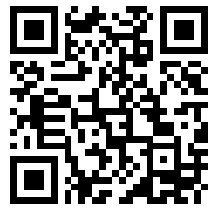

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SUPREME COURT DECISIONS ON FEDERAL POWER OVER COMMERCE, 1910-1914 I

By Thomas Reed Powell *

THIS paper and two to follow aim to present narratively such controversies over congressional power under the commerce clause as were adjudicated by the Supreme Court of the United States during the four terms of court beginning in October, 1910, and ending in June, 1914. To these are added the story of exercises of commerce power that were alleged to offend against constitutional limitations on the national government in favor of individual liberty and property. Mention is made, too, of the more important interpretations of the scope and effect of the acts of Congress under review. The footnotes assemble references to to articles and notes in legal periodicals during the quadrennium of the cases treated in the text. References appended to the citations of the Supreme Court cases are to discussions of those decisions or of the same cases or similar ones in other courts. References to other law-review material on congressional power over commerce are subjoined to such more or less appropriate places in the text as can be discovered. The four years from 1910 to 1914 are chosen not for any intrinsic significance but because the decisions of later years have been reviewed elsewhere[1] and it is convenient at this time to fill in the gaps of the work of the court under Chief Justice White. The method of treatment is ex-

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[1] Reviews of Supreme Court decisions from 1914 to 1921 appear in 12 Am. Pol. Sci. Rev. 17-49, 427-457, 640-666, 13 Am. Pol. Sci. Rev. 47-77, 229-250, 607-633, 14 Am. Pol. Sci. Rev. 53-73, 19 Mich. L. Rev. 1-34, 117-151, 283-323, and 20 Mich. L. Rev. 1-23. Reviews of Supreme Court decisions from 1910 to 1914 on state power over interstate and foreign commerce are begun in the current issue of the Columbia Law Review (December, 1921) and will be continued in succeeding issues.

pository only and not critical. This method is chosen, not from motives of modesty, but from a persuasion that there are advantages in allowing the Supreme Court to speak for itself and in leaving the reader to form his own judgments as to the merits of the results reached and of the reasons advanced in their support. Those who yearn to know what others have thought about it will find ample scope for their energies if they follow the trails pointed out in the references in the footnotes.[2]

I. COMMERCE AMONG THE SEVERAL STATES

1. *The Interstate Commerce Act and Its Amendments*

The authority to remove discriminations which was vested in the Interstate Commerce Commission by the Interstate Commerce Act of February 4, 1887, was held validly exercised in two cases against the objection that the subject matter regulated was not interstate commerce and so not within the control of the federal government. In *Southern Pacific Terminal Co. v. Interstate Commerce Commission*[3] one Young was the lessee of a pier and facilities of a terminal company under a contract whereby the payment of this stipulated rent relieved him from any other wharfage or terminal charges. Young bought raw materials in Texas and other states, shipped them to this wharf in Galveston where he transformed them into the finished product which he shipped to foreign ports on vessels loading at the wharf. This manufacture or concentration at the wharf was held to be but an incident in the whole process of buying supplies outside of Texas and shipping

[2] For articles on various aspects of the general problem of the relation between federal and state power over commerce see O. W. Catchings, "Recent Exercise of Federal Power Under The Commerce Clause of The Constitution," 1 Va. L. Rev. 44; Frederick H. Cooke, "Nature and Scope of the Power of Congress to Regulate Commerce," 11 Colum. L. Rev. 51, "The Source of Authority to Engage in Interstate Commerce," 24 Harv. L. Rev. 635; "The Gibbons v. Ogden Fetish," 9 Mich. L. Rev. 324, "The Use and Abuse of the Commerce Clause," 10 Mich. L. Rev. 93, "The Pseudo-Doctrine of the Exclusiveness of the Power of Congress to Regulate Commerce," 20 Yale L. J. 297, and "The Right to Engage in Interstate Transportation," 21 Yale L. J. 207; Ernst Freund, "Unifying Tendencies in American Legislation," 22 Yale L. J. 96; Frank B. Kellogg, "Federal Incorporation and Control," 20 Yale L. J. 177; Edward Lindsay, "Wilson Versus The 'Wilson Doctrine'," 44 Amer. L. Rev. 641; Joseph R. Long, "Unconstitutional Acts of Congress," 1 Va. L. Rev. 417; Victor Morawetz, "The Power of Congress to Enact Incorporation Laws and to Regulate Corporations," 26 Harv. L. Rev. 667; Charles W. Needham, "The Exclusive Power of Congress Over Interstate Commerce," 11 Colum. L. Rev. 251; Max Pam, "Powers of Regulation Vested in Congress," 24 Harv. L. Rev. 182; and Dorrance Dibell Snapp, "National Incorporation," 5 Ill. L. Rev. 414. In 5 Ill. L. Rev. 57, 123 various articles on interstate commerce are reviewed and criticized by Henry Schofield.

[3] (1911) 219 U. S. 498, 55 L. Ed. 310, 31 S. C. R. 279.

them through Texas to foreign points. The fact that the shipment was not on through bills of lading was held to make no difference. The contention that the lessor terminal company was not a public carrier was put to one side by pointing out that its entire stock was owned by a railroad company and that it owned the only track facilities for movement of cars to or from the ships, from or to the railroads leading to the pier. The pier and the railroads were united into and managed as an organized system. Young enjoyed preferential facilities which competing shippers were denied and these facilities were facilities of interstate commerce and so within the regulatory power of the national government.[4]

Houston, East & West Texas Railway Co. v. United States,[5] commonly called the *Shreveport Rate Case,* sustained an order of the Interstate Commerce Commission requiring certain railroads running between Louisiana and Texas points to remove discrimination against interstate commerce by raising rates for local transportation between Texas points. The Texas rates had been fixed by the Texas commission and so far as appears were remunerative. The rates from Louisiana to Texas had been approved by the Interstate Commerce Commission as not unreasonable. They were, however, higher in proportion to distance than the local Texas rates and therefore operated to the disadvantage of Louisiana communities. Or, put in another way, the Texas rates were lower in proportion to distance than the interstate rates and therefore operated to the advantage of Texas communities. In support of the decision that the roads should remove the discrimination by

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[4] For decisions that certain transportation though in some aspects only between two points in the same state is in reality an integral part of an interstate shipment and that therefore orders of state commissions are not applicable thereto, see Railroad Commission v. Worthington, (1912) 225 U. S. 101, 56 L. Ed. 104, 32 S. C. R. 653, commented on in 11 Mich. L. Rev. 593; Texas & N. O. R. Co. v. Sabine Tram. Co., (1913) 227 U. S. 111, 57 L. Ed. 442, 33 S. C. R. 229, commented on in 26 Harv. L. Rev. 554 and 11 Mich. L. Rev. 593; and Railroad Commission v. Texas & P. R. Co., (1913) 229 U. S. 336, 57 L. Ed. 1215, 33 S. C. R. 837, commented on in 2 Georgetown L. J. 23.

[5] (1914) 234 U. S. 342, 58 L. Ed. 1341, 34 S. C. R. 833. See 2 Calif. L. Rev. 482, 14 Colum. L. Rev. 583, 607, 9 Ill. L. Rev. 276, and Henry Wolf Bicklè, "Federal Control of Intra-State Railroad Rates," 63 U. Pa. L. Rev. 1; William C. Coleman, "The Evolution of Federal Regulation of Intra-State Rates," 28 Harv. L. Rev. 34; and John S. Sheppard, Jr., "Another Word About the Evolution of the Federal Regulation of Intra-State Rates," 28 Harv. L. Rev. 294. In 26 Harv. L. Rev. 757 is a consideration of a decision on the same question in the Commerce Court.

charging higher intra-state rates in Texas than those authorized by the Texas Commission, Mr. Justice Hughes said:

"It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this power, that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local government . . . .

"Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce: to enact 'all appropriate legislation' for its 'protection and advancement . . .'; to adopt measures 'to promote its growth and ensure its safety, . . .; 'to foster, protect, control, and restrain . . .' Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance . . . . Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field.[6]

On the effect of congressional action on inconsistent state action the learned Justice observed:

"Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do what Congress is entitled to forbid and has forbidden.

"It is to be noted . . . that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the state cannot fix the relation of the carrier's interstate and intra-state charges without directly interfering with the former, unless it simply follows the standard set by federal authority . . . .

"It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard

[6] (1914) 234 U. S. 342, 350-352.

as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.'"[7]

The opinion further declared that the power of Congress may be delegated to the Interstate Commerce Commission. The contention of the roads that Congress had not done so was predicated on a clause in the Interstate Commerce Act providing that the Act should not apply to the transportation of property wholly within one state. Mr. Justice Hughes got around this by saying that the commission dealt with the relation of rates injuriously affecting interstate traffic and that the question of this relation is not simply one of transportation "wholly within one state." The proviso refers to exclusively intra-state traffic, "separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved." Justices Lurton and Pitney dissented, but without opinion.

Among the complaints against the enforcement of a reparation order issued by the Interstate Commerce Commission for charging and collecting unreasonable rates, which came before the court in *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*[8] was the contention that, since the transportation in question was between two Colorado points, it was not within the jurisdiction of the federal commission. But the court found that the carriage was part of a through shipment from Missouri and held that

"its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts, and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation."

To this Mr. Justice Lamar added:

"That there was a common arrangement between the two carriers here was shown by the long-continued course in dealing, and the division of the freight, with the knowledge that it had been paid as compensation for the single haul. If there had been a failure on the part of one of the carriers to file the tariffs, that did not defeat the jurisdiction of the Commission to award reparation against the same carrier, when it was shown that its unreasonable charge of 45 cents per cwt. formed a part of the total rate of 90 cents per cwt. actually paid by the Baer Company."[9]

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[7] Ibid., 353-355.
[8] (1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. C. R. 641.
[9] Ibid., 491.

The case held also that under the federal statutes the commission might issue a reparation order for past unreasonable charges without at the same time fixing a rate for the future.[10]

[10] The necessity of action by the Interstate Commerce Commission as a prerequisite to suit by a shipper for overcharges or discriminations was affirmed in several cases. The complaint in Robinson v. Baltimore & Ohio R. Co., (1912) 222 U. S. 506, 56 L. Ed. 288, 32 S. C. R. 114, was of a charge of 50 cents more a ton for coal loaded from wagons than from that loaded from a tipple. Suit was brought without first getting a reparation order from the commission. The commission had in fact in other proceedings declared the discrimination to be unwarranted, but this decision had not been called to the attention of the trial court and so was dismissed from consideration on that ground and on the further one that it had not included any finding or direction as to reparation. The denial of the action was based on a previous decision with respect to an alleged excessive charge rather than a discrimination, but the court declared that the power of the commission over the two complaints is the same and that "if a court acting originally upon either, were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards, and yet continuing to be the legal rate, obligatory upon both carrier and shipper." Earlier in the opinion Mr. Justice Van Devanter had referred to the elaborate provisions of the act for investigations and hearings by the commission and to the prohibition against departures from the legally established rate and added:

"When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and the exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that the rate established in the mode prescribed should be deemed the legal rate, and obligatory alike upon carrier and shipper until changed in the manner provided, would be a derogation of the power expressly delegated to the commission, and would be destructive of the uniformity and equality which the act was designed to secure" (222 U. S. 506, 509-510).

This case was followed in Mitchell Coal & Coke Co. v. Pennsylvania R. Co., (1913) 230 U. S. 247, 57 L. Ed. 1472, 33 S. C. R. 916, where the complaint was of discrimination because competing shippers had in effect been given rebates by means of unwarranted allowances for doing their own hauling from the mine to the station. The court declared that such allowances are unlawful only when unreasonable and that the question of reasonableness is primarily one for the commission. The discrimination complained of arose before the Elkins Act of 1903 which required carriers to publish their allowances for trackage or haulage services. Nevertheless Mr. Justice Pitney dissented because he thought that the decisions requiring preliminary action by the commission should be confined to cases in which the complaint is against rates duly published and approved. He dissented also in Morrisdale Coal Co. v. Pennsylvania R. Co., (1913) 230 U. S. 304, 57 L. Ed. 1494, 33 S. C. R. 938, which refused to entertain a suit for an unlawful distribution of cars in the absence of a ruling by the commission that the distribution adopted was unreasonable, and in Texas & P. R. Co. v. American Tie & Timber Co., (1914) 234 U. S. 138, 58 L. Ed. 1255 34 S. C. R. 885, where a similiar lack of hospitality was shown to a complaint against the refusal to accept a shipment of oak railway cross ties for a point beyond the initial carrier's line when the dispute was

The question whether a prosecution for discrimination under the Interstate Commerce Act would lie against Canadian corporations operating only in Canada when they had made an arrangement with American carriers whereby through routes and joint rates were established with some connecting carriers and not with others was answered in the affirmative in *United States v. Pacific & A. R. & N. Co.*[11] These connecting carriers included American steamship lines operating between the United States and Alaska and a company owning and operating wharves in Alaska. Under

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whether this commodity was included in the filed tariff fixing joint through lumber rates.

The opposite result was reached in Pennsylvania R. Co. v. International Coal Mining Co., (1913) 230 U. S. 184, 57 L. Ed. 1446, 33 S. C. R. 893, commented on in 19 Colum. L. Rev. 68, 81, and 63 U. Pa. L. Rev. 217, in which a shipper was held entitled to come at once to the court to sue for the damages caused by discrimination practiced by violating the published tariffs in charging competitors less than the published rate. The companies had lawfully raised their rates but had departed from the new rates and continued the old as to coal contracted to be sold while the old rates were in force. This was held to be unwarranted and patently so without any action by the commission, since the new rates were approved by the commission and the incidental departures therefrom had not been submitted to it for approval. While the shipper was held to be entitled to sue without preliminary action by the commission, his judgment for the difference between the published rate charged him and the lower rate charged others was set aside, on the ground that the act allowed him the actual damages suffered but not a participation in the unlawful rebates granted his competitors. On the denial of damages measured by this discrepancy, Mr. Justice Pitney dissented, insisting that no other measure would usually be practicable and that this is the measure most likely to be adopted by the commission in issuing reparation orders.

This decision was followed in Morrisdale Coal Co. v. Pennsylvania R. Co., (1913) 230 U. S. 304, 57 L. Ed. 1494 33 S. C. R. 938, with respect to discrimination produced by granting haulage and trackage allowances to competitors who in fact did not perform such services. As the railroad hauled for them as well as for the plaintiffs, its allowance was held a mere rebate which under no circumstances would be lawful and which therefore did not inquire preliminary investigation by the commission.

For consideration of various aspects of the judicial enforcement of rights acquired under the Interstate Commerce Act and its amendments, see J. Newton Baker, "The Commerce Court—Its Origin, Its Powers and Its Judges," 20 Yale L. J. 555; Henry Wolf Bicklè, "Jurisdiction of Certain Cases Arising Under the Interstate Commerce Act," 60 U. Pa. L. Rev. 1; George W. Kirchwey, "The Interstate Commerce Commission and the Judicial Enforcement of the Act to Regulate Commerce," 14 Colum. L. Rev. 211; and notes in 2 Calif. L. Rev. 154 on the judicial enforcement of reparation orders; in 14 Colum. L. Rev. 512, 539, on the recovery of damages under the Interstate Commerce Act; in 25 Harv. L. Rev. 292 on the power of state courts to entertain suits by carriers to recover difference between the scheduled rate and the rate charged; in 26 Harv. L. Rev. 665 on denying reparation because of laches; in 10 Mich. L. Rev. 232 on the jurisdiction of the Commerce Court; in 12 Mich. L. Rev. 135 on whether an action is one arising under the Interstate Commerce Act.

[11] (1913) 228 U. S. 87, 57 L. Ed. 742, 31 S. C. R. 443.

these facts the court held that the Canadian companies were in a conspiracy to exercise control over transportation in the United States and were therefor amenable to our laws, both criminal and civil.[12]

While it is not clear that the issue in *United States v. Union Stock Yard & Transit Co.*[13] was more than one of statutory construction, Mr. Justice Day, in holding that the Interstate Commerce Act, the Elkins Act and the Hepburn Act apply to a stockyard company with tracks and other facilities for transferring cars from the trunk-line railroads to the yards, observed that it does not matter that the service is performed wholly in one state if it is a part of interstate carriage nor that the performance of the service is distributed among different corporations having common ownership in a holding company. In characterizing the situation he said:

"Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act, and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars, and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate

[12] The question whether the jurisdiction of the Interstate Commerce Commission had been extended by Congress to Alaska was answered in the affirmative in Interstate Commerce Commission v. United States, (1912) 224 U. S. 474, 56 L. Ed. 849, 32 S. C. R. 556. The original act applied to transportation "from one place in a territory to another place in the same territory." The commission, however, in declining to entertain jurisdiction of a petition to compel an Alaska railroad to file tariffs and establish joint through rates with steamships, had gone on the ground that the word "territory" referred only to "organized territory," of which the chief and determining feature "is a local legislature, as distinguished from a territory having a more rudimentary and less autonomous form of government which it considered Alaska possessed." Mr. Justice McKenna did not controvert the major premise but denied the truth of the minor one, referring to previous decisions to the effect that Alaska is an organized territory notwithstanding the absence of a local legislature. Another ground of the commission's refusal to act was that the Act of May 14, 1898, which first authorized the construction of railroads in Alaska, provides that the rates shall be posted in accordance with the provisions of the Interstate Commerce Act of 1887, "and such rates shall be subject to revision and modification by the secretary of the interior," thereby, it was contended, excluding the operation of other provisions of the Act of 1887 and excluding control by the commission. This was answered by pointing out that the commission was not given power to prescribe rates until the Hepburn Act of June 29, 1906, which, it was declared, "entirely superseded the minor authority which had been conferred upon the secretary of the interior." A mandamus was granted to compel the commission to take jurisdiction.

[13] (1912) 226 U. S. 286, 57 L. Ed. 226, 33 S. C. R. 83. The decision in the court below is considered in 25 Harv. L. Rev. 741.

commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee. They are common carriers because they are made such by the terms of their charters, hold themselves out as such, and constantly act in that capacity, and because they are so treated by the great railroad systems which use them."[14]

The stockyard company had leased its tracks to a railroad company which paid as rental a proportion of the profits. Both companies were owned by a holding company. Both were held to be interstate carriers. A contract between the stockyard company and a packing company by which the latter was paid $50,000 for erecting a plant adjacent to the stockyards and for agreeing to buy only stock moving through the yard or to pay regular charges on stock not so bought was held to be an unlawful discrimination forbidden by the acts of Congress.[15]

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[14] (1912) 226 U. S. 286, 304-305, 57 L. Ed. 226, 33 S. C. R. 83.

[15] Other issues as to whether payments or allowances by carriers to shippers for alleged services rendered amount to unlawful preferences or rebates were considered in three cases.

In United States v. Baltimore & Ohio R. Co., (1913) 231 U. S. 274, 58 L. Ed. 218, 34 S. C. R. 75, a reasonable allowance by a carrier to sugar refineries within a ten-mile free lighterage zone for maintenance of a terminal within that zone and for lightering between that terminal and the rail terminal was held a proper payment for facilities in aid of transportation and not an illegal preference or discrimination on account of the failure to pay a similar compensation to refineries outside that ten-mile zone who are not entitled to free lighterage. The disadvantage of the latter refineries was said to be one arising out of their disadvantageous location which would still exist if the carrier performed all the duties within the free lighterage zone instead of hiring others to do part of them.

In Interstate Commerce Commission v. Diffenbaugh, (1911) 222 U. S. 42, 56 L. Ed. 83, 32 S. C. R. 22, considered in 25 Harv. L. Rev. 456, 478, it was held not to be a preference for a carrier to allow the owner of an elevator a reasonable compensation for the cost of transferring grain through his elevator, when such elevator facilities enable the carrier to keep its cars from being sent beyond the terminus of its lines and to compete with other carriers having through lines from grain fields to eastern markets. The commission's orders to cease these payments were sustained as applied to grain kept in the elevator more than ten days before being reshipped, but not as to grain retained less than that time which belonged to the owner and was weighed and graded by him while in his elevator. This advantage which the elevator owner might enjoy was said not to be an undue preference or discrimination so long as the payment by the carrier is no more than reasonable compensation for the necessary elevator service. Justices McKenna and Hughes, in dissenting insisted that the weighing and grading are no part of transportation and that for this separate business no compensation may be given.

Union Pacific R. Co. v. Updike Grain Co., (1911) 222 U. S. 215, 56 L. Ed. 171, 32 S. C. R. 39, held that the carrier may not make its payment to an elevator conditional on unreasonable requirements as to return of the empty cars when under the circumstances disclosed this would discriminate in favor of certain shippers against others to whom the same requirements would be less onerous.

The "long and short haul" clause of the original Interstate Commerce Act of 1887 forbade interstate carriers to charge greater compensation for transportation, "under substantially similar circumstances and conditions" for a shorter than for a longer haul over the same route. This was amended by the Act of June 18, 1910, by omitting the qualification "under substantially similar circumstances and conditions" and by vesting power in the Interstate Commerce Commission to authorize greater charges for a shorter than for a longer haul. The *Intermountain Rate Cases* (*United States v. Atchison, T. & S. F. R. Co.*)[16] involved action by the commission refusing to allow carriers to continue the existing rates from ocean to interior points which were higher than the rates for the same distance as a part of ocean to ocean traffic, but sanctioning certain modifications prescribed by the commission. A contention that the specific action of the commission took property without due process was answered by pointing out that it had already been held that "a general enforcement of the long and short haul clause would not be repugnant to the Constitution." The objection that the failure of Congress to specify the circumstances under which the commission might relax the prohibition of the statute makes it unconstitutional as a delegation of legislative power was said to challenge every decided case since the Act of 1887. "The provisions as to undue preference and discrimination," remarked Chief Justice White, "while involving, of course, a certain latitude of judgment and discretion, are no more undefined or uncertain in the section as amended than they have been from the beginning." In characteristic vein he advanced the following argument to show that the contention of the carrier is self-destructive:

"How can it otherwise be since the argument as applied to the case before us is this: that the authority in question was validly delegated so long as it was lodged in carriers, but ceased to be susceptible of delegation the instant it was taken from the carriers for the purpose of being lodged in a public administrative body? Indeed, when it is considered that, in last analysis, the argument is advanced to sustain the right of carriers to exert the public power which it is insisted is not susceptible of delegation, it is apparent that the contention is self-contradictory, since it reduces

[16] (1912) 234 U. S. 476, 58 L. Ed. 1408, 34 S. C. R. 986. See 2 Calif. L. Rev. 491, 28 Harv. L. Rev. 110, and 9 Ill. L. Rev. 276. The decision of the same case in the Commerce Court is discussed in Jay Newton Baker, "The Fourth Section, or the Long and Short Haul," 21 Yale L. J. 278.

itself to an effort to sustain the right to delegate a power by contending that the power is not capable of being delegated."[17] This case was followed in *United States v. Union Pacific R. Co.*[18] decided on the same day. The decisions were unanimous but were reached only after rearguments.[19]

The original Interstate Commerce Act forbade interstate carriers to receive from any person "a greater or less compensation" for any transportation than that demanded of others for a like and contemporaneous service. The Hepburn Act of 1906 changed this so as to forbid "a greater or less *or different compensation.*" In *Louisville & Nashville R. Co. v. Mottley*[20] this language was held to render illegal the further fulfilment of a promise made by an interstate carrier in 1871 as part of a settlement of a claim for personal injuries to give to the claimant an annual pass during the remainder of his life.[21] In *Chicago, I. & L. R. Co. v. United States*[22] the same language was construed to forbid the issuing of passes in payment of advertising. The operation of the statute in the latter case was on an agreement made after its passage and no due-process issue appears to have been raised. The company placed some reliance upon the fact that the Indiana statute under which it was incorporated permitted passes in payment for advertising, but Mr. Justice Harlan answered that since the transactions in question were interstate the acts of Congress applicable thereto were paramount and no conflicting state statute was of any avail. In the *Mottley Case* it was urged that it is a denial of due process for Congress to make illegal a contract valid when made, but Mr. Justice Harlan answered that all such contracts are subject to the future exercise of the legitimate powers

[17] (1912) 234 U. S. 476, 486, 58 L. Ed. 1408, 34 S. C. R. 986.

[18] (1912) 234 U. S. 495, 58 L. Ed. 1426, 34 S. C. R. 995.

[19] For a discussion of the application of the principle of the separation of powers to the authority delegated to the Interstate Commerce Commission, see Paca Oberlin, "Authorizing a Federal Commission to Fix Rates is not a Delegation of Congressional Legislative Power in the Constitutional Sense," 73 Cent. L. J. 111.

[20] (1911) 219 U. S. 467, 55 L. Ed. 297, 31 S. C. R. 265. See 9 Mich. L. Rev. 615. The issue between the parties was before the Supreme Court previously in Louisville & N. R. Co. v. Mottley, (1908) 211 U. S. 149, 53 L. Ed. 126, 29 S. C. R. 42, in which a suit to compel the specific performance of the agreement to give the pass was held not to be within the jurisdiction of the federal courts.

[21] In 1 Va. L. Rev. 561, 568, is a discussion of a state decision requiring a railroad to pay reasonable compensation for a right of way after an agreement to give a pass in compensation therefor has been rendered invalid by statute.

[22] (1911) 219 U. S. 486, 55 L. Ed. 305, 31 S. C. R. 272. A state decision on a state statute to the same effect is considered in 24 Harv. L. Rev. 59.

of Congress over interstate commerce, since any other principle would put it in the power of individuals by contracts between themselves in anticipation of future legislation to "render of no avail the exercise by Congress, to the full extent authorized by the constitution, of its power to regulate commerce."[22]

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[22] Several cases involved the question whether the differences of treatment complained of were unlawful discriminations or preferences under the applicable statutes. Three cases sustained the Interstate Commerce Commission in commands to put an end to discriminations found objectionable. Interstate Commerce Commission v. Baltimore & Ohio R. Co., (1912) 225 U. S. 326, 56 L. Ed. 1107, 32 S. C. R. 742, involved lower rates on coal intended for railroad consumption than on other coal. The court thought that the differences with respect to facilities for delivery do not make the traffic dissimilar in circumstances and conditions within the meaning of the act of 1887. The Los Angeles Switching Case, (1914) 234 U. S. 294, 58 L. Ed. 1319, 34 S. C. R. 814, commented on in 3 Calif. L. Rev. 50, held it unjustifiable to impose added charges for delivering cars to industrial spur tracks when no extra charge is made for delivery to team tracks and freight sheds. Interstate Commerce Commission v. Delaware, L. &. W. R. Co., (1911) 220 U. S. 235, 55 L. Ed. 448, 31 S. C. R. 392, considered in 11 Colum. L. Rev. 574 and 24 Harv. L. Rev. 669, condemned the refusal of the carrier to apply its carload rates to carload lots of the goods of several owners assembled by a shipping agent.

In two cases in which action brought by a shipper was decided in favor of the carrier, the underlying ground of decision was that victory for the shipper would result in sanctioning a preference. Chicago & Alton R. Co. v. Kirby, (1912) 225 U. S. 155, 56 L. Ed. 1033, 33 S. C. R. 648, was an action for failure to fulfil a special contract to expedite a shipment of horses, in which judgment for the carrier was affirmed on the ground that under the Elkins Act of February 19, 1903, this was a service for which a special higher rate might be charged, and the shipper in asking for this special service at regular rates was seeking a discrimination in his favor. The same case in the court below is discussed in 18 Va. L. Reg. 228. A shipper who complained that the agent of the carrier quoted him a lower rate than that duly posted and thereby caused him loss when he was compelled to pay the posted rates was sent away comfortless in Illinois Central R. Co. v. Henderson Elevator Co., (1913) 226 U. S. 441, 57 L. Ed. 290, 33 S. C. R. 176. A state decision to the same effect is noticed in 27 Harv. L. Rev. 83. In 27 Harv. L. Rev. 177 is a note on a decision that the intending shipper may refuse to ship and recover damages for the misquoting of the rate.

A contract to ship at reduced rates the materials of a construction company engaged in work for the carrier was held lawful in Santa Fe, P. & P. R. Co. v. Grant Brothers Construction Co., (1913) 228 U. S. 177, 57 L. Ed. 787, 33 S. C. R. 474, when entered into in good faith as part of the contract for the construction work. Such a shipment was held to be not in the course of the railroad's duty as common carrier, and a contract limiting liability for loss occasioned by the carrier's negligence was sustained.

An instance of discrimination by extending credit to some shippers but not to others is noted in 27 Harv. L. Rev. 754. The question of what is a continuous shipment under the Elkins Act is discussed in 10 Mich. L. Rev. 55. A case holding that cars owned by a shipper must be included in determining the distribution of cars among shippers is treated in 10 Colum. L. Rev. 256, 261.

One of the provisions of the Hepburn Act of June 29, 1906, brought under the jurisdiction of the Interstate Commerce Commission any corporation or person engaged in the interstate transportation of oil by means of pipe lines and declared that such corporations or persons should be considered and held to be common carriers within the meaning and purpose of the act. Under authority of the statute the Interstate Commerce Commission ordered a number of oil companies operating pipe lines to file schedules of their rates and charges for transportation of oil. The validity of these orders came before the court in *The Pipe Line Cases.*[24] One of the companies carried no oil except from its own wells to its own refineries and was held not to fall "within the description of the act, the transportation being merely an incident to use at the end." "It would," observed Mr. Justice Holmes, "be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in transportation whenever he pumped a pail of water from his well to his house." Chief Justice White in a separate concurring opinion declared that "the business thus carried on is transportation in interstate commerce within the statute" but that "it would be impossible to make the statute applicable to it without violating the due-process clause of the fifth amendment, since to apply it would necessarily amount to a taking of the property of the company without compensation." Congress, he insisted, cannot turn a purely private business into a public business except by the exercise of the right of eminent domain.

The other companies carried no oil except that which they derived from their own wells or purchased from owners of other wells. As Mr. Justice Holmes put it, "they carry everybody's oil to market, although they compel outsiders to sell it before taking it into their pipes." This, he added, made them common carriers in everything but form, and Congress may require those who are common carriers in substance to become so in form. On the commerce question he observed:

"That the transportation is commerce among the states we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive

[24] (1914) 234 U. S. 548, 58 L. Ed. 1459, 34 S. C. R. 956. See 2 Calif. L. Rev. 494, 14 Colum. L. Rev. 662, 687, 28 Harv. L. Rev. 84, 104, and 13 Mich. L. Rev. 159. The case in the court below is considered in 26 Harv. L. Rev. 630, 655.

against the transportation being such commerce . . . The situation that we have described would make it illusory to deny the title of commerce to such transportation, beginning in purchase and ending in sale, for the same reasons that make it transportation within the act."[25]

On the due-process question Mr. Justice McKenna vigorously disagreed in a manner prophetically reminiscent of his later passionate dissent in the cases sustaining the regulation of rents.[26] One or two of the complaining companies, he recognized, might for special reasons have been common carriers before being declared to be so by Act of Congress, but he refrained from going into details since he was without the power of decision. He objected strenuously to the idea that a person using his private property to carry his own products may be compelled to carry the products of others at prices fixed by governmental authority. As against the statement of Mr. Justice Holmes that the oil companies used their ownership of pipe lines to require other producers of oil to sell to them on practically their own terms, thus by duress making themselves master of the situation, Mr. Justice McKenna declared:

"This is the charge. The facts of the case do not sustain it except as they exhibit the advantages of the possession of property which others do not possess. Must it be shared by those others for that reason? The conception of property is exclusiveness, the rights of exclusive possession, enjoyment, and disposition. Take away these rights and you take all that there is of property. Take away any of them, force a participation in any of them, and you take property to that extent . . . The employment of one's wealth to construct or purchase facilities for one's business greater than others possess constitutes no monopoly that does not appertain to all property. Such facilities may give advantages, and, it may be, power; so does all property and in proportion to its extent . . . . If the owner of a small oil well may be given rights in the facilities of the appellee companies, why may not the owner of a small business be given rights in the facilities of a larger business, if Congress sees fit to say that the public welfare requires the gift? Can any privilege be claimed for oil that cannot be claimed for other commodities?

"There is quite a body of opinion which considers the individual ownership of property economically and politically wrong and insists upon a community of all that is profit-bearing. This opinion has its cause, among other causes, in the power—may I

[25] (1914) 234 U. S. 548, 560, 58 L. Ed. 1459, 34 S. C. R. 956.

[26] Block v. Hirsh, (1921) 256 U. S. —, 65 L. Ed. —, 41 S. C. R. 458; Marcus Brown Holding Co. v. Feldman, (1921) 256 U. S. —, 65 L. Ed. —, 41 S. C. R. 465.

say the duress?—of wealth. If it accumulates 51 per cent of political power, may it put its conviction into law and justify the law by the advancement of the public welfare by destroying the monopoly and mastery of individual ownership?"[27]

Though Mr. Justice Holmes had declared that the Hepburn Act does not compel the pipe lines to continue in operation, but merely requires them not to continue except as common carriers, Mr. Justice McKenna referred to the commodities clause of the Hepburn Act which forbids common carriers to carry their own products and insisted that the result of sustaining that clause and of reaching the present decision is that "by legal circumlocution property legally devoted to the use of its owners is forbidden such use and devoted wholly to the use of others." To this he added the curt comment: "A queer outcome."[28]

After holding in *United States v. Adams Express Co.*[29] that Congress by the provision in the Hepburn Act of June 29, 1906, that "the term 'common carrier', as used in this act, shall include express companies and sleeping car companies" had extended to unincorporated express companies the provisions of the original act of 1887 for criminal punishment of carriers indulging in unlawful discriminations, Mr. Justice Holmes referred to a possible constitutional issue as follows:

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[27] (1914) 234 U. S. 548, 571-573, 58 L. Ed. 1459, 34 S. C. R. 458.

[28] Orders of the Interstate Commerce Commission reducing rates were sustained in Interstate Commerce Commission v. Union Pacific R. Co., (1912) 222 U. S. 541, 56 L. Ed. 308, 32 S. C. R. 108, and Interstate Commerce Commission v. Louisville & Nashville R. Co., (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. C. R. 185. Orders reducing rates were set aside in Florida East Coast R. Co. v. United States, (1914) 234 U. S. 167, 58 L. Ed. 1267, 34 S. C. R. 867, because made without evidence in support, and in Southern Pacific Co. v. Interstate Commerce Commission, (1911) 219 U. S. 433, 55 L. Ed. 283, 31 S. C. R. 288, commented on in 24 Harv. L. Rev. 581, because based on the erroneous assumption that the commission has jurisdiction to protect lumber interests from a change in rates and not because the new rates were found unreasonable.

Kansas City Southern R. Co. v. C. H. Albers Commission Co., (1912) 223 U. S. 573, 56 L. Ed. 556, 32 S. C. R. 316, held that under the Interstate Commerce Acts of 1887 and 1889 rates are duly established by being filed with the Interstate Commerce Commission and kept open to shippers in the office of the company even though not posted in a public place as the law requires. In the absence of an established joint rate over connecting lines the authorized rate is the sum of the two separate rates of the two roads, and any agreement with a shipper to charge less is void.

An order of the commission permitting consignors of pre-cooled shipments to ice cars at their warehouses before shipment when the roads failed to furnish the service at substantially equal cost was affirmed in Atchison, T. & S. F. R. Co. v. United States, (1914) 232 U. S. 199, 58 L. Ed. 568, 34 S. C. R. 291, commented on in 9 Ill. L. Rev. 48.

[29] (1913) 229 U. S. 381, 57 L. Ed. 1237, 33 S. C. R. 878.

"The power of Congress hardly is denied. The constitutionality of the statute as against corporations is established . . ., and no reason is suggested why Congress has not equal power to charge the partnership assets with a liability, and to personify the company so far as to collect a fine by a proceeding against it by the company name. That is what we believe that Congress intended to do. It is to be observed that the structure of the company under the laws of New York is such that a judgment against it binds only the joint property, . . . and that it has other characteristics of separate being . . ."[30]

The constitutionality of what is known as the Commodities Clause of the Hepburn Act which before 1910 had been sustained —after being warped in its interpretation so as not to prohibit interstate carriers from transporting certain commodities unless they owned or were interested in the ownership of them at the time of transportation—was reaffirmed in *Delaware, L. & W. R. Co. v. United States*.[31] In earlier cases the railroads had been transporting commodities owned by them from the mines which they also owned. In the principal case the road was carrying hay which it acquired in Buffalo to a mine which it owned in Scranton. Mr. Justice Lamar said that the act applies to transportation from market to mine as well as from mine to market and that as to both it is a regulation of interstate commerce and not a violation of the due-process clause of the fifth amendment. In support he added:

"The commodity clause does not take property, nor does it arbitrarily deprive the company of a right of property. The statute deals with railroad companies as public carriers, and the fact that they may also engage in private business does not compel Congress to legislate concerning them as carriers so as not to interfere with them as miners or merchants. If such carrier hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished, or the quality of the service rendered. The commodity clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of govern-

[30] Ibid., 390. In Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, (1913) 230 U. S. 324, 57 L. Ed. 1501, 33 S. C. R. 890, it was held that the word "railroads" in the Interstate Commerce Act of 1887 does not include street railways, since they are not within the mischief which the act sought to remedy and since many of the provisions of the act are quite inapplicable to them. In 10 Mich. L. Rev. 498 is a note to the same case in the court below. The topic is considered in Borden D. Whiting, "Street Railways and the Interstate Commerce Act," 10 Colum. L. Rev. 450.

[31] (1913) 231 U. S. 363, 58 L. Ed. 269, 34 S. C. R. 65.

mental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the company occupied the dual and inconsistent position of public carrier and private shipper."[32]

Aftermaths of the earlier Commodity Cases came before the court in *United States v. Lehigh Valley R. Co.*[33] and *United States v. Erie Railroad Co.*[34] which held that the statute forbids the roads to transport coal owned by a corporation which is so completely owned and managed by the roads as to be an alter ego of them. While the constitutional issue was not mentioned, the necessary inference is that the act so interpreted is constitutional.[35]

The so-called Carmack Amendment to the Hepburn Act of 1906 required interstate carriers receiving property for interstate transportation to issue a receipt and bill of lading therefor and provided that the initial carrier should be liable for any loss, damage or injury to the property caused by it or by any succeeding connecting carrier, such initial carrier being given a right of reimbursement against the carrier on whose line the injury occurs.

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[32] Ibid., 370.

[33] (1911) 220 U. S. 257, 55 L. Ed. 458, 31 S. C. R. 387. See 24 Harv. L. Rev. 672.

[34] (1911) 220 U. S. 275, 55 L. Ed. 464, 31 S. C. R. 392.

[35] The Commodities Clause excludes from its operation the shipment of lumber which the carrier owns. Three cases have to do with questions of discrimination arising from situations in which roads carry both their own lumber and that of others. Fourche River Lumber Co. v. Bryant Lumber Co., (1913) 230 U. S. 316, 57 L. Ed. 1498, 33 S. C. R. 887, held that a railroad company the stock of which is owned by a lumber company is entitled to retain its proportion of interstate freight rates received for shipments made over its road by another lumber company, notwithstanding an agreement between the two lumber companies that there should be no discrimination against either in the matter of freight rates, since otherwise the second lumber company would in effect receive a rebate from the railroad company in violation of the Interstate Commerce Act.

In The Tap Line Cases (United States v. Louisiana & P. R. Co.), (1913) 234 U. S. 1, 58 L. Ed. 1185, 34 S. C. R. 741, commented on in 27 Harv. L. Rev. 579, 586, the court reversed the Interstate Commerce Commission in ordering through carriers to make no allowance to branch lines owned by lumber companies for the transportation of their own products over the branch lines. Such lines were found to be common carriers carrying the products of others as well as of their owners, and their owners would therefore be discriminated against as shippers if they received no allowance for carriage over their own line and furnished that transportation without remuneration as carrier while other shippers paid for the entire haul of their products no more than the owners of the lines paid. In effect the commission was requiring the owners of the tap lines to charge themselves as shippers as much for the main haul as they charged other shippers for the combined haul. The Supreme Court held that as carriers they were entitled to get as much for hauling their own products as for hauling those of others. The Tap Line Cases were followed in United States v. Butler County R. Co., (1914) 234 U. S. 29, 58 L. Ed. 1196, 34 S. C. R. 748, decided on the same day.

The amendment further provides that no contract, receipt or rule shall exempt the initial carrier from the liability thus imposed by the statute and that nothing in the section shall deprive the holder of a bill of lading of any right under existing law. In *Atlantic Coast Line R. Co. v. Riverside Mills*[36] this imposition of liability on the initial carrier for the fault of a succeeding carrier was sustained and a stipulation in the bill of lading against such liability was declared invalid as against the complaint that the enforcement of the statute deprives the initial carrier of liberty of contract in violation of the fifth amendment. Mr. Justice Lurton reminded the company that there is no such thing as absolute freedom of contract, that contracts against public policy are invalid at common law, and that the power to regulate commerce includes power to impose on interstate carriers duties reasonably adapted to promote the welfare of commerce. After rehearsing the conditions out of which the statute arose and the hardship on shippers over several connecting lines if they must discover and sue the particular carrier in fault, the learned Justice laid down that the regulation complained of imposes no unreasonable burden on the receiving carrier, since that carrier collects the freight for the entire transportation, has frequent settlements of traffic balances with connecting carriers, has facilities for locating the carrier actually in fault which the shipper lacks, and therefore enjoys a reasonable security for reimbursement. The complaint that a carrier might be held liable for the fault of a succeeding carrier which it had no power to select or reject as participant in the through carriage was put to one side as not applicable to the present case in which, for all that appeared, the initial carrier had voluntarily made its arrangements with the succeeding carrier in fault.[37]

The *Riverside Mills Case* was followed in *Louisville & Nashville R. Co. v. Scott*,[38] decided the same day, and in *Galveston, H. & S. A. R. Co. v. Wallace*, [39] decided a year later. In the latter

[36] (1911) 219 U. S. 186, 55 L. Ed. 167, 31 S. C. R. 164. See 1 Calif. L. Rev. 269, 11 Colum. L. Rev. 380, and 24 Harv. L. Rev. 404.

[37] For general articles on the problem raised by the Riverside Mills Case, see Frederick H. Cooke, "The Power of Congress and of the States Respectively, to Regulate the Conduct and Liability of Carriers," 10 Colum. L. Rev. 35; Edwin C. Goddard, "The Liability of the Common Carriers As Determined by Recent Decisions of the Supreme Court," 15 Colum. L. Rev. 399, 475; and Jacob S. New, "The Liability of the Initial Carrier Under the Interstate Commerce Act," 73 Cent. L. J. 4.

A case holding the initial carrier liable for a fire in a warehouse at the destination of the shipment is discussed in 11 Mich. L. Rev. 255.

[38] (1911) 219 U. S. 209, 55 L. Ed. 183, 31 S. C. R. 171.

[39] (1912) 223 U. S. 481, 56 L. Ed. 516, 32 S. C. R. 205. See 1 Calif. L. Rev. 269.

case it was held that the act applies to a failure to deliver although the shipper has not proved negligence. The act in effect makes later carriers the agents of the initial carrier, and failure to deliver is presumptively due to negligence. If it was "due to the act of God, the public enemy, or some other cause against which" the initial carrier "might lawfully contract, it was for the carrier to bring itself within such exception." The *Wallace Case* held also that the liability imposed by the federal statute may be enforced in a state court.[40]

The question reserved in the *Riverside Mills Case* was raised again in *Norfolk & Western R. C. v. Dixie Tobacco Co.*[41] in which the shipment involved was over a route partly by sea which was chosen by the shipper and was a different one from that which the initial carrier would normally have adopted. The railroad had no through route or rate established with the line of steamers. It argued that "as it was bound to accept goods destined beyond its own line for delivery to the next carrier, and was required by the statute to give a through bill of lading, if, on such compulsory acceptance, it is made answerable for damages done by others, its property is taken without due process of law." Mr. Justice Holmes contented himself with answering that in the *Riverside Case* there "was the same stipulation" against liability beyond its own lines "in the bill of lading, and the supposed through routes were only presumed;" that in the *Wallace Case* "the carrier is spoken of as voluntarily accepting goods for a point beyond its line, but there, too, there was the same attempt to limit liability, and in the present case the acceptance was voluntary in the same degree as in that," so that "there is no substantial distinction between the earlier decisions and this."[42]

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[40] In 6 Ill. L. Rev. 133 is a note on the jurisdiction of the state courts to enforce liability based on the Carmack Amendment.

[41] (1913) 228 U. S. 593, 57 L. Ed. 980, 33 S. C. R. 609.

[42] In a series of cases the prohibition of the Carmack Amendment against any contract or stipulation exempting the initial carrier from liability for loss, damage or injury was construed not to prohibit or make unlawful a contract or stipulation as to the agreed value of the goods for the purpose of obtaining a choice of rates based on the value. This interpretation was first put forth in Adams Express Co. v. Croninger, (1913) 226 U. S. 491, 57 L. Ed. 314, 33 S. C. R. 148, which held also that the Carmack Amendment covers the question of the liability for interstate shipments and precludes the further application of state law regulating such liability. The stipulation limiting recovery to the agreed value was unlawful by state law but was held not to be forbidden by the Carmack Amendment. It was not, however, explicitly approved by the Carmack Amendment. In holding the stipulation valid under federal law, the Supreme Court applied its views of what it thought the

The original Interstate Commerce Act of 1887 authorized the Interstate Commerce Commission to require interstate carriers to

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common law ought to be, so that the controlling federal law is not an act of Congress, but the Supreme Court's knowledge of the principles of common law, which knowledge as contrasted with the contradictory Act of Congress but the Supreme Court's knowledge of the principles of common law, which knowledge as contrasted with the contradictory knowledge of the state court became the knowledge to apply because the subject matter had passed from state to federal authority. The Croninger Case is discussed in 1 Georgetown L. J. 169, 26 Harv. L. Rev. 456, 8 Ill. L. Rev. 123, 11 Mich. L. Rev. 460, 61 U. Pa. L. Rev. 501, and 18 Va. L. Reg. 778. The issue whether the carrier's liability is governed by state or federal law is dealt with in 60 U. Pa. L. Rev. 39 and 18 Va. L. Reg. 705. The question whether a shipper who undervalues the goods shipped is guilty of a violation of the federal statute is considered in 5 Ill. L. Rev. 240, 311, 372.

