely discussed in the legal periodical literature. The following articles may be mentioned here: D. O. McGovney, The Webb-Kenyon Law and Beyond, 3 Iowa Law Bul. 145; S. P. Orth, The Webb-Kenyon Law Decision, 2 Corn. Law Quar. 283; T. R. Powell, The Validity of State Legislation Under the Webb-Kenyon Law, 2 So. Law Quar. 112; Lindsay Rogers, The Webb-Kenyon Decision, 4 Va. Law Rev. 558. Other articles are cited in the notes to Decisions of the Supreme Court of the United States on Constitutional Questions, T. R. Powell, 12 Amer. Polit. Science Rev. 19 et seq.

[82] Act of May 25, 1900, 31 Stat. at L. 188.

[83] Rupert v. United States, (1910) 181 Fed. 87.

4. *The Reed "Bone-Dry" Amendment.* The introduction for discussion at this point of the Reed Amendment by its popular title rather than by a caption indicating the principle on which it is based is a confession by the author of his inability to discover what that principle is, if there be any. This act was passed as an amendment to the Postoffice Appropriation Act of 1917.[84] The pertinent provision reads as follows: "Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the *manufacture or sale* therein of intoxicating liquors for beverage purposes shall be punished as aforesaid."[85]

A casual reading of this statute might lead one to assume that Congress had merely supplemented the Webb-Kenyon Act by punishing those who make interstate shipments of liquor which, in order to divest them of their interstate character, that act had prohibited without attaching a penalty. What the Reed Amendment really does is to impose, under penalty of the federal law, a "bone-dry" policy in the matter of shipments of liquor from other states upon any state which prohibits merely the manufacture and sale of intoxicants for beverage purposes. In other words, the amendment forbids the shipment of liquor even for personal use into a state which may permit the personal use of liquor but forbids its manufacture and sale.

The Supreme Court recently upheld the validity of the Reed Amendment in the case of *United States v. Hill.*[86] It was urged

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[84] Act of March 3, 1917, 39 Stat. at L. 1069. The same act also prohibited sending liquor advertisements through the mails into states which forbade such advertising. See J. K. Graves, The Reed "Bone Dry" Amendment, 4 Va. Law Rev. 634.

[85] Italics are the author's.

[86] (1919) 248 U. S. 420, 39 S. C. R. 143. In McAdams v. Wells Fargo & Co. Express, (1918) 249 Fed. 175, the law was enforced against the carrier and the court said: "It is quite evident that Congress, in adopting said act, intended to aid the states in the enforcement of their prohibition laws. . . . . It may be that Congress builded better than it knew in passing the Act of March 3, 1917; but there is no doubt that it prohibits the shipment of liquor in interstate commerce for beverage purposes into the dry parts of the state of Texas wherein the sale of liquor is prohibited by the state law, though intended only for personal use." In United States v. Mitchell, (1917) 245 Fed. 601, the court, while not declaring the Reed Amendment unconstitutional, held that the transportation of liquor for personal use in one's own baggage is not "commerce" and does not therefore fall within the prohibitions of the act. The view is, of course, in conflict with the decision of the Supreme Court in the Hill case.

upon the court, and the lower court so held, that the prohibition of the act should be construed to apply only to such shipments of liquor as were in violation of the law of the state into which they went. But the Supreme Court refused to narrow the meaning of the act in this way. The illegality of the forbidden shipments of liquor does not depend upon the law of the state, as it does in the case of the Webb-Kenyon Act, but upon the law of Congress. While Congress may exercise its authority over interstate commerce "in aid of the policy of the state, if it wishes to do so, it is equally clear that the policy of Congress acting independently of the states may induce legislation without reference to the particular policy or law of any given state." It is well established that in certain cases congressional regulation of commerce may take the form of prohibition, and this is an appropriate case for the exercise of that power. "That the state saw fit to permit the introduction of liquor for personal use in limited quantity in no wise interferes with the authority of Congress, acting under its plenary power over interstate commerce, to make the prohibition against interstate shipment contained in this act. It may exert its authority, as in the Wilson and Webb-Kenyon Acts, having in view the laws of the state, but it has a power of its own, which in this instance it has exerted in accordance with its view of public policy."

A brief but vigorous dissenting opinion was written by Mr. Justice McReynolds. He expressed his conviction that the Reed Amendment "in no proper sense regulates interstate commerce, but it is direct intermeddling with the states' internal affairs. . . . . to hold otherwise opens possibilities for partial and sectional legislation which may destroy proper control of their own affairs by the separate states . . . . If Congress may deny liquor to those who live in a state simply because its manufacture is not permitted there, why may not this be done for any suggested reason—e. g., because the roads are bad or men are hanged for murder or coals are dug? Where is the limit? . . . . The Reed Amendment as now construed is a congressional fiat imposing more complete prohibition wherever the state has assumed to prevent manufacture and sale of intoxicants."

There is nothing in the majority opinion in the Hill case to throw any light upon Mr. Justice McReynolds' question, "Where is the limit?" The law classifies the states and prohibits the shipment of liquor for beverage purposes into the states comprising

one of the classes. But there is nothing to indicate that the court regarded the constitutionality of the law as in any way contingent upon the intrinsic reasonableness of that classification. Emphasis is laid upon the fact that Congress could exclude all liquor from interstate commerce, and the suggestion that the Reed Amendment depends for its prohibitive force upon the existence of any particular type of state law relating to liquor is repudiated. The court does suggest that Congress apparently thought it would be a good thing to impose the "bone-dry" rule upon all states having more moderate prohibition laws, but this is far from saying that the statute would not have been an equally legitimate exercise of the commerce power if the purpose of Congress had been something quite remote from the suppression of the liquor traffic. If Congress has full power to stop all interstate traffic in liquor, but is under no constitutional obligation to prohibit the shipment of liquor into all states merely because it prohibits such shipments into some, being free to make the application of that prohibition depend upon the existence or non-existence of certain conditions in the states, then may not Congress by turning the interstate spigot on or off, as the needs of the case may demand, exert a pressure on the states which will lead them to comply with the congressional wishes in matters over which Congress has no direct authority? It is not impossible that Congress has stumbled inadvertently into an unexplored field of police regulation, although there is small probability that such an indirect method of exerting police power would ever prove particularly alluring.

Whatever may be the constitutional implications of the Reed Amendment and the case upholding it, it is impossible to classify it with any of the types of national police regulation which have been thus far discussed. It is not an exclusion from interstate commerce of a commodity which Congress regards as injurious to the national health or morals, because Congress does not exclude all liquor from such commerce, but only that destined for certain states. Nor is it an act designed to co-operate with the states in the adequate enforcement of their police regulations relating to the liquor traffic, because it overrides the wishes of many of those states and imposes on them a more rigorous prohibition than they desire. It embodies neither the principle of positive national control over the interstate shipments of liquor nor the principle of local option or state home rule embodied

in the Wilson and Webb-Kenyon Acts. It proceeds upon the somewhat curious theory that Congress ought to impose its own brand of prohibition not upon all the states but only upon those states which have seen fit to adopt another sort of prohibition.

From the ground thus far covered it is apparent that the police power which Congress may exercise in protecting and promoting interstate commerce, substantial as that power has been shown to be, has been overshadowed by the police power resulting from the efforts of Congress to keep that commerce from being used to distribute objectionable commodities or to promote objectionable transactions. The goods or transactions which may thus be excluded from interstate commerce may be objectionable either because they are dangerous to the public morals, health, or welfare, or because they are to be used in violation of the legitimate police regulations of the state. The question which remains for consideration is whether or not a still more extensive national police power may properly be derived from the commerce clause by allowing Congress to deny the privileges of interstate commerce to commodities which are harmless in their nature and the use to which they are to be put, but which are produced under conditions which Congress deems objectionable. This problem will be dealt with in the concluding section of this article.

(To be concluded.)

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MORALS AND SOME PHASES OF LEGAL LIABILITY

IT IS a commonplace in jurisprudence and in the decisions that with morals the law has nothing to do. Austin first elaborated the idea in his "Province of Jurisprudence Determined" and since then most writers upon formal law have accepted the principle, some boldly and others with misgivings and apologies. Markby, referring to Austin, has put the matter very strongly:

"He has admitted that law itself may be immoral, in which case it is our moral duty to disobey it; but it is nevertheless law and this disobedience, virtuous though it may be, is nothing less than rebellion."[1]

This may be accepted as the extreme, logical consequence of the theory. It is indeed startling to be told that the law bears within itself the seeds of its own destruction and that this judicial separation of law and morals also completely absolves him who wages war against his sovereign in the name of a law more moral than that to which he has sworn allegiance.

A theory with such a consequence may not be lightly regarded. There have been times when the ethical problems of allegiance have had an extremely practical importance. Tomorrow may bring occasion for new decisions. When ancient governments of the old world are displaced over night by strange and untried schemes of political organization, and there are many within our gates who openly threaten our social system with destruction, a principle of that kind fathered in such respectability, may easily be "twisted to make a trap for fools." The new day has its clever apologist; then the sophist, the wielder of spurious logic and the champion of theories at odds with all experience, gains each many believers. Straight thinking becomes dangerous. Courage, mon ami, le diable est mort!

Among lawyers the jurisprudence of Austin is not an esteemed science. They regard it as highly artificial and impossible of practical application. Not a little of it is in their opinion founded on ideas which are downrightly wrong and hence a source of

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[1] Markby, Elements of Law, 2nd ed., p. 12. But see the words of Austin in Sec. 174 of Campbell's edition of the "Jurisprudence."

error and confusion in legal thinking. In this matter lawyers are likely to agree with the remark of Bentham: "In certain cases jurisprudence may be defined as the art of being methodically ignorant of what everybody knows."

The average practitioner thinks legal theory pragmatically. A principle that explains a great variety of instances of legal liability is true only because it works under practical application. What it accomplishes is the full compass of its verity. Such a point of view is entirely objective. It assumes no hypothetical major premise, but deals with the facts, i.e., the decisions as it finds them. That method of approach is the old and familiar habit of every lawyer.

Austin and his followers have not gone unchallenged and the whole burden of the attack against them has been the charge that dogma on the separation of law and morals runs counter to the actual facts. Nearly thirty years ago there was published a little book[2] written from the pragmatic standpoint, which boldly denounces the antithesis created by the formal jurists between law and morals. The conception is simple. If the law gives a right, then what it confers must be deemed righteous. If A is bound by the law to convey a house to B, then every principle of morality sanctions an enforcement by B of that obligation. The following excerpt puts the author's idea clearly:

"All rights are moral rights; and it is as much a contradiction in terms to speak of a right that is not a moral right as to speak of a square circle, or a four-sided triangle. It is thus that the term is universally received, except by a small clique of jurists, who find it impossible to reconcile their theory with this obvious meaning of the term, and in this sense is the proposition to be understood when we say that it is the function of the state to protect and enforce rights or to administer justice, which is but the observance of rights or the rendering to every man his right; by which is meant nothing else than rights and justice in the familiar and proper sense of the term."[3]

The authority for this view is ancient. It is, indeed, in part, a paraphase of the famous sentence of the Institutes: Justitia est constans et perpetua voluntas jus suum cuique tribuere[4]—a conception more Christian than is usually found in books of the

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[2]Law of Private Right, by George H. Smith, 1890. The Humboldt Publishing Co., New York.

[3]Ibid., pp. 14-15.

[4]Institutes, I, 1.

law. The Roman set the task of justice high, and would he serve her well, the lawyer must be expert in matters of conscience.

Since the late Dean Ames taught modern law from the Year Books, the words of many an old judge, well worth remembering, have been restored to us. In *Langbridge's Case* (1345)[5] the colloquy between Court and Counsel shows that even in that far off day the riddle had already been put and the same answers invented. . .

"Sharshulle, J. One has heard speak of that which Bereford and Herle [former judges] did in such a case, that is to say, when a remainder was limited in fee simple by fine they admitted the person in remainder to defend, and it was said by them that it would be otherwise if the limitation were by deed in pais; but nevertheless, no precedent is of such force as that which is right. . . .

Hillary, J. Demandant, will you say anything else to oust him from being admitted?

R. Thorpe. If it so seems to you, we are ready to say what is sufficient; and I think you will do as others have done in the same case, or else we do not know what the law is.

Hillary, J. It is the will of the Justices.

Stonore, C. J. No; law is that which is right."[6]

That conversation epitomizes a whole literature. Hillary is an ancient precursor of Austin. In his mind the law is the arbitrary will of the State as expressed by the court. He does not even admit that it is controlled by precedent. Judgment is given for the ethical view by a divided court. But the words of the chief justice ought to be as famous as the refusal of the barons at Merton to alter the law of England and legitimize by adoption a canon of Gratian.[7]

In a true sense every legal problem is an ethical problem. But those who have to do with the practical administration of justice do not always proceed from that point of view. They solemnly

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[5]Reported Year Book 19 Edw. III 375. Also in part in J. H. Beale's Cases on Legal Liability, p. 1, from which book the English version is taken.

[6]The original text reads: "Nanyl; ley est resoun." The negative is doubly emphatic. All may not agree with the rendering of "resoun." Does the old judge mean anything other than is expressed in the maxim "cessante ratione legis cessat et ipsa lex"? Of course, right and reason were one to the mediaeval lawyer. The only question is how much of a moral quality we are to attach to the word. In Coke reason is contrasted with inconvenience. See Blackstone, 1 Commentaries 70.

[7]Nolumus leges Angliae mutare. For the whole account see Pollock and Maitland, History of English Law, I, pp. 131, 188.

claim to move in accordance with rules which are more or less fixed and which may or may not coincide with those other principles of conduct which are sanctioned by the general customs of society; and whether or not they do agree is immaterial. Criticism of a rule of law from the ethical standpoint is seldom welcomed in a court. There is always the familiar answer that with the law ethics has nothing to do, or that, if the law be bad, then it is for the legislature to change the law.

This independence of the law which has so often been declared is by no means so absolute as it has been made to appear. In the commonly recurrent cases of legal liability, the law gives an action for damages or grants specific relief against a defendant either because his wilful or negligent act is the proximate cause of the injury, or because he has broken a promise given on good consideration, or to prevent unjust enrichment. This is an ordinary and familiar classification. It is certainly not exhaustive nor are the groups mutually exclusive. But it serves to rationalize in a rough way a good deal of law.

There are, however, many instances where the law imposes a liability or creates rights which may not be referred to any of the grounds before mentioned, and it is in cases of this kind that the basis of the juristic result becomes exceedingly interesting, because of the very fact that familiar legal concepts are inadequate to afford an explanation.

Stare decisis[8] lays the ghosts of many inconsistencies, but where it cannot be invoked to conjure a decision,—What then, Horatio? A decision must be rendered on some ground, for our law demands that every court of competent jurisdiction must always hear the parties before it and give judgment on the very right of the matter. No court was ever heard to reject a controversy because of its novelty. We know that in such difficulties the judge does not decide as the die is cast. His judgment is not an arbitrary unreasoned thing. In such a situation he sits as a man learned in the law, knowing the rules which have guided his predecessors in other cases, and if these fail, then he must perforce rely for his instruction upon that never failing source of inspiration, the example of the good and upright man. This ideal gentleman will, however, be a modern specimen of righteousness, a composite of all opinions and tendencies, economic, social, moral, and religious, which must be integrated into the sum total of all law.

[8]The whole maxim is stare decisis et non quieta movere.

Our court, then, may upon occasion become in a broad sense a professor of ethics, and, being the oracle of the law, he speaks with a greater authority upon that subject than any university or ecclesiastical foundation even can confer. Thus it is that moral principles become rules of positive law. Who can mark the boundaries of their several sovereignties? The question was answered in part long ago in the old dialogue of Doctor and Student and answered well: ". . . . in every law positive well made is somewhat of the law of reason and of the law of God; and to discern the law of God and the law of reason from the law positive is very hard."[9]

The growth of the law is largely a legalizing of moral opinion.[10] When a new decision introduces a departure from a principle of wide application, it ought always to be viewed

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[9] St. Germain, Doctor and Student, Dial. I, Chap. 4. Compare the words of the Chancellor in Y. B. 4 Hen. VII, 5: "I know that every law is or ought to be according to the law of God. And the law of God is that an executor who is badly disposed shall not waste all the goods, etc.; and I know well that if he does so and does not make amends, if he has the power, unless he repents he shall be damned in hell." See Pound, The End of Law as Developed in Legal Rules and Doctrines, 27 Harv. Law Rev. 195, 213, note 74.

It is, of course, unnecessary to say that the phrase "law of God" as used in the Dialogue and by the Chancellor means something more than "morals" or the "moral law." It did not mean less than the moral law with a divine imprimatur and it had at times meant the foundation of Papal supremacy. The theocracy of Innocent III never became an accomplished fact in England, but the authority of that conception dominated men's thinking long after Empire and Papacy ceased to be the political masters of Europe. The release of jurisprudence from theology is almost a modern event. See Pound, The End of Law as Developed in Juristic Thought, 27 Harv. Law Rev. 605, 612.

[10] All the decisions are contra: Parke, J., in Mirehouse v. Rennell, (1883) 1 Cl. & F. 527, 546, 7 Bli. N. S. 241, 8 Bing. 490, 6 Eng. Reprint 1015, 1022:

"The precise facts stated by your Lordships have never, as far as we can learn, been adjudicated upon in any court; nor is there to be found any opinion upon them of any of our judges, or of those ancient text-writers to whom we look up as authorities. The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it ourselves, according to our own judgment of what is just and expedient. Our common-law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science."

with a liberal mind. It should be regarded as an experiment in the administration of justice, an event in that constant process by which the law is ever approaching a moral ideal. And the rule of stare decisis makes an unsuccessful experiment dangerous. It perpetuates the ignominy of a mistake, and in case the new rule is a distinct improvement it converts a discovery into a thing commonly obvious. A lone decision unattended by a train of subsequent authority may therefore be a mark of courage, originality, and independent thinking on the part of the court that rendered it.

The time is here when the whole body of the law is being reëxamined by investigators, who test by new standards. With them internal consistency and symmetry of the law as a system are of only collateral importance. Their prime object is to gauge the law by what it actually accomplishes in the protection and enforcement of a new category of rights which the modern sciences of economics and sociology have discovered and championed.

The new demand is for a socialized justice. We used to hear a great deal about the freedom of the individual, his inalienable rights in property and liberty of contract and to carry on as he desired. Due process and equal protection of the law were constitutional restraints invented to secure these rights against aggression by the state. The political ideal demanded the widest possible field for the exploits of human activity subject only to a minimum of restraint required for the maintenance of the State, which governed best when it governed least. In the era

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Brett, M. R., in Munster v. Lamb, (1883) 11 Q. B. D. 588, 599, 52 L. J. Q. B. 726, 49 L. T. 252, 32 Wkly. Rep. 243:

"The judges cannot make new law by new decisions; they do not assume a power of that kind; they only endeavor to declare what the common law is and has been from the time when it first existed. But inasmuch as new circumstances, and new complications of fact, and even new facts, are constantly arising, the judges are obliged to apply to them what they consider to have been the common law during the whole course of its existence, and therefore they seem to be laying down a new law, whereas they are merely applying old principles to a new state of facts."

See Blackstone, 1 Commentaries 69. The question is, do the courts legislate? No judge speaking ex cathedra was ever heard to admit that he did. The view expressed in these opinions is a fiction. The fact is that courts make new law and unmake old law. The law is not something that has an immortal existence from everlasting to everlasting—"unwritten and unfailing mandates which are not of to-day or yesterday but ever live and no one knows their birthtide." (The Antigone.)

See Dicey, The Relation between Law and Public Opinion in England, Chap. XI; and Gray, The Nature and Sources of the Law, Secs. 215-231 and 465-512.

in which we now are, a new force is operating. The vested interest of the individual finds itself opposed by the social interest. Each must struggle to maintain itself against the other.[11] Inasmuch as rights claimed for the protection of the social interest are new, they sustain an unequal combat with the old rights of the individual. The latter are vested in the sense that they have won recognition from the law and are fortified against disestablishment by constitutional guarantees.

The last quarter of a century has seen a flood of legislation enacted for the sole purpose of vindicating and creating rights for the protection of the social interest. We have statutes regulating the hours of labor, conditions of employment, and the tariff of wages paid in a particular industry and the method of payment. Then, too, there are statutes prohibiting certain business practises by large combinations of capital. The methods of conducting the business of insurance have within the last ten years become so thoroughly fixed by statute that about the only field in which originality or initiative may be shown by the managers is in the discovery of new ways in expediting the payment of losses. Then lately we have had the country-wide enactment of Workmen's Compensation Acts, some compulsory and some pseudo-elective.

In each and every instance these new laws trench upon the liberty of the individual. His freedom becomes burdened with a servitude in favor of the State, a kind of profit à prendre by which society takes to itself certain elements of the citizen's liberty for the purpose of administering all such deforced rights for the benefit of the whole. Hence the individual is placed under a disability and becomes a ward of the State in respect to those matters in which the law has declared him incompetent to act. All this proceeds upon the theory that it is better for society as a whole and therefore to the advantage of the individual that he should forego his unlimited freedom of action and submit to the restraints imposed so that a larger and a fairer justice may be done. It is not based upon any sheer utilitarian

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[11] Mr. Justice Peckham, in Lochner v. New York, (1905) 198 U. S. 45, 49 L. Ed. 937, 25 S. C. R. 539, 3 Ann. Cas. 1133: "It is a question of which of two powers or rights shall prevail—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract." The contrast between the majority opinion and the dissenting opinion of Justice Holmes sets in clear relief the contest being waged between the new and the old ideas.

ground nor is expediency the only argument. The whole idea is the product of a strong moral purpose and a genuine belief that the new conception of justice gives to each a larger measure of his right than would otherwise be the case in these times.

It would of course be a mistake to say that social interests are now for the first time finding recognition in the law. That began as early as the Statute of Quia Emptores. Usury laws are old, and the later statutes regulating Sunday work, giving sanctuary in bankruptcy to debtors, and exempting certain classes of property from sale under execution are all instances where the law yielded long ago to social pressure. When Chancery first invented the equity of redemption it was serving something more than individual justice. It is only in late years, however, that the thing has received a great impetus.

The categories of our law are of relationships. And it is in the relationship of Master and Servant that the processes of social justice have been most observable. Into other fields its effects have not thus far penetrated to so great an extent. The ethical problems there presented are therefore in a large degree unaffected by this new social interest. They are not, however, less difficult or of less importance, and especially is this the case where a ready explanation is not afforded by the familiar grounds of legal liability. The discussion of these matters is reserved for another paper.

(To be concluded.)

L. B. BYARD.

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TAXATION—UNIT RULE — INSTRUMENTALITIES OF INTERSTATE COMMERCE—TRACK MILEAGE AS BASIS OF ASSESSMENT—MEANING OF OBITER DICTUM.—What is the value of the rolling stock of a sleeping car, tank car, or other transportation company, used in interstate commerce, for purposes of state taxation? It is well settled that such personal property may be taxed in any state where found regardless of the domicile of the owner, and of the fact that it may be also taxed at such domicile.[1]

Income taxes and taxes upon the franchises of railroads

[1]Pullman's Palace Car Co. v. Pennsylvania, (1891) 141 U. S. 18, 35 L. Ed. 613, 11 S. C. R. 876.

have been apportioned upon a track mileage basis. "It may well be doubted whether any better mode of determining the value of that portion of the track . . . has been devised[2] . . . This court has expressly held in two cases, where the road . . . ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation. *The Delaware Railroad Tax Case*, 18 Wall. 208; *Erie R. R. Co. v. Pennsylvania*, 21 Wall. 492."[3] This same principle of assessment was applied to the property of telegraph companies on the proportional mileage basis.[4] The rolling stock of a railroad having no part of its own line within a state is subject to taxation.[5] The basis of such an assessment may be "such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles, in that and other states, over which its cars were run. This was a just and equitable method of assessment."[6] This apportioned mileage assessment upon the unit rule basis was sustained as applied to the personal property of express companies.[7] As a rule for assessment of a system of tank cars in Georgia it has now been rejected by the United States Supreme Court.

State statutes have been passed in reliance upon these cases sustaining a definite and approved method of assessing interstate carriers. Georgia is one of these states. The Union Tank Line owns cars which are leased to oil shippers, and for which the railroads using them also pay compensation. Such cars were furnished to the Standard Oil Company of Kentucky and operated "in and out" of Georgia. The 1914 tax return to the state comptroller general showed "an average of 57 tank cars in Georgia during 1913" and their value as $47,310. But the assessment of said cars was made upon the basis of the state statutes:[8] "Ascertain the whole number of miles of railroad over which such

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[2]State Railroad Tax Cases, (1876) 92 U. S. 575, 608, 23 L. Ed. 663.

[3]State Railroad Tax Cases, supra, note 2, 92 U. S., at p. 611.

[4]Western Union Telegraph Co. v. Attorney General of Massachusetts, (1888) 125 U. S. 530, 31 L. Ed. 79a, 8 S. C. R. 961.

[5]Marye v. Baltimore & Ohio R. Co., (1888) 127 U. S. 117, 32 L. Ed. 94, 8 S. C. R. 1037.

[6]Note 1, supra, 141 U. S., at p. 26.

[7]Adams Express Co. v. Ohio, (1897) 165 U. S. 194, 41 L. Ed. 683, 17 S. C. R. 305.

[8]Georgia Code 1910, Secs. 989-990.

. . . cars are run, and ascertain the entire value of all . . . cars of such . . . company, then tax such . . . cars at the regular tax rate . . . in the same proportion to the entire value of such . . . cars that the length of lines in this state over which such cars are run bears to the length of lines of all railroads over which such . . . cars run." Upon this basis, Georgia having 2.768+ per cent of the track mileage upon which the said tank cars operated in the United States, the assessed value of tank cars in Georgia was $291,195, or six times the result arrived at by the average-in-use test.

The Georgia supreme court upheld the assessment made pursuant to the statute. "The scheme of the statute is what is sometimes called the track-mileage basis of apportionment, or what in a more general way is termed the unit rule. The comptroller-general followed the statute. The unit rule has been upheld by the Supreme Court of the United States, in regard to railroads, telegraph companies, and sleeping car companies."[9] The Georgia court relied upon the method apparently approved of in the *Pullman* case.[10] In that case the company denied that its cars, used in Pennsylvania in interstate commerce, had any taxable situs in that state. The method of appraisal was not the issue, but the right of the state to make any assessment was challenged. No statute fixed any method of assessment. The executive officers used the proportional track mileage basis. The Pennsylvania supreme court held that personal property within the state was taxable regardless of the owner's domicile elsewhere. It also declared that the value of the property had been determined "according to a just and equitable rule."[11] The Supreme Court of the United States in affirming the decision of the Pennsylvania court said: "The method which the state of Pennsylvania adopted . . . as a just and equitable method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its property and no more."

This would appear expressly to authorize statutes such as that of Georgia. But the Supreme Court of the United States holds otherwise.[12] Justice Pitney, in his dissenting opinion, con-

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[9] Union Tank Line Co. v. Wright, (1915) 143 Ga. 765, 85 S. E. 994.
[10] Note 1, supra.
[11] (1884) 108 Pa. 156, 160.
[12] Union Tank Line v. Wright, 39 S. C. R. 276, U. S. Adv. Ops. 1918-19 (March 24, 1919).

curred in by Justices Brandeis and Clarke, says: "The tax laws of the state of Georgia, and doubtless of many other states, have been based upon that decision, and I regard it as most unfortunate that at this late date its authority should be overthrown.' But in the opinion of the majority the reasonableness of the rule was never in question in the *Pullman* case, although the court has itself cited that exact portion of the opinion with approval, as in *American Refrigerator Transit Co. v. Hall*,[13] yet in the opinion of the court the apparent approval of the *method* involved in the *Pullman* case was only obiter dictum. In all cases approving of the *Pullman* case, in the words of Justice McReynolds, speaking for the court in the Georgia case, "We upheld the power of the state to tax property actually within its jurisdiction upon a fair valuation considered as a part of a going concern: they [those cases] give no sanction to arbitrary and inflated valuations. Taxes must follow realities, not mere deductions from inadequate or irrelevant data." Therefore the court held the Georgia tax assessed against the Union Tank Line illegal as an undue burden upon interstate commerce and also as violating the Fourteenth Amendment by depriving the Tank Company of its property without due process of law. The dissenting judges insisted that the "method of apportionment" was necessarily an issue in the *Pullman* case and therefore its approval was not obiter dictum. It may be admitted that the disputed tax had to "be vindicated as a property tax in order to relieve it from the criticism that it was an unwarranted interference with interstate commerce,' but it does not necessarily follow, as the dissenting judges assert, that "it could not be maintained as a property tax unless the method of apportionment was fair and equitable." If on the particular facts before the court in the *Pullman* case, the result reached was equitable, it was entirely unnecessary to determine the fairness of the rule used, when applied to different circumstances. Certainly the track mileage used by a few cars in a state has no necessary relation to the value of such cars, nor to the proportion which such cars constitute of the entire value of cars owned by the operating company. If, by chance, this test produced a fairly equitable result, as it did in the *Pullman* case, it by no means follows as a matter of law that such a method used in assessing tank cars in Georgia must necessarily be fair and equitable.

The exact position taken by the court in the *Pullman* case

[13](1899) 174 U. S. 70. 75, 76, 14 L. Ed. 899, 19 S. C. R. 590.

is stated in the dissenting opinion of Justice White, concurred in by Justices Field, Harlan, and Brown, in *Adams Express Co. v. Ohio.*[14] "When, however, it was said . . . that the method of assessment, to-wit, taking a proportion of the capital stock ascertained on the mileage basis as the value of one hundred sleeping cars was a just and equitable method, such statement was made with reference to the facts held to exist in the case before the court. . . . The objection advanced by counsel to the method of taxation was, not that the results produced were inequitable, but that (theoretically, not practically) the method adopted was improper." It is not surprising then to find the present Chief Justice concurring with the court's opinion in the *Union Tank Line* case, that if the practical results reached in Georgia are unfair, the assessment is illegal although the same rule might produce fair results under other circumstances.

The unit rule, and the track mileage basis of apportionment for assessments, is a valid method of assessment only if the results obtained in the particular case justify the use of such a rule. Ordinarily the results reached may be equitable, but years ago the court recognized the possibility of circumstances making the rule inapplicable. "It is true, there may be exceptional cases, and the testimony offered on the trial in this case in the circuit court tends to show that this plaintiff's road is one of such exceptional cases, as for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock."[15] The court in the *Union Tank Line* case recognizes the "intangible value due to what we have called the organic relation of the property in the state to the whole system." It acknowledges that absolute accuracy is impossible and grave difficulties attend any method of apportionment. Yet the state must place a "fair value" upon such personal property.

This case apparently will encourage much litigation to determine the questions of fact in the application of the unit rule theory of valuation to interstate carriers. It also is an interesting illustration of the meaning of obiter dictum.

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[14]Note 7, supra, 165 U. S., at pp. 249, 250.

[15]Pittsburgh, etc., Ry. Co. v. Backus, (1894) 154 U. S. 421, 431, 38 L. Ed. 1041, 14 S. C. R. 1114.

COHABITATION AS ESSENTIAL TO A COMMON LAW MARRIAGE. —Apart from those states where the so-called common law marriage has been expressly abolished, its efficacy to create the marriage relationship is generally recognized in this country. By statute, this form of marriage has been abolished in Illinois[1] and North Dakota.[2] Arkansas,[3] Maryland[4] and Vermont[5] have always repudiated this doctrine.

As the name indicates, the common law marriage is a creation of the common law, its validity depending upon the mutual oral promises to marry. But it has been too long established to admit of doubt that the marriage contract implies more than a simple contractual obligation. It is also a status. Now, whether the contract creates this status, or whether the status is an element inherent in the marriage relationship, independent of the agreement, is a question attended by much controversy. Uncertainty exists as to the law on this point, because so few cases have arisen which are squarely apropos.

The contract of marriage may be of two kinds: (1) per verba de praesenti, and (2) per verba de futuro. As to the former, there are two lines of authority. The prevailing rule is that mutual consent without cohabitation is sufficient to create the marriage relation.[6] This consent must be expressed in words indicating that the contract is to take effect presently. The theory of the holdings is possibly best expressed by the maxim—"Consensus non concubitus facit matrimonium." Or, as stated by the supreme court of Pennsylvania,[7] "Marriage is the cause, these [cohabitation and repute] follow as the effect." It must not be overlooked, however, that a great number of cases asserting the same rule of law are cases where cohabitation followed the consent, wherefore in strictness, as the court points out in

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[1]Wilcox v. Cooke, (1912) 256 Ill. 460, 100 N. E. 222.

[2]Schumacher v. Great Northern Ry. Co., (1912) 23 N. D. 231, 136 N. W. 85.

[3]Furth v. Furth, (1911) 97 Ark. 272, 133 S. W. 1037.

[4]Denison v. Denison, (1871) 35 Md. 361, overruling Chelseldine v. Brewer, (1739) 1 Har. & McH. (Md.) 152.

[5]Northfield v. Plymouth, (1848) 20 Vt. 582; Morrill v. Palmer, (1895) 68 Vt. 1, 33 Atl. 828.

[6]Mathewson v. Phoenix Iron Foundry, (1884) 20 Fed. 281; Davis v. Stouffer, (1908) 132 Mo. App. 555, 112 S. W. 282; United States v. Simpson, (1885) 4 Utah 227, 7 Pac. 257. Also see note L. R. A. 1915E p 25. Recent cases are: Great Northern Ry. Co. v. Johnson, (1918) 254 Fed. 682; Love v. Love, (Iowa 1919) 171 N. W. 257.

[7]Yardley's Estate, (1874) 75 Pa. St. 207, 212.