Kansas City Southern Ry. Co. v. Carl, (1913) 227 U. S. 639, 57 L. Ed. 683, 33 S. C. R. 391, considered in 11 Mich. L. Rev. 588, follows the Croninger Case in holding that the Carmack Amendment does not forbid or render unlawful a stipulation as to an agreed valuation for the purpose of determining the applicable rate and in applying the rule of the federal courts that such stipulations are lawful and that a limitation of the recovery to the agreed valuation is not a release of the carrier for a part of the loss due to negligence. The apparent impasse is apparently avoided by saying that "the ground upon which such a declared or agreed value is upheld is that of estoppel." In this case Justices Hughes and Pitney dissented, but it is to be assumed that their difficulty was with regard to the question whether the principle was applicable to the particular stipulation rather than to the principle itself, since they had concurred in the Croninger Case. Both cases were decided only after a reargument. The Carl Case was a suit against the ultimate carrier instrumental in causing the injury; the stipulation was imposed by the initial carrier, but it stated that it was for the benefit of succeeding carriers and the Supreme Court declared that any lawful stipulation entered into by the initial carrier enures to the benefit of succeeding carriers.

These semi-professed interpretations of the Carmack Amendment are in reality the Supreme Court's ideas of common-law principles of the law of carriers on matters on which the Carmack Amendment is silent. Wells, Fargo & Co. v. Neiman-Marcus Co., (1913) 227 U. S. 469, 57 L. Ed. 600, 33 S. C. R. 267, held that the shipper's acceptance of an express receipt stating that the company "is not to be held liable beyond the sum of $50, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated" is, in the absence of any statement of higher value, equivalent to a declaration that the value does not exceed $50, and the shipper is estopped from claiming more than that amount. Great Northern R. Co. v. O'Connor, (1914) 232 U. S. 508, 58 L. Ed. 703, 34 S. C. R. 380, held that the carrier was justified in relying upon the signature of the shipper's agent to a bill of lading describing the goods as household goods not exceeding a designated value, and in the absence of special circumstances, was not required to make inquiry as to the value.

In Boston & Maine R. Co. v. Hooker, (1914) 233 U. S. 97, 58 L. Ed. 868, 34 S. C. R. 526, the rule of the previous cases was applied to baggage checked on a passenger's railroad ticket. The check was held to be a sufficient receipt within the requirements of the Carmack Amendment, and the filing and posting of a tariff limiting the liability for lost baggage to $100 when no higher value is stated and an excess rate paid was found sufficient to estop the passenger from claiming more than $100 although the lady in question had no actual knowledge of the tariff

make annual reports and vested it with discretion to prescribe the forms for keeping accounts and records. The Hepburn Act of 1906 reiterated this authorization and added a prohibition against keeping accounts in other forms than those specified by the commission. It also extended the requirements to carriers transporting passengers and property partly by railroad and partly by water. In *Interstate Commerce Commission v. Goodrich Transit Co.*[43] certain carriers objected that the requirements of the commission exceeded the constitutional powers of Congress because they imposed the duty of giving information as to purely intra-state business. Mr. Justice Day answered that knowledge of the whole business of interstate carriers is essential to the adequate regulation of their interstate business and that the requiring of information concerning intra-state business is not a regulation of that business. The contention that Congress had unlawfully delegated legislative power to the commission was answered by saying that Congress had laid down the general rule as to the keeping of accounts and vested the commission only with power to fill in details. It was also held that the complainants have no immunity from federal supervision on the ground that Congress has no visitorial powers over state corporations. While it has no general visitorial powers it may exercise such powers as are necessary to regulate their interstate business. Justices Lurton and Lamar dissented without opinion.

Still more elaborate complaints against the forms of accounting and reporting required by the Interstate Commerce Commission were held unfounded in *Kansas City Southern Ry. Co. v. United States*[44] by an unanimous court. The major lament was that the

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and neither made, nor was asked to make, any representations as to the value. Mr. Justice Pitney filed an extended and vigorous dissent, in which he insisted that a limitation of liability under such circumstances is opposed to the Supreme Court's reiterated declarations of the common law, is not only not sanctioned by anything in acts of Congress but is opposed to the letter and the spirit of the Carmack Amendment, and is not only not sanctioned by the Interstate Commerce Commission but is covered by an adverse ruling handed down by it. The Supreme Court's decision is discussed in 27 Harv. L. Rev. 737, 755, 9 Ill. L. Rev. 276, and 62 U. Pa. L. Rev. 638. The decision in the court below is considered in 25 Harv. L. Rev. 186 and 10 Mich. L. Rev. 133.

The limitation of the carrier's liability is dealt with in Edmund F. Trabue, "Contract Limitation of Carrier's Liability, State and Federal," 48 Amer. L. Rev. 50; and notes in 9 Mich. L. Rev. 233, and 62 U. Pa. L. Rev. 727.

[43] (1912) 224 U. S. 194, 56 L. Ed. 729, 32 S. C. R. 436.

[44] (1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. C. R. 125. See 27 Harv. L. Rev. 369, 395.

distinctions imposed by the commission between property accounts and operating accounts required the companies to tranfer to operating expenses a number of items that properly belonged in the capital accounts. This, it was alleged, was so unreasonable and arbitrary as to constitute an abuse rather than an exercise of the powers conferred. Mr. Justice Pitney pointed out that the validity of the contention depended upon whether the regulations were entirely at odds with fundamental principles of correct accounting. After an elaborate examination he reached the conclusion that the commission was justified in what it had done. The company's contention was characterized as one resting on the unwarrantable assumption that all capital expenditures result in permanent accretion to the property, thus ignoring depreciation. The opinion seems to have the idea that the bookkeeping required would not control the rights of the company with respect to the rates to be charged or the dividends that might be paid but merely required it to set forth the facts as they actually were, though this is not made very explicit. This issue is not treated by Mr. Justice Pitney as a constitutional one, but in one of the briefs it was alleged that the unwarranted transfer of capital expenditures to operating accounts would deprive holders of non-cumulative preferred stock of property without due process of law by denying them dividends to which actually they were entitled. In addition to disagreeing with the analysis indulged in by the company, Mr. Justice Pitney answered that the preferred stockholders were not before the court and that Congress may deal with the carriers as distinct entities without restraint on account of agreements among the stockholders as to the apportionment of profits. The regulations of the commission merely prevent the proceeds of bond issues from being used "to maintain dividend payments *without that fact appearing in the accounts.*" Undoubtedly this will deter the company from making such payments, but "since one of the very purposes of establishing the accounting system is to deter the payment of dividends out of capital, the criticism, upon analysis, bears its own refutation." The decision that the commission had not abused the discretion vested was accompanied by a reaffirmation that the vesting of the discretion is not an unconstitutional delegation of legislative authority.

(*To be continued*)

LIABILITY OF CONSIGNORS AND CONSIGNEES OF INTERSTATE SHIPMENTS FOR UNPAID FREIGHT CHARGES

By Edgar Watkins *

A DECIDED weight of authority would allow the carrier to recover from the consignor any unpaid freight charges remaining due after goods have been delivered, and no charge, or a charge less than that called for by the lawful tariffs, has been collected.[1] In the courts which follow this general rule, it is immaterial whether the unpaid charges result from a partial prepayment by the consignor or the collection of less than the amount required by the tariffs from the consignee. Several courts refuse to allow the consignor to be held liable unless an effort has been made to collect unpaid charges from the consignee.[2] The theory underlying such initial and permanent liability on the part of the consignor is well expressed in a recent decision of the Interstate Commerce Commission in which it is said:[3]

"The consignor, being the one with whom contract of transportation is made, is originally liable for the carrier charges, and unless it is specifically exempted by the provisions of the bill of lading, or unless the goods are received or transported under such circumstances as would clearly indicate an exemption for him, the carrier is entitled to look to the consignor for charges."

Having concluded that the consignor is liable in every case for the unpaid freight charges unless specially exempted, the next question to be considered is whether or not and under what circumstances the consignee is liable for any or all unpaid freight charges on interstate shipments. First of all, it will be necessary to consider certain provisions of the Interstate Commerce Act, bearing in mind that the purpose of this act, as frequently declared in the decisions of the United States Supreme Court, was to provide one rate for all shipments of like character and to make

* Of the Atlanta Bar.

[1] Baltimore, etc., Ry. v. New Albany Box and Basket Co., (1911) 48 Ind. App. 647, 94 N. E. 906; Georgia R. R. v. Creety (1909) 5 Ga. App. 424, 63 S. E. 528; 2 Michie, Carriers sec. 1547, note 3.

[2] Yazoo etc., R. Co. v. Zemurray, (1917) 238 Fed. 789; King v. Van Slack, (1916) 193 Mich. 105, 159 N. W. 157.

[3] In the Matter of Bills of Lading, (1919) 52 I. C. C. 671, 721.

the rate charged for the transportation of goods in interstate commerce the rate duly filed with the commission. In this way discrimination is avoided and all shipments receive like treatment which it is the main purpose of the act to secure.

Turning our attention to the act itself, we find that section 6 which is now and has been in operation with modifications since 1887 provides:

"Nor shall the carrier charge, or demand, or collect, or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith, between the points named in such tariffs, than the rates, fares and charges mentioned or specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privilege or facilities in the transportation of passengers or property except as are specified in such tariffs."[4]

This section is mandatory upon the carrier requiring it to collect the charges called for in the published tariffs but does not name the party or parties from whom the charges are due or collectible, that is, the consignor or consignee, thus creating no new liability and imposing no additional burden upon them apart from their common law liability.

In the Transportation Act 1920 a new provision added to section 3 of the previous act reads:[5]

"From and after July 1, 1920, no carrier by railroad subject to the provisions of this act shall deliver or relinquish possession at destination of the freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination . . ."

While this new section does not enlarge the legal liability of the parties who would ordinarily be liable for the unpaid freight charges but simply places an affirmative duty on the carrier, nevertheless in its actual operation it does result in the consignee being compelled either to pay the charges due before receiving the goods or to execute a bond or establish credit relations with the carrier sufficiently ample to guarantee payment of freight charges on his entire business, both of which arrangements must be made under the terms and conditions imposed by the Interstate Com-

[4] 31 Stat. at L. 587, Chap. 3591; Comp. Stat. 1913, sec. 8597.
[5] Interstate Commerce Act, sec. 3, par. 2.

merce Commission.[6] This section goes a long way toward eliminating the issue as to whether or not the consignor or consignee shall pay the freight charges, since most consignees either pay the freight or obligate themselves so to do before they receive the goods. The position of the occasional shipper or consignee who has no credit relations with the carrier and who receives the freight, paying the charges demanded at the time of delivery, is, of course, the same as it was before this amendment. While the section does not specifically enlarge the obligation of the consignee, it would seem, when considering the effects of its operation, that the Congress must have thought the consignee liable for unpaid freight charges, and so thinking have provided a practical arrangement whereby when goods are erroneously delivered by the carrier to the consignee before the latter has paid all the freight charges which the carrier at the time thinks are due, the carrier can in most cases unquestionably hold the consignee liable for the balance of the proper charge.

Although the Interstate Commerce Commission realizes that someone must pay the lawful tariff charges, it has in a conference ruling[7] clearly explained that it will not attempt to determine in any case whether the consignee or consignor is legally liable for undercharges, asserting that such a question can only be determined by a court having jurisdiction and upon all the facts in each case. Hence it is to decisions of the various courts interpreting the applicable statutes, above quoted, in connection with the common law that we must turn to find out under what, if any, circumstances the consignee is liable for unpaid freight charges.

The scope and meaning of section 6 above quoted was considered by the United States Supreme Court in a decision which gives light upon the subject under discussion, the question at issue being whether the plaintiff could recover under the statute of the state of Texas imposing a penalty upon the carrier for failure to deliver goods on tender of the rate named in the bill of lading when such rate was not the lawful tariff rate, or whether the state statute must yield to section 6 which prescribes that the published tariff rates are the lawful charges. It was held that the published tariffs governed and that the plaintiff could not recover.[8]

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[6] Ex Parte 73, (1920) 57 I. C. C. 591.

[7] Conference Ruling 314.

[8] The Gulf, etc., Ry. Co. v. Hefley & Lewis, (1895) 158 U. S. 98, 39 L. Ed. 910, 15 S. C. R. 802.

In a similar case in Alabama, the plaintiff failed to recover, the court relying upon the decision above quoted and saying:[9]

"The clear effect of the decision was to declare that one who has obtained from a common carrier transportation of goods from one state to another at a rate specified in the bill of lading less than the published schedule rate filed with and approved by the Interstate Commerce Commission and in force at the time, whether or not he knew that the rate obtained was less than the schedule rate, is not entitled to recover the goods or damages for their detention upon a tender of payment of the amount of charges named in the bill of lading or of any sum less than the schedule charges; in other words, that whatever may be the rate agreed upon, the carrier's lien on the goods is by force of the act of Congress for the amount fixed by the published schedule of rates and charges and this lien can be discharged by the payment or tender of payment of such amount. Such is now the supreme law and by it this and the courts of all other states are bound."

Whatever doubt may have previously existed in the minds of counsel as to the effect of section 6 upon the subject of our discussion, the question of the liability of the consignee for unpaid freight charges was definitely decided in a recent United States Supreme Court decision, the facts of which were that goods were shipped from Los Angeles, California, consigned to defendant at Dayton, Ohio, $15.00 being paid by defendant upon receipt of the goods, while under the tariffs on file the proper charges were $30.00; defendant had no knowledge of the tariff rates and had made no agreement with the consignor to pay the freight. This suit was to collect the undercharge of $15.00. In holding defendant liable for such charges the court said:[10]

"Examination shows some conflict of authority as to the liability at common law of the consignee to pay freight charges under the circumstances here shown. The weight of authority seems to be that the consignee is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier. However this may be, in our view the question must be decided upon consideration of the applicable provisions of the statutes of the United States regulating interstate commerce."

And in discussing the effect of section 6 of the Interstate Commerce Act, the court said:

"It was therefore unlawful for the carrier, upon delivering merchandise consigned to Fink, to depart from the tariff rates filed. The statute made it unlawful for the carrier to receive

[9] Texas, etc., Ry. Co. v. Mugg & Dryden, (1906) 202 U. S. 242, 50 L. Ed. 1013, 26 S. C. R. 628.

[10] Pittsburgh, etc., Ry. Co. v. Fink, (1919) 250 U. S. 577, 580, 63 L. Ed. 1151, 40 S. C. R. 27.

compensation less than the sum fixed by the tariff rates duly filed. Fink, as well as the carrier, must be presumed to know the law and to have understood that the rate charged could lawfully be one when fixed by the tariff. When the carrier turned over the goods to Fink upon a mistaken understanding of the rate legally chargeable, both it and the consignee undoubtedly acted upon the belief that the charges collected were those authorized by law. Under such circumstances, consistently with the provisions of the Interstate Commerce Act, the consignee was only entitled to the merchandise when he paid for the transportation thereof the amount specified as required by the statute. For the legal charges the carrier had a lien upon the goods and this lien could be discharged and the consignee become entitled to the goods only upon tender of payment of this rate. *Texas & Pacific Co. v. Mugg,* 202 U. S. 242. The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the only legal rate the carrier had the right to charge or the consignee the right to pay."

In some cases where the consignee has based his selling price upon the cost of the goods to him, including freight charges, and the carrier later presents its bill for undercharges on the shipment, considerable hardship is apt to result to the consignee. This point was considered by the Supreme Court in the above decision and at page 582 of the opinion it is said:

"This may be in the present as well as some other cases a hardship upon the consignee due to the fact that he paid all that was demanded when the freight was delivered, but instances of individual hardship cannot change the policy which Congress has embodied in the statute in order to secure uniformity in charges for transportation. *Louisville & Nashville R. R. Co. v. Maxwell,* 237 U. S. 94. In that case the rule herein stated was enforced as against a passenger who had purchased a ticket from an agent of the company at less than the published rate. The opinion in that case reviewed the previous decisions of this court from which we find no occasion to depart."

While no remedy exists to mitigate the hardships which accompany the collection of undercharges made after the consignee has sold the goods, basing his price upon the supposition that the freight charges already collected were the full charges, the occurrence of such hardships may in a measure be prevented if the shipper makes a written request upon the carrier for a written statement of the rate or charge applicable to a described shipment, such as is authorized by the Interstate Commerce Act,[11] because the act prescribes a penalty of $250.00 should the carrier refuse to

[11] Interstate Commerce Act, sec. 6, par. 11.

furnish the rate or misstate the rate to the shipper's damage. While this penalty accrues in favor of the United States and can only be collected by it, still, it is believed that the carriers will exercise more care in correctly quoting rates and charges for which a written request is made if an error in so doing may in each instance subject them to the penalty described. At any rate, since this is the only protection available to the shipper, he has all to gain and nothing to lose by making use of it.

In several earlier cases the principle of estoppel has been brought into play to prevent the carrier from recovering undercharges from the consignee after the delivery of the goods and collection of what at that time the carrier mistakenly supposed to be the lawful tariff charges.[12] The later and better reasoned cases refuse to admit that the principle of estoppel is applicable in such matters. In a recent New York case[13] the court said:

"The defendant therefore became bound to pay to the plaintiff the charges—not those charges as erroneously or illegally computed by the plaintiff or himself, but the lawful and correct charges. If the amount of them were subject to the determination of the plaintiff it might, of course, remit them in part or perhaps estop itself from collecting the balance. We have no concern here in regard to such hypothesis. The one and only lawful and correct freight rate was that set forth in the schedule or tariff file in the office of the Interstate Commerce Commission and duly published and posted. The United States statutes known as the Interstate Commerce Act made that rate arbitrary, immutable by agreement, mistake or artifice of the parties, and not to be deviated from. The consignee, consignor and carrier were alike charged with full knowledge of it and its inescapable force, and it was the rate which defendant agreed to pay in accepting the goods.

"The record does not present the question of estoppel on the part of the plaintiff which could not by its act, intentionally or unintentionally, release the defendant or itself from the compulsory direction of the statutes."

To the same effect is a recent Massachusetts case in which the court said:[14]

"Estoppel against the collection of a rate fixed by rigid law cannot be predicated upon a statement or representation which at most can be of no higher binding force than an express contract to the same effect honestly made by both parties would be. Such

[12] Central Railroad of New Jersey v. MacCartney, (1902) 68 N. J. Law 165, 52 Atl. 575; Hutchinson, Carriers, 3rd Ed. sec. 807.

[13] Pennsylvania R. Co. v. Titus, (1915) 216 N. Y. 17, 109 N. E. 857.

[14] New York, etc., R. Co. v. York & Whitney, (1913) 215 Mass. 36, 40, 102 N. E. 366.

a contract would be of no avail in any aspect because contrary to law. Estoppel cannot rest on an illegal contract. . . The rate when published became established by law. It can be varied only by law and not by act of the parties. The regulation by Congress of interstate commerce rates takes the subject out of the realm of ordinary contracts in some respects and places it upon the rigidity of a quasi statutory enactment. The public policy thus declared supersedes the ordinary doctrine of estoppel so far as that would interfere with the accomplishment of the dominant purpose of the act. It does not permit that inequality of rates to arise indirectly through the application of estoppel which it was the aim of the act to suppress directly."

And the Supreme Court of the United States has unequivocally held that the principle of estoppel cannot be invoked against the right to collect the legal rate. In *Texas & Pac. Ry. Co. v Leatherwood* it has said:[15]

"That a carrier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled. A carrier has, for instance, been permitted to collect the legal rate, although it had quoted a lower rate, and the shipper was ignorant of the fact that it was not the legal rate."

And in the case of *Pittsburg, Cincinnati, etc., Ry. Co. v. Fink* it is said:[16]

"Estoppel could not become the means of successfully avoiding the requirements of the act as to equal rates in violation of the provisions of the statute."

To the same effect is a recent Wisconsin case.[17]

The opinion of the United States Supreme Court in *Pittsburg Cincinnati, etc., Ry. Co. v. Fink* was confirmed by a more recent decision handed down on May 16, 1921, by the same court, the facts of which were that the carrier sued to collect alleged undercharges on cars of melons consigned to defendant moving under straight bills of lading, none of which came into the possession of the consignee, defendant, and of whose issuance or terms defendant knew nothing. Defendant accepted the cars and paid all the charges claimed to be due, and later refused to pay the alleged undercharges. The court said:[18]

"We think that the doctrine announced in *Pittsburg, Cincinnati Chicago & St. Louis Ry. v. Fink,* 250 U. S. 577, is controll-

[15] (1919) 250 U. S. 479, 481, 63 L. Ed. 1151, 40 S. C. R. 27.
[16] (1919) 250 U. S. 577, 583, 63 L. Ed. 1154, 40 S. C. R. 28.
[17] Chicago, etc., Ry. Co. v. J. I. Case Plow Co., (Wis. 1921) 180 N. W. 846.
[18] New York Central, etc., R. Co. v. York & Whitney Co., (1921) 41 S. C. R. 509.

ing and that the liability of York and Whitney was a question of law. The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had a right to pay or the carrier a right to charge. The consignee could not escape the liability imposed by law through any contract with the carrier."

Since under the decisions of the highest courts both the consignor and the consignee are equally liable for any unpaid freight charges, it would seem that the carrier may proceed against either or both to collect such charges, and if a suit against one of these parties is not sufficient that another suit may be instituted against the other party liable. Having rights against two parties, it would seem that all the methods of procedure to enforce such rights would follow as a natural consequence and that the enforcement of one right would not militate against the enforcement of the other right against a different party nor operate as an election limiting the carrier to its action against one party, although there is a decision to the contrary.[19] An order-notify consignee who has received the goods is treated in all respects as an ordinary consignee, being liable for the freight charges.[20]

The contract that the consignor and consignee may enter into between themselves will not alter their individual and several liability for all unpaid freight charges. For instance, if the contract between the consignor and consignee called for shipment f. o. b. destination and only a part or no part of the freight is paid and the goods are delivered to the consignee, it is clear that in line with the decisions above quoted the consignee would be liable for the unpaid freight charges, either on the ground that the carrier having given up its lien the consignee was impliedly bound to make good any charges due, or on the ground that the lawful rate must be paid and cannot be avoided by contracts of any description;[21] nor can the lawful rate be avoided by the use of sham devices. For instance, undercharges may be collected on the basis of the lawfully established interstate through rate on shipments that have been first billed to an intermediate point and then rebilled to the intended destination, this plan having been originated for the sole purpose of getting the traffic through to the interstate destination at the rates applicable to and from the intermediate point, the sum

[19] Yazoo, etc., R. Co. v. Zemurray, (1917) 238 Fed. 789.
[20] Wabash Ry. Co. v. Bloomgarden, (Mich. 1920) 180 N. W. 443.
[21] Note 15 and Baltimore, etc., R. Co. v. New Albany Box & Basket Co., (1911) 48 Ind. App. 647, 94 N. E. 906.

of which was materially less than the through rate for the through service.[22]

Prior to the Transportation Act 1920 the carriers could bring suits for undercharges within the period allowed by the statutes of limitation in the state in which the action was brought. In the Transportation Act this subject is brought within the field of federal control, it being provided that actions for undercharge must be brought "within three years from the time the cause of action accrues and not thereafter."[23] It is a general rule of law that acts of limitation will be construed to operate prospectively only unless the contrary intention clearly appears[24]. The provision above quoted dating the running of the statute "from the time the cause of action accrues" does not show an intention of Congress to make the limitation period in which the carriers must begin their actions for charges retroactive. In line with the principles announced by the United States Supreme Court in an earlier case it is thought that all claims which were not barred by the respective state statutes of limitation on February 28, 1920, may be sued upon by the carriers for a period of three years after March 1, 1920.[25] The laws of the forum would determine in each case whether or not any particular claim was alive. These laws remain in full effect for that purpose, simply being superseded by the federal statute as to the time within which actions may be brought on live claims existing on and arising after March 1, 1920.

[22] Kanatex Refining Co. v. Atchison, etc., Ry. Co., (1915) 34 I. C. C. 271.
[23] Interstate Commerce Act, sec. 16, par. 3.
[24] 25 Cyc. 994.
[25] Sohn v. Waterson (1873) 17 Wall (U.S.) 596, 21 L. Ed. 731.

THE LEGAL RELATIONS OF CITY AND STATE WITH REFERENCE TO PUBLIC UTILITY REGULATION

By Harold F. Kumm*

I

Introduction

As suggested by the title, this paper is to deal with some questions concerning the relation of municipality and state which arise in connection with the state control of public utilities. These problems are a natural outgrowth of the present widespread system of regulation by state public service commissions.

The rapid development of this country, and the rise of large cities, have given a great stimulus to the growth of urban utilities. Among the most important of these are gas plants, electric light and power systems, water-works and street railways. No comment is needed to show the dependence of city dwellers on these industries or the importance of low rates and good service. There are involved other interests as well, sometimes conflicting. The state at large is interested in the maintenance of property rights and the people's welfare, the company in receiving a fair return on its investment, the municipal corporation in the following of that policy which will contribute most to the growth and prosperity of the city. That these interests make some sort of control necessary is fully recognized; but there is a difference of opinion as to the method to be employed, whether control should be by franchise, or by local regulation without franchise, or by a state public service commission. Municipal ownership has also been proposed and in many cases adopted, as a solution of the problem. In connection with these questions of policy come legal questions

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of equal importance. Since an understanding of both law and policy is necessary to a full understanding of the subject it shall be our object first to outline the problems of policy, and to follow this by a more detailed discussion of the legal questions involved, though neither subject can be adequately considered in a paper of this length.

Although different forms of regulation have been witnessed at various periods in our history, the American doctrine of regulation has remained little changed. This fundamental doctrine is that the public is entitled to reasonable service at a reasonable rate, and it has never been so interpreted by the courts as to permit the company to charge all that the traffic would carry.[1] Bearing this principle in mind, we are ready to examine the attempted control of public utilities by means of franchise provisions.

Under a system of franchise control, the fixing of rates is either the sole and deliberate act of some such group as the state legislature, the city, or the public utility; or it is a contractual agreement between two of the parties. Where the rates are fixed solely by municipality or utility, they cannot be strictly fair to the other party. One personally interested in the outcome must inevitably be prejudiced in his own favor. However honest the intention to act fairly, one's own interests will always loom larger in the mind than the interests of the other party and consequently the other party cannot consider the rate so fixed to be just.

Nor is the likelihood of reasonableness much improved when the charge is fixed by contract between two of the groups. The relation here is contractual and it arises out of a political struggle rather than out of a judicial determination. The representatives of the contracting groups do not meet as impartial judges to be guided by a standard that is above both parties, a standard which must be declared independent of conflicting personal interests. Instead, as would be expected in a contractual relation, the interests are foremost and the object of each party to the agreement is to gain the utmost for the group he represents. The council, acting in behalf of the city, must necessarily be guided by political considerations. The councilmen have not been chosen by the city to act as impartial outsiders in dealing with the utility. More probably they have been chosen in a heated campaign in which the franchise question has achieved prominence through appeals to

[1] William Anderson, Local Control of Public Utilities, (an unpublished manuscript) 1914, p. 2.

passion, prejudice, and self-interest, rather than through an appeal to reasonableness; a campaign in which the highly technical but important questions of valuation, etc., could have but little consideration. Then the public utility, moved to self-defense, attempts to control the council through favors. Once started in this practice, self-interest prompts it to go beyond a merely reasonable rate, and to try to get all it can. The utility is no more competent to determine reasonableness than the city. But whether the city or company control the council the result is essentially a compromise contract in which politics, self-interest and the relative strength of the parties play a greater part than reasonableness. We must look to some other system than this to find a rate fair to public and company alike.

It might be argued that although political control is defective, such defects as exist can be remedied by the courts which under this system are open to the injured party. For although the primary control be political, the ultimate decision in case of appeal lies with the courts. It might be said that the judges are well fitted to handle the questions of public utility control. But let us take the question of rates. In a given case the court can merely say whether the contested rate is or is not reasonable, according to law; and no common standard of reasonableness has as yet been adopted. Even if the court after long drawn-out litigation decides that the charge in question is not reasonable, the proper rate is still undetermined. The court has not the power to fix what it considers a reasonable rate since that power is legislative or administrative rather than judicial.[3] Further, the highly technical

[3] Freund, Police Power, 1904, Sec. 304-5. Among other cases Freund notes State v. Johnson, (1900) 61 Kan. 803, 60 Pac. 1068 in which a legislative act attempted to set up a court of visitation. The Supreme Court of the state declared the law unconstitutional as violating the principle of separation of powers since the proposed court had not only judicial powers but the power to fix rates, which the court held to be a legislative function.

In some recent cases the courts have in practice ignored this defect of power. Thus in a federal case the court declared that although the direct power of the courts in rate making was negative and not affirmative, the courts might nevertheless while acting within their judicial power grant an injunction against the enforcement of unreasonable rates, and condition the grant upon the acceptance by the plaintiff of a rate which the court regards as reasonable. City of Toledo v. Toledo Ry. and Light Co., (1919) 259 Fed. 450, 458. The judge made the rate in practice though not in theory.

Some courts directly declare that they have not the power to fix rates. City of New York v. Bronx Gas and Electric Co., (1920) 113 Misc. Rep. 166, 184 N. Y. Supp. 658, 660. But see contra Municipal Gas Co. v. Public Service Commission, (1919) 225 N. Y. 89, 121 N. E. 772; Morrell v.

questions involved in utility regulation demand that the persons settling these questions be trained not only in law, but in the valuation and control of public utilities as well. A judge can become a technical expert only by neglecting the remaining field of law. This he is not likely to do. To the extent then that the judge lacks the necessary technical training we may even say that the courts are unfitted for settling ultimately questions of regulation. And finally, the law's delays are such that the city may suffer irreparable injury or the company be forced into bankruptcy before a decision is finally handed down. Where the contest drags over several years, the decision may easily be obsolete by the time it is rendered. Thus the courts not only fail to remedy the evils of political control, but add the disadvantages of the delays of justice, the lack of the necessary knowledge; and sporadic rather than continuing supervision over the public service company.

To meet these evils and furnish speedy justice through the means of an impartial, competent tribunal the commission idea was brought forward for the control of public utilities. This control might take various forms so far as the different states were concerned; that is, there might be exclusive local control, or exclusive state control, or a division of regulatory powers between city and state.

A few words might be said at this point as to exclusive control by a local commission. Assuming the city to have been given the power of regulation, the final legislative control must remain with the council, since legislative power once delegated cannot be further delegated.[8] We are here considering a locally established commission subordinate to the city council, which that body is free to follow or not as it pleases. In such case the final decision must still remain in the field of politics, and be subject to the grave objection already pointed out. That this is true is amply demonstrat-

Brooklyn Borough Gas Co., (1920) 113 Misc. Rep. 65, 184 N. Y. Supp. 651. In the latter at page 655 the court says: "It seems to me error to take the position that court's may determine that a gas rate is too low to be fair to the corporation and is too high to be fair to the consumer, yet has no power to determine the rate that will be fair to both." However, on appeal the courts fixing of the rate was held to be error. Morrell v. Brooklyn Borough Gas Co., (N. Y. 1921) 132 N. E. 129.

[8] The general principle that the legislature cannot delegate its power to any other body has an exception in the case of municipal corporations, and the general view is that a grant of power to municipal corporations for certain purposes is not unconstitutional on the ground of delegation of powers. 6 R. C. L. 168-9. Sec. 168. But this power cannot be further delegated by the municipality.

ed by the history of the St. Louis commission.[4] Even where a local body may be set up independent of the council, politics will still creep in, though to a lesser extent; for those selected from that locality will naturally overestimate the interests of those who elect them. Were it possible to get unbiased commissioners, local control would still be subject to the criticism that the average city cannot afford to get the men best fitted for the task, nor conduct the extensive and costly investigation necessary to a proper decision. For these reasons it would appear that exclusive control in the hands of a local commission cannot be as satisfactory, from the standpoint of intelligent and impartial regulation, as exclusive state control.

Adequate control of utilities by state commissions began in 1907 when both New York and Wisconsin created public service commissions. Since these bodies were given wide regulatory powers, their work was followed throughout the country with much interest. That the state commission idea has since found rapidly increasing favor is evidenced by a study of state legislation during the next few years. By the end of 1910 five states had adopted this type of control.[5] That it had come to stay was shown by the results of 1911 when nine states established public commissions;[6] and in no state was any legislation passed lessening the powers of existing commissions.[7] During 1912 the idea grew steadily as experience strengthened the conviction that state control was greatly superior to local control in handling the involved questions connected with the control of public utilities.[8] The next year, 1913, found forty-two states holding legislative sessions, in seventeen of which the governors urged the passage of public service commission laws or the strengthening of existing laws.[9]

[4] William Anderson, Local Control of Public Utilities, (an unpublished manuscript) 1914, pp. 39-44. In a footnote to p. 40, Professor Anderson refers to the following for information concerning the St. Louis Commission: (a) King, the Regulation of Municipal Utilities, 1912, ch. XIII, (an article by Roger N. Baldwin, secretary of the Local Civic League); (b) Wilcox, Municipal Franchises, 1911, 750-754; (c) Report . . . in rates for Electric Light and Power (cover title), St. Louis, 1911, pp. 172; (d) Report . . . in the United Railways Company . . .; St. Louis, vol. I, 1912, pp. 382 plus; vol. II, 1913, pp. 34 and tables; (e) Report . . . on the Southwestern Telegraph and Telephone Company . . . (cover title); St. Louis, 1913, pp. IV, 152.

[5] Georgia, Maryland, New York, Vermont and Wisconsin.

[6] California, Connecticut, Kansas, Nevada, New Jersey, New Hampshire, Ohio, Oregon and Washington.

[7] R. C. Harrison in American Year Book of 1911, p. 446.

[8] R. C. Harrison in American Year Book of 1912, p. 280.

[9] R. C. Harrison in American Year Book of 1913, p. 294.

Ten states adopted the commission idea in this year.[10] 1914 did not see the establishment of any new commissions. The year following, 1915, was again a year in which most of the state legislatures met, and a year in which public sentiment could be tested. But though in most of the states not having commissions bills were introduced for their establishment, only one new state was added to the list.[11] In some states the powers of the commission were slightly added to, in others proposals to add to the commission's powers were defeated.[12] By 1917 the regulation of public utilities by state commissions had become almost universal throughout the country. There still continued to be much objection to the part that political considerations played in the selection and reappointment of commissioners. The companies by this time had modified their earlier attitude of hostility toward all regulation, and now favored the commission idea as the greatest barrier against municipal ownership.[13] The agitation for state control had given added strength to the home-rule sentiment, and in such organizations as the Minnesota Home Rule League this sentiment actively combated the further extension of state authority. During the war the interest in this subject was naturally lessened by the more stirring events of the great conflict. But the high operating costs then and the continued high prices since have forced the commissions in many instances to grant increased rates, and the commissions have consequently lost popularity. Within the last year added interest has been given to this subject in Minnesota by the adoption of a statute which places street railways under the control of the state Railroad and Warehouse Commission.[14]

At the present time the state commission idea seems to be firmly established. But though it appears that state control of public utilities is more desirable than exclusive local control, it is quite possible that the best results can be gained by a division of powers. Under such a division, we would give to the state control over those matters which are of statewide importance and to the

[10] Colorado, Idaho, Illinois, Indiana, Maine, Massachusetts, Missouri, Montana, Pennsylvania and West Virginia.

[11] Wyoming.

[12] R. C. Harrison in American Year Book of 1915, p. 297.

[13] R. C. Harrison in American Year Book of 1917, p. 272. Mr. Harrison is a former member of the New York Public Service Commission.

[14] Laws 1921, ch. 278. Under this act the street railways in Minneapolis, St. Paul and Duluth applied for an increase in rates which the commission granted. But the charging of these higher rates was blocked by temporary injunctions issued by the district courts of the districts in which these cities lie. Thus the courts are presented with the problems here discussed.

city control over those which are essentially local. This may lead to some friction somewhat similar to that which exists between state and nation over the control of commerce, but at the same time the benefits of such a division would seem to outweigh its disadvantages. The extent of the control that can be granted the city varies of course with geographical conditions and the degree of home rule the cities enjoy. Generally, the more isolated the communities the more power they may properly have; and the greater the local self-government the greater the power they may be given. Bearing these considerations in mind, we may say, speaking generally, that the powers of regulation can be divided into three classes:[15]

(1) Those of a state-wide character, to be exercised exclusively by the state.

(2) Those of an essentially local character, to be exercised exclusively by the municipality.

(3) Those of a mixed character, to be exercised primarily by the city, but subject to revision by the state commission.

The control in the first class of powers is vested in the state commission. This must be so since the problems which these powers must meet are so state-wide in their character, and their control is so necessarily uniform throughout the commonwealth that they can be properly exercised only by a body having a jurisdiction as wide as the problem to be met. Failure of the state to act within this field should not be so construed as to permit local regulation. Rather, it should be taken as an indication of an intent on the part of the higher authority that the field is to be left uncontrolled. As to the powers that can be properly handled by the state, a few may be enumerated. The subject of incorporation is a vital one in public utility control. Power over incorporation is ordinarily in the hands of the state, and the state commission might properly be given control over the issuance of stock, the general powers and duties of corporations, and intercorporate relations. In the latter, especially where there is extensive interlocking control, the cities are powerless to remedy conditions.

[15] The classification here presented cannot be referred to any one work, but the writer has examined the following authorities as to the division of regulatory powers between city and state: (a) 2 Wilcox, Municipal Franchises, 1911, 744-5; (b) A. L. Valentine, Address on Public Utilities reported in the Municipal League News (Seattle), April 27, 1912, p. 2; (c) J. M. Eshlemen, 2 Nat. Mun. Rev., Jan. 1913, pp. 24-30; (d) H. E. Wilson, Seattle Mun. Rev., Dec. 13, 1913, pp. 1-2, 5; (e) Report of Commission 3 Nat. Mun. Rev., Jan. 1914, pp. 13-27.

Other powers which the state commission should have by reason of its greater impartiality or wider knowledge are the right to fix rates, depreciation standards, and uniform accounting systems, and to make rules for valuation for the purposes of rate-making, capitalization, condemnation or purchase. Thus the state is to determine the settlement of those problems which are state-wide, or which the state by reason of its fuller knowledge and more judicial attitude can handle more justly than the city.

The second class of powers, a limited one, consists of those to be vested exclusively in the city. There are certain minor matters which the locality should have the right to regulate, even though its control be essentially political. In respect to some things essentially local in their nature the state commission would have neither the time nor the interest which is necessary for proper regulation. Exclusive local control would probably be most complete in the case of street railways. There it might properly be extended to questions of stops, schedules, re-routing of cars, and service. In the case of gas, telephone and electric companies, the city's control would be confined more or less to the question of service, although it might also include such matters as the placing of poles, etc.

There still remains the third class. This covers a broad field and includes such elements as the assignment of streets upon which railways or mains may be laid, orders for extensions of existing lines, and the granting of permits. The direction in which a city will build is determined in large measure by the direction in which street car lines or water mains are extended. Unless the community have some control over these matters, city planning is impossible. Questions of such importance, affecting so vitally the future of the locality should be left primarily to it, for after all the public utilities exist for the city and not the city for the public utilities. But that the utility may be protected against abuses of power, against attempts to build up outlying "speculation districts" at the expense of the company or other localities, there should be a right of appeal to the state commission. In case of appeal the higher body should content itself primarily with a determination of whether or not the regulation complained of is unreasonable; and not alter the city's finding without good cause. By allowing the municipality to make its own agreements in the field indicated above, the interest of the people in municipal affairs is maintained while the state prevents shortsighted action by its

power of review. Thus the best of both is kept; the particular needs of the people in any community will insure their attention and continued interest in the matter of regulation while the state will bring in that equality and impartiality which can only be obtained by a highly trained body unmoved by local self-interest.[16]

This concludes our discussion of the questions of policy. We now turn to the corresponding legal problems. These are many and include such questions as to the protection to be given municipal corporations and private persons by the national and state constitutions through the contract clause, the due process clause, and the like; questions as to the delegation of powers; and as to the nature of the powers given the commission, whether legislative, administrative or judicial; the problems of franchises and franchise rights; and finally the whole question of what is a public use. In a paper of this length but few of these problems can be considered. Certain constitutional questions concerning the relation of city and state have been selected as being of the greatest interest, and it shall be our object to inquire so far as space will permit into the following:

(1) To what extent is a municipal corporation, in its ownership of public utilities, protected against the state public service commission by the contract and due process clauses of the federal constitution?

(2) To what extent is the state's police power, when acting through a public service commission, hampered by franchises granted prior to the establishment of the commission?

[16] The writer is fully aware of the fact that the state commissions have not yet reached this ideal condition. But there is in the state commission idea the possibility of progress toward such an end; whereas there can be no progress under the old system where the decision rests on the strength of the parties and where the question is one for political agitation rather than law. It is probable that while this new set of rules and law is in the making, political considerations will at times be given weight. No doubt the same was true when the common law was in the making, and the same is true today in those branches of international law which are still in a fluid state. But in spite of this present defect, the commission idea points the way toward a body of precedent which, when fully developed, it will be the province of the commission to enforce as thoroughly as the courts now enforce the common law. When such a state has been reached, an elected commissioner must necessarily be as impartial and aloof from politics as an elected judge. It is no extravagant assertion to say that when such a time comes, the commissioners will honor their established precedent as much as the courts do theirs, and follow it with as great fidelity.

II

On the Protection Which the Federal Constitution Affords the Municipal Corporation Against the State

It is necessary briefly to inquire into the nature of municipal corporations, in order to determine what protection, if any, the federal constitution may give them against the state in their ownership of public utilities.[17] It is apparent that if there are bounds beyond which the legislature cannot go in its dealings with the municipality, its creature, the public service commission, is likewise limited. Added importance is given this question by the large number of utilities which are municipally owned.

Before the state commission idea was adopted as a remedy, the inability of the city to settle the problems of regulation through the medium of political and judicial control had given great impetus to the movement for municipal ownership. This movement was especially noticeable in the period from about 1890 to 1907, and resulted in many cities becoming the owners of water plants, electric light and gas plants, etc. Municipal ownership was adopted as the only means by which the public could adequately safeguard its interests.[18] This condition of affairs complicates our problem of state control, for the commission will be forced in many instances to deal with utilities owned by the city. To examine the constitutional principles governing the relations between city and state where the utilities are so owned is the main object of this article.

In this country municipal corporations, like private corporations, must be created by statute.[19] It might be thought that inasmuch as they are the creation of the legislature for the purposes of government, the legislature as the higher governing body should be supreme over them at all times and in all things. If this view ever was held in an unqualified form it has been modified in this country by the recognition of the private or proprietary capacity of cities. The municipality has been held to be acting in this capacity in the maintenance and operation of a water works

[17] A municipal corporation is defined by Dillon as "the body corporate and politic constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof." Municipal Corporations, 5th ed., 58.

[18] C. L. King, The Regulation of Municipal Utilities, 1912 p. 26.

[19] 1 Dillon, Municipal Corporations, p. 61.

system,[20] gas plant,[21] electric light plant,[22] market house,[23] wharf,[24] and cemetery;[25] and in the negligent operation of such business has been held to a liability corresponding to that of a private individual engaged in a like enterprise. With the idea of a private capacity and its corresponding liabilities, there appeared a principle of protection. The principle was this: that the city, acting in such capacity, was entitled to receive protection as against the state similar to that given the private corporation or individual engaged in a similar undertaking.[26] This conception of a proprietary capacity was the result of "judicial legislation"[27] which aimed to escape technical difficulties and do substantial justice.[28] The principle so evolved is now clearly established,[29] but there is still a very real difficulty in its application.[30] For the creators of this principle did not mark clearly the boundaries of such proprietary capacity, nor did they indicate the basis upon which it was founded. Indeed, it would have been difficult to do so, for while from the viewpoint of the individual all municipal acts are public, yet from the viewpoint of the people at large many acts are not public in the sense that the whole state is politically interested. With no sound basis then for the distinction between the two capacities, governmental and proprietary, it is not surprising that succeeding cases show much confusion. But this confusion must not be erroneously interpreted as a denial of the principle but as a denial of its applicability to the particular facts presented by the case.

It is interesting to note in this connection certain federal cases. While these relate to state rather than municipal activities the distinction between proprietary and governmental acts is clearly brought out. In *Bank of the United States v. Planter's Bank of*

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[20] See cases cited in footnote 57, post.
[21] See cases cited in footnote 59, post.
[22] See cases cited in footnote 58, post.
[23] See cases cited in footnote 60, post.
[24] See cases cited in footnote 61, post.
[25] See cases cited in footnote 62, post.
[26] A fundamental distinction, however, between private and municipal corporations exists in the power of the legislature to deprive the municipal corporation of its charter and thus of its corporate capacity to hold property. Cooley, Constitutional Limitations, 4th ed., 290.
[27] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular action." Holmes, J., in Southern Pacific Co. v. Jensen, (1916) 244 U. S. 205, at 221, 61 L. Ed. 1086, 37 S. C. R. 524.
[28] 1 Dillon, Municipal Corporations, 184; David v. Portland Water Committee, (1886) 14 Ore. 98, 12 Pac. 174.
[29] 1 Dillon, Municipal Corporations, 184.
[30] 1 Rose's Notes on United States Reports, p. 979.

Georgia,[31] the defendant numbered among its stockholders the state of Georgia. On this account it claimed immunity from suit in any but the highest federal court. This claim was denied by Chief Justice Marshall who said:[32]

"It is, we think, a sound principle that when a government becomes a partner in any trading company it divests itself so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted."

This case was quoted with approval in *Briscoe v. The Bank of Kentucky*[33] where the state had chartered a bank which was to be exclusively the property of the commonwealth. After quotations from previous cases, the court declared:

"They show that a state, when it becomes a stockholder in a bank, imparts none of its attributes of sovereignity to the institution, and that this is equally the case, whether it own a whole or a part of the stock of the bank."[34]

Finally, in the *South Carolina Dispensary Case*,[35] where the state had engaged in the sale of intoxicating liquors, a federal tax on such state business was upheld by the United States Supreme Court. While recognizing that certain state agencies are immune from taxation, the court insisted that such immunity does not extend to those agencies "which are used by the state in the carrying on of an ordinary private business."[36] An analogy is drawn between state and city while acting in a private capacity and the opinion contains several quotations from state cases in which the proprietary capacities of a municipal corporation are discussed.

Regarding it as an established principle that the municipal corporation is entitled to some degree of protection against the state where the corporation is engaged in a proprietary undertaking, it will be our object to define the limits of that protection.

As to the city in its public or governmental capacity, a few words may be said. It is to be observed that from the viewpoint

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[31] Bank of the United States v. Planter's Bank of Georgia, (1824) 9 Wheat. (U.S.) 904, 6 L. Ed. 244.

[32] Ibid., p. 907-8.

[33] Briscoe v. Bank of Kentucky, (1837) 11 Pet. (U. S.) 257, L. Ed. 709, 928.

[34] Ibid., pp. 325-6.

[35] South Carolina v. United States, (1905) 199 U. S. 437, 50 L. Ed. 261, 26 S. C. R. 110.

[36] Ibid., p. 461.

of the state the community has been incorporated for a political or governmental purpose, to assist the state in the government of its local subdivisions.[37] The legislative act is in effect the setting up of a lesser legislature to exercise a portion of the governing powers of the state in the government of that particular locality. There is nothing of commerce about the transaction; it is essentially political. Nor can it be said that by such act a contract has been set up which is protected against subsequent impairment by state act, for it is elementary that to make a valid contract requires the assent of both parties.[38] But incorporation requires the assent of one party only, the governing body of the state. Its act is binding without the assent of the corporators, unless the act is expressly made conditional.[39] It is incorrect, therefore, to consider the grant of purely governmental powers a contract within the sense of that clause of the federal constitution which prohibits any state from passing a law impairing the obligation of contracts.[40] If the city is acting merely as a local or lesser legislature, must it not necessarily be subordinate to the greater legislature in all political questions on which the greater acts? Were it otherwise, were we to permit rights of local government to become vested as against the state, we should have within the commonwealth a number of petty governments, created by the legislature to assist it in expressing the political will of the state, but now beyond its control.[41] Such purely governmental functions cannot become vested as against the state.[42]

Connected with the absence of constitutional protection while the city is engaged in a public capacity is freedom from liability for the negligence of its employees while so acting.[43] Consequently

[37] 1 Dillon, Municipal Corporations, 58.

[38] There are of course other reasons than this to account for the fact that in respect to governmental functions no contract exists between city and state. The point is given here by way of illustration, rather than as proof.

[39] 1 Dillon, Municipal Corporations, 142.

[40] "No state shall . . . pass . . . law impairing the obligation of contracts." Art. 1, Sec. 10, The constitution of the United States.

[41] Sloane v. State, (1847) 8 Black. (Ind.) 361, at 364.

[42] 1 Dillon, Municipal Corporations, p. 178; Cooley, Constitutional Limitations, 4th ed. p. 232; People v. Morris, (1835) 13 Wend. (New York) 325, at 331; Sloane v. State, (1847) 8 Black. (Ind.) 361, at 364.

[43] See cases cited below in footnotes 44 to 51 inclusive. "The liability of cities for not keeping streets in repair would seem to be an exception to this general rule, which we think the courts would do better to rest either upon special considerations of public policy or upon the doctrine of stare decisis than to attempt to find some strictly legal principle to justify the decision." Mitchell, J., in Snider v. City of St. Paul, (1892) 51 Minn. 466, 472, 53 N. W. 763, 18 L. R. A. 151.

it has been held that the municipality is not liable for damages resulting from its inability to put out a fire where such inability was the result of negligently permitting the city water mains to become clogged with sand or mud,[44] or the water system to get out of repair,[45] and that there was no liability on the part of the city for the negligent operation of its fire department,[46] police department,[47] health department and hospitals,[48] public schools,[49] jails and workhouses,[50] or ambulances,[51] whereby damages were sustained. Hence the municipality acting as the political agent of the state has neither responsibility for its negligent acts in such capacity, nor the privileges of protection against the state legislature. The legislature may alter, abolish or modify the municipal corporation at will; its power unlimited save by its own state constitution.[52]

When we turn to a consideration of the city's acts in a proprietary capacity we find that there the city has both responsibilities and privileges. Its rights and liabilities while so acting may be said to resemble those of a private person engaged in similar enterprises. But inasmuch as the creation of this capacity in American law is the result of "judicial legislation" as noted above, it is evident that the limits set in this field will vary in the different jurisdictions, and result in much confusion. We may, however, lay down the general rule that in the construction and operation of water works,[53] gas plants[54] and electric light plants,[55] the city is

[44] Miller v. City of Minneapolis, (1898) 75 Minn. 131, 77 N. W. 788. Canty J., at 75 Minn. 133 says, "For purposes of protection from fire, the water plant and service must be regarded as part of the fire department."

[45] Springfield Fire Ins. Co. v. Village of Keeseville, (1895) 148 N. Y. 146, 42 N. E. 405, 30 L. R. A. 660, 51 A. S. R. 667.

[46] Hillstrom v. St. Paul, (1916) 134 Minn. 45, 159 N. W. 1076, L. R. A. 1917B 548; and notes in 30 A. S. R. 398; 108 A. S. R. 170; 15 L. R. A. 781; 1 L. R. A. (N.S.)666; 4 L. R. A. (N.S.) 629; 44 L. R. A. (N.S.) 68; 7 Ann. Cas. 807; 18 Ann. Cas. 508; 45 L. Ed. 314; 45 L. Ed. 314.

[47] Cleveland v. Payne, (1905) 72 Ohio St. 347, 74 N. E. 177, 70 L. R. A. 841.

[48] Evans v. Kankakee, (1907) 231 Ill. 223, 83 N. E. 223, 13 L. R. A. (N.S.) 1190 and note; Richmond v. Long, (1867) 17 Gratt. (Va.) 375, 94 Am. Dec. 461 and note.

[49] Ernst v. West Covington, (1903) 116 Ky. 850, 76 S. W. 1089, 105 A. S. R. 241 and note, 3 Ann. Cas. 882 and note. 63 L. R. A. 652; Wahrman v. Bd. of Education, (1907) 187 N. Y. 331, 80 N. E. 192, 116 A. S. R. 609 and note, 10 Ann. Cas. 405.

[50] Nichols v. Fountain, (1914) 165 N. C. 166, 80 S. E. 1059, Ann. Cas. 1915C 152 and note, 52 L. R. A. (N.S.) 942 and note.

[51] Maxmilian, Admx. v. Mayor of New York, (1875) 62 N. Y. 160, 20 Am. Rep. 468.

[52] 1 Dillon, Municipal Corporations, 142, 182.

[53] See cases cited in footnote 57, post.

[54] See cases cited in footnote 59, post.

acting in a proprietary capacity. It is to be observed that although the object here is public, it is not recognized as governmental so far as the state at large is concerned. It cannot matter to the state as a whole whether gas light is furnished to private individuals in a particular locality by the city or private corporation. Whatever interest the state may have is a commercial or neighborhood interest. The aim is not governmental but commercial. The city has entered a field ordinarily occupied by private enterprise and is operating a plant and selling service to consumers after the manner of a private corporation. We may well ask:

"Should it be permitted to carry into this quasi-private enterprise the attributes of sovereignty and stand immune from actions for negligence in the operation of such enterprises, or be free from federal taxation? Should sovereignty protect that which is not necessary to the government of the community."[56]

Justice to those who have dealings with the city in such capacity would declare the enterprise entitled to no such protection.

If we deny the city in its private enterprises immunity from suit, we may hold it liable for the negligence of its servants in such undertakings. Accordingly, the city has been held liable for the negligent construction of its water works system,[57] electric light[58]

[56] See cases cited in footnote 58, post.

In a recent case the California supreme court decided that a municipally owned electric light plant did not come within the terms of a statute which permitted the State Railroad Commission to regulate public utilities. Pasadena v. R. R. Commission, (Cal. 1920) 192 Pac. 25, 10 A. L. R. 1425 annotated. The statute in this case classed as public utilities, among other industries, every private corporation engaged in the production, etc. of light for the public. The court said that a plant owned by a municipal corporation was not owned by a private corporation within the meaning of the act.

[57] Exemption from liability for the negligence of its officers while acting in a governmental capacity has been extended to the municipal corporation upon various grounds. In Murray v. Omaha, (1902) 66 Neb. 279 the city was held not to be liable for the negligence of certain building inspectors since the board represented the state and exercised its sovereignty. In Levy v. Mayor, etc., of New York, (1848) 1 Sand. (N. Y. Sup. Ct.) 465 multiplicity of suits was mentioned as a basis for denying recovery for damages resulting from the failure to enforce a law since "there would be no end to the claims against the city and state" if such actions were permitted. Whether the city profited or not by the undertaking seemed to be a vital point in the case of Hill v. Boston (1871) 122 Mass. 344 where the city was held not liable for the defective condition of its public school whereby a child was injured.

[58] 1 McQuillan, Municipal Corporations, 1012, 182; Winona v. Botzet, (1909) 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204 and note; Watson v. Needham, (1894) 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287; Pettingill v. Yonkers, (1889) 116 N. Y. 558, 22 N. E. 1095, 15 A. S. R. 442 and note; Brown v. Salt Lake City, (1908) 33 Utah 222, 93 Pac. 570, 126 A. S. R. 828 and note, 14 Ann. Cas. 1004 and note, 14 L. R. A. (N. S.) 619.

and gas plant,[59] market houses,[60] wharves[61] and cemeteries.[62] But as we have noted, the development of this liability has generally carried with it corresponding privileges. The extent to which these privileges protect the municipality against the acts of the state brings us to the main question of this article. For in its operation of public utilities the city acts in a private capacity and any protection afforded it by the federal constitution must to that extent hamper the powers of the public service commission. Attention already has been called to that section of the constitution which declares that "No state shall pass any law impairing the obligation of contracts," and we may also note at this point the due process clause of the fourteenth amendment.[63] We are thus confronted with this question:

"Is the protection which the constitution affords private persons against state acts, extended as completely to a municipal corporation which is acting in a proprietary capacity?"

This point has never been directly adjudicated in the United States Supreme Court, although it often has noted the distinction between the two capacities. Story, J., in the celebrated *Dartmouth College Case* said:

"It may be admitted that corporations for mere public government, such as towns, cities, and counties, may in many respects be subject to legislative control. But it will hardly be contended, that even in respect to such corporations the legislative power is so transcendant that it may, at its will, take away the private property of the corporation."[64]

In a more recent case the court remarks:

"It has been held that as to the latter class of property [that

[59] Davoust v. Alameda, (1906) 149 Cal. 69, 84 Pac. 760, 9 Ann. Cas. 847, 5 L. R. A. (N. S.) 536 and note; Hodgins v. Bay City, (1909) 156 Mich. 687, 121 N. W. 274, 132 A. S. R. 546 and note; Riley v. Independence, (1914) 258 Mo. 671, 167 S. W. 1022, Ann Cas. 1915 D. 748 and note.

[60] Brantman v. Canby, (1912) 119 Minn. 396, 138 N. W. 671, 43 L. R. A. (N. S.) 862 and note.

[61] Savannah v. Collins, (1868) 38 Ga. 334, 95 Am. Dec. 398 and note; Barron v. Detroit, (1893) 94 Mich. 601, 54 N. W. 273, 34 A. S. R. 366 and note, 19 L. R. A. 452 and note.

[62] Jefferson v. Louisville, etc., Ferry Co., (1866) 27 Ind. 100, 89 Am. Dec. 495; Willey v. Alleghany City, (1888) 118 Pa. St. 490, 12 At. 453, 4 A. S. R. 608.

[63] Hollman v. Plattville, (1898) 101 Wis. 94, 76 N. W. 1119, 70 A. S. R. 899 and note.

[63] "No state shall....pass any....law impairing the obligation of contracts." Art. 1, Sec. 10. The constitution of the United States. "Nor shall any state deprive any person of life, liberty, or property, without due process of law." Amendment XIV to the United States constitution.

[64] Dartmouth College v. Woodward, (1819) 4 Wheat. (U. S.) 518, 694, 4 L. Ed. 629.

held by the city in a proprietary capacity] the legislature is not omnipotent. If the distinction is recognized it suggests the question whether property of a municipal corporation owned in its private or proprietary capacity may be taken from it against its will and without compensation. Mr. Dillon says truly that this question has never been directly adjudicated in this court. But it and the distinction upon which it is based have several times been noticed."[65]

It would appear that the court has not committed itself irrevocably on the question. We cannot say that it has either recognized or denied the municipal corporation protection in a proprietary capacity.[66]

We must turn then to the state cases for what light they may shed upon the problem. In view of the wide use of the contract clause in other fields it is surprising that we find so few cases where it has been directly presented in a contest between city and state. There are many dicta on the point, but few adjudications. However, these few cases clearly recognize a principle of protection.

Perhaps the earliest case deserving attention, though not directly in point, is that of *Benson v. New York*.[67] There the state legislature had passed an act relating to ferries which it was claimed deprived the city of New York of property rights in certain ferries which it operated by ancient grant. The court after pointing out that by the doctrine of *Dartmouth College v. Woodward*, a grant of franchise when acted upon became a contract, declared that the principles of that case were equally applicable to all franchises coupled with a pecuniary interest. If this statute must then be so construed as to include existing ferries, it must be pronounced unconstitutional and void. The court, however, de-

[65] Hunter v. City of Pittsburgh, (1907) 207 U. S. 161, 179, 52 L. Ed. 151, 28 S. C. R. 40. The court here refers to Commissioners v. Lucas, (1876) 93 U. S. 108, 115, 23 L. Ed. 822; Meriwether v. Garett, (1880) 102 U. S. 472, 518, 530, 26 L. Ed. 197; Essex Board v. Skinkle, (1880) 140 U. S. 334, 342, 35 L. Ed. 446; New Orleans v. New Orleans Waterworks Co., (1891) 142 U. S. 79, 91, 35 L. Ed. 943, 12 S. C. R. 142; Covington v. Kentucky, (1898) 173 U. S. 231, 240, 43 L. Ed. 679, 19 S. C. R. 383; Worcester v. Street Ry. Co., (1904) 196 U. S. 539, 551, 49 L. Ed. 591, 25 S. C. R. 327; Monterey v. Jacks, (1906) 203 U. S. 360, 51 L. Ed. 220, 27 S. C. R. 67.

[66] In San Antonio v. San Antonio Public Service Co. (1921) 41 S. C. R. 428, where the Texas constitution prohibited the granting of irrevocable privileges, the United States supreme court held that since the city was not bound by the ordinance provision for street car rates the courts would not construe such ordinance provision as binding on the company, so as to permit the city to claim a contract right in such a rate.

[67] Benson v. New York (1850) 10 Barb. (N. Y.) 223.

cided that the act did not include the city's ferries and so there was no necessity for declaring it void.[68]

What appears to be the first case directly in point arose in Wisconsin in 1860.[69] This was an action of ejectment to recover forty acres of land which plaintiff town had formerly purchased, and which later by legislative act was included in the extended city limits of the defendant. If the legislature is supreme over all city property the plaintiff could have no valid claim here. But its claim was upheld since the property was held in a private capacity. Dixon, Chief Justice, says in this case:

"The difficulty about the question is to distinguish between the corporation as a civil institution or delegation of merely political power and as an ideal being endowed with the capacity to acquire and hold property for corporate or other purposes. In its political or governmental capacity, it is liable at any time to be changed, modified or destroyed by the legislature; but in its capacity of owner of property, designed for its own, or the exclusive use and benefit of its inhabitants, its vested rights of property are no more the subject of legislative interference and control without the consent of the corporators than those of a merely private corporation or person . . . In its character of owner of property, it is a private corporation, possessing the same rights, duties and privileges as any other."[70]

The grant of land to the plaintiff was held a contract entitled to the protection given by the federal constitution.

The next year the California supreme court decided the case of *Grogan v. San Francisco*.[71] Here the city had attempted to sell certain of its wharf property but irregularities rendered the sale invalid. The state then attempted to ratify the sale. Whether its act was sufficient to pass title to the property in question depended on whether it had absolute control over the city's property. The court held that it did not and said through Chief Justice Field,

"Nor is there any difference in the inviolability of a contract between a grant of property to an individual and a like grant to a municipal corporation. So far as municipal corporations are

[68] Cooley points out that this case would not be supported by the weight of authority. Constitutional Limitations, 6th ed., p. 292 note. This attitude appears to be based upon the belief that ferries are not properly subject to being held in a proprietary capacity by a municipality. This is rather a denial of the applicability of the principle than a denial of the principle itself. It should be noted that the conditions in this case are peculiar, by reason of the antiquity of the ferry grants.

[69] Town of Milwaukee v. City of Milwaukee, (1860) 12 Wis. 103.

[70] Ibid., pp. 111-2.

[71] Grogan v. San Francisco, (1861) 18 Cal. 590.

invested with subordinate legislative powers for local purposes they are mere instrumentalities of the state. . . But though a municipal corporation is the creature of the legislature, yet when the state enters into a contract with it, the subordinate relation ceases, and that equality arises which exists between all contracting parties. And however great the control of the legislature over the corporation, it can be exercised only in subordination to the principle which secures the inviolability of contracts."[72]

The state's attempt to deprive the city of its wharf property was held unconstitutional, as impairing the obligation of contracts.

In *Spaulding v. Andover*[73] this provision of the federal constitution again was successfully invoked to protect municipal property against state interference. The state of New Hampshire had issued bonds for the reimbursement of expenditures, incurred by various cities during the Civil War. A portion of them were assigned to the city of Andover. Subsequently, the state legislature attempted to assign to private individuals certain of the bonds still held by the city. The original grant was held a contract and the later act of the state was held to be invalid as impairing the obligation of contracts.

A decision a few years later by the Louisiana supreme court[74] is of more than ordinary interest, since some preceding decisions of that court often have been cited in support of the contention that the city can receive no constitutional protection in a proprietary capacity. In this case New Orleans had been given the right by the state legislature to build docks and charge wharfage. It later leased these to the plaintiff. Subsequently a statute exempted from the payment of fees vessels of over a certain tonnage, built in the state. The defendant, owner of such a vessel, refused to pay plaintiff the customary fees and this action was brought. The court held the later act unconstitutional and in its opinion through Manning, Ch. J., declared:

"The exclusive right to regulate and make improvements to the wharves, and to lease them, having been thus lawfully conferred upon and delegated to the city, it became the private right of the corporation and not subject to divestiture without a due legal process and compensation therefor, as contradistinguished from a public right which may be abrogated by the state at its pleasure."[75]

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[72] Ibid. pp. 613-4.
[73] Spaulding v. Andover, (1873) 54 N. H. 38.
[74] Ellerman v. McMains, (1878) 30 La. Ann. 190, 31 A. S. R. 218.
[75] Ibid. p. 191.

While the case does not state whether the decision is based on the contract or due process clause, it is probably upon the former, since the court quotes with approval an extract from Cooley which speaks of contracts arising in favor of cities, which cannot be divested. The fact that a private person is the plaintiff here, rather than the city, should not affect the decision, since the lessee can have no greater rights than the lessor, the city of New Orleans.[16]

The last case to be noted, and perhaps the most able, is that by the Massachusetts supreme judicial court in *Mount Hope Cemetery v. Boston.*[17] The city of Boston owned a cemetery which the legislature by statute attempted to transfer to a corporation entitled "The Proprietors of Mount Hope Cemetery." The act made no provision for compensation to the city. The court distinguishing the governmental and proprietary capacities of a city, declared that here the municipality had not acted strictly "for the accomplishment of general public or political purposes, but rather with special reference to the benefit of its own inhabitants. . . In view of all these considerations, the conclusion to which we have come is that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the constitution of Massachusetts and of the United States so that the legislature has no power to require its transfer without compensation."[18]
The decision in this case was placed upon the due process clause of the federal constitution rather than upon that clause relating to contracts. But for practical purposes it makes little difference upon what ground the protection is based, so long as it is actually extended.

Since, however, what is a proprietary character varies with the varying "judicial legislation" as before noted, cases will be found in which rights proprietary in one jurisdiction will be held governmental in another, and protection denied. But that is not

[16] L. H. McBain says of this case, "The case of Ellerman v. McMains may also be excluded. The New Orleans charter of 1836 conferred upon the city power to construct wharves and to collect wharfage. In 1874 the legislature passed an act exempting from the payment of such charges boats built within the state. This act was held to be void, but no mention was made of the contract clause, the court declaring that the act operated to deprive the city of property without due process of law." 3 Nat. Mun. Rev. p. 293, footnote.

[17] Mount Hope Cemetery v. Boston, (1893) 158 Mass. 509, 33 N. E. 695, 35 A. S. R. 515.

[18] Ibid. p. 519.

a denial of the principle, but rather a denial of its applicability to the facts under consideration. That municipal corporations have a dual character must be regarded as firmly established.[79] And as to the protection to be afforded the city in a proprietary capacity, the weight of authority would seem to incline toward a considerable degree of protection, though as to this the law cannot be regarded as definitely settled.[80] We should note at this point H. L. McBain's opinion to the contrary, as expressed in an article on the "Rights of Municipal Corporations under the Contract clause of the Federal Constitution."[81] In this article Mr. McBain comes to the conclusion that the federal constitution affords the city no protection in a proprietary capacity. He is considering the contract clause only. In a support of his conclusion he cites *St. Louis v. Shields*[82] (a wharf case), *Layton v. New Orleans*[83] (a tax case), *Police Jury v. Shreveport*[84] (a ferry), *City of Laredo v. Martin*[85] (a ferry), *Trustees v. Tatum* (a ferry),[86] *Board of Education v. Aberdeen*[87] (a case in which the legislature had changed the uses to which money received by the city for liquor licenses should be devoted), and *People v. Vanderbilt*[88] (in which there is discussed the question as to the right of the state to establish a bulkhead without regard to a previous grant of waterfront property to the city). It will be noted that these cases all relate to borderline rights, rights which the courts when they were building up the doctrine of a proprietary capacity could either include or exclude from that category. That they have chosen to exclude in the above cases the particular rights there considered would not seem to be sufficient to prove that they would have denied protection if held in a proprietary capacity. That the courts were here concerned with the applicability of the principle rather than with its denial is shown by the fact that other decisions of these same

[79] 1 Dillon, Municipal Corporations 184. "As to municipal powers and rights held by the corporation in its proprietary or private character, and as to contracts made with reference thereto, it is to be regarded nearly if not quite as a private corporation and is within the constitutional protection." 12 Corpus Juris p. 1004.

[80] 1 Dillon, Municipal Corporations, pp. 186-7.

[81] Printed in 3 Nat. Mun. Rev. 284.

[82] St. Louis v. Shields, (1873) 52 Mo. 351.

[83] Layton v. New Orleans, (1857) 12 La. Ann. 515.

[84] Police Jury v. Shreveport, (1850) 5 La. Ann. 661.

[85] City of Laredo v. Martin, (1880) 52 Tex. 548.

[86] Trustees v. Tatum, (1851) 13 Ill. 27.

[87] Board of Education v. Aberdeen, (1879) 56 Miss. 518.

[88] People v. Vanderbilt, (1863) 26 N. Y. 287.

courts are often cited as showing the recognition of a proprietary capacity, and the right to a degree of protection for enterprises undertaken in that character. Thus McBain's second and third cases are from Louisiana. But we have already noted a more recent case from that state in which the principle of protection is clearly recognized.[89] His fourth case is one from Texas. A later case from that state is often cited as supporting the principle of protection to rights held in a proprietary capacity.[90] The fifth decision is by the Illinois supreme court. The case of *Richland County v. Lawrence County* [91] from that state is frequently cited as showing the right to protection in a proprietary capacity. It is true that the additional Texas and Illinois cases to which we have called attention relate to counties rather than cities, but it would seem that the courts would recognize proprietary rights even less readily in the case of a county than in the case of a compact municipal organization. Mr. McBain's seventh citation is of a New York case but we have already noted the statements in *Benson v. New York.*[92]

Approaching these cases from another angle we may note that three are ferry cases: one relates to taxation, and one to the use to which money derived from liquor licenses is to be put. Is there anything inconsistent in the reasoning which regards these rights as public? The United States Supreme Court in the *Hartford Bridge Case*[93] spoke of a ferry as "being virtually a highway across the river, over another highway up and down the river." If such a view be followed, it is quite logical to exclude ferries from that class of enterprises which the city may engage in in a proprietary capacity. Nor should the fact that the court chose to regard arrangements for taxation and liquor licensing as the exercise of a governmental function lead to the conclusion that in all cases they will refuse to recognize a dual character, and a de-

[89] Ellerman v. McMains, (1878) 30 La. Ann. 190, 31 A. S. R. 218.

[90] Milam County v. Bateman, (1880) 54 Texas 153.

[91] Richland County v. Lawrence County, (1850) 12 Ill. 1, 8 the court says, "That the state may make a contract with, or grant to, a public municipal corporation, which it could not subsequently impair or reserve, is not denied; but in such a case the corporation is to be regarded as a private company. A grant may be made to a public corporation for purposes of private advantage; and although the public may also derive a common benefit therefrom, yet the corporation stands on the same footing as respects such grant, as would any body or person upon whom like privileges were conferred."

[92] Benson v. New York, (1850) 10 Barb. (N. Y.) 223, discussed p. 48 supra.

[93] East Hartford v. Hartford Bridge Co., (1850) 10 How. 511, 534, 13 L Ed. 518.

gree of protection in the proprietary undertakings. In other words, it seems that these cases are concerned more with the applicability of the principle than with its assertion or denial.

Another point which Mr. McBain notes is the matter of free water for cities and he believes that this right ought to be proprietary if any right is. But it is to be observed that the water is to be used mainly, if not wholly, for governmental purposes, that is, for the sprinkling of the streets and the prevention of fire. And even if it were a proprietary right, the state in the exercise of its police power could require the city to pay for water used as the state can require any private consumer to pay for water used as will be brought out more fully in the next subdivision.

Our conclusion as to the protection to be given the city may be then summed up to this effect: that numerous dicta, certain learned commentators, and several adjudications, which appear to represent the weight of authority, unite in declaring that the protection which the federal constitution affords a city while acting in a proprietary capacity approaches that extended to a private individual or corporation engaged in a like enterprise.

(*To be concluded.*)

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THE LAW SCHOOL.—The faculty has been strengthened this year by the addition of George E. Osborne. Professor Osborne was graduated from the University of California in 1916, receiving the A. B. degree, and from Harvard Law School in 1919, where he took his L. L. B., followed by that of S. J. D. in 1920. He came to Minnesota from the Law School of the University of West Virginia, where, in addition to his duties as assistant professor of law he was editor-in-chief of the West Virginia Law Quarterly. While at Harvard he was president of the law review editorial board.

The registration in the Law School is somewhat larger than last year, the total being 297 as against 269. The freshman class is 153, compared with 119 in 1920-21.

TAXATION—STATE TAX ON NATIONAL BANK STOCK.—The power of the states to tax national bank stock rests upon the permissive legislation of Congress, and a state tax in excess of and not in conformity with such legislation is void.[1] This permissive legislation is found in section 5219 of the Revised Statutes of the United States which provides that state taxation "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens" of the state. The main purpose of Congress in so limiting state taxation was "to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of like character" to those engaged in by national banks.[2] It is to be noted that the prohibition is not specifically confined to discrimination between national and state banks. The language of section 5219 is much broader. It prohibits discrimination against national banks and in favor of *moneyed capital in the hands of individual citizens*.[3] While the term "moneyed capital" perhaps has not been exhaustively defined, it nevertheless has come to have a well established meaning of a fairly comprehensive extent. It does not include stock in corporations not competing with banks but it does include something more than shares in banking corporations. In the leading case[4] on this phase of the subject it is said that "moneyed capital" includes "shares . . . in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money," and, further, that it "includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment." An early case[5] held it to be a prohibited discrimination where the state permitted a taxpayer to deduct from his moneyed capital the amount of his bona fide indebtedness and taxed him upon the remainder but denied him the privilege of de-

[1] Owensboro National Bank v. Owensboro, (1899) 173 U. S. 664, 19 S. C. R. 537, 43 L. Ed. 850.

[2] Mercantile National Bank v. New York, (1887) 121 U. S. 138, 7 S. C. R. 826, 30 L. Ed. 895.

[3] Boyer v. Boyer, (1885) 113 U. S. 689, 5 S. C. R. 706, 28 L. Ed. 1089.

[4] Mercantile National Bank v. New York, (1887) 121 U. S. 138, 157, 7 S. C. R. 826, 30 L. Ed. 895. The rule of construction announced in this case has been consistently adhered to by the Supreme Court. Amoskeag Sav. Bank v. Purdy, (1913) 231 U. S. 373, 34 S. C. R. 114, 58 L. Ed. 274.

[5] People v. Weaver, (1880) 100 U. S. 539, 24 L. Ed. 705.

ducting such indebtedness from the value of national bank shares. The court there points out that the statute has reference to the entire process of assessment and embraces the valuation of shares as well as the rate imposed. This case was soon followed by a series of others to the same effect.[6] An affirmative showing must be made that the moneyed capital comes into competition with the business of national banks[7] and also that the state taxation discriminates in fact against the holders of shares in national banks.[8]

In the light of the language of the statute and of the construction of that language by the Supreme Court it might reasonably have been expected that the several states would so adjust their tax programs as not to conflict with the congressional inhibitions. The recent case of *Merchants' National Bank v. Richmond*[9] shows, however, that at least one state has not done so. The case involved the validity of certain parts of the Virginia tax laws and briefly was as follows: the rate of taxation on bank stocks (both state and national) was $1.75 per hundred dollars value while the rate on bonds, notes, and other evidences of indebtedness (i.e., on moneyed capital) in the hands of individuals was ninety-five cents per hundred dollars value. There was no discrimination between state and national banks, as they were classed together and treated exactly alike. But bank stock was taxed at a greater rate than moneyed capital and it appeared that the moneyed capital was competing with the banks in the loan market. On that state of facts the court held the law to exceed the limits of section 5219 and the tax to be void.[10]

State laws imposing taxes on national bank stock doubtless will be examined anew and with closer scrutiny as a result of this decision. Already there are signs that it is being regarded with much concern by several states, particularly those which

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[6] Supervisors v. Stanley, (1881) 105 U. S. 305, 26 L. Ed. 1044; Hills v. National Bank, (1881) 105 U. S. 319, 26 L. Ed. 1052; Evansville National Bank v. Britton, (1881) 105 U. S. 322, 26 L. Ed. 1053.

[7] First National Bank of Wellington v. Chapman, (1898) 173 U. S. 205, 219, 19 S. C. R. 407, 43 L. Ed. 669; Commercial Bank v. Chambers, (1901) 182 U. S. 556, 21 S. C. R. 863, 45 L. Ed. 1227.

[8] Amoskeag Sav. Bank v. Purdy, (1913) 231 U. S. 373, 393, 34 S. C. R. 114, 58 L. Ed. 274.

[9] 41 S. C. R. 619, (decided June 6, 1921).

[10] In Supervisors v. Stanley, (1881) 105 U. S. 305, 26 L. Ed. 1044, there is an interesting application of the doctrine that valid parts of a statute will be saved if they are separable from the invalid. Thus the tax statute involved in that case was held valid except so far as it did not authorize a deduction for debts of the shareholder.

have special taxes on "money and credits." At least two bills[11] have been introduced in the present Congress designed to broaden the scope of the congressional permission and thus save the tax programs of such states as find themselves within the range of the doctrine reannounced in the Richmond case. Assuming that the language of the bills is adequate for the purpose intended, the absence of a retroactive provision makes it doubtful whether either bill, if passed, would save existing tax programs, whatever might be the result of its prospective operation.

TORTS—CIVIL LIABILITY FOR INDUCING BREACH OF CONTRACT. —Ever since the law has recognized a property right in the right of the poor man to labor with his hands,[1] in the right of a man to pursue a learned profession,[2] and in the rights arising out of contract,[3] the courts have labored with the question of how far and by what means and for what ends this property right might be invaded without incurring liability. The theory of tort liability for interfering with contractual relations has grown to such dimensions that is is impossible to treat the subject in detail here.[4] So far as possible the scope of this note will be limited to interference with existing contract rights, as opposed to mere contract expectancies.

It is perhaps not safe to say that the tort of enticing away another's servant has been assimilated to the tort of interference with contract rights generally.[5] It is probably more cor-

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[11]S. 2200, introduced by Senator Nelson, July 1, 1921, providing that the taxation "shall not be at a greater rate than is assessed upon other moneyed capital used in banking", and H. R. 8015, introduced by Congressman Volstead, August 1, 1921, providing that the taxation "shall not be at a greater rate than is assessed upon other moneyed capital similarly situated and used in banking."

[1]Butcher's Union, etc. v. Crescent City, etc., Co., (1884) 111 U. S. 746, 757, 4 S. C. R. 652, 28 L. Ed. 585; Jones v. Leslie, (1910) 61 Wash. 107, 110, 112 Pac. 81, 48 L. R. A. (N.S.) 893, and note.

[2]Lawrence v. Briry, (Mass. 1921) 132 N. E. 174; Raymer v. Trefry, (Mass. 1921) 132 N. E. 190.

[3]Posner Co. v. Jackson, (1918) 223 N. Y. 325, 332, 119 N. E. 573.

[4]The earliest cases on the subject grew out of the economic situation in England following the Black Plague and the Statute of Laborers (23 Edw. III.), enacted to cope with it, 27 E. R. C. 106 note, et seq. From these early cases, the theory of tort liability for inducing breach of contractual obligations has grown until today it embraces the right to contract freely, as well as existing contract obligations, boycotts, strikes, unfair competition, picketing, and interference with trades and callings.

[5]Huffcut, Interference with Business in New York, 18 Harvard Law Review 423-424; 27 E. R. C. 108 note, indicates somewhat the confusion of the courts on this point.

rect to say that the latter has developed from the former.[6] True it is today, that in regard to inducing breaches of contract, few courts draw any distinction between contracts for personal service and contracts in general.[7]

A recent case from the Texas court of civil appeals[8] seems to be an exception to this modern rule. In this case, the defendant willfully and with knowledge of the contract induced the promisor to break a contract for the conveyance of real estate to the plaintiff. The court held, on general demurrer, that the complaint stated no cause of action, and nonsuited the plaintiff. The court is not clear in giving the reasons for this result, seemingly resting its decision on the ground that the law will not interfere where there is an adequate remedy in equity, such as specific performance.[9] It is submitted that this is wrong, as it should be no answer for a wrongdoer to say that the plaintiff may have recourse against another in some other or similar action.[10] The remedies should be concurrent or correlative. Did the facts support such a theory, the decision might be based on the fact that there was no actual damage.[11] By way of dictum the court seems to admit that in a proper case, even in the case of a contract relat-

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[6]See note 16 L. R. A. (N.S.) 746.

[7]1 Street, Foundations of Legal Liability, 342, et seq.; 27 E. R. C. 108 note; Beekman v. Marsters, (1907) 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N.S.) 201, 11 Ann. Cas. 332, exclusive agency contract, injunction granted; American Malting Co. v. Keitel, (1913) 209 Fed. 351, 359, 126 C. C. A. 277, sale of merchandise, injunction granted; Mealey v. Bemidji Lumber Co., (1912) 118 Minn. 427, 136 N. W. 1090, logging contract; Gonzales v. Reichenthaler, (1921) 189 N. Y. S. 783, exclusive contract to operate a game; Raymond v. Yarrington, (1903) 96 Tex. 443, 73 S. W. 800, 62 L. R. A. 962, agreement not to engage in the business; Temperton v. Russell, [1893] 1 Q. B. 715, 69 L. T. 78, 41 W. R. 565, contract expectancy for building material; see note 31 Harvard Law Review 1017; Jones v. Stanley, (1877) 76 N. C. 355, transportation contract; see note 16 L. R. A. (N.S.) 747; also 27 E. R. C. 109.

[8]Sonnenberg v. Hajek, (Tex. Civ. App. 1921) 233 S. W. 563.

[9]The decision can be best supported, perhaps, on the theory that the court recognized the equitable property of the plaintiff arising out of the contract, and that this equitable property remained undamaged by the conveyance of the land to another who had knowledge of the contract and induced a breach thereof. That raises the question, can a law court recognize an equitable property, and if so, can it exercise any discretion in turning a suitor out of court as it did here, compelling him to proceed in equity? Even then it does not dispose of the fact that he sued for an injury to his contract rights, and not for damage to his equitable property.

[10]Raymond v. Yarrington, (1903) 96 Tex. 443, 73 S. W. 800, 62 L. R. A. 962.

[11]Bigelow, Torts, 8th Ed., p. 238, 255, 266, names actual damage as one of the elements necessary to be proved.

ing to real estate, the action would lie;[12] and then intimates further that in such a case there must be deceit or fraud, or a malicious purpose. It is elementary that an unlawful means such as fraud or deceit used to procure a breach of contract will render the actor liable.[13] On the other hand it would seem that malice in the sense of a malevolent motive is not an essential ingredient of the tort.[14] By the weight of modern authority, English and American, if the actor intended the consequences of his act he is liable unless he can justify. Such willful interference was present in the instant case. Another dictum of the court is that it is not an actionable tort to procure the breach of an unenforceable contract. There is a sharp conflict on this point, but it is believed that the better authority holds the wrong actionable.[16]

The rule today seems to be that an intentional or willful interference with the contract right of another renders the actor liable unless he can justify, and the motive of the actor may, or may not, be of consequence in determining the sufficiency of the justification.[17]

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[12]Commenting on Raymond v. Yarrington, (1903) 96 Tex. 443, 73 S. W. 800, 62 L. R A. 963, the court says, "it is held that a person who interferes with a contract for the sale of real estate, is liable in damages in a proper case."

[13]Huffcut, Interference with Business in New York, 18 Harvard Law Review 426, et seq.; 1 Street, Foundations of Legal Liability, 346, 352, et seq. Indeed, in those courts which do not follow the doctrine of Lumley v. Gye, (1853) 2 El. & B. 216, the interference is actionable only when the means used is unlawful; Glencoe Land, etc., Co. v. Hudson Bros. Co., (1897) 138 Mo. 439, 40 S. W. 93, 36 L. R. A. 804; 1 Street, Foundations of Legal Liability, 346, note 6.

[14]South Wales Miners' Fed. v. Glamorgan Coal Co., [1905] A. C. 239, 53 W. R. 593, 2 Ann. Cas. 436; Twitchell v. Glenwood-Inglewood Co., (1915) 131 Minn. 375, 155 N. W. 621; Posner Co. v. Jackson, (1918) 223 N. Y. 325, 119 N. E. 573; Lamb v. Cheney & Son, (1920) 227 N. Y. 418, 125 N. E. 817; Gonzales v. Reichenthaler, (1921) 189 N. Y. S. 783; 49 Solicitor's Journal 666, gives an excellent treatment of leading English decisions on this point. Ames, Tort Because of Wrongful Motive, 18 Harvard Law Review 411, 412,—"The question whether there was or was not just cause will depend, in many cases, but not in all, upon the motive of the actor." In other words, motive goes to the justification and not to the gist of the action. See semble, 1 Street, Foundations of Legal Liability, 344, et seq.

[15]Gonzales v. Reichenthaler, (1921) 189 N. Y. S. 783; Twitchell v. Glenwood-Inglewood Co., (1915) 131 Minn. 375, 155 N. W. 621; Chapin, 1 New Jersey Law Review 160; 49 Solicitor's Journal 666.

[16]Cumberland Glass Mfg. Co. v. DeWitt, (1913) 120 Md. 381, 87 Atl. 927; Rice et al. v. Manley, (1876) 66 N. Y. 82, 23 Am. Rep. 30; Bigelow, Torts, 8th Ed., p. 265.

[17]Another arbitrary exception to the rule made by some courts is the case of inducing breach of a contract of engagement to marry. Homan v. Hall, (1917) 102 Neb. 70, 165 N. W. 881; Guida v. Pontrelli, (1921) 186 N. Y. S. 147. It is submitted that the rule should be the same as in other

INTERSTATE COMMERCE—INTENT AS DETERMINING CHARACTER OF SHIPMENT.—In determining whether an article is subject to state or federal control, it often is important to determine the exact point of time at which interstate commerce in the article begins. The leading case on this subject is *Coe v. Errol*,[1] in which the Supreme Court of the United States said that the interstate character is not assumed until the goods are committed to the common carrier for transportation out of the state.

However, when once delivered to the common carrier for shipment, if a foreign destination is contemplated, the goods are subjects of interstate commerce even though shipped on a local bill of lading between two points in the same state. The court of appeals of Maryland, in a recent case,[2] stated the rule as follows:

"The intention as to destination with which the goods are delivered and accepted for conveyance by the carrier is held to be the determining factor in such a problem. Whether or not in a particular case the bill of lading discloses that the shipment is for export, if that was the real design with which it was started on the course of its transportation, and if it would proceed to a foreign destination as the normal result of the movement thus originated, it must be regarded and classified as foreign commerce."

The intent of the shipper as to the destination of the goods is thus material in determining the interstate character of the goods, after they have once been delivered to a carrier for shipment. Is the intent of the shipper or purchaser, previous to delivery to the carrier, material?

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contracts. Privilege should be held sufficient justification in some cases. As to what a court must consider in deciding on the sufficiency of the justification, see the language of Romer, L. J., in Glamorgan Coal Co. v. South Wales Miners' Fed., [1903] 2 K. B. 545, 574, 52 W. R. 165. See also note, 3 Virginia Law Review 385.

[1](1886) 116 U. S. 517, 525, 6 S. C. R. 475, 29 L. Ed. 715. The court states: "There must be a point of time when they [the goods] cease to he governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state."

[2]Fahey et al. v. Baltimore, etc., R. Co., (Md. 1921) 114 Atl. 905, following Texas, etc., R. Co. v. Sabine Tram Co., (1913) 227 U. S. 111, 33 S. C. R. 229, 57 L. Ed. 442, and Railroad Com. of Louisiana v. Texas and Pac. Ry., (1913) 229 U. S. 336, 33 S. C. R. 837, 57 L. Ed. 1215.

It has been held that the manufacture of goods for the purpose of interstate trade is not a part of interstate commerce.[3] So also brokerage agreements for sales on commission, where the goods are intended for interstate trade, are not a part of interstate commerce but merely incidents thereof.[4] In the case of *In re Conicuh, etc., Co.*,[5] it was held that the fact that the buyer of lumber, at the time of purchasing, intended to sell the lumber so purchased only to persons in other states did not render the transaction one in interstate commerce. The right of a state to tax the goods does not end until they are actually delivered to the carrier for shipment.[6] In all these cases, the intent of the shipper previous to the actual delivery of the goods to the carrier has no effect on the interstate character of the goods.

The circuit court of appeals, eighth circuit, in a recent case[7] decided that a purchase of grain by an elevator in North Dakota from a farmer of that state is a part of interstate commerce, and accordingly held that a statute of North Dakota providing for the grading of grain and the licensing of persons buying grain was unconstitutional as imposing a direct burden on interstate commerce.[8] In view of the cases cited above, the decision could not be supported merely on the ground that the purchaser bought the grain with the intent to ship it out of the state. The lower court gave this as its reason for holding the purchase not a part of interstate commerce. But on appeal, the decision was reversed, not on the ground of intent, but on the ground that since ninety per cent of the grain annually raised in North Dakota must be and is purchased for shipment out of the state, such course of commerce is a fact and not a matter of intention.[9] The court cited the case of *Brown v. Maryland*[10] to the effect that a sale of goods

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[3]United States v. E. C. Knight Co., (1895) 156 U. S. 1, 15 S. C. R. 249, 39 L. Ed. 325; Kidd v. Pearson, (1888) 128 U. S. 1, 9 S. C. R. 6, 32 L. Ed. 346; Crescent Cotton O. C. Co. v. Mississippi, (1921) 42 S. C. R. 42.

[4]Hopkins v. United States, (1898) 171 U. S. 578, 19 S. C. R. 40, 43 L. Ed. 290; State ex rel. Beek v. Wagener, (1889) 77 Minn. 483, 500, 80 N. W. 633, 77 A. S. R. 681, 46 L. R. A. 442; State v. Edwards, (1905) 94 Minn. 225, 102 N. W. 697.

[5](1910) 180 Fed. 249. See also Brunner v. Mobile & Gulfport Lumber Co., (1914) 188 Ala. 248, 66 So. 438.

[6]Coe v. Errol, (1886) 116 U. S. 517, 6 S. C. R. 475, 29 L. Ed. 715.

[7]Farmers Grain Co. of Embden v. Langer, (1921) 273 Fed. 635.

[8]"Where a substantial part of a business is interstate commerce, the imposition of burdens and regulations thereon by state action cannot be justified by the fact that a portion of the business thus sought to be controlled and regulated is intrastate." Landon v. Public Utilities Commission, (1917) 242 Fed. 658, 688.