[8](1913) 105 Tex. 597, 153 S. W. 1124.

the case of *Grigsby v. Reib*,[8] these holdings are merely obiter dicta in many of the decisions.[9] The supreme court of Minnesota, in the case of *Hulett v. Carey*,[10] stated, "The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed." It is interesting to note in this connection that in Missouri, prior to the case of *Davies v. Stouffer*,[11] several cases of common law marriage existed, where the consent was followed by cohabitation, and in which the court asserted the rule that consent in praesenti was sufficient to establish the marriage.[12] But when the case was squarely put before the court, it adopted the obiter dicta above referred to.

In opposition to this rule, there are many courts holding that a contract in praesenti is not sufficient to create the marriage status, but that cohabitation or some other assumption of the marriage relation is necessary.[13] The dicta to this effect are numerous.[14] New Hampshire has taken the extreme position, holding that cohabitation and the contract are mere evidence from which the jury may infer marriage.[15] In a few states, statutes provide that there must be an actual assumption of the marriage relation.[16]

The second form of common law marriage is the contract per verba de futuro. It is couched in words indicating an intention to enter the marriage contract in the future, e.g., "I will take you for my husband (or wife)." By itself, it is of no effect,[17] but by the law of Scotland and the common law a presumption was raised that the parties thereby mutually intended

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[9]In re Imboden's Estate, (1905) 111 Mo. App. 220, 86 S. W. 263; Hulett v. Carey, (1896) 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. Rep. 419; Jackson ex dem. Dies v. Winne, (1831) 7 Wend. (N. Y.) 47, 22 Am. Dec. 563.

[10]Note 9, supra, 66 Minn. at p. 336.

[11]Note 6, supra.

[12]Dyer v. Brannock, (1877) 66 Mo. 391, 403; Topper v. Perry, (1906) 197 Mo. 531, 95 S. W. 203, 114 Am. St. Rep. 777.

[13]Grigsby v. Reib, note 8, supra.

[14]Lorimer v. Lorimer, (1900) 124 Mich. 621, 83 N. W. 609, where there was no contract, but cohabitation; Taylor v. State, (1876) 52 Miss. 84, 2 Am. Crim. Rep. 43; In re Peterson's Estate, (1912) 22 N. D. 480, 134 N. W. 751, decided on authority of Lorimer v. Lorimer, states that in Michigan an assumption of the marriage relation is necessary.

[15]Dunbarton v. Franklin, (1848) 19 N. H. 257.

[16]In re Baldwin, (1912) 162 Cal. 471, 123 Pac. 267; O'Malley v. O'Malley, (1913) 46 Mont. 549, 129 Pac. 501.

[17]Dalrymple v. Dalrymple, (1811) 2 Hagg. Consist. 54, 17 Eng. Rul. Cas. 11.

the marriage relationship, provided that the intention thus expressed was followed by actual cohabitation.[18] There are but few cases in which the promise de futuro and subsequent cohabitation have been held to constitute marriage.[19] Generally speaking, the courts seem agreed that these elements do not constitute a marriage, but only evidence the relationship.[20] Indeed, it is positively stated by many courts, that the parties must actually intend to enter into the relation of husband and wife during the cohabitation, so that present consent will be evidenced.[21]

The institution of marriage has long been jealously protected by the law, and it is probably due to the salutary benefits of a legalized relationship in this respect that the courts will strain a point to give effect to the intention of the parties. As a matter of fact, the common law marriage is becoming quite a rare occurrence, and the instances in which it is being presented to the courts for adjudication are fewer still. By its very nature, in the absence of direct proof, such a marriage is exceedingly difficult to establish. In the ordinary case, the common method of proving such a marriage is by evidence of cohabitation and repute, for the presumption of marriage arising out of these facts can only be overthrown by most cogent proof.[22] On the other hand, the case of a common law marriage without some form of a consummation of the contract is the exceptional one, and must be established by direct proof. On authority and reason, therefore, it would seem that cohabitation is merely evidence from which a marriage may be established, if there be no indubitable proof of the contract of marriage; but where the agreement, with present matrimonial intent, is clearly proven, it would seem that the parties ipso facto become husband and wife.

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[18]Dalrymple v. Dalrymple, note 17, supra; Yelverton v. Longworth, (1864) 4 Macq. H. L. Cas. 746, 10 Jur. N. S. 1209, 11 L. T. N. S. 118; Patton v. Philadelphia, (1846) 1 La. Ann. 98.

[19]Dalrymple v. Dalrymple; Yelverton v. Longworth; Patton v. Philadelphia, note 18, supra.

[20]Port v. Port, (1873) 70 Ill. 484; Maher v. Maher, (1899) 183 Ill. 61, 56 N. E. 124. In Illinois common law marriage has since been abolished by statute. Also, Simmons v. Simmons, (Tex. Civ. App. 1897) 39 S. W. 639.

[21]Peck v. Peck, (1880) 12 R. I. 485, 39 Am. Rep. 702.

[22]Hynes v. McDermott, (1883) 71 N. Y. 451.

RECENT CASES

ACTION FOR WRONGFUL DEATH—STATUTE OF LIMITATIONS.—Preston, a telegraph lineman in the employ of the Western Union Telegraph Co., was injured in 1905 and died in 1915. The Pennsylvania statute provides: "Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or if there be no widow, the personal representative may maintain an action for and recover damages for the death thus occasioned." Preston's right of action at the time of his death was barred by the statute of limitations. His widow brought this action within one year after his death. The jury found that the accident was the proximate cause of the death. *Held*, the statute of limitations operated against the husband's right of action and not against the tort, the cause of action, and did not affect the right to sue that accrued to the widow at his death. *Western Union Telegraph Co. v. Preston*, (1918) 254 Fed. 229.

The action, whether brought by the husband or by the personal representative after the death of the husband, is an action for a specific act of negligence, and a satisfaction or release by the husband bars a future action for the benefit of the widow or next of kin, after his death. *Hill v. Pennsylvania R. Co.*, (1896) 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754. A leading case in New York of recent decision holds that the statute makes it a condition to the right of the beneficiaries to maintain an action, that a right of action should exist in the deceased at the time of death, and that the three year statute of limitations was an absolute bar to the maintenance of the action. *Kelliher v. N. Y. C., etc., R. Co.*, (1914) 212 N. Y. 207, 105 N. E. 824. The same construction has been placed upon Lord Campbell's Act and it is said that the test of the right to sue under the act is whether an action could have been maintained by the deceased in respect to his injuries. *Williams v. Mersey Docks and Harbour Board*, (1905) 1 K. B. 804, 74 L. J. K. B. 481, 92 L. T. 444, 53 Wkly. Rep. 488. A statute providing "if such injury results in the death of the servant or employee, his personal representative is entitled to maintain an action therefor," was construed to mean that no new cause of action was given, and that since the representative's cause of action was based on the same wrongful act, it would be necessary that the deceased at the time of his death had a right of action that could be enforced. *Williams v. Alabama Great Southern Ry. Co.*, (1908) 158 Ala. 396, 48 So. 485, 17 Ann. Cas. 516; *Fowlkes v. Nashville, etc., Ry. Co.*, (1872) 9 Heisk. (Tenn.) 829. The decision of the Tennessee case just cited, however, was based on a survival statute which provided that the cause of action shall not be extinguished by the death of the person injured. "Who would have been liable if death had not ensued" has been construed to mean liable at any time prior to the death and not just at that time. Under this construction it was held that although the

injured person's action was barred by the statute of limitations, an action could still be maintained by the personal representative for the benefit of the widow or next of kin, *Hoover's Adm'x v. Chesapeake, etc., Ry. Co.*, (1899) 46 W. Va. 268, 33 S. E. 224; and where the only limitation as to time was contained in a paragraph which read as follows: "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued," it was held that the cause of action to the legal representative did not accrue until the death of the person injured. *Nestelle v. Northern Pac. R. Co.*, (1893) 56 Fed. 261. A statute not differing very widely from Lord Campbell's Act was construed as giving an entirely new and independent cause of action for the benefit of the widow and children, and the fact that the decedent's cause of action had become barred will not affect the right of action conferred by the statute upon his survivors. *Wilson v. Jackson Hill Coal and Coke Co.*, (1911) 48 Ind. App. 150, 95 N. E. 589; *Robinson v. Canadian Pac. Ry. Co.*, [1892] A. C. 481, 61 L. J. P. C. 79, 67 L. T. 501. The same line of reasoning was followed in *German American Trust Co. v. Lafayette, etc., Co.*, (1912) 52 Ind. App. 211, 98 N. E. 874; *Causey v. Seaboard Air Line Ry. Co.*, (1914) 166 N. C. 5, 81 S. E. 917; *Donnelly v. Chicago City Ry. Co.*, (1911) 163 Ill. App. 7. A mere change in the phraseology of a statute adopted in embodying it, declaring that the action must be brought within one year after the cause of action accrued, did not change the effect of a former statute in respect to the limitation providing that the action did not accrue to the widow until the death of the person injured. *Louisville, etc., R. Co., v. Simrall's Admr.*, (1907) 127 Ky. 55, 104 S. W. 1011.

Since the right of the personal representative to sue does not accrue until the death of the person injured, under the Minnesota statute and those similar to it, this right which is given for the benefit of the widow or next of kin, and protected in the instant case, may be extinguished even before it comes into existence. See G. S. 1913, Sec. 8175. As the statute intends to give to the widow a right which she did not possess at common law, some provision should be made to insure her this right, especially when there has been no recovery by the husband during his lifetime and the injury is the proximate cause of his death.

COMMON LAW MARRIAGE—NECESSITY OF COHABITATION—PRESENCE OF THE PARTIES.—The plaintiff, a resident of Missouri, received from one Spiers, a resident of Minnesota, the following paper signed in duplicate by him:

"It is hereby agreed by and between E. R. Spiers and Mayme Woodall, from this date henceforth to be husband and wife, and from this date henceforth to conduct ourselves towards each other as husband and wife. . . ." She also signed, and returned the duplicate to him. He was killed while working for defendant. Plaintiff sues for damages under the wrongful death statute. *Held*, there was a good common law marriage, wherefore the plaintiff could recover. *Great Northern Ry. Co. v. Johnson*, (1918) 254 Fed. 683.

For discussion see NOTES p. 426.

CRIMINAL LAW—FALSE PRETENSES—FRAUDULENT CHARITABLE ENTERTAINMENT.—The defendant represented that a proposed entertainment was to be given for the benefit of the Red Cross and that the committee in charge acted for the Red Cross, when in fact it did not. The defendant failed to turn over the money received to the Red Cross. *Held*, that the defendant was guilty of obtaining money under false pretenses. *State v. Hathaway*, (Wis. 1919) 170 N. W. 654.

"A false pretense is such a false representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." Bishop, Criminal Law, 8th ed., II, Sec. 415. False pretenses cannot, therefore, be predicated from the nonperformance of a mere future promise. *Commonwealth v. Drew*, (1837) 19 Pick. (Mass.) 179. But where a promise to do something in the future combines with a false pretense to induce a person to part with his money, the promisor is guilty, even though the party defrauded would not have been induced by the false pretense alone. *State v. Briggs*, (1906) 74 Kan. 377, 86 Pac. 447, 7 L. R. A. (N. S.) 278. Where the promise is coupled with the false statement of fact, and the promise alone is the inducement, no offense is committed. *People v. Hart*, (1901) 35 Misc. (N. Y.) 182, 71 N. Y. Supp. 492; *State v. Tripp*, (1900) 113 Ia. 698, 84 N. W. 546. Some courts have held that a state of mind is a fact and that therefore a false statement as to the intention of the accused is a false pretense as to an existing fact. *State v. Dowe*, (1869) 27 Ia. 273, 1 Am. Rep. 271; *State v. Cowdin*, (1882) 28 Kan. 191. Other courts have held that a representation as to intention is not within the statute. *People v. Blanchard*, (1882) 90 N. Y. 314; *Regina v. Woodman*, (1879) 14 Cox C. C. 179.

CRIMINAL LAW—LARCENY—HUSBAND AND WIFE—LARCENY OF HUSBAND'S PROPERTY BY WIFE.—Husband upon enlisting in the English army entrusted to his wife a box containing over three thousand dollars, representing his lifetime savings. While he was with his regiment in France, wife broke open the box and spent the money going about with a Canadian soldier and buying him presents. Later there were immoral relations between them. When husband came home both wife and Canadian were arrested and indicted. Wife was convicted of larceny, and Canadian of "receiving." The latter appealed. *Held*, the effect of Sec. 36 of the Larceny Act, 1916, is to enact not merely that no proceedings for theft shall be taken by a husband against his wife except in the circumstances mentioned in that section (when not living together or about to desert), but also that except in those circumstances a wife cannot steal her husband's property. Since consortium existed here at the time of the taking, there was no stealing, and appellant's conviction was quashed. *Rex v. Creamer*, (Eng. 1919) 35 Times L. R. 281.

At common law a wife could not be guilty of the larceny of her husband's property, because husband and wife were one person in law and also because she has an interest in her husband's property. In England a long line of decisions follow the common law doctrine. *Reg. v. Kenny*,

(1877) 2 Q. B. D. 307, 13 Cox C. C. 397, 46 L. J. M. C. 156, 36 L. T. 36, 25 Wkly. Rep. 679; *Reg. v. Avery*, (1859) 1 Bell C. C. 150, 8 Cox C. C. 184, 28 L. J. M. C. 185, 23 Jur. 577, 33 L. T. 138, 7 Wkly. Rep. 431. In *Rex v. Willis*, (1833) 1 Moody C. C. 375, it was held that the stealing, by the wife of a member of a friendly society, of money of the society deposited in a box in the husband's custody, was not larceny. The judge before whom the case was tried referred to *Rex v. Clark*, Old Bailey Sessions Papers, January Sessions, 1818, where it appeared that the prosecutor's wife had assisted the prisoner in carrying off the property in question and had cohabited with him from the time of his absconding until his apprehension. In that case the court ruled that no person could be convicted of a felony alleged in stealing goods when such goods came into his possession by the delivery of the proprietor's wife.

But in *Rex v. Tolfree*, (1829) 1 Moody C. C. 243, on facts similar to the last mentioned case, it was held that if a man and the owner's wife jointly take away the husband's goods it may be larceny in the man. The accused ran away with the wife of the man at whose house he lodged. They took with them money, plate, etc., and lived together until he was taken into custody. Although the wife swore that she took all the property herself or gave it to the prisoner to take, the finding was that the two "stole jointly," and the man was convicted of larceny, the judges agreeing that, though the wife consented, it must be considered that it was done invito domino.

Under our modern statutes giving married women the right to their separate property, the law in most states seems to have remained the same. It was early held in Pennsylvania that the so-called "Married Woman's Law" did not destroy the relation of husband and wife with respect to her separate property, nor (dictum) so far alter it as to render the husband guilty of larceny by converting the property of the wife. *Walker v. Reamy*, (1860) 36 Pa. St. 410. Cases in accord are *Thomas v. Thomas*, (1869) 51 Ill. 162; *State v. Parker*, (1882) 3 Ohio Dec. Reprint 551. In *Commonwealth v. Hartnett*, (1855) 3 Gray (Mass.) 450, it was held that a wife who committed theft in a building owned by her husband was not liable to the punishment prescribed by a statute for larceny "in any building." In *Snyder v. People*, (1872) 26 Mich. 106, 12 Am. Rep. 302, in which case a husband was under indictment for burning his wife's dwelling house, it was held that the married woman's statutes of the state did not affect the marital unity of husband and wife and did not change the common law rule. Said Cooley, J.: " . . . . the unity of man and woman in the marriage relation is no more broken up by giving her a statutory ownership and control of property, than it would have been before the statute, by such family settlement as should give her the like ownership and control. At the common law, the power of independent action and judgment was in the husband alone: now it is in her also, for many purposes; but the authority in her, to own and convey property, and to sue and be sued, is no more inconsistent with the marital unity, than the corresponding authority in him."

Indiana under a similar statute holds the opposite. In the case of *Beasley v. State*, (1894) 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418, the

court held that the statute had done away with the legal fiction of the unity of husband and wife, and said: "If a woman may contract, under these statutes, with her husband and recover for a breach of contract, or for cheating her, it would seem reasonable to conclude that he may steal from her also . . . . " Arkansas held also that a husband might be guilty of larceny of his wife's personal property. But in that case there was a scheme to get the money which began before and included the marriage ceremony. *Hunt v. State,* (1904) 72 Ark. 241, 79 S. W. 769, 105 Am. St. Rep. 34, 2 Ann. Cas. 33, 65 L. R. A. 71. It will be noted that in the two cases last cited the husband stole from the wife. In *State v. Hogg,* (1910) 126 La. 1053, 53 So. 225, it was held that a husband might be guilty of embezzlement of property of wife, though whether the same is true of the wife and the husband's property is a question not decided.

The common law rule is followed in the only recent American cases on the subject. In the case of *State v. Phillips,* (1912) 85 Oh. St. 317, 97 N. E. 976, it was said in effect that the legislature when passing the act (Married Woman's Act) were not considering crimes and criminal procedure; they did not intend to authorize husband and wife to maintain civil actions for tort against each other, such as actions for personal injuries, assault, false imprisonment, or slander, thus multiplying a hundred-fold the unhappy differences which have to be settled in the divorce court; that the peace and sanctity of the home are the ultimate reasons for the common law rule. In an action by wife against husband for assault and battery, *Thompson v. Thompson,* (1910) 218 U. S. 611, 54 L. Ed. 1180 31 S. C. R. 111, 30 L. R. A. (N. S.) 1153, the United States Supreme Court held that the common law relation was not modified by the statute in the District of Columbia which gave married women the right to sue separately for recovery, security, and protection of their property, so far as to give the wife a right of action against her husband for assault and battery. Justice Day said in the opinion: "Conceding it to be within the power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention." Two Texas cases involve, in a manner, the same question and hold to the same result. *Golden v. State,* (1886) 22 Tex. Crim. App. 1, 2 S. W. 531; *Warren v. State,* (1907) 51 Tex Crim. 616, 103 S. W. 853.

In Minnesota there seem to be no cases directly in point, but the language used in *Gillespie v. Gillespie,* (1896) 64 Minn. 381, 67 N. W. 206, indicates that Minnesota would follow the Indiana doctrine. In that case Mitchell, J., said: "The obvious intent and effect of these statutory provisions is to preserve the separate legal existence of a married woman . . . . Section 5530 . . . . [now 7143] extends this rule to all rights, of both person and property, and expressly gives her . . . . the same remedies in the courts for the protection of these rights which she would have if unmarried. The clearly-declared policy of the statute in respect to the relation of husband and wife is that the latter can, in her own name and in any form of action, sue the former to enforce any right affecting her property, the same as if he were a stranger." That case allowed a civil action by wife against husband for conversion. In case of an assault

no civil action is allowed, but the state can prosecute in a criminal action. It would therefore seem, by analogy, that a criminal action for theft would be allowed in case of theft by the husband from the wife; and, if so, there would be no good reason for not applying the same rule to theft by wife from husband.

WAR—ALIEN ENEMIES—PROPERTY—CUSTODY—PROPERTY SUBJECT TO SEIZURE—EFFECT OF WAR UPON POWERS OF ATTORNEY.—Testator gave residue of his estate to executor in trust; upon division, certain shares were to be paid over to persons who are now alien enemies. S and R, holding powers of attorney executed by the alien enemies prior to war, claim the shares in behalf of their principals. The alien property custodian, also claiming them, declines to execute the refunding bonds required by New Jersey law. *Held*, (1) the trustees must require the bonds to protect themselves as well as creditors of the estate; (2) the custodian's authority is over the property of and interests of alien enemies in property, and not property in which they have an interest, so that his interest is that of the alien enemies to receive the shares upon giving the bonds; (3) it is for the courts to determine what is and what is not enemy property, and Congress cannot, under the war power, authorize the President to take property not within the field of military operation for public use without just compensation; (4) the war did not invalidate the powers of attorney. *Keppelman v. Keppelman*, (N.J. 1918) 105 Atl. 140.

Section 7c of the Trading with the Enemy Act provides:

"That any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy, not holding a license granted by the President hereunder, which the President, after investigation, shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the alien property custodian."

The Executive Order of February 26, 1918, provides among other things:

"A demand for the conveyance, transfer, assignment, delivery and payment of the money or other property, unless expressly qualified or limited, shall be deemed to include every right, title, interest and estate of the enemy in and to the money or other property demanded, as well as every power and authority of the enemy thereover."

The controversy arose in the state of New Jersey, where the deceased died, and under the laws of that state refunding bonds are required to be given by the heirs or legatees for the protection of the executors and creditors. The alien property custodian doubted his authority to give these bonds, under the act which created his office, and declined to give them. This point, however, as far as he was concerned, was considered by the New Jersey court to be immaterial, as S and R had the undoubted authority to furnish the bonds, provided their powers of attorney were valid and exercisable, and were ready to do so, and also admitted that if the shares were turned over to them they would hold them subject to the directions

of the alien property custodian and be under the duty of accounting to him for them.

The questions passed upon by the court therefore were: (1) Might the shares be turned over to either of the claimants without the execution of refunding bonds, and (2) even though it were conceded that the bonds of the holders of the powers of attorney, S and R, would protect the creditors and answer the requirements of the New Jersey statute even though the property was turned over to the alien custodian and not to S and R, were such powers of attorney valid and exercisable at all?

On the first point the alien property custodian contended that the Trading with the Enemy Act was a war measure and that the President acts under it as commander-in-chief of the army and that therefore the statute of New Jersey which was enacted for the protection of the executor and the creditors was inapplicable.

This point, of course, raised a nice constitutional question: the Alien Enemy Act being a war measure, had Congress in the United States, and when no martial law had been declared, the power to grant to the President, or had the President, as commander-in-chief of the forces of the United States, the power, not merely as against the alien enemy but as against the executor, the other heirs, and the creditors of the deceased person, to order the delivery of the goods or property to the alien custodian or any other person without the giving of the bond which should protect the executor and the creditors and heirs in case of an overpayment or wrongful payment? The court avoided passing directly upon this question, by holding that the Act was not applicable until the property had been actually received by the alien enemy or his agent. Had the point been squarely decided, however, it seems the court must have held that as the state creates the right to devise and inherit property, it could have denied the right altogether, or could place any limitation around that right which it chose; that since the alien property custodian takes only what the alien is entitled to, he must take it subject to the same limitations—that is, give the bond, or relinquish the right. The court, however, in fact held that the Alien Enemy Act, so far as property or property rights were involved, was concerned with the property of and *interest* of alien enemies *in property* and not *in* the property in which they had an interest.

The argument of the court is, in fact, based upon the premise that the state has the right to determine what shall pass to the heirs and legatees and what shall not and under what conditions it shall pass, and that the act as construed by the custodian of alien property would violate this right, and it is for this reason that it makes the distinction. It is made to prevent conflict between the act of the legislature of New Jersey and the Act of Congress and the Executive Order. It, however, concedes in its logic, though perhaps not in express words, the basic argument of the trustees and the unconstitutionality of the whole legislation if so construed as to deny to the state the right to limit the succession of aliens or the terms under which they shall take.

Another interesting feature of the case is its construction of the term "Trading with the Enemy." Were the powers of attorney good? Could

S and R execute the bonds necessary for the delivery to them of the property, no matter how that property might be held after its delivery? Could they execute the bonds necessary for the turning of the "property in which aliens had an interest" into property which they owned or "an interest in the property"?

The court intimated that the powers of attorney could have been exercised under the common law. The question, however, remained whether they were rendered invalid by the "Trading with the Enemy Act." This question the court avoided, though it strongly intimated that in its opinion, since the word "trade" was defined in the statute to include the payment of a debt and the receipt of money or property, the act done must be on behalf of and for the benefit of the alien enemy. It seemed to intimate, though it did not expressly hold, that since in this case, if the property were delivered to S and R and the bonds were executed, the shares would really go to the alien property custodian, no such benefit was apparent; but suggested that steps be taken to ascertain the wishes of the alien enemies as to whether or not the powers of attorney should be used and the bonds be executed. How this could be done without "trading with the enemy" is not made clear.

The court's conclusion is somewhat remarkable. At the beginning it seems to doubt whether the property is alien property at all until the bonds have been given and the statute of the state has been complied with. It, however, welcomes the suggestion that one of the purposes of the Trading with the Enemy Act and of the appointment of the alien property custodian was to create a fund which might be used for the benefit of the United States, and it therefore suggests that, upon application of the alien property custodian, it will direct the funds to be invested in Liberty bonds. If, indeed, there is a distinction between property in which alien enemies have an interest and interests of alien enemies in property, and the alien custodian has only jurisdiction of the latter, and such interest in property does not arise until the money is paid to the agent of the alien enemy or to the alien enemy himself, what right of dictation at all had the custodian of alien property in the premises? Is there really any merit in the distinction? Were not the shares of the alien enemies "money held for them by the trustees" and did they not come within the clause of Section 7c of the act? The case as a whole is interesting in its suggestions, but disappointing in its holdings.

BOOK REVIEWS

COMMENTARIES ON EQUITY JURISPRUDENCE. By Joseph Story, LL. D. Fourteenth Edition. By W. H. Lyon, Jr., LL. B. Boston: Little Brown and Co. 1918. In Three Volumes: pp. cxcii, 545; vii, 683; vii, 682. Price, $22.50.

It is well that this edition has been published. It is well also that in it the original text of Judge Story should have been retained, for, as far as the earlier law of equity and the influence of the civil law thereon is concerned, it is rarely necessary to look beyond the conclusions of the great master writer. Any such an editorial attempt is full of difficulty, and that difficulty is augmented by the fact that since the original work was published numerous other editions have appeared which have up to and as far as their own time was concerned more or less adequately completed the task, so that if the original text was to be preserved, the new edition could merely be an edition upon editions and its notes be notes upon notes. These limitations are perhaps responsible for the disappointing features of the work, and for the seeming incompleteness of many of the notes and discussions. They are also responsible no doubt for the impression that in many cases the new statement of the law is hardly necessary at all as it is already covered in the original text. These faults, however, we believe to be in a large measure unavoidable and to be involved in the situation itself. Even if they exist, the bar will welcome the work. A new revision was necessary, for the original book was written in 1835 and the seventh edition was published in 1886, and even since the later date the old cloth of equity jurisprudence has had to be cut and adapted to many and incongruous garments. We are glad also that the original text has been preserved in the manner it has been and that the additions which have been made by the author have been clearly distinguished from it. That text indeed has been so often quoted and has entered so largely into our legal literature, in fact has had so great and formative an influence upon the development of the American law, that many of us would resent its mutilation as much as we resent the mutilation of our old Bible by the modern revised versions.

Perhaps the most disappointing feature of the book are the notes, which in the main are merely the notes of Mr. Bigelow, are hardly up to date, and in some cases are inaccurate. The author, however, explains this by the statement that it has been his intention merely to select the leading cases, and perhaps after all the province of a text book is not that of a digest.

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CURRENT LEGISLATION

MINNESOTA LEGISLATION 1919

THIS is intended as a brief summary of the more important laws enacted at the recent session of the state legislature. Appropriation acts, curative acts, and acts wholly local are omitted, as are also acts merely amendatory of existing laws which make no material change in principle or application, nor is any reference made to laws relating to the courts or court procedure.

CONSTITUTIONAL AMENDMENTS

Three constitutional amendments are proposed for submission at the general election in 1920. The first, and probably the one of the greatest general interest, is the so-called "Good Roads Amendment" proposed by Chapter 530. It is a very long one consisting of approximately five thousand words and provides for a Trunk Highway System consisting of seventy different routes, which are designated and described, connecting all county seats as well as all other important cities within the state. It further creates a Trunk Highway Sinking Fund, from the proceeds of a motor vehicle tax which the legislature is authorized to impose, to meet the principal and interest upon bonds the issuance of which is authorized to an amount not exceeding ten million dollars per year, not more than seventy-five million dollars to be outstanding at any one time. In anticipation of the adoption of this amendment, county boards are authorized by Chapter 265 to issue bonds for constructing and improving state roads.

Chapter 531 proposes an amendment extending the term of Judges of Probate to four years to correspond with the statutory four-year term of other county officers. This amendment was also submitted at the general elections in 1914 and 1916, but failed to receive a majority of the total vote cast, owing, not to any opposition, but to the indifference of the electors, who failed, in large numbers, to vote thereon.

Chapter 532 proposes an amendment to Article 9, Section 1, relating to taxation, the adoption of which would authorize the legislature to exempt from taxation household goods and certain other classes of personal property, and to impose graduated and progressive income, privilege, and occupation taxes. The proposed amendment is in line with the present tendency throughout the country of exempting more personal property from taxation and of imposing taxes on incomes, many states having already adopted such changes.

In addition to these amendments, Chapter 533 provides for the submission to the electors of an increase in the Railroad Gross Earnings Tax to five per cent.

Agriculture

Strange as it may seem, the great agricultural state of Minnesota has up to the present time had no agricultural department, though some of its agricultural activities have been taken care of through departments with other designations. By Chapter 444 the legislature created such department under its proper title and, pursuant to its provisions, a Commissioner of Agriculture has now been appointed by the Governor, to take office on June 1st, 1919. His duties are those which naturally fall within the scope of such department in promoting agricultural activities within the state. He is required to gather statistics and other information, take a farm census, and publish bulletins. He also takes over the licensing of commission merchants, which has heretofore been done by the Railroad and Warehouse Commission. Such department is fraught with large possibilities and should prove of great and increasing value to the state.

Chapter 143 creates a board for the inspection and certification of seed potatoes. This legislation was desired by potato growers in order to facilitate the profitable marketing of seed potatoes. It requires inspection both of the growing crop and of the potatoes after being harvested.

Chapter 81 declares Mahoma bushes and Barberry bushes, except Japanese Barberry, to be rust producing, and provides for their destruction, the state entomologist being charged with the duty of causing such bushes to be eradicated.

Chapter 260 regulates the sale of concentrated commercial feeding stuffs, the supervision thereof being placed with the Dairy and Food Commission.

Closely related to agricultural production is the problem of marketing. To meet the present demand for co-operative action in this regard the legislature by Chapter 82 amended the law relating to the formation of co-operative associations and also passed a new law, Chapter 382, authorizing the incorporation of such associations for certain purposes and defining their powers.

"Blue Sky" Legislation

By Chapter 429, Laws 1917, a State Securities Commission was created consisting of three members. This law was amended by Chapter 105, the Superintendent of Banks being made a member, and the powers of the Commission being enlarged and its duties more clearly defined. By Chapter 257 it is made an offense to circulate or distribute any offer of, or solicitation to purchase, any securities not approved by the Commission.

Chapter 86 imposes upon the State Securities Commission the duty of passing upon applications for charters for new banks, and provides for notice and hearing. Charters may be granted only upon a showing that there is a reasonable public demand for the new bank, and that the probable volume of business is sufficient to insure and maintain its solvency, as well as the solvency of the existing bank or banks in the locality. Review of the decision of the Commission upon an application for a charter may be had by certiorari.

EDUCATION

Chapter 334 establishes a Department of Education under an appointive State Board of five members which takes over the functions at present performed by the State Superintendent of Education, the State High School Board, and the Public Library Commission, the purpose being to centralize educational activities as far as practicable.

In the interest of Americanization the legislature passed Chapter 320 which amends the compulsory school attendance law by providing that a school, in order to meet the requirements of compulsory attendance, must be taught in the English language, the teaching of foreign languages being permissible only to the extent of one hour each day. A great deal of attention was given during the session to the question of encouraging the use of English and discouraging the continued use of foreign languages, and this act is a step in that direction.

ELECTIONS

Measures were introduced looking toward the radical amendment or the repeal of the present primary election system, but all such failed of passage and the law remains practically unchanged.

The death of two members of the senate and refusal to seat a third for violation of the corrupt practices act necessitated the holding of three special elections to fill the vacancies. This called attention to the inadequacy of the law in this respect and led to the passage of Chapter 5, amended by Chapter 11, which makes provision for special elections to fill such vacancies. Primaries for the nomination of candidates are to be held seven days before the day set for the special election, and the general election laws govern as far as applicable, the registration list for the last preceding general election being used, and the same election officers act without further appointment.

Chapter 162 provides for taking evidence in the district court in case of contest for a seat in the legislature and for determination in such court of who is entitled to the certificate of election, subject to appeal to the supreme court from such determination, the final decision of the contest remaining, however, with the legislature as provided by the constitution.

By Chapter 89 women possessing the requisite qualifications are given the right to vote for candidates for presidential electors.

FIRE AND TORNADO RELIEF

Chapter 12 providing for relief to sufferers from the forest fires of October, 1918, was repealed by Chapter 37, which continues in existence the Fire Relief Commission of nine members appointed by the Governor shortly after the disastrous fire. The act continues the Commission for one year or until its work has been accomplished and appropriates $1,850,000 for such aid and relief as may be found necessary. Provision is made for issuing certificates of indebtedness for the amount appropriated, and for an annual tax levy of $370,000 for five years to retire the certificates. The Commission is given broad power in granting such relief as may be found desirable. By Chapter 133 county boards in certain counties are also authorized to grant fire relief.

Chapter 62 creates a Commission of five members to be appointed by the Governor, with authority to expend $35,000, appropriated by the act, for the relief of sufferers from the tornado which destroyed the village of Tyler in August, 1918.

Fish and Game

Laws of 1917, Chapter 461, provided for a Commission of five members to revise and codify the Fish and Game laws of the state. This Commission reported a bill covering the entire subject matter which with some amendments was adopted and became Chapter 400, revising our entire Fish and Game law into one consistent whole. The plan seems to have met with approval, since by Chapter 406 a similar Commission is to be appointed to present to the next legislature a revision and codification of the Dairy and Food laws.