[9](1827) 12 Wheat. (U. S.) 419, 446-447, 6 L. Ed. 678, Marshall, C. J.

within a state after their transportation into that state was a part of interstate commerce, and said that it could see no logical distinction between a sale following transportation and a purchase preceding it.[10] It is difficult to justify the decision on any established rule of law. The decision extends the broad construction of the commerce clause of the federal constitution to a case not heretofore considered as a part of interstate commerce.

RAILWAY BONDS—AUTHORITY TO ISSUE—JURISDICTION OF STATE COMMISSION.—A fresh example of the intimate relation of the railroads to the government and business of the country is furnished by the joint issue of Great Northern-Northern Pacific fifteen year convertible gold bonds designed to retire the Burlington purchase bonds. This issue was authorized by the Interstate Commerce Commission and the business caution which is the order of the day has drawn the attention of lawyers in this state to the effect of such authorization upon the jurisdiction of the Minnesota State Securities Commission over such issues.

The securities in question are not exempt from the operation of the Minnesota Securities Act,[1] by virtue of an express provision therein. Section 2 (c) of our securities act provides that:

"The provisions of this act, except section 10 thereof, shall not apply to . . . securities of public or quasi public corporations, the issue of which securities is regulated by a public service commission of this state or of any state or territory of the United States, or securities senior thereto."

The only portion of this section which might be construed as applicable to securities approved by the Interstate Commerce Commission is the clause "securities senior thereto." Are securities regulated by a public service commission of the federal government *senior* to securities regulated by the states and territories? It is submitted that the legislative meaning of *senior* was the ordinarily accepted one: securities which are a prior lien

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[10]Swift v. United States, (1905) 196 U. S. 375, 398, 25 S. C. R. 276, 49 L. Ed. 518. Here the court said, "commerce among the states is not a technical legal conception but a practical one drawn from the course of business." Also Savage v. Jones, (1912) 225 U. S. 501, 520, 32 S. C. R. 715, 56 L. Ed. 1182. In Heyman v. Hays, (1915) 236 U. S. 178, 186, 35 S. C. R. 403, 59 L. Ed. 527, the court said, "The protection against the imposition of direct burdens upon the right to do interstate commerce is not a mere abstraction affording no real protection but is practical and substantial and embraces those acts which are necessary to the complete enjoyment of the right protected."

[1]Minn. Laws, ch. 429, 1917, as amended.

on the assets of the issuing company, or, in other words, securities which are "senior" in the sense that a first mortgage on real estate is senior to a second mortgage. If that interpretation is correct the clause would not operate to exempt securities approved by the Commerce Commission from the jurisdiction of the Minnesota State Securities Commission.

Are the securities in question nevertheless exempt by virtue of paramount law? The Interstate Commerce Act[3] provides in Title IV, sec. 439, sub-section 20 a (2) that:

"it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') . . . even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof . . . the Commission by order authorizes such issue."

And in subdivision (7) of the same section and sub-section it is provided that:

"The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

In terms the federal act clearly relieves the states of jurisdiction.

May the Minnesota State Securities Commission nevertheless exercise jurisdiction over the securities in question by virtue of the police power? The securities act rests upon the exercise of police power for the protection of our citizens. Under the police power the states may impose certain regulations on interstate carriers, even though such regulations incidentally affect interstate commerce.[4] Thus for example, Minnesota may restrict the speed of interstate trains, while traveling in this state, to forty miles per hour, and not only protect the health and safety of its people but serve their convenience by requiring the carrier to stop all passenger trains at all county seats to receive and deposit passengers.[5] If, however, the federal Congress has undertaken to regulate a subject matter over which its jurisdiction is

[3]41 Stat. at L. 494.

[4]Lake Shore, etc., Ry. v. Ohio, (1899) 173 U. S. 285, 19 S. C. R. 465, 43 L. Ed. 702; Hall v. Geiger-Jones Co., (1917) 242 U. S. 539, 37 S. C. R. 217, 61 L. Ed. 480; Elliott, The Annotated Blue Sky Laws of the U. S. 15.

[5]Gladson v. Minn., (1897) 166 U. S. 427, 17 S. C. R. 627, 41 L. Ed. 1064.

co-extensive or paramount, the authority of the state is terminated and it is ousted of jurisdiction.[5] Upon that principle federal exercise of war powers was deemed to abrogate state legislation so far as it was co-extensive;[6] and similarly it is believed that congressional action in the exclusively federal field of interstate commerce relieves the states of jurisdiction over the securities thereby subjected to federal control.[7]

RECENT CASES

ADOPTION — DEATH OF ADOPTED CHILD — RIGHT OF NATURAL AND ADOPTIVE PARENTS TO INHERIT.—The decedent died intestate survived by neither wife nor issue but by his adoptive parents and natural mother. *Held*, that in the absence of statute, his surviving parents by nature and by adoption inherit in equal proportion; and that one third of the property should be distributed to each of the three survivors. *Baird v. Yates*, (1921) 108 Kan. 721, 196 Pac. 1077, 200 Pac. 280.

The court argues in the instant case that since, in the absence of statute, an adopted child will inherit from both its natural and adoptive parents, the right must be reciprocal. In the absence of statute, there are several views on the question of inheritance from an adopted child. The older view is that the child's natural parents only are entitled to his property, because, on a strict construction of the statute of descent, "inheritance" connotes the next of kin by blood of the deceased. *Edwards v. Yearby*, (1915) 168 N. C. 663, 85 S. E. 19, L. R. A. 1915E 462; *Heidcamp v. Jersey City St. Ry Co.*, (1903) 69 N. J. L. 284, 55 Atl. 239, 101 A. S. R. 707; *Hole v. Robbins*, (1881) 53 Wis. 514, 10 N. W. 617; *White v. Dotter*, (1904) 73 Ark. 130, 83 S. W. 1052. Some courts limit this rule by holding that where the adopted child had derived the property by gift or inheritance from an adoptive parent, it will go to the surviving adoptive parent. *Humphries v. Davis*, (1884) 100 Ind. 274; *Lanferman v. Vanzile*, (1912) 150 Ky. 751, 150 S. W. 1008, Ann. Cas. 1914D 563, or, under a statute, to "the persons who would have been his kindred, if he had been born to his adopting parent in lawful wedlock," *MacMaster v. Fobe*, (1917) 226 Mass. 396, 115 N. E. 487. Under statutes, however, providing that after adoption the two shall sustain the legal relation of parent and child with all the rights and duties of such relation, that the adoptive parent must give the child support and education, and that the natural parents are absolved from all duties and responsibility, the more recent cases permit the adoptive parent to inherit to the exclusion of the natural parent. *Havsgord v. Sverson*, (1914) 34 S. D. 131, 147 N. W. 378; *Estate of*

[5]Lake Shore, etc., Ry. v. Ohio, (1899) 173 U. S. 285, 19 S. C. R. 465, 43 L. Ed. 702.

[6]Konkel v. State (1919) 168 Wis. 335, 170 N. W. 715; see 4 MINNESOTA LAW REVIEW 353, 358.

[7]In an opinion dated May 3, 1921, the Attorney General of Minnesota reached a similar conclusion.

Jobson, (1912) 164 Cal. 312, 128 Pac. 938. Colorado, with a similar statute, nevertheless does not permit the *heirs* of the adoptive parents to inherit from the adopted child to the exclusion of the natural parents, on the ground that adoption creates a purely personal relationship not extending beyond the adoptive parents. *Russell v. Jordan*, (1915) 58 Col. 445, 147 Pac. 693.

The question is governed in Minnesota by G. S. Minn. 1913, sec. 7156, providing that "the adopting parents and their relatives shall inherit his [the child's] estate as if they had been his parents and relatives in fact." Whether this clause excludes natural parents has not been decided, but such would seem to be the intent.

BAILMENTS—LIVERY STABLE AND GARAGE KEEPERS—POWER OF BAILEE TO LIMIT LIABILITY FOR NEGLIGENCE.—Plaintiff's automobile was destroyed by fire due to defendant garage keeper's negligence. Defendant had attempted to avoid liability by posting notice disclaiming responsibility for loss by fire. *Held*, posting of notice was insufficient to establish a special contract in the absence of proof that plaintiff ever saw it. *Parris v. Jaquith*. (Colo. 1921) 197 Pac. 750.

In holding that a bailee cannot limit his liability for negligence by posting a notice which his bailor did not see, the case is in accord with the weight of authority, *Hoel v. Flour City, etc., Co.*, (1919) 144 Minn. 280, 175 N. W. 300; *Pilson v. Tip Top Auto Co.*, (1913) 67 Ore. 528, 136 Pac. 642, on the double ground that a bailee cannot substitute a special contract for his common law liability when the bailor has no knowledge of its terms, and that such a contract is void as against public policy. A garage keeper, being a bailee for hire, is under a legal obligation to exercise such reasonable care as a man of ordinary prudence would be expected to exercise if the property were his own. *McLain v. West Virginia Automobile Co.*, (1913) 72 W. Va. 738, 79 S. E. 731, 48 L. R. A. (N.S.)561, Ann. Cas. 1915D 956; Berry, Automobiles, 2d Ed. sec. 742, p. 807. Even evidence of custom contrary to the implied obligation of a garage keeper to exercise reasonable care has been held inadmissible. *Simms v. Sullivan*, (Ore. 1921) 198 Pac. 240. See Berry, Automobiles, 2d Ed., sec. 703, p. 809. Nor does knowledge of the bailor of the inadequate condition of the place affect the garage keeper's liability. *Stevens v. Stewart-Warner Speedometer Co.*, (1916) 223 Mass. 44, 111 N. E. 771; *Hecht v. Boston Wharf etc., Co.*, (1915) 220 Mass. 397, 404, 107 N. E. 990, L. R. A. 1915D 725. At this time, there seems to be but one direct holding that a garage keeper cannot contract to limit his liability for negligence. *Pilson v. Tip Top Auto Co.*, (1913) 67 Ore. 528, 136 Pac. 642.

The extent to which a bailee may limit his common law liability for negligence is a problem which the Minnesota court has carefully avoided. *Hoel v. Flour City, etc., Co.*, (1919) 144 Minn. 280, 175 N. W. 300; *Minn. Butter and Cheese Co. v. St. Paul, etc., Co.*, (1899) 75 Minn. 445, 77 N. W. 977. It is submitted that Minnesota might permit a bailee to exempt himself from all except gross negligence. *Smith v. Library Board*, (1894) 58

Minn. 108, 59 N. W. 979; see also *Evans v. Nail*, (1907) 1 Ga. App. 42, 57 S. E. 1020.

BANKS AND BANKING—RELATION OF SAVINGS BANK TO DEPOSITORS—RIGHT OF SET-OFF.—Petitioner, having deposits to his credit in savings department of insolvent trust company, and being indebted to the trust company on a note, sought to set off the amount of his deposits against his indebtedness. *Held*, the relation of savings bank to depositor is substantially that of trustee and cestui que trust, and doctrine of set-off therefore does not apply. *Bachrach v. Allen* (Mass. 1921) 131 N. E. 857.

In the ordinary commercial bank, the legal relation established between the bank and the depositor by the deposit of money is considered as that of debtor and creditor. *National Mahaiwe Bank v. Peck*, (1879) 127 Mass. 298, 34 Am. Rep. 368; *People v. Cal. Safe Deposit and Trust Co.*, (1914) 23 Cal. App. 199 137 Pac. 1111, 1115; *North British and Mercantile Ins. Co. v. Merchant Nat. Bank*, (1914) 146 N. Y. S. 720, 16 App. Div. 341. The money deposited, being regarded as a debt due the depositor from the bank, the depositor is entitled, in case of insolvency of the bank, to set off the full amount of his deposits against any debts which he may owe the bank, *Scott v. Armstrong*, (1892) 146 U. S. 499, 13 S. C. R. 148, 36 L. Ed. 1059; *State v. Brobston*, (1894) 94 Ga. 95, 218 S. E. 146, 47 A. S. R. 138. See Waterman, Set-Off, 2d Ed., sec. 22, P. 23.

In the case of savings banks, however, where the deposits constitute the only capital, and the funds are held solely for the benefit of the depositors, the relation between bank and depositor is more nearly that of trustee and cestui que trust. *Greenfield Savings Bank v. Abercrombie*, (1912) 211 Mass. 252, 97 N. E. 897, 39 L. R. A. (N.S.) 173, Ann. Cas. 1913B 420; *State v. Savings Bank of St. Paul*, (1902) 87 Minn. 473, 92 N. W. 403. Nevertheless, the relation is sometimes termed that of creditor and debtor with regard to other facts. *Ladd v. Androscoggin Co. Savings Bank*, (1902) 96 Me. 520, 52 Atl. 1016; *Schippers v. Kempkes*, (N. J. Eq., 1907) 67 Atl. 1042, affirmed in 72 N. J. Eq. 948, 73 Atl. 1118. Since the depositors are entitled to a proportionate share of the profits, it is merely equitable that they should bear the losses proportionately. Therefore, a depositor in an insolvent savings bank is not, in absence of statute, entitled to set-off. *Osborne v. Byrne*, (1875) 43 Conn. 155, 21 Am. Rep. 641; *Hall v. Paris*, (1879) 59 N. H. 71; *Hannon v. Williams*, (1881) 34 N. J. Eq. 255, 38 Am. Rep. 378; 1 Morse, Banks and Banking, 5th Ed., sec. 339; contra, *Robinson v. Aird*, (1910) 43 Fla. 30, 29 So. 633.

In the case of a trust company having both savings and commercial departments, it is held, under the Massachusetts statute, that the relation of the trust company to the depositors in the savings department is that of a trustee to his cestui que trust, while to the depositors in the commercial department, the relation is that of common-law debtor. It follows naturally that, in case of insolvency of the trust company, a depositor in the commercial department cannot set-off the deposit against a debt due the company for money loaned from the funds of the savings department,

since the departments are, to all intents and purposes, distinct and separate entities. *Kelly v. Allen*, (Mass. 1921) 131 N. E. 855.

In Minnesota, a saving bank is defined as a corporation managed by disinterested trustees, solely authorized to receive and safely invest the savings of small depositors." G. S. Minn. 1913, sec. 6326. The trustees of the bank occupy a fiduciary relation to its depositors. *Dickson v. Kittson*, (1899) 75 Minn. 168, 77 N. W. 820, 74 A. S. R. 447, and in *State v. Savings Bank of St. Paul*, (1902) 87 Minn. 473, 92 N. W. 403, the holding of the instant case is laid down as the law without comment.

BOUNTIES—CONSTITUTIONALITY OF SOLDIERS' BONUS LAW—TAXATION—PUBLIC PURPOSE—Action was brought to test the validity of the Soldiers' Bonus Law. This statute had been submitted to a referendum vote of the people and had been ratified by an overwhelming majority. *Held*, the act was unconstitutional. *People v. Westchester County Nat. Bank of Peekskill*, (N. Y. 1921) 132 N. E. 241.

This is the first case since the war in which a Soldiers' Bonus Law has been declared unconstitutional. The court stated that serving the public purpose was no longer the sole test as to the proper use of the credit of the state. The law was held unconstitutional solely on the ground that the state was giving its credit to an individual in violation of sec. 1, art. 7 of the constitution. The argument that the statute authorized a payment in recognition of some claim, moral or equitable, against the state, was dismissed, because mere gratitude is not in itself sufficient to constitute a moral obligation. The court must find that there is a reasonable ground for the legislative decision that a moral obligation actually exists in order to recognize the claim. The legislature can not arbitrarily call it an obligation when in fact it does not exist.

Soldiers' Bonus Laws have been upheld in other states on various grounds: (1) the state has a right to recognize a moral obligation to compensate services rendered the federal government,—the court expressly holding there was a moral obligation to compensate services which helped to overcome a common peril which threatened the state as well as the nation, *State ex rel. Hart v. Clausen*, (Wash. 1921) 194 Pac. 793. 13 A. L. R. 580, and note 587; (2) that those who serve the nation also serve the state, and that considerations of gratitude and patriotism are sufficient to support a tax levy, *State ex rel. Atwood v. Johnson*, (1919) 170 Wis. 218, 175 N. W. 589, 7 A. L. R. 1617, and note 1636; *Gustafson v. Rhinow*, (1920) 144 Minn. 415, 175 N. W. 903. In all these cases the courts did not refer to the giving or loaning of credit to an individual, although these states have provisions similar in that respect to the New York constitution. Minn. const., sec. 10, art. 9; Wis. const., sec. 3, art. 8, Wash. const., sec. 5, art. 8. The argument relied on in the instant case, to wit, that the state cannot give its credit to an individual was expressly raised against the Wisconsin Educational Bonus Law. But the court held that the state did not "lend its credit or create a debt within the meaning of the constitution by making a voluntary lawful gift to a number of its

citizens." *State ex rel. Atwood v. Johnson,* (1920) 170 Wis. 251, 263, 176 N. W. 224. See note on this subject, 4 MINNESOTA LAW REVIEW 233; Ann. Cas. 1913B 951.

COMMERCE—PURCHASE OF GRAIN FOR INTERSTATE SHIPMENT AS A PART OF INTERSTATE COMMERCE.—The North Dakota Grain Grading and Inspection Act (Laws of N. D. 1919, Chap. 138) provides that no person shall engage in the business of buying wheat without paying a license fee of ten dollars. Revocation of plaintiff's license being threatened for non-payment of fee, it asks for an injunction to restrain enforcement of the statute as imposing a direct burden on interstate commerce and as conflicting with the United States Grain Standards Act (39 Stat. 482, Comp. Stat. 1918, sec. 8747½). It appears that as a matter of fact ninety per cent of all the wheat raised in North Dakota is shipped outside of the state. *Held,* that the North Dakota statute is unconstitutional as imposing a burden on interstate commerce; that a purchase of grain in North Dakota for shipment and sale outside of the state, taken in connection with the fact that the seller knows that the grain is sold for shipment outside of the state, makes the sale and purchase a unit in interstate commerce, such course of commerce being a fact, not a matter of intention. *Farmers' Grain Co. of Emden v. Langer,* (C. C. A., 8th Circuit, 1921) 273 Fed. 635.

For a discussion of the principles involved in this case, see NOTES, p. 61.

CONSTITUTIONAL LAW—KANSAS INDUSTRIAL COURT—COAL BUSINESS AFFECTED WITH PUBLIC INTEREST—POLICE POWER—INVOLUNTARY SERVITUDE.—A court of industrial relations was created by Kansas in 1920 (Laws of Kansas 1920, Special Session, Chap. 29, p. 35; reprinted, 198 Pac. 705). The statute creating the court declared that "the business of producing coal is affected with public interest, and provided that such business shall be operated with a reasonable continuity and efficiency" and further that "no person, firm or corporation or association of persons shall in any manner or to any extent willfully hinder, delay, limit or suspend such continuous and efficient operation for the purpose of evading" the statute. Defendant, an officer of a mine workers' union, was enjoined from calling a strike in execution of a conspiracy to violate the statute. He resists the injunction on the ground that the statute is unconstitutional. *Held,* (1) that the business of producing coal is affected with a public interest and may be regulated to the end that reasonable continuity and efficiency of production may be maintained; and (2) that the act creating the court of industrial relations and regulating such business is a reasonable exercise of the police power of the state and does not impair liberty of contract or permit involuntary servitude. *State v. Howat,* (Kan. 1921) 198 Pac. 686.

Previous assaults, chiefly under the state constitution, had been made against the validity of the much discussed Kansas act creating the Court

of Industrial Relations and were each time repelled. *State v. Howat,* (1920) 107 Kan. 423, 191 Pac. 585, and *State v. Scott,* (Kan. 1921) 197 Pac. 1089. In the instant case the Kansas supreme court gives its answer denying the contention that the act is unconstitutional as permitting involuntary servitude and violating the fourteenth amendment. The court points out that there is no involuntary servitude for the simple reason that the act itself expressly recognizes the right of the individual to quit work at any time. The real difficulty was in determining whether the act was a proper exercise of the police power. A legislative declaration that a particular business—e. g., the business of producing coal, as here—is affected with a public interest, while not conclusive, is entitled to great judicial respect, *Block v. Hirsh,* (1921) 41 S. C. R. 458, 65 L. E. 589, and in this instance accords with what the court conceives to be the true state of fact. A regulatory requirement that such a public business shall be operated with "reasonable continuity and efficiency" seems to be a proper method of protecting public interest, and this is exactly what the act required. This requirement being established, the court sustains the power of the state to prohibit wilful hindrances and delays, at least as a result of conspiracy, in such operation with the purpose of defeating the act. The essence, then, of the Kansas law as illustrated in the instant case, lies in this, that having established a primary duty for the operation of the business with reasonable continuity and efficiency, the state penalizes a wilful interference with that duty where the purpose is to defeat the law. As bearing on the fate of the Kansas statute in case of further appeal, it should be noticed that the Supreme Court of the United States has said that the declaration of a public use by the legislature of a state and an affirmative decision on the question by its highest court based on familiarity with the local conditions, while not conclusive, are entitled to the greatest respect. *Green v. Frazier,* (1920) 253 U. S. 233, 40 S. C. R. 499, 64 L. Ed. 878; *Jones v. City of Portland,* (1917) 245 U. S. 217, 38 S. C. R. 112, 62 L. Ed. 252.

Coal mining is declared to be affected with a public interest in *People v. United Mine Workers of America,* (Colo. 1921) 201 Pac. 54.

For a full discussion of the questions involved in the Kansas legislation, see J. S. Young, Industrial Courts with Special Reference to the Kansas Experiment, 4 MINNESOTA LAW REVIEW, 483-512; 5 MINNESOTA LAW REVIEW, 39-61; 185-215; 353-366.

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES—SELF-INCRIMINATION—ILLEGAL SEIZURE BY PRIVATE INDIVIDUALS.—Petitioner's private papers were taken forcibly and illegally from his desk by private individuals and given to a federal prosecuting officer for use as evidence against petitioner in a federal action. Petitioner seeks an order for the return of the papers on the ground that to retain and use them as intended would violate the fourth and fifth amendments. *Held,* (two justices dissenting), that the papers may be retained for the use above stated without violating any constitutional right of the petitioner. *Burdeau v. McDowell,* (1921) 41 S. C. R. 574, 65 L. Ed. 683.

The fourth amendment, prohibiting unreasonable searches and seizures,

is not directed to individual misconduct but reaches only the federal government and its agencies. *Weeks v. United States,* (1914) 232 U. S. 383, 34 S. C. R. 341, 58 L. Ed. 652, L. R. A. 1915B 834, Ann. Cas. 1915C 1177. In the instant case no federal officer participated in the seizure of the papers. Again, the fifth amendment, operating only against the federal government, *Twining v. New Jersey,* (1908) 211 U. S. 78, 29 S. C. R. 14, 53 L. Ed. 97, is intended to secure a person from compulsory testimony against himself in a criminal case. *Hale v. Henkel,* (1906) 201 U. S. 43. 26 S. C. R. 370, 50 L. Ed. 652. In the instant case there was no compulsion upon the petitioner by federal officers, the papers being surrendered voluntarily by the persons having possession of them.

Is the result, however, one which would have been expected in the light of the development, particularly in the last few years, of the doctrine involved in the fourth and fifth amendments? (For discussion of the development see 4 MINNESOTA LAW REVIEW 447, and 5 MINNESOTA LAW REVIEW 465). Where the property is lawfully out of a person's possession, it may be retained and used as evidence. *Johnson v. United States,* (1913) 228 U. S. 457, 33 S. C. R. 572, 57 L. Ed. 919. In the instant case, however, the papers were unlawfully out of the petitioner's possession. Assuming that they were stolen from him, it would seem that the petitioner was entitled to immediate possession, even as against the government. Furthermore, there is some ground for the suggestion that in accepting or retaining such papers after notice of the method by which they were secured and after demand for their return, the government sanctions and adopts that method. Authorization in advance or ratification thereafter may make individuals in effect representatives of the government, 34 Harvard Law Rev. 361, 377, citing *United States v. Welsh,* (1917) 247 Fed. 239; *Flagg v United States,* (1916) 233 Fed. 481, 147 C. C. A. 367.

Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented: "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

CONSTITUTIONAL LAW—WISCONSIN RENT LAW—EQUAL PROTECTION OF THE LAWS—POLICE POWER.—Unreasonable rents for the use of "rental property" were prohibited by the Wisconsin legislature in 1920, and jurisdiction was conferred on the railroad commission to fix the rents. Laws of Wis., Special Session, 1920, Chap. 16, p. 14. The act was made applicable only to counties having a population of 250,000 or more, and was limited to a temporary period ending April 30, 1923, a public emergency being declared. Relator seeks to enjoin the enforcement of the act. *Held,* that the act is unconstitutional as a denial of the equal protection of the laws, because the classification is not reasonable. *State ex rel. Milwaukee Sales & Investment Co. v. Railroad Commission,* (Wis. 1921) 183 N. W. 687.

The equal protection clause of the Fourteenth Amendment does not prohibit classifications by the state but admits a wide discretion in that regard. A classification must be sustained unless it is "purely arbitrary"; and "if any state of facts reasonably can be conceived that would sustain

it," that state of facts must be assumed. *Lindsley v. Natural Carbonic Gas Co.*, (1911) 220 U. S. 61, 31 S. C. R. 337, 55 L. Ed. 369. Classification on the basis of population in the New York housing laws, similar to the classification adjudged invalid in the instant case, was upheld by the Supreme Court of the United States in *Marcus Brown Holding Co., Inc., v. Feldman,* (1921) 41 S. C. R. 465, 65 L. Ed. 539, with the remark that it was "too obviously justified to need explanation." By placing the decision on the ground above noted, the Wisconsin court escaped the larger question whether the subject-matter involved was properly within the police power, a question, however, to which an affirmative answer previously had been given in a five-to-four decision of the Supreme Court of the United States. *Block v. Hirsh,* (1921) 41 S. C. R. 458, 65 L. Ed. 531, discussed in 5 MINNESOTA LAW REVIEW 472; *Marcus Brown Holding Co., Inc. v. Feldman,* (1921) 41 S. C. R. 465, 65 L. Ed. 539, discussed in 5 MINNESOTA LAW REVIEW 474.

CORPORATIONS—DIVIDENDS—RESTRAINING OR ENFORCING PAYMENT OF—PAYMENT OUT OF CAPITAL—WHAT CONSTITUTES CAPITAL—A corporation had issued and outstanding stock of the par value of $3,000,000, but only about $1,700,000 had been realized from the sale of stock. The complainant sought to restrain the payment of a dividend, claiming that there was not sufficient surplus above the $3,000,000 out of which a dividend could be paid. *Held,* that the sum actually received from the sale of stock may be set down as capital, and that any surplus above it may be utilized for the payment of dividends. *Peters v. United States Mortgage Co.*, (Del. 1921) 114 Atl. 598.

It is well settled that dividends cannot be paid out of capital, Machen, Modern Law of Corporations, sec. 1313, p. 1090, but only out of surplus earnings. 7 R. C. L. 283. When a corporation has a surplus, the declaration of a dividend rests in the sound discretion of the directors in the absence of restraint imposed by charter or statute. 14 C. J. 808. Payment of a dividend by directors when there are no profits may be enjoined by a stockholder. 6 Fletcher, Cyclopedia of Corporations, sec. 3730, p. 6208; see *Coquard v. National Linseed Oil Co.*, (1898) 171 Ill. 480, 49 N. E. 563, On the other hand, when there is a surplus available, payment of a dividend will only be compelled when the directors are acting in a palpably unreasonable and capricious manner. *Dodge v. Ford Motor Co.*, (1919) 204 Mich. 459, 499, 170 N. E. 668, 3 A. L. R. 414 (where there was a large surplus which the defendant intended to use for charitable rather than productive purposes).

There is a distinction between the nominal or share capital of a corporation and the amount paid in, which is the actual capital. *Wetherbee v. Baker,* (1882) 35 N. J. Eq. 501. The instant case, decided under a statute, is correct on principle and in accord with the rule that profits are to be determined with reference to capital paid in rather than with reference to nominal share capital. *Goodnow v. American Writing Paper Co.*, (1908) 73 N. J. Eq. 692, 69 Atl. 1014; *Merchants & Insurers Reporting Co. v.*

Schroeder et. al., (1918) 39 Cal. App. 226, 178 Pac. 540. In the latter case it was held that the proceeds of sales of stock above par are part of the original assets or capital and not profits out of which dividends can be paid. However, there is a *dictum* in one case to the effect that a corporation, in order to determine whether there is surplus available for dividends, must list capital stock at par among its liabilities. *Hyams v. Old Dominion Copper Mining & Smelting Co.*, (1913) 82 N. J. Eq. 507, 89 Atl. 37.

DIVORCE—REVIVAL OF OFFENSE CONDONED.—Plaintiff wife sought divorce for adultery committed by defendant and condoned by her five years before. Defendant had since been guilty of harsh treatment and further infidelities. *Held*, that the divorce should be granted. *Bravo v. Bravo*, (N. J. 1921) 114 Atl. 790.

It is well established law that an offense, which has been condoned, may be revived by a repitition of the same offense or by the commission of any other recognized by a matrimonial court, for the reason that condonation is subject to the condition that the pardoned party repent and treat the other with conjugal kindness in the future. 19 C. J. 88; 9 R. C. L. 384; *Johnson v. Johnson*, (1835) 14 Wend. (N. Y.) 637; *Durant v. Durant*, (1825) 1 Hagg. Ecc. R. 733. The one exception to this rule is desertion, which must be continuous to the filing of the suit, because condonation before suit breaks the continuity and prevents the statutory cause of action from arising. *LaFlamme, v. LaFlamme*, (1911) 210 Mass. 156, 96 N. E. 62, 39 L. R. A. (N.S.) 1133. In Scotland condonation is absolute and unconditional on theory that, after intentional forgiveness, the marriage status should be the same as, and not more precarious than, that of a new marriage, *Collins v. Collins*, [1884] 9 A. C. 205, 32 Wkly. Rep. 500. In certain states condonation of adultery is made absolute by statute. *Nogees v. Nogees*, (1852) 7 Tex. 538, 58 Am. Dec. 78; Lord's Oregon Laws, 1910, sec. 510; but in Minnesota, it seems that condonation of adultery may be conditional or not at the discretion of the court. G. S. Minn. 1913, Sec. 7113; see, however, interpretation of a similar statute, *Johnson v. Johnson*, (1835) 14 Wend. (N. Y.) 637, 642, 647. By the great weight of authority, misconduct tending toward but falling short of grounds for divorce will revive a condoned offense if it creates a reasonable apprehension that it will be repeated if the marriage relation continues. 19 C. J. 89; *Cochran v. Cochran*, (1904) 93 Minn. 284, 101 N. W. 179; *James v. James*, 103 Neb. 278, 171 N. W. 904; *Robbins v. Robbins*, (1868) 100 Mass. 150, where husband's refusal for six weeks to speak to spouse was sufficient. Contra: *Bridge v. Bridge*, (N. J. Eq. 1915) 93 Atl. 690; *Collins v. Collins*, [1884] 9 A. C. 205, 238. Where condonation takes place after commencement of divorce suit, it has been held that a revival of the grounds does not also revive the original suit, but that a new suit must be instituted. *Jones v. Jones*, (1911) 59 Ore. 308, 117 Pac. 414; *Hartl v. Hartl*, (1912) 155 Ia. 329, 135 N. W. 1007. But in *Egidi v. Egidi*, (1915) 37 R. I. 481, Ann. Cas. 1918A 648, plaintiff was permitted to continue former suit. It should be noted that the early English cases which originated the doctrine of con-

ditional condonation, and which are responsible for the whole American law on the subject, were most vigorously questioned on principle by Lord Blackburn and Lord Watson in *Collins v. Collins*, [1884] 9 A. C. 205, 233-234, 258, and are thus considerably shaken in authority; see also dissenting opinion in *Johnson v. Johnson*, (1835) 14 Wend. (N. Y.) 637, 647.

ELECTRICITY—KNOWLEDGE AS AFFECTING LIABILITY OF VENDOR OF ELECTRICITY FOR INJURY CAUSED BY DEFECTIVE FIXTURES NOT UNDER ITS CONTROL.—Action against a city and the owner of a building for unlawful death resulting from contact with a defective electric fixture not owned or controlled by the city which furnished the current. The city knew of the dangerous defect. *Held*, that the city was liable. *Aurentz v. Nieman*, (Ind. 1921) 131 N. E. 832.

Courts generally agree that actual knowledge of the defective and dangerous condition of electric appliances owned and controlled by customers will charge a supplier of electricity with liability for the consequences where the current is thereafter supplied to such fixtures, because the law imposes a duty not knowingly to endanger life and limb. 20 C. J. 365; *Hoffman v. Leavenworth Light etc. Co.*, (1914) 91 Kan. 450, 138 Pac. 632, 50 L. R. A. (N.S.) 574; *City of Sandersville v. Moye*, (1920) 25 Ga. App. 64 102 S. E. 552; *Devost v. Twin State, etc., Co.*, (N. H. 1920) 109 Atl. 839 (dictum). Whether anything short of actual knowledge is sufficient depends on whether there is a duty on the part of the electric company to make reasonable inspection to keep safe such privately controlled fixtures. The weight of American authority upholds the doctrine that the duty of a mere purveyor of electricity with respect to fixtures controlled by others ends when the proper connections are made, on the ground that the electric company is entitled to presume that the appliances are safe until the presumption is rebutted by actual knowledge to the contrary. *National Fire Ins. Co. v. Denver Consol. Elec. Co.*, (1901) 16 Col. App. 86, 63 Pac. 949; *Hoffman v. Leavenworth, etc., Co.*, (1914) 91 Kan. 450, 138 Pac. 632, 50 L. R. A. (N.S.) 574; *Minneapolis, etc., Co. v. Cronan*, (1908) 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N.S.) 816; *Pressley v. Bloomington Co.*, (1916) 271 Ill. 622, 111 N. E. 511.

But some courts maintain that, because of the dangerous character of electricity, a seller is liable for injuries resulting from defective appliances not under its control if the defect is such as might have been discovered by reasonable inspection. *Thomas v. Mayville Gas Co.*, (1900) 108 Ky. 224, 56 S. W. 153; *Hanton v. New Orleans, etc., Co.*, (1909) 124 La. 562, 571, 50 So. 544 (dictum); *Hoboken Land, etc., Co. v. United Electric Co.*, (1904) 71 N. J. L. 430, 58 Atl. 1082, where however the fixtures were installed by independent contractor hired by defendant. But *Thomas v. Mayville Gas Co.*, the leading case for this view, was limited by the Kentucky court in *Smith's Adm'x v. Middlesboro Elec. Co.*, (1915) 164 Ky. 46, 174 S. W. 773, which holds that the doctrine does not apply to fixtures in private dwellings where the electric company has no right to enter to inspect, and is therefore essentially in accord with the instant case. For a discussion of res ipsa loquitur as applied to this situation, see 3 Va. L Rev. 349-65.

EXTRADITION—EFFECT OF SURRENDER OF INCARCERATED PRISONER TO ANOTHER STATE.—Defendant serving sentence for larcency in Iowa was released by the governor of Iowa to Missouri authorities, on condition that defendant should be returned to Iowa to serve out his sentence if not convicted in Missouri of the crime there charged. In considering the question whether, by honoring the extradition papers from Missouri, the state of Iowa had waived its right to require the return of the prisoner for completion of his sentence, *held*, that there was no such waiver, since the governor's release was neither a pardon nor a parole, and since the governor had no right to suspend a judicial sentence, such a matter not being within the executive power. *State v. Saunders*, (Mo. 1921) 232 S. W. 973.

There is little authority in point. Clearly, extradition of a person already incarcerated cannot as a matter of right be demanded, and the law thus violated may first be satisfied before the necessity of obedience to the constitutional provision to surrender him arises. *Ex parte Hobbs*, (1893) 32 Tex. Cr. App. 312, 22 S. W. 1035, 40 A. S. R. 782; *In re Troutman*, (1854) 24 N. J. L. 634; see also, *Taylor v. Taintor*, (1872) 16 Wall. (U. S. 366, 21 L. Ed. 287, 4 Am. Rep. 58. Massachusetts has held that the governor has no power at all to release from prison a person therein incarcerated, for the purpose of surrendering him to another state, because the governor has no power to interfere with a judicial sentence except by pardon, and because a waiver of punishment does not constitute a pardon. *In re Opinion of the Justices*, (1909) 201 Mass. 609, 89 N. E. 174, 24 L. R. A. (N.S.) 799. The weight of authority seems to be that the governor of a state can release an incarcerated prisoner upon the requisition of a sister state, but that the surrendering state, by releasing a prisoner under such circumstances, waives all further exercise of jurisdiction over the person delivered to the demanding state. *In re Hess*, (1897) 5 Kan. App. 763, 48 Pac. 596; *People ex rel. Gallagher v. Hagan*, (1901) 69 N. Y. S. 475, 34 Misc. Rep. 85; *In re Whittington*, (1917) 34 Cal. App. 345, 167 Pac. 404, where it was held that a prisoner once surrendered on extradition could not be re-extradited, on the ground that not having left the state voluntarily he was not a fugitive from justice. See, 2 MINNESOTA LAW REVIEW 303. The question has not been passed on in Minnesota.

HUSBAND AND WIFE—ENTICING AND ALIENATING—DIVORCE AS DEFENSE.—To a petition charging damage by reason of alienation of affections of plaintiff's former wife and criminal conversation, the defendant answers by way of estoppel, that the plaintiff's wife was granted a divorce prior to the institution of this suit, and that such decree was entered on the finding that plaintiff falsely accused his wife of the matter here averred as a cause of action. *Held*, that a decree of divorce does not bar an action for alienation of affection or act of criminal conversation occurring before granting of the decree. *Pollard v. Smith*, (Mo. 1921) 233 S. W. 14.

By the great weight of authority the decree of divorce is an adjudication of the status of the principals conclusively binding on themselves and strangers but not conclusively binding strangers on any other cause of

action springing from the marital relation prior to the decree of divorce. 9 R. C. L. 459; *Luke v. Hill,* (1911) 137 Ga. 159, 73 S. E. 345, 38 L. R. A. (N.S.) 559 and note; note L. R. A. 1915C 870; note Ann. Cas. 1912D 619. A minority hold that the spouse is estopped now to maintain an action founded on subject matter which would have been a defense in the divorce action if established; that the divorce adjudication is conclusive on that subject matter; and that the positions of the plaintiff are inconsistent. *Gleason v. Knapp,* (1885) 56 Mich. 291, 22 N. W. 865, 56 Am. Rep. 388. But see *Philpott v. Kirkpatrick,* (1912) 171 Mich. 495, 137 N. W. 232 limiting the application of *Gleason v. Knapp* to a situation where the matter would have been an absolute defense to divorce action. *Hamilton v. McNeill,* (1911) 150 Iowa 470, 129 N. W. 480, Ann. Cas. 1912D 604 and note, is only limited support for the minority doctrine because a statute of Iowa provides forfeiture by the guilty party, on divorce granted, of all rights acquired by marriage and incident to the relationship.

HUSBAND AND WIFE—RIGHT OF WIFE TO SUE FOR LOSS OF CONSORTIUM CAUSED BY DEFENDANT'S NEGLIGENCE.—Plaintiff's husband was injured through the negligence of the defendant, and she sues for loss of consortium. *Held,* she is entitled to recover. *Hipp v. Dupont de Nemours & Co.,* (N. C. 1921) 108 S. E. 318.

The instant case is contrary to all previous decisions on the point. At the common law a wife's legal status precluded her recovery for loss of consortium. 13 R. C. L. p. 1443, sec. 493; 3 Bl. Com. 140, 143. But now by virtue of the enabling acts the almost unanimous weight of authority permits her to recover for loss of consortium against anyone who maliciously alienates her husband's affections, *Bennett v. Bennett,* (1889) 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; *Lockwood v. Lockwood,* (1897) 67 Minn. 476, 70 N. W. 784; *Nolin v. Pearson,* (1906) 191 Mass. 283, 77 N. E. 890, 4 L. R. A. (N.S.) 643, 114 A. S. R. 605, 6 Ann. Cas. 658; or who debauches him, *Seaver v. Adams,* (1889) 66 N. H. 142, 19 Atl. 776, 49 A. S. R. 597; *Haynes v. Nowlin,* (1891) 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 A. S. R. 213; contra, *Kroessin v. Keller,* (1895) 60 Minn. 372, 62 N. W. 438, 27 L. R. A. 685, 51 A. S. R. 533; or who sells him habit-forming drugs, *Flandermeyer v. Cooper,* (1912) 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. (N.S.) 360; *Moberg v. Scott,* (1917) 38 S. D. 422, 161 N. W. 998, L. R. A. 1917D 732. But where, as in the instant case, the wife bases her action on the defendant's negligence, she has heretofore been uniformly denied recovery, *Goldman v. Cohen,* (1900) 63 N. Y. S. 459, 30 Misc. 336; *Feneff v. N. Y. Cent. Ry.,* (1909) 203 Mass. 278, 24 L. R. A. (N.S.) 1024, 133 A. S. R. 291; *Bernhardt v. Perry,* (1919) 276 Mo. 612, 208 S. W. 462, 13 A. L. R. 1320; *Smith v. The Nicholas Bldg. Co.,* (1915) 93 Ohio St. 101, 112 N. E. 204, L. R. A. 1916E 700, Ann. Cas. 1918D 206. These apparently inconsistent holdings are based on the theory that the courts will give damages only where the loss of consortium results from an intentional act directed at the heart of the marriage relation itself. The instant case failed to observe this distinction, but argued that the law should not deny

the wife the redress which it affords the husband. At the common law a husband recovered for loss of consortium regardless of whether the defendant's act was intentional or negligent on the theory that the wife was his chattel, *Guy v. Livesey,* (1619) 2 Cro. Jac. 501. Even in the face of statutes emancipating the wife this view subsists in the majority of jurisdictions, *Birmingham R. R. v. Lintner,* (1904) 141 Ala. 420, 38 So. 363, 109 A. S. R. 40, 3 Ann. Cas. 461; *Skoglund v. Mpls. St. Ry. Co.,* (1891) 45 Minn. 330, 47 N. W. 1071, 11 L. R. A. 222, 22 A. S. R. 733. Some courts, however, have recently held that in case of negligent injury the husband cannot recover for loss of consortium, because the reason for the common law rule no longer exists, *Bolger v. Boston El. Ry.,* (1910) 205 Mass. 420, 91 N. E. 389; *Marri v. Stamford St. Ry. Co.,* (1911) 84 Conn. 9, 78 Atl. 582, 33 L. R. A. (N.S.) 1042, Ann. Cas. 1912B 1120; *Blair v. Seitner Co.,* (1915) 184 Mich. 304, 151 N. W. 724, L. R. A. 1915D 524.

At all events, it is submitted that in view of our modern conceptions of sex equality consistency demands that the right to sue for loss of consortium should be given to both husband and wife or denied to both.

INSURANCE—RIGHT OF JUDGMENT CREDITOR OF INSURED TO PROCEED AGAINST INSURER.—Defendant's automobile insurance policy provided that "no action shall lie against the company to recover for any loss under the policy unless it shall be brought by the insured for loss actually sustained and paid in money by the insured in satisfaction of a judgment after actual trial of the issue." Plaintiff recovered judgment against the defendant for injuries covered by the policy, but the judgment was not satisfied. Plaintiff then garnished the insurance company. *Held,* that the policy was one of indemnity and not of liability, and that therefore the judgment creditor could not garnishee the insurer. *Luger v. New Amsterdam Casualty Co.,* (Wash. 1921) 199 Pac. 760.

The instant case overrules an earlier one, *Davis v. Maryland Casualty* Co., (1916) 89 Wash. 571, 154 Pac. 1116, 155 Pac. 1035, L. R. A. 1916D 395, 398, and brings Washington into line with the great weight of authority. 25 Cyc. 224; see 2 MINNESOTA LAW REVIEW 216, 231. In these cases the actual payment of the loss is a condition precedent to the right of anyone to maintain action on the policy. *Ford v. Aetna Life Ins. Co.,* (1912) 70 Wash. 29, 126 Pac. 69; *Stenborn v. Brown-Corliss Engine Co.,* (1909) 137 Wis. 564, 119 N. W. 308, 20 L. R. A. (N.S.) 956. The policy is not obtained for the benefit of the injured party, but for the exclusive benefit of the insured to indemnify himself against loss sustained by actually having paid damage claims after judgment against him therefor. *Fidelity & Cas. Co. v. Martin,* (1915) 163 Ky. 12, 173 S. W. 307, L. R. A. 1917F 924; *Frye v. Bath Gas & Elec. Co.,* (1903) 97 Me. 241, 54 Atl. 395. 94 A. S. R. 500, 59 L. R. A. 444; *Allen v. Aetna Life Ins. Co.,* (1906) 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N.S.) 958. The injured party has no equitable or legal interest in the proceeds of the policy, as there is no privity of contract between the insured and the injured party. 15 Cyc. 1038. Nor does the insurance money constitute a trust fund for the

benefit of the injured party *Bain v. Atkins,* (1902) 181 Mass. 240, 63 N. E. 414, 92 A. S. R. 411. The fact that the insurance company conducted the defense against the injured party does not estop it to deny liability to the injured party. *Carter v. Aetna Life Ins. Co.,* (1907) 76 Kan. 275, 91 Pac. 178, 11 L. R. A. (N.S.) 1155.

On a policy almost identical with the one in the instant case the Minnesota court arrived at a different result, holding that the "no action" clause applies only in case the company denies liability and refuses to defend. *Patterson v. Adan,* (1912) 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N.S.) 184. Acknowledging the weight of authority to be otherwise, the court followed the only other case to the contrary, where the court holds that, by defending, the insurance company assumes the liability. *Sanders v. Frankfort, etc., Co.,* (1904) 72 N. H. 485, 57 Atl. 655, 101 A. S. R. 688; see also dissenting opinions in *Glatz v. Kroeger Bros. et al.,* (Wis. 1921) 183 N. W. 683.

The unfortunate effect of the majority rule becomes obvious when a judgment is obtained against an insured who is insolvent or financially embarrassed; the party injured is in that case left without remedy. In recognition of this unhappy result, some states have passed statutes providing that, upon recovery of a final judgment against the insured, the judgment creditor may proceed in equity to reach the insurance money. Mass. St. 1914, ch. 464, p. 408; Laws of Ohio, 1910, p. 191, supplementing Ohio Gen. Code 1910, sec. 9510.

JURY—CONSTITUTIONAL LAW—SUFFRAGE AMENDMENT AS QUALIFYING WOMEN FOR JURY DUTY—NECESSITY OF A QUALIFYING STATUTE.—After the nineteenth amendment had been adopted (August 26, 1920), and before the New Jersey legislature passed a statute qualifying women for jury duty, defendant was convicted of murder and now assigns as error that no women had been selected for the jury. *Held,* that the nineteenth amendment does not operate in terms or by implication to qualify women as jurors, but that it requires legislation to do that. *State v. James,* (N. J. 1921) 114 Atl. 553.

This case is in accord with the recent decision of the Massachusetts court to the effect that the nineteenth amendment does not ipso facto qualify women as jurors; that under the then existing jury statutes women cannot serve; but that the problem is one with which the legislature is competent to deal. *In re Opinion of the Justices,* (Mass. 1921) 130 N. E. 685. This view, that jury qualification is a legislative matter has had the support of other courts prior to the adoption of the suffrage amendment. See 5 MINNESOTA LAW REVIEW 318, where the recent holding of the Michigan supreme court is discussed, to the effect that the nineteenth amendment of its own force qualified women to serve on juries, without new enabling legislation. *People v. Barltz,* (1920) 212 Mich. 580, 180 N. W. 423, 12 A. L. R. 520, and note; accord, *Commonwealth v. Maxwell,* (Pa. 1921) 114 Atl. 825. The argument that the constitution guarantees a jury as constituted at common law, to-wit, of twelve "men;"

that, therefore, the legislature is without power to change the constitution by statutory enactment; and that, as a consequence, a constitutional amendment is required in each state to qualify women for jury service, has thus far found no support in the courts, which prefer to recognize in the legislatures a competency to include or exclude women from jury service at will. 5 MINNESOTA LAW REVIEW 318; see also *In re Eben Mana*, (1918) 178 Cal. 213, 172 Pac. 986, L. R. A. 1918E 771, where the above mentioned argument was raised against the constitutionality of a statute permitting women to serve on juries, and disregarded. The Minnesota legislature in its last session declared that a grand or a petit jury is a body of *"men or women, or both,"* thus recognizing the theory of legislative power to deal with the question. Minnesota Laws 1921, chap. 365, p. 549.

MASTER AND SERVANT—"FAMILY AUTOMOBILE" DOCTRINE—LIABILITY OF FATHER WHO BORROWS AUTOMOBILE FOR ADULT CHILD—An adult, self-supporting daughter requested her father to ask a neighbor if she might borrow his car to take her married sister to the train. The father carried out the daughter's request. The son-in-law of the defendant obtained the car. The wife of the owner of the car was an occupant, but the defendant father was not. While using the car under these circumstances, the daughter of the defendant ran into the plaintiff, who sustained personal injuries for which he sues. *Held*, that defendant father is liable on the ground that where the head of the household provides an automobile for the use of the family, he is responsible for its negligent use by a member thereof. *Emanuelson v. Johnson*, (Minn. 1921) 182 N. W. 521, (Brown, C. J., and Quinn, J., dissenting.)

This case presents a novel extension of the "family automobile" doctrine which is that when a head of a family provides a car for the pleasure and convenience of the members thereof, he makes their conveyance his business, and anyone driving for that purpose, his servant or agent. See 4 MINNESOTA LAW REVIEW 73, and 5 MINNESOTA LAW REVIEW 321. While the trend of the courts has seemed to be towards the adoption of the so-called "family purpose" doctrine, the Arkansas court has recently stated that at the present time, a numerical majority of the courts reject the doctrine. *Norton v. Hall*, (Ark. 1921) 232 S. W. 934. Where the head of the family owns the automobile and has authorized its use, grounds of practical policy lend support to the doctrine. Note 5 A. L. R. 226. In all of the cases in which the head of the family has been held liable, he has been the *owner* of the automobile and has expressly or impliedly authorized its use. Berry, Automobiles, 2nd Ed., secs. 652-683; *Birch v. Abercrombie*, (1913) 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N.S.) 59; notes 5 A. L. R. 226, 10 A. L. R. 1449.

The facts of the instant case are difficult to harmonize with the "family purposes" theory. The father did not own the car, nor did he have possession or control over it. The person operating the car was an emancipated, adult daughter, and the father had no authority over her, express or implied. In fact, the father appears rather to have been the agent of the daughter.

Minnesota was one of the first to adopt the "family purpose" doctrine, and it has, in the instant case, gone farther in its application than any other jurisdiction.

NEGLIGENCE—MANUFACTURER'S LIABILITY TO THIRD PARTIES.—Defendant carelessly manufactured a paste commonly used in pasting linings to fabrics. In an action by a purchaser of paste from defendant's vendee for damages to cloth caused by the paste. *Held*, plaintiff could not recover. *Windram Mfg. Co. v. Boston Blacking Co.*, (Mass. 1921) 131 N. E. 454.

It is well settled that a manufacturer ordinarily is not liable in an action for negligence to third parties with whom he stands in no contractual relationship, for damages caused by the careless making of a product. *Winterbottom v. Wright*, (1842) 10 M. & W. 109; *McCaffrey v. Mossberg, etc., Co.*, (1901) 23 R. I. 381, 50 Atl. 651, 55 L. R. A. 822, 91 A. S. R. 637. An exception to this rule is found where the product of the manufacturer is of an inherently dangerous nature, in which case public policy demands that the manufacturer be held strictly accountable even to sub-vendees. *Thomas v. Winchester*, (1852) 6 N. Y. 397, 57 Am. Dec. 455; *Huset v. J. I. Case Threshing Machine Co.*, (1903) 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303. Recently there has been a marked tendency to deviate from the general rule holding manufacturers not accountable to sub-vendees, in cases where the goods manufactured, though not inherently dangerous, imperil life or limbs of users because of careless making. *Schubert v. J. R. Clark Co.*, (1892) 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 A. S. R. 559; *Salmon v. Libby, McNeill & Libby*, (1906) 219 Ill. 421, 76 N. E. 573.

OFFICERS—POWER OF COURTS TO REVIEW GOVERNOR'S ACTS ON CERTIORARI—Incumbent, without a hearing or an opportunity for defense, had been summarily removed from office by the governor who was authorized by statute to "remove for cause." He now seeks to have the governor's act reviewed on certiorari. *Held*, removal without hearing by governor was void. *State ex rel. Wehe v. Frazier*, (N. Dak. 1921) 182 N. W. 545.

"The judicial dissension on the question presented by the instant case is due chiefly to the difference in the construction of statutes prescribing the method for removal for cause. Cases where an officer is vested with an absolute power of removal at pleasure are not in point. In a majority of jurisdictions, it is held, on the theory of the constitutional separation of powers, that, in the absence of fraud or mistake, the governor is immune from judicial control or interference in the discharge of both discretionary and ministerial duties. *State v. Ill. Cent. Ry.*, (1910) 246 Ill. 188, 233, 92 N. E. 814; *In re Guden*, (1902) 171 N. Y. 529, 64 N. E. 451; *Rice v. The Governor*, (1911) 207 Mass. 577, 93 N. E. 821, 32 L. R. A. (N.S.) 355. The minority view holds that, although the executive cannot be interfered with, or controlled, as to discretionary acts, yet, as to purely ministerial duties, he may be restrained, or their performance may be compelled by mandamus. *State of Mississippi v. Johnson*, (1867) 4 Wall. (U. S.) 475,

18 L. Ed. 437; *Harpending v. Haight,* (1870) 39 Cal. 189, 2 Am. Rep. 432; *Ellingham v. Dye,* (1912) 178 Ind. 336, 99 N. E. 1. Minnesota, formerly in accord with the majority view, *Rice v. Austin,* (1872) 19 Minn. 103 (Gil. 74) 18 Am. Rep. 330, now holds with the minority. *Cooke v. Iverson,* (1909) 108 Minn. 388, 122 N. W. 251, 52 L. R. A. (N.S.) 415. The distinction between acts purely discretionary or ministerial and those of a judicial nature is rather indistinct, but, in general, it is held that where the law, in words or by implication, commits to any officer the duty of looking into the facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi-judicial. Mechem, Public Officers, sec. 637, p. 421. The weight of authority seems to justify the decision that where the amotion from office must be "for cause," the executive, in exercising his right of removal, acts in a quasi-judicial capacity. *People v. Stuart,* (1889) 74 Mich. 411, 16 A. S. R. 644; *State ex rel. Hart v. Common Council,* (1893) 53 Minn. 238, 55 N. W. 118, 39 A. S. R. 595; note 40 A. S. R. 28, 45; 11 C. J. 108. The act being quasi-judicial, it is well settled that certiorari will lie to review it. Bailey, Habeas Corpus, sec. 173, p. 665.

Minnesota is not only in direct accord with the instant case on the question of the court's right to examine into the governor's jurisdiction and the exercise of his power, but it also intimates that although the court cannot, if there was any legal cause at all, question the sufficiency of the cause as determined by the governor, it may inquire whether there is any evidence of legal cause reasonably tending to support his decision. *State ex rel. Kinsella v. Eberhart,* (1911) 116 Minn. 313, 133 N. W. 857; *In re Nash,* (Minn. 1921) 181 N. W. 570.

RAILROADS—PUBLIC SERVICE CORPORATIONS—RIGHT TO CEASE OPERATION —The Duluth & N. M. Ry. Co. petitioned the state Railroad and Warehouse Commission for permission to abandon its railroad, claiming that it could no longer be operated at a profit. Permission to abandon was granted, but the commission failed to comply with G. S. Minn. 1913, sec. 4424, providing that permission to abandon may be given only when "the abandonment or closing for traffic will not result in substantial injury to the public." *Held,* that unless a railway has contracted to keep its road in operation, it has a constitutional right to abandon it if it no longer can be operated except at a loss; but that the legislature has withheld from the Railroad and Warehouse Commission power to authorize abandonment on that ground. *State v. Duluth & N. M. Ry Co.,* (Minn. 1921) 184 N. W. 186.

In the absence of statute or express contract, a public service corporation can not be compelled to operate even a branch of business, much less the whole business, at a loss; and it has the right to stop without the consent of the state. To compel it so to operate would deprive it of property without due process of law. *Brooks-Scanlon Co. v. Railroad Comm. of La.,* (1920) 251 U. S. 396, 40 S. C. R. 183, 64 L. Ed. 323; *Bullock v. State,* (1921) 254 U. S. 513, 41 S. C. R. 193, 65 L. Ed. 222; *Northern Pacific R.*

v. North Dakota, (1915) 236 U. S. 585, 35 S. C. R. 429, 59 L. Ed. 735; see note, 11 A. L. R. 249. Present inability to operate at a profit, however, is not in itself sufficient to warrant abandonment of a road by a public service corporation, but it must appear that there is no reasonable prospect of profitable operation in the future. *Bullock v. State,* (1921) 254 U. S. 513, 41 S. C. R. 193, 65 L. Ed. 222.

A charter granted by the government to, and accepted by, a corporation is a contract, *Trustees of Dartmouth College v. Woodward,* (1819) 4 Wheat. (U. S.) 518, 4 L. Ed. 629. But it has been held that no implied contract that a corporation will continue operation at a loss can be elicited from the mere fact that it has accepted a charter from the state and has been allowed to exercise the power of eminent domain. *Bullock v. State,* (1921) 254 U. S. 513, 41 S. C. R. 193, 65 L. Ed. 222. On the other hand, older cases have taken the view that acceptance of, and entering upon, charter privileges will prevent abandonment without consent of the state, even where the road (which, however, had accepted land grants) was operating under receivership, *Farmers' Loan & Trust Co. v. Henning,* (1878) Fed. Cas. No. 4666, 17 Am. Law Reg. (N.S.) 266; and regardless of whether the operation was profitable or unprofitable. *State v. Dodge City, etc., Ry Co.,* (1894) 53 Kan. 377, 36 Pac. 747. It is true, of course, that if a railroad *continues* to exercise the powers and to enjoy the privileges conferred upon it by a state charter, the state may require it to fulfil an obligation imposed by the charter even though fulfilment in that particular may cause a loss. *Mo. Pac. Ry. Co. v. Kansas,* (1910) 216 U. S. 262, 277, 278, 279, 30 S. C. R. 341, 54 L. Ed. 469.

It would seem, therefore, that under the recent United States Supreme Court decisions, an ordinary charter or franchise, unless it expressly provides for continuance of operation during the life of the instrument, will not by the mere conferring of various privileges prevent the lawful exercise of the right of abandonment. Furthermore, there appears to be some question about the constitutionality of a state statute which would compel a railroad to operate at a loss, even when its abandonment would result in substantial injury to the public. It is to be noted that in the instant case the Minnesota supreme court did not make the statutory exception made by the United States Supreme Court. And finally, the state statutes specifying the means by which a railroad may be abandoned, e. g., G. S. Minn. 1913, sec. 4424, while creating an orderly and authoritative procedure and probably enforceable as such, seem to be of no value beyond that, in the face of a constitutional right to abandon operation whenever the proper facts exist.

SALES—RISK OF LOSS WHEN SELLER RETAINS BILL OF LADING.—Plaintiff pursuant to contract of sale shipped 125 cases of liquor to the defendant, taking the bill of lading to his own order. The bill of lading and draft as agreed were mailed to a bank which presented the draft to the defendants, but payment was refused. Upon arrival of the goods, the defendants were notified, but failed to take them away. Ten or twelve days after their arrival, the goods were destroyed by fire. *Held,* as the

seller had fully performed, the goods were at the buyer's risk, and he must bear the loss. *Turner Looker Liquor Company v. Hindman,* (Mo. Court of App. 1921) 232 S. W. 1076.

The authorities are not agreed as to where the risk lodges when the seller retains control of the bill of lading. It seems that by the law merchant, when the seller has performed all that is required of him by the terms of the contract, and delivery alone remains to be made, the property vests in the buyer, 2 Bl. Com. 448, 449, and subjects him to the risk of any accident which may befall the subject matter of the sale. Story, Law of Sales, sec. 300; 2 Kent Com. 492; see *Hinde v. Whitehouse,* (1806) 7 East 558, 571; *Willis v. Willis's Admrs.,* (1837) 6 Dana (Ky.) 48; *Olyphant v. Baker,* (1848) 5 Denio (N. Y.) 379.

With the advent of negotiable bills of lading, arises the question where the risk lodges when the goods are sent on order bill of lading with draft attached so that the buyer can not obtain the goods without paying the draft? In *Browne v. Hare,* (1858) 3 H. & N. 484, 4 H. & N. 822, the court held that upon delivery to the carrier, the property passed to the buyer and the loss in transit fell upon him. See also *Farmers' & Mechanics' Nat. Bank v. Logan,* (1878) 74 N. Y. 568. A respectable number of courts, however, reject the doctrine enunciated in the instant case. *Seeligson v. Philbrick,* (1886) 30 Fed. 600; *Willman Merc. Co. v. Fussy,* (1895) 15 Mont. 511, 39 Pac. 738, 48 A. S. R. 698; *Jones & Co. v. Brewer,* (1885) 79 Ala. 545.

The rule laid down in the instant case is based on the theory that upon delivery to the carrier, the beneficial interest vests in the buyer and the seller retains the bill of lading merely for security. The transaction is in effect a sale to the buyer and a mortgage back to the seller for the price. Williston, Sales, secs. 303, 305. This result is effected under the Sales Act; the buyer assumes the risk although the bill of lading is retained by the seller. Sales Act sec. 20 (2) (3) and sec. 22 (a); G. S. Minn., 1917 Supplement, sec. 6015-20, 22; *Kinney v. Horwitz,* (1919) 93 Conn. 211, 105 Atl. 438; *Smith Co. v. Marano,* (1920) 267 Pa. 107, 110 Atl. 94, 10 A. L. R. 697; *Maffei v. Ginocehio,* (Ill. 1921) 132 N. E. 518.

TAXATION—PROPERTY—PROFESSIONAL SALARY IS INCOME DERIVED FROM PROPERTY.—Plaintiff, a university professor, demanded an abatement of his income tax on the ground that under the income tax amendment, Gen. Acts Mass. 1914, p. 1059, his income not being derived from property, could not be taxed at a higher rate than income derived from property. *Held,* that the salary of a university professor is income derived from property. *Raymer v. Trefry,* (Mass. 1921) 132 N. E. 190.

It is necessary to a proper analysis of the instant case to understand that "an unlimited discretion on the subject of taxation . . . was not reposed in the legislature" of Massachusetts. *Opinion of the Justices,* (1907) 195 Mass. 607, 612, 613, 84 N. E. 499. The constitutional limitations on the power of taxation inhibited all rates, assessments and taxes on persons and property that were not "reasonable and proportional." Excise taxes on goods, wares, and merchandise had to be "reasonable".

Opinions of the Justices, (1915) 220 Mass. 613, 108 N. E. 570. The income tax amendment then was a removal of a part of these limitations on the power to tax, and as such was the measure of the extent to which they had been removed. Among other things, the amendment gave the power to "tax income not derived from property at a lower rate than income derived from property." The plaintiff contended that this clause implied a negation of the power to tax income not derived from property at a higher rate than income derived from property, and that therefore, the higher rate levied on his salary was unconstitutional. The case was decided against the plaintiff on the one ground that his salary was income derived from property. No authority was cited and none has been found.

The reasoning of the court to the effect that what is property for the purpose of protection under the state and the federal constitutions is also property for the purpose of taxation seems artificial. In substance, the court holds that the word "property" as used in the constitution is a word of art with an unvarying content of meaning. It is submitted that such is not the fact. The terms "life, liberty and property" are representative terms, Brannon, The Fourteenth Amendment, p. 114 *et seq.*, and not words of art. The right to following a calling, to labor, and to contract are usually held to partake of the nature of liberty as well as of property. *Allgeyer v. Louisiana,* (1897) 165 U. S. 578, 589, 17 S. C. R. 427, 41 L. Ed. 832; *Lochner v. New York,* (1905) 198 U. S. 45, 53, 25 S. C. R. 539, 49 L. Ed. 937; *Butcher's Union, etc., Co. v. Crescent, etc., Co.,* (1884) 111 U. S. 746, 757, 764, 4 S. C. R. 652, 28 L. Ed. 585. The fact that the protection of the constitution may have been invoked or granted under the term "property" is not conclusive. It could have been as effectively invoked or as completely granted under the term "liberty." Heretofore a tax of the sort here involved, has been held to be an excise tax. 21 Eng. & Am. Ency. of Law, 775. Cases even go farther and hold that a general income tax is an excise and not a property tax. *Hattisburg Grocery Co. v. Robertson,* (Miss. 1921) 88 So. 4. The reason for the decision probably lies in the fact that the commonwealth of Massachusetts had for a long time prior to this decision, levied an income tax of the sort involved here without any question, *Opinions of the Justices,* (1915) 220 Mass. 613, 624, 108 N. E. 570, and that it had been listed as a personal property tax by the General Court. See, Acts and Resolves of Mass. 1909, c. 490, part I. sec. 4, cl. 4, p. 539.

TORTS—CIVIL LIABILITY FOR INDUCING BREACH OF CONTRACT.—The defendant with knowledge of the contract, induced breach of a contract for the sale of real estate made with the plaintiff. Plaintiff sued in tort for interference with his contract rights. *Held,* that where the plaintiff has a right of specific performance against the promisor, he has no right of action against the defendant for inducing a breach of the contract. *Sonnenberg v. Hajek,* (Tex. Civ. App. 1921) 233 S. W. 563.

For a general discussion of principles involved in this case see NOTES p. 58.

AN EMPIRE VIEW OF THE EMPIRE TANGLE. By Edward O. Mousley. With preface by Rt. Hon. W. F. Massey, Prime Minister of New Zealand. London: P. S. King & Son. 1921.

The author of this little monograph who is a staunch colonial imperialist, is greatly alarmed at the present nationalist pretensions of some of the dominions. The inevitable result of these pretensions, he is convinced, will be the disruption of the Empire unless steps are speedily taken to counteract these tendencies by the creation of an effective imperial organization.

The present constitution, he clearly points out, is an anomaly. There is a manifest incompatibility between the legal theory of imperial sovereignty and the independent activities of the self-governing dominions. The unity of the Empire was secure as long as the colonies restricted their jurisdiction to purely domestic affairs, but a new situation was created when they began to intermeddle in questions of defense and foreign affairs. The war brought matters to a head. At the Peace Conference the dominions demanded and secured an international status as full-fledged members of the League of Nations. Internationally, the Empire was divided even though it still retained in theory its constitutional unity.

It is interesting to observe that the views of British imperialists on the separate representations of the self-governing dominions in the League stand out in striking contrast to those of the nationalistic "irreconcilables" in our own country. To the latter, the grant of separate votes to the dominions has appeared as a Machiavellian plot on the part of British statesmen to establish a hegemony throughout the world. To the former, it presents itself as an insidious device to bring about the dismemberment of the Empire. Under the provisions of the Covenant, as the author points out, the dominions might be called upon to take action against the Mother Country or vice versa. The Covenant ought therefore, to be revised so as to safe-guard the unity and interests of the Empire.

An imperial conference should likewise be called to provide a more adequate constitution for the Empire. The primary need is for the creation of an imperial council on which all the self-governing colonies shall have representation. This body would give consideration and direction to all matters of common imperial concern.

"Such a council would consolidate the dominion point of view; would be friendly and not biased or outweighed by the British cabinet, as so many recorded objections have feared. It retains the unity of the Empire. There are several subjects on which it could reach an immediate decision, e. g. privy council appeal, merchant shipping acts and commerce." From a strictly legal standpoint, it must be admitted, Mr. Mousley has made out a strong case.

"(1) If the Dominions are separate states, they must accept responsibility for the making of war and peace, unsupported by other Dominions or Great Britain, and of course responsibility for their own defence. (2)

Their relation to the rest of the Empire can only be one of alliance. The unity of Empire will be over." The Empire, as he truly says, has been gradually transformed from an imperial state into a Britannic confederation or a league of nations.

The author recognizes the facts but refuses to accept the inevitable conclusion. He still conceives of the Empire as a constitutional bond rather than as a voluntary union of hearts. In place of the present beneficent conventions of the imperial constitution, he would again set up the irksome restrictions of constitutional machinery. The recent imperial conference at London was called upon to choose between these two ideals of empire and it unhesitatingly chose the road to freedom. The Empire, it was resolved, should continue to develop not as a unitary state but as a copartnership of free and independent nations.

Mr. Mousley has been no more fortunate in his specific proposals for constitutional reorganization. Various attempts have been made to set up an imperial council but they all have failed. The creation of such a body, it has been recognized, would be manifestly incompatible with the principle of responsible government. Neither the British nor the dominion parliaments would ever consent to the transfer of political power to an extraneous body over which they had no control.

The author none the less has performed a most useful service in bringing out the apparently hopeless inconsistencies of the imperial constitution. To the jurists these legal inconsistencies may appear a danger, but to the practical statesman, as Boutmy has pointed out, these inconsistencies present themselves as the greatest source of strength in a democracy inasmuch as they allow free play for those divergences of political principles and understandings which are inherent in society itself and essential to the free development of liberty loving nations. The British people are neither logical nor legalistic. On the contrary, they are hopelessly inconsistent and utilitarian in their political theories and practices. All that they ask of their constitution is, does it work?

In this case the Mother Country and dominions alike desire union but not unity. That end they believe can be best attained by extending to all the self-governing dominions the largest measure of independence in both internal and foreign affairs. The future of the Empire will be based upon the common political ideals of the sister states and on the principle of good faith and credit in their mutual relations. Such has been the spirit of the imperial constitution in the past. Mr. Mousley may be right in believing that the doctrines of laissez faire constitutionalism are not strong enough to hold the empire in the future, but mere prophecies or forebodings will not suffice to overrule the strong presumption of permanency which has been raised by past colonial experience and the more recent splendid voluntary sacrifices of the dominions on the fields of France. The Tory imperialists seemingly cannot understand or will not learn the lesson of history. All previous extensions of the powers of the colonies have been accompanied by similar warnings of the inevitable dissolution of the Empire. But the principles of liberal imperialism have been justified in and by the colonies from the days of Baldwin to the days of Jan Smutz. The burden of proof it is submitted still rests upon the author.

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PURCHASE FOR VALUE AND ESTOPPEL

By Henry W. Ballantine*

1. Various Grounds of Defeasance of Legal and Equitable Titles

IT is a fundamental principle that an owner cannot be divested of his property without his consent, or by operation of the law.[1] As Kent says:[2]

"Although it may be true, as an absolute principle, that a derivative title cannot be better than that from which it is derived, yet there are many necessary exceptions to the operation of this principle."

These exceptions are based on the necessities and policy of commerce in giving effect to the usual evidence of title, upon estoppel, upon the relation of equitable and legal rights, upon statutory provisions and possibly other grounds. It may be of interest to take a comprehensive view of the grounds and policy of those exceptional cases where the seller has power to give what he himself did not have.

At common law sales in market overt gave title to stolen goods. The doctrine of sale in market overt, which is perpetuated in Eng-

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[1]Saltus v. Everett, (1838) 20 Wend. (N. Y.) 267, 270, 32 Am. Dec. 541; Ventress v. Smith, (1836) 10 Pet. (U.S.) 161, 175, 9 L. Ed. 382; Baker v. Taylor, (1893) 54 Minn. 71, 55 N. W. 823; Snell v. Snell, (1893) 54 Minn. 285, 55 N. W. 1131; Root v. French, (1835) 13 Wend. (N. Y.) 570, 572, 28 Am. Dec. 482; Williams v. Merle, (1833) 11 Wend. (N.Y.) 80, 25 Am. Dec. 604; Cunday v. Lindsay, (1878) 3 A. C. 459, 464; 2 Kent, Comm. 323, 324; Williston, Sales, sec. 311, 406; 2 Tiffany, Real Property, 2nd Ed., sec. 566.

[2]See Kent, C. J., Jackson v. Henry, (1813) 10 Johns. (N. Y.) 185.

land by the Sale of Goods Act, for the protection of the buyers of goods in shops where such goods are openly sold, has not been adopted in America.[3] It is interesting to notice it, however, as an illustration of how far the law may go in protecting bona fide purchasers and treating possession in a public market as evidence of title, conferring the power of sale. It would be entirely conceivable that the law should recognize purchasers who buy on the faith of the possession of a bailee, finder or thief of any sort of personal property commonly dealt in.

The first and most striking class of exceptions to the general rule of caveat emptor includes currency and negotiable instruments. The negotiability of money and commercial paper is given by the policy of the law and by the consent of those who put obligations in negotiable form, to facilitate the circulation of this species of property, which is intended to pass freely from hand to hand.[4]

A second large and important class of exceptions includes those cases where the true owner is estopped to assert his title. Estoppel arises where the owner has, by his own voluntary act, conferred upon the person who makes the sale either the apparent title or indicia of property, or the apparent power of disposal as an agent.[5] The "equity" of the purchaser is based on the principle formulated by Justice Ashurst, in 1787, in the celebrated case of *Lickbarrow v. Mason*.[6]

"We may lay it down as a broad general principle that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."[7]

As Ewart points out in his noteworthy treatise on estoppel a man may be estopped by the misrepresentation of another person if he has assisted it by furnishing an opportunity for the fraud.[8] The true owner, although not a party to the sale, yet may be bound by it if he has assisted in creating a deceptive situation, which is

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[3]Williston, Sales, sec. 347; Jones, Position of a Bona Fide Purchaser of Goods 48; Hogan v. Atlantic El. Co., (1896) 66 Minn. 344, 346, 69 N. W. 1.

[4]Miller v. Race, (1758) 1 Burr. 452, 1 Smith L. Cas. 12th ed., 525; Voss v. Chamberlain, (1908) 139 Ia. 569, 575, 117 N. W. 269.

[5]Saltus v. Everett, (1838) 20 Wend. (N. Y.) 267, 270, 32 Am. Dec. 541; Williston, Sales, sec. 312; Ewart, Estoppel 238.

[6](1787) 2 Durn. & E. 63, 1 Smith L. Cas. 12th ed., 726, 734, 769.

[7]See Rimmer v. Webster, [1902] 2 Ch. 163, 169, 173; Farquharson v. King, [1902] A. C. 325, 336, 342; Voss v. Chamberlain, (1908) 139 Ia. 569, 579, 117 N. W. 269.

[8]Ewart, Estoppel 20, 21, 238; 18 Law Quarterly Review 165.

relied upon by the subsequent buyer. Such is the case where a seller is allowed to remain in possession of goods after a sale, and is thereby given a false and deceptive appearance of ownership.[9]

Bills of lading, certificates of stock, and warehouse receipts, are often spoken of as *quasi-negotiable* instruments. In *Ammon v. Gamble-Robinson Co.*,[10] it is said that bills of lading and warehouse receipts have not been put by our statute on the footing of bills of exchange, but the transfer and delivery of these symbols of property has been made the equivalent of a transfer and delivery of the property itself. In truth, however, these documents of title are not merely symbols of the tangible property, but of the title, and create an estoppel in favor of the innocent purchaser in cases where he buys the property in good faith in reliance on the ostensible title of the holder.[11]

The common law on this subject is being extended by statute to make the customary evidences of title such as bills of lading transferable in the same way and to the same extent as bills of exchange. Legislation has been proposed by the Commissioners on Uniform State Laws, and adopted in many states which aims to make it safe to give full faith and credit to bills of lading and similar documents, so that banks and merchants may deal in them freely. A bill of lading is now fully negotiable by the Minnesota Bills of Lading Act and by the Federal Bills of Lading Act. There are inconsistent provisions with reference to the extent of negotiability of warehouse receipts, bills of lading, and stock certificates in the various uniform state statutes, which the Commissioners on Uniform State Laws have recommended for enactment.

In the Sales Act, and Warehouse Receipts Act, it is provided that negotiation may be made by any one entrusted with a document in deliverable form. On the other hand, by the Bills of Lading Act, and the Stock Transfer Act, a purchaser for value of an order bill of lading, or a stock certificate, even from a finder or thief, is protected, provided the instrument is made or endorsed to the holder, or endorsed in blank.[12]

The commissioners evidently were prepared to go further in promoting the negotiability of mercantile documents as representa-

[9] Flanagan v. Pomeroy, (1902) 85 Minn. 264, 88 N. W. 761.
[10] (1910) 111 Minn. 452, 127 N. W. 448. But see Minn. G. S. 1917 secs. 4434-37, 38.
[11] Shattuck v. American Cement Co., (1903) 205 Pa. St. 197, 54 Atl. 785. See Negus, Negotiability of Bills of Lading 37 Law Quar. Rev. 442, 456.
[12] See 1 MINNESOTA LAW REVIEW 68; 16 Ill. L. Rev. 233.

tives of title in these later acts than in the earlier. It has been recommended by a committee that these statutes be made harmonious, so that these documents, running to order or bearer, may be negotiated by any person in possession with apparent title, however such possession may have been acquired, whether by theft or finding, as in case of bills of exchange. It is a great point of policy that in all mercantile transactions, the circulation and transfer of property be made as easy, safe, and certain as possible, so that men may be protected in buying and in lending money in reliance upon the customary indicia of title.[13]

A third class of cases of bona fide purchase is where the true owner's right is equitable, and the trustee or holder of the legal title is enabled to sell to a bona fide purchaser for value free and clear of the equity. Thus, if the owner has been led to part with his property with his consent, but under circumstances which would make that consent revocable, as where it is obtained by fraud or mutual mistake, if the property passes into the hands of a bona fide purchaser for value, the defrauded owner cannot follow his goods into the hands of the buyer. What is the reason? It may possibly be explained by the nature of equitable rights and remedies, or it may rest on grounds of public policy and estoppel, namely, that if the owner has given an apparent title to the fraudulent purchaser, he is precluded from asserting his claim against the innocent purchaser, who has relied upon the apparent ownership of the fraudulent party.[14]

As Savage, C. J., says, in *Root v. French*:[15]

"The bona fide purchaser is justified in considering the fraudulent vendee the true owner . . . He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer who by his indiscretion, has enabled such third person to commit the fraud. A contrary principle would endanger the security of commercial transactions, and destroy that confidence upon which what is called the usual course of trade, materially rests."[16]

If the true principle here is estoppel, and giving effect to the outward evidence of title, then a rescission of the voidable sale by

[13]Buller, J. in Lickbarrow v. Mason, (1787) 2 Durn. & E. 63, 6 East 20, 5 Durn. & E. 683, 1 Smith L. Cas., 12th ed., 726, 769.

[14]Saltus v. Everett. (1838) 20 Wend. (N.Y.) 267; Root v. French, (1835) 13 Wend. (N. Y.) 570. Jones, Position of a Bona Fide Purchaser of Goods Improperly Obtained 62, 63.

[15](1835) 13 Wend. (N. Y.) 570.

[16]See also Moore v. Moore, (1887) 112 Ind. 149, 152, 13 N. E. 673;

notice to the buyer, without recovery of the possession, would not so far revest the title as to prevent a sale to a bona fide purchaser in reliance on the apparent title of the fraudulent buyer.

It is contended by Ewart that in practically all cases the rights of the innocent purchaser as against the true owner are really acquired on principles of estoppel. He argues that both negotiability and also the cutting off of equities by transfer of the legal title must be explained and developed along lines of responsibility for ostensible ownership in a third party or "assisted misrepresentation."

A fourth class of exceptions to the general rule covers the defeasance of titles under the recording acts. The system of recording conveyances by which the title may be affected is especially designed for the benefit and protection of parties dealing in real property. The leading object is to provide evidence of title, accessible to all, upon which one may rely in making a purchase when he has no knowledge of anything to put him on inquiry.[17] Purchases are commonly made with little other inquiry than that which the records and the occupancy may suggest.

The safe transaction of business and the security of titles in these different classes of cases may depend on the protection of the bona fide purchaser who acquires title unconscious of latent defects and without any practical means of knowing them. If latent equities could be asserted no matter through what a course of successive alienations the title had passed, the inconvenience to business would be serious indeed. The law is anxious to quiet the title of the bona fide purchaser against secret defects and latent equities if there is any just ground to do so.[18] The doctrine of bona fide purchase cannot be regarded as based upon self-evident principles of natural justice. It is the expression of various more or less clearly perceived notions of expediency, justice and business policy. What these are needs to be more clearly understood in connection with various types of wrongful transfer.[19]

We shall take up first transfers of stock as typical of the rights of the purchaser of documents of title; second the assignment of

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Trustees of Brookhaven v. Smith, (1890) 118 N. Y. 634, 640, 23 N. E. 1002; Ewart, Estoppel, 302, ff., 423; Williston, Sales, sec. 406.

[17]Merchant v. Woods, (1881) 27 Minn. 396, 7 N. W. 826, Wade, Law of Notice, sec. 96.

[18]See Jackson v. Henry, (1813) 10 Johns. (N. Y.) 185.

[19]See Cook, Alienability of Choses in Action, 30 Harv. L. Rev. 476, 477. See also Williston, 31 Harv. L .Rev. 829, 930.

choses in action, whether or not free and clear of latent equities; and third wrongful transfers by trustees and whether the doctrine of bona fide purchase should extend to one who acquires only an equitable title.

II. Bona Fide Purchase of Stock Certificates

It is said in the case of *Axford v. Western Syndicate Investment Co.*,[20] that:

"Stock certificates are not negotiable instruments. They do not run to bearer or to the order of the person to whom they are given. They simply declare that the person named in the certificate is entitled to a certain number of shares of stock. . . . An assignment or transfer thereof is necessarily subject to inherent infirmities and to all rights and liabilities attached thereto at the time of the assignment."

It is true that at common law certificates of stock are not negotiable paper in the sense that a title transferred by a thief or finder to a bona fide purchaser cannot be questioned.[21] But if one could never buy a share of stock without ascertaining at his peril whether there was not someone with a secret equitable interest in it, stock purchases would be perilous indeed.

As Cook says in his work on corporations:[22]

"To such an extent has the law of estoppel been applied to protect a bona fide purchaser of stock that, excepting in cases of certificates transferred in blank and lost or stolen without negligence on the part of the owner, a bona fide purchaser is protected now in almost every instance when he would be protected if he were purchasing a promissory note or other negotiable instrument."[23] Estoppel may protect the purchaser not only against rights of previous holders, but against claims of the corporation itself.

If one holds stock in trust, a purchaser in good faith will be protected, although the transferor is guilty of a breach of trust.[24]

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[20](1918) 141 Minn. 412, 423, 170 N. W. 587, 591.

[21]Bangor Electric Light Co. v. Robinson, (1892) 52 Fed. 520; Barstow v. City Trust Co., (1914) 216 Mass. 330, 103 N. E. 911; East Birmingham Land Co. v. Dennis, (1888) 85 Ala. 565, Levine v. Wilson, (1891) 90 Cal. 126, 27 Pac. 33; Anderson v. Nicholas, (1864) 28 N. Y. 600; Weaver v. Barden, (1872) 49 N. Y. 286.

[22]2 Cook, Corporations, sec. 416.

[23]See also Cincinnati, etc., Ry. v. Citizens National Bank, (1897) 56 Ohio St. 351, 47 N. E. 249; Omara v. Newcomb, (1906) 38 Colo. 275, 88 Pac. 167; Shattuck v. American Cement Co., (1903) 205 Pa. St. 197, 54 Atl. 785, 97 A. S. R. 735; Machen, Corporations, sec. 842, 902; Fletcher, Cyc. Corporations, sec 3846, 3847; Ewart, Estoppel, 342, 347.

[24]Winter v. Montgomery G. L. Co., (1889) 89 Ala. 544, 7 So. 773; Dueber Watch Case Manufacturing Co. v. Daugherty, (1900) 62 Ohio St. 589, 57 N. E. 455; 14 C. J. 785; Ames Cases on Trusts 300. See also Wolf v. Trust & Savings Bank, (1914) 214 Fed. 761; Iron Stone Ditch Co. v.

A transferee of a certificate of stock in good faith thus takes it free of any latent equities in favor of third parties. In England, however, a man may transfer his shares in a corporation to a trustee and entrust him with the certificates, and yet enforce his equitable title against a purchaser or mortgagee of the trustee who has not obtained the legal title.[25]

If an owner of stock allows another to appear to be owner or to have full power of disposition, an innocent purchaser will have a superior equity. One who, for purposes of his own, places the legal title to property in another must take the risk of loss that may result from his dealing with innocent third persons as owner. Where, however, an agent or servant simply has access to document endorsed in blank, remaining in the possession of the owner, and the owner has not entrusted him with the document, he is not considered to have done enough to be estopped against a purchaser in good faith.[26] But if possession of the indicia of title be entrusted to an agent or pledgee for one purpose and he uses them for another, the ground of estoppel is present and the estoppel arises. It is held that the sufferer should be the one who has created the means of doing the wrong.[27] It would be contrary to justice and business convenience to permit the owner to assert his title against an innocent purchaser from one whom he has clothed with all the indicia of ownership and power of disposition.[28] The principles which underlie equitable estoppel place the loss on him whose misplaced confidence has made the wrong possible.

Thus, in the leading case of *McNeil v. Tenth National Bank*,[29] it is held that one who indorsed in blank a certificate of stock to his broker as a margin on account of advances made, was estopped to set up his title against one to whom the broker had wrongfully pledged the stock. If the owner entrusts to another, not merely

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Equitable S. Co., (1912) 52 Colo. 268, 273, 121 Pac. 174. Compare, however, Colonial Bank v. Cady. (1890) L. R. 15 A. C. 267; Ireland v. Hart, [1902] 1 Ch. 522; Shropshire, etc., R. Co. v. The Queen, (1875) L. R. 7 H. of L. 496.

[25]Shropshire, etc., R. Co. v. The Queen, (1875) L. R. 7 H. L. 496.

[26]Knox v. Eden Musee Co., (1896) 148 N. Y. 441, 454, 31 L. R. A. 779, 42 N. E. 988; Farmers' Bank v. Diebold Safe Co., (1902) 66 Ohio St. 367, 64 N. E. 518, 58 L. R. A. 620.

[27]National Safe Deposit Co. v. Hibbs, (1913) 229 U. S. 391, 57 L. Ed. 1241, 33 S. C. R. 818; O'Neil v. Wolcott Mining Co., (1909) 174 Fed. 527, 27 L. R. A. (N.S.) 200; Fletcher, Cyc. Corporations, secs. 3781, 3853.

[28]McNeil v. Tenth National Bank, (1871) 46 N. Y. 325, 7 Am. Rep. 341; National City Bank v. Wagner, (1914) 216 Fed. 473.

[29](1871) 46 N. Y. 325.

the possession of the property but also the written evidence of title, this is sufficient to preclude him from reclaiming the property in case of its unauthorized disposition.[20]

In *Schumacker v. Greene-Cananea Copper Co.*,[21] the plaintiff, owner of a stock certificate, endorsed it in blank to a reputable going bank as pledge for a loan. The cashier stole it and sold it to a bona fide purchaser. It was held that the owner was not estopped to assert his title against the innocent purchaser. It is admitted that if the sale was the act of the bank, the defendant should prevail, as the plaintiff was the one who trusted the bank and put in its hands the power of inflicting the loss. But it was held that the cashier's act in abstracting and selling the certificate was not the act of the pledgee bank, but of the officer individually. In view of the fact that there was authority in the cashier to sell in case of default, and that the certificate was endorsed in blank for that purpose, it is somewhat hard to understand why the act of the cashier was not the act of the bank, and why pledging a certificate in blank to a bank should not raise an estoppel as much as pledging it to a broker by way of a margin.[22]

A case presenting a problem similar to that arising under forged transfers of stock is found in *Dixon v. Caldwell*.[23] One Caldwell was the owner of a military bounty land warrant for 160 acres, issued by the government. It was misappropriated, and without the knowledge or consent of Caldwell, was sold and assigned to Dixon by some person who forged his name thereto. Dixon purchased in good faith and in ignorance that the assignment was forged, located the warrant and obtained a patent to the land from the government. Caldwell then sought to charge Dixon as a constructive trustee for the lands so located.

It was held that the defendant could hold the land as a bona fide purchaser for value. Although the true owner of the warrant would have had an equitable claim upon the land upon which the location was made before the defendant clothed himself with the legal title, yet when Dixon obtained the legal title, unaffected with notice and for a valuable consideration, Caldwell it was declared could no longer follow his property. Dixon was liable as a con-

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[20] 14 C. J. 783, 786.

[21] (1912) 117 Minn. 124, 134 N. W. 510, 38 L. R. A. (N.S.) 180.

[22] See McCarthy v. Crawford, (1909) 238 Ill. 38, 86 N. E. 750, 29 L. R. A. (N.S.) 252, 254.

[23] (1864) 15 Oh. St. 412.

verter for the value of the warrant, but he could not be required to surrender the legal title of the land or account for the proceeds of the land which he had obtained in return for the warrant.

This decision although it is not criticized by the text writers seems clearly erroneous. In the case of a forged indorsement, the warrant belongs not to the purchaser but to him whose name was forged. The purchaser is guilty of conversion, though a morally innocent one. When he presented the warrant and "collected" it from the government by securing a patent to land, he became a constructive trustee, since he obtained the title by the use of another's property and in exchange for it. If the government were a private person, the warrant could still be enforced by the true owner in spite of payment or patent to one who was not a lawful owner, and had no authority from him to receive it. The fact that Dixon paid away his money to a swindler without title gives him no "equity" as a purchaser for value either to the warrant or its proceeds. Caldwell's position was that of one holding a contract right against the government, and Dixon obtained title to the land by an innocent misrepresentation that he was the assignee and holder of this contract right which belonged in law and equity to Caldwell. An innocent purchaser from Dixon however would doubtless take title to the land free and clear.

Pomeroy lays it down in his work on Equity Jurisprudence,[84] that even where a transfer of a certificate of stock is accomplished solely by the forgery of the owner's name to the indorsement and power of attorney, and the certificate thus comes into the hands of a purchaser for valuable consideration and without notice, and he registers himself as a stockholder by surrendering the original certificate to the corporation and receiving a new one in his own name, the purchaser would be protected. He asserts that the assignee would under these circumstances obtain a complete precedence over the original owner; he would not be liable to the owner for the shares nor for their value; the owner's remedy if it exists at all, is against the corporation alone, to compel it either to issue new shares or to pay the value of the old ones. This remarkable statement is, however, not supported by the authorities cited by Mr. Pomeroy, and seems clearly erroneous. It is only where one purchases stock from one who is registered on the company's books as legal owner that he prevails against the company by estoppel.

[84] Sec. 712.

In general, the owner of shares cannot be deprived of his title by forgery, even though his certificates pass thereby into the hands of an innocent purchaser.[35] No title passes under forged indorsement whether the forgery is by a finder, a thief, or by bailee to whom the certificate was entrusted.[36] No estoppel is created in favor of the person presenting the forged transfer, by the issue to him of a new certificate.[37] If the corporation has registered a transferee whose title is based on a forgery, it may cancel his stock. A forgery can confer no power and transfer no rights.[38] As Cook says:

"The transferee who first obtains the registry has no rights except against his transferor. But all subsequent innocent purchasers are protected. They cannot be compelled to give up their stock, either to the corporation or to the original owner."[39]

The company is estopped from denying the title of a purchaser by the issue of a share certificate to the transferor which is a representation made for the purpose of being acted upon. The estoppel is not raised in favor of the person to whom the certificate was issued, but only for the transferee from such person.[40] One who surrenders a certificate bearing a forged indorsement and obtains a new certificate in ignorance of the forgery is liable to the corporation upon an implied warranty of the genuineness of the signature.[41]

III. Assignment of Choses in Action and Latent Equities

There is much support for the view that the doctrine of purchase for value without notice has no operation in the transfer of a chose in action, as the assignee takes only an equitable title which does not defeat prior rights. In general, the assignee of a non-negotiable chose in action stands in the shoes of his assignor, as to all equities or defenses in favor of the obligor or debtor party. Thus, in Min-

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[35] 2 Cook, Corporations, secs. 358, 365.