Insurance

Chapter 42 provides that fraternal benefit societies may consolidate, merge, or reinsure and prescribes regulations under which such consolidation may be made.

Chapter 21 permits such societies to provide for annuity benefits in case of children from two to sixteen years of age, the benefits payable being limited to $34 in case of death at two years and gradually increased until reaching $600 at sixteen years of age.

Chapter 141 prescribes conditions under which an insurance company may re-insure its risks.

Chapter 413 permits insurance companies to insure against loss resulting from war.

Intoxicating Liquors

Owing to the adoption of the Federal Amendment, legislation on this subject at this session was very limited. Chapter 455 provides for stringent enforcement within the state of the Federal Amendment and of the "War Prohibition Act," taking effect July 1st. The act specifically provides, however, that if the Federal Amendment for any reason fails or is held void, this act shall be inoperative.

By Chapter 457 cities and villages are authorized to refund liquor license money in any case where the sale of intoxicating liquors becomes unlawful before the expiration of the license period.

Labor

The Workmen's Compensation Act was amended by Chapters 185, 416, and 442, whereby the schedules of compensation were revised so as to provide for increased amounts in case of certain injuries.

Chapter 84 prescribes rules and regulations for the operation of foundries so as to give more adequate protection to foundry employees.

Chapter 175 requires that workmen be paid promptly upon discharge or when (not being under contract for any definite period of service) workmen quit or resign their employment. In case of failure to pay within the time limited by the act, the workmen are given a right to wages while waiting.

By Chapter 40 eight hours was made to constitute a day's work for employees in the various state institutions from and after January 1, 1920.

Public Health and Welfare

Chapter 64 provides for the appointment of a board of chiropractic examiners with authority to examine and license persons desiring to commence the practice of chiropractic within the state, and Chapter 240 provides for examination and licensing of dental nurses.

By Chapter 38 city and village councils, county commissioners, and town boards are authorized to employ registered nurses to inspect schools and otherwise assist in looking after the public health.

By Chapter 74 villages and cities of less than 10,000 inhabitants are authorized to establish and maintain public rest rooms, and by Chapter 146 village councils are authorized to levy a one-half mill tax for the purpose of providing musical entertainments to the public either in public buildings or on public grounds.

Chapter 348 prohibits the sale of cigarettes to minors under eighteen years of age and makes it a misdemeanor for such minors to smoke cigarettes, and also provides for the licensing of dealers and manufacturers of cigarettes and cigarette papers.

Uniform Acts

Only one of the so-called "Uniform Acts" was adopted, that being the Limited Partnership Act which becomes Chapter 498.

War Legislation

Many bills were introduced as a result of our participation in the war. Among those enacted into law the following may be noted:

Chapter 93 repeals the sedition act of 1917 (Chapter 463) and prohibits seditious and disloyal acts, language, and propaganda at any time when the United States is at war, and names and defines specifically what shall come within the prohibition of the act. The punishment for violation is fixed at a fine of not more than $10,000 or imprisonment not more than twenty years, or both.

Chapter 64 prohibits the display of any red or black flag, except that red flags may be used for danger signals, and also prohibits any person from having such flags in his possession. Section 3 of the act prohibits the display of any flag, banner, ensign, or sign having upon it any inscription antagonistic to the existing government of the United States or the state of Minnesota.

Chapters 14 and 192 give preference in public employment to soldiers, sailors, and marines in the late war, as well as those of earlier wars, while Chapter 358 grants to such soldiers, sailors, and marines free tuition in the State University, State Normal Schools and Colleges within the state, and Chapter 140 authorizes abatement of penalties, interest, and costs on taxes levied on lands owned by persons who served in the army, navy, or marine corps during the late war.

Chapter 284 establishes a War Records Commission for the purpose of collecting, compiling, and preserving the record of Minnesota's partici-

pation in the war, and for the publication of a condensed narrative thereof, as a memorial record. The material gathered is to be deposited for permanent preservation in the library of the Minnesota Historical Society; and Chapter 288 provides that municipalities may appropriate money to aid in this project.

Miscellaneous

Chapter 290 prescribes procedure for the restoration of civil rights to persons convicted of a felony, certificate of such restoration to be issued by the Governor in proper cases.

Chapter 72 makes it a felony to use a motor vehicle without the permission of the owner, the act being aimed at the practice of "borrowing" automobiles for the purpose of "joy riding."

Chapter 471 amends the drainage laws of the state and establishes a department of drainage and waters. The act makes numerous changes in the existing law and is virtually a revision of the drainage laws.

Chapter 166 creates a Minnesota Land and Lake Attraction Board composed of five members whose duty it shall be to carry on a publicity campaign to advertise Minnesota lands as well as the various attractions of the numerous lakes within the state.

By Chapter 189 the standard gauge of sleighs is made four feet six inches to correspond with the gauge of the usual wheeled vehicles.

Chapter 188 prohibits discrimination, in written instruments relating to real estate, against persons or classes of persons because of their religious faith.

Chapter 165 changes the state fiscal year so as to end June 30th, instead of July 31st as heretofore.

Chapter 106 provides that, in the future, women sentenced for crime shall be sentenced to the State Reformatory for women instead of to the State Prison, and the Board of Control is authorized to transfer women now in the State Prison to said reformatory.

Chapter 469 empowers any village or city of the third or fourth class to prescribe rates for the furnishing of gas and electricity to its inhabitants, subject to appeal to the courts from any order fixing such rates.

Local Acts

The following acts while local in their application are of general interest:

Chapter 292, which authorizes the creation of a city planning department in Minneapolis. An act of this kind might well be made to apply to all cities.

Chapter 327, which creates a department of public welfare in Minneapolis, to have charge of all matters pertaining to the promotion and preservation of health, to supervise city hospitals, dispensaries, and clinics, to look after the welfare of the poor, and to control the penal institutions of the city.

Chapter 402, which authorizes the city of Minneapolis to issue bonds for the establishment of public markets.

Chapter 153, which authorizes St. Louis County to establish and maintain an industrial home for girls, to which the juvenile court may commit any girl found to be dependent, neglected, or delinquent, and to which other courts may, in proper cases, commit girls or women in lieu of sentencing them to jail.

Chapter 112, which creates a conciliation court for the city of Stillwater and defines its jurisdiction.

Resolutions

The legislature also passed the following resolutions which are of special importance:

No. 1 ratifying the Federal Prohibition Amendment.

No. 2 petitioning Congress to pass the Woman's Suffrage Amendment.

Nos. 7 and 11 memorializing Congress in favor of canalizing the St. Lawrence River to permit ocean-going vessels to enter the Great Lakes, and authorizing the Governor to appoint "The Great Lakes-St. Lawrence Tidewater Commission" to co-operate with other states in advancing the project.

No. 9 requesting and demanding a modification of the Federal Grades of grain.

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THE IDEA OF LAW AMONG CIVILIZED PEOPLES*

THE GENERAL system of Roman law is dominated by a great antithesis, which has exercised in the life of the law and in the theorizing of jurists and philosophers a most powerful influence, both of good and of bad, namely, the opposition between the civil law and the natural law, jus civile and jus naturale.

This distinction among the Romans was the fruit of observation and of experience. The good fortune and superior political organization of the Romans made them able to dominate all the nations living on the shores of the Mediterranean and to unify the ancient world. Barbarous and semi-civilized peoples of the west and in the countries of the north, and people of diverse civilization, but all superior to and much more advanced than their conquerors (the Punic, Greek, Hellenistic, and Oriental civilizations), were all gathered under the Roman scepter and constituted such a varied mixture that not even the Anglo-Saxon Empire of today has its equal. In the laws of all these peoples, or tribes, the Romans observed a combination of corresponding institutions which seemed to constitute a common basis, so not alone in their own laws but in all the laws of the peoples they distinguished two groups, a complex number of particular precepts and a complex number of common precepts. The jurist Gaius expresses it in this form:

"omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum jure utuntur."

*Translated by Signorina Yone Galletti Cambiagi, Foreign Office, Rome.

The designation of the common category of rules was sometimes the jus gentium and sometimes the jus naturale. The first designation belongs wholly to the Romans. It is related to their observation and expresses their universal recognition. The Romans inherited the designation of jus naturale from the Greek philosophy, but they infused into it a more positive spirit. The essential idea of the words, natura, naturalis, naturaliter, is what exists, happens or comes to pass independently of man's active agency, but through the work of other forces and especially through a general power of movement, nature, and the mysterious force which creates these facts and these effects.

So therefore, to consider some examples taken from these same Roman jurists, in matters not related to law, we notice that they say, "naturalis agger," the barrier not made by man, or in other words not artificial or manufactured; "motus naturalis arboris," a natural movement of a tree; the water coming down from the sky has a natural cause, "naturalis causa"; the river, a "naturalis alveus," etc. In these instances the most general contrast is with everything produced by man, or whatever a man causes, provokes, or, in fact, makes. Lex naturae or natura rerum signifies in these instances what the natural sciences call natural law or nature. Now transported to the field of law, the word does not express a different thought nor assume a mystical appearance. The antithesis is above all related to the forms of legal action which constitute the part most visibly in contrast between different peoples and in which the mutual relations make the contrast most noticeable. There are rules in which are seen the will of the legislator and other rules which correspond exactly in their scope to the social conscience. The first are the work of legislators; they have been discussed in the Senate and approved by the Council; the second represent an ancient and sacred inheritance, an obscure elaboration whose origin it is not possible to trace. We can say that natural law has not been established by civilization, which has not invented it nor shaped it of its own will, but has discovered it in the social conscience, and by no other recognition, as a rule of law.

But in this way it is easily understood how we reach the conclusion that this jus, responding always to duty and conforming always to justice (that is to say, what the Romans called equitas), has been established not by man but by a Being, above man, which will be the personification of the same thing—Nature. Gaius defines the jus naturale or the jus gentium as the law

"quod naturalis ratio inter omnes homines constituit," that is to say, the law which nature and the natural order of things (and not natural reason) has established among all mankind.

The prevailing opinion holds that the last of the jurists, as Ulpian, Trifoninus, and Hermogenian, have made a further distinction between jus naturale and jus gentium. Modern criticism, with which I agree, holds to a contrary opinion. There is reason to believe that not a single one of the Roman lawyers (Hermogenian does not belong to the classical Roman school of jurisprudence) ever made the distinction between jus gentium and jus naturale. This distinction belongs to the Christian Emperor Justinian or to the Roman-Christian epoch. Norms which pertain to the body of natural law have no reason to change in order to assume a form more adapted to the aim of the norms of the jus civile. They only change when the social surroundings are completely transformed and the reason for them disappears, a thing which man by instinct cannot believe possible. Therefore it is obvious that this law comes to be conceived of as an eternal law, unchangeable in time as well as in space.

Nevertheless given the positive character of natural law among the Romans and given the empirical method of establishing the principles of natural law, the idea that this right would be absolute and unchangeable could not cause any harm to the Romans. Not so harmless, however, was a similar conception in modern times, especially in the 18th century just on the eve of the French Revolution when the philosophers and jurists and the so-called "natural rights" school, the historians and literary men approving the doctrine, pretended to fix a priori a natural law of pure fancy, without taking into consideration the men and society in which they lived. The naturalis ratio of the Romans, which was only used to mean the natural order of things, a pure synonym for Nature, was converted by a curious mistake and the school of natural law was called by some philosophers the school of rational law.

At the beginning of the nineteenth century this idea of natural law, which during so many centuries dominated the ancient and the modern civilization, was combated by the works of the German historical school.

In truth, this idea had already been combated since the year 600. But the word pronounced too soon by our Vico in the full glory of rationalism and under the unfavorable conditions of Italy was a voice crying out in the wilderness. Even a few

years before Savigny, the eloquent voice of Burke was heard in the English Parliament combating the principles of natural law on which were founded the principles of the French constitution, but without any immediate result. The historical school raised in opposition to the school of natural law was based on two postulates, each of them in opposition to the idea of the school of natural law, juridical evolution and the national conscience. There is nothing unchangeable in law, nor may we create a priori a system of ideal law, because law, as well as morality, habits, art, is subject to a perpetual evolution, nor can there be a law common to all people, because each race has its own national conscience by which the law is inspired. Thus the idea of evolution, which was to renew so many sciences and to create new ones (if the nineteenth century is the especially scientific century), made its first appearance largely and strongly in the domain of law, since its applications to comparative philology, to geology, and to psychology are all later, and even its application to biology is later or at least dates from about the same time. Vico recalls the seventeenth century; the declaration of Burke, the end of the eighteenth; as also the celebrated pamphlet of Savigny, published in 1814, follows closely with greater developments the biological communications of Geoffroy St. Hilaire and of Lamarck. Before the philosopher of evolution, Herbert Spencer, began to synthesize the various applications of the doctrine of evolution, very often in opposition to one another (it is known how Lyell, and not he alone, remade geology on the basis of evolution, but was nevertheless one of the strongest adversaries of biological evolution), the science of law for nearly half a century had been based on the same ideas.

Nevertheless, the two postulates of the historical school did not represent in the least all the truth, and together they have brought, with some good benefits, both aberration and harm. A notable confusion in the mind has produced the doubtful expression and hence the epithet "slow and gradual" added to the concept of evolution. Above all, this epithet, which arose perhaps as an effect of the age when the concept was born, transformed it into a political instrument which would necessarily injure its scientific value.

In the writings of Savigny, in the words of Burke, and in the works of the historical school the concept was used as a weapon against the dreams of the French Revolution and even against the most useful innovations produced by that great event.

Instead of being an instrument of progress, as it was in the idea which inspired it, it was used at the beginning as a help to restore and in course of time also to reinforce the conservative tendencies and to weaken the progressive ideas. This worship of history and of historical continuity became fetichism. Really the study of past ages, the sentimental passion, the idyllic coloration of the different past stages of national life, helped to chain the mind to the most obsolete institutions. History and romanticism ran together. The historical justification of everything that exists nowadays inspired a resistance to any change; anything which lives has a reason to live. Any innovation was banished as contrary to the slow and gradual evolution, the contribution of men came to be nearly eliminated, and progress was represented as a movement of things which, in their course, carried men away from their voluntary liberty, from their own activity.

But the true scientific harm of that concession was exactly this: for the sake of the principal, the accessory was forgotten and the research of organic law was neglected, that is, the development of law as against the slow and gradual character of the movement which seemed to assume the entire concept of evolution. And this expression in which the common opinion used to sum up the concept is probably untrue. Latest studies have contributed to destroy these pretended bases of evolution in the field of biology, but above all in the field of social sciences it is observed how peoples pass through periods of slow movement and sometimes of stagnation, followed by sudden crises in which everything changes, and, if the institutions of the past are not abolished, there is injected into them the germs of a profound alteration and of a great and sudden movement in a wholly new direction. The classical countries of evolution cannot escape from this law. The history of Roman law, which in the concept of the historical school was represented as a slow and gradual development from the first king of Rome to the great legislator of Constantinople, may be now considered as a story in which the conservative forces have suddenly twice undergone the effects of an immense crisis.

But the other concept which isolates law in the pales of the national mind is exaggerated. In the field of private law, if not completely, we can say that it is true as far as it relates to the family. This happens very few times in relation to the rights of succession, even though it might be desired to connect

these with the rights of the family. Still less is this seen in the realm of property, but the law of obligation and above all the commercial law could be made uniform with no difficulty for a large family of civilized peoples, without meeting obstacles in the national conscience. Before unifying the whole world under the norm of a common law, the Romans had succeeded in creating a common commercial law, the jus gentium. This practically fulfilled this function.

The higher value of law is the certainty of the norm, and the Romans had begun to unify it by making a unity of vast agglomerations of men. The form is indifferent. As in nature different organs fulfil the same function, so the most widely differing institutions can be used for the same purpose. To use a common but a very practical example, we may cite vehicles which play so great a part in modern life. It does not make any difference whether they keep the right or left side; the important thing is to have a rule for one side or the other. The ideal will be a rule common to all sorts of vehicles and for the largest zone. In the field of obligation, the unity among peoples could be established in obtaining the same advantage that we have in weights and measures and that we could have even for money. The propagation of our civilization in countries which have lived independent from it, as those of the Far East, has spread also the principles of the old Roman law, the most important element which formed the heritage of the ancient world. The general movement for codification, which took hold of all the continental countries of Europe, and Latin America, in the nineteenth century, seemed to break the approximate unity of the law which had been formed in former centuries under the aegis of the common Roman law, but ended in facilitating its progress and its enlargement with the Codes. Unnoticed, the Roman law has given a unity to the language and institutions of the legislation of civilized peoples and a common direction of thought and discipline of the mind. The compilation of a proposed Code of Obligations, confined as yet to France and Italy, is in progress as the work of willing French and Italian scholars, under the direction of the eminent lawyer Vittorio Scialoja. This movement is followed by every other country of the Entente, and we hope that even the lawyers who represent the great American people will join in these studies and ideas and will collaborate in reconstructing the Latin science of law so that, in course of time, the

basis of a common commercial law may be laid.

We are at the beginning of a new era for the world. Since so many human institutions have been overturned by the recent tempest, one may hope that worshipers of law in all of the most civilized countries will feel that the time is opportune to co-operate in a common effort to render more agreeable and more sympathetic the relations among peoples, breaking down at least many of the artificial barriers, that an evil inheritance of juridical traditions propagating itself ever like an eternal malady may have no stable foundation among men.

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THE NATIONAL POLICE POWER UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION*

IV. Regulations Denying the Privileges of Interstate Commerce to Harmless Goods Produced under Objectionable Conditions—The Federal Child Labor Law

In passing the Keating-Owen Child Labor Law[1] Congress plunged, probably with some misgivings, into what was expected to prove a new field of national police regulation. The act forbade the shipment in interstate commerce of the products of mines and factories in which, within thirty days prior to their shipment in such commerce, child labor had been employed. It was an entirely novel exercise of the power to regulate commerce. Even those who deny that the unique character of the act created any serious constitutional difficulty readily agree that it stands in a class by itself as an exercise of congressional authority. Hitherto Congress had exercised a national police power under the commerce clause in two general ways: first, to protect interstate commerce from injury and obstruction; second, by refusing to allow it to be used to further the distribution of obnoxious commodities or the consummation of injurious designs. Wherever Congress had resorted to prohibitions of interstate commerce the prohibition had been justified upon the harmful nature of the thing excluded; harmful either to commerce itself or harmful in the use to which it was put. The goods excluded by the Child Labor Law, however, were themselves entirely harmless and legitimate in character, and harmless and legitimate also in the use to which they were to be put; their harmfulness consisted in the fact that they were produced under conditions injurious to the public welfare. Like an illegitimate child, they were made to bear the taint of the evil which brought them into existence; the disability which attached to them was created not because Congress in any way objected to having that kind of goods distributed through interstate commerce but

*Continued from 3 Minnesota Law Review 412.

[1] Act of September 1, 1916, 39 Stat. at L. 675, Chap. 432.

because it wished to make it unprofitable to employ children in the manufacture of any kind of goods. The doctrine of the Child Labor Law would have extended enormously the scope of the national police power under the commerce clause by placing within congressional regulation the conditions under which any articles of interstate commerce are produced.

The history of the movement for a federal child labor law shows that movement to have been in the main a trial and error search for constitutionality. The most dangerous opposition to such a law did not come from the friends of child-labor, a group which grows constantly smaller and more silent; nor did it come from the "states rights" advocates, who, on grounds of policy and expediency, objected to the placing of child labor under uniform national control—for few intelligent persons are now prepared to deny that there is small hope for an effective suppression of the child labor curse in the divergent legislation of forty-eight states. On the contrary, the opposition which counted most came from those who, while sympathising with the objects of the law, honestly doubted that there was any sound constitutional basis upon which a child labor law under the commerce clause could rest; who, in the apt phrase of one of their number, could not convince themselves "that 'accroachment of power' is expedient when benevolent, and that, though a child is entitled to protection, the constitution is not."[2] This was apparent from the very outset. The first federal child labor bill was introduced into the Senate in 1906 by Senator Albert J. Beveridge of Indiana. This pioneer bill forbade any interstate carrier to transport the products of any mine or factory in which children under fourteen years of age were employed; and to make the bill effective the management of any establishment desiring to ship goods in interstate commerce was compelled to give the common carrier a statement that no such children were employed in its plant.[3] In a brilliant speech extending over three

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[2] Green, The Child Labor Law and the Constitution, Ill. Law Bul., April, 1917, p. 6.

[3] The portions of this bill which are of interest in this connection are as follows: "Be it enacted . . . That six months from and after the passage of this act no carrier of interstate commerce shall transport or accept for transportation the products of any factory or mine in which children under fourteen years of age are employed or permitted to work, which products are offered to said interstate carrier by the firm, person, or corporation owning or operating said factory or mine, or any officer or

days Senator Beveridge set forth the need for such legislation and defended its constitutionality.[4] The most distinguished legal talent in the Senate was drawn into this debate; and it was plain to see that with but few exceptions their views of its validity ranged from skepticism to the clear conviction that it was unconstitutional.[5] The bill never became law, and the Judiciary Committee of the House of Representatives to which it was referred made a report setting forth its belief that the bill was clearly invalid.[6] With the retirement of Mr. Beveridge from the Senate, the active efforts of congressmen to secure federal legislation upon the problem of child labor for the time being ceased.

The Keating-Owen bill was the successor to the Beveridge bill. As introduced into the House, it forbade the shipment in interstate commerce of goods produced in whole or in part by the labor of children under fourteen years of age. This bill was not wholly satisfactory to the National Child Labor Committee which was sponsoring it, because placing the prohibition merely upon child-made goods narrowed considerably the scope of the act; though there was a belief that a stronger argument could be made for its constitutionality than for one broader in

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agent or servant thereof, for transportaton into any other state or territory than the one in which said factory is located.

"Sec. 2. That no carrier of interstate commerce shall transport or accept for transportation the products of any factory or mine offered it for transportation by any person, firm, or corporation which owns or operates such factory or mine, or any officer, agent, or servant of such person, firm, or corporation, until the president or secretary or general manager of such corporation or a member of such firm or the person owning or operating such factory or mine shall file with said carrier an affidavit to the effect that children under fourteen years of age are not employed in such factory or mine." The full text of this bill may be conveniently found at page 56 of the supplement to vol. XXIX, Annals of the American Academy, etc., (1907).

[4] Cong. Rec. vol. 41, pp. 1552-1557, 1792-1826, 1867-1883.

[5] It was probably doubt as to the constitutionality of the Beveridge bill which led Senator Lodge to introduce a rival bill (S. 6730) on December 5, 1906, which provided: "That the introduction into any state or territory or the District of Columbia, or shipment to any foreign country, of any article in the manufacture or production of which a minor under the age of fourteen years has been engaged is hereby prohibited." The second section applied a similar prohibition to goods made by children between fourteen and sixteen years, except those made by "any minor between the ages of fourteen and sixteen years to whom has been granted a certificate" by various school authorities "testifying to the fact that he or she is able to read and write the English language." This bill was referred to the Committee on Education and Labor, but it seems never to have attracted much notice or discussion.

[6] House Rep. No. 7304, 59th Cong., Second Session. Part of the argument of this committee is quoted in Watson, Constitution, I, pp. 532-534.

scope. When the bill came before the Committee on Interstate Commerce in the Senate it was changed into the form in which it was finally enacted, a form which made it a far more effective law.[7] In this form it forbade not merely child-made goods but the products of any mine or factory in which children were employed. The President signed the bill September 1, 1916, and by its terms it became effective September 1, 1917. Almost immediately a bill was filed in a federal district court in North Carolina by a father on behalf of himself and his two minor sons asking for an injunction against the enforcement of the act. The district court held the act unconstitutional,[8] and an appeal was taken to the Supreme Court of the United States. On June 3, 1918, the Supreme Court handed down a five to four decision invalidating the law.[9]

Few questions have arisen in recent years in our constitutional law upon which the professional opinion of the country has been more evenly divided. Few questions have called forth on both sides abler or more convincing arguments. Discussion of the question had been kept up intermittently during the dozen years between the introduction of the Beveridge bill and the decision of the Supreme Court upon the constitutionality of the Keating-Owen Act; and that decision, rendered as it was by an almost evenly divided court with a vigorous dissenting minority, called

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[7] An account of the legislative history of the bill is found in Pamphlet No. 265 of the National Child Labor Committee (1916).

The relevant portion of this act is as follows: "Be it enacted . . . . That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock postmeridian, or before the hour of six o'clock antemeridian."

[8] No opinion was written. This decision was rendered by the same judge who, according to press reports, has recently declared unconstitutional the clause of the Revenue Act of Feb. 24, 1919, placing a ten per cent excise tax upon the net profits of businesses employing children.

[9] Hammer v. Dagenhart, (1918) 247 U. S. 251, 62 L. Ed. 1101, 38 S. C. R. 529.

forth a new grist of opinion.[10] Even now the layman who approaches the problem without definite preconceptions is greatly in danger of experiencing a painful instability of opinion and of finding himself landed finally on the side of the advocate or critic to whose arguments he last gave ear.

There would be small justification for the writer to add to the already voluminous literature on the subject another argument for or against the validity of the federal Child Labor Law. However, a discussion of the national police power under the commerce clause would hardly be complete without some attempt to classify the precise constitutional issues involved in this attempt to extend that power so radically. An effort will be made, therefore, to set forth as plainly and fairly as possible the arguments which have been advanced, first by those who have believed the act to be unconstitutional and second by those who have regarded it as valid. In each case the reasoning of the majority and minority, respectively, of the Supreme Court will be briefly summarized as fitting conclusions to the briefs.

The Argument Against the Constitutionality of the Law

Inasmuch as the constitutionality of a law is to be presumed until disproved, it will be appropriate to present first the arguments of those who have attacked the validity of the law.[11] These arguments quite naturally differ a great deal in persuasiveness, in thoroughness of reasoning, and in the emphasis placed upon the different points considered. In spite of this diversity it is possible to melt them all together into a brief composed of three major arguments, which will be considered separately. The writer has made no special effort at originality in setting forth

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[10] While there are differences between the provisions of the Beveridge bill and the Keating-Owen Act, these differences are largely in the method used to accomplish the legislative purpose and not differences in constitutional principle. The fundamental issue of constitutionality seems to be the same in both, and the arguments for and against the measures are applicable to both alike.

[11] In addition to the arguments presented in the debate in Congress above referred to (see note 4, supra), the Beveridge bill was criticized on constitutional grounds by the following writers: Bruce, The Beveridge Child Labor Bill and the United States as Parens Patriae, (1907) 5 Mich. Law Rev. 627; Maxey, The Constitutionality of the Beveridge Child Labor Bill, (1907) 19 Green Bag 290; Knox, Development of the Federal Power to Regulate Commerce, (1908) 17 Yale Law Jour. 135; Willoughby, Constitution, II, Sec. 348; Watson, Constitution, I, pp. 523-534. Before the

these arguments, but has attempted to present a sort of composite picture made up of all of them, a picture in which, as in the real composite photograph, the details of each component are lost to view, but in which the common characteristics stand out vividly.

1. *It Is Not a Regulation of Commerce.* It is important to bear in mind that Congress has no power to deal openly and directly with the evil of child labor. It merely has the right to regulate interstate commerce. Therefore, while the federal Child Labor Law was admittedly passed for the purpose of driving child labor out of existence, it was compelled, from the standpoint of constitutional law, to seek justification not as a child labor law but as a regulation of interstate commerce. If it can be shown that the law is not a regulation of interstate commerce, then its constitutional underpinning collapses and it must be regarded as an attempt by Congress to exercise a power which it does not possess under the constitution. Probably without exception the opponents of the law have built their case around this central and vital point, that it is not a regulation of commerce. The arguments advanced in support of this proposition may be set forth as follows:

(a) *Not Every Regulation Dealing with Commerce Is a Regulation of Commerce in the Constitutional Sense*: The fact that the Child Labor Law is entitled "An Act to Prevent Interstate Commerce in the Products of Child Labor, and for Other Purposes," coupled with the fact that the thing which the law punishes is not the employment of children, but the shipment in interstate commerce of certain commodities, raises an initial presumption that it is a regulation of commerce. Constitutional

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Keating-Owen Act was declared invalid, its constitutionality was attacked in the following articles: Green, The Child Labor Law and the Constitution, Ill. Law Bul., April, 1917; Gleick, The Constitutionality of the Child Labor Law, (1918) 24 Case and Com. 801; Hull, The Federal Child Labor Law, (1916) 31 Pol. Sci. Quar. 519; Krum, Child Labor, (1917) 24 Case and Com. 486. See also the general criticism in Hough, Covert Legislation and the Constitution, (1917) 30 Harv. Law Rev. 801. The decision of the Supreme Court in Hammer v. Dagenhart, supra, note 9, was discussed with approval in the following articles: Berry, The Police Power of Congress under Authority to Regulate Commerce, (1918) 87 Cent. Law Jour. 314; Bruce, Interstate Commerce and Child Labor, (1919) 3 MINNESOTA LAW REVIEW 89; Green, Social Justice and Interstate Commerce, (1918) 208 North Amer. Rev. 387; and note, (1919) 2 Ill. Law Bul. 126; Taft, The Power of Congress to Override the States, (July, 1918) 15 Open Shop Rev. 273. See also editorial (1918) in 86 Cent. Law Jour. 441.

phrases must not, however, be construed "with childish literalness." It must not be naïvely assumed that everything which is labeled a regulation of commerce or which in some way affects commerce is a regulation of commerce in the constitutional sense. The extent and nature of the power of Congress over interstate commerce must be interpreted in the light of the purposes for which the power was granted.[12] For instance, the governments of the state and nation enjoy a power of taxation which in "the extent of its exercise is in its very nature unlimited;"[13] yet when the state of Kansas authorized a city to levy a tax for a private and not a public purpose the Supreme Court of the United States declared that the levy was not a tax, merely "because it is done under the forms of law and is called taxation," but was "a decree under legislative forms."[14] In like manner the Child Labor Law is not necessarily a regulation of commerce simply because it is done under the forms of law and is called "a regulation of commerce."

(b) *Power to Regulate Interstate Commerce Was Given to Promote and Not to Destroy Commerce*: If we had no light whatever upon the purposes for which the power to regulate commerce was given to Congress by the framers of the constitution, it would still be reasonable to argue that the power to "regulate" does not include any general power to "destroy" or to "prohibit" commerce. A grant of "the power to regulate necessarily implies the existence of the thing to be regulated."[15] Where power has been given to state legislatures or city councils to "regulate" the liquor traffic the courts have held that no authority was thereby given to "prohibit" such traffic.[16] It is logical to assume that the power to regulate commerce should be thought of as "a power to regulate acts of commerce so as to promote the good or prevent the evil that might flow from those acts."[17] While it might properly include the power to make all necessary rules to protect commerce and promote its efficiency and to pre-

[12] This point is clearly developed by Professor Green, op. cit., Ill. Law Bul., note 11, supra.

[13] Loan Association v. Topeka, (1874) 20 Wall. (U.S.) 655; 22 L. Ed. 455.

[14] Ibid.

[15] Watson, Constitution, I, p. 532, citing State v. Clark, 54 Mo. 17; State v. McCann, 72 Tenn. [4 Lea] 1.

[16] Watson, op. cit., p. 532.

[17] Green, op. cit., Ill. Law Bul. 13.

vent the injury to the national welfare which might flow from the acts and transactions of commerce, it cannot be held to include the authority to prohibit commerce in innocent and harmless commodities.

But we are not entirely in the dark as to the purposes for which the "fathers" placed the power to regulate commerce in the hands of Congress. While the debates in the Convention of 1787 do not throw much light on the subject, the whole history of the Confederation as well as the contemporary literature of the period would seem to indicate a hope and desire that Congress would bring about freedom of commercial intercourse, freedom which would replace the oppressive and mutually retaliatory obstructions which emanated from the jealousies of the separate states. There was apparently no thought that Congress was being given power by the new constitution to prohibit commerce in legitimate articles because it disapproved of the local conditions under which they were produced. While the Convention of 1787 went out of its way to forbid in express terms any congressional interference with the importation of slaves prior to 1808,[18] yet it made no effort to prevent Congress from excluding from commerce the products of slave-labor,—an exclusion clearly in line with the Child Labor Law—quite as though it assumed that Congress had no such authority. Certainly it can hardly be believed that either the framers of the constitution or the conventions which ratified it had any idea that they had given to Congress any power under the commerce clause to knife the institution of slavery in the back.

It has been forcefully argued that since, prior to the adoption of the constitution, the several states enjoyed full and sovereign power to prohibit commerce with the other states, as any independent nation might prohibit it, and that since the states gave up their power to Congress and made that power of Congress plenary and exclusive, it must therefore follow that Congress received all the power that the states gave up.[19] Otherwise what became of it? The answer is that it went back into the hands of the people, the same "people" who hold all the other powers of government "not delegated to the United States by the Con-

[18] Art. I, Sec. 9. On this point see Green, op. cit., North Amer. Rev., note 11, supra.

[19] Infra, p. 472.

stitution" nor "reserved to the States respectively."[20] Indeed, it is quite within reason to suppose that the framers of the constitution consciously intended to wipe out of existence entirely any power to prohibit interstate commerce in legitimate commodities by withdrawing that power from the individual states which had abused it and by failing to confer it upon Congress which might abuse it.

(c) *In Its Real Purpose and Effect the Law Has Nothing to Do with Interstate Commerce*: The contention that the Child Labor Law is not a regulation of interstate commerce in the constitutional sense has been most frequently and cogently grounded upon the fact that the purpose and effect of the act is to prohibit child labor, something quite remote from the act of shipping commodities in interstate commerce. "Its purpose and effect are to benefit children and not to benefit commerce."[21] Thus the statute is looked upon as somehow fraudulent, or misbranded. This argument is presented in several ways.

It has been urged by some that the Child Labor Law is in effect a denial by Congress of the privileges of interstate commerce as a penalty for doing things of which Congress does not approve but which it has no power to prohibit directly. This has been aptly expressed in this way: "Plainly the reason for the statute must be stated in the first instance in this form: 'The state does not like what you are doing. Therefore it has forbidden you to do something else—ship certain goods—not because that is in the least degree objectionable, but because the state thinks it can in this way make you so uncomfortable that you will quit employing children."[22] In commenting on the case in which the Supreme Court held the law invalid, ex-President Taft said: "The majority of the court decided that this was an attempt by Congress to regulate the use of child labor in the state. Will any man say that this was not its purpose? It was a congressional threat to the state, 'Unless you make your labor laws to suit us we shall prevent your use of interstate commerce for the sale of your goods.' "[23] In short, when Congress uses its power over commerce as a "club for belaboring persons

[20] Constitution of the United States, Amendment X.
[21] Green, op. cit., Ill. Law Bul., note 11, supra.
[22] Ibid.
[23] Taft, op. cit., note 11, supra.

whose habits it does not approve,"[24] its action ought in reason to be regarded as a regulation not of the club but of the thing or person clubbed.

Others have laid emphasis in this connection on the fact that the statute is in effect a regulation of manufacturing or production. It is then pointed out that manufacturing is antecedent to and wholly separate from commerce and transportation and that the authority of Congress extends only to the latter.[25]

It is further suggested that the purpose and effect of the act is to regulate the relations between employers and employees who are not themselves engaged in the processes of interstate commerce, and to regulate them in respect to a matter that in no way concerns interstate commerce,—namely, the age of the employee. In the *Adair* case[26] Mr. Justice Harlan pointed out that a regulation of the relations between master and servant in respect to the membership of employees in a labor union did not bear sufficiently close connection to interstate commerce to be regarded as a legitimate regulation of that commerce. The regulation imposed upon employers by the Child Labor Law is thought to be still less closely related to interstate commerce.

It is quite natural that those who attack the Child Labor Law on the ground that it is too remote from interstate commerce to be a legitimate regulation of it should be challenged to show that the law is less a regulation of commerce than the Lottery Act, the Pure Food Act, the White Slave Act, and the other statutes by which Congress has prohibited commerce in various commodities. The friends of the law claim that the only possible distinction between the Child Labor Law and these other acts the validity of which is no longer open to question is that in the one case Congress uses its power over interstate commerce to protect the producer and in the other case to protect the consumer. This distinction, it is urged, is wholly irrelevant and immaterial so far as any question of the constitutional limits of

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[24] Green, op. cit., North Amer. Rev., note 11, supra.

[25] The cases usually relied on to support this view are United States v. E. C. Knight Co., (1895) 156 U. S. 1, 39 L. Ed. 325, 15 S. C. R. 249; Kidd v. Pearson, (1888) 128 U. S. 1, 32 L. Ed. 346, 9 S. C. R. 6; In re Greene, (1892) 52 Fed. 104.

[26] Adair v. United States, (1908) 208 U. S. 161, 52 L. Ed. 436, 28 S. C. R. 277, 13 Ann. Cas. 764. Professor Goodnow severely criticizes the use of the Adair case as an authority to prove the Child Labor Law not a regulation of commerce. See Social Reform and the Constitution, 87.

congressional power over commerce is concerned, since there is nothing in the constitution nor in the decisions of the Supreme Court to indicate that the consumer is any more entitled to protection through any exercise of the commerce power than is the producer.[27]

It seems clear that this distinction between regulations which guard the interests of the consumer and those which seek to improve the condition of the producer has been given a prominence by writers on both sides of this controversy which has tended to obscure what the opponents of the law regard as the vital distinction between it and the police regulations which Congress has previously enacted under the commerce clause. This distinction is that in the Lottery and White Slave Acts Congress has used its power over interstate commerce to prevent evils which might be said to result in the sense of actual causation from the acts or processes of interstate commerce. "In all of these cases, the introduction of the thing carried into the state is an act of evil tendency. Introducing it contributes to produce evil; it is a part of a course of action by which evil is consummated."[28] These acts are all "regulations of commerce made with a view to the results that may flow from the commerce regulated; to prevent evils that, unregulated, it might produce, or to promote benefits that, unregulated, it might not produce."[29] But the Child Labor Law does not prevent any evil which can be said to result from the acts or transaction of interstate commerce. The curse of child labor cannot be said to be promoted by the freedom of the employer of children to ship his products in interstate commerce simply because he might cease to employ children if that freedom were denied to him, any more than it can be said that child labor is promoted by free education because those who now employ children might cease to do so if, because of that, they were denied the right to send their children to the public schools. It cannot be said, therefore, that when Congress passed the Child Labor Law it was preventing the use of interstate commerce as a means of promoting a national evil, since the evil in question is not in any reasonable sense promoted by the uninterrupted flow of interstate commerce. This fact makes clear the distinc-

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[27] Infra, p. 475.
[28] Green, op. cit., North Amer. Rev., note 11, supra.
[29] Ibid.

tion between this act and the other instances in which Congress has exercised police power under the commerce clause.

It would seem that those who regard the Child Labor Law as just as real and thoroughgoing a regulation of commerce as the Lottery Act or the White Slave Act have trod, perhaps unconsciously, the following steps: (1) By passing these regulations of commerce, the Lottery Act and so forth, Congress has openly intended to protect the public morals, health, and safety, and has exercised a police power. (2) Therefore Congress enjoys a broad police power in the exercise of which it may set up any type of control over interstate commerce which will result in benefit to the public morals, health, and safety. (3) The exclusion of the output of child labor factories from interstate commerce will result in great good to the nation by safeguarding its children. (4) Therefore the Child Labor Law is a proper exercise of this police power of Congress under the commerce clause and should be regarded with no more suspicion or disfavor than the White Slave Act or the Lottery Act, which have also protected the national health, morals, and general welfare. Now the opponents of the Child Labor Law believe that there is a non sequitur between (1) and (2). It does not follow from the authority of the *Lottery Case*[30] and the *Hoke*[31] case that Congress has a police power unlimited in scope and limited only in the means available for its exercise. Congress has police power, but only such as can be exercised within the limits of the domain under congressional control—interstate commerce. This police power extends to the suppression of any evil which threatens interstate commerce or arises from or is being consummated by that commerce. Now the evil of child labor does not exist within the domain of interstate commerce; it exists where the children are employed. "The menace in the case of child labor is over and done with when the product is manufactured. . . . The exercise of the police power in prohibiting the use of interstate transportation for such products will operate of course as a deterrent. But it seems clear that thereby the police power becomes operative outside of the domain of interstate commerce. And beyond the borders of that domain the police power of

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[30] (1903) 188 U. S. 321, 47 L. Ed. 492, 23 S. C. R. 321.
[31] (1913) 227 U. S. 308, 57 L. Ed. 523, 33 S. C. R. 281.

Congress, like the king's writ beyond his kingdom, does not run."[32]

This is not a matter of inquiring into congressional motives and invalidating a law because those motives were disingenuous. It is purely a question of power. The act fails as a regulation of commerce not because its purpose and effect are to prohibit child labor but because the child labor prohibited has nothing to do with interstate commerce. If interstate railroads employed children, Congress could doubtless forbid the employment of children in interstate commerce, just as it has prevented cruelty to animals while they are being transported by an interstate carrier.[33] Such a law would deal with an evil which existed within the domain of interstate commerce and not an evil which is over and done with before the commerce the power to regulate which forms the basis of congressional action begins.

The opponents of the Child Labor Law argue further that the extensive and arbitrary power which Congress has used to prohibit foreign commerce in various commodities constitutes no authority for the exercise of a similar power over interstate commerce. The power of Congress over foreign commerce is more extensive than over interstate commerce. Several reasons support this view. In the first place, the commerce clause is not the exclusive source of the power which Congress enjoys over foreign commerce. The power over foreign commerce derived from the commerce clause is supplemented by the power derived from the sovereign authority of the federal government to regulate its relations with other countries.[34] In the second place, assuming that the word "regulate" used in the commerce clause means the same and bestows the same power upon Congress in regard to both interstate and foreign commerce, nevertheless there are certain constitutional limitations which operate as restrictions upon congressional power over interstate commerce which do not apply to foreign commerce in the same way. The dissenting opinion of Chief Justice Fuller in the *Lottery Case*[35] suggests that the power of Congress over interstate commerce is subject to a limitation growing out of the "implied or reserved power in the states" which would not apply to the regulation of

[32] Hull, op. cit., 524, note 11, supra.
[33] Act of Mar. 3, 1891, 26 Stat. at L. 833.
[34] Willoughby, Constitution, Secs. 64, 66, 374, with cases cited.
[35] Note 30, supra.

interstate commerce. This amounts to invoking indirectly the Tenth Amendment as a restriction on the power over interstate commerce. It has been intimated elsewhere by the court as well as by other authorities that while the complete prohibitions of foreign commerce would not deprive any one of property without due process of law, since no individual has a right to trade with foreign nations,[36] a similar prohibition of interstate commerce might under many circumstances amount to a denial of due process of law by invading the constitutional right of the citizen to engage in such commerce. In the third place, in spite of numerous dicta in early opinions to the effect that the scope of congressional authority over the two kinds of commerce is identical, there is not a single case, out of all that have afforded an opportunity for such a decision, in which the Supreme Court has decided squarely that it is.[37]

In similar manner it is pointed out that the police power which Congress has exercised through its control over the postal system, a power which has been used to exclude from the mails a wide variety of things, does not constitute any authority for the power used to pass the Child Labor Law. In the first place, it is impossible to mention any act by which Congress has actually excluded any commodity from the mails because of the objectionable character of the conditions under which it was produced; and in the second place, the power of Congress over the postal system is broader than over interstate commerce, inasmuch as Congress has explicit authority to "establish post offices and post roads,"[38] while in respect to interstate commerce the power given is not to "establish" but to "regulate." It may very properly be argued that no one is deprived of any property right without due process of law by being denied the enjoyment even somewhat arbitrarily of privileges and facilities which Congress may not

[36] "As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution." Buttfield v. Stranahan, (1904) 192 U. S. 470, 48 L. Ed. 525, 24 S. C. R. 349.

[37] Senator Knox made this statement during the course of the debate in the Senate on the Beveridge bill. Cong. Rec. vol. 41, p. 1879.

[38] Constitution of the United States, Art. I, Sec. 8.

merely create but may also destroy; whereas he may claim a higher degree of protection for his right to engage in an interstate commerce which was not in the power of Congress to create but merely to "regulate."[39]

The foregoing analysis presents what the writer regards as the more important arguments which have been used to prove that the Child Labor Law is not a regulation of commerce in the constitutional sense. A somewhat extended discussion of the point has seemed desirable, because it is without question the point which has been most hotly debated and which has seemed to the authorities on both sides of the case the most vital issue involved in the whole controversy.

2. *It Violates the Tenth Amendment.* The Tenth Amendment reserves to the states or to the people all powers not delegated to the federal government nor prohibited to the states. It has been alleged that the federal Child Labor Law contravenes this amendment.

Now if the opponents of the law succeed in establishing their contention that the act is not a regulation of commerce, then it would seem to follow as a matter of course that Congress has passed a law which cannot be justified as an exercise of any delegated power, and such a law becomes ipso facto an invasion of the reserved rights of the states. The argument has not always been put, however, in this conservative form. More than one critic of the law has urged as a more or less separate objection to it that in its purpose and effect it invades the reserved rights of the states and therefore violates the spirit if not the letter of the Tenth Amendment. "It was conceded by all," declared ex-President Taft, "that only States could regulate child labor. . . . Can any man fairly say that this was not an effort of Congress, by duress, to control the discretion of the

[39] This distinction is emphasized with clearness by Bruce, op. cit., 3 MINNESOTA LAW REVIEW 96, and also by Willoughby, op. cit., Sec. 349. Both writers rely upon the statement of the court in Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877: "We do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and to prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets when not sent as merchandise; but further than this its power of prohibition cannot extend."

State intended by the Constitution to be free?"[40] Professor Willoughby regards it as "an attempt upon the part of the Federal Government to regulate a matter reserved to the control of the States."[41] The same view is most emphatically expressed by the Judiciary Committee of the House of Representatives in reporting upon the Beveridge bill. They said: "The lives, health, and property of the women and children engaged in labor are exclusively within the power of the States, originally and always belonging to the States, not surrendered by them to Congress. . . . The assertion of such power by Congress would destroy every vestige of State authority, obliterate State lines, nullify the great work of the framers of the Constitution, and leave the State governments mere matters of form, devoid of power, and ought to more than satisfy the fondest dreams of those favoring centralization of power."[42]

While courts have usually refrained from invalidating laws because of their alleged violation of the "spirit" of the constitutional prohibitions in cases where some doubt has existed as to the violation of the letter, attention is called to the fact that one of the important restrictions upon the power of the states and of the federal government to levy taxes has been grounded, not upon any specific clause of the constitution, but upon the essential nature of the federal union. This is the restriction upon the laying by either government of taxes upon the agencies, property, functions, or instrumentalities of the other.[43] While this restriction has not rested upon any alleged violation of the Tenth Amendment, it has been argued that it would not be unreasonable for the Supreme Court to use it as authority by way of analogy for recognizing the existence of certain restrictions upon the exercise by Congress of its power to regulate commerce when by

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[40] Taft, op. cit., p. 273, note 11, supra.

[41] Willoughby, op. cit., II, Sec. 348

[42] Quoted by Watson, op. cit., pp. 532-534.

[43] Willoughby, op. cit., I, Sec. 40. In The Collector v. Day, (1870) 11 Wall. (U.S.) 113, 20 L. Ed. 122, the court said: "It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government." See also Green, op. cit., Ill. Law Bul. 13.

such regulation the essential nature of the federal union in the matter of the distribution of powers is being threatened.

3. *It Takes Liberty and Property Without Due Process of Law.* Even if it be granted, however, that the Child Labor Law is a regulation of commerce in the constitutional sense and that it is not a violation of the Tenth Amendment, it has still been the object of attack as an act which deprives persons of liberty and property without due process of law. It has already been made clear[44] that any exercise of a national police power must be kept within the limits of the specific restrictions of the Bill of Rights, perhaps the most important of which is the due process clause of the Fifth Amendment.[45] The argument that the act is a violation of the guarantee of due process of law has taken two forms.

In the first place, it has been urged that "the right to liberty and property would certainly include the continuance of the right of interstate traffic in goods which were in themselves harmless and innocent."[46] No one can be said to enjoy a property right to ship commodities in interstate commerce when those commodities are harmful or when the shipment itself is an act of evil tendency. But any prohibition placed by Congress upon the right to ship harmless commodities destined for harmless uses constitutes an arbitrary invasion of a property right and is a denial of due process of law.

Now those who deny the validity of the Child Labor Law do not agree among themselves that there is a property right to ship goods in interstate commerce.[47] But even assuming that no such right does exist, it is still urged that the law fails of due process. It is well established that any state may prohibit child labor without depriving any one of his constitutional rights; but it is equally well established that Congress cannot directly prohibit child labor under any power it now possesses. Now it is argued that even if the right to ship harmless goods in interstate commerce is one which Congress under the commerce clause might legitimately take away entirely, it would still be a denial of liberty or property without due process of law for Congress to make the continued enjoyment of the privileges of interstate commerce con-

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[44] 3 MINNESOTA LAW REVIEW 299.
[45] Constitution of the United States, Amendment V.
[46] Bruce, op. cit., 5 Mich. Law Rev. 636.
[47] See infra, p. 476.

tingent upon abandoning a course of action which so far as any possible prohibition by Congress is concerned a person has a perfect right to pursue. In other words, Congress cannot withdraw a privilege which can be enjoyed only under its permission, for the purpose of making that withdrawal a punishment for doing something which Congress had no direct authority to forbid. Such an exercise of power by Congress rests upon the same principle as a state statute which, while not directly forbidding child labor, forbids those who employ children "to shave, to ride in an automobile, or to have children of their own."[48] It is one thing to prohibit child labor directly; it is another and far different thing to permit the continuance of child labor only on the condition of the forfeiture of a right or privilege shared by all the other members of the community. In *Western Union Telegraph Company v. Kansas*[49] the Supreme Court held that the plaintiff company had been denied due process of law by a statute which made its admission into the state as a foreign corporation—admission which it was granted the state was under no obligation whatever to allow—contingent upon payment by the company of taxes which the state was without constitutional authority to impose. There are other cases in which a similar principle has been applied.[50] It is in the light of the authority of these cases and the reasoning set forth above that the Child Labor Law is believed to work a denial of due process of law.

4. *The Majority Opinion of the Supreme Court.*[51] It is unnecessary to dwell at length upon the opinion of the majority of the Supreme Court which held the federal Child Labor Law invalid. That opinion was reasoned with a brevity that was entirely surprising considering the importance of the question involved. It does not allude in any way to the contention of the plaintiff that the act works a denial of due process of law. The decision rested upon two points: first, that the Child Labor Law is

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[48] Green, op. cit., Ill. Law Bul. 11. The most effective statement of this argument is found in Professor Green's article.

[49] (1910) 216 U. S. 1, 54 L. Ed. 355, 30 S. C. R. 190.

[50] Herndon v. Chicago, etc., Ry. Co., (1910) 218 U. S. 135, 54 L. Ed. 970, 30 S. C. R. 633; Harrison v. St. Louis, etc., R. Co., (1914) 232 U. S. 318, 58 L. Ed. 621, 34 S. C. R. 333; New York Life Ins. Co. v. Head, (1914) 234 U. S. 149, 58 L. Ed. 332, 34 S. C. R. 879. These cases cited by Green, op. cit., Ill. Law Bul. 18.

[51] Written by Mr. Justice Day and concurred in by Justices White, VanDevanter, Pitney, and McReynolds.

not a regulation of commerce, second, that it violates the Tenth Amendment.

The first of these arguments proceeds along familiar lines. The power to "regulate" commerce is the power to "prescribe the rule by which commerce is to be governed," and does not include the right to "forbid commerce from moving and thus destroying it as to particular commodities." The cases in which Congress has prohibited interstate commerce in certain commodities have all rested "upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate. . . . In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results." The Child Labor Law does not, however, regulate transportation, but aims to standardize child labor. The goods shipped are harmless and the fact that they may be intended for interstate commerce does not make them articles of that commerce at the time they were produced. There is no force in the argument that the law prevents unfair competition between states with child labor laws of different standards. So also there are many conditions which give certain states advantages over others, but Congress has no power to regulate local trade and commerce for such a purpose.

The act violates the Tenth Amendment. "The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution." Under the law Congress "exerts a power as to purely local matters to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed."

The Argument for the Constitutionality of the Law

The constitutionality of the Child Labor Law has probably been discussed more frequently and at greater length by its

friends than by its enemies.[52] An analysis of the arguments in support of the law indicates that they clash squarely at all vital points with the arguments which have just been set forth. They may, therefore, be grouped under the same three headings.

1. *It Is a Regulation of Commerce in the Constitutional Sense.* The friends of the Child Labor Law have bent their efforts with special care to proving that it is a regulation of commerce in the constitutional sense, a task which has of course involved disproving the arguments of their opponents that the law is not such a regulation. This task has been approached in a wide variety of ways and from many different points of view. The writer believes, however, that these arguments may all be subsumed under three major propositions, which if established would prove the point at issue. These will be treated in order.

(a) *The Power to Regulate Interstate Commerce Includes the Power to Prohibit Entirely Shipment in Such Commerce of Specified Persons and Property*: In the first place, the power to prohibit is not incompatible with the power to regulate commerce. Even if it is true that "the power to regulate implies the existence of the thing regulated,"[53] it is equally true that "the power to prescribe the rule by which commerce is carried on does not negative the power to prescribe that certain commerce shall not be carried on."[54] As Mr. Justice Holmes puts it, "Regulation

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[52] Before the Supreme Court annulled the law, the following discussions had appeared supporting its constitutionality: Goodnow, Social Reform and the Constitution, (1911) 80; MacChesney, Constitutionality of a Federal Child Labor Law, (1915) The Child Labor Bul. IV, p. 155; Parkinson, Brief for the Keating-Owen Bill, (1916) The Child Labor Bul., IV, pt. 2, p. 219; Constitutional Prohibitions of Interstate Commerce, (1916) 16 Col. Law Rev. 367; The Federal Child Labor Law, (1916) 31 Pol. Sci. Quar. 531; Precedents for Federal Child Labor Legislation, (1915) The Child Labor Bul., IV, p. 72; Troutman, Constitutionality of a Federal Child Labor Law, (1914) 26 Green Bag 154; see also note, The Use of the Power over Interstate Commerce for Police Purposes, (1917) 30 Harv. Law Rev. 491. Since the decision in Hammer v. Dagenhart, supra, the opinion of the majority has been criticized in the following articles: Gordon, The Child Labor Law Case, (1918) 32 Harv. Law Rev. 45; Jones, The Child Labor Decision, (1918) 6 Cal. Law Rev. 395; Parkinson, The Federal Child Labor Decision, (1918) The Child Labor Bul., (1918) VII, p. 89; Powell, The Child Labor Decision, (1918) The Nation, vol. 107, p. 730; The Child Labor Law, the Tenth Amendment and the Commerce Clause, (1918) 3 So. Law Quar. 175; see also note, (1918) 27 Yale Law Jour. 1092, and (1918) 17 Mich. Law Rev. 83.

[53] Note 15, supra.

[54] Powell, op. cit., So. Law Quar.

means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid."[55]

In the second place, there is evidence to indicate that the framers of the constitution intended the power given to Congress to regulate interstate commerce to include the power to prohibit such commerce in certain cases. This is shown, first, by the fact that they intended to give Congress all the power over interstate commerce that the states had previously had and this included the power to prohibit such commerce.[56] It is shown, secondly, that they specifically denied to Congress the right to pass any law prior to 1808 which should prohibit the "migration or importation" of slaves,[57] a denial of power entirely superfluous unless the power to prohibit such commerce existed, in the absence of such denial.

In the third place, the power to regulate foreign commerce has always been held to include the power to place prohibitions upon such commerce,[58] and the commerce clause gives to Congress the same power over interstate as over foreign commerce. The friends of the Child Labor Law do not infer from this that Congress could necessarily impose the same restrictions upon interstate commerce as upon foreign commerce; but they assert that whatever difference there may be exists not because the power exercised is the power to regulate in the one case but not in the other, but because the limitations of due process of law affect the power to regulate in different ways. In other words, although the constitutional restrictions on that power may vary with the kind of commerce, the power to "regulate" remains the same. And since the power to regulate foreign commerce includes the power to prohibit it, it must of necessity follow that the power to regulate interstate commerce also includes the power to impose prohibitions upon it.

Finally, it is only necessary to refer to the Lottery Act, the White Slave Act, and the Pure Food Act to show that there have

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[55] Hammer v. Dagenhart, note 9, supra.

[56] This argument is carefully developed by Mr. Parkinson, op. cit., Col. Law Rev. 370 et seq.

[57] The Constitution of the United States, Art. I, Sec. 9.

[58] For citation of cases in support of this view see Parkinson, op. cit., The Child Labor Bul. 225-228; also note by E. B. Whitney, (1898) 7 Yale Law Jour. 291.

been other cases in which the Supreme Court has viewed with approval the exercise by Congress of the power to prohibit entirely interstate commerce in certain commodities.

(b) *The Power to Regulate Interstate Commerce May Be Used for the Protection of Public Health, Morals, Safety, and Welfare in General*: This point might perhaps be stated in this way: a regulation of commerce does not cease to be such merely because its purpose and effect are to eradicate evils over which Congress has no direct control. It is not the business of the Supreme Court to pry into the motives which prompt Congress to exercise its power to regulate commerce. Whatever restrictions there may be upon the power by reason of alleged violations of due process of law, the power to regulate commerce may properly be used by Congress to remedy any evils which may exist before, during, or after interstate commerce takes place, without making such action any less truly an exercise of the power to regulate such commerce. It is apparent that this view is in conflict with the position of the opponents of the Child Labor Law who argue that, while Congress may exercise a real police power under the commerce clause, that police power is limited to the actual domain of interstate commerce and may only extend to the prohibition of evils existing in or directly promoted by such commerce. The friends of the law, in short, look upon interstate commerce as a means entrusted to Congress to be used in any manner which will promote the public health, morals, and safety; and they find in the Lottery Act, the White Slave Act, and laws of similar character instances in which Congress has used the commerce power, not to protect any particular group of people, not to strike at evils which are limited to any particular locality, but to protect the nation at large from injury or danger. The evils, in other words, do not need to have any particular locus to be within the reach of congressional police power under the commerce clause.

(c) *No Distinctions Exist Between This Law and the Other Police Regulations Based on the Commerce Clause That Would Make It Less a Regulation of Commerce Than They*: Those who believe the Child Labor Law to be constitutional feel that the efforts to distinguish it from the Lottery Act and so forth and to prove that, while those earlier acts were bona fide regulations of commerce, the Child Labor Law is not, are after all merely efforts to set up straw men for the purpose of knocking them down.

They take the position, first, that the alleged distinctions do not in fact exist; and, second, that if they did exist they would not prove the Child Labor Law to be any less a regulation of commerce than the earlier statutes mentioned.

In support of the first point it is contended that the Child Labor Law does not stand alone in excluding from interstate commerce articles in themselves harmless. Lottery tickets are no more harmful in themselves than milk tickets; the goods excluded by the Commodities Clause[59] are in all respects above reproach; the anti-trust statutes forbid the shipment of goods intrinsically indistinguishable from any other articles of commerce. Nor is it true that the Child Labor Law is unique in that it excludes goods when no danger or injury can result from their interstate transportation. The other police regulations passed by Congress under the commerce clause have rested usually on the ground that the forbidden shipments were "acts of evil tendency." So also is the shipment of goods manufactured in a child labor factory an act of evil tendency. It promotes child labor both before and after the actual shipment takes place: before, because a producer could not afford to continue the employment of children if it cut him off from interstate markets; after, because states which may honestly desire to abolish child labor feel a reluctance to place their own industries at the mercy of the competition which results from the shipping in from other states of goods made by children. It is a peculiarly naïve logic which insists that a cause must always chronologically precede an effect, and that interstate commerce cannot cause or promote child labor because the immediate child labor is over before the immediate goods are delivered to the interstate carrier. The manufacture of goods is a continuous process, and its effects control its beginnings quite as much as with lottery tickets. This point has been clearly put in language which is worthy of quotation: "Clearly enough the transportation is a contributing factor to the employment of children, as it is to the consumption of liquor and the purchase of lottery tickets. In terms of physics, the transportation is a pull in the one case, and a push in the others. The matter belongs, however, to the realm, not of physics, but of economics. And in economics the push and the pull are not to be differentiated. In so far, then, as the majority [of the Supreme Court] imply

[59] See note 71, (1919) 3 MINNESOTA LAW REVIEW 311.

that the interstate transportation was not necessary to the harmful results aimed at by the Child Labor Law, they are obviously in error. Unless it were necessary, the law would have been idle and useless, no employer or 'next friend' of children would have objected to it, and it would not have touched, even obliquely, matters reserved to the states."[60] In other words, just as the Mann Act forbids the use of interstate commerce as a facility in carrying on the white slave traffic, so the Child Labor Law prohibits such commerce from being used to promote the evil of child labor, and there is, accordingly, no difference in principle between the two as to their being each a bona fide regulation of interstate commerce.

But in the second place, even if it be admitted that there are important distinctions between the Child Labor Law and the other regulations enacted under the commerce clause, those differences do not have any bearing whatever upon the question whether the Child Labor Law is or is not a regulation of commerce. The distinction, for example, that the Child Labor Law benefits the producer, while the Lottery Act and similar statutes protect the consumer, is an entirely artificial and worthless distinction. The enemies of the law are challenged to show anything in the commerce clause itself, the acts of Congress passed in pursuance thereof, and the decisions of the United States Supreme Court, which in any way suggest that a prohibition of interstate commerce loses its character as a regulation of that commerce in the constitutional sense because it is the consumer of goods shipped, rather than the producer, who receives the benefit therefrom. To hold otherwise is to inject into the constitution something which the framers did not put there. "Proponents [of this distinction] are standing on their political ideas of what ought to be in the Constitution rather than on what the Supreme Court has said is there."[61] In like manner, even if it is admitted for the sake of argument that the Child Labor Law excludes harmless commodities from interstate commerce, or even admitting that the exclusion established is arbitrary and unreasonable, this would not prove that the law is not a regulation of commerce. It would merely prove that Congress had regulated commerce in such a way as to deprive persons of

[60] Powell, op. cit., So. Law Quar. 197.
[61] Parkinson, op. cit., 31 Pol. Sci. Quar. 537.

liberty or property without due process of law. In the *Lottery Case* and in *Clark Distilling Co. v. Western Maryland Ry. Co.*[62] the Supreme Court plainly intimated that power to exclude commodities from interstate commerce might be held to be limited so as to preclude its exercise in a manner palpably arbitrary, but in each of these cases the implication is very plain that any such limitation would arise from the due process of law clause and not at all from any implied narrowing of the meaning of the word "regulate" as used in the commerce clause. What the critics of the law have done in using the distinctions mentioned to prove that the Child Labor Law is not a regulation of commerce is to employ an argument "built upon a due process distinction and then unwarrantably transferred to the commerce clause."[63]

2. *The Child Labor Law Does Not Work a Denial of Due Process of Law.* When Senator Beveridge was defending the constitutionality of his child labor bill in 1906 he took the position that the power of Congress over interstate commerce was absolute, and that while Congress would naturally be restrained by considerations of policy and expediency from any arbitrary and unreasonable exercise of that power, the power itself was subject to no constitutional restrictions of any kind.[64] This means, of course, that Congress in the exercise of its commerce power is not restricted by any limitations arising from the due process of law clause of the Fifth Amendment.

A writer on the subject who regards the law as unconstitutional upon other grounds takes the position that there is no property right to ship products in interstate commerce. That even if there were such a right it would be a "right to engage in interstate commerce lawfully regulated. So, if the regulation be lawful, the property right has existed subject to the regulation. And to assail the validity of the regulation by the due process clause is to argue in a circle."[65]

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[62] (1917) 242 U. S. 311, 61 L. Ed. 326, 37 S. C. R. 180.

[63] Powell, op. cit., 3 So. Law Quar. 194.

[64] In the course of the debate the senator said: "Will you ask me whether or not I think we have power to prohibit the transportation in interstate commerce of the milk of a cow milked by a young lady eighteen years old? Undoubtedly we have the power, but undoubtedly we would not do it. We have the power to prohibit the transportation through interstate commerce of any article." Cong. Rec., vol. 41, p. 1826.

[65] Hull, op. cit., 31 Pol. Sci. Quar. 529.

With these two exceptions, there would seem to be no disagreement among friends and critics of the Child Labor Law that the validity of any congressional prohibitions of interstate commerce must be subject to due process of law; and this view is supported by decisions of the Supreme Court.[66] The proponents of the law, however, deny that it deprives any person of property or liberty without due process of law and they advance the following arguments in support of their view.

At the outset attention is called to the fact that "the due process does not protect things, but persons. Goods made by child labor have no constitutional immunities."[67] Therefore the law does not fail of due process merely because the goods shipped are harmless.

Compliance with the test of due process does not depend, therefore, upon the character of the goods excluded but upon the effect of that exclusion upon the rights and immunities of those who are forbidden to ship the goods. Now a constitutional right to ship in interstate commerce the products of factories employing children must of necessity rest upon a constitutional right to employ children; just as the constitutional right to ship lottery tickets in interstate commerce depends upon the existence of a constitutional right to conduct or engage in a lottery enterprise. The question then reduces itself to this: is there a right to employ children, of such a nature that an interference with it constitutes a denial of due proces of law? Now the tests of due process of law are not very definite, and the cases in which acts of Congress have been invalidated for violation of the due process clause of the Fifth Amendment are relatively rare and throw little or no light on this particular problem. However, it has been held that the requirement of due process of law imposed on the federal government by the Fifth Amendment is the same in principle as the requirement of due process of law imposed upon the states by the Fourteenth Amendment.[68] And since it has long been established not only by the state courts[69]

[66] As, for instance, in Adair v. United States, note 26, supra. See also 3 MINNESOTA LAW REVIEW 299.

[67] Powell, op. cit., 3 So. Law Quar. 194.

[68] Parkinson, op. cit., The Child Labor Bul. v. IV, pt. 2, p. 245, citing Slaughter House Cases, (1872) 16 Wall. (U.S.) 26, 19 L. Ed. 915; Tonawanda v. Lyon, (1901) 181 U. S. 389, 45 L. Ed. 908, 21 S. C. R. 609; Twining v. New Jersey, (1908) 211 U. S. 78, 53 L. Ed. 97, 29 S. C. R. 14.

[69] See 16 R. C. L. 477 and cases cited.

but also by the Supreme Court[70] that a state may forbid or regulate the employment of children without depriving anyone of liberty or property without due process of law, it must follow that Congress does not violate due process by interfering in a similar or analogous manner with the employment of children.