[36] National City Bank v. Wagner, (1914) 216 Fed. 473; Crocker v. Old Colony R. Co., (1884) 137 Mass. 417; 6 Fletcher, Cyc. Corporations, sec. 3834.

[37] Hamilton v. Central Ohio R. Co., (1876) 44 Md. 551; Brown v. Howard Fire Ins. Co., (1875) 42 Md. 384; 20 Am. Rep. 90; Houston v. VanAlstyne, (1882) 56 Texas 439. See note 21 Colum. L. Rev. 576.

[38] Citizens National Bank v. State, (1913) 179 Ind. 621, 631, 635, 45 L. R. A. (N.S.) 1075, 1077, 1082.

[39] 2 Cook Corporations 6th ed., sec. 370, 401.

[40] Machen, Corporations, secs. 914, 916, 942; Ewart, Estoppel, 187, 188.

[41] Boston Tow Boat Co. v. Medford Nat. Bank, (1919) 232 Mass. 38, 121 N. E. 491; In re Bahia & S. F. Ry. Co., (1868) L. R. 3 Q. B. 584; Sheffield Corp. v. Barclay, [1905] A. C. 392, 404; Oliver v. Bank of England, [1902] 1 Ch. 610; Clarkson v. Mo., etc., Ry. Co., (1905) 182 N. Y. 47, 74 N. E. 571; see 34 Harv. L. Rev. 305.

nesota, it is held that where a debt is secured by mortgage and also by a negotiable promissory note, the mortgage is a chose in action as between the mortgagor and any subsequent assignee, and is exposed to the same defenses in the hands of the assignee as in the hands of the original mortgagee.[42]

There is much difference of opinion and decision, however, as to whether or not innocent purchasers of a chose in action will cut off the latent equities of prior holders and third persons, of which the assignee had no notice.[43] The doctrine of bona fide purchase for value in connection with negotiable instruments as also in connection with choses in action has a double aspect. Taking free from equities of *defense,* i. e., defenses good against the maker or obligor, turns on different principles from the cutting off of equities of *ownership* in favor of prior holders and third parties.[44]

The cutting off of the equities of a prior holder of the paper is not based on any principle peculiar to negotiable instruments, but rather upon the transfer of the legal title, which has the same effect in all sorts of property. As to the latent equities of third parties, accordingly, the rule as to negotiable instruments and ordinary choses in action may well be the same, unless the title of the assignee of a chose in action be regarded as equitable merely. It is, therefore, not true as Pomeroy contends,[45] that the doctrine of cutting off latent equities of third parties would, in effect, make all choses in action negotiable. Negotiability is produced by issuing an obligation in negotiable form, creating an "ambulatory" credit which is intended to circulate freely as the obligation of the debtor party. The effect of the bona fide purchase for value in cutting off latent equities of prior holders on the other hand is the same as in case of land or goods.[46] As Ewart points out,[47] land is not negotiable, but if an owner executes an absolute conveyance to his mort-

[42]Johnson v Carpenter, (1862) 7 Minn. 176, (Gil. 120); Hostetter v. Alexander, (1876) 22 Minn. 559; Watkins v. Goessler, (1896) 65 Minn. 118, 67 N. W. 796; See also Moffett v. Parker, (1898) 71 Minn. 139, 144, 73 N. W. 850; Olson v. Northwestern Co., (1896) 65 Minn. 475, 478, 68 N. W. 100; Bailey v. Smith, (1863) 14 Oh. St. 396, 84 Am. Dec. 385; compare Carpenter v. Logan, (1872) 16 Wall (U.S.) 271, 21 L. Ed. 313.

[43]Ames, 1 Harv. L. Rev. 7; Ames, Cases on Trusts, 2nd ed., 310; Brown v. Equitable Assurance Co., (1899) 75 Minn. 412, 420, 78 N. W. 103; Newton v. Newton, (1891) 46 Minn. 33, 48 N. W. 450; Moffett v. Parker, (1898) 71 Minn. 139, 143, 73 N. W. 850.

[44] Ewart, Estoppel, 391, 423; Chaffee, Rights in Overdue Paper, 31 Harv. L. Rev. 1104.

[45]2 Pomeroy, Equity Jur., sec. 708, 711, p. 1443.

[46]Ewart, Estoppel, 396, 423; Lee, 28 Albany L. J., 290, 296.

[47]Estoppel, 418.

gagee instead of a mortgage, he is estopped from setting up his equities against an innocent purchaser from the grantee. Just as the owner of tangible property subject to some trust or equity can transfer his legal title free and clear to an innocent purchaser, so the holder of a non-negotiable security at least if represented by a document, can do the same. Thus, as we have seen, certificates of stock in this respect resemble tangible property.[48]

The foundation of the doctrine protecting holders in due course of negotiable paper is doubtless the convenience and necessities of business which require that purchasers be permitted to rely on the usual evidence of title and obligation. But the peculiarity consists in cutting off defenses based on infirmities in the creation of the original obligation rather than in cutting off latent equities, and innocent purchase after maturity may well cut off the equities of ownership, even if not the equities of defense.[49]

According to Ewart, the protection of the holder in due course of negotiable paper is based on estoppel, (1) as against the obligor, from putting into circulation an ambulatory instrument which is intended to be taken at its face value; (2) as against prior holders, because the holder has been given apparent title and other claimants are estopped to set up their claims against a purchaser who has relied on his ostensible ownership. There is, of course, also the policy of giving faith and credit to the document and making possession conclusive evidence of ownership so that a purchaser for value, even from a thief or finder is protected provided the instrument is endorsed to him or is endorsed in blank. According to Professor Chaffee, a policy similar to that of estoppel underlies the law as to the transfer of negotiable instruments.[50]

In the United States where the owner of stock or other semi-negotiable securities assigns them for a special purpose, and clothes the assignee with apparent indicia of title, he will estop himself as against a subsequent purchaser from setting up a claim good against the first assignee. Thus a bona fide purchaser of a certificate of stock prevails over one having merely an equitable right against his assignor. The same thing is generally true of non-negotiable notes, bonds and other choses in action represented by a

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[48]Machen, Corporations, secs. 840, 904, 916; 1 Williston, Contracts, sec. 438.

[49]Chaffee, Rights in Overdue Paper, 31 Harv. L. Rev. 1104, 1108; Ewart, Estoppel, 423.

[50]Chaffee, 31 Harv. L. Rev. 1118, 1119.

document. The holder of the document which embodies the claim and is the best evidence of the right to it, has ostensible ownership, and the purchaser who obtains delivery of the instrument will take free and clear of any latent equities.[51]

"If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting the title as against a person to whom such third party has disposed of it, and who received it in good faith and for value."[52]

Thus, in *Moore v. The Metropolitan Bank*,[53] one Moore held a non-negotiable certificate of indebtedness of the state of New York for ten thousand dollars. Miller procured an assignment of the certificate from Moore by fraud and without consideration. Moore assigned to Miller by an endorsement as follows, "For value received, I hereby transfer, assign and set over to Isaac Miller the within described amount, say ten thousand dollars." Miller then assigned the certificate as security for a loan to the defendant bank. It was held that Moore, the assignor, was estopped, and that the bank was entitled to hold the certificate as security, but the plaintiff was permitted to redeem on payment of Miller's debt to the bank. The assignment being procured by fraud was voidable; yet the latent equity of the assignor to avoid it was cut off by assignment to an innocent purchaser who took on the faith of the apparently absolute title given by the owner to the fraudulent assignee. There are the same grounds for estoppel against the assertion of the plaintiff's equity whether the bona fide assignee acquired a legal or an equitable title to the chose in action.

Pomeroy criticises the opinion of Grover, J., in *Moore v. Metropolitan Bank*,[54] and would confine the estoppel of the assignor to

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[51]Moore v. Moore, (1887) 112 Ind. 149, 13 N. E. 673; Williston, 30 Harv. L. Rev., 102, 104; 1 Williston, Contracts, sec. 438. But see Brown v. Equitable Life Assurance Society, (1899) 75 Minn. 413, 78 N. W. 103, 79 N. W. 968; Moore v. Jervis, (1845) 2 Collyer 60.

[52]Lord Herschell in Colonial Bank v. Cady, (1890) 15 A. C. 267, 285. In McNeil v. Tenth National Bank, (1871) 46 N. Y. 325, 329, 7 Am. Rep. 341, 343, it is said: "Where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and the innocent third parties are led into dealing with such apparent owner, they will be protected." See also Boice v. Finance Co., (1920) 127 Va. 563, 102 S. E. 591, 10 A. L. R. 654; 24 R. C. L. 478; Cochran v. Stewart, (1875) 21 Minn. 435, s. c., (1894) 57 Minn. 499, 507, 59 N. W. 543. See also dissenting opinion of Start, C. J., in Brown v. Equitable Life Assurance Society, (1899) 75 Minn. 422, 78 N. W. 103; 2 Pomeroy Equity Jur. sec. 710; Lee v. Turner, (1886) 89 Mo. 849; Otis v. Gardner, (1883) 105 Ill. 436.

[53](1878) 55 N. Y. 41. [54](1878) 55 N. Y. 41.

securities which have acquired a semi-negotiable character by business custom.[55] He would not allow the effect of estoppel to be produced by the mere assignment of any ordinary non-negotiable chose in action even if absolute on its face. He contends that this would abolish the distinction between negotiable and non-negotiable instruments, as there would be equal ground for estopping the debtor party from the fact of issuing the undertaking and thereby creating an apparent liability against himself.[56] Pomeroy admits that the tendency of the courts is to extend the doctrine of estoppel to all species of things in action which are embodied in instruments in writing, and to hold that the purchaser of a non-negotiable security is protected against the claims of one who has by his own act conferred on another the apparent title and power of disposition.

A case involving this question of latent equities which gave no little trouble to the Minnesota court is that of *Brown v. Equitable Life Assurance Society*.[57] Plaintiff, the owner of a life insurance policy, assigned the policy to H by a written assignment, absolute in form, but in fact merely as security for a loan which H agreed to procure, but failed in securing. H was allowed to remain in possession of the policy for eleven years and fraudulently assigned the policy to a bank as security for a loan. The bank made the loan, relying on the absolute assignment from the plaintiff to H, and believing that H was the true owner of the policy, without any knowledge of any equities between plaintiff and H.

It was first held that the bank took the assignment of the policy subject to the equities between plaintiff and H and that plaintiff was not estopped as to the bank to assert his rights by the fact that he had executed and delivered to H an assignment of the policy absolute in form. There was a vigorous dissenting opinion, however, by Chief Justice Start, in which Collins, J., concurred, on the ground that the payee had clothed his assignee with the apparent absolute title and should be estopped as against an innocent purchaser from asserting any latent equities. Upon re-argument, the members of the court agreed that the conduct of the plaintiff was such as equitably to estop him, but the mere fact that the assignment from him to H was absolute in form did not create such an estoppel.

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[55] 2 Pomeroy, Equity Jur., sec. 710, 711.

[56] That there may be ground for such estoppel, see Marling v. Fitzgerald, (1909) 138 Wis. 93, 130 N. W. 388, 23 L. R. A. (N.S.) 177; Moffett v. Parker, (1898) 71 Minn. 139, 144.

[57] (1899) 75 Minn. 412, 78 N. W. 103, 79 N. W. 968.

Chief Justice Start and Justice Collins, however, were in favor of a reversal on the broader ground.

Ewart criticises this case[58] on the ground that usually the fact of enabling another person to mislead a purchaser by appearing to be the owner of the property is an amply sufficient ground of estoppel.[59]

In *Cochran v. Stewart*[60] it was declared that if the owner of a chose in action executes an absolute assignment of his claim and delivers it with the evidences of the chose in action, his assignee has power to transfer to a purchaser for a valuable consideration and without notice the title which he appears to have by the assignment and the possession of the evidences of the debt. In this regard the court could see no difference between transfers of choses in action and other personal property. The equity of the innocent purchaser, though subsequent in time, is superior in degree to that of the defrauded assignor.[61] As Professor Williston points out,[62] a distinction must be drawn in discussing the assignment of choses in action between, (1) non-negotiable securities, overdue notes, certificates of stock, non-negotiable bonds, certificates of debt, savings bank books, and others embodied in documents, the possession of which gives the apparent ownership, and (2) written assignments of parol choses in action, and (3) oral assignments of intangible choses in action, such as judgments. This latter class is not intended to circulate as a subject of commerce, and Professor Williston suggests that there is little reason to prefer the assignee to the defrauded owner of the claim. Where the sale of property is a necessary function of commercial activity, it is desirable to protect à bona fide purchaser; but there is no sufficient policy to protect a purchaser in dealing in some classes of property.

Ames supports the view that an innocent purchaser of any

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[58] Ewart, Estoppel, 417.

[59] See also Plummer v. Peoples Bank, (1884) 65 Ia. 405, 21 N. W. 699; Quebec Bank v. Taggart, (1896) 27 Ont. 162; Tripp v. Jordan, (1913) 177 Mo. App. 339, 344, 164 S. W. 158; Culmer v. American Grocery Co., (1897) 21 N. Y. App. Div. 556, 48 N. Y. S. 431; Cochran v. Stewart, (1875) 21 Minn. 435.

[60] (1875) 21 Minn. 435.

[61] See also Moore v. Moore, (1887) 112 Ind. 149, 13 N. E. 673; Combes v. Chandler, (1877) 33 Oh. St. 178; Farmers National Bank of Salem v. Fletcher, (1876) 44 Ia. 252; State ex rel. State Bank v. Hastings, (1862) 15 Wis. 75, 83; Baker v. Wood, (1894) 157 U. S. 212, 39 L. Ed. 677, 15 S. C. R. 628; Cowdrey v. Vandenburgh, (1879) 101 U. S. 572, 25 L. Ed. 923.

[62] 30 Harv. L. Rev. 102, 1 Williston, Contracts, sec. 438.

chose in action from one who held it subject to latent equities, i. e., equities in favor of third parties, should take free and clear. He does so upon the ground that the assignee gets a legal power of attorney to collect or dispose of claims for his own use.[63] A purchaser for a valuable consideration should not be deprived by a court of equity of any advantage in law which he has fairly obtained for his protection.[64] But as Williston points out, the defrauded original owner has an equity prior in time and therefore superior to that of the ultimate assignee, if the latter's right is merely equitable.[65] If the assignee is regarded as acquiring a legal title to the assigned right, latent equities would be cut off. If he enforces merely the assignor's rights as under a power of attorney from him, he would be subject to the same defenses.[66]

Professor Cook takes the position that an assignee of a chose in action acquires a legal title, but says that the problem involved in bona fide purchase for value as shown by statutory extensions is purely one of public policy and not of logical deduction from supposed intrinsic characteristics of legal and equitable titles.[67]

Thus, in the case of the assignment of mortgages, which are often spoken of as choses in action, but are really transfers of an interest in property to afford a means for the enforcement of a chose in action, it is commonly held that the assignee is protected against latent equities of third persons, even if not against the equities of the mortgagor. Persons dealing in such securities can inquire of the makers of the obligation whether any defenses exist as against them. But it is not practicable to inquire whether latent equities exist in favor of unknown third persons as against prior holders.[68] It may be argued that judgments are not adapted to transfer and are not necessary instruments of active business, and that the harsh rule

[63]Ames, Lectures, 258.

[64]Eyre v. Burmeister, (1862) 10 H. L. C. 90.

[65]30 Harv. L. Rev. 102, 1 Williston, Contracts, sec. 438.

[66]Silverman v. Bullock, (1881) 98 Ill. 11, 19; Mullanphy v. Schott, (1891) 135 Ill. 655, 26 N. E. 640; Schultz v. Sroelowitz, (1901) 191 Ill. 249, 61 N. E. 92.

[67]Pearson v. Leucht, (1902) 199 Ill. 475, 482, 65 N. E. 363; Sutherland v. Reeve, (1894) 151 Ill. 384, 393, 38 N. E. 130; Cutts v. Guild, (1874) 57 N. Y. 229; State ex rel. Rice v. Hearn, (1892) 109 N. Car. 150, 13 S. E. 895; Gillette v. Murphy, (1898) 7 Okla. 91, 54 Pac. 473; Downing v. South Royalton Bank, (1866) 39 Vt. 25. See, however, to the effect that latent equities are cut off, Western Bank v. Maverick, (1892) 90 Ga. 339, 16 S. E. 942; Duke v. Clark, (1880) 58 Miss. 465; Yarnell v. Brown, (1897) 170 Ill. 362, 368, 48 N. E. 909; Baker v. Wood, (1894) 157 U. S. 212, 39 L. Ed. 677, 15 S. C. R. 577.

[68]See also Kenneson, 23 Yale Law Journal 193, 204, 447.

which excludes latent equities for the benefit of commerce need not be applied.[69] Commerce will not be impeded by requiring the purchaser to take an assignment at his peril, or by the rule that if they are assigned, the assignee takes only the interest which the assignor had, and is bound to submit to prior equitable rights of third persons. To deprive such persons of just rights without subserving any public policy would be the mechanical application of a rule of law devised for other purposes.[70]

In a number of states, as also in England, it is held that if an assignee of a chose in action purchases in good faith and for value without notice of an earlier assignment, he may obtain priority by giving notice to the trustee or obligor, although he himself made no inquiry of the trustee, debtor, or obligor, and this even after knowledge of the earlier assignment.[71] The primary object of giving notice to the debtor is to prevent collection by the assignor. As Professor Williston says, this rule which gives priority to the first assignee who gives notice may be compared in its effect to a recording act, or to the rule in sales preferring a second vendee with delivery over a prior vendee without delivery. In many jurisdictions in this country, however, this rule is not adopted, the transfer being complete and the assignor divested of all his interest without notice to the debtor, and priority in the time of assignment controls.[72] By the other view, the giving of notice by the assignee is regarded as the nearest approach to the taking of possession. But it is difficult to perceive any reason to cut off the first assignee where there is no estoppel and no reliance by the second assignee on the absence of notice to the debtor.

IV. Rationale of Doctrine that Legal Title Prevails over Equities

The true reason for the effect of bona fide purchase in cutting off "equities" is said by Langdell and Ames to lie in the nature of equitable rights. According to them, equitable rights are in es-

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[69]30 Harv. L. Rev. 476, 477, 479, 480. See also Lee, 28 Albany L. J. 290, 296; 5 C. J. 974.

[70]See Bailey v. Smith, (1863) 14 Oh. St. 396, 84 Am. Dec. 385; 2 Pomeroy, Equity Jur., secs. 703, 708.

[71]Dearle v. Hall, (1828) 3 Russ. 1; Ames, Cases on Trusts 326; Scott, Cases on Trusts 623, note; Pomeroy, Equity Jur. sec. 695; 5 C. J. 953; In re Hawley, (1916) 233 Fed. 451; 1 Williston, Contracts, sec. 435.

[72]Lewis v. Bush, (1883) 30 Minn. 244, 15 N. W. 113; Burton v. Gage, (1902) 85 Minn. 355, 88 N. W. 997; Quigley v. Walter, (1905) 95 Minn. 383, 104 N. W. 236.

sence only personal claims. If, therefore, A, trustee for B, transfer the property to C, B's equitable right and remedy to follow the property will be gone, unless C's conscience is charged with B's claim; i. e., unless he have notice of it or take without value. But if C took the title in good faith and for value, with no reason to know of B's equity, then there is no ground to charge the purchaser with B's personal claim as a constructive trustee."[13]

Ames regarded the doctrine as based on a self-evident and far-reaching principle of natural justice. There must be some basis in honesty and natural justice to impose a constructive trust on the purchaser if he acquires a title either legal or equitable.

"A decree against a mala fide purchaser or a volunteer is obviously just; but a decree against an innocent purchaser who has acquired the legal title to the res would be as obviously unjust."[14] Hence follows his proposition:

"A court of equity will not deprive a defendant of any right of property, whether legal or equitable, for which he has given value without notice of the plaintiff's equity, nor of any other common law right acquired as an incident of his purchase."[15]

It is historically true, as Professor Williston says,[16] that "every equitable right is primarily personal," that is, "it binds primarily a particular person and binds others only when their relation to that person is such that in conscience they should be subject to his duties." The maxim that equity acts in personam means that equitable rights are obligations or claims, "directed primarily against one person, and secondarily against those who stand in no better position, [that is, donees and purchasers with notice]." An equitable right to property results from the specific enforcement of an obligation such as a contract or a trust against all who are justly subject to it."

The doctrine of bona fide purchase for value, however, does not necessarily depend upon the theory that all equitable rights are merely rights in personam. Rights in rem may also, in many cases, be cut off and defeated by bona fide purchase. Though legal

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[13]Langdell, Summary of Equity Pleading 90; Langdell, Survey of Equity Jurisdiction 6; Ames, Lectures Legal History 253; Bogert, Trusts 513.

[14]Ames, Lectures Legal History 76, 272. Note: Ames does not explain why it is just or unjust. In case of a trust, this might be put on the ground that the trustee represents the cestui and is clothed with apparent absolute power to convey.

[15]Ames, Lectures Legal History 254; Compare Cook, 30 Harv. L. Rev. 476; Jenks, The Legal Estate, 24 Law Quar. Rev. 142, 154.

[16]30 Harv. L. Rev. 97.

title is ordinarily conceived of as good against all the world, yet it too has its limitations. As Professor Williston says, the reason why an innocent purchaser of goods from a seller in possession is protected at law is no doubt fundamentally the same reason which has led equity to protect a bona fide purchaser from prior equitable claims."[77]

The recording acts furnish the best illustration of the defeasance of legal titles in a manner which bears analogy to the defeasance of equitable titles. The legal title of a purchaser of real property is made defeasible by subsequent sale or mortgage to an innocent purchaser, where the instrument of transfer is not duly recorded in order that one may deal in reliance on the public records. On the other hand, one who has only an equitable right in real estate may, by recording his contract, protect himself against the world.

It is said by Professor W. W. Cook:[78]

"The truth seems to be that the doctrine [of bona fide purchase for value] as we have inherited it is the result of various more or less clear or confused ideas of expediency, justice and supposed logic."

Its precise limitations may be artificial and inconsistent with the principles of policy and natural justice on which it is based. It is well, therefore, to inquire into the real reasons back of the rule governing the rights of innocent purchasers and to find out whether they justify the rule and its limitations at the present day.

It is frequently laid down as a self-evident maxim that as between two persons having equal equities, one of whom must lose, the legal title shall prevail.[79] But are the "equities" or claims to the property of the purchaser and the prior equitable owner to be regarded as equal? The cestui is the "true owner." He has priority. The trustee should not be able to confer upon an innocent purchaser a greater equity or title than he himself had, unless the true owner has by his own conduct made himself justly responsible for the belief that the trustee was owner and had power to convey. Why is it not unconscientious to retain the legal title as against the equity? How does the bona fide purchaser get his equitable or beneficial interest from a trustee with a dry legal title? The purchaser

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[77] See 1 Williston, Contracts, sec. 446a.
[78] 1 Williston, Contracts, sec. 446a.
[79] 30 Harv. L. Rev. 477.
[80] Rice v. Rice, (1853) 2 Drew. 73, 2 White & Tudor L. Cas. 961.

would acquire no equity at all unless he could charge the conscience of the true owner against the assertion of his prior right.

Ewart, in his work on estoppel, contends that the modern law of purchaser for value without notice should be based on estoppel by ostensible ownership.[81] According to his theory a "purchase for value without notice never arises except in cases in which the purchaser says he has been misled by somebody's misrepresentation. His case always is, 'I bought from a man who pretended to be the owner;' 'the person with whom I dealt appeared to be entitled to bargain with me.'" A purchaser for value without notice is one who changes his position prejudicially upon the faith of the misrepresentation of apparent ownership. He must show that his opponent was in some way to blame for his having been misled.[82]

The courts frequently say that the reason for the bona fide purchaser rule lies in a kind of estoppel, namely, the conduct of the cestui in placing or leaving his property in the hands of a trustee which has made possible the abuse of power and wrongdoing by the trustee.

"The principle upon which the bona fide purchaser is protected, is that when one or two innocent purchasers must suffer through the fraudulent act of a third person, he who has voluntarily placed such third person in a position to commit this fraud must be the sufferer."[83]

"The possession of legal title by the trustee like the possession of the indicia of title by a factor, and of adequate power of attorney under appointment as an agent, clothes him with power to confer upon a bona fide purchaser better rights than he himself had."[84]

One dealing with a trustee with notice of the trust must ascertain the scope of his authority, but his acts within his apparent authority will bind the trust estate or the beneficiary, as to third persons acting in good faith and without notice, although the trustee intends to defraud the estate by abuse of power.[85] The

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[81]Chapter XI. 49, 152, 264.

[82]Compare, however, Huston, Enforcement of Decrees in Equity 127.

[83]Cochran v. Stewart, (1875) 21 Minn. 435; Behrmann v. Seybel, (1917) 178 App. Div. 862, 166 N. Y. S. 254; Pilcher v. Rollins, (1872) L. R. 7 Ch. App. 259, 274, 21 E. R. C. 728, 742; 1 Perry, Trusts, 6th ed., sec. 218.

[84]Huston, Enforcement of Decrees in Equity 131; In re Hart, [1912] 3 K. B. 6, 18.

[85]Kirsch v. Tozier, (1894) 143 N. Y. 390, 38 N. E. 375; 2 Perry, Trusts, 6th ed., sec. 814; Spencer v. Webber, (1900) 163 N. Y. 493, 57 N. E. 753; Dillage v. Commercial Bank, (1873) 51 N. Y. 345.

principle of estoppel is then an important element in the modern policy of the bona fide purchase for value rule. It says to the beneficiaries, as Ewart points out, when you have accredited the title of the trustee, you become accessory to the representation of his ownership and power of disposal, and you are, therefore, precluded from asserting a claim against an innocent purchaser by virtue of some secret claim or trust. This estoppel should be even stronger as against a voluntary trust than against a constructive trust.

If a man selects a rascal as his trustee, or accepts the benefit of a trust administered by such a representative, he should bear the burden of his rascalities.[86] There is the same responsibility on the part of the true owner for the appearance of ownership in the trustee, whether the cestui created the trust himself or is the beneficiary of a trust created by another through whose acts he derives his interest.

It is suggested by Professor Jenks,[87] that a cestui might well be absolutely bound as against strangers by his trustee's misconduct, as the cestui should be responsible for the frauds of his representative.[88]

If A, the owner of land, contracts with B to sell it to him at a future date, from the moment of the making of the contract, B has an equitable interest in the land. This arises from his right of specific performance. If thereafter, A, in violation of his duty to B, makes a conveyance of the legal title to C, who purchases it for a valuable consideration and without notice of B's interest, it is well settled that there is no ground for equity to enforce B's right against C. But, if C got only a contract right against A, B's prior claim would prevail.

This result cannot be entirely explained on principles of estoppel, but is explained by Ewart on the ground that where the merits are equal, the actual estate will prevail over the contractual;[89] in other words, the grantee by the executed conveyance has the legal title, and B, by virtue of his prior contract, has what is primarily a right in personam, and his contractual estate is a right in rem only in so far as he is entitled to the remedy of specific performance. There must always be, as Ewart says, a difference between a convey-

[86]Hunter v. Walters, (1871) L. R. 7 Ch. App. Cas. 75, L. R. 11 Eq. 292.
[87]24 Law Quar. Rev. 147, 154.
[88]See Sweet, Trusteeship & Agency, 8 Law Quar. Rev. 220.
[89]Ewart, Estoppel 271.

ance of land and a contract to convey it, and there is no reason to deprive the innocent grantee of what he has obtained in good faith. In case of a contract, the legal title which includes the jus disponendi is still left in the vendor, and the purchaser holding under the contract must put his contract on record to deprive the vendor of his power of disposal.

It may be suggested that the rights of a bona fide purchaser for value of the legal title would be recognized as against latent equities even though no estoppel could be found. For example, if a conveyance were made to the grantor under a mistake or by fraud, and this was not recorded or seen by the purchaser, and no possession were delivered, yet it may be argued that he would prevail over the equitable claim to avoid the conveyance to his grantor.[90] On principle, there would seem to be no valid reason why the purchaser should take a better title than his grantor, or why the prior equity of the true owner should be cut off by a transfer of the legal title where there is no reliance on apparent conveyance or ostensible ownership in the grantor.[91]

V. Position of Purchaser of Equitable Title

It is an interesting question whether, in theory, the purchaser of an equitable title may gain protection as a purchaser in good faith against prior equities. If T, trustee for C of an equity of redemption or other equitable estate, sells it to P, a bona fide purchaser without notice, should P be preferred to C, or do their equities rank in the order of time in which their interests were created?

Dean Ames in his classic article on Purchase for Value Without Notice,[92] maintained the following proposition:

"Just as the honest purchaser of a legal title from one who holds it subject to an equity acquires the legal title discharged of the equity, so also the purchaser of an equitable title from one who holds it subject to an equity takes the equitable title discharged of the equity."[93]

This raises the issue whether a distinction should be drawn between the rights of a purchaser for value of an equitable interest as against a sub-trust on the one hand and as against a prior equitable assignment on the other. It depends on the reason and basis

[90]See Williston, 14 Ill. L. Rev. 94.
[91]See Globe Milling Co. v. Minn. Elevator Co., (1890) 44 Minn. 153, 46 N. W. 306.
[92]Ames, Lectures Legal History 253, 261.
[93]Bogert, Trusts 510, n. 22.

of divestiture of rights by purchase for value without notice.

If a cestui que trust of land, after diminishing his equitable interest by an assignment, makes an ostensible conveyance of his rights to an innocent purchaser for value, there is no question that the latter will take subject to the previous assignment apart from recording acts.[84] But it is contended by Dean Ames that if the cestui should convey his interest after charging himself with a *sub-trust,* the innocent purchaser ought to take the beneficial interest of the cestui discharged of the sub-trust. The same thing, he argues, should be true of a sub-trust created by the operation of the law. If the equitable owner is induced by fraud to assign his interest, the fraudulent purchaser would become a constructive trustee. But if the fraudulent assignee in turn assigns to an innocent purchaser without notice of the constructive trust or claim of the defrauded cestui, the equitable title should pass free of this latent equity.

This distinction goes on the ground that the trustee of an equitable interest, unlike the assignor, remains the owner of the res or equitable interest, and has the power to transfer it, while in case of an assignment, he has nothing left to transfer.

None of the decisions, however, as Dean Ames admits, recognized this distinction at the time that he wrote, and none of the later ones seem to have adopted his doctrine. In *Cave v. MacKenzie,*[85] M was constructive trustee of a land contract which he made in his own name as agent for C. He assigned the contract to his son, X, who claims as bona fide purchaser. It was held that in equity, he who is prior in time is better in title. The son, as a bona fide purchaser, got merely an equitable title which is subordinate to that of the cestui.

There are a few of the older English cases to the effect that the defense of purchaser for value without notice does apply even in case of persons not getting the legal title.[86] These cases, however, do not seem to have been followed, and it is now held that the title of a cestui is not displaced by anything short of the acquisition of the legal title by the purchaser, or a very strong case of estoppel.[87]

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[84] Phillips v. Phillips, (1861) 4 Deg. F. & J. 208.

[85] (1877) 46 L. J. (N.S.) Ch. 564; Ames Cases on Trusts 308.

[86] Attorney-General v. Wilkins, (1853) 17 Beav. 285; Finch v. Shaw, (1854) 19 Beav. 500; Lane v. Jackson, (1855) 20 Beav. 535; Penny v. Watts, (1848) 2 DeG. & Sm. 501, 521.

In *Hill v. Peters*,[98] where trustees for D of an equitable interest in personalty, in breach of trust, purported to assign the equitable interest by way of mortgage to T and handed over the instrument creating the equitable interest, it was held that they had not displaced the prior equity of the beneficiary. So in *Duncan Townsite Co. v. Lane*,[99] it is said that the doctrine of bona fide purchase applies only to purchasers of the legal estate.[100] As between persons having only equitable interests, if their titles are in all other respects equal, priority in time gives the better equity.[101]

The problem is well presented by the facts of *Cave v. Cave*.[102] In this case, T was trustee for A, and used the trust funds dishonestly in purchasing land which he caused to be conveyed to his brother. The brother made a legal mortgage to B and an equitable mortgage to C, neither B nor C having notice of the trust. It was held that B's legal mortgage had priority over the equitable interest of A, the beneficiary of the trust, but that A had priority in turn over C, the equitable mortgagee. As between A and C, the order of the time settles the order of their rights; both have equal claims and as between equitable rights, the oldest prevails if equal in merit.

This decision has been criticized on the ground that the beneficiary should have been held to be estopped as against all the mortgagees from setting up his equitable title. He had permitted his trustee to pose as the owner of the land; upon the faith of his ostensible ownership, innocent persons had been led to change their position. They should accordingly have the better claim. But the English courts have held that the beneficiaries and mortgagees have equal merits or equities, although on grounds of estoppel the equities would seem most unequal.[103]

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[97]Burgis v. Constantine, [1908] 2 K. B. 501; Phillips v. Phillips, (1861) 4 Deg. F. & J. 208. Hill v. Peters, [1918] 2 Ch. 273; Pomeroy, Equity Jur., 4th ed., sec. 683 (a); Huston, Enforcement of Decrees 118; 2 White & Tudor L. Cas. 168, 181.

[98][1918] 2 Ch. 273.

[99](1917) 245 U. S. 308, 62 L. Ed. 309, 38 S. C. R. 99.

[100]See also Hawley v. Diller, (1900) 178 U. S. 476, 484, 44 L. Ed. 1157, 20 S. C. R. 986; Boone v. Chiles, (1836) 10 Pet. (U. S.) 177, 9 L. Ed. 388; Lowther Oil Co. v. Miller-Sibley Oil Co., (1903) 53 W. Va. 501, 44 S. E. 433, 97 A. S. R. 1027.

[101]Taylor v. Weston, (1888) 77 Cal. 534, 20 Pac. 62; Jennings v. Bank of California, (1889) 79 Cal. 323, 21 Pac. 852; United States v. Lamm, (1906) 149 Fed. 581; Johnson v. Hayward, (1905) 74 Neb. 157, 103 N. W. 1058.

[102](1880) 15 Ch. Div. 639.

As Ewart says in his work on estoppel:[104]

"Suppose the owner of property, real or personal, transfers it absolutely,—title, evidence of title and possession,—to a trustee in such a way that there is no trace of a trust visible; and that the trustee afterwards fraudulently disposes of some estate in the property to an innocent purchaser for value. This, according to the law of estoppel, is a clear case; the owner is, of course, estopped,—he has accredited the title of the trustee and cannot deny it."[105]

According to the rule of purchase for value, however, the case depends upon the nature of the estate which the purchaser acquires, legal or equitable. The mere fact that a person has transferred legal ownership of property real or personal to a trustee and has given him the indicia of title, does not estop him as against a bona fide purchaser unless the purchaser gets the legal title. The purchaser who doesn't get the legal title cannot set up the apparent ownership of the trustee as a ground of the estoppel against the beneficial owner.[106] This is supported by the following peculiar reason:

"Because it is in accordance with the usages of mankind that the legal estate in property should be conveyed to, and indicia of title deposited with trustees, and no member of the community, therefore, is entitled to allege that such a course of action constitutes any invitation to him from which a duty towards him can be inferred."

Although there is nothing whatever on the face of the documents of title to indicate the possibility of a trust, the beneficial owner according to this doctrine can still prevail over an equitable purchaser or mortgagee. A person dealing with a legal owner must take the chances of his being a trustee and he can protect himself only by getting a legal transfer. This theory of the common usage by which the equity of the beneficiary prevails would, of course, not hold in America under our system of the registration of the instruments of title.

Dean Ames would criticise the result reached in *Cave v. Cave*[107] and similar cases on the ground that as the conscience of C, the purchaser of the equitable interest, was not affected by the personal obligation of the trustee, as against A, the cestui, there was

[103]Ewart, Estoppel 265, 293, 294. Compare Maitland, Equity 131; 2 Pomeroy, Equity Jur. sec. 727.
[104]Ewart, Estoppel 264.
[105]Citing Dillage v. Commercial Bank, (1873) 51 N. Y. 345.
[106]Burgis v. Constantine, [1908] 2 K. B., 484, 501.
[107](1880) 15 Ch. Div. 639.

no unjust enrichment and no ground to deprive him of the equitable title, and that equity will not take away from a purchaser what he has obtained for value and in good faith. The English cases, however, hold that C doesn't get any equitable title, that where a trustee holds an equitable interest which he has no right to assign, his assignee gets nothing, that conveyances of equitable estates are "innocent" conveyances and defeat no prior rights.

According to Dean Ames' theory, there is a perfect analogy between a trust of an equitable estate and a trust of the legal estate. The cestui stands in the same relation to the holder in trust of an equitable res or interest as to the holder in trust of a legal title. In neither case, according to Dean Ames, has he a direct right or claim upon the property, but in each case he must work out his rights through the enforcement of a personal obligation.[108]

The assumption which lies at the foundation of Dean Ames' theory that the trustee of an equitable estate remains *"complete owner of the equitable obligation"* or interest, *"subject to a duty in favor of the cestui que trust of the obligation"* or equitable interest, is a premise which is not accepted by the courts. If this premise were once admitted it might follow logically, as Dean Ames contends, that as the legal title may be transferred to an innocent purchaser discharged of the personal obligation or duty of the trustee, so on principle the equitable title should be.

The law of transfer is in general the same for both legal and equitable estates. Whatever would be the rule of law in the case of a legal estate is in general applied by a court of chancery by analogy to an equitable estate.[109] It seems an arbitrary anomaly that the rights of a bona fide purchaser for value from the trustee of an equity of redemption should be made to turn on whether the mortgagor be regarded as the legal or equitable owner, and whether the "title" or "lien" theory of mortgages be adopted at law in the particular jurisdiction. In all jurisdictions, a mortgage is merely a lien in equity and the mortgagor is the true and substantial owner of the property.[110]

When the trustee's estate is equitable merely, there is no necessity for regarding the trustee as the "owner" of the estate at all.

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[108] Ames, Lectures Legal History 263.

[109] Freedman's Savings & Trust Co. v. Earle, (1884) 110 U. S. 710, 28 L. Ed. 301, 4 S. C. R. 226; 1 Spence, Equity Jur. sec. 502.

[110] See Arnold v. Southern Pine Lumber Co. (1909) 58 Tex. Civ. App. 186, 198, 123 S. W. 1162, 1168.

What the trustee holds is really a *power*, and the cestui is the owner of the property, subject to the exercise of the power. A declaration of a sub-trust, then, would seem to operate in equity like an assignment, namely, to transfer to the sub-beneficiary the substantial equitable interest. There is thus no real distinction between an assignment and a sub-trust, except so far as the sub-beneficiary may be bound by *estoppel* or by the ostensible authority which he confers on the trustee to deal with third parties. A declaration of trust is equivalent to an assignment of an equitable interest, a reduction pro tanto. As between successive assignments, the prior prevails.

According to the English cases, a strong case of estoppel must be shown to give priority to one who deals with the trustee of an equitable interest beyond his authority. Even a conveyance to the trustee, absolute on its face, so that the trustee is able to deal with the property without giving any notice of the trust, is held not to destroy the priority of the beneficiary against a purchaser of an equitable interest from the trustee.[111]

Where, however, the indicia of title are transferred to a trustee with the intent that he shall deal with the property, and he exceeds the limits of his authority, the cestui must suffer as against an innocent purchaser of the equitable title. Often there is no distinction between agency and trust cases.[112]

If A, the owner of an equitable fee, purports to convey to B and his heirs on trust that B shall sell the land and account to him for the proceeds, in legal effect, B will merely have a power, not the dominion, which will remain in those who are entitled to the beneficial ownership. At law, a trustee of a legal estate is regarded as holding the full legal title. His powers are often more extensive than necessary to execute the trust and may be abused; and the risk of loss from their abuse should be put on the beneficiary of the trust. But in equity, the trustee may be invested with a power exactly commensurate with the purposes of the trust, and active trusts may be treated, as under the New York legislation, after the manner of powers. So under the recording acts where the instrument creating the trust is recorded, equitable interests which were formerly subject to be defeated, are rendered indefeasible and

[111]Carrit v. Real & Personal Advance Co., (1888) 42 Ch. Div. 263, Shropshire, etc., R. Co. v. The Queen, (1875) L. R. 7 H. L. 496, 505.

[112]Rimmer v. Webster, [1902] 2 Ch. 163; Lloyds Bank v. Bullock, [1896] 2 Ch. 192; Lloyd's Banking Co. v. Jones, (1885) 29 Ch. Div. 221.

become in effect a legal estate in the land. It has indeed been enacted in some states that whenever the trust is expressed in a recorded instrument a conveyance by the trustee in contravention of the trust is absolutely void.[113]

The function of the trustee is historically related to that of the agent.[114] A trustee is in equity not an owner at all, but a species of agent, upon whom the creator of the trust has conferred the power and imposed the duty of administering the property of another person, so that he may enjoy the benefits. He is a nominal owner bound to use his powers in behalf of the real owner. These powers, in case of the trustee of an equitable estate, may not enable him to transfer to a purchaser a title free and clear of the trust obligation. The mere fact of bona fide purchase is thus insufficient in case of equitable estates to give the purchaser priority.[115] It is only where the trustee has the legal title that he can (perhaps) convey free and clear of prior equities in the absence of estoppel.

In a leading English case, *Directors of Shropshire, etc., Ry. Co. v. The Queen*,[116] one Holyoake held shares in his own name in trust for the defendants. His name appeared upon the register as owner. He deposited the certificates with one Robson as security for a loan convenanting to give a legal mortgage. Robson, who was ignorant of the trust, was a bona fide purchaser. It was held that the cestuis, who were the real owners in equity, had not lost their rights. The placing of the title of the shares of stock in the name of a sole trustee and allowing him to have possession of the certificates, which he wrongfully deposited by way of an equitable mortgage, did not give the equitable mortgagee priority as a bona fide purchaser over the cestuis. There must be conduct, such as representations by the cestuis, which would raise an estoppel. But if the purchaser takes a mere equitable transfer, the trustee does not bind the real owner beyond the scope of his actual authority.[117]

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[113]Minn. G. S. 1913, sec. 6720.

[114]2 Pollock & Maitland, History of English Law 229, 233; Sweet, Trusteeship & Agency, 8 Law Quar. Rev. 220; Salmond, Jurisprudence, 3rd ed., 233.

[115]Huston, Enforcement of Decrees of Equity 120, 131.

[116](1875) L. R. 7 H. L. 496.

[117]So it has been held that taking a conveyance in the name of a clerk who had access to the securities and who took and deposited the title deeds with an equitable mortgagee, was not sufficient to postpone the real owner, the beneficiary, to the trustee's equitable mortgagee. Carrit v. Real and

As counsel argued in the Shropshire case, the situation is this:— a purchaser sees certificates in the trustee's possession. He purchases or advances money on the security of the certificates, believing that the person who is registered as owner and who has possession of the certificates of ownership is in fact full owner. If he deals with the trustee by equitable transfer or assignment without getting a formal endorsement, should not this bind the equitable owner? Does the fact that the lender took only an equitable charge instead of a legal transfer alter the case? Can the cestui set up an equal equity, or should he not be the one to suffer the consequences of the misconduct of his representative when he has encouraged the belief that the trustee is absolute owner with full power of disposition?[118] If one chooses to have a representative or trustee to administer his property should he not be the one to suffer for any act of improper management or disposition, whether there is a transfer of the legal title or only an equitable assignment or executory contract?[119]

Estoppel should on principle be held to arise as soon as a contract is made and money is advanced in reliance on the ostensible ownership. The situation is then such that the purchaser has the superior equity and better right to call for the legal title. Estoppel in no way requires that the purchaser shall have acquired the legal estate. A change of position is all that is essential. Thus, in agency cases, it is not necessary that the third person should have acquired any legal estate but merely that the principal should have assisted his agent to misrepresent the scope of his authority. Thus, if an innocent purchaser who takes possession and makes improvements on the land without having paid the purchase money in full, or having acquired the legal title, he should be protected as against a prior equity of which he had no notice.[120]

A promise might well be considered as "value." Under the Uniform Sales Act, value is defined as "consideration sufficient to

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Personal Advance Co., (1888) 42 Chancery Div. 263. But compare Rimmer v. Webster, [1902] 2 Ch. 163.

[118]See also Hunter v. Walters, (1870) L. R. 11 Eq. 292, on appeal (1871) L. R. 7 Ch. App. 75; Rice v. Rice, (1853) 2 Drew. 73; 2 White & Tudor L. Cas. 916; Wilson v. Hicks, (1884) 40 Oh. St. 418; Lloyds Banking Co. v. Jones, (1885) 29 Ch. Div. 221; Dueber Watch Case Manufacturing Co. v. Dougherty, (1900) 62 Oh. St. 589, 57 N. E. 455.

[119]See Ewart, Estoppel, 267, 271, 341; Ames, Cases on Trusts 305 n.