It does not, however, follow from this argument that Congress can deny the privileges of interstate commerce to one who pursues any line of conduct that the state can interfere with without a violation on its part of due process of law. "So Congress could not prescribe that a man should not ship goods across a state line in case he violated his marriage vows. There would be no nexus between the infidelity and the transportation. But there is a nexus between making goods and shipping them. Evil in the making grows by the transportation it feeds on. Transportation increases child labor. It aids an evil which is a menace to the attainment of national objects. Congress cannot obliterate the evil. But it should be allowed to lessen it by denying it aid from the enjoyment of the highways under national control. If it ever should go further and seek to apply its commerce power to evils in no way dependent upon the commerce subject to its control, then the Supreme Court may with wisdom declare that it has failed to make a legitimate connection between its prohibition of transportation and the circumstances on which the prohibition is conditioned. But the court did not need to annul the Child Labor Law in order be free to deal with such cases if ever they should arise."[71]

3. *It Does Not Violate the Tenth Amendment.* Those who defend the Child Labor Law regard the contention that the law violates the Tenth Amendment with less respect than any of the other arguments directed against its constitutionality. They point out three weaknesses in it which convince them of its lack of merit. In the first place, the Child Labor Law takes away from the states no right reserved to them by the constitution. The law forbids the shipment of certain commodities across state lines; it does not forbid the employment of children. No state at any time during its history has ever had the power to compel any other state to admit its products; and during the Confederation the states freely exercised the power to set up embargoes

[70] Sturges & Burn Mfg. Co. v. Beauchamp, (1913) 231 U. S. 320, 58 L. Ed. 245, 34 S. C. R. 60.

[71] Powell, op. cit., 3 So. Law Quar. 201.

and restrictions on goods from neighboring states. Therefore when the Child Labor Law takes from the individual states the right to impose the products of their industry upon other states through the channels of interstate commerce it takes away no right which the states ever had and therefore no right which could have been reserved to them by the federal constitution.

In the second place, it is held that it is unsound to declare the law void as an invasion of the reserved powers of the states because of its indirect or incidental effects. Never before has the exercise by Congress of an admitted power been held unconstitutional because of such incidental effects upon the authority of the states. Although there have been plenty of instances in which congressional authority over interstate commerce has been so exercised as to impair seriously the freedom of action of the states in matters within their jurisdiction, these have always been regarded as the inevitable results of our federal form of government.[72] Thus the Lottery Act, the Pure Food Act, the Meat Inspection Act, all in precisely the same way discourage the production of the commodities excluded from interstate commerce. To invalidate one law because of its indirect invasion of the power of the states and not to treat in the same way other acts which also invade that power leaves upon the shoulders of the court the burden of determining when the indirect effects of a law are a sufficiently serious interference with state authority to warrant the interposition of the judicial ban; and we have thus opened up another fertile field for the production of judge-made law.

Finally, the argument based on the Tenth Amendment is superfluous. "If the Child Labor Law was a proper exercise of power to regulate interstate commerce, it was by the explicit terms of the Tenth Amendment not an exercise of a power reserved to the states. If it was not a proper exercise of the power to regulate interstate commerce, it was unconstitutional, and nothing more need be said about it."[73]

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[72] An extreme example of this is the "Shreveport Case," Houston, etc., Ry. Co. v. United States, (1914) 234 U. S. 342, 58 L. Ed. 1341, 34 S. C. R. 833, in which railroads were compelled to raise their intrastate freight rates which had been fixed by a state railroad commission, because those rates produced discrimination against competing shipments in interstate commerce which were being made at rates held reasonable by the Interstate Commerce Commission.

[73] Powell, op. cit., So. Law Quar.

4. *The Dissenting Opinion of Mr. Justice Holmes.*[74] The dissenting opinion of Mr. Justice Holmes is not an attempt to build up a constructive argument in support of the Child Labor Law, but is rather a pungent criticism of the reasoning of the majority. Since the majority opinion did not take up at all the due process of law argument, the justice confined the batteries of his criticism in general to a single concise attack upon the remaining two points of difference.

He protests most vigorously against invalidating an exercise by Congress of one of its admitted powers because of the collateral effect of such regulation upon matters reserved to state control. "I should have thought," declared the justice, "that the most conspicuous decisions of this court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state." He then proceeds to comment on some of these "conspicuous decisions" in which the indirect effect upon state authority of congressional acts has been held quite irrelevant to the question of their validity. Furthermore, some of the acts already sustained have excluded from commerce commodities intrinsically harmless, and the Supreme Court in the *Hoke* case[75] has specifically put itself on record as upholding the use of the commerce power for police purposes. In these cases "it does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil."[76]

It is no longer open to dispute that the power to regulate commerce includes the power to prohibit it in some cases. Mr. Justice Holmes denies strenuously the propriety of upholding or invalidating the exercise of this power to prohibit commerce in accordance with judicial views of the morality or immorality of the transactions prohibited. But if this were permissible, there is no denying that child labor is an evil which ought to be dealt with as readily as any other. "I should have thought that if we were to introduce our own moral conceptions where in my opinion they do not belong, this was pre-eminently a case for upholding the exercise of all its powers by the United States."

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[74] Justices Brandeis, McKenna, and Clark concurred in the dissent.
[75] Note 31, supra.
[76] Mr. Justice Holmes, dissenting opinion, 247 U. S. at p. 279.

And finally, the law does not interfere with any power reserved to the states. "They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. . . . The public policy of the United States is shaped with a view to the benefit of the nation as a whole. . . . The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command."

Conclusion

In the foregoing analysis of the arguments for and against the constitutionality of the Child Labor Law, the effort has been to make clear the exact issues involved in that controversy. It should also make clear that the advocates and opponents of the law disagreed not only upon the question of its validity but also upon the question of just what the actual result would be of a decision sustaining the law. Clearly it would advance the national police power far beyond its old limits. To what extent would it be expanded? Would there be any real limits upon that expansion?

The opponents of the law have felt that to uphold its constitutionality would be to open wide the door to congressional interference in any and every matter now confided to state control. In fact, they have pretty unanimously been seized with an irresistible impulse to lapse into reductio ad absurdum and paint in the most lurid colors the constitutional havoc wrought upon state authority and state institutions by such a doctrine. They argue that, if a man can be denied the privileges of interstate commerce because he employs children, he can be denied those privileges because of any other line of conduct which a majority in Congress view with disapproval; the line which now exists between the police power of the state and the regulatory power of Congress would be obliterated, and the only difference between the authority of the two governments to regulate the conduct of its citizens would be that one could act directly and the other by a process of indirection.

It seems clear that some at least who have taken this extreme view of the results of the Child Labor Law in expanding the scope of the national police power have lost sight of the fact that any exercise of that power must be kept within due process of law. But, even if this were not the case, it should be borne in mind that a court which has expressed its contempt for those who show a tendency to push the application of constitutional principles to a "drily logical extreme" is not apt to permit itself to be browbeaten by the requirements of absolute consistency into upholding any law which is a manifestly ridiculous or dangerous application of even the most harmless principle.

But if the Supreme Court had been willing to sustain the Child Labor Law on the basis of the argument advanced by its friends in its behalf, it is apparent that, while the national police power would have been strikingly enlarged, that expansion would not have been unlimited but would have been confined to well defined boundaries. Under this interpretation, the power of Congress to exclude commodities from the channels of interstate commerce could be used, not to strike at any evil which Congress might succeed by this method in bringing within its reach, but to strike at only those evils which could be said to be promoted by interstate commerce or motivated by the expectation or necessity of enjoying the privileges of such commerce. Concretely, those evils would be those connected with the processes of manufacturing the products destined for interstate markets. Congress would doubtless have gained the authority to regulate the conditions of labor in any industry dependent on interstate commerce for its markets, and this of course includes every industry of importance in the country; it is not clear that it would have gained much more.

But if the scope of the national police power under the commerce clause was not enlarged by the decision invalidating the Child Labor Law, neither was it narrowed. Congress still retains full authority to deal with any evil which threatens to injure, destroy, or obstruct interstate commerce. There still remains the authority to protect the national health, morals, safety, and general welfare from such evils as depend upon the physical agency of interstate commerce facilities for the transportation of commodities or persons. But evils which feed on interstate commerce only in the sense that they would dwindle

away if the right of those responsible for them to engage in interstate commerce were withdrawn are still beyond the reach of congressional power as conferred by the commerce clause. Congress may exercise a police power to protect interstate commerce, and to protect the nation from the actual misuse of that commerce; it may not, however, protect the nation from all the other equally dangerous and much more numerous evils which would die of discouragement if the interstate commerce they thrive on were prohibited.

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DOUBLE JEOPARDY AND THE POWER OF REVIEW IN COURT-MARTIAL PROCEEDINGS

NOT THE least interesting of the problems which are involved in the administration of military law is the question of former jeopardy.

The question has been brought to public notice by a widespread criticism of the present practice of sending cases back to courts-martial for revision even after findings of not guilty, and of allowing not only new and higher sentences to be imposed on the revision but an entire change of front and a verdict or finding of guilty, and in fact of recommending and almost ordering these sentences.

This practice prevails in spite of the constitutional provision:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law." [1]

It prevails in spite of the 40th Article of War, which provides that:

"No person shall be tried a second time for the same offense." [2]

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[1] Art. V, Amend. Const.

[2] The extent to which this practice has been carried is shown by the following exhibit which was filed by General Crowder in his testimony before the Committee on Military Affairs of the United States Senate, in February, 1919.

"From the commencement of the war to October 1, 1918, a total of approximately 2,500 cases were returned by reviewing authorities for revision. This number comprises all cases returned, including those returned for correction of clerical errors, revision upward of inadequate sentences, and acquittals.

"From these 2,500 cases, the first 1,000 records were examined for the purpose of securing the following data. That is to say, approximately 40 per cent of all cases returned by reviewing authorities for revision have been scrutinized.

"Out of the 1,000 cases thus examined, it appears that 95 of the cases were ones in which the court had returned a verdict of acquittal; 39 of these 95 cases were returned for the purpose of having the court make purely formal correction of the record, leaving a balance of 56 cases of acquittals returned by the reviewing authorities for a reconsideration of a verdict of acquittal.

It prevails in spite of the statement in the Manual for Courts-Martial that "Where a person subject to military law has been once duly convicted or acquitted by a court-martial he has been 'tried' in the sense of the article [No. 40], and can not be tried again, against his will, for the same offense, or for any included offense, *and it is immaterial whether the conviction or acquittal has been approved or disapproved.*" [3]

It exists in spite of the fact that the only reported opinions of the Judge Advocate General upon the subject, and which alone are cited by the text writers, hold conclusively that it is illegal.[4]

"In 38 of these 56 cases the court adhered to its former finding of not guilty. That is to say, in 2 out of every 3 cases of acquittal returned for reconsideration the court adhered to its original finding. The remaining 18 cases of acquittal returned for revision are the subject matter of the following synopsis. Sixteen of these cases are those of enlisted men; 2 of officers.

"The case referred to above in which it was said that dishonorable discharge and a long period of confinement were inflicted after an acquittal is, without doubt, the case of Recruit David Cortesini. An analysis of that case appears in the attached synopsis marked (1). The final outcome of that case was a sentence of confinement for one month and forfeiture of one-third pay for a like period.

"An analysis of the 18 cases referred to discloses that the total confinement in all cases amounted to 27 months. In 2 cases confinement of 6 months was imposed, but in 11 cases no confinement whatever was imposed. The average confinement for the 18 cases was 1.5 months. This, of course, completely refutes the charge that long terms of confinement have been inflicted by courts in cases in which there was at first an acquittal.

"In 3 of the 18 cases discussed in this synopsis all punishment was remitted by the reviewing authority. It therefore appears that out of 1,000 cases returned by reviewing authorities, or 40 per cent of all cases returned to October 1, 1918, there were 14 cases of original acquittal in which the court in revision changed its finding, imposing an average confinement of 1.5 months."

[3] See page 68 of Manual for Courts-Martial which was revised in the Judge Advocate General's Office and published by authority of the Secretary of War in 1917. Italics are the writer's.

[4] "Where the accused has been once duly convicted or acquitted, he has been 'tried' in the sense of the article, and can not be tried again against his will, though no action whatever be taken upon the proceedings by the reviewing authority (R. 31, 300, Apr., 1871); or, though the proceedings, findings (and sentence, if any) be wholly disapproved by him. R. 9, 611, Sept., 1864; 27,348, Nov., 1868, and 605, Apr., 1869; 38, 38, Apr., 1876; P. 60, 177, June, 1893; C. 16,814, Apr. 29, 1907. It is immaterial whether the former conviction or acquittal was approved or disapproved. P. 36, 259, Nov., 1889." Howland, Digest of Opinions of Judge Advocates General of the Army, 167, CII A 1.

To this paragraph there is attached the footnote: Compare Macomb, Sec. 159; O'Brien, 277; Rules for Bombay Army, 45; McNaughton, 132, 133.

Upon this subject and in reviewing the popular criticisms upon the administration of military justice during the war, Judge Advocate General E. H. Crowder says:

"This power undoubtedly does exist; and it is occasionally exercised. . . .

"The reviewing authority, i. e., ordinarily the commanding general who has convened the court, represents essentially a first appellate stage. No sentence of court-martial can be carried into execution until it has been approved by the reviewing authority, i. e., neither acquittal nor conviction is effective until the reviewing authority has scrutinized the record and given it approval. The very object of this institution is to secure the due application of the law, and to surround the accused with an additional protection independent of the trial court. This power to approve or disapprove a finding is given great flexibility by the Articles of War; it includes the power to approve a finding of guilty of a lesser offense and the power to approve or disapprove the whole or any part of the sentence. In this respect the military appellate code differs from the usual civil code. Incidentally, this power to disapprove includes the power to disapprove a sentence of acquittal and to return the record for reconsideration by the court. But, intrinsically, nothing more is here implied than that the court is to reconvene and reconsider its judgment freely and independently. It is in no sense a measure which subjects the court-martial to the command of the reviewing authority in framing the tenor of its judgment upon such reconsideration; for the court is, under the law, entirely at liberty to adhere to its original decision.

"That this power is a useful one, and that it is not in fact in any appreciable number of cases so exercised as to amount to an abuse of the commanding general's military prestige, will, I think, appear from the figures to be gathered from the records. In the first place, the power is exercised in the vast majority of cases solely for the purpose of making formal corrections of the record; for example, to enable the fact to be shown, if it was a fact, that a certain member of the court was present or was qualified or that a witness was sworn, or the like formal correction which will make the record of the trial correspond to the facts. In the second place, the exercise of the power in cases of an initial judgment of acquittal has been rare indeed; and in those few cases the trial court, far from exhibiting a supple obedience to the supposed hint of the commanding officer, has, in the great majority of cases, adhered to its original judgment." [5]

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[5] Military Justice During the War, p. 32 (War Dept. pamphlet).

Colonel Beverly A. Read, Chief of the Military Justice Division of the Judge Advocate General's Department, testifying before the Committee of the American Bar Association in April, 1918, among other things, said:

In spite of his positive assertion that "the power undoubtedly exists," even General Crowder does not claim that there is any express warrant for its exercise in the constitution or even in the Articles of War themselves.[6]. It is and can be asserted only on the theory that the jeopardy clause of the constitution is

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"The idea about returning for retrial is based on the theory, I suppose, the belief, that after the court has concluded its labors that is the end of the trial, while the action of a court-martial is not final until it has been passed upon by the reviewing authorities. In other words, he is part of the judicial system. As has been frequently stated, the whole . . . and quoting the Supreme Court in the Runkle case, 122 U. S., where they held that the whole proceeding is judicial in character up through and including the President. That is a remarkable situation, that a great many people are not advised in regard to. A record which goes up to the President for review in case of death or dismissal under this provision of the 48th Article of War which refers to him—he acts there in a judicial capacity, not in an administrative capacity, but in a judicial capacity. You will find that squarely laid down in the Runkle case.

"Mr. Bruce: The Manual at one place seems to intimate that a man has been in jeopardy, when a judgment has been rendered by a court-martial whether confirmed or not——

"Col. Read (interposing): That is true. They have held that if the proceedings of the court have gone to a finding and sentence, or a finding and an acquittal, he could not be tried again, because that would violate not only the 40th Article of War, but the 5th Amendment to the constitution for that matter.

"Col. Hinkley: Let me read into the record a section of the court-martial that I think this has reference to: from page 68 of the 'Manual for Courts-Martial' and in the portion relating to pleas there, being paragraph 149, the subsection (3a), 'the 40th Article of War': 'No person shall be tried a second time for the same offense.' Then the explanatory section (b) goes on: 'where a person subject to military law has been once duly convicted or acquitted by a court-martial he has been "tried" in the sense of the article, and can not be tried again, against his will for the same offense, or for any included offense, and it is immaterial whether the conviction or acquittal has been approved or disapproved.' . . . .

"Col. Read: It is not a trial de novo. The reviewing authority had simply found itself unable to concur in the action of the court and upon his reading of the record he is of the opinion for the reasons set out by him that the court erred in the findings and acquittal, and his endorsement returning the record directs a revision by the court, a reconsideration by the court, in view of these suggestions which he makes. Now, the court, as I said, is at perfect liberty to disregard the suggestions of the reviewing authority and to adhere to his prior action in the case, and I only spoke practically from my knowledge. In the regular army they almost uniformly decline to change their action. The form of action is usually respectfully returned with the endorsement 'the court adheres to its former findings and acquittal' and that is the end of it."

[6] Testifying before the Committee on Military Affairs of the United States Senate, in February, 1919, General Crowder said: "And this brings up the main question: Is it right, is the present rule right, the present rule authorizing the reconsideration of the verdict of acquittal? Let me say first, it is simply a regulation and there is no law under which it is done. The War Department could wipe out the regulation to-night, and could establish this very prohibition by

not binding upon the military branch of the government; that the "revision" is not "a new trial" within the meaning of Section 40 of the Articles of War, and that a court-martial is not a court or a judicial body but an administrative agency merely.

This theory is expressed in the Digest of the Opinions of the Judge Advocate General which was published in 1912, where we find a reference to an opinion which was filed in July, 1895, and which was probably never printed but has the card reference of 1495. This states that "the *principle* of the fifth amendment in the constitution, but *not the amendment itself*, applies to court-martial trials, as a part of our common law military. As Section 860, R. S., does not apply to courts-martial, it does not set aside the general principle which with courts-martial takes the place of the constitutional provision, but whether it applies or not an accused on trial before a court-martial cannot, when testifying as a witness in his own behalf, be compelled to criminate himself as to an offense in respect to which he has not testified."

It was expressed by General Bell in the case of the recruit David Cortesini, to which we shall afterwards refer, when in his order sending the matter back to the court-martial for a revision, after a verdict of "not guilty," he said:

"In the present case the accused was given every opportunity to obey the order, but nevertheless disobeyed it intentionally, in defiance of authority, and accordingly such disobedience was 'wilful' within the meaning of this section.

"The reviewing authority does not intend to give the impression that he personally believes that the accused must be required to serve a long period of confinement for this act, but rather he desires the court to understand that the commission of this act should be met by severe punishment, and then, if in this case there are reasons why the sentence should be reduced, such reduction should be ordered on the action of the reviewing authority rather than in the inadequate sentence awarded by a court appointed as an executive agency in the administration of discipline." [7]

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an order." The prohibition under discussion was contained in a proposed bill and was to the effect that "When a court-martial shall find the accused not guilty upon all charges and specifications, it shall not reconsider, nor shall the appointing authority direct it to reconsider its findings."

[7] See Hearings Before the Committee on Military Affairs of the United States Senate on Senate Bill 5320, published in 1919, p. 247, also record Judge Advocate General's Department, No. 116234.

The question to be determined is whether the officers and soldiers of our army are entitled to the protection of the constitution or whether they are not, and the position of the military authorities evidently is that they are not. In their opinion a court-martial is merely an agency "appointed" by the commanding officer for the training of the soldiers in discipline, and though one is sentenced by such a tribunal to death or to a long term of imprisonment, he is not deprived of life or liberty or in fact punished at all, but merely trained and educated and disciplined. A criminal sentence in the army, in short, serves the same purpose as the manual of arms or the setting up exercises, and must be cheerfully acquiesced in, no matter how severe it may be, as it is but a part of the school of the soldier. If this states the law and the military contention, we then have the situation of a military code and practice which, except where Congress has expressly spoken, is based on a military common law, that is to say, the usages of war, the opinions of the military commanders and of the judge advocates and military departments, and which is outside of and uncontrolled by the constitution. It presents a system which may recognize the constitutional provisions or the constitutional analogy, but considers itself not bound to do so.

This we believe can hardly have been the intention of the founders of our government, or even of the Congress which in 1916 passed the so-called Articles of War. Followed to its logical conclusion, the theory implies that the military law is not even subject to Congress, for what but the constitution gave to Congress the power to legislate at all? Can it be that a nation that was conversant with the Mutiny Acts and the determined efforts through the centuries of the English Parliament and of the English people to subordinate the Military to the Civil, when they solemnly adopted a series of constitutional amendments as an expression of fundamental rights and as an expressed limitation upon the powers of the new government which they were creating, ever could have intended that the only persons to be denied these constitutional rights should be the men who were called to the national colors to defend the nation thus created? It is true that Section 8 of Article I of the constitution gives to Congress the power "to raise and support armies, to provide and maintain a navy and to make rules for the government of the land and naval forces," but surely it was the intention that these powers as well as all of the other powers granted by the article

should be exercised in conformity both with the spirit and the actual conditions and restraints of the constitution, and it is to be noticed that these powers are given to Congress and not to any military chief. The first ten amendments, indeed, were limitations and amendments to the whole of the constitution, and not to any particular part thereof. That they were intended to cover the military as well as the civil portion of the population is clear from Articles II and III, which limit the power of military control and the rules for the disposition and government of the military, by providing that the exercise of the powers conferred shall not deprive the states of the right to maintain their own militia, nor involve the right of quartering soldiers in time of peace. It is true that Article V of the amendments in express terms provides that the right to a presentment or indictment by a grand jury shall not extend to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, but this limitation is restricted to the presentment or indictment, and the language is explicit and unlimited which provides: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." It is noticeable indeed that this provision does not in terms refer to criminal prosecutions alone, and in order that it shall apply to the men in the army it is not necessary that a court-martial proceeding should be technically called a criminal proceeding or a criminal trial, for the words are merely: "Nor shall any person be subject for *the same offense* to be twice put in jeopardy of life or limb."

It may possibly be that if a court-martial is not a criminal prosecution, but merely a means of enforcing discipline, a defendant might be compelled to testify against himself, as the article provides: "Nor shall be compelled in any *criminal case* to be a witness against himself," but no such restrictive words are used when it comes to the question of jeopardy, and there is doubt even as to the first proposition, since the Supreme Court has held that a conviction in a court-martial is a bar to a prosecution in a civil court for the same offense.[8]

[8] Grafton v. United States, (1907) 206 U. S. 333, 51 L. Ed. 1084, 27 S. C. R. 749.

It also will be noticed that the Articles of War everywhere provide that the punishment shall be such as the *court-martial* and not the commanding officer may direct, and that the trial shall be had before the *court-martial,* and not the commanding officer, and that no person shall be twice tried for the same offense.

That the practice is anomalous, indeed, seems to be fully recognized by the military authorities, for they all appear to agree that on the review or rehearing no new evidence can be taken,[9] and by this theory they attempt to meet the objection that Article 40 of the Articles of War expressly provides that no new trial shall be had. This quibble, however, does not meet the added objection that the constitution does not content itself with merely providing that no person shall be twice tried, but distinctly states that no person shall be twice placed in jeopardy.

It is also freely admitted that there is no express authorization for the practice to be found anywhere in the Articles of War,[10] which, it may be observed, in so far at least as the clauses in regard to review are concerned, were enacted by Congress in 1916, and superseded any prior rules, regulations, or military practices upon the matter.[11] It must, indeed, be

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[9] See testimony of Colonel Read in note 5, ante.

[10] See note 4, ante.

[11] These Articles, among other things, provide:

Art. 14. ". . . . Provided, That when the summary court officer is also the commanding officer no sentence . . . . shall be carried into execution, until the same shall have been approved by superior authority."

Art. 40. "No person shall be tried a second time for the same offense."

Art. 46. "No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being."

Art. 47. "The power to approve the sentence of a court-martial shall be held to include:

"(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to approve or disapprove the whole or any part of the sentence."

Art. 48 requires the approval of the President in addition to that of the commanding officer in certain cases, but in no particular confers any greater powers upon the latter than are conferred by Article 47 upon the former.

Art. 49. "The power to confirm the sentence of a court-martial shall be held to include:

"(a) The power to approve or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of

conceded that in America, at any rate, the military is subordinate to the civil authority, and that where Congress has acted its action is final and conclusive. It would also seem, though the military authorities appear to doubt the premise, that even in military matters Congress itself must act within and not outside of the constitution.

General Crowder, it is true, justifies the practice by saying that—

"the reviewing authority, ordinarily the commanding officer who has convened the court, represents essentially a first appellate stage. No sentence of a court-martial can be carried into execution until it has been approved by the reviewing authority, i. e., neither acquittal nor conviction is effective until the reviewing authority has scrutinized the record and given it approval. The very object of this institution is to secure the due application of the law and to surround the accused with an additional protection independent of the trial court." [12]

But is not this true of the presiding judge in the ordinary criminal action? It is for him to receive the verdict and to render judgment upon it. Even where the jury is by statute given the power to fix the penalty, it is for him to announce it and to sentence the prisoner. In spite of an adverse verdict, he may still entertain a motion in arrest of judgment for the causes authorized by the law. Wherein does the commanding officer or reviewing authority exercise any other or different powers? Even if the commanding officer is a part of the appellate machinery, where in our criminal procedure or criminal history is an appellate court authorized or where has it assumed to possess the power to set aside a verdict of acquittal?

It is also true that in an opinion rendered in 1853 Attorney-General Cushing justified the practice on the theory that such a review was not a new trial, as no new testimony was taken; but this opinion, if authority at all, is practically the only authority in favor of the position, and its sophistry is of course apparent.

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the authority having power to confirm, the evidence of record requires a finding of only the lesser degree of guilt; and

"(b) The power to confirm or disapprove the whole or any part of the sentence."

Art. 50. "The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence . . . ."

[12] See note 6, ante.

"A new trial," the Attorney General said, "is a rehearing of the case. A court-martial on revisal does not rehear the case: it only reconsiders the record for the purpose of correcting or modifying any conclusions thereon. The true analogy of such a revisal, ... is the case of a jury sent out by the court to reconsider its verdict." [13] But where, in the administration of the criminal law, has a judge been allowed to send back a jury to reconsider a verdict of not guilty? The revisal may possibly not be, technically speaking, a new trial, and perhaps is not forbidden by the 40th Article of War, but what of the constitutional provision in relation to former jeopardy? Did not the learned Attorney General confuse civil with criminal causes?

It is admitted also in the opinion referred to that the views expressed did not agree with the then prevailing practice nor with a former ruling of the Attorney General's department.

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[13] Case of Captain Voorhees, (Oct. 27, 1853) 6 Opinions Atty. Gen. 200.

Attorney-General Cushing, among other things, said:

"It is laid down as a thing not open to controversy, in all the books of military law, that the superior authority may order a court-martial to reassemble to revise its proceedings, and its sentence. (Hough on Courts-Martial, p. 29; i McArthur on Courts-Martial, p. 136; Griffith's Notes, p. 90; Kennedy on Courts-Martial, p. 229, 290; Anon., Observations on Courts-Martial, p. 38-65; Tytler's Mil. Law, p. 170-338; James' Collection, p. 556; Simmons' Practice, 389; De Hart on Courts-Martial, p. 203; O'Brien's Mil. Laws, ch. 23.)

"Revisal by court-martial is not a case of new trial. If it were, it would, in the present case, be unlawful. The 5th Article of Amendment of the Constitution, provides that 'No person shall be subject for the same offence, to be put twice in jeopardy of life or limb.' This provision is in accordance with a well-known doctrine of the law of England, to the same effect. That is to say, by the common law, as understood and administered both in England and the United States, there cannot be a new trial at the instance of the Government, in a case of treason or felony, though there may be in case of misdemeanor, where a party is alleged to be improperly convicted, but not where he has been acquitted. (i Chitty's Com. L. p. 664 and note.) We may admit for the argument's sake, that this doctrine applies to trials by court-martial, as well as by the civil judicature. Indeed, Mr. Attorney-General Wirt has given an official opinion, that though there may be a new trial by court-martial, on application of the party, yet it cannot be lawfully ordered in invitum. (Opinions, ante vol. i, p. 233, September 16th, 1818: see, also, United States v. Gibert and Others, ii Sumner, 19.)

"But the present, I repeat, is not a case of a new trial. A new trial is a rehearing of the case. A court-martial on revisal does not rehear the case: it only reconsiders the record for the purpose of correcting or modifying any conclusions thereon. The true analogy of such a revisal, to take an example from the practice of civil courts, is the case of a jury sent out by the court to reconsider its verdict. Such is the whole current of authorities, as well in the United States as in Great Britain."

The prior ruling was made by Attorney-General William Wirt, in 1818, in the case of Captain Nathaniel N. Hall. Among other things he said:

"The court, under the opinion of the judge advocate, refused to arraign Captain Hall, on the ground that he had been previously tried by a court-martial on the same charge, and that a new trial was forbidden by the 87th Article of War. The general order prefixed to this report shows that the sentence of the first court, which cashiered this officer, was disapproved by the President; and it appears by the proceedings that the new trial ordered, by a court composed of different members, was an act of mercy to the party accused, in consonance with his wishes, and at his own desire. . . . The question presented for my opinion is, whether a President of the United States has the right, under these circumstances, to order a new trial?

"The court, in this case, was a general court-martial; and its sentence one which extended to the dismission of a commissioned officer: it could not, therefore, according to this law, be carried into effect until the sentence, with the whole proceedings which led to it, should be laid before the President, who was authorized by the law either to direct it to be carried into execution, or otherwise, as he should judge proper. To show the value of this appellate power, according to the spirit of this nation from the period of its earliest struggles for liberty, it is not unworthy of remark, that, by the 18th section of the rules and articles of war, established by the continental Congress, it was provided 'that the continental general commanding in either of the American States for the time being shall have full power of appointing general courts-martial to be held, and of pardoning and mitigating any of the punishments ordered to be inflicted for any of the offences mentioned in the aforementioned rules and articles for the better government of the troops, except the punishment of offenders under the sentence of death by a general court-martial, which he may order to be suspended until the pleasure of Congress can be known; which suspension, with the proceedings of the court-martial, he shall immediately transmit to Congress for their determination.' (1 Graydon's Digest, app. 156-7.) On the 27th May, 1777, the whole appellate power was given to the general or commander-in-chief, id. ib., confirmed by an order of 18th June, 1777. Some years after the close of the revolutionary war (to wit, on the 31st May, 1786), it was resolved by Congress, among other things that 'no sentence of a general court-martial, in time of peace, extending to the loss of life, the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, shall be carried into execution, until after the whole proceeding shall have been transmitted to the Secretary of War, to be laid before Congress for their confirmation or disapproval and their orders in the same.' (1 Graydon, app. 158-9.) The question may as

well be asked here as elsewhere, whether the appellate power of the continental Congress, in the resolution last quoted, was limited to the confirmation or disapproval of the sentence of the court-martial on which they were called to act? Had they not the power, not merely of disapproving that sentence, but of ordering a new trial? If they were so limited, why did not the resolution stop at giving them the power to confirm or disapprove? Why the additional words, after the disapproval, 'and their orders in the same'? These words obviously mean something; and what they do mean, we shall discover by turning our attention for a moment to the prototype from which we have chiefly drawn all our laws, both civil and military, and from which our then recent connexion with Great Britain rendered it most natural that we should draw them.

"The mutiny act of England, which annually passed, and which is the sole foundation and rule of courts-martial in that country, establishes a connexion between the martial and civil courts of the kingdom, and authorizes an appeal from the former to the latter. The 79th section of the mutiny act authorizes an appeal from the sentence of a court-martial to the Courts of King's Bench and Common Pleas in England and Ireland, and the Court of Sessions in Scotland. (Tytler's Essay on Military Law, &c., p. 167-'8: Edinburgh edition 1800.) The causes for which the sentence of a court-martial may be brought under review of a superior judicature, are the same which in the civil courts of England authorize either the granting of a new trial, or an arrest of judgment; that is to say, if the sentence or verdict shall have been manifestly without or contrary to evidence, &c., &c. . . .

"It appears, therefore, that in England the power to award a new trial does exist, by an appeal from the courts-martial to the civil courts of the kingdom. But there is something still more strong in this view of the subject: which is, that this appeal lies to the civil courts of the kingdom; and this power of awarding a new trial exists after the king shall have approved the sentence of the court-martial; for, never until then is the sentence complete and final, and never, therefore, until then, can there be an appeal; since an appeal lies from a final sentence only.

"It cannot be doubted that our Congress were in full possession, by painful experience, of the mutiny act, and of the whole laws of the British army, at the period of our Revolution. . . . Can it be believed that, acting in this spirit, and with these enlarged views of human liberty, they would have narrowed the rights and privileges of the American citizen, and surrendered him to a military despotism more severe than that which they were throwing off? And yet this must be supposed, if the peace resolution of the Congress of 1786, above quoted, is to be construed as limited to a cold rejection of the sentence of a court-martial, without the milder and more conciliating remedy of a

new trial, which they knew to exist under the British law; because the rejection would still leave the party under the ignominy of the sentence of his brother officer, without a hope of wiping out the reproach, and reduce the power of Congress to a power (most humiliating to the prisoner) of pardoning a condemned culprit. Looking on the subject in this light, I cannot doubt that, by the words of the resolution of 1786, above quoted, 'for their confirmation or disapproval, and their orders in the same,' it was the intention of Congress to lodge in that body all the conciliating powers, over sentences of courts-martial, which they must have known to exist in the different branches of the government of England. For if Congress did not intend by this resolution to reserve to themselves this power, among others, of awarding a new trial, no other tribunal of this country could then have possessed it. We had then no national courts, corresponding with the King's Bench, &c., to whom the power of awarding new trials is given in England; much less any connexion established by law between such courts and the courts-martial of the country. . . .

". . . . . Congress were forced by the emergency of the crisis to assume, in some instances, legislative, executive, and judicial power; or, in other words, to take care of the republic —in relation to the army particularly. Having no national court, they were forced to divide the government of *that* between the republican generals and themselves; and, in relation to an army composed of their fellow-citizens struggling for the common liberty, and alive, in every nerve, to all that concerned their honor, it cannot be doubted that every power, whose exercise was essential to that honor, was intended to be preserved by the broad expressions which have been quoted. That they could have done all, therefore, which the court of the King's Bench, &c., could have done for the relief of the injured honor of the army, I have no doubt.

"The power which Congress possessed before the formation of the present government was, obviously, intended to be transferred to the President after its formation. This will be evident by comparing the congressional resolution of 1786 with the language of the act of Congress first quoted. . . . What answer can be given, but that the design was to comprehend, under this clause, all the power which had been long known to exist in England, over sentences of courts-martial pronounced in that country? and, among these, (as shown under the English mutiny act by Tytler,) the power of reviewing them and giving a new trial. And where is the injury, in any quarter, by the existence of such a power? The benefit of an appellate tribunal is obvious, while human nature shall remain as imperfect as it is: not so, I think, the final power of the tribunal first convened. On the contrary, the dangers of this latter principle are incalculable; it surrenders the victim, bound hand and foot, to the malice, revenge, and corruption of his enemies.

"The argument presented by the judge advocate and the court-martial at Plattsburg, against the new trial, strikes me as being founded rather on the letter than on the spirit of the 87th article of the rules and articles of war. That article is in the following words: 'No person shall be sentenced to suffer death, but by the concurrence of two-thirds of the members of a general court-martial nor except in the cases herein expressly mentioned; nor shall more than fifty lashes be inflicted on any offender, at the discretion of a court-martial; and no officer, non-commissioned officer, soldier, or follower of the army, shall be tried a second time for the same offence.' It is very apparent that the whole of this article is designed for the benefit of the party accused, not for his prejudice; and yet the constructive operation given to it, in this case, is for his prejudice only, and not for his benefit. There is no principle in law better settled than that a party has the right to waive a rule designed merely for his own benefit. The writers on martial law have labored, very laudably, to reconcile the principles of proceeding in this law with those of the common law of England; and there is not a lawyer who can read this article without seeing in it the common-law rule in criminal trials, from which it has flowed. . . . But do these maxims, which form the rule of the common law, (and consequently of the martial law, which is borrowed from it,) bar a new trial, on the motion, and in behalf, of the accused? Blackstone shall answer: 'Yet, in many instances, where, contrary to evidence, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of King's Bench, &c. But there hath been, yet, no instance of granting a new trial, where the prisoner was acquitted on the first.' (4th Black., 361.) . . . . It is enough for our purpose that the prisoner has long had this right, and that the rule which forbids a second trial, devised purely for his benefit, has never been considered as being infringed by granting such a new trial on his motion; that he has invariably had this new trial, whenever, in the estimation of those constituted to judge, the reason and equity of the case have required it. . . . It will be observed that the rule is altogether benignant to the party accused. It does not follow that, if acquitted, he can be arraigned anew; it is not (according to Blackstone) that the new trial can be ordered against him—it is only for him. What just ground of alarm, therefore, can there be to the officers of the army, that a principle, exclusively beneficent in its operation, should exist?—one which can operate in their favor; and never, by any possibility, can operate against them? . . . .

"Upon the whole, I am of the opinion that the President of the United States is vested by the laws with the power of ordering a new trial for the benefit of the prisoner." [14]

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[14] Case of Nathaniel N. Hall, 1 Ops. Atty. Gen. 149.

This opinion clearly limits the new trial to one at the request of and for the benefit of the defendant, and to one which is granted at his request and at his request alone.

The practice also is expressly denied, not only by the only American writers upon the subject, but by writers whose authority the military have always recognized.

Colonel William Winthrop, in his work on military law, says: [15]

"*The Plea of Former Trial for the Same Offence.* Similar at Military and at Criminal Law. This is the plea by which an accused party avails himself of the principle incorporated in the 102d Article of the military code, viz:—'No person shall be tried a second time for the same offence.'

"In the criminal procedure the defendant takes advantage of this principle by means of one of the two pleas of former acquittal, (*autrefois acquit,*) or former conviction, (*autrefois convict*). . . . The rulings thereupon by the civil courts will therefore be applicable to similar cases at military law.

"Former Trial and 'Jeopardy' Identical. That no man shall be liable to be twice tried or punished for the same offence, was an ancient maxim of the common law, ... it was incorporated in the Constitution of the United States in a form similar to that in which it originally appears in the early cases and writings in criminal law, as follows—'nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.' . . . That it takes this form is explained by the fact that, at the period of its origin, all the considerable offences in regard to which this right of defence would be asserted were felonies punishable capitally or by dismemberment. In the present state of the law, indeed, the provision, as worded in the Constitution, applies, strictly, to but two or three crimes, as treason, murder, and piracy; but, construing it in the light of its original bearing and its manifest spirit, the U. S. courts generally have viewed it as covering in principle all other crimes, and have held the phrase 'put in jeopardy' to mean practically the same as *tried*, thus giving to such provision substantially the effect of the declaration expressed in the military statute.

"*Meaning of 'Tried' and 'Trial.'* In so ruling, these courts have further held that the 'jeopardy' or 'trial' means the prosecution of a case to a verdict; that unless the case has proceeded at least to an acquittal or a conviction, there has been no trial and therefore no jeopardy. Similarly the word 'tried' in Art. 102 is to be interpreted as meaning *duly prosecuted before a court-martial to a legal conviction or acquittal.* After such a conclusion the Article prohibits a further trial of the accused except,

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[15] Winthrop, 2nd ed., I, p. 387 et seq.

(as will hereafter be indicated), by his own waiver and consent.

"Immaterial Whether There Has Been a Sentence Adjudged. It is further held by the weight of authority that, to complete the trial, no judgment or sentence is requisite. Thus, while in the military procedure a sentence properly follows at once and as a matter of course upon a conviction, a court-martial will properly hold an accused to have been 'tried' in the sense of the 102d Article, when he has been duly acquitted or convicted, without regard to whether, in a case of conviction, a sentence or a legal sentence has been adjudged.

"Immaterial Whether Any or What Action Has Been Taken on the Proceedings by the Reviewing Officer. Further, where the accused in a military case has been once duly acquitted or convicted, he has been 'tried' in the sense of the Article, although no action may have been taken upon the finding or proceedings by the reviewing authority. Nor has he been any the less 'tried' where the finding has been formally *disapproved*, by such authority. For the finding is no less a consummation in law of the *trial*, though, from a cause beyond the control both of the accused and the court, such finding has been rendered ineffectual."

In the same connection, and in speaking of Section 40 of the Articles of War, which provides that no person shall be tried a second time for the same offence, Major General George B. Davis says: [16]

"The Constitution declares that 'no person shall be subjected for the same offense to be twice put in jeopardy of life or limb.' The United States courts, in treating the term 'put in jeopardy' as meaning practically tried, hold that the 'jeopardy' indicated 'can be interpreted to mean nothing short of the acquittal or conviction of the prisoner and the judgment of the court thereon.' So it has been held that the term 'tried', employed in this Article, meant *duly prosecuted, before a court-martial, to a final conviction or acquittal;* and therefore that an officer or soldier, after having been duly convicted or acquitted by such a court, could not be subjected to a second military trial for the same offense, except by and upon his own waiver and consent. For that the accused may *waive* objection to a second trial was held by Attorney-General Wirt in 1818, and has since been regarded as settled law.

"Where the accused has been once duly convicted or acquitted he has been 'tried' in the sense of the Article, and cannot be tried again, against his will, though no action whatever be taken upon the proceedings by the reviewing authority, or though the proceedings, findings (and sentence, if any), be wholly disapproved by him. It is immaterial whether the former conviction or acquittal is approved or disapproved.

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[16] Davis, Military Law, 3rd ed., p. 533.

"Where an officer or soldier has been duly acquitted or convicted of a specific offense, he cannot, against his consent, be brought to trial for a minor offense included therein, and an acquittal or conviction of which was necessarily involved in the finding upon the original charge. Thus a party convicted or acquitted of a desertion cannot afterwards be brought to trial for an absence without leave committed in and by the same act. . . .

"That an accused has been, in the opinion of the reviewing authority, inadequately sentenced, either by a general or an inferior court, cannot except his case from the application of this Article; though insufficiently punished, he cannot be tried again for the same offense."

Nor has the Supreme Court at any time sustained the constitutionality of such a practice. All that it has ever done has been to say that the practice prevails, and that the point cannot be raised or inquired into in a collateral proceeding or on a habeas corpus.

The case of *Swaim v. United States*[17] was one in which a claim was filed in the Court of Claims for the allowance of the pay of a Brigadier General in spite of a judgment of a court-martial suspending the officer from his rank and forfeiting his

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[17] (1897) 165 U. S. 553, 41 L. Ed. 823, 17 S. C. R. 448. The court in its opinion and in reviewing prior authorities also said:

"It was said by this court in Dynes v. Hoover, 20 How. 65, 82, that 'with the sentences of courts-martial which have been convened regularly, and have proceeded regularly, and by which punishments are directed, not forbidden by law, or which are according to the law and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. . . .'

"Keyes v. United States, 109 U. S. 336, was, like the present, a suit in the Court of Claims to recover back pay alleged to have been wrongfully retained by reason of an illegal judgment of a court-martial, and the rule was laid down thus: 'That the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, is not disputed. This being so, whatever irregularities or errors are alleged to have occurred in the proceedings, the sentence must be held valid when it is questioned in this collateral way,' but where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment."

That such judgments may not be collaterally attacked, see Dynes v. Hoover, (1859) 20 How. (U. S.) 65, 82, 15 L. Ed. 839; Ex parte Mason, (1882) 105 U. S. 696, 26 L. Ed. 1213; Smith v. Whitney, (1886) 116 U. S. 167, 177, 179, 29 L. Ed. 601, 6 S. C. R. 570; Ex parte Kearney, (1822) 7 Wheat. (U. S.) 37, 5 L. Ed. 391; Ex parte Watkins, (1829) 3 Pet. (U. S.) 193, 7 L. Ed. 650; Ex parte Milligan, (1866) 4 Wall.

pay. Nowhere in this opinion was the constitution referred to. Mr. Justice Shiras in speaking for the court said:

"It is claimed that the action of the President in thus twice returning the proceedings to the court-martial, urging a more severe sentence, was without authority of law, and that the said last sentence having resulted from such illegal conduct was absolutely void. This contention is based upon the proposition that the provision in the British Mutiny Act, which was in force in this country at the time and prior to the American Revolution, and which regulates proceedings in courts-martial, is applicable. This provision was as follows: 'The authority having power to confirm the findings and sentence of a court-martial, may send back such findings and sentence, or either of them, for revision once, but not more than once, and it shall not be lawful for the court on any revision to receive any additional evidence, and when the proceedings only are sent back for revision the court shall have power, without any direction, to revise the sentence also. In no case shall the authority recommend the increase of a sentence, nor shall the court-martial, on revisal of the sentence, either in obedience to the recommendation of the authority or for any other reason, have the power to increase the sentence awarded.'

"Even if it be conceded that this provision of the British Mutiny Act was at any time operative in this country, the subject is now covered by the Army Regulations, 1881, Section 923, relied upon by the Attorney General in his letter to the President and cited by the Court of Claims, which is as follows:

"'When a court-martial appears to have erred in any respect, the reviewing authority may reconvene the court for a consideration of its action, with suggestions for its guidance. The court may thereupon, should it concur in the views submitted, proceed to remedy the errors pointed out, and may modify or completely change its findings. The object of reconvening the court in such a case is to afford it an opportunity to reconsider the record for the purpose of correcting or modifying any conclusions thereupon, and to make any amendments of the record necessary to perfect it.'

"This regulation would seem to warrant the course of conduct followed in the present case. In *Ex parte Reed*, 100 U. S. 13, a somewhat similar contention was made. There a court-martial had imposed a sentence which was transmitted with the

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(U. S.) 2, 18 L. Ed. 281; Ex parte Reed, (1879) 100 U. S. 13, 25 L. Ed. 538; Johnson v. Sayre, (1895) 158 U. S. 109, 39 L. Ed. 914, 15 S. C. R. 773.

That a writ of prohibition will not lie, see Smith v. Whitney, supra.

That an appeal, writ of error, or habeas corpus will not lie, see Ex parte Kearney, supra.

record to Admiral Nichols, the revising officer, who returned it with a letter stating that the finding was in accordance with the evidence, but that he differed with the court as to the adequacy of the sentence. The court revised the sentence and substituted another and more severe sentence, which was approved. The accused filed a petition for a writ of habeas corpus in this court; and it was claimed that the court had exhausted its powers in making the first sentence, and, also, that it was not competent for the court-martial to give effect to the views of the revising officer by imposing a second sentence of more severity. The Navy Regulations were cited to the effect that the authority who ordered the court was competent to direct it to reconsider its proceedings and sentence for the purpose of correcting any mistake which may have been committed, but that it was not within the power of the revising authority to compel a court to change its sentence, where, upon being reconvened by him, they have refused to modify it, nor directly or indirectly to enlarge the measure of punishment imposed by sentence of a court-martial.

"This court held that such regulations have the force of law, but that as the court-martial had jurisdiction over the person and the case, its proceedings could not be collaterally impeached for any mere error or irregularity committed within the sphere of its authority; that the matters complained of were within the jurisdiction of the court-martial; that the second sentence was not void; and, accordingly, the application for a writ of habeas corpus was denied. We agree with Court of Claims that the ruling in *Ex parte Reed,* in principle, decides the present question."

The case of *Ex parte Reed*[18] was also one in which the Supreme Court refused relief, but merely on the ground that a writ of habeas corpus would not lie. The case was one where a sentence had been increased on the revision. The constitution was not commented upon or even mentioned in the opinion.[19]

Nor is there an justification or support for the practice to be found in the case of *Runkle v. United States*,[20] to which Colonel Read referred in his testimony before the American Bar Association.[21] That case, indeed, is opposed to, rather than supports, the position of the military authorities. It took the

[18] Note 17, ante.

[19] See note 17, ante.

[20] (1887) 122 U. S. 543, 30 L. Ed. 1167, 7 S. C. R. 1141. Nor is there any justification for it in the case of Ex parte Milligan, (1866) 4 Wall. (U.S.) 2, 18 L. Ed. 281, which is sometimes referred to.

[21] See note 5, ante.

position that court-martial proceedings are judicial and not administrative, and, if judicial, one would naturally infer that judicial principles should ordinarily prevail. All that the case held was that until the President had acted in the manner required by Article 65 of the Articles of War, contained in the Act of April 10, 1806, the judgment of a court-martial was inoperative and that, there being no sufficient evidence that the action of the court-martial which dismissed Major Runkle from the service was approved by the President, it followed that he was never legally cashiered or dismissed from the army. The Article of War provided that "neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case." It was held that the action required by the President was judicial in its character and not administrative, and had to be performed by him and by him alone, and that in order that the sentence might be operative, his approval must be authenticated in a way to show otherwise than argumentatively that it is the result of his judgment, and not a mere departmental order which may or may not have attracted his attention, and that the fact that the order is his own must not be left to inference only.

"Here, however, [the court says] the action required of the President is judicial in its character, not administrative. As Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he himself is to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he can not delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another."

If this be true of the action of the President in reviewing the judgment of a court-martial and in determining whether the judgment shall be carried into execution or not, much more

must it be true of the action of the court-martial itself, before which alone the defendant may be tried and which alone is intrusted with the power of determining the guilt of the accused and of fixing his penalty. The Articles of War either expressly impose the penalty or provide that it shall be such "as the court-martial may direct." When it comes to the matter of review and to the question whether the sentence shall be put into execution, the determination of this question is, it is true, conferred upon the reviewing officers alone. They to this extent are members of the court-martial and a part of the military judicial system. Further than this we believe we cannot go. The proceedings have been declared by the Supreme Court to be judicial and not administrative. The court-martial is not merely a subordinate ministerial body. It is the only forum before which the prisoner can be tried. It is the only forum which can pass upon his guilt. When before it, the prisoner is in jeopardy. Under every principle of law and of the constitution, its decision should be followed.

Nor is there any historical basis for the assumption of the power complained of. Article 5 of the amendments itself negatives it, for its limitations are confined merely to the indictment or presentment by a grand jury, which are of course inapplicable to military proceedings, but whether inapplicable or not are denied to the military offender by express terms, while the protection of no other clause of the constitution is so denied him.

It is quite clear that the states were jealous of the new government which they were creating and above all determined that it should have no powers which were greater than the exigency demanded. Everywhere they showed a peculiar solicitude for personal liberty and for the guaranties of Magna Charta. It is true they did not go to the extent of the Mutiny Act and provide that all regulations for the conduct of the army should be yearly enacted by the legislative body, and should thus be taken from the control of the monarch, but they certainly hedged constitutional limitations around the powers granted to the new sovereign, the United States, which took the place of the English sovereign. In England it was perhaps necessary that the Mutiny Act should be yearly enacted as a constant reminder that the right to maintain a standing army was not a royal prerogative, and, as there is in England strictly speaking no written constitution, such a reminder may be necessary. Here, however, we have a written constitution and a federal govern-

ment of delegated and not original powers. Even Congress has no powers except those which are expressly delegated to it or which are necessary to the exercise of those delegated. Here we have no royal prerogative. The constitution is the source of all power and its limitations are all-controlling. Here indeed the law of the land which is mentioned in the Mutiny Act, but which in England is more or less indefinite, is made clear and certain by the first ten amendments, or the so-called American declaration of rights.

The military authorities, in short, in acting contrary to the opinion of their own text writers and in following the opinion of Attorney-General Cushing instead of that of Attorney-General Wirt, and Judge Advocate General Crowder in coming to his conclusion, have utterly failed to recognize the fact that the military law of the United States has always been under the control of Congress and of the constitution and has known no royal or presidential prerogative and that to Congress and not to the President or any commanding officer is given the power to make rules for the government and regulation of the land and naval forces.[22] It is as the law now is in England since the passage of the Mutiny Act of 1879 and not as it was in England before or even after the passage of the Mutiny Act of 1689.

"The history of English military law up to 1879 may be divided into three periods, each having a distinct constitutional aspect: (1) that prior to 1610, when the army, being regarded as so many personal retainers of the sovereign rather than servants of the state, was mainly governed by the will of the sovereign; (2) that between 1689 and 1803, when the army, being recognized as a permanent force, was governed within the realm by statute and without it by the prerogative of the crown, and (3) that from 1803 to 1879, when it was governed either directly by statute or by the sovereign under an authority derived from and defined and limited by statute." [23]

Our forefathers, indeed, were fresh from the English revolutions and the English experiences. They chose to repudiate the theory of the Mutiny Act of 1689 and to anticipate that of 1879.

Even if we accept the theory that the spirit and not the words of the amendments apply, then surely the spirit is not

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[22] Art. I, Sec. 8.

[23] Enc. Britannica, 9th ed., Vol. XVI, p. 296.

complied with by the practice that is adopted. Is not the whole history of the development of English law, at any rate as far as criminal trials are concerned, a struggle for the independence of the jury and freedom from executive and even judicial restraint? Would the people who had built bonfires and held popular celebrations in honor of the acquitted bishops and of the jury that acquitted them, have tolerated for a moment a system which should have made those juries subordinate to the royal power and put it into the hands of the judges or royal representatives to call them together again, tell them that they disapproved of the acquittal, that they, the summoners, were satisfied of the guilt of the accused, that the jury was remiss in its duty, and allowed them to send the jury back to reconsider their verdict? Attorney-General Cushing in his opinion in the case of Captain Voorhees [24] suggests that the practice adopted by the military authorities is not different from that which would prevail if a judge sent back a verdict to a jury in a criminal case. But when, at any rate since the English revolution, has there been an instance of any case in which this has been tolerated in a criminal action when a verdict of not guilty has been rendered? It may be that an uncertain verdict may be made certain. If, for instance, a jury should return a verdict of "guilty on some of the counts of the information and not guilty on others," they might be required to state definitely those on which the guilt had been determined, but we find no instance where the law has gone any further.

The question is, is the man to be tried by the members of the court-martial or by the commanding officer alone? If by the latter, why the rigid requirements as to members, oaths, and challenges? The commanding officer is a superior officer. The prospects and chances of preferment of the inferior officers who sit on the courts-martial are largely in his hands. His recommendations to the war department are the only recommendations of record. It is he alone who can usually mention a man in the dispatches. Is such a jury or tribunal free and untrammeled and unbiased in its second review, when the case is sent back to it with the comment that the commanding officer disapproves of its decision and of its sentence and is displeased with its action? It is true that its members need not alter their former judgment. There is, however, every temptation to them to do so.

[24] See note 13, ante.

The military authorities, in short, ignore the constitution and insist upon looking upon the courts-martial as executive agencies rather than courts of justice; the administration of the military criminal law as a means to enforce discipline, and the law itself as a compilation of military rules, rather than a declaration of primary rights, duties, and obligations. This is clear from the comment and order of General Bell in the case of the recruit David Cortesini, which we have before referred to and which was approved by General Crowder in his testimony before the Senate committee,[25] and which was as follows:

"In the present case the accused was given every opportunity to obey the order, but nevertheless disobeyed it intentionally, in defiance of authority, and accordingly such disobedience was 'willful' within the meaning of this section.

"The reviewing authority does not intend to give the impression that he personally believes that the accused must be required to serve a long period of confinement for this act, but rather he desires the court to understand that the commission of this act should be met by severe punishment, and then, if in this case there are reasons why the sentence should be reduced, such reduction should be ordered on the action of the reviewing authority rather than in the inadequate sentence awarded by a court appointed as an executive agency in the administration of discipline."

The case was one where an ignorant Italian refused to sign an enlistment and assignment card. He pleaded guilty to refusing to obey the order, but claimed that the same was unlawful. The court-martial acquitted him. On the revision which was ordered, he was found guilty and sentenced to a dishonorable discharge and to confinement for five years. This sentence was, it is true, reduced by the commanding officer to confinement for one month and forfeiture of one-third of his pay for that period. It may be that the punishment was richly deserved. It was a case, however, where the court-martial was treated as an agency subject to the commands of its superior, and not as a court of justice, and the prisoner was not tried by the court-martial but by the commanding officer, and this in spite of Article 64 of the Articles of War, which expressly provides that such an offender shall "suffer death, or other such punishment as a court-martial [not the commanding officer] may direct." Will the American people ever be willing that their sons who, in the

[25] See note 2, ante.

future, shall volunteer out of sheer patriotism in the cause of their country shall be deemed to have relinquished all constitutional rights and be subject to be punished or acquitted for every offense merely as their commanding officers may direct? We realize that the system of a jury of one's peers can hardly exist in the army, though the old British system recognized a right to an appeal to such a jury in extreme cases.[26] We are, however, stretching the strict language of the constitution when we deny that right, for the restriction of the first ten amendments is only made expressly to cover the presentment or indictment by a grand jury; but surely the ordinary rules of jeopardy and due process of law were intended to apply. It is inconceivable that a people who had cognizance of the bloody assizes and of a Judge Jefferies who was told by his monarch how to judge and how to rule, and in turn forced his juries to do likewise, would ever consent to such a practice even under the pressure of military exigency.

Nowhere in speaking of the reviewing power do the Articles of War suggest that a rehearing may be ordered, nor that any resubmission or recommendation may be made to the court-martial. Nowhere even is the word "recommendation" used. The articles merely provide that no sentence shall be carried into execution unless approved. Is there anywhere any intimation that a new trial may be ordered or a revision of the record by the court-martial may be suggested, and a verdict of guilty substituted for that of not guilty? The practice is nothing but an arbitrary assumption of power.

It may do no great harm. It may be that in the great majority of cases the courts-martial adhere to their former decisions. In some cases, however, they do not. At any rate, it shocks the legal sense of the practicing lawyer; it is violative of basic constitutional rights; it furnishes grounds for the charge that the constitution protects all except those who fight beneath our flag, and this charge we cannot allow to be made. If in the future we would raise armies and hope to have men volunteer, we must make it clear that the country's "uniform is not the soldier man's disgrace," and that, though while in the army he must submit to restrictions not encountered in civil life because not there necessary to the public weal, his basic constitutional rights

[26] See Opinion of Atty.-Gen. Wirt, ante.

will nevertheless be respected. The practice should definitely be declared unlawful and should be discontinued.

The sense of fair play is bred into the bone and sinew of the Anglo-Saxon, and the Anglo-Saxon is, above all things, a sportsman. He will submit to anything if he thinks it is according to the rules of the game. When, however, "the Anglo-Saxon shakes his head like an ox in the stall and says it is not fair, then, my son, it is time to beware."

A bald fact is apparent and that is that a practice has been allowed to prevail in the army of the United States which is fundamentally unjust and fundamentally and unquestionably unconstitutional, and has been recognized by the military authorities and enforced by them, and believed by them to be legal, merely because our rules of judicial procedure were such that its validity could not be properly inquired into by the civil courts. The military courts in the cases passed upon were properly organized and had jurisdiction of the person and of the subject matter, and therefore the point raised could not be raised in habeas corpus or in any other collateral proceeding. It could not be raised on appeal or by writ of error because in America (though not in England) no appeal or writ of error from or to the civil courts from the judgments of courts-martial is provided for, and the right to an appeal is not a constitutional right. The Supreme Court of the nation has conceded that such a practice prevails. It has never decided that it is constitutional. It is not.

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TORT LIABILITY OF AN INDEPENDENT CONTRACTOR.—A recent decision denying the liability of certain bridge builders for injury to one lawfully using their structure, after its acceptance by the county officials who contracted for it, raises a question the importance of which is growing in the ratio that modern division of labor bears to medieval family or community economic self-sufficiency: Can the negligence of the maker of products who sets them in the path of commerce make him liable to future users who have no contract with him? The defendant had constructed a bridge [1] upon a public highway, under a contract with the board of county commissioners. Five

[1] Travis v. Rochester Bridge Co., (Ind. 1919) 122 N. E. 1.

years after the opening of the bridge to the public the plaintiff's decedent crossed it with a traction engine. It gave way, causing injuries which resulted in his death. The complaint charged the defendant with negligence in respect to defects specifically pointed out in the complaint; and alleged that the dangerous condition of the bridge was known to defendant, but concealed from the public generally by the floor of the bridge. Defendant demurred. It was *held* (on appeal) that the demurrer was properly sustained. The court relied for its decision upon the general rule of non-liability of contractors to persons not in privity for negligent construction of products which had left the hands of the contractor.

The principle which governed this decision has been frequently applied in favor of the manufacturers of commercial products. A manufactures a chattel and sells it to B, a retail dealer. B resells it to C, a customer. The chattel contains a defect due to A's negligence. The defect is unknown to A, B, and C, but A would have known had he used reasonable care in manufacture. C while carefully using the article suffers harm from the defect. Quaere: Does A owe a duty of care to sub-vendees? Can C maintain an action for damages against A, the manufacturer? C had no right of action at common law;[2] and by the weight of present authority a contractor, manufacturer, vendor, or bailor, once his product is accepted, is not liable to third persons who have no contractual relations with him for damages subsequently sustained by reason of his negligence in the performance of his original duties.[3]

That an action by such a person could not be supported on the theory that he was a beneficiary of the company seems elementary. Even where the greatest latitude is allowed to those not parties to the contract to sue upon it as beneficiaries, there is still the fundamental condition that the plaintiff must

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[2] Pollock, Torts, 10th ed., p. 550 et seq.; Langridge v. Levy, (1837) 2 M. & W. 519, 4 M. & W. 337, 6 L. J. Ex. 137, 1 Jur. 659; Woodward v. Miller, (1900) 119 Ga. 618, 46 S. E. 847, 100 Am. St. Rep. 188, 193, 64 L. R. A. 932.

[3] Winterbottom v. Wright, (1842) 10 M. & W. 109, 11 L. J. Ex. 415; Heaven v. Pender, (1883) 11 Q. B. D. 503; Bates v. Batey, [1913] L. R. 3 K. B. D. 351; Losee v. Clute, (1873) 51 N. Y. 494, 10 Am. Rep. 638; Marvin Safe Co. v. Ward, (1884) 46 N. J. L. 19; Lewis v. Terry, (1896) 111 Cal. 39, 43 Pac. 398, 52 Am. St. Rep. 146, 31 L. R. A. 220; Husett v. J. I. Case Threshing Mach. Co., (1903) 120 Fed. 865, 61 L. R. A. 303; Heizer v. Kingsland, etc., Mfg. Co., (1892) 110 Mo. 605, 615, 617, 19 S. W. 630, 33 Am. St. Rep. 482, 15 L. R. A. 821.

be a *direct* beneficiary as distinguished from one incidentally benefited.[4] Thus, if the promise is to put money into the hands of the promisee, and not, as in *Lawrence v. Fox*,[5] to hand it directly to the third party, creditors cannot sue.[6] And if a railway company contracts with levee commissioners to so build an embankment on its right of way as to establish a dam that would keep the water off the land of property owners, and to complete the work by a certain time, it will not be liable in contract to the property owners of the levee district who are damaged by the failure to complete the work on time.[7]

It is on these principles that any contract theory of recovery is ruled out. It has been strongly argued that a precisely similar principle in the law of torts provides an adequate bar to recovery in that form of action. also. "The law creates a mandate to act or refrain from acting (the breach of which is a tort), not in favor of everyone who may be damaged as the natural and probable consequence of the breach . . . . but only in favor of some single individual or limited class of individuals to whom the performance directly and physically runs, or who are the immediate recipients of the benefits of refraining from acting. Thus if the negligence of A caused the death of B while both were driving upon the highway, A's wife and children, who were dependent upon him, would have, apart from statute, no cause of action for damages. There was a mandate to use due care toward A alone."[8] It is submitted that this is a rule of convenience merely. The common law judges felt that if A's children were allowed to sue it would be hard to say that the most remote kin might not equally claim damages. But if there is a mandate not to cut down a tree, the duty runs in favor of the branches depending for their life upon the trunk. If the plaintiffs are very remote branches of a family, or, in a commercial transaction their connection with the promisor is but tenuous, recovery may be denied on grounds of expediency; but not on any arbitrary classification of persons in whose favor some duty does or does not exist. Hard and fast lines drawn

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[4] Per Baker, J., in Crandall v. Payne, (1895) 154 Ill. 627, 39 N. E. 601.

[5] (1859) 20 N. Y. 268.

[6] Burton v. Larkin, (1887) 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541.

[7] Rodhouse v. Chicago, etc., Ry. Co., (1906) 219 Ill. 596, 76 N. E. 836.

[8] A. M. Kales, note in 19 Green Bag 131.

on considerations as restricted as the terms of a contract cannot fairly form the basis of tort liability. The liability for want of care with respect to acts involving relations with others should continue so long as any force originally created by one person has not changed its qualities and direction by reason of the interposition of another.

The courts, however, have declined to lay down so broad a rule, and as a result have been compelled to apply four distinct principles to the cases of independent contractors. The first line of decisions falls within the general rule of non-liability where there was no privity, where the object causing the damage was not by nature dangerous and has left the maker's hands without defects known to him.[9] The second line of cases is where the defendant is guilty of negligent misfeasance in creating a source of danger and not merely of nonfeasance in omitting to make the chattel safe.[10] In the third line there is an invitation to use the dangerous thing;[11] while in the fourth class the defendant puts into the path of commerce articles he knew or ought to have known to have dangerous, concealed defects.[12]

It is worth noticing that in none of these four lines of cases was it attempted to hold the independent contractor as an insurer, nor to found liability on implied warranty to subvendees or users. The decisions of the first class denied liability on a principle of expediency to the effect that rights bestowed on any person outside the contract would open the door to plaintiffs whose relationship with the defendant is too distant.[13] This objection hardly seems tenable today in view of our minute division of labor: the vast majority of city dwellers are eating, wearing, and using articles produced hundreds of miles away, reaching the consumer only through several middlemen. The

[9] Winterbottom v. Wright, note 3, supra.

[10] Thomas v. Winchester, (1852) 6 N. Y. 396, 57 Am. Dec. 455 (poison labeled as harmless drug); Tomlinson v. Armour & Co., (1908) 75 N. J. L. 748, 70 Atl. 314 (liability for poisonous canned food).

[11] Indermaur v. Dames, [1867] L. R. 2 C. P. 311, 16 L. T. 293, 36 L. J. 181, 15 Wkly. Rep. 434; Heaven v. Pender, note 3, supra.

[12] Langridge v. Levy, note 2, supra; Dominion Natural Gas Co. v. Collins, [1909] L. R. App. Cas. 640; Lewis v. Terry, note 3, supra; Casey v. Hoover, (1905) 114 Mo. App. 47, 89 S. W. 330; Schubert v. J. R. Clark Co., (1892) 49 Minn. 331, 51 N. W. 1103, 32 Am. St. Rep. 559, 15 L. R. A. 818; O'Brien v. American Bridge Co., (1910) 110 Minn. 364, 125 N. W. 1012; MacPherson v. Buick Motor Co., (1912) 153 App. Div. 474, 138 N. Y. Supp. 224. Contra: Heindirk v. Louisville Elevator Co., (1906) 122 Ky. 675, 92 S. W. 608; Travis v. Bridge Co., note 1, supra.

[13] 19 Green Bag 131, 132.

cases of the second class enforce liability on the theory that a duty arises where a positively dangerous article like poisoned meat or a flimsy bridge is set before the public, but not when by mere negligent nonfeasance a defective article is sent forth.[14] It is submitted that this distinction is unjustified. The dangerous character of goods may determine in a particular case whether there was negligence in producing or distributing them, but it is difficult to see how it can determine whether or not manufacturers are under a duty to guard against negligence. Fixing liability in cases in the third class on the ground of "invitation," in the sense of inducement to use something in which the defendant still has a business interest,[15] is quite as narrow as the rule of remoteness in class one. The mere fact of user proves, except in the case of infants, a holding out for the use from which damage results.