[120]Temples v. Temples, (1883) 70 Ga. 480. See 2 Tiffany, Real Property, 2nd ed., sec. 574, p. 2253.

support a simple contract." As Williston says in his work on sales:[121]

"Upon principle there seems no good reason why a purchaser should be deprived of the benefit of his bargain because his obligation to pay is executory. The original owner or claimant of goods should not have the right to deprive the innocent purchaser of goods, but should be obliged to get relief upon the enforcement for his advantage, of the obligation of the purchaser to pay the price."[122]

The recording acts in the United States have extended the doctrine of bona fide purchase to one who has acquired an equitable estate merely against another who claims a prior legal estate by an unrecorded document. Rights created by unrecorded instruments are thus equivalent merely to equitable interests which may be cut off by innocent purchase even of an equitable title.[123]

VI. The Effect of Getting In Legal Title After Notice

In *Dueber Watch Case Mfg. Co. v. Dougherty*,[124] one Coburn was given stock in the plaintiff company to qualify him as a director, which he agreed to transfer back to the corporation. While this stock stood in his name, he induced Dougherty and another to indorse his note under an agreement with them that he would subsequently transfer the stock to them as collateral security for his liability upon their indorsement. At the time of this agreement the indorsers had no notice of the right of the company to the stock, but they received notice of that right before Coburn assigned the stock to them. After this notice, Coburn made the assignment to the indorsers. It was assumed that both the company and the indorsers had equitable claims to the stock and the question was which should prevail. The court sustained the claim of the indorsers against the equity of the company to a re-transfer of the stock, partly on the ground of a superior equity by estoppel and partly on the ground that the indorsers had the right to protect their junior equity by getting in the legal title to the stock even after notice.

It was a sufficient ground of decision that "one who places the legal title to his property in the name of another, must take the hazard of any loss that may result from his dealing with it as his

[121] Williston, Sales, sec. 621.
[122] See also Ames, Cases on Trusts, 2nd ed., 287.
[123] 2 Pomeroy, Equity Jur., secs. 758, 772; 2 Tiffany, Real Property, 2nd ed., secs. 567, 575 p. 211.
[124] (1900) 62 Oh. St. 589, 596, 57 N. E. 455.

own, so far as innocent third parties are concerned. On principles of natural justice his equity is inferior to that of any person who acquires in good faith any title to the property."[125]

The second ground of decision is open to serious doubt and criticism. May the holder of a junior equity secure priority by clothing himself with legal title, though he does so after notice of the earlier equity and merely for the purpose of securing priority? There is not much positive authority on this question in the United States, but the better opinion is that he should not be able to do so.[126]

Under the English law, a junior equitable claimant may fortify himself by getting in the legal title after notice so long as he does not become a party to a breach of trust. If Coburn was a trustee for the company, the indorsers would seem to have participated in a breach of trust in the subsequent transfer. A transferee of a merely equitable interest takes, in general, only what his transferor can equitably give him. But in England he can subsequently "perfect" his title, even after notice of a prior equity or interest by acquiring the legal estate, except from a trustee.[127] Thus a third mortgagee of an equity of redemption who acquires the legal estate, after having knowledge of the existence of the second mortgage, will be entitled to squeeze out and gain priority over the second mortgagee. The reason assigned is that where the equities are equal, the legal title shall prevail, and he that has only an equitable claim or title shall not take a legal title from another with an equally meritorious equitable title. But it is assuming the whole case to say that the equities are equal. It would seem obvious justice that each mortgagee should be paid according to his priority. The second mortgagee, when he loaned his money, might know that the land was of sufficient value to pay the first mortgage and also his own. To permit him to be defeated of a just debt by a contrivance between the first mortgagee and the third, is, indeed, a

[125] See 2 Pomeroy, Equity Jur., secs. 710, 727, 729, p. 1437; Scott, Cases on Trusts 669, note; 1 Machen, Corporations, sec. 882; Ames, Cases on Trusts 229, note; 30 Harv. L. Rev. 103.

[126] See 2 Pomeroy, Equity Jur., 4th ed., secs. 727, 729, 740, 755, 756, 768; 2 Tiffany, Real Property, 2nd ed., sec. 566, pp. 2174, 2175; Wenz v. Pastene, (1911) 209 Mass. 359, 363, 95 N. E. 793; Ames, Lectures Legal History, 267, 268.

[127] Jennings v. Jordan, (1881) L. R. 6 A. C. 698, 714, 51 L. J. Ch. 129; Marsh v. Lee, (1671) 2 Vent. 337, 2 White & Tudor L. Cas. 8th Ed., 121, 136, 185, 961; Pilcher v. Rawlins, (1872) L. R. 7 Ch. 259; Jenks, The Legal Estate, 24 Law Quar. Rev. 147, 155.

judicial absurdity. This is known as the doctrine of the *tabula in naufragio*. On principle no advantage should be attainable by taking a conveyance with notice of a prior equitable right. The fact that this unreasonable doctrine has been followed in England for some centuries is no reason for its adoption by an American court.[128]

In *United States v. Detroit*, [129] Sanborn, J., says, by way of dictum:

"A court of equity will not interfere at the suit of the holder of a prior equitable title or claim to deprive an innocent purchaser for value of a junior equitable estate of equal strength of a legal title which he has subsequently bought or obtained after notice of the defect. It will not disarm a bona fide purchaser, or take from him the shield of any legal advantage."[130]

It is believed that this does not in general represent the American Law and that in the absence of estoppel, a purchaser is not protected from a prior equity if he receives notice of it at any time before the conveyance of the legal title is executed, even though he may have paid the purchase money before notice.[131] Ewart, in his work on estoppel,[132] in speaking of the scramble for legal estate in the English Law says, "It resembles the greasy pig which being in the general scramble seized by some lucky competitor, gains for its captor the prize," even though in seizing it his hands be not entirely clean. The maxim is Ubi Pig, Ibi Priority.

The weight of authority in this country is that the purchaser of lands, who gets notice before he receives a conveyance, takes

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[128]Jennings v. Jordan, (1881) L. R. 6 A. C. 698, 714, 51 L. J. Ch. 129, 2 Tiffany, Real Property, sec. 566, pp. 2174, 2175; Paul v. McPherrin, (1910) 48 Colo. 522, 111 Pac. 59, 21 Ann. Cas. 460, note. This doctrine apparently is not confined in England to the tacking of mortgages, but applies in favor of all equitable owners or encumbrancers for value and without notice of prior equitable interests, who get in the legal estate from persons who commit no breach of trust in parting with it. Bailey v. Barnes, [1894] 1 Ch. 25; Taylor v. Russell, [1891] 1 Ch. 826; [1892] A. C. 244; 2 Pomeroy, Equity, secs. 683, 691, 766. But see Willoughby, Legal Estate 70, 71.

[129](1904) 131 Fed. 668, 678.

[130]2 Pomeroy, Equity Jur., sec. 766; Lea v. Polk Co., (1858) 21 How. (U.S.) 493, 16 L. Ed. 203, Bailey v. Greenleaf, (1822) 7 Wheat, (U.S.) 46, 57, 5 L. Ed. 393; 21 C. J. 208; Weston v. Dunlap, (1878) 50 Ia. 183; Fidelity Mutual Life Ins. Co. v. Clark, (1906) 203 U. S. 64, 51 L. Ed. 91, 27 S. C. R. 19.

[131]See Ames, Cases on Equity, 2nd ed., 288 note; Grimstone v. Carter, (1832) 3 Paige (N.Y.) 420, 436, 24 Am. Dec. 230; Louisville, etc., R. Co. v. Boykin, (1884) 76 Ala. 560; 2 Pomeroy, Equity Jur., secs. 683, 691, 756; 21 Ann. Cas. 463 n.; Wigg v. Wigg, (1739) 1 Atk. 382; Willoughby, Legal Estate 29-87; Ames, Lectures Legal History 267, 283.

[132]Ewart, Estoppel chap. 18, pp. 251, 252.

subject to the claim of the holder of a prior equity, although he makes his contract and pays the purchase price in full before receiving notice.[133] Thus if land subject to mortgage were sold by contract to two purchasers, each having no notice of the other, the English rule would give priority to the second if he succeeds in getting the mortgagee to convey his legal title to him. But it would seem that nothing that the mortgagee may do should affect the legal result in any way.[134] The first purchaser has the equitable estate and the second has nothing, as the mortgagor had nothing to give him.

The question has arisen whether one who pays the agreed consideration without at the time taking a conveyance may be protected as against a prior unrecorded conveyance after notice. Is this analogous to the question of tacking? It would seem not, for although the subsequent purchaser acquires merely an equitable title or claim, the later equity should be held superior by reason of the recording acts.[135] Of course apart from recording acts the second buyer would prevail if he gets in the legal title from the vendor without notice of the prior contract. Where notice is received before the purchase price is actually paid the completion of the purchase is generally held a fraud upon the prior claimant.[136]

In *Newman v. Newman*,[137] a cestui who had mortgaged his equitable interest later assigned his interest as security to the trustee who gave value without notice of the mortgage. He advanced his money on the faith of a legal title which he already had. It was held that the trustee could not be charged with the prior mortgage, but took the beneficial interest free and clear. This was compared by the court to cases in which a second equitable incumbrancer without notice has got in the legal estate and thus protected himself. It was said that there is nothing to prevent a trustee from dealing with his own cestui que trust, and then taking advantage of the legal estate which he does not get in later but has already. The priority here should not however be put on the theory of tacking or on the magic potency of the legal title, but on the ground that the assignment of the cestui to the trustee is in

[133] Paul v. McPherrin, (1910) 48 Colo. 522, 111 Pac. 57; 21 Ann. Cas. 460, note.

[134] 2 Pomeroy, Equity Jur., sec. 756; Jenks, 24 Law Quar. Rev. 147, 152.

[135] See 2 Tiffany, Real Property, 2nd ed., sec. 574, p. 2256; Paul v. McPherrin, (1910) 48 Colo. 522, 111 Pac. 57, 21 Ann. Cas. 460, note.

[136] Wenz v Pastene, (1911) 209 Mass. 359, 362, 95 N. E. 793.

[137] (1885) L. R. 28 Ch. Div. 674.

effect the release of an obligation. The relation between cestui and trustee is primarily personal, like that of creditor and debtor, and the estate of the cestui in the res is derived through the specific enforcement of the obligation. The doctrine that trustees who have got a legal estate, or an estate of any kind, may deal with their cestuis and get a beneficial interest in the trust property, if they have no notice that there had been any prior assignment or incumbrance, may well be compared to cases of a debtor paying the creditor without notice of an assignment. The trustee owes his obligation primarily to the cestui, and may, accordingly, discharge his obligation to the cestui, or take a release from him, unless he has received notice of some transfer of the cestui's claim. In the absence of notice of the cestui, as creditor, continues to have apparent ownership and power of releasing or collecting from his debtor.[188] So the trustee is safe in paying an assignee of the equitable interest, who obtained the assignment by fraud, if the trustee has no notice of the fraud.[189]

VI. Summary and Conclusion

The fundamental principles and policy of divestiture of prior rights by purchase for value are essentially the same at law and in equity. The purchaser for value without notice must show how he acquired an equity and why it is superior to the title, legal or equitable, of the real owner. The true merit of the innocent purchaser as against a cestui or other equitable owner, would seem to consist, not in having acquired the legal title, but in his acting in reliance upon the apparent title. The basis does not lie in the idea that equity respects the legal title as in itself superior to the equitable title, or that the equitable right is merely one in personam. The purchaser who has parted with value on the faith of an apparently absolute title in the trustee has not merely an equal equity with the cestui, but a superior equity. The cestui has created the situation, or is accessory to an act, which exhibits the trustee to the world as complete owner of the res, by which he is armed with the means of dealing with the property as his own. The hidden owner is estopped from setting up his title as against an innocent

[188] Jenkinson v. New York Finance Co., (1911) 79 N. J. Eq. 247, 82 Atl. 36, 2 Pomeroy, Equity Jur., sec. 702.

[189] Lovato v. Catron, (1915) 20 N. Mex. 168, 148 Pac. 490, L. R. A. 1915E 451; Scott's Cases on Trusts 729. See Fidelity Mutual Life Ins. Co. v. Clark, (1906) 203 U. S. 64, 51 L. Ed. 91, 27 S. C. R. 19; 2 Pomeroy Equity, sec. 702; Ames, Lectures Legal History 261.

victim. His conscience is charged. His secret equity is inferior to that of the "mis-reliant" purchaser.

The rule as to cutting off equities has been crystallized into an artificial and technical doctrine by courts which have not clearly analyzed the "obvious equity" and policy of it. These are found in a kind of estoppel which generally exists, even if there is no inquiry in each particular case as to misreliance on ostensible ownership, and even though the guiding principles are not carried to their full, logical conclusion in cases where the consideration is wholly or partially executory, or where the legal title has not yet been got in. Some of the cases of tabula in naufragio might perhaps be justified as cases where the junior equity to which the legal title was added with notice was superior by reason of estoppel.

Where the owner voluntarily permits strong evidence of title, as possession of a duly endorsed document of title, or a non-negotiable obligation, to be in the hands of another, he should not be permitted to impeach the evidence by which, owing to his own neglect or misplaced confidence, he has enabled the holder to impose on others.

The rules protecting a bona fide purchaser of certificates of stock are largely based on estoppel, at least apart from statute. The "semi-negotiability" of stock certificates results from ostensible title by the possession of the customary evidence of title. By statute many documents of title are being advanced from the estoppel class to the negotiable class.

The cutting off of latent equities by the bona fide purchase of choses in action and non-negotiable securities usually turns on questions of estoppel by the apparent title with which the holder of the document is clothed. If there is no evidence of title, as in case of a parol assignment of a parol chose in action, it is doubtful whether there is any basis in justice or policy to cut off latent equities. But those who suffer the outward evidence of ownership in another to allure innocent purchasers to their prejudice are not entitled to assert their latent claims.

The divestiture of a valid title by a wrongful sale to a bona fide purchaser for value thus rests on considerations of justice as between the purchaser and the true owner, and also upon the policy of the law that in the case of all property which is the usual subject of commerce, the transfer of title be made as quick, as easy,

and as reliable as possible, and that full faith and credit may be given to the customary evidences of title.

The "bona fide purchaser for value without notice" might well be asked to give up his cumbersome title for some more convenient and descriptive one, such as "fair evidence purchaser." The divested owner is a party to the transfer as a kind of undisclosed principal of a power conferred on the seller by his own act or acquiescence, in clothing him with the external indicia of title or authority. In some exceptional cases such as money, market overt where a thief or finder can give title, and negotiable instruments, the power is one conferred by law to facilitate ready transfer on the strength of possession.

SUPREME COURT DECISIONS ON FEDERAL POWER OVER COMMERCE, 1910-1914. II*

By Thomas Reed Powell*

I. Commerce Among the Several States (Continued)

2. Employers' Liability Act

After the first federal Employers' Liability Law had been held to exceed the commerce power of Congress because, as construed by the court, it regulated the liability of interstate carriers for injuries incurred in the course of intra-state as well as of interstate commerce, Congress passed a second statute which was confined to injuries suffered by employees while engaged in interstate commerce. This was sustained as a proper exercise of the commerce power in *Second Employers' Liability Cases (Mondou v. New York N. H. & H. R. Co)*.[1] Mr. Justice Van Devanter cited the commerce cause and the "necessary and proper" clause and said that the following propositions had become so firmly settled as to be no longer open to dispute:

"1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

2. The phrase 'among the several states' marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single state and does not affect other states,—the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the states severally.

3. 'To regulate,' in the sense intended, is to foster, protect, control, and restrain, with appropriate regard for the welfare of

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*The preceding installment in 6 Minnesota Law Review 1 has reviewed the decisions of the Supreme Court from October, 1910, to June, 1914, on the validity and effect of the Interstate Commerce Act of 1887 and its later amendments. The present paper covers the decisions of the same period on other acts of Congress specifically directed to the regulation of interstate carriers.

[1](1912) 223 U. S. 1, 56 L. Ed. 327, 32 S. C. R. 168. See 12 Colum. L. Rev. 252, 272, 25 Harv. L. Rev. 548, 565, 10 Mich. L. Rev. 478, 491, 60 U. Pa. L. Rev. 501, and 18 Va. L. Reg. 491. For discussions prior to the Supreme Court decision see John L. Hall, "The Federal Employers' Liability Act," 20 Yale L. J. 122; and a note in 24 Harv. L. Rev. 156.

those who are immediately concerned and of the public at large.

4. This power over commerce among the states, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

5. Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees.

6. The duties of common carriers in respect of the safety of their employees, while both are engaged in commerce among the states, and liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power.'"[3]

Having thus sustained the act as within the general scope of federal power, Mr. Justice Van Devanter proceeded to consider certain specific objections. He declared that so long as the injury in question is to an employee engaged in interstate commerce, "it is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intra-state commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein." Earlier he had said that it is a mistake to treat "the source of the injury, rather than its effect upon interstate commerce, as the criterion of congressional power."

The objections to the rules of liability set forth in the act were founded on the commerce clause as well as on the due-process clause of the fifth amendment. These rules deprived the carrier of the defense that the injury is caused by a fellow servant, made the contributory negligence of the injured employee not a complete defense but only a ground for reducing the damages on the theory of comparative negligence, abrogated the defense of assumption of risk whenever the employer's violation of any statute enacted for the safety of employees contributes to the injury, and gave an action to the personal representative of employees whose death results from their injury. As to the due process objection,

[3](1912) 223 U. S. 1, 46-47, 56 L. Ed. 327, 32 S. C. R. 169.

Mr. Justice Van Devanter contented himself with quoting an earlier opinion to the effect that "a person has no property, no vested interest in any rule of the common law." The contention that the rules of liability prescribed "have no tendency to promote the safety of the employees, or to advance the commerce in which they are engaged" was answered by saying:

"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....

"We are not unmindful that the end was being measurably attained through the remedial legislation of the several states, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the states, upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce."[3]

It was further held that the act of Congress supersedes all state laws in the same field and that "rights arising under the congressional act may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion." One of the cases before the court had been brought in a state court of Connecticut and Chief Justice Baldwin had held that the state court may decline to exercise jurisdiction because the act of Congress is not in harmony with the policy of the state. Such a suggestion, said Mr. Justice Van Devanter, "is quite inadmissible, because it presupposes what in legal contemplation does not exist." This he reinforced by adding:

"When Congress, in the exertion of the power confided to it by the constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state."[4]

It was pointed out that the prescription of the rule of liability to be applied in cases where the state courts under their own laws have jurisdiction of the controversy is not an "attempt to enlarge or regulate the jurisdiction of state courts, or to control or affect

[3] Ibid., 50-51.
[4] Ibid., 57.

their modes of procedure." After reminding the supreme court of Connecticut that it is accustomed to entertain tort actions in which the rule of liability applied is that of another state in which the injury occurred, even under circumstances where the laws of Connecticut give no right of recovery, Mr. Justice Van Devanter added:

"We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be that as it may, it affords no reason for declining a jurisdiction conferred by law. The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication. Besides, it is neither new nor unusual in judicial proceedings to apply different rules of law to different situations and subjects, even although possessing some elements of similarity, as where the liability of a public carrier for personal injuries turns upon whether the injured person was a passenger, an employee, or a stranger. But it never has been supposed that courts are at liberty to decline cognizance of cases of a particular class merely because the rules of law to be applied in their adjudication are unlike those applied in other cases."[8]

Further objections to the act were confined to the due-process clause of the fifth amendment. It was held that the possession by Congress of the power to impose the liability in question necessarily carries with it "the power to insure its efficacy by prohibiting any contract, rule, regulation, or device in evasion of it." The complaint against the discrimination caused by the act in applying only to carriers by railroads and not to other interstate carriers and the criticism of the lack of discrimination in not making a distinction between employees subject to the peculiar hazards of trains and others engaged in interstate commerce but not directly employed on trains or tracks were answered by saying:

"But it does not follow that this classification is violative of the 'due process of law' clause of the fifth amendment. Even if it be assumed that that clause is equivalent to the 'equal protection of the laws' clause of the fourteenth amendment, which is the most that can be claimed for it here, it does not take from Congress the power to classify, nor does it condemn exercises of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute, distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary. . . . Tested by these standards, this

[8]Ibid., 58-59.

classification is not objectionable. Like classifications of railroad carriers and employees for like purposes, when assailed under the equal-protection clause, have been sustained by repeated decisions of this court."[6]

The provision of the act which prohibits any contract or regulation in evasion of the liability imposed came before the court again in *Philadelphia, B. & W. R. Co. v. Schubert*[7] which sustained the prescription that the acceptance of benefits under relief contracts or funds shall not defeat liability under the act but shall merely entitle the carrier to a deduction of what it has paid towards the fund or as indemnity. This was construed to be applicable to contracts made prior to the enactment of the statute, and the constitutional complaint was disposed of by Mr. Justice Hughes as follows:

"Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the federal authority to the continuing operation of previous contracts would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which, as to future action, should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority."[8]

Northern Pacific R. Co. v. Babcock,[9] which was one of the suits disposed of in the opinion in *Second Employers' Liability Cases*,[10] was an action under the federal law brought in the lower federal court by the personal representative of an employee killed while engaged in interstate commerce. Under the federal law the sum recovered by the representative would go exclusively for the benefit of the surviving widow, while under the statutes of Mon-

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[6] Ibid., 52-53.
[7] (1912) 223 U. S. 1, 46-47, 56 L. Ed. 327, 32 S. C. R. 169.
[8] Ibid., 613-614. For notes on other cases sustaining the prohibition against contracts in derogation of rights under the act, see 26 Harv. L. Rev. 273 and 20 Yale L. J. 392.
[9] Note 1, supra.
[10] Note 1, supra.

tana which would have controlled in the absence of the federal statute, the widow and a surviving sister would have shared equally. The judgment for the benefit of the widow alone was sustained with no discussion of the question of the disposition of the proceeds other than the general statement that the federal act supersedes all laws of the states so far as they cover the same field.

This was applied in *Taylor v. Taylor*[11] in which a surviving widow who was also the personal representative of the deceased had with the consent of the state surrogate compromised with the railroad and accepted $5,000 in settlement of her claim under the federal statute. Thereupon the father of the deceased sued the widow for half of the amount received by her. The state court found for the father under the state law of distributions and held that the commerce power of Congress "must end with the death of the employee" and that an attempt by Congress to distribute funds recovered for his death is "invalid and unauthorized." The Supreme Court reversed the judgment of the state court, again with no discussion of the constitutional issue other than that to be implied from a review of previous cases which had applied to various situations the principle that the federal act supersedes all state legislation in the same field.

Though the opinions in these previous cases proceed mainly on the path of statutory interpretation, they necessarily involve the decision of constitutional issues. Among a number of cases to the same effect, *North Carolina R. Co. v. Zachary*[12] and *Missouri, K. & T. R. Co. v. Wulf*[13] may be cited for the point that, if the injury

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[11](1914) 232 U. S. 363, 58 L. Ed. 638, 34 S. C. R. 350. For comment on the decision in the state court see 25 Harv. L. Rev. 565.

[12](1914) 232 U. S. 248, 58 L. Ed. 591, 34 S. C. R. 305. See 27 Harv. L. Rev. 591. In interpreting the federal statute this case held that the lessor of an intra-state railroad to an interstate railroad is a "common carrier by railroad engaging in commerce between the states" within the meaning of the federal act when by the local law the lessor is responsible for the negligence of the lessee. An employee of the lessee who was killed while engaged in interstate commerce was held not entitled to sue under state law.

[13](1913) 226 U. S. 570, 57 L. Ed. 335, 33 S. C. R. 135. See 18 Va. L. Reg. 785. This was an action brought in a state court by a person who was sole beneficiary under the federal statute. The question was whether an amendment stating that the plaintiff is the personal representative of the deceased stated a new cause of action. Such amendment was necessary in order to show that the plaintiff was entitled to sue under the federal law. It was held that the amendment was a matter of form and not of substance and that it could be made although the two-year limitation in the federal act had expired between the original petition and the amendment. The facts that the original petition referred to a state statute

arises while the employed is engaged in interstate commerce, the only action is one under the federal statute. In the former case a judgment recovered in a state court in a suit brought under state law was set aside because it appeared that the employee was engaged in interstate commerce. In the latter case, where it appeared that the employee was engaged in interstate commerce, the action brought in the federal court was sustained as one under the federal law although the act of Congress was not referred to in the pleadings. *St. Louis, S. F. & T. R. Co. v. Seale*[14] holds that, if the suit is for the death of an employee killed in interstate commerce, it cannot be maintained by any person other than the personal representative to whom the right of action is given by the federal law.[15] That the damages recovered by such personal representative must be limited to the pecuniary loss sustained by the persons named as beneficiaries in the federal act and may not include compensation that they or others might recover if state laws were applicable was held in *Michigan Central R. Co. v. Vreeland*,[16] *American Railroad Co. v. Didricksen*,[17] *Gulf, C. & St. F. R. Co. v. McGinnis*,[18] *St.*

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and that neither it nor the amendment referred to the federal act were held not to defeat the right of action as one under the federal law when the facts as shown make it one necessarily arising under that law. Mr. Justice Lurton stated that he "entertains doubts as to whether the two years' limitation does not apply."

The question when suit is brought under the federal act is considered in 62 U. Pa. L. Rev. 376.

[14](1913) 229 U. S. 156, 57 L. Ed. 1129, 33 S. C. R. 751. See 19 Va. L. Reg. 224. This was a suit brought in a state court by the widow and parents of the deceased. The facts showed that the case was one arising under the federal statute and the judgment was reversed both because not one in a suit brought by the personal representative and because recovery had been allowed in favor of persons not beneficiaries under the federal act. Mr. Justice Lamar dissented.

[15]This had been held previously in American R. Co. v. Birch, (1912) 224 U. S. 547, 56 L. Ed. 879, 32 S. C. R. 603, in a case coming from Porto Rico where of course the power of Congress is not dependent on the commerce clause. The act of Congress was here held to supersede any local law and to preclude an action brought by others than the personal representative.

[16](1913) 227 U. S. 59, 57 L. Ed. 417, 33 S. C. R. 192. See 26 Harv. L. Rev. 551. This was an action brought in the federal court under the federal statute in which there was a reversal because the trial court had charged that the damages may include compensation for deprivation by the widow of the care and advice of her deceased spouse. Damages for such loss were held not be to allowable under the federal statute. Mr. Justice Holmes confined his concurrence to the result. The case held also that the act of April 22, 1908, did not provide for the survival of the right of action of a deceased employee. For the later amendment of April 5, 1910, allowing such survival, see St. Louis, I. M. & S. R. Co. v. Hesterly, note 19, infra.

[17](1913) 227 U. S. 145, 57 L. Ed. 456, 33 S. C. R. 224. This was an action brought in Porto Rico, in which the Supreme Court held that the

Louis, I. M. & S. R. Co. v. Hesterly,[18] and *North Carolina R. Co. v. Zachary.*[19]

court below had wrongly allowed compensation to parents for the loss of the society and companionship of their son.

[18](1913) 228 U. S. 173, 57 L. Ed. 785, 33 S. C. R. 426. See 27 Harv. L. Rev. 87. This was a suit in a state court under the federal law, in which the damages allowed to the personal representative included compensation to a married child on equal terms with that given to children dependent on the deceased father. The court held that this was not in accord with the limitation in the federal act to actual pecuniary loss.

In 1 Va. L. Rev. 490 is a note on a case denying an action by a father who had no expectation of support from a deceased son.

[19](1913) 228 U. S. 702, 57 L. Ed. 1031, 33 S. C. R. 703. This was an action in a state court in which the personal representative had recovered damages for the injury and pain suffered by the deceased prior to his death. The injury occurred prior to the amendment of April 5, 1910, which provided for survival of the action of the deceased. This amendment was held not to be retroactive and the judgment was reversed for the wrongful allowance of damages not recoverable under the original federal act. The state court had treated the action as one under state law and had held the federal act to be only supplementary. This of course was erroneous under the decisions of the Supreme Court, as it was conceded that the injury occurred in interstate commerce. The action however was maintainable under the federal act and the defendant did not object to that part of the judgment which was for pecuniary loss to the next of kin. The court held, therefore, that it was not called upon to say whether the defendant could have defeated this part of the judgment on the ground that the suit was brought under the statute of one jurisdiction while it was maintainable only under that of another. But it held that the defendant was not estopped from objecting to the recovery not permissible under the federal act on the ground that it had pleaded contributory negligence which was a defense only under the state law, since "the plaintiff, not the defendant, had the election how the suit should be brought, and as he relied upon the state law, the defendant had no choice, if it was to defend upon the facts."

[20]Note 12, supra. This was an action brought in a state court which the Supreme Court held wrongly brought under state law. Among the reasons why it could not be sustained as one under the federal act, was that the damages recovered were not confined to the pecuniary loss sustained by the beneficiaries named in that act.

A state case holding that the federal act controls the distribution of the proceeds is discussed in 26 Harv. L. Rev. 375.

The question whether the federal act applies to a Pullman porter is considered in 26 Harv. L. Rev. 375.

For general articles on the federal statute see H. D. Minor, "The Federal Employers' Liability Act," 1 Va. L. Rev. 169 and Homer Richie, "The Federal Employers' Liability Act," 19 Va. L. Reg. 171, 248, 234, 405, 502, 594.

In Winfree v. Northern Pacific R. Co., (1913) 227 U. S. 296, 57 L. Ed. 518, 33 S. C. R. 273, it was held that the federal act is not retroactive and so does not permit recovery in a cause of action that accrued prior to its passage.

Troxell v. Delaware, etc., R. Co., (1913) 227 U. S. 434, 57 L. Ed. 586, 33 S. C. R. 274, allowed an action under the federal act based on the negligence of a fellow servant, notwithstanding a prior action unsuccessfully brought under state law based on failure to provide proper facilities. The original action was brought by the surviving widow and children, and the second by the widow in her capacity as personal representative. Mr. Justice Lurton concurred on the question of res adjudicata

The first federal Employers' Liability Act was held unconstitutional because construed to apply to injuries received by employees who might have no connection with interstate commerce. The second statute was confined to injuries received by the employee while engaged in interstate commerce. In *Illinois Central R. Co. v. Behrens*[21] this language was held to restrict the act more than would be necessary under the constitution. From this it follows that a holding that an employee is not within the federal act does not necessarily involve a decision as to the power of Congress under the combination of the commerce clause and the "necessary and proper" clause. The *Behrens Case* involved a suit brought under the federal act by the representative of an employee who was killed when, as a fireman, he was engaged in switching several cars loaded wholly with intra-state freight. In general the switching crew "handled interstate and intra-state traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other." In declaring that accidents suffered by members of such a crew would be within the regulatory power of Congress without inquiry as to the precise work on which an employee was engaged at the time of his injury, Mr. Justice Van Devanter said:

"Considering the status of the railroad as a highway for both interstate and intra-state commerce, the interdependence of the two classes of traffic in point of movement and safety, and the nature and extent of the power confided to Congress by the commerce clause of the constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intra-state commerce."[22]

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solely because of the lack of identity of the parties in the two actions.

Seaboard Air Line R. Co. v. Horton (1914) 233 U. S. 492, 58 L. Ed. 1062, 34 S. C. R. 635, contains a discussion of the difference between contributory negligence and assumption of risk as worked out by the Supreme Court in interpreting the rules of liability imposed by the federal act. See Edward P. Buford, "The Assumption of Risk Under the Federal Employers' Liability Act," 28 Harv. L. Rev. 163, and Irwin E. Richter, "The Application of State Safety Statutes to Actions Under the Federal Employers' Liability Act," 15 Colum. L. Rev. 649. In 27 Harv. 765 is a note on a case holding that the question whether the employee's assumption of risk is voluntary is one for the jury.

[21] (1914) 233 U. S. 473, 58 L. Ed. 1051, 34 S. C. R. 646. See 25 Harv. L. Rev. 741 and 18 Law Notes 85.

[22] (1914) 233 U. S. 473, 477, 58 L. Ed. 1051, 34 S. C. R. 646.

Passing then "from the question of power to that of its exercise," the court decided that the particular movement of freight from one part of the city to another was not in itself interstate commerce and that the fact that the employee "was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

In the other cases in which suit was brought under the federal act, the injuries were held to be within its terms. There was no contest with regard to employees on trains actually moving in interstate commerce who were held within the federal act in *Missouri, K. & T. R. Co. v. Wulf*,[23] *Gulf, C. & St. F. R. Co. v. McGinnis*,[24] *and St. Louis, I. M. & S. R. Co. v. Hesterly*,[25] nor with regard to a switchman whose arms were crushed between two cars moving in interstate commerce in *Grand Trunk W. R Co. v. Lindsay*.[26] In *Pedersen v. Delaware, L. & W. R. Co.*[27] the issue was fully fought out and produced disagreement among the judges. Here an employee carrying bolts to be used in repairing a railroad bridge used in interstate commerce was held to be engaged in such commerce. The carrying of the bolt was called a minor part of the larger task of inserting it "as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars which he is to haul in interstate commerce." Interstate commerce was said to be dependent upon the good condition of the instrumentalities by which it is carried on, and the work of keeping such instrumentalities in repair to be "so closely related to such commerce as to be in practice and in legal contemplation a part of it." It was declared that the bridge is none the less an instrumentality of interstate commerce because used also for intra-state transportation, "nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce." Mr.

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[23]Note 13, supra. [24]Note 18, supra. [25]Note 19, supra.

[26](1914) 233 U. S. 42, 58 L. Ed. 838, 34 S. C. R. 581. In this case it was held that an action is controlled by the provisions of the federal act when the allegations and proof bring it within the act although the provisions of the act are not expressly referred to in the pleadings or pressed at the trial.

[27](1913) 229 U. S. 146, 57 L. Ed. 1125, 33 S. C. R. 648. See 2 Georgetown L. J. 38, 26 Harv. L. Rev. 354, 375, 19 Va. L. Reg. 224, and 1 Va. L. Rev. 73, 83.

Justice Van Devanter pointed out that the decision does not apply to the original construction of instrumentalities which have not yet been used for interstate commerce. Mr. Justice Lamar wrote a dissenting opinion in which Justices Holmes and Lurton concurred. This apparently contents itself with the position that the injury was not within the act of Congress without considering whether it might under the constitution have been made so, though this is not absolutely certain. Mr. Justice Lamar's comments are as follows:

"The defendant, though engaged in both interstate and intrastate commerce, was also engaged in many other incidental activities which were not commerce in any sense.

"The railroad had to be surveyed and built, bridges had to be constructed and renewed, cars had to be manufactured and repaired, warehouses had to be built and painted, wages had to be paid and books kept; but these transactions, though incident to it, were not transportation, and, therefore, not within the purview of the statute limited to persons employed in commerce. Otherwise the law would embrace 'all of the activities in any way connected with trade between the states, and exclude state control over matters purely domestic in their nature.'... Acts burdening interstate commerce can, of course, be prohibited by Congress. But when Congress itself limits the operation of the statute to persons injured while employed in interstate commerce, the statute does not extend to its incidents, and is confined to transportation. It does not include manufacturing, building, repairing, for they are not commerce, whether performed by a private person, a railroad, or its agents." [28]

Cases in which suits were held to be wrongly brought under state law because the injuries were within the federal act belong properly under the head of state police power and interstate commerce, but it is convenient to group together all decisions on the scope of the federal act. *St. Louis, S. F. & T. R. Co. v. Seale*[29] denied an action under state law for an injury to a yard clerk who was on his way to take the numbers on the cars of an incoming interstate train. His duty was declared to be connected with the interstate movement, "not indirectly or remotely, but directly and immediately." *North Carolina R. Co. v. Zachary*[30] reached the same conclusion with regard to a fireman who had prepared his locomotive to attach to a train that was going to another point in

[28] (1913) 229 U. S. 146, 154, 57 L. Ed. 1125, 33 S. C. R. 648. In 1 Calif. L. Rev. 196 is a note on what employees are within the federal statute.

[29] Note 14, supra.

[30] Note 12, supra.

the same state but to which two cars which had come from another state were to be attached. The fact that these two cars had come in empty and were going on empty was held not material, and the fireman was held still on duty even though he had left his engine and gone towards his boarding house when struck by another train in the railroad yard. Mr. Justice Pitney remarked that "there is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer."

3. Safety Appliance Acts

The first federal safety appliance act of March 2, 1893, was confined to locomotives, cars, etc., "used in moving interstate traffic." In *Delk v. St. Louis & S. F. R. Co.*[21] this was held applicable to a car loaded with lumber consigned to another state which while awaiting a repair piece was being moved about on a switching track in connection with other cars. The suit in question was by an injured employee against the railroad. The duty of the railroad to have the required appliances on all cars used in interstate traffic was held to be an absolute one, in accordance with the ruling in *Chicago, Burlington & Quincy R. Co. v. United States*,[22] decided at the same time. This was an action by the government for the penalty provided in the act. The contention of the road that "it cannot be held guilty of a crime when it had no thought or purpose to commit a crime, and endeavored with due diligence to obey the act of Congress" was held to be "unsound, because the present action is a civil one." Later in the opinion, however, Mr. Justice Harlan declared:

"If the statute upon which the present action is based had expressly or by implication declared that the penalty prescribed may only be recovered by a criminal proceeding, that direction must have been followed. The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned."[23]

The second safety appliance act of March 2, 1903, applied to locomotives, cars, etc., "used on any railroad engaged in interstate commerce." The constitutionality of applying the statute to cars hauling only intra-state freight was sustained in *Southern*

[21] (1911) 220 U. S. 580, 55 L. Ed. 590, 31 S. C. R. 617.
[22] (1911) 220 U. S. 559, 55 L. Ed. 582, 31 S. C. R. 612.
[23] Ibid., 578.

R. Co. v. United States,[84] in which Mr. Justice Van Devanter said:

"We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intra-state traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by the acts in respect of vehicles used in moving intra-state traffic, and the objects which the acts obviously are designed to obtain; namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation and connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intra-state as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intra-state commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intra-state transportation.

"Speaking only of railroads which are highways of both interstate and intra-state commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen, and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others.

[84](1911) 222 U. S. 20, 56 L. Ed. 72, 32 S. C. R. 2. See 12 Colum. L. Rev. 174 and 10 Mich. L. Rev. 212.

"These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative."[85]

4. Hours of Service Act

The constitutionality of the federal Hours of Service Act was sustained in *Baltimore & Ohio R. Co. v. Interstate Commerce Commission*,[86] after being interpreted to apply only to employees engaged in interstate commerce. The fact that many employees are necessarily engaged in both intra-state and interstate commerce at the same time was held to lend no support to the contention that the act goes beyond interstate commerce. Mr. Justice Hughes covers both the commerce question and the due-process question when he says:

"The fundamental question here is whether a restriction upon the hours of labor of employees who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. The question admits of but one answer. The length of hours of service has a direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employees and travellers, 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,

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[85](1911) 222 U .S. 20, 26-27, 56 L. Ed. 72, 32 S. C. R. 2. In Schlemmer v. Buffalo, R. & P. R. Co., (1911) 220 U. S., 390, 55 L. Ed. 596, 31 S. C. R. 561, commented on in 17 Va. L. Reg. 322, it was held that Congress in providing in the first and second safety appliance acts that defendants using unlawful appliances could not have the defense of assumption of risk against plaintiffs suing for injuries did not preclude the states from enforcing their law of contributory negligence in such actions.

By the Second Employers' Liability Act of April 22, 1908, it was provided the defense of contributory negligence could not be made in any case where the violation by the carrier of an statute enacted for the safety of employees contributed to the injury which gave rise to the cause of action.

In American R. Co. v. Didricksen, (1913) 227 U. S. 145, 57 L. Ed. 456, 33 S. C. R. 224, the federal safety appliance act of March 2, 1903, was held to apply in Porto Rico, since Porto Rico is a "territory" within the meaning of the statute, although not for all purposes incorporated into the United States.

In Pennell v. Philadelphia & R. R. Co., (1914) 231 U. S. 675, 58 L. Ed. 430, 34 S. C. R. 220, commented on in 12 Mich. L. Rev. 220, the safety appliance acts of 1893 and 1903 were held not to require automatic coupling devices between the locomotive and the tender.

In 11 Mich. L. Rev. 141, is a note on a case in the lower federal courts on an issue raised by the safety appliance act.

train despatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the constitution."[37]

It was further held that the statute is not void for indefiniteness and that the requirement of reports is not an unwarranted search and seizure. The complaint that this requirement imposes self-incrimination was answered by saying that this objection is not open to a corporation. No specific attention was given to the question whether the particular limitations imposed are reasonable. The most drastic provision forbade certain classes of employees to remain on duty more than nine hours in any twenty-four hour period.[38]

The question whether an employee who was worked overtime was employed in interstate commerce arose in *Northern Pacific R. Co. v. Washington*[39] which held that the federal act superseded state regulations immediately even though the requirements of the federal act were not operative until a year after its enactment. On the character of the employment in question Chief Justice White said:

"The train although moving from one point to another in the state of Washington, was hauling merchandise from points outside of the state, destined to points within the state, and from points within the state to points in British Columbia, as well as in carrying merchandise which had originated outside the state, and was in transit through the state to a foreign destination. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may have been carrying some local freight. In view of the unity and indivisibility of the service of

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[36](1911) 221 U. S. 612, 55 L. Ed. 878, 31 S. C. R. 621.

[37]Ibid., 618-619.

[38]This provision was held in United States v. Atchison, etc., R. Co., (1911) 220 U. S. 37, 55 L. Ed. 361, 31 S. C. R. 362, not to be violated by work from 6:30 A. M. to noon and from 3 P. M. to 6:30 P. M.

Missouri, etc., R. Co. v. United States, (1913) 231 U. S. 112, 58 L. Ed. 144, 34 S. C. R. 26, noticed in 12 Mich. L. Rev. 612, held that a separate penalty is due for each employee kept overtime, and that no deduction can be made of time spent by employees waiting idle while an engine was sent off for water and repairs, since they were on duty and subject to call. As the well-read writer of the opinion put it: "Their duty was to stand and wait."

In St. Louis, etc., R. Co. v. McWhirter, (1913) 229 U. S. 265, 57 L. Ed. 1179, 33 S. C. R. 858, it was held that a violation of the hours of service act by the carrier does not create an unconditional liability for injuries occurring during work beyond the statutory limit without proof of a connection between the injury and the working overtime. Another aspect of this case is considered in 27 Harv. L. Rev. 88.

[39](1912) 222 U. S. 370, 56 L. Ed. 237, 32 S. C. R. 160. See 12 Colum. L. Rev. 374 and 10 Mich. L. Rev. 555.

the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling."[40]

So also in *Erie R. C. v. New York*[41] in which the application of state law was held to be precluded by the fact that Congress had taken possession of the field, the employee whose labor was in question was found to be engaged in interstate commerce. He was a telegraph operator engaged in spacing and reporting trains from a signal tower. The facts disclose that a majority of the trains spaced and reported by him were engaged in interstate commerce, but do not tell us whether the trains themselves went beyond the limits of the state. A distinction which the state court had sought to draw between the particular duties of the employee and the interstate business of the railroad was declared to be untenable.

5. Live Stock Transportation Act

The federal live stock act of June 29, 1906, called "the act to prevent cruelty to animals while in transit" forbids the confinement of animals in interstate transit for a period of longer than twenty-eight consecutive hours without unloading them for a period of at least five hours for rest, water and feeding. The constitutionality of the statute was assumed in *Baltimore & Ohio S. S. R. Co. v. United States*[42] which, however, dealt only with its construction and held that penalties accrue at the expiration of the period of lawful confinement of the cattle first loaded and that distinct penalties accrue at the expiration of the period of lawful confinement of any other cattle, but that the number of penalties is not dependent upon the number of owners or the number of cattle or the number of cars in which they are shipped.

6. Live Stock Quarantine Act

The animal quarantine act of March 3, 1905, which authorizes the secretary of the interior to designate districts as quarantined and prohibits transportation from the quarantined portion of any state to any other state was held in *United States v. Baltimore & Ohio S. W. R. Co.*[43] not to apply to a connecting carrier which

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[40](1912) 222 U. S. 370, 375, 56 L. Ed. 237, 32 S. C. R. 160.

[41](1914) 233 U. S. 671, 58 L. Ed. 1155, 34 S. C. R. 756. The decision in the court below is discussed in 10 Colum. L. Rev. 667.

[42](1911) 220 U. S. 94, 55 L. Ed. 384, 31 S. C. R. 368. The decision in the court below is considered in F. Granville Munson, "The Unit of Offense in Federal Statutes," 20 Yale L. J. 28.

[43](1911) 222 U. S. 8, 56 L. Ed. 68, 32 S. C. R. 6.

continues the shipment to another point in the same state in which it received it from the carrier who had brought it in from another state. The decision is based entirely on the construction of the language of the statute with no suggestion that Congress could not have applied it to any and every carrier participating in a through interstate shipment.

(To be concluded)

THE LEGAL RELATIONS OF CITY AND STATE WITH REFERENCE TO PUBLIC UTILITY REGULATION

By Harold F. Kumm*

Extent of the Commission's Control Over Franchises

III

IN a preceding section we sought to determine to what extent the federal constitution will protect a municipal corporation, in its ownership of public utilities, against the state. In that connection we examined a number of federal and state cases and concluded that the city, when acting in a proprietary capacity, was entitled to a considerable degree of protection under the contract and due process clauses of the constitution. It is now our object to see whether the fixing of rates by a state public service commission is an impairment of such municipal rights.

The particular provisions under which the city most often claims contract rights are usually embodied in a franchise agreement. It will therefore be necessary to inquire briefly into the nature of franchises. During the first half of the nineteenth century, it was customary to grant them their privileges by special act of the legislature. As might be expected, such a system was subject to abuse, and during the latter half of the century there was a tendency toward incorporation under general laws, with the franchises to be obtained from the local councils.[1] Thus a great number of existing franchises are the result of municipal grants.