The cases in class four more nearly afford an adequate rule of law. This rule affirms liability wherever the independent contractor has set in the path of commerce anything which, because of his negligence, does damage to users. These cases treat the chain of causation as unbroken notwithstanding intervening stages, such as delivery and acceptance,[16] and they declare that "whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." [17]

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[14] Longmeid v. Holliday, (1851) 6 Exch. 761, 20 L. J. Ex. 430. In this case a lamp exploded and injured the plaintiff. As lamps are not in their nature explosive, it was held the defendant could be liable in contract only. See Pollock, Torts, 10th ed., p. 529; cf. O'Brien v. American Bridge Co., note 12, supra, Jaggard, J., at p. 367, denying this theory of the case.

[15] Heaven v. Pender, note 3, supra.

[16] Scott v. Shepard, (1773) 2 Wm. Bl. 892, 3 Wils. 403, Beale's Cases on Liab. 309; Hartley v. Mayor, [1908] L. R. 2 K. B. D. 594; O'Brien v. American Bridge Co., note 12, supra, per Jaggard, J., at page 370: "So far as the doctrine of cause is concerned no difficulty is experienced, in appropriate cases, in the transmission of effect of the original wrongful act through intermediate unconscious agents, who are parties to the contract." Contra as to this point: Casey v. Hoover, note 12, supra; Woodward v. Miller, note 2, supra; Travis v. Bridge Co., note 1, supra.

[17] Heaven v. Pender, note 3, supra.

These principles should embrace the bridge case (*Travis v. Rochester Bridge Co.*),[18] where the contractor undertook to furnish his promisee with a product for the use of the public generally. Mere acceptance of the contractor's work by the board of commissioners could not arrest the forces he had set in motion; and the plaintiff's intestate as a member of the class for which the bridge was constructed occupied such a position with regard to the defendant as to entitle him to the protection which ordinary care and skill in construction would have given. The relationship was quite as adequate to found tort liability upon as it is where A and B are both driving upon the highway, and B, by reason of A's negligence, suffers harm. As there was no question under the Indiana statutes as to the right of dependents to recover for wrongful death,[19] a recognition of the duty of the bridge constructors should have entitled the plaintiff to recover. Indeed, since the defendant by his demurrer must be taken to have admitted his knowledge of faulty workmanship in building the bridge, the case is within the Minnesota rule [20] that cognizance of dangerous defects will render independent contractors liable to persons not in privity.

IMMUNITY OF QUASI-JUDICIAL PERSONS FROM SUITS FOR MALICIOUS ACTS.—The doctrine that an action will not lie against a judge for erroneous judgment or for any other act made or done by him in his judicial capacity is thoroughly established.[1] Such an exemption is said to be absolutely essential

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[18] Note 1, supra.

[19] Burns' Ann. Ind. Stat. (Revision of 1908), I, Sec. 285.

[20] Schubert v. Clark Co., note 12, supra; O'Brien v. Am. Bridge Co., note 12, supra.

[1] In re Saline Co., (1869) 45 Mo. 52, 100 Am. Dec. 337; Stewart v. Cooley, (1877) 23 Minn. 347, 23 Am. Rep. 690; Bradley v. Fisher, (1871) 13 Wall. (U.S.) 335, 20 L. Ed. 646; Pratt v. Gardner, (1848) 2 Cush. (Mass.) 63, 48 Am. Dec. 652, by Shaw, C. J., at page 70: "The general principle which excepts judges from answering in a private action, as for a tort, for any judgment given in the due course of the administration of justice, seems to be too well settled to require discussion." Hoosac Tunnel, Dock & Elev. Co. v. O'Brien, (1884) 137 Mass. 424, 50 Am. Rep. 323; Jones v. Brown, (1880) 54 Iowa 74, 6 N. W. 140, 37 Am. Rep. 185; Yates v. Lansing, (1810) 5 Johns. (N.Y.) 282; Howe v. Mason, (1863) 14 Ia. 510; Hilliard, Torts, 3rd ed., II, Chap. 28, p. 171; Grove v. Van Duyn, (1882) 44 N. J. L. 654.

to the very existence of the judicial office; for a judge could not be respected or independent if his motives for his official actions were continually called to account in suits by malignant and disappointed litigants. Again, the reasons justifying the rule have been frequently stated as arising out of considerations of public policy and in a disposition of the courts to maintain the dignity of judges and the sanctity of judicial tribunals.[2]

Upon the existence or nonexistence of jurisdiction, however, depends immunity from, or liability for, acts done by a person while acting in the judicial capacity.[3] Where the jurisdiction of the person and the subject matter is complete, the authorities are uniform that personal immunity attaches, even though the act complained of be done mala fide. But if the limits of this authority are exceeded, liability will attach, according to good authority.[4] It necessarily follows, therefore, that courts of general jurisdiction have greater protection than those of limited or special jurisdiction, and a distinction has been attempted on this basis, but the better reasoning is that this classification is not a safe criterion. There is, for instance, a line of cases where it was necessary for the judge to decide whether he had jurisdiction or not, in which it was generally held that the rule of personal immunity there attached for errors in judgment.[5] From these legal conditions and limitations, therefore, it may be laid down as a rule that personal immunity attaches to judges, from the highest to the lowest, when acting actually or colorably within their jurisdiction, whether it be general or special.

This rule, moreover, has been extended and applied to public officers, not judges, who, in the exercise of their duties, are required to perform quasi-judicial functions.[6] As an example

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[2] See note 1, supra.

[3] See note, Personal Liability of Judges and Judicial Officers, 137 Am. St. Rep. 47.

[4] See note, 137 Am. St. Rep. 53; see note 1, supra; note, 14 L. R. A. 138; Cooley, Torts, 417.

[5] See note, 14 L. R. A. 138. See statement by Beasley, C. J., at page 660, in Grove v. Van Duyn, note 1, supra: "Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong."

[6] Stevens v. Carroll, (1905) 130 Ia. 463, 104 N. W. 433; Downer v. Lent, (1856) 6 Cal. 94, 65 Am. Dec. 489.

of a quasi-judicial board or tribunal coming under the rule, a board of pilot commissioners is held not liable civilly.[7] The court say: "They are public officers to whom the law has entrusted certain duties, the performance of which requires the exercise of judgment. They are unlike a ministerial officer, whose duties are well defined, and who must fail to execute them properly at his own peril. Whenever, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment." So also, a fish inspector,[8] a county treasurer,[9] assessors, and many others.[10] It will be noted that in all of these cases the public is vitally interested.[11] In fact, they are either officers appointed or elected by the people or their representatives. In other words, the same reasons which justify the rule of immunity in the case of judges, etc., apply to this latter line of cases. The protection is not extended to the judge for his own sake, but because the public interest requires full independence of action and decision on his part, uninfluenced by a fear of the consequences. And though, as in the case of judges, there is a slight difference of opinion as to the elements of malice and corruption, it is pretty well settled that if a quasi-judicial officer acts within his jurisdiction and in good faith, he will be protected to the same extent as judges.[12]

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[7] Downer v. Lent, note 6, supra.

[8] Fath v. Koeppel, (1888) 72 Wis. 289, 39 N. W. 539, 7 Am. St. Rep. 867.

[9] Stevens v. Carroll, note 6, supra; Yates v. Lansing, note 1, supra.

[10] Steele v. Dunham, (1870) 26 Wis. 393; Harrington v. Commissioners of Roads, (1823) 2 McCord (S.C.) 400; Raymond v. Fish, (1883) 51 Conn. 80, 50 Am. Rep. 3; and in determining what property is subject to, and what exempt from, taxation, Barhyte v. Shepherd (1866) 35 N. Y. 237; so also, a board of registration of voters in passing upon the right of a party to be registered or not. Fausler v. Parsons, (1873) 6 W. Va. 486; 20 Am. Rep. 431; and a county superintendent of schools in granting or refusing license to teach. Elmore v. Overton, (1886) 104 Ind. 548, 4 N. E. 197.

[11] Fath v. Koeppel, note 8, supra, at page 293: "This is a high and responsible judicial power, as it concerns the public health, and as it may affect the rights of property; and the officer exercising such a power is within the protection of that principle, that a judicial officer is not responsible in an action for damages to anyone for any judgment he may render, however erroneously, negligently, ignorantly, corruptly, or maliciously he may act in rendering it, if he act within his jurisdiction."

[12] See note, 137 Am. St. Rep. 47, 50.

In a recent case in Minnesota,[13] the court held that the board of directors of an incorporated live stock exchange, when acting upon charges against a member of the exchange, are protected by the rule that an action for damages does not lie against one whose acts, however erroneous they may have been, were done in the exercise of quasi-judicial authority clearly conferred, no matter by what motives they may have been prompted. The court say that when one of the charter powers of the association is to arbitrate controversies between its members, voluntarily such, the committee of arbitration, when acting within its jurisdiction and in regular form, is a quasi-judicial body and immune from personal liability for its acts, thus bringing such persons within the rule conferring absolute immunity upon judicial officers. In other words, it declares that the acts of a body like the above, merely a committee of a private corporation, having no public functions at all, and who act corruptly, maliciously, and under color of official sanction, are entitled to the same privilege of protection as the judiciary.

The case of *Evans v. Chamber of Commerce*[14] is cited by the court in support of the statement that a board or committee of arbitration is a quasi-judicial body and is entitled to immunity within the spirit of the rule. But that decision does not support the proposition that an action cannot be maintained for damages by an aggrieved person. In that case, the only point considered was the power of an association to expel a member; it arose in a suit for reinstatement, where the whole proceeding was held to have been according to the by-laws of the corporation. And no one will seriously contend but that where a corporation is authorized by statute to prescribe proper rules and regulations for the government of the board, these rules and regulations are valid and the board is clothed with quasi-judicial powers to aid in their enforcement. There is a long line of cases in which the aggrieved member asks the civil court for a writ of mandamus to compel reinstatement after expulsion.[15] The general principles of this class of cases are well settled. It is generally held that the decision of the tribunal is conclusive of the merits of the action

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[13] Melady v. South St. Paul Live Stock Exchange, (Minn. 1919) 171 N. W. 806.

[14] (1902) 86 Minn. 448, 91 N. W. 8. The action was for damages as well as reinstatement, but the discussion by the court is confined to the latter.

[15] See note, 49 L. R. A. 353, and cases there cited.

and that the civil court will only inquire into the jurisdiction of the tribunal and the regularity of the proceedings under which the hearing was had, including those cases where bad faith or abuse of power is shown.[16]

But does the reason for immunity apply with equal force to suits for corrupt or malicious acts against these private arbitration commissions? It is quite true that such boards exercise judicial functions in acting under the powers conferred upon them by their charter, but it is here submitted that the interest of the public is not vitally affected, nor are the members accountable to the state for malfeasance in office. Their authority is obtained by agreement in the process of organization and there is no doubt that their rules are valid and enforceable,[17] but when these rules are abused in enforcing them through malice, and personal and property rights are thereby infringed, it seems that the aggrieved party should have a remedy in the civil court. The law has always frowned upon malice and bad faith. Judicial opinion has even sometimes distinguished between judges and public quasi-judicial officials on this point.[18] To extend this immunity, which is conceded to be politic where a reason therefor exists, to private arbiters seems a misconception of its purpose, an enlargement of its scope, and the wresting of a legal principle to an end never contemplated by its originators.[19] Where to draw the line is, of course, difficult, but it would seem that the rule should not be extended beyond those officers who have the welfare of the public in their hands, and that an action for damages should lie against private committees if a direct showing of malice or corruption is made, resulting in a deprivation of the rights of a person aggrieved.

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[16] Courts have the power to correct abuses resulting from the unwarranted procedure of a committee of a board of trade, where property rights are involved. Ryan v. Cudahy, (1895) 157 Ill. 108, 41 N. E. 760, 48 Am. St. Rep. 305, 49 L. R. A. 353. When a person becomes a member of an exchange whose charter provides a method for adjusting difficulties and settling conflicting demands, he assents to the scheme adopted, and in the absence of fraud, imposition, or gross injustice, will not be heard to impeach in the courts the validity of the decision over him, nor can the courts examine the merits of the controversy. National League of Commission Merchants v. Hornung, (1911) 132 N. Y. Supp. 871; see note, 49 L. R. A. 353, and cases there cited.

[17] Ryan v. Cudahy, note 16, supra.

[18] Note, 137 Am. St. Rep. 47, 52.

[19] See note 1, supra. No suggestion of extension in Bradley v. Fisher, the leading case.

WHAT CONSTITUTES CHAMPERTY?—Champerty and maintenance are two closely allied vices, the rules prohibiting them beginning in the common law. Their origin as crimes dates back to the Statutes of 32 Henry VIII designed to make champerty and maintenance punishable offences. Even in the early development of the law there was no uniformity among the authorities as to what constituted champerty, but all authorities were agreed, and now are, that such contracts are void. Coke's definition of champerty is somewhat comprehensive, viz., "to maintain to have part of the land or anything out of the land or part of the debt, or other thing in plea or suit." [1] Blackstone confines champerty to "a species of maintenance, ... being a bargain with a plaintiff or defendant campum partire, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champerter is to carry on the party's suit at his own expense." [2] The modern authorities are divided along these two different lines. A review of the American cases shows that Coke's definition is quite generally accepted among the earlier authorities.[3] The recent decisions [4] adopting the rule that a prospective agreement looking to the division of the amount recovered constitutes champerty are very rare. Massachusetts has taken the stand that an agreement that an attorney shall receive a part of the recovery does not constitute champerty, unless it also contains a further element that the attorney's services shall not constitute a debt from the client to the attorney either before or after recovery, but that the attorney must look solely to the recovery for compensation.[5]

The other view that is more widely followed by recent decisions, in fact by the great majority,[6] is in accord with Blackstone's definition requiring not only an agreement that the attorney shall share in the recovery, but also that he shall undertake to pay the expenses of the suit. Agreements to the effect that the plaintiff shall not settle the case without the consent of his

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[1] Co. Litt. 368b.

[2] Blackstone Com., IV, p. 135.

[3] Rust v. Larue, (1823) 4 Litt. (Ky.) 412, 14 Am. Dec. 172; Key v. Vattier, (1823) 1 Ohio 132; Backus v. Byron, (1857) 4 Mich. 535, now changed by statute abolishing champerty; Thurston v. Percival, (1823) 1 Pick. (Mass.) 415.

[4] Hadlock v. Brooks, (1901) 178 Mass. 425, 59 N. E. 1009; Gargano v. Pope, (1904) 184 Mass. 571, 69 N. E. 343.

[5] See Hadlock v. Brooks, supra.

[6] Peck v. Heurich, (1897) 167 U. S. 624, 42 L. Ed. 302, 17 S. C. R. 927; Geer v. Frank, (1899) 179 Ill. 570, 53 N. E. 965; Moreland v. Devenney, (1905) 72 Kan. 471, 83 Pac. 1097.

attorney are always held champertous, because they give the attorney a pecuniary interest in the case, whereas he should in conformity to good legal ethics be a disinterested party aside from his client's success.[7]

As the law against champerty is one grounded in public policy, the modification of the law as to champerty has been necessitated by public policy. With a rule of law in existence prohibiting an attorney from taking a case if he were to share in the recovery, it practically would be impossible for a poor client to obtain good counsel, especially in a case against a corporation with trained and experienced attorneys. If the experienced counsel could not obtain a fee greater than a nominal sum, he would refuse the case, and if the injured client had to pay more than a nominal sum he would be compelled by circumstances to forego pressing his claim, or employ inexperienced counsel; and being thus between the horns of a legal dilemma, he would probably lose out in either case. To accomplish justice for poor clients, public policy necessitated the removing of the severer restrictions in the law of champerty to the extent of allowing an attorney to take a case with the inducement of obtaining a percentage of the recovery, provided he did not undertake to pay the expenses, thus legalizing the contingent fee which the majority of the courts now recognize as legitimate.[8]

The Michigan court in an early case [9] pointed out the inconsistency of legalizing a contingent fee so that an attorney receives, perhaps, one-third of the recovery in event of success and nothing in the event of failure, in which case the attorney pays the expense, and at the same time of prohibiting as champertous an agreement by an attorney to share in the recovery and to pay the expenses. An inspection of the authorities would seem to reveal that contracts of such a nature are only champertous when the attorney specifically undertakes to pay the expenses. The Minnesota court takes this view in *Johnson v. Great North-*

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[7] Huber v. Johnson, (1897) 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; Davis v. Webber, (1899) 66 Ark. 190, 49 S. W. 822, 74 Am. St. Rep. 81, 45 L. R. A. 196; Papineau v. White, (1904) 117 Ill. App. 51.

[8] Davis v. Webber, supra; Robinson v. Sharp, (1903) 201 Ill. 86, 66 N. E. 299.

[9] Backus v. Byron, note 3, supra, held the contingent fee invalid because the attorney assumed in effect to pay the expenses in event of failure; however, this case has been repudiated by statute legalizing the contingent fee and practically abolishing champerty.

ern Ry. Co.[10] However, there can be no denying the logical consistency of the Massachusetts courts in holding that if the payment of the expenses by the attorney is to constitute a personal obligation between the attorney and the client, in the nature of a loan to be repaid, the contract is valid, but if there is to be no personal obligation, but the advance is in the nature of a gift, speculative upon success, it is champertous.

For the sake of clearness, it may be well, before considering the Minnesota cases, to distinguish from champerty the closely associated forms of barratry and maintenance. Maintenance, also of common law origin, is defined as "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it."[11] Barratry, on the other hand, is the "offence of frequently exciting and stirring up suits and quarrels. . . ."[12] All three forms have a logical sequence and an interdependence upon one another,—barratry, by which suits are stirred up; maintenance, by which they are kept alive; and champerty, by which the sums recovered are divided after obtaining judgment. These different vices are seldom found separate, but are more or less intermingled.

The Minnesota courts have taken a perplexing position upon the subject of champerty. The cases of *Gammons v. Johnson*[13] and others recognize the prevailing rule of law. In that case objections were sustained at the trial to the defendant's offer to prove (1) that the plaintiff's attorney solicited the case through an agent, and (2) that the plaintiff agreed not to settle without the consent of the agent. This was held error by Justice Mitchell in the following language: "A course of conduct on the part of either an attorney or a layman more obnoxious than this to public policy, as involving champerty, maintenance, and barratry, cannot be well imagined." The later case of *Johnson v. Great Northern Ry. Co.*,[14] is a direct contrast. There, against objections which were sustained, the defendant offered to prove the following: (1) that the attorney solicited the case; (2) that the attorney encouraged the bringing of the suit by assuring large damages, in order to discourage individual settle-

[10] (1915) 128 Minn. 365, 151 N. W. 125.
[11] Blackstone Com., IV, p. 134.
[12] Ibid. See Dorwin v. Smith, (1862) 35 Vt. 69; Andrews v. Thayer, (1872) 30 Wis. 228.
[13] (1899) 76 Minn. 76, 78 N. W. 1035.
[14] Note 10, supra.

ment; and (3) that the attorney paid the plaintiff some money for living expenses until a settlement might be had. On appeal this was held no error. Justice Bunn gave these reasons for this decision: first, that in absence of a statute it was not illegal or against public policy for an attorney to solicit a case; and second, that an agreement between an attorney and his client by which the former was to advance money for living expenses and hospital bills, but was to be permitted to deduct the amount thereof from the amount recovered, is not against public policy, where it does not appear that it was agreed that the client should not be liable for the expenses in case there was no recovery. But in the recent case of *Anker v. Chicago, etc., R. Co.*,[15] where an attorney sought by intervention to enforce a lien, and there being evidence tending to show that the case was solicited for the attorney by a layman upon a contingent fee, and that the layman was to share in it, the trial court ordered judgment for the attorney. The judgment was reversed on appeal, Justice Bunn holding that the evidence made an issue of fact which should have been submitted to the jury, as to whether Roe solicited the case in behalf of the attorney. The court, however, said: "It cannot be seriously questioned, and we do not understand counsel for intervener to contend to the contrary, that if Roe, a layman, solicited and procured the case for intervener, with the agreement that he was to share in the compensation received, intervener cannot prevail in his appeal to equity to grant him a lien. The authorities are entirely in accord on this proposition." While this case is not in harmony with the spirit of the *Johnson* case, it cannot be said to overrule it, since the only question involved is the one of fact concerning the means by which the case was procured. It did not appear that the attorney was to pay the expenses, nor that no settlement was to be made without plaintiff's consent.

The unfortunate departure from the trend of Minnesota authority shown in the *Johnson* case has, however, certain illustrative features. It shows the elasticity of legal phraseology and how the spirit is sometimes sacrificed to a form of words. It raises sharply this issue: when does an attorney undertake to pay the expenses, so as to render the contract champertous when accompanied by a provision for sharing the recovery? The court in that case held that a contract to advance moneys to

[15] (1918) 140 Minn. 63, 167 N. W. 278.

the client for living expenses, hospital bills, etc., is not champertous, where it does not appear to have been agreed that the client should not be liable for the expenses in case there was no recovery. This allows a practical evasion of the law where an attorney advances moneys to a client for expenses, being fully aware that the only means of being repaid is out of the suit. Is not this in essence allowing an attorney to speculate on the purchase of an interest in the client's suit, and therefore contrary to public policy? The advancing of court costs and court expenses is an ordinary practice. For reasons of necessity and convenience, such advances must be allowed. But the extension of the rule to permit the advance of living expenses opens the door wide to shystery and sharp practice. Under such a state of the law there would be no barratry, no maintenance, and no champerty. The practice of advancing moneys to clients to keep them from their work, and of maintaining them on crutches and in hospitals would become common. But the great difficulty lies in the fact that there is no practical way of stopping such practices, for when the agreement to advance the expenses is oral or implied, it is well nigh impossible to prove champerty. It is difficult to formulate a rule that will be satisfactory, and more difficult to apply it. The Massachusetts rule seems the most logical and practical. But any rule that may be adopted must conform to public policy; it must allow contingent fees and the advancing of legal expenses which are to remain personal obligations of the client; and it must prevent the making of advances in the nature of speculations and gifts which tend to foment suits and encourage maintenance and champerty. But to make any such rule effective it is necessary that there be a spirit in the law as well as a form. This places a duty upon the members of the legal profession to discourage in some effective manner practices of barratry, maintenance, and champerty. It is submitted that a stricter compliance with the following extract from the 28th Canon of the Code of Ethics of the American Bar Association would accomplish this end:

"It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries, or those having any other grounds

of action, in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office. . . . A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred."

LIFE INSURANCE—THE INCONTESTABLE CLAUSE.—The incontestable clause is peculiar to insurance contracts.[1] Its use became general because insurance companies saw that this stipulation, which is in the nature of a "short statute of limitation,"[2] by making the contract very much more attractive, greatly increased the volume of their business.[3] The clause usually provides either that the policy "shall be incontestable" after a certain period of time, usually one or two years, or that it shall be incontestable "after date." It must be borne in mind that the clause need not be absolute, that the insurer usually reserves some few defenses from its operation, the more common being: "this policy shall be incontestable, provided that all premiums that shall have become due shall have been paid," while others add the following: "except for fraud in the procurement," or "except for suicide." This anomaly in insurance law has been incorporated by the legislature into the standard policies, and the following quotation from a recent Indiana decision very concisely gives the reasons for the incorporation: "As the provision here was inserted pursuant to legislative enactment, it should not

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[1] Vance, Law of Insurance 530: "The incontestable clause, now so popular in life insurance contracts is an anomaly in contract law, and the decisions of the courts in determining its effect upon the conditions of the contract are quite as anomalous as the condition itself."

[2] Wright v. Mutual, etc., Assn., (1890) 118 N. Y. 237, 23 N. E. 186, 16 Am. St. Rep. 749, 6 L. R. A. 731; Murray v. State, etc., Ins. Co., (1901) 22 R. I. 524; 48 Atl. 800, 53 L. R. A. 742; Reagan v. Union, etc., Ins. Co., (1905) 189 Mass. 555, 76 N. E. 217, 109 Am. St. Rep. 659, 2 L. R. A. (N.S.) 821. In Clement v. New York Life Ins. Co., (1898) 101 Tenn. 22, 46 S. W. 561, 70 Am. St. Rep. 650, 42 L. R. A. 247, 27 Ins. Law Jour. 827, the court, quoting, said: "The practical and intended effect of the stipulation is to create a short statute of limitation in favor of the insured, within which limited period the insurer must, if ever, test the validity of the policy."

[3] Macgillivray, Insurance Law 875: "The object of this clause is to give the assured a feeling of absolute security in the validity of his policy and to render the policy more valuable as a marketable asset."

be presumed that back of it there was a purpose to give to either party an advantage over the other, but rather an intent to stipulate what was fair between them. As a practical proposition it can scarcely be said that such provision results in favor of one party to the exclusion of the other. Such a provision favors the insured, as it affords him a sense of security after the lapse of a limited time. It results in benefit to the insurer, as it enables him to point to it as a means of increasing the volume of business." [4]

In respect of time there are two kinds of incontestable clauses. The more prevalent of these is that which fixes a period of one year or more,[5] while the other and less used provides that the policy shall be incontestable from date. When adjudicating cases involving fraud in the inception of the contract, nearly all courts refuse to enforce the clause unless a reasonable time has been given the company to annul the contract. When a year or more is allowed before the policy becomes incontestable, practically all of the courts hold that fraud even in the inception of the contract will not be a cause for cancellation. In these cases the courts regard the provision as neither unreasonable nor contrary to public policy, as the insurer had ample time to discover the fraud.[6] But in most jurisdictions, where fraud exists in the inception of the contract, the courts refuse to enforce a clause making the policy incontestable from date,[7] for the insurer does not have sufficient time to investigate the facts. A few courts uphold such a contract on the ground that a sufficient time, before the date of the contract, is given for necessary investigation.[8] Joyce in his work on insurance, while discussing this question, sums it up in the following

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[4] Ebner v. Ohio State Life Ins. Co., (Ind. 1918) 121 N. E. 315.

[5] Macgillivray, Insurance Law 876; see "Clauses which have been judicially construed."

[6] Clement v. New York, etc., Co., note 2, supra; Philadelphia Life Ins. Co. v. Arnold, (1913) 97 S. C. 418, 81 S. E. 964; Wright v. Mutual Benefit, etc., Assn., note 2, supra; see note, 33 Ann. Cases 652. Contra, Union, etc., Ins. Co. v. Spinks, (1904) 119 Ky. 261, 26 Ky. L. Rep. 1205, 83 S. W. 615, 69 L. R. A. 264. In this case the court admits it is in a small minority, if not alone, when it says: "We are further aware that the provision is upheld by many courts, including the United States Supreme Court (Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386, 19 L. Ed. 257), and is approved by text writers."

[7] Duvall v. National Ins. Co., (1916) 28 Ida. 356, 154 Pac. 632; Reagan v. Union, etc., Ins. Co., note 2, supra.

[8] Union, etc., Ins. Co. v. Fox, (1901) 106 Tenn. 347, 61 S. W. 62, 82 Am. St. Rep. 885. Inference to same effect is found in Patterson v. Natural Premium, etc., Ins. Co., (1898) 100 Wis. 118, 75 N. W. 980.

words, "This point of reasonable time for insurer to investigate and ascertain his rights enters into most of the discussions by the courts, concerning the effect of such clauses, and it is expressly declared by the Illinois court [9] that fraud is no defense provided a sufficient time is given for such investigation by assurer, that is, the noncontest provision is hereby made qualifiedly valid, and it is also declared that the prescribed time must not be unreasonably short, as in Indiana.[10] So in Massachusetts [11] this distinction is considered under a clause making the policy incontestable from date of issue and wherein it was held that in so far as actual fraud was precluded as a defense the clause was void." [12]

The incontestable clause cannot bar the defense of want of an insurable interest.[13] Contracts of this kind are considered by the courts as a wager on the life of the insured and so void as against good public policy. It is a well settled doctrine that a policy of insurance, though declared to be incontestable, issued to one not having an insurable interest in the life of the insured is void, because the parties to such a vicious contract "cannot by stipulating that it shall be incontestable tie the hands of the court and compel it to enforce contracts which are illegal and void." [14]

In those states where the incontestable clause must be incorporated into the policy because of statutes [15] to that effect, the question naturally arises—is the insurer bound by the exact period provided for in the statute? If the insurer provides that the policy shall be incontestable in a shorter time than the statute allows, the stipulation is binding and valid.[16] But

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[9] Weil v. Federal Life Ins. Co., (1914) 264 Ill. 425, 106 N. E. 246, 44 Ins. L. J. 616, affirming 182 Ill. App. 322, to the effect that one year from date of issue is sufficient time to investigate the policy.

[10] Indiana Nat., etc., Co. v. McGinnis, (1913) 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N.S.) 192.

[11] Reagan v. Union, etc., Ins. Co., note 2, supra.

[12] Joyce, Law of Insurance, 2nd ed., V, p. 6112, Sec. 3733b.

[13] Vance, Cases on Insurance, see note 18, p. 59; also see the following cases cited in above note: Hall v. Coppell, (1868) 7 Wall. (U.S.) 558, 19 L. Ed. 244; Bromley's Adm'r. v. Washington Life Ins. Co., (1906) 122 Ky. 402, 28 Ky. Law Rep. 1300, 92 S. W. 17, 121 Am. St. Rep. 467, 12 Ann. Cas. 685, 5 L. R. A. (N.S.) 747. Contra, Wright v. Mutual, etc., Assn., note 2, supra.

[14] Bromley v. Washington Life Ins. Co., supra; Clement v. New York, etc., Ins. Co., note 2, supra.

[15] Minn. G. S. 1913, Secs. 3471, 3477.

[16] Citizens Life Ins. Co. v. McClure, (1910) 138 Ky. 138, 127 S. W. 749, 27 L. R. A. (N.S.) 1026, 39 Ins. L. J. 987; Duvall v. National Ins. Co., note 7, supra.

every court holds that the contract cannot be such as to extend the period beyond the time allowed by statute; but if the contract should so stipulate, that stipulation is void, and the statutory period controls.[17]

Some conflict exists respecting the beginning of the period limited by the incontestable clause when such date is not definitely stated. A number of courts hold that the period must be ascertained from the date of the policy, while others maintain that the period must be computed from the date of delivery and acceptance of the policy.[18] Likewise where the policy had been delivered and accepted, but stipulated that it should not be in force until the first premium was paid, and such premium was not paid until some days later, nevertheless it was held that the time during which the policy was deemed to be in force, within the meaning of the incontestable clause, should be computed from the date of the policy.[19]

The question may arise, if the insured should die within the contestable period, what form of action or proceeding may the insurer take to avoid the policy within the disputable period? This precise question arose in *Ebner v. Ohio State Life Ins. Co.*[20] The policy contained this provision: "After one year this policy shall be incontestable except for nonpayment of premiums." Claiming fraud in the inception, the insurer brought action after the death of the insured, and within the year, to cancel the policy. The beneficiary claimed that the insurer had only a negative defense, to be interposed in an action on the policy, as equity will not interfere to cancel a policy where the insurer has a good defense at law to an action on the policy. This contention is probably supported by the great weight of authority[21] if applied only to policies which do not contain the incontestable clause, but as to policies having this clause it is a

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[17] Joyce, Law of Insurance, 2nd ed., V, pp. 6119-6120, Sec. 3733e.

[18] Meridian, etc., Co. v. Milam, (1916) 172 Ky. 75, 188 S. W. 879, L. R. A. 1917B 103 and note; also see note, L. R. A. 1915F 703.

[19] Meridian, etc., Co. v. Milam, supra; see also Mutual, etc., Assn. v. Austin, (1905) 142 Fed. 398.

[20] Note 4, supra.

[21] The Sailors v. Woelfle, (1907) 118 Tenn. 755, 102 S. W. 1109, 12 L. R. A. (N.S.) 881, and note; Bankers Reserve Life Co. v. Omberson, (1913) 123 Minn. 285, 143 N. W. 735, 48 L. R. A. (N.S.) 265, note; Pacific Mutual, etc., Co. v. Glaser, (1912) 245 Mo. 377, 150 S. W. 549, 45 L. R. A. (N.S.) 222, note (insurer may maintain action to cancel policy before loss, but not after).

fallacy.[22] As the court states, "It is universally held, however, that recourse to equity may be had where the remedy at law is inadequate and does not afford the complaining party the relief to which he is entitled." [23] The inadequacy of the legal remedy is evident, since the beneficiary could refuse to bring suit until the contestable period had expired and thus bar the insurer from setting up the defense of fraud. Such was the intention of the beneficiary in the above cited case. But the court quickly disposed of the action by holding that such cases come within the jurisdiction of equity, and the insurer is permitted to contest the policy by affirmative action, after the death of the insured, provided, of course, that the action is brought within the contestable period.

IS A RATE SCHEDULE FOR GAS, INCLUDED IN FRANCHISE GRANTED BY MUNICIPALITY, SUBJECT TO CHANGE BY THE LEGISLATURE?—The proposition to be considered may, perhaps, best be treated under two main heads: I, Right of municipality to fix rates by legislative methods; II, Power to contract as to rates, as distinguished from power to regulate rates.

I. Right of Municipality to Fix Rates.

Since the case of *Munn v. Illinois*,[1] the legislative power to regulate charges or rates which may lawfully be demanded in a business "affected with a public interest" has become a settled rule of our constitutional system. In reality, it established no new principle, but only gave a "new effect to an old one." [2] The limitations on this right or power of regulation by the state legislature are the limits on the police power of the state, —no more, no less. In other words, if a regulation does not violate some specific constitutional provision, such as that against impairment of the obligation of contract, or the broader and more inclusive guaranties of equality and due process of law, it must be sustained.[3]

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[22] John Hancock, etc., Ins. Co. v. Houpt, (1901) 113 Fed. 572.
[23] Ebner v. Ohio, etc., Ins. Co., note 4, supra.
[1] (1876) 94 U. S. 113, 24 L. Ed. 77.
[2] Ibid.
[3] See 33 L. R. A. 177, note.

This power of regulation may be delegated: (a) to a commission;[4] or (b) to a municipality.[5] However, the regulation of rates for public service, being part of the police power of the state, and a municipality having only such part of the police power as may be granted to it by the legislature in express terms, or by necessary implication, a municipality, as such, has no inherent power to regulate.[6] As stated by a leading authority on public utilities, " . . . . the courts will not presume that such a right is vested in the municipality unless it has been granted by the legislature expressly or by clear implication." [7] A municipality being simply a political subdivision of the state, whose powers are delegations of legislative authority, any portion of the police power which has been given to it may be withdrawn from it, and rates established may be modified by the legislature without impairing the obligation of contract.[8]

II. Power to Contract as Distinguished from Power to Regulate Rates.

In order thoroughly to understand the cases dealing with rates for public service, one must keep clearly in mind the vital distinction between regulation of rates by legislative methods and contracts as to rates entered into between the municipality and the public service corporation.[9] The former, as has been stated, is an exercise of the police power, legislative in nature,[10] subject to change by the state legislature as the repository of the ultimate police power of the state.[11] The latter is an exercise of one of the business powers of the municipality. "The purpose of such a contract is not to regulate rates, for there are no rates to regulate." [12]

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[4] State v. Chicago, etc., Ry. Co., (1888) 38 Minn. 281, 37 N. W. 782, reversed on different grounds, (1889) 134 U. S. 418, 33 L. Ed. 970, 10 S. C. R. 462.

[5] Rogers Park Water Co. v. Fergus, (1899) 178 Ill. 571, 53 N. E. 363; affirmed (1901) 180 U. S. 624, 45 L. Ed. 702, 21 S. C. R. 490.

[6] Bluefield Water Works & Impvt. Co. v. Bluefield, (1911) 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N.S.) 759; Minneapolis Genl. Elec. Co. v. Minneapolis, (1911) 194 Fed. 215, 218.

[7] Pond, Public Utilities, Sec. 418.

[8] Boerth v. Detroit City Gas Co., (1908) 152 Mich. 654, 116 N. W. 628.

[9] Louisville & Nashville R. Co. v. Mottley, (1910) 219 U. S. 467, 482, 55 L. Ed. 297, 31 S. C. R. 265, 34 L. R. A. (N.S.) 671.

[10] Knoxville v. Knoxville Water Co., (1908) 212 U. S. 1, 53 L. Ed. 371, 29 S. C. R. 148.

[11] Mount Pleasant v. Beckwith, (1879) 100 U. S. 514, 25 L. Ed. 699.

[12] Omaha Water Co. v. Omaha, (1906) 147 Fed. 1, 12 L. R. A. (N.S.) 736.

Clearly, the legislature may expressly grant the municipality the power of stipulating for certain rates in return for the use of the streets. The principal difficulty arises in connection with the circumstances under which such power will be implied. It has been held that the power "to provide for supplying the city with water" is sufficient to sustain a contract with a water company in respect to rates to be charged consumers.[13] Similarly, where the power is granted a city to contract for the construction and operation of waterworks "on such terms and under such regulations as may be agreed on," the municipality may contract for the rates to be charged by the public service corporation.[14] Where a municipality has power to refuse the use of its streets to public service corporations, and it grants the use of its streets under a contract which stipulates for certain rates to be charged private consumers, it has been held that the possession of the power to impose conditions on granting the franchise includes the power to fix rates in the contract.[15] The court said, in *Shreveport Traction Co. v. Shreveport*,[16] that though there existed no legislative authorization for municipal contracts for the establishment of rates, yet "such power necessarily flows from the statutory prohibition that no railroad shall be constructed through the streets of any incorporated city without the consent of the municipal council thereof, and from the general power of regulating the use of the streets." A United States Supreme Court decision[17] is authority for the proposition that a city may contract for rates where a statute provided that street railroads should not be constructed until the council "by ordinance shall have granted permission and prescribed the terms and conditions."

The foregoing cases sufficiently indicate the trend of the decisions in implying a right to fix rates by contract as distinguished from regulation by legislative methods. Several features of this contractual power are next to be considered. First, it will be noted that such contractual stipulations are in derogation of the legislature's right of control and regulation: they

[13] Los Angeles City Water Co. v. Los Angeles, (1898) 88 Fed. 720, affirmed, (1900) 177 U. S. 558, 44 L. Ed. 886, 20 S. C. R. 736.

[14] See note 12.

[15] Noblesville v. Noblesville Gas & Impvt. Co., (1901) 157 Ind. 162, 60 N. E. 1032.

[16] (1908) 122 La. 1, 47 So. 40.

[17] Cleveland v. Cleveland St. Ry. Co., (1903) 194 U. S. 517, 18 L. Ed. 1102, 24 S. C. R. 756.

suspend that right for the time being. Consequently, such contracts must be for a reasonable time only.[18] Secondly, if a municipality has the power, express or implied, to make a contract fixing the rates which may be charged by a public service corporation and such contract actually has been entered into between the municipality and the public service corporation, such contract is protected by the contract clause of the federal constitution, and cannot be impaired by a subsequent reduction of the rates, unless such right is reserved by the municipality.[19] Such right is not reserved by the fact that a franchise granted to a street railway company reserves the right of future control as to "construction, maintenance and operation of the lines of the company." [20] Finally, such a contract between a municipality and a public utility corporation will not be raised by mere implication.[21]

In a recent New York case,[22] the question is raised whether a public service commission, in which the legislature has vested its rate-making power, has authority to permit a public service corporation to raise its rates, increased costs of production and changed conditions having made them confiscatory. This presents the converse of the cases previously considered, for in them the attempt, in each case, was made by the municipality to reduce rates already established by contract. The instant case presents a proceeding on the relation of the village of South Glen Falls, New York, to restrain an increase in rates. In 1900 the village granted the United Gas, Electric Light and Fuel Company a fifty year franchise. In the franchise was a stipulation that the company was to charge no more than $1.25 a thousand cubic feet for gas. The cost of manufacturing rose greatly, whereupon the company raised its rates. The village complained to the state public service commission, which dismissed the complaint. This was reversed on appeal. The question is whether the commission has power to regulate rates irrespective of the franchise provision. The court said, "But

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[18] Home Teleg. & Tel. Co. v. Los Angeles, (1908) 211 U. S. 265, 53 L. Ed. 176, 29 S. C. R. 50.

[19] Ashland v. Wheeler, (1894) 88 Wis. 607, 60 N. W. 818; Los Angeles City Water Co. v. Los Angeles, (1900) 103 Fed. 711.

[20] Minneapolis v. Minneapolis St. Ry. Co., (1909) 215 U. S. 417, 54 L. Ed. 259, 30 S. C. R. 118, affirming 155 Fed. 989.

[21] See note 12.

[22] People v. Publ. Serv. Com., (N.Y. 1919) 121 N. E. 777.

the regulations regarding rates which municipalities may impose in granting licenses or permission to use its streets by public service corporations cannot be said to form contracts beyond the inherent police power of the legislature to modify for the public welfare. Reason dictates that such arrangements could not be contracts falling within the constitutional provisions against abrogation." [23]

The authority of the city, in this case, to annex terms to the franchise is to be found in Art. 7, Sec. 61, subd. 1, of the Transportation Corporations Law.[24] This gives to gas companies the power "to lay conductors for conducting gas through the streets, ... in each such city, village and town, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe." A comparison with the language used in other statutes construed in the cases previously considered herein, in which the right to contract for rates has been implied, will show that this language is quite within the scope of such an implication. Such being the case, it is submitted that the decision in *People v. Public Service Commission* is wrong.

The court, it is true, speaks of the arrangement with the public service company as a license or permission, which, of course, is subject to alteration by the legislature. But the court apparently has missed the distinction between rate regulation by legislative methods and contracts for rates.

In several quite recent cases,[25] a public service commission has been held authorized, under proper circumstances, to raise rates to the point of fairness, notwithstanding they had been fixed in a contract with the municipality. However, in neither case cited did the municipality have power so to contract.

The most recent decision on this matter was handed down by the United States Supreme Court in April of this year.[26] In this case there was a contract for twenty-five years between the Columbus Railway, Power and Light Company and the city of Columbus, Ohio, obligating the grantee to furnish the service contemplated for that period, and to issue and sell eight

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[23] Ibid, p. 778.

[24] N. Y. Consol. Laws 1909, V, Chap. 63, p. 4400.

[25] Dawson v. Dawson Tel. Co., (1911) 137 Ga. 62, 72 S. E. 508; State v. Sup. Ct. for King County, (1912) 67 Wash. 37, 120 Pac. 861.

[26] Columbus Ry., Power & Light Co. v. Columbus, U. S. Sup. Ct. Adv. Ops. (1918-19) 416.

tickets for twenty-five cents and give universal transfers. Abnormal conditions having made the contract unprofitable, the company served a written notice of surrender of the franchises upon the city. This surrender not having been accepted, the company brought a bill for an injunction against the city to restrain it from compelling the company to go on under the contract, alleging that to do so would result in confiscation of its property, and that to go on was, under the circumstances, not only impracticable but impossible. The Supreme Court held that a municipality acting under state authority may, by ordinance, make a valid binding contract of this nature, which is mutually binding for the period named. The court went on to say that unforeseen difficulties will not excuse performance; where the parties have made no provision for a dispensation, the terms of the contract must prevail.

It is conceived that this is the correct doctrine of contract law to be applied.

RECENT CASES

BILLS AND NOTES—GUARANTY OF PAYMENT—RELEASE OF PRINCIPAL DEBTOR BY STATUTE OF LIMITATIONS—EFFECT UPON LIABILITY OF GUARANTOR.—The promissory note sued upon was payable six months from date, and the defendant wrote the following guaranty upon it before delivery: "For value received we hereby guarantee the payment of the within note at maturity, waiving demand, notice of non-payment, and protest." No action was taken against the maker or his estate and it became barred as to him by the statute of limitations. The guarantor was for a portion of the time a non-resident, so that the statute had not yet run as to him, and this action was brought on his guaranty. *Held*, that the defendant as guarantor was discharged under that section of the Iowa statutes which provides that a person secondarily liable on the instrument is discharged by the discharge of a prior party. *First National Bank v. Drake*, (Iowa 1919) 171 N. W. 115.

Even in the absence of this statute, the Iowa court doubtless would have reached the same conclusion. In the leading case of *Auchampaugh v. Schmidt*, (1886) 70 Iowa 642, 27 N. W. 805, 59 Am. Rep. 459, where the action was against a surety in circumstances similar to the instant case, the court held that a debt barred by the statute of limitations as to the principal debtor was barred also as to the surety. This view is supported by *Bridges v. Blake*, (1885) 106 Ind. 332, 6 N. E. 833; and *Siebert v. Quesnel*, (1896) 65 Minn. 107, 67 N. W. 803, 60 Am. St. Rep. 441. In the Minnesota case the plaintiff failed to present his claim on the note against the estate of the principal debtor within the period pre-

scribed by statute, whereby it was barred as against the principal. The court held that it amounted to a voluntary release of the estate and must have the effect of releasing the surety from personal liability. Many states, however, take the opposite view and hold that where the statute has not yet run against the surety he cannot avail himself of the fact that it has run in favor of the principal, but is liable. *Villars v. Palmer*, (1873) 67 Ill. 204; *Bull v. Coe*, (1888) 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; *Willis v. Chowning*, (1897) 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842. This latter view represents the weight of authority. Spencer, Suretyship, p. 285. The ground upon which the surety is held liable in these cases is that he had it in his power to pay the debt and then proceed against the principal, or to have gone into equity and obtained a decree that the principal pay the debt due. *Villars v. Palmer*, supra. In Minnesota, a guarantor who before maturity unconditionally guarantees the payment of a promissory note becomes absolutely liable upon default of the maker. *Hungerford v. O'Brien*, (1887) 37 Minn. 306, 34 N. W. 161. In view of this absolute liability, the courts of this state have not been inclined to draw any distinguishing line between the liabilities of sureties and guarantors. They have even permitted an absolute guarantor to be sued jointly with the makers of the note as a party liable on the same instrument with the maker. *Hammel v. Beardsley*, (1883) 31 Minn. 314, 17 N. W. 858. The Minnesota courts have regarded the liability of guarantor and surety as similar for all practical purposes. The distinction, however, may become of great importance under the Negotiable Instruments Law, which in Sec. 192 (Minn. Gen. St. 1913, Sec. 6004) declares, "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable," and in Sec. 120 of the act (Minn. Gen. St. 1913, Sec. 5932) provides that "A person secondarily liable on the instrument is discharged by the discharge of a prior party." The terms "primary" and "secondary" when applied to parties to an obligation refer to the remedy provided by law for enforcing the obligation rather than to the character and limits of the obligation itself. *Kilton v. Providence Tool Co.*, (1901) 22 R. I. 605, 48 Atl. 1039. It has been decided that under the Negotiable Instruments Law the surety is a person primarily liable on the instrument. *Vanderford v. Farmers' Bank*, (1907) 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N.S.) 129, and note; *Cellers v. Meachem*, sub nom. *Cellers v. Lyons*, (1907) 49 Ore. 186, 89 Pac. 426, 10 L. R. A. (N.S.) 133. But the contract of guaranty is considered a separate liability and, although it may result in the guarantor paying the note, it is not predicated upon the terms of the instrument, and the guarantor must be considered a party secondarily liable under the Negotiable Instruments Law, even though he be an absolute guarantor. *Northern State Bank v. Bellamy*, (1910) 19 N. D. 509, 125 N. W. 888. Since in the instant case the defendant was a guarantor and, in view of these cases, secondarily liable, and since the prior party had been discharged by the statute of limitations, the discharge of the defendant seems reasonably to follow from that portion of the statute which provides that a person secondarily liable on the instrument is discharged by the discharge of a prior party.

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES—EVIDENCE OBTAINED BY UNLAWFUL SEARCH—RETURN OF PROPERTY.—Defendant is the owner of a home in Wayne County, Michigan. While he was absent from the state, some officers of the county and town entered his home, without breaking locks or doors, and found and seized some liquor stored there. This was done without a search warrant and without the consent of the defendant. He was later charged with violation of Act 161, Public Acts, 1917. Upon his return, he was arrested and after examination was bound over for trial. In the circuit court the information was quashed, and the liquor ordered returned to him. A writ of error was sued out and in the supreme court it was *Held*, that this was an unauthorized trespass and an invasion of the constitutional rights of the person occupying the premises. That where it is made to appear before the trial that articles have been taken from the possession of the defendant by unlawful search and seizure, it then becomes the duty of the trial court to order the return of the articles. *People v. Marxhausen*, (Mich. 1919) 171 N. W. 557.

The section of the Michigan constitution referred to is in effect the same as the Fourth Amendment to the federal constitution. The latter is transcribed verbatim into the Minnesota constitution and is found in Section 10, Article I.

The effect to be given these constitutional provisions is a matter not entirely settled. The recent cases accept it as an established rule of law that evidence secured by search and seizure is admissible and that the lawfulness of the seizure will not be inquired into when offered at the trial. *Ripper v. United States*, (1910) 178 Fed. 24, 101 C. C. A. 24; *Lum Yan v. United States*, (1912) 193 Fed. 970, 115 C. C. A. 122; *State v. Rogne*, (1911) 115 Minn. 204, 132 N. W. 5. The principle underlying the decisions admitting the evidence is that an objection to the evidence at the time of trial would require the court to enter on the trial of a collateral issue as to the source from which the evidence was obtained. The remedy is found in making timely application to the court for an order directing the return to the applicant of the evidence unlawfully seized. Upon such an application, the question of the illegality of the seizure may be determined. This doctrine finds its basis in three United States Supreme Court cases. *Boyd v. United States*, (1886) 116 U. S. 616, 29 L. Ed. 746, 6 S. C. R. 524; *Adams v. New York*, (1904) 192 United States 585, 48 L. Ed. 575, 24 S. C. R. 372; and *Weeks v. United States*, (1914) 232 U. S. 383, 58 L. Ed. 652, 34 S. C. R. 341, L. R. A. 1915B 834, Ann. Cas. 1915C 1177. In the *Adams* case the question was raised collaterally at the trial, but in the *Boyd* and *Weeks* cases it was raised by direct proceedings. Accord, *Underwood v. The State*, (1913) 13 Ga. App. 206, 78 S. E. 1103, and *State ex rel. Murphy v. Brown*, (1914) 83 Wash. 100, 145 Pac. 69. In the latter case it was held that the rule did not apply where the owner voluntarily surrendered the property. Also, in *State v. Griswold*, (1896) 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227, the rule was not invoked, because an agent of the defendant allowed the police to enter the premises and to take the evidence. Contra, *Gindrat et al v. People*, (1891) 138 Ill. 103, 27 N. E. 1085; *Williams v. The State*, (1897) 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; *Commonwealth v. Tibbetts*, (1893) 157 Mass. 519, 32 N. E. 910. It must be borne

in mind that the above rule is not applicable in cases where instruments, weapons, etc., used in the commission of a crime are taken from the accused by an officer arresting him upon charge of having committed a crime. Such a seizure is not illegal.

In Minnesota there seems to be no case in which this question of evidence illegally obtained has been raised by direct proceedings. Several cases hold that when the question is first raised at the trial the court will not pause to try the collateral issue as to how the evidence came before the court. *State v. Strait*, (1905) 94 Minn. 384, 102 N. W. 913; *State v. Hoyle*, (1906) 98 Minn. 254, 107 N. W. 1130; *State v. Rogne*, supra.

CONSTITUTIONAL LAW—GAS—STATUTE FIXING RATES—TEMPORARILY UNCONSTITUTIONAL.—This was an action to restrain the city of Albany from compelling the plaintiff gas company to adhere to the maximum rate fixed by Laws 1907, Chap. 227. *Held*, though the statute was not confiscatory when enacted, where because of changing conditions the rate fixed precluded a fair return to plaintiff gas company, there is confiscation, and the plaintiff has a remedy in the courts and need not resort to a petition to the legislature to change the statute. Into the law must be read an implied condition that the rates shall remain in force at such times only as will not work a denial of the right to a fair return, and when the return falls below that level the law is suspended until the level is again obtained, when the duty of obedience revives. *Municipal Gas Co. v. Public Service Commission* (N.Y. 1919) 121 N. E. 772.

The rather startling doctrine here enunciated seems to be supported by no other adjudicated case. The court has cited no other case in point, but seizes hold of statements made in other cases wherein the *constitutionality* of statutory rate regulations has been attacked, saying that these statements are to the effect that in controversies of this order, experience is the final test, that the courts must bide their time, and let the workings of the law decide. *Willcox v. Consol. Gas Co.*, (1909) 212 U. S. 19, 53 L. Ed. 382, 29 S. C. R. 192, 15 Ann. Cas. 1034, and similar cases seem to bear out the proposition quoted. The New York court, in the instant case, states that bills to annul rates have been dismissed "without prejudice" while the outcome of operation under the rates fixed has remained uncertain; and subsequently bills to annul the same rates have been sustained when experience had shown such action necessary. *Northern Pacific Ry. Co. v. North Dakota*, (1915) 236 U. S. 585, 59 L. Ed. 735, 35 S. C. R. 429, L. R. A. 1917F 1148, Ann. Cas. 1916A 1. It is pointed out that leave has later been granted the appropriate representatives of the state to reinstate the rates so suspended so soon as changing circumstances permitted an adequate return under such rates. *Minnesota Rate Cases*, (1913) 230 U. S. 352, 473, 57 L. Ed. 1511, 33 S. C. R. 729, 48 L. R. A. (N.S.) 1151, Ann. Cas. 1916A 18. The result arrived at by this process of reasoning is, not that the statute being confiscatory is violative of the federal constitution, and therefore void, but that, present conditions being peculiar, the law may be suspended meanwhile. In other words, it seems that a statute may be *temporarily unconstitutional*, depending on conditions which subsequently arise. Apparently the court has taken into

consideration the evils aimed at when the law was passed, and considers them a condition precedent to the continuance in effect of the law. One is tempted to apply this test to some of the war legislation. It is submitted, however, that technically, at least, the doctrine is incorrect. A statute is or is not unconstitutional from the time it is passed until it is repealed; it cannot be one or the other with each rise or fall in the state of the market.

INTERNAL REVENUE—FORFEITURE OF PROPERTY USED IN VIOLATIONS—OWNER'S INNOCENCE.—The owner of an automobile sent an employee with it on a lawful errand. While on this errand, the employee used the automobile in removing and concealing distilled spirits on which the tax had not been paid, with intent to defraud the United States. The owner, claimant in this case, had no knowledge of the fact that his employee would use the automobile for any such purpose. *Held*, the automobile is subject to forfeiture under Rev. St. Sec. 3450 (Comp. St. 1916, Sec. 6352), despite the owner's innocence of any fraud. *United States v. Mincey*, (1918) 254 Fed. 287.

If goods are stolen from the owner or if a person has obtained possession of them fraudulently or without authority, no act of his can forfeit them as against the true owner. *The Lady Essex*, (1889) 39 Fed. 765 (dictum). Where a team and wagon were used for the conveyance of unstamped barrels of whiskey, being removed with intent to defraud the government of the tax thereon, in violation of Rev. St. Sec. 3450, without the knowledge or consent of a mortgagee, who, by reason of condition broken, was the legal owner of such team and wagon under the laws of the state and had taken proper steps to obtain possession thereof, the property is not subject to forfeiture as against him. *United States v. Two Barrels Whiskey*, (1899) 96 Fed. 479. The subject has been discussed generally in 2 MINNESOTA LAW REVIEW 141. The courts have repeatedly said that the forfeiture of goods for violation of revenue laws would not be imposed, unless the owner of the goods or his agent has been guilty of an infraction of the law, *United States v. Bags of Kainit*, (1889) 37 Fed. 326; *The Lady Essex*, supra. In cases where the thing forfeited is a thing which the owner knows is to be used in a business strictly regulated by law, as in *Dobbins' Distillery v. United States*, (1877) 96 U. S. 395, 24 L. Ed. 637; *United States v. Stowell*, (1889) 133 U. S. 1, 33 L. Ed. 555, 10 S. C. R. 244; *United States v. Two Hundred and Twenty Patented Machines*, (1900) 99 Fed. 559, there would seem to be more reason in forfeiting the goods regardless of the owner's innocence, for he is chargeable with knowledge of the consequence of the infraction of the laws. Yet cases have gone farther than that in forfeiting goods of innocent parties. In *The Frolic*, (1906) 148 Fed. 921, a chronometer on board a schooner which was forfeited for violation of the Chinese exclusion acts was held not to be exempt from forfeiture because of the fact that it was not the property of the owners of the vessel, but was leased to them by the owner to be used as a necessary part of a vessel's equipment. The principal case is another example of the extreme limit to which the courts have gone in applying and construing these revenue and other statutes providing for forfeiture of goods.

NEGLIGENCE—DAMAGES—ILLNESS RESULTING FROM FRIGHT.—The defendant, a private detective, in order to frighten the plaintiff into doing his bidding, made some false statements to her about her relations with an interned German, and about the latter's alleged activities as a spy. The plaintiff became sick from the nervous shock which this act occasioned, and sues for the damage sustained. The jury found that the statements made were not made with any malicious intent to injure the plaintiff, but that they were calculated to have that effect. *Held*, that the plaintiff has a cause of action. *Janvier v. Sweeney*, (K. B. Div. 1919) 35 Times Law Rep. 226.

The court considered itself bound by the decision in *Wilkinson v. Downton*, [1897] L. R. 2 Q. B. 57, 66 L. J. Q. B. 493, 76 L. T. 493, 45 Wkly. Rep. 525, but intimated that that case should be taken with the limitation that the plaintiff has a cause of action only when the fright which causes the injury is itself caused by a fear for the plaintiff's own personal safety. The doctrine that an action will lie for a wrongful act causing nervous shock and consequent physical illness is now the law in England and in many jurisdictions in this country. *Wilkinson v. Downton*, supra; *Dulieu v. White*, [1901] L. R. 2 K. B. 669, 70 L. J. K. B. 837, 85 L. T. 126, 50 Wkly. Rep. 76; *Sanderson v. Northern Pac. Ry. Co.*, (1902) 88 Minn. 162, 92 N. W. 542, 97 Am. St. Rep. 509, 60 L. R. A. 403; *Bucknam v. Great Northern Ry. Co.*, (1899) 76 Minn. 373, 79 N. W. 98; *Purcell v. St. Paul, etc., Ry. Co.*, (1892) 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; *Watson v. Dilts*, (1902) 116 Ia. 249, 89 N. W. 1068, 93 Am. St. Rep. 239, 57 L. R. A. 559. Many of these courts, however, place the same limitation on the rule as that suggested in the instant case. In Minnesota it is held that there can be no recovery where the nervous shock is not caused by a fear for the plaintiff's own safety. *Sanderson v. Northern Pac. Ry. Co.*, supra; *Bucknam v. Great Northern Ry. Co.*, supra. There are cases in some jurisdictions which do not recognize this limitation. *Hill v. Kimball*, (1890) 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618; *Engle v. Simmons*, (1906) 148 Ala. 92, 41 So. 1023; *Watson v. Dilts*, supra. But these cases have little following, and the law in most jurisdictions is certainly otherwise. See note, 77 Am. St. Rep. 867. Upon principle, however, it is difficult to understand why the limitation is insisted upon. The theory of the cases seems to be that there is no violation of any legal duty owed by the defendant to the plaintiff. Kennedy, J., in *Dulieu v. White*, supra, states the ground of the distinction as follows: "The shock, when it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A has, I conceive, no legal duty not to shock B's nerves by the exhibition of negligence toward C, or towards the property of B or C." But how is it material in what relation the act stands toward C? The real question is whether it is negligent toward B. Judge Cooley expresses what seems to be the sounder view: "But if there may be a recovery for physical injuries resulting from fright wrongfully caused by the defendant, it would seem that an assault committed in the view of a woman whose presence is known, especially upon a member of her family, was an act of negligence towards the woman, a failure to exercise the due care towards her

which the occasion and circumstances required, and was therefore a legal wrong against her which will support an action if damage follows." Cooley, Torts, 3rd ed., I, p. 98.

PAROL LICENSE—EXECUTED BY LICENSEE AT LARGE EXPENSE—IRREVOCABLE.—Plaintiff owned third floor and defendant owned first and second floors of a certain building. Defendant orally agreed with plaintiff to let the latter install steam, water, and sewer pipes to the third floor, which were then installed, with the knowledge of the defendant, at a cost of over $500. After several years the defendant seeks to revoke the license, and plaintiff brings this action to enjoin the removal of the pipes. *Held*, that the parol license having been executed at large expense to plaintiff, with full consent of defendant, it vested in plaintiff an irrevocable license to maintain improvements in as efficient a position as when installed. *Green v. Crain*, (Iowa 1919) 171 N. W. 574.

The view that executed parol licenses are irrevocable is an extension of the decisions relating to parol gifts of land. Where there is a parol gift of land, and the donee has taken possession and made valuable improvements, with the knowledge of the donor, in reliance upon the gift, the gift is enforced, the expenditures made being regarded as a valid consideration for the gift. *Hayes v. Hayes*, (1914) 126 Minn. 389, 148 N. W. 125; *Freeman v. Freeman*, (1870) 43 N. Y. 34, 3 Am. Rep. 657; *Bevington v. Bevington*, (1907) 133 Ia. 351, 110 N. W. 840, 9 L. R. A. (N.S.) 508. But when it is sought to extend this principle to a parol license which has been acted upon by the licensee and money expended by him, there is a division of authority. A few states in accord with the instant case hold that such parol license so acted upon is irrevocable. *Rerick v. Kern*, (1826) 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497; *Roush v. Roush*, (1900) 154 Ind. 562, 55 N. E. 1017; *Miller & Lux v. Kern County Land Co.*, (1908) 154 Cal. 785, 99 Pac. 179; *Shaw v. Proffitt*, (1910) 57 Ore. 192, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A 63, note. Many states, however, take the opposite view and hold that the license, even though acted upon, is revocable at the will of the licensor. *Pifer v. Brown*, (1897) 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497; *Hicks v. Swift Creek Mill Co.*, (1902) 133 Ala. 411, 31 So. 947, 91 Am. St. Rep. 38, 57 L. R. A. 720; *Yeager v. Tuning*, (1908) 79 Ohio St. 121, 86 N. E. 657, 19 L. R. A. (N.S.) 700; and note. This latter represents the majority view. Tiffany, Real Property, Sec. 304. It has also been held that though the license is in writing and has been acted upon by the licensee, it is nevertheless revocable, since it is a mere license. *Rodefer v. Pittsburg, etc., R. Co.*, (1905) 72 Ohio St. 272, 74 N. E. 183, 70 L. R. A. 844. The first view in effect makes the grant of a license become, by the making of expenditures by the licensee, the grant of an easement in the land. Tiffany, Real Property, Sec. 304. This would seem to permit the passing of an interest in land by parol, contrary to the Statute of Frauds. And such licenses can only become irrevocable where the courts have permitted the doctrine of estoppel to override the Statute of Frauds. *Nowlin Lumber Co. v. Wilson*, (1899) 119 Mich. 406, 78 N. W. 338. But public policy demands the opposite rule, that parol

licenses be revocable, in order that security and certainty may be given to titles, which it is most important should be preserved against defects and qualifications not founded upon solemn instruments. *Crosdale v. Lanigan*, (1892) 129 N. Y. 604, 29 N. E. 824, 26 Am. St. Rep. 551. Minnesota follows the majority rule and holds a parol license revocable even though acted upon by the licensee. *Johnson v. Skillman*, (1882) 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192. In *Wilson v. St. Paul, etc., Ry. Co.*, (1889) 41 Minn. 56, 42 N. W. 600, 4 L. R. A. 378, there is a dictum to the effect that a mere oral license to construct or maintain a drain across the licensor's land is revocable at any time, for, says the court, such a proposition necessarily follows from the law that interests in real estate cannot be created by parol.

WILLS—REVOCATION BY CANCELLATION.—Testator wrote on the margin of his will the following unattested notation: "Not any good, changed my mind," this notation not obliterating or intersecting any part of the will, though touching words "signed" and "sealed" in the attestation clause. *Held*, not a revocation by cancellation within the meaning of the statute. *Dowling v. Gilliland*, (Ill. 1919) 122 N. E. 70.

"The right to take property by devise or descent is the creature of the law and not a natural right." *Magoun v. Illinois Trust & Savings Bank*, (1898) 170 U. S. 283, 42 L. Ed. 1037, 18 S. C. R. 594. Nor is the right to make a will vested in one by reason of the constitution. *Patton v. Patton*, (1883) 39 Ohio St. 590. It is peculiarly within the power of the legislature to provide requisites essential for the validity of the will. *Blackbourn v. Tucker*, (1895) 72 Miss. 735, 17 So. 737. The mode of revocation as provided for by the legislature is exclusive. *Graham v. Burch*, (1891) 47 Minn. 171, 49 N. W. 697, 28 Am. St. Rep. 339. And the most evident intent of the testator to revoke his will, will be ineffectual, if not manifested as the law requires. *In re Penniman*, (1873) 20 Minn. 245, 18 Am. Rep. 368.

To constitute a cancellation within the meaning of the statute, there must be a striking or blotting out. *Dowling v. Gilliland*, supra. But it is not necessary that the words should be actually effaced in order to have an effectual cancellation. *Evans's Appeal*, (1868) 58 Pa. 238. Thus a statutory cancellation has been effected by drawing cross marks across the face of the will. *In re Alger's Will*, (1902) 38 Misc. Rep. 143, 77 N. Y. Supp. 166, or in drawing scrolls through the signature to the will, the signature remaining legible. *In re Philp's Will*, (1892) 64 Hun. (N.Y.) 635, 19 N. Y. Supp. 13; *Woodfill v. Patton*, (1881) 76 Ind. 575, 40 Am. Rep. 269; *Glass v. Scott*, (1900) 14 Colo. App. 377, 60 Pac. 186. Actual obliteration of the signature was held essential to a cancellation in *Gay v. Gay*, (1882) 60 Iowa 415, 14 N. W. 238, 46 Am. Rep. 78. This holding may be distinguished by reason that the Iowa statute requires a cancellation to be attested. It has been universally held, with the exception of *Warner v. Warner's Estate*, (1864) 37 Vt. 356, in jurisdictions in which the mode of revocation is expressly stated by statute, that an unattested memorandum, written upon the margin of the will, as in the instant case, purporting to revoke such a will, is ineffectual as a cancellation within

the meaning of the statute. *Ladd's Will*, (1884) 60 Wis. 187, 18 N. W. 734, 50 Am. Rep. 355; *Lewis v. Lewis*, (1841) 2 Watts & S. (Pa.) 455; *Howard v. Hunter*, (1902) 115 Ga. 357, 41 S. E. 638, 90 Am. St. Rep. 121. Where mode of revocation is not expressly formulated by statute, an unattested memorandum has been held sufficient. *Witter v. Mott*, (1816) 2 Conn. 67; *Billington v. Jones*, (1901) 108 Tenn. 234, 66 S. W. 1127, 56 L. R. A. 654, 91 Am. St. Rep. 751. The instant case is in harmony with the great weight of authority that the mere intention to revoke a will, expressed in writing upon the face of the will, which does not physically obliterate or cancel it, is not a cancellation within the meaning of the statute, although purporting to be such.

SUBJECT INDEX