A franchise has been defined as "a particular privilege which does not belong to an individual or corporation as of right, but is conferred by a sovereign or government upon, and vested in, individuals or a corporation."[2] The following have been held to be franchises: the right to construct and operate a street railway;[3] right to construct and maintain a public bridge;[4] or a ferry;[5] right

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Continued from 6 Minnesota Law Review, 32.
[1]King, The Regulation of Municipal Utilities 78-80.
[2]3 Dillon, Municipal Corporations 1906.
[3]Joyce, On Franchises, 42.
[4]Ibid p. 43.
[5]Ibid p. 45.

to dig in the streets of a city or town to supply the inhabitants with water;[6] or with gas;[7] right to use the streets for the purpose of transmitting electricity.[8] It is a generally accepted principle that such a grant when accepted and acted upon by the grantee becomes, as to him, a contract within the meaning of the federal constitution.[9] Because of this, the regulation of public utilities is accompanied by constitutional questions, which must be investigated. We may suppose the city has granted to a private corporation the right to sell water to its inhabitants for a certain specified rate, and under certain conditions. On the establishment of the state commission questions will arise as to the commission's power to regulate the rates and services stipulated for by such agreement.

It is essential that the franchise be a grant from a sovereign authority, and in this country none are valid unless derived from a law of the state.[10] But while the state may make the grant directly, it is equally competent for it to delegate this power to a municipal corporation.[11] That in every instance the privilege is to be considered as originating with the state is shown by the fact that the state may grant a public service corporation the use of a city's streets without the consent of the city and even against its will.[12] Nor need it make any compensation to the municipality for such concession.[13] It is true that the general practice has been to allow the city a voice in the granting of such rights. But while this may have led some courts to regard the franchise as emanating from the municipal corporation, it must be kept in mind that the city is here acting as the agent of the state, and that any municipal authority in this matter "is purely derivative and must flow from the legislative fountain."[14]

Since the city in the granting of true franchise privileges is acting merely as the agent of the state, for the purposes of government, it is evident that it cannot get a vested right in such powers as against the state. The term "franchise" as here used, refers to

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[6]Ibid p. 48.
[7]Ibid p. 49.
[8]Ibid p. 50.
[9]Dartmouth College v. Woodward, (1819) 4 Wheat. (U.S.) 518, 4 L. Ed. 629.
[10]Bank of Augusta v. Earle, (1839) 13 Pet. (U.S.) 519, 595, 10 L. Ed. 274.
[11]Joyce, Franchises 261-62; L. R. A. 1918D 315 note.
[12]3 Dillon, Municipal Corporations 1915 6, 1932, 2137.
[13]City of La Harpe v. Gas Co., (1904) 69 Kan. 97, 76, Pac. 448.
[14]3 Dillon, Municipal Corporations 2140. "The source of a franchise is the state whatever the agency employed." Joyce, Franchises 239.

the grant of those privileges which do not belong to any citizen as of common right but can come only through a grant from the sovereign; and is not used, as in the popular sense, to mean all those various provisions that appear in the document that sets forth the agreement between city and company. The grant of franchise rights is a purely governmental function, but the agreement may contain in addition various provisions made in a proprietary capacity. As noted in a preceding section, the city's purely governmental powers are held at the will of the legislature. There would consequently be no difficulty in the state resuming the franchise granting power in order to place it in the hands of a public service commission. Neither should there be any difficulty in the state giving up governmental benefits derived by the municipal corporation from previous contracts, for in the final analysis the agreement is not between the city and company but between the state and the company. If the state foregoes benefits which the municipality has gained under the contract, it is merely giving up that which has been gained for it by its agent, the city. Though the municipal corporation may have private rights beyond the reach of the legislature, it has no such governmental privileges. Hence the principle that a franchise when acted upon becomes a contract must not be so interpreted as to include powers exercised by the city as governmental agent of the state.[15]

But it has been suggested that the franchise agreement, using that term in its broadest sense, may include private as well as public provisions; that though made by the city primarily in its governmental character, the agreement may incidentally contain stipulations of a private nature. The city has exercised each of its dual capacities in a single franchise contract, acting in one character with respect to certain matters, and in a different character with respect to others. It is often a matter of great difficulty to determine in what capacity a particular provision has been made. Consider, for instance, a franchise stipulation for free water for the city. McBain is of the opinion that this right should be regarded as a proprietary one, if any is. The court's refusal so to regard it is cited by this writer as additional proof of his contention that the city is entitled to no protection under the contract clause while

[15]An exception to this principle exists in a particular class of cases where it has been held that the power to fix rates may be suspended for a term of years, as will be brought out later.

engaged in a private undertaking.[16] But it is to be observed that in incorporating this provision the municipality is seeking to further its governmental rather than its proprietary interests. The water is to be used mainly, if not wholly, for fire and street purposes and in buildings held in a public capacity such as the city hall, hospitals and the city schools. The public service commissions have found no trouble in ordering payment in such cases. Their decisions, however, are generally based on the ground that free water for cities is a form of discrimination in that a public burden is placed on resident users only, rather than on the whole public.[17]

The case of *Chicago v. O'Connell*[18] indicates the nature of the provisions which may be regarded as establishing proprietary rights. Here the court was considering the rights accruing to city and street railway under an ordinance of the city of Chicago. In its opinion the court says:

"Appellees contend, however, that the settlement ordinances, having been accepted and acted upon by the railway companies, constitute binding contracts between the city and the railway companies, and that their obligation cannot be impaired by any act of the legislature or by any act of the State Public Utilities Commission. Appellee's contention is undoubtedly sound so far as the contracts relate to matters which do not affect the public safety, welfare, comfort and convenience. Thus . . . the agreement to divide the net receipts between the railway companies and the city and the option given to the city to purchase the railway properties at a certain price are all matters which do not affect the public safety, welfare, comfort or convenience, because it is immaterial to the public what person or corporation operates the street railways, or what disposition is made of the profits and over these matters neither the State nor the State Public Utilities Commission has any control by virtue of the police power."

Thus the same franchise may contain both public and private provisions. As we have seen the public are held wholly at the will of the state, but in its private rights the city has a considerable degree of protection. We are now prepared to examine the rate stipulations commonly included in franchises, to see whether the city has there any right which is entitled to constitutional protection against the activities of the state public service commission. It may

[16]See article by H. L. McBain in 3 Nat. Mun. Rev. 284.

[17]Town of Hollister v. Hollister Water Co., (1915) P. U. R. 1915D 626 (Cal.); Borough of East Pittsburgh v. Pennsylvania Water Co., (1919) P. U. R. 1919F 631 (Pa.); Re Charles Town Water Co., (1916) P. U. R. 1916D 725 (W. Va.); Re Warwood Water & Light Co., (1917) P. U. R. 1917C 329 (W. Va.).

[18]Chicago v. O'Connell, (1917) 278 Ill. 591, 116 N. E. 210.

be that the agreement fixes a certain rate as the only one to be charged during a fixed period. On the establishment of a state commission with the power to regulate rates the question naturally arises, has that body the power to alter the rate in such a case as this where the period has not yet expired? The answer so far as the city is concerned must depend on one or both of the following elements: (1) on the nature of the power to regulate rates; (2) on the capacity in which the city entered into the rate-fixing agreement.

The regulation of rates is an exercise of the police power of the state. This broad power is not limited in its application to regulations in the interest of the public health, morals or safety, but extends as well to those which are designed to promote the public convenience, or general welfare or prosperity.[19] Since the regulation of public utility rates is for the public convenience and general welfare, such rate-fixing must be deemed a proper exercise of this power.[20] It is one of the great sovereign rights of the state. It may be delegated to a municipal corporation,[21] but since the power is governmental, it must in such case be exercised directly by the municipality, and cannot be further delegated.[22]

It is well settled that ordinary contracts are subject to an exercise of the police power, that the prohibition against their impairment does not prevent the state from exercising this great power.[23] This must be so when we consider that the power is a governmental one and of a continuing nature. Private persons cannot by contract between themselves limit the exercise of such a function. Rather, their agreements are supposed to have been made with reference to a probable change than an exercise by the state of a continuing power. Accordingly, contracts between private consumer and public utility which lay down a certain rate for a definite period are subject to change by the commission, even though the period named therein has not yet expired.[24]

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[19]Chicago, etc., Ry. v. Drainage Commissioners, (1905) 200 U. S. 561, 592, 50 L. Ed. 596, 26 S. C. R. 341; Chicago and Alton R. v. Tranbarger, (1914) 238 U. S. 67, 77, 59 L. Ed. 1204, 35 S. C. R. 678.

[20]Mill Creek Coal and Coke Co. v. Public Service Comm., (1919) 84 W. Va. 662, 100 S. E. 557, P. U. R. 1920 A 704; Freund, Police Power 1904, sec. 555.

[21]3 Dillon, Municipal Corporations 22-26 note; Joyce, Franchises 263.

[22]3 Dillon, Municipal Corporations 2233.

[23]Manigault v. Springs, (1905) 199 U. S. 473, 26 S. C. R. 127, 50 L. Ed. 274; 6 R. C. L. 199.

[24]Pinney and Boyle Co. v. Los Angeles G. and E. Corporation, (1914) 168 Cal. 12, 141 Pac. 620, L. R. A. 1915C 282, and note; Minneapolis, etc., R. Co. v. Menasha Wooden Ware Co., (1914) 159 Wis. 130, 150 N. W.

If private persons cannot through agreement tie up the exercise of the rate-making power of the state we may assume that the city in its private capacity is likewise limited. We have already noted that the municipality in that character has rights approaching but not equalling those of a private person engaged in a similar undertaking. We should hardly expect to find it with greater rights in the case of rates.

Not only is it beyond the competency of private persons to suspend the police power, but it is a general principle that this sovereign right cannot be permanently alienated or suspended even by the state itself. Even though there has been no express constitutional reservation of the rate-fixing power, the state may ordinarily resume it.[25] The right to regulate rates, being a portion of the police power, is inherent in the state, and is not dependent on the reservation of a right of alteration or repeal.[26]

We must, however, note one important exception to the general principle that the police power may not be alienated or suspended. This is where the public utility and the state, or its agent, have made a contract for a term of years, wherein it is expressly provided that the rates there established shall not be lowered during the period of the agreement. It has been held by the United States Supreme Court on several occasions that the effect of such a contract is to suspend during its term the power of the state to regulate rates so as to affect adversely the utility company.[27] This is in effect a suspension for that period of a portion of the police power of the state. Since the courts have always held that the renunciation of sovereign rights must be by terms so clear and unequivocal that there can be no doubt as to their proper construction, the sus-

411; Raymond Lumber Co. v. Raymond Light and Water Co., (1916) 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C 574; Kansas City Bolt and Nut Co. v. Kansas City Light and Power Co., (1918) 275 Mo. 529, 204 S. W. 1074; V. and S. Bottle Co. v. Mountain Gas. Co., (1918) 261 Pa. 523, 104 Atl. 667; Union Dry Goods Co. v. Georgia Public Service Corporation, (1919) 248 U. S. 372, 63 L. Ed. 309, 39 S. C. R. 117; Producer's Transportation Co. v. R. R. Commission, (1920) 251 U. S. 228, 64 L. Ed. 239, 40 S. C. R. 131.

[25] 3 Dillon, Municipal Corporations 2225-6.

[26] Ibid, p. 2226, note.

[27] Los Angeles v. Los Angeles City Water Co., (1899) 177 U. S. 558, 44 L. Ed. 886, 20 S. C. R. 736; Cleveland v. Cleveland City Ry. Co., (1903) 194 U. S. 517, 48 L. Ed. 1102, 24 S. C. R. 756; Vicksburg v. Vicksburg Water Works Co., (1906) 206 U. S. 496, 51 L. Ed. 1155, 27 S. C. R. 762. See also an extensive note in L. R. A. 1915C 261 on "Right to Reduce Rates of Public Service Corporations Fixed by Franchise or Charter." See also 12 R. C. L. 180.

pension of this power will not be acknowledged unless the power and intention to suspend are clearly shown.[28] Only where the contract is properly made, is clearly expressed, and is not ultra vires, will it be upheld against the rate-making activities of the state or its agencies. Where it complies with these conditions it will be upheld, and the public service commission must, during the term of the agreement, be held powerless to alter the rates to the detriment of the utility. Thus the public service company may under certain contracts be exempt from the rate-making activity of the state commission.

But no such exemption is recognized in the case of the municipality. It is obvious that in the making of such a contract the city is acting in its governmental character since it could not in its private capacity suspend the operation of the rate-making power. But agreements made by the municipal corporation in its public capacity are subject to the will of the state, whose agent the city is. Those who would give the municipality a contract right in rates fixed by agreement are thus confronted with this dilemma: If the agreement was made by the city in its private character, the police power has not been suspended, and subsequent regulation is not an impairment of contract. On the other hand, if the agreement was made by the city in its governmental character so as to suspend the operation of the power in behalf of the utility, the city holds its rights as agent of the state which may if it desires give up the rights so gained. In such a case where the public service commission grants an increase of rates, that may be taken as indicating an intent on the part of the state to forego whatever rate privileges it may have gained through its agent, the city.[29]

It is true that the same franchise agreement may contain both public and private provisions, some made by the city in one capacity, some in the other. But it is hard to conceive of the municipal corporation as having dealt in both capacities with a single matter, such as that of rates. It is difficult to see how it could in its governmental character make with itself in its proprietary character an irrevocable contract as to rates. The presumption against the suspension of the rate-making power is so strong that it can be

[28]Home Telephone and Telegraph Co. v. Los Angeles, (1908) 211 U. S. 265, 53 L. Ed. 176, 29 S. C. R. 50; Milwaukee Electric, etc., Co. v. Railroad Comm., (1914) 238 U. S. 174, 59 L. Ed. 1254, 35 S. C. R. 820.

[29]See note on "Power of Public Utility Commissions to Alter Rates of Public Service Corporations Fixed by Contract Between the Municipality and the Public Service Corporation" in 4 MINNESOTA LAW REVIEW 526.

overcome only by showing a clear power and intent to suspend. The doubt surrounding the city's power and intent to grant itself an irrevocable rate contract in its private capacity is such that it would seem that the presumption has not been overcome. In such cases the city can have no valid objection to subsequent rate regulation by the public service commission. Thus though the municipality may have contract rights protected by the federal constitution, an agreement for certain rates for a specified period is not to be included among such rights.

When we turn from the problem of rates to the broader questions of regulation we may find many privileges of city and public utility that are entitled to constitutional protection. The nature of the city's rights has been indicated in the extract quoted from the opinion in *Chicago v. O'Connell.*[20] The company likewise may have been granted many private privileges. Such contract rights are held free from an unwarranted exercise of power by the state, but are of course subject to a proper use of the state's police power, with the exception noted above. It is well established that the exercise of the power must be at all times reasonable.[21]

Conclusion

In conclusion, we may summarize the points considered in this paper. The rapid rise of public utilities, and the public's dependence on them, made some sort of control necessary. Many different methods were suggested, and several were tried. The failure of political control, and the inability of the courts to remedy the evils of such control, led in many cases to municipal ownership of public utilities. The commission control idea was also brought forward and tried in both local and state commissions. It appeared that exclusive state control was more desirable than exclusive local control, and the state commission for the control of public utilities found rapidly increasing favor. It is possible that a division of powers between state and city is more desirable than the exclusive control of either, and a suggested division of powers has accordingly been presented.

Connected with these problems of policy are legal questions of great interest, especially constitutional questions in respect to the relations of city and state where the utilities are municipally owned. While it appears that the city in its governmental capacity is entitled to no protection against the state, it appears from a study of

[20] p. 143, supra.
[21] 3 Dillon, Municipal Corporations 2062; 6 R. C. L. 236.

the cases that in its proprietory capacity the city is entitled to constitutional protection against the state approaching that extended to a private person engaged in a similar undertaking. This seems to be supported by the weight of authority, though the law cannot be regarded as definitely settled on this point. If protection is given the city in its proprietary undertakings, its rights in such enterprises must be respected by the state commission in the same manner as that body would respect the rights of a private person engaged in similar undertakings.

We noticed that franchises are derived from the state, whatever may be the agency employed in granting them, and that in the granting of pure franchise privileges the city acts in a governmental capacity. It cannot get any vested rights in the powers which it has used in this character. However, the franchise agreement may contain many items not governmental in their nature, and as to them the city and company may get private rights. Privileges of this nature, while protected against abuse of power, are generally held to be subject, as other rights are, to the police power of the state. The fixing of rates is considered an exercise of the police power and may generally be exercised by the commission, notwithstanding previous rate-fixing agreements. An exception to this has been noted. Where the city plainly has been given the power to make an irrevocable contract for rates for a term of years, and has made a contract in which it is clearly evident that the city intends to suspend the rate-making power for a term of years, that contract will be upheld during its term against the rate-making power of the state.

Granting to the city a full measure of protection in its proprietary capacity, the powers of the commission are still almost as great as before. The majority of the city's powers are held in a governmental capacity and we have seen that as to those the power of the state is at all times supreme. The remaining rights of the municipality are in large measure subordinate to the police power, so that the commission may regulate in such matters as rates and service. The city as owner of a business affected with a public use can have no greater rights than a private person, and we have noted that it may have less through the power of the state to deprive it of its existence and thus of its capacity to hold property. Consequently, while the question of rights is of great importance in particular cases, in general it will not affect in any great degree the powers of the state commission in the control of public utilities.

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LOGS AND LOGGING—ABANDONMENT—SALVAGING SUNKEN LOGS.—Recently the city council of Minneapolis considered the feasibility of expending funds for the salvage of the millions of feet of logs which carpet the bed of the Mississippi River in the vicinity of that city.[1] It has been suggested that such an enterprise would be highly impracticable in that it is illegal under the law of Minnesota for anyone other than the original owner, his heirs or assigns, to take possession of such logs. The result, it is said, would be civil liability for twice the value of the logs and criminal indictment for larceny.[2] Is this the Minnesota law?

[1]"Law Declared Barrier Between City and River's Sunken Wealth." Minneapolis Tribune, Sunday, Nov. 13, 1921.
[2]Minn. G. S. 1913, sec. 5475.

The small number of logs that are unmarked or marked with unrecorded marks are declared abandoned property by statute[3] and need not be further considered. Practically all of the logs in question are marked in compliance with statutory provisions[4] which are such that the logs may be treated as chattels capable of identification. To consider the marked logs as lost property will afford no solution of the question of salvaging them in view of the statute[5] making it larceny to appropriate lost property when it is possible to find the true owner. The possibility of identification, however, in no way precludes the application of the doctrine of abandonment of property. To prove that the logs in question are abandoned property, it is essential to maintain first, that the logs are abandoned property according to the rules of the common law and second, that the application of the common law doctrine of abandonment of property is not limited by General Statutes Minnesota 1913, sec. 5475.

There are but few adjudications on the question of abandonment of chattels but in those few cases a uniform rule has been stated by the courts. Intention to abandon all interest therein accompanied by an actual relinquishment will divest an owner of all property interest in a chattel. The actual relinquishment of possession and control over the goods may be effected either by a positive act or by inaction.[6] The intention to abandon must be an intent to release without reservation of any interest whatever to the party so abandoning and without reservation in favor of any specific person.[7] To this extent the cases are in accord, but the courts disagree as to what evidence is competent to establish the existence of an intention to abandon. The possible weight of authority is that the mere fact of failure to retake into possession is not of itself evidence from which a jury may find intent to abandon,[8] though the contrary view has considerable support.[9] The courts are agreed, however, that

[3]Minn. G. S. 1913, sec. 5474. [4]Minn. G. S. 1913, sec. 5471.
[5]Minn. G. S. 1913, sec. 8879.
[6]Haslem v. Lockwood, (1871) 37 Conn. 500, 9 Am. Rep. 350; St. Louis Dairy Co. v. Northwestern Bottle Co., (Mo. App. 1918) 204 S. W. 281.
[7]See Norman v. Corbley, (1905) 32 Mont. 195, 79 Pac. 1059.
[8]Whitman v. Muskegon Log Lifting & Operating Co., (1908) 152 Mich. 645, 116 N. W. 614, 20 L. R. A. (N.S.) 984; Log Owners' Booming Co. v. Hubbell, (1903) 135 Mich. 65, 97 N. W. 157, 4 L. R. A. (N.S.) 573; Alamosa Creek C. Co. v. Nelson, (1908) 42 Colo. 140, 93 Pac. 1112; Ray Coal Mining Co. v. Ross, (1915) 169 Ia. 210, 151 N. W. 63; Faw v. Whittington, (1875) 72 N. C. 321.
[9]Eads et al. v. Brazelton, (1861) 22 Ark. 499, 79 Am. Dec. 88; Creevy v. Breedlove, (1857) 12 La. Ann. 745; Bel Lumber Co. v .Stout, (1914) 134

in the presence of some direct evidence of abandonment the fact of failure to retake possession, or nonuser in the case of contract rights, is evidence which the jury may consider in determining the existence of an intent to abandon.[10] The value of the property to the particular individual at the time of the alleged abandonment is considered competent evidence on the question of intent to abandon.[11] As in the case of evidence of failure to retake possession and nonuser, a distinction has been asserted requiring the presence of evidence directly tending to prove abandonment before a jury shall be permitted to consider the element of value.[12] Both of these limitations indicate recognition by the courts of what has been expressed to be "a strong natural presumption that the owner of property or rights intends to preserve them, because this is the customary purpose of such owners, the burden of proof being on him who alleges abandonment."[13] In theory personal property of any value may be abandoned. Statements of several courts, however, would apparently limit the doctrine of abandonment to property of negligible value to the owner at the time of abandonment.[14] Schouler has said:

"To say that a thing of much intrinsic worth was designedly abandoned would rarely be less than a violent assumption."[15]

It would seem that in all cases the element of value would be given its logical weight as evidence of motive for the intention to abandon and should not be considered as an arbitrary limitation as to what property should be subject to the doctrine of abandonment.

La. 987, 64 So. 881; Harkey v. Powell, (1820) 8 N. C. 17, abandonment of an equity of redemption under a chattel mortgage; but see Faw v. Whittington, (1875) 72 N. C. 321, granting that an equitable right to specific performance of a contract is abandonable, it is held that mere lapse of time will not amount to waiver or abandonment.

[10]Log Owners' Booming Co. v. Hubbell, (1903) 135 Mich. 65, 97 N. W. 157, 4 L. R. A. (N.S.) 573, logs were not sunken but on an old rollway; Alamosa Creek C. Co. v. Nelson, (1908) 42 Colo. 140, 93 Pac. 1112, abandonment by nonuser and other acts; Ray Coal Mining Co. v. Ross, (1915) 169 Ia. 210, 151 N. W. 63, abandonment of a contract right.

[11]Kee & Chapell Dairy Co. v. Pennsylvania Co., (1919) 214 Ill. App. 1, aff'd 291 Ill. 248, 126 N. E. 179; see also Haslem v. Lockwood, (1871) 37 Conn. 500.

[12]Smith v. Glover, (1892) 50 Minn. 58, 52 N. W. 210, 912.

[13]Wilson v. Colorado Mining Co., (1915) 227 Fed. 721, 725, 142 C. C. A. 245.

[14]Kee & Chapell Dairy Co. v. Pennsylvania Co., (1919) 214 Ill. App. 1, 6, aff'd 291 Ill. 248, 126 N. E. 179, speaking of milk bottles salvaged from the city dump, "the bottles were too valuable to permit their abandonment."

[15]2 Schouler, Personal Property, 3d Ed., sec. 8, p. 8.

Notwithstanding the limitations placed on the admissibility of evidence of value and failure to reclaim, such evidence probably would be admissible in the problem presented in Minnesota for there is present direct evidence of abandonment, or such evidence of abandonment as has been considered sufficient to justify the reception of evidence of failure to reclaim and value. *Log Owners' Booming Co. v. Hubbell*[16] holds that the fact that an act of removal has not been exercised, of itself, is not evidence of abandonment. The court further states that "if it be true that the owners had run other logs past them for years"—"if the parties had abandoned logging operations on the river"—it would not be an unreasonable inference that they were abandoned. Not only do these conditions exist in Minnesota but a large portion of the logging companies have gone entirely out of the business and in many districts, as in the case of the Mississippi River at Minneapolis, there is not a single logging company in operation. The original owners of the logs have disposed of all the equipment they once possessed which would be indispensable to the collection of sunken logs. Since this evidence justifies in addition a consideration by the jury of the elements of value and failure to retake possession, is it not reasonable to suppose that a jury would find that an intention to abandon existed?

The common law doctrine of abandonment of property is not limited expressly by section 5475.[17] Nor is the doctrine of abandonment inconsistent with the terms of the statute, nor with the protection sought to be afforded by such statute.

Economic reasons are apparent that prompt the salvage of this valuable remnant of the lumbering industry. In the absence of express adjudications in Minnesota on the legality of the salvaging of sunken logs and in view of the fact that salvaging operations might cause friction in communities where the lumbering industry still thrives, it is reasonable to suppose that capital will not be freely invested in this venture. If the repeal of section 5475 would tend

[16](1903) 135 Mich. 65, 97, N. W. 157. See Smith v. Glover, (1892) 50 Minn. 58, 72, 52 N. W. 210, 912, for the view of the Minnesota court.

[17]"Whoever shall wilfully take, carry away, or otherwise convert, without the consent of the owner, any log, pile, cant, or other timber, not his own, from the waters of any lumber district, or from any land upon which the same has been floated or cast by such waters, and whoever shall cut out or otherwise affect the marks . . . shall be guilty of larcency, and shall also be liable to the owner for twice the value of such timber, in a civil action therefor, etc."

to induce prompt action, is not that step desirable? The statute was passed to protect a vast industry that was of necessity carried on in uninhabited regions affording but meager protection from thieves, but this reason has ceased to exist. Affirmative and permissive legislation may be necessary to insure extensive results but it would seem that the economic value of this resource justifies such action.

ENFORCEMENT OF FOREIGN RECORDED CHATTEL MORTGAGE.—The question as to what effect the court of the forum shall give to a foreign mortgage properly executed and duly recorded in a foreign jurisdiction, when the mortgaged property is removed by the mortgagor from the latter jurisdiction and sold in the former, is a matter not infrequently coming before our courts. The weight of authority, in the absence of statute, is that when personal property is properly mortgaged and the mortgage duly recorded in the jurisdiction where the property is situated, such mortgage will be recognized and enforced, by virtue of comity, in another jurisdiction to which the mortgagor has subsequently removed the property, even though the rights of purchasers for value without actual notice are thereby superseded.[1] By "comity" is meant the extension of constructive notice of a recorded mortgage in the foreign jurisdiction into the jurisdiction of the forum. The courts which deny the foregoing doctrine are few,[2] the Texas court in a recent decision throwing its weight with the minority.[3]

Regardless of whether a mortgage is treated as creating merely a lien on, or a transfer of, the mortgaged property, the rights of the mortgagee should be protected. If a chattel mortgage creates merely a lien right, such lien right, being based on and created by

[1] 11 C. J. 424; 5 R. C. L. 399; 6 Cyc. 1089; Minor, Conflict of Laws, sec. 132, p. 307; 25 Harvard Law Review 83; 4 Michigan Law Review 358; 54 Central Law Journal 443, 446; Hoyt v. Zibell, (1919) 259 Fed. 186; Keenan v. Stimson, (1884) 32 Minn. 377, 20 N. W. 364; Langworthy v. Little, (1853) 12 Cush. (Mass.) 109; Sims v. McKee & Stimson, (1868) 25 Ia. 341; Wilson v. Rustad, (1898) 7 N. D. 330, 75 N. W. 260. See notes, L. R. A. 1917D 942; 64 L. R. A. 356; 35 L. R. A. (N.S) 386; Ann. Cas. 1914B 1252.

[2] Allison v. Teeters, (1913) 175 Mich. 212, 142 N. W. 340; Bank v. Carr, (1900) 15 Pa. Super. Ct. 346; Delop & Co. v. Windsor & Randolph, (1874) 26 La. Ann. 185; 2 Southern Law Quarterly 146.

[3] Farmer v. Evans, (Tex. 1921) 233 S. W. 101. In this case the mortgaged property was removed by the mortgagor without the knowledge or consent of the mortgagee, but the court refused to recognize the priority of the mortgagee's rights. The decision, however, is based on Texas statutes requiring the recording of a foreign mortgage.

contract, should be recognized by other jurisdictions and the mortgagee given priority over purchasers for value without actual notice.

"It has always been the policy of the courts to give force and effect to a contract made in another state if the contract could be upheld under the law of such state; and rights once acquired under a contract will not be forfeited simply because the subject of the contract is by one of the parties moved into a foreign jurisdiction. The right remains the same regardless of the law of the state to which the subject of the contract is removed."[4]

If the mortgage operates as a transfer of property, then although the mortgagor retains possession, the mortgagee should nevertheless be protected on the ground that he cannot be deprived of his property without his consent. The mere possession of the mortgagor will not estop the mortgagee. If a mortgagor, contrary to his agreement, removes the mortgaged property into another state, does he not thereby become a converter? When he disposes of the mortgaged property, he is certainly a converter.[5] A general discussion of the cases in which a man may be held to have conveyed title to another when he himself does not have that title will be found in the present number of the Review.[6]

The equity in favor of a purchaser for value of the mortgaged property without actual notice of the mortgage is certainly strong. In a Michigan case it was said that it would be unreasonable to require a citizen of Michigan to take notice of the files and records of Nebraska, such notices having no extraterritorial effect.[7] In answer to this it has been said that it is no greater hardship to require purchasers to examine the records of another state or buy at their peril than to examine the records of a sister county,[8] which in the absence of statute are good throughout the state.[9]

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[4] Greenville National Bank v. Evans-Snyder-Buel Co., (1900) 9 Okl. 353, 363, 60 Pac. 249; Jones, Chattel Mortgages, 4th Ed., sec. 299, p. 330.

[5] Miller v. Allen, (1871) 10 R. I. 49; Bowers, Law of Conversion, sec. 123, p. 98; Jones, Chattel Mortgages, 4th Ed., sec. 460, p. 524. And in Massachusetts and North Carolina criminal prosecution under statutes has taken place for selling mortgaged property. Commonwealth v. Damon, (1890) 105 Mass. 580; State v. Ellington, (1887) 98 N. C. 749, 4 S. E. 534; see I Bishop, New Criminal Law, 8th Ed., sec. 572 a-2, p. 353.

[6] Article by Professor Ballantine, Purchase for Value and Estoppel, ante p. 87.

[7] Corbett v. Littlefield, (1890) 84 Mich. 30, 47 N. W. 581, 11 L. R. A. 95, 22 A. S. R. 681.

[8] 4 Mich. L. Rev. 358, 369.

[9] 6 Cyc. 1088; Jones, Chattel Mortgages, 4th Ed., sec. 260, p. 302.

A number of states make a distinction as to whether the mortgaged property is removed with or without the mortgagee's knowledge and consent. If removed with his consent, then the mortgagee forfeits his rights of priority.[10] If he has taken such steps as are required for his protection by the law of the state to which the property has been removed the mortgagee is, of course, protected.[11] If a mortgagee is willing, according to this view, to place his security in a situation where it may mislead citizens in the state to which the property has been removed, he should not be heard to complain. In such cases, the mortgagee negligently has placed it within the power of the mortgagor to deceive and defraud purchasers in the state to which the property has been removed, and he will be estopped. There is much to commend in the foregoing view and there is a tendency of recent authority to follow it.[12]

In view of the very mobile character of certain kinds of property, such as automobiles and stock, and in view of the ease and rapidity with which property may be transported over modern good roads, it may be argued that in the interest of free and unhampered trade, foreign mortgages should not be recognized. But it is an easy and comparatively inexpensive matter to inquire as to incumbrances against property, even in another state. No one is under the necessity of buying from a stranger, and in many instances there is some suspicious circumstance, like a "good bargain," to put the purchaser on his guard.

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[10] Pennington Co. Bank v. Bauman, (1910) 87 Neb. 25, 126 N. W. 654; see also Farmers, etc., Bank v. Sutherlin, (1913) 93 Neb. 707, 141 N. W. 827, 46 L. R. A. (N.S.) 95, Ann. Cas. 1914B 1250; Jones v. North Pac. Fish, etc., Co., (1906) 42 Wash. 332, 84 Pac. 1122, 6 L. R. A. (N.S.) 940, 114 A. S. R. 131; see also Green v. Bentley, (1903) 114 Fed. 112.

[11] In Alabama and Georgia, it is required that a foreign mortgage be recorded within a certain specified time. Johnson v. Hughes, (1889) 89 Ala. 588, 8 So. 147; Armitage-Herschell Co. v. Muscogee Real Estate Co., (1903) 119 Ga. 552, 46 S. E. 634. But a foreign chattel mortgage to be effective in the state of the forum must be recorded in the foreign state before the property is removed to the forum, otherwise the property goes to the state of the forum free of any lien as to creditors, and subsequent filing will create no lien upon it in the forum. Yund v. First National Bank, (1905) 14 Wyo. 81, 82 Pac. 6; Smith v. Consolidated Wagon, etc., Co., (1917) 30 Idaho 148, 163 Pac. 609; Sublett v. Hurst, (Tex. Civ. App. 1914) 164 S. W. 448.

[12] Moore v. Keystone Driller Co., (1917) 30 Idaho 220, 163 Pac. 1114. And Tennessee, in receding from a former position refusing priority to foreign mortgages, limited the enforcement of foreign mortgages against purchasers for value without actual notice to those cases where the mortgage property was removed without knowledge or consent of the mortgagee. Newsum v. Hoffman, (1911) 124 Tenn. 369, 137 S. W. 490.

RECENT CASES

BILLS AND NOTES—UNIFORM NEGOTIABLE INSTRUMENTS LAW—PAYEE AS HOLDER IN DUE COURSE.—Defendant gave a promissory note to a corporation for the purchase of stock, naming as payee of the note the plaintiff, from whom the corporation expected to buy certain property. Plaintiff received the note from the corporation in good faith, for value, and before maturity. Plaintiff sued the defendant, who set up the fraud of the corporation in the sale of stock. *Held*, that the payee cannot be a holder in due course because the instrument was not "negotiated" to him, and that therefore the plaintiff cannot recover. *Britton Milling Co. v. Williams*, (S. D. 1921) 184 N. W. 265.

Prior to the Negotiable Instruments Law the rule was well settled that a payee might be a holder in due course. 8 C. J. 468. But since its general adoption, there is much conflict on the question. The following decisions reach the same conclusion as the instant case, under the N. I. L.: *Vander Ploeg v. Van Zuuk*, (1907) 135 Ia. 350, 112 N. W. 807, 124 A. S. R. 275, 13 L. R. A. (N.S.) 490, and note; *Southern Nat. Life Realty Corp. v. Bank*, (1917) 178 Ky. 80, 198 S. W. 543; *St. Charles Sav. Bank v. Edwards*, (1912) 243 Mo. 553, 147 S. W. 978; *Gresham Bank v. Walch*, (1915) 76 Ore. 272, 147 Pac. 534; *Bowles Co. v. Clark*, (1910) 59 Wash. 336, 109 Pac. 812, 31 L. R. A. (N.S.) 613; *Herdman v. Wheeler*, L. R. [1902] 1 K. B. 361, 71 L. J. K. B. N. S. 270, 50 Week. Rep. 300, 86 L. T. N. S. 48, 18 T. L. R. 190, 5 B. R. C. 651, and note 702, 712, qualified and practically overruled by *Lloyd's Bank v. Cooke*, L. R. [1907] 1 K. B. 794, 76 L. J. K. B. N. S. 666, 96 L. T. N. S. 715, 23 T. L. R. 429, 8 Ann. Cas. 182, 5 B. R. C. 666, and note 702, 712. The following decisions, however, hold, under the N. I. L., that a payee of a negotiable note may be a holder in due course: *Boston Steel & Iron Co. v. Steuer*, (1903) 183 Mass. 140, 66 N. E. 646, 97 A. S. R. 426; *Liberty Trust Co. v. Tilton*, (1914) 217 Mass. 462, 105 N. E. 605, L. R. A. 1915B 114; *Brown v. Rowan*, (1915) 154 N. Y. S. 1098, 91 Misc. 220; *Johnson v. Knipe*, (1918) 260 Pa. 504, 105 Atl. 705; *Merchants Nat. Bank v. Smith*, (1921) 59 Mont. 280, 196 Pac. 523; *Redfield v. Wells*, (1918) 31 Idaho 415, 173 Pac. 640; *Ex parte Goldberg & Lewis*, (1914) 191 Ala. 356, 67 So. 839; 8 C. J. 468. Section 30 of the act provides that "an instrument is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by indorsement of the holder completed by delivery." The enumeration of the methods of negotiation in the last sentence was held to be exclusive by the instant case. The leading Iowa decision of *Vander Ploeg v. Van Zuuk*, (1907) 135 Ia. 350, 112 N. W. 807, 13 L. R. A. (N.S.) 490, 124 A. S. R. 275, was followed without discussion. The Iowa court conceded that the result reached, i. e., that the payee could not be a holder in due course, was unfortunate and even dangerous. The above section says that an instrument is negotiated when it is "transferred from one *person* to another." The court construed this language to mean from one *holder* to another. This admittedly unfortunate result has

been avoided in Massachusetts, New York, Pennsylvania, Alabama, Idaho, and Montana, by holding that the comprehensive terms of the first sentence of section 30 were not restricted by the enumeration in the second which merely described one method of transfer from one holder to another. The instant case followed the general rule as laid down by the Iowa Court, but overlooked an exception there made of a case on all fours with the instant case. The question has not been decided in Minnesota.

CARRIERS—LIMITATION OF LIABILITY—AGREED VALUATION—ESTOPPEL.—Plaintiff sues for full value of a shipment of goods, lost by the negligence of the carrier, where the agreed valuation was a much smaller sum. Only one rate was filed with the Interstate Commerce Commission for this commodity. *Held*, that the carrier is not permitted to limit its liability for loss occasioned by its negligence where only one rate is offered the shipper, so that he has no choice which can be made the basis of estoppel. *Union Pac. Ry. Co. v. Burke*, (1921) 41 S. C. R. 283.

By the great weight of authority a carrier may not limit its liability for negligence. *Boston, etc., Ry. v. Piper*, (1918) 246 U. S. 439, 38 S. C. R. 354, 62 L. Ed. 820, Ann. Cas. 1918E 469; *Porteous v. Adams Exp. Co.*, (1910) 112 Minn. 31, 127 N. W. 429. But where more than one rate is offered and an agreed valuation made of the goods shipped, the carrier may fix the maximum recovery of the shipper in case of loss, even though such loss is occasioned by negligence. *Hart v. Penn. Ry.*, (1884) 112 U. S. 331, 5 S. C. R. 151, 28 L. Ed. 717. And it has even been permitted to limit liability for gross negligence. *Donlon Brothers v. So. Pac. Co.*, (1907) 151 Cal. 763, 91 Pac. 603. Minnesota has upheld such agreements only provided they were fairly entered into, just and reasonable, and a bona fide attempt made to ascertain the value of the shipment. *Alair v. Nor. Pac. R. Co.*, (1893) 53 Minn. 160, 54 N. W. 1072, 19 L. R. A. 764, 39 A. S. R. 588, and such questions were for the jury to determine in each individual case. *O'Connor v. G. N. Ry. Co.*, (1912) 118 Minn. 223, 136 N. W. 743, 120 Minn. 359, 139 N. W. 618, but this case was reversed in *G. N. Ry. Co. v. O'Connor*, (1914) 232 U. S. 508, 34 S. C. R. 380, 58 L. Ed. 703, in which it is held that the carrier, in the absence of rebating or false billing, is as a matter of law liable only for what the shipper declared them to be in class and value, and no effort need be made to ascertain the true value of the shipment. That the value is grossly disproportionate is not material. *Pierce v. Wells Fargo Co.*, (1914) 236 U. S. 278, 35 S. C. R. 351, 59 L. Ed. 576 (actual value: $15,000—agreed value based on rate: $50). It should be pointed out, however, as held in the principal case, that while the opportunity to exercise an option must be given the shipper, an alternative contract need not actually be presented to him for choice, as the rates are on file and he is presumed to know them. *Christl v. Mo., etc., R. Co.*, (1914) 92 Kan. 585, 141 Pac. 580; see also, *Kan. City So. R. Co. v. Carl*, (1914) 227 U. S. 639, 652, 33 S. C. R. 391, 57 L. Ed. 683. The principal case illustrates that contracts of agreed valuation will be valid only when two or more rates are available for the commodity shipped. For example, the current rate for household goods from St. Paul to Chicago,

as found in the *Consolidated Freight Classification,* is $1.02 cwt., if released at not to exceed $10 cwt.; $1.27 cwt., if valued not to exceed $20 cwt.; and $1.53 cwt. for full value. The agreement will not prevent full recovery, however, upon failure of the carrier to stop in transitu if it has agreed to do so, *Rosenthal v. Weir,* (1902) 170 N. Y. 148, 63 N. E. 65, or upon deviation. *Atl. Coast L. R. Co v. Hinely,* (Fla. 1921) 60 So. 749. It has been argued that the estoppel theory is fallacious. 21 Harvard L. Rev. 32, 38. And Minnesota seems to base its decisions on contract. *O'Connor v. G. N. Ry. Co.,* (1912) 118 Minn. 223, 136 N. W. 743. The doctrine of estoppel, however, is firmly established in the federal courts as the foundation of these cases. *Kan. City So. R. Co. v. Carl,* (1912) 227 U. S. 639, 33 S. C. R. 391, 57 L. Ed. 683. Since the validity of contracts limiting liability, in so far as interstate carriage is concerned, is governed exclusively by the Interstate Commerce Act, Carmack Amend., U. S. Comp. Stat. 1918, sec. 8604a, state decisions are not controlling; but it should be noted that while *O'Connor v. G. N. Ry. Co.,* (1914) 118 Minn. 223, 120 Minn. 359, has been overruled as to interstate shipments, the court might still apply the rule of that case to shipments purely intrastate.

CHATTEL MORTGAGES—ENFORCEMENT IN FOREIGN JURISDICTION.—Plaintiff mortgagee recorded his chattel mortgage in Oklahoma. The mortgagor took part of the stock covered by the mortgage into Texas and sold it to defendant, a bona fide purchaser, without the knowledge or consent of plaintiff. *Held,* plaintiff mortgagee can not enforce his mortgage against an innocent purchaser in Texas. *Farmer v. Evans,* (Tex. 1921) 233 S. W. 101.

For a discussion of the principles here involved see NOTES, p. 153.

CONSTITUTIONAL LAW—RECALL OF SUPREME COURT DECISIONS ON CONSTITUTIONAL QUESTIONS.—Defendant, charged with violation of the "Anti-Coercion Act," demurred on the ground that the act was unconstitutional. The state objected on the ground that the consideration of such a question by the trial court was precluded by section 1, art. 6 of the state constitution (reprinted in Laws of Col. 1913, p. 678) which provides that "none of said courts, except the supreme court, shall have any power to declare or adjudicate any law of this state or any city charter or amendment thereto adopted by the people . . . in violation of the constitution of this state or of the United States. . . . If it [the decision] concerns a state law, it shall not be binding until sixty days after such date [after it has been filed in the office of the clerk of the supreme court]. Within sixty days a referendum petition, signed by not less than five per cent. of the qualified voters, may request that such law be submitted to the people of this state for adoption or rejection at an election to be held in compliance herewith." The trial court overruled the state's objection. *Held,* that the ruling of the trial court was correct because the section of the constitution providing for determination of constitutional questions solely in the supreme court, and vesting the people with the right to recall

supreme court decisions is a violation of the Fourteenth Amendment of the federal constitution. *People v. Western Union Tel. Co.*, (Col. 1921) 198 Pac. 146.

The court in the instant case points out that if the people by popular vote can sustain a state statute after it has been held violative of the federal constitution, the guaranties of the federal constitution are completely nullified. And in the companion case of *People v. Max*, (Col. 1921) 198 Pac. 150, the court held that the recall amendment, in so far as it provided for the recall of decisions on statutes held violative of the state constitution only, must fall with the rest of the indivisible portions, and for the further reason that it deprived a litigant of due process of law in not providing any tribunal in which the defense of unconstitutionality can conveniently be raised.

CONSTITUTIONAL LAW—KANSAS INDUSTRIAL COURT—POLICE POWER—BUSINESS OF MANUFACTURING FOOD PRODUCTS AFFECTED WITH A PUBLIC INTEREST.—An action of mandamus was brought by the Kansas court of industrial relations in the supreme court of Kansas to compel the defendant to put in effect a scale of wages and to establish hours of labor as ordered by the industrial court. *Held*, (1) that mandamus in the supreme court was a proper remedy to compel obedience to the order; (2) that an order of the industrial court does not require the approval of the supreme court before becoming effective and binding; (3) that a sufficient emergency existed to invoke the power of the industrial court; (4) that the wages of the employees engaged in the kinds of business named in the act are affected with a public interest and subject to the regulation of the industrial court; (5) that the act does not deprive the employer of due process of law, the equal protection of the laws, nor of freedom of contract; and (6) that the legislature had power to enact the law and make it apply to the classes of business named therein, without including any other class. *Court of Industrial Relations v. Wolff Packing Co.*, (Kan. 1921) 201 Pac. 418.

Thus the Kansas law governing (1) the manufacture or preparation of food products, (2) the manufacturing of clothing and wearing apparel, (3) the mining and production of fuel, (4) the transportation of food products, clothing, and coal, and (5) public utilities, has withstood another vigorous attack, this time from the side of the employer, and has become an extremely effective instrument. Assaults, from the side of labor, on certain features of the act already have been successfully repulsed. *State v. Howat*, (Kan. 1921) 198 Pac. 686, discussed in 6 MINNESOTA LAW REVIEW 69.

CONTRACTS—CONSIDERATION—FORBEARANCE TO SUE ON INVALID CLAIM.—Plaintiff had a judgment against defendant and was about to have execution levied upon defendant's property and advertise it for sale. To prevent this, defendant promised to pay the amount of the judgment. Plaintiff sues on the promise. *Held*, conceding plaintiff's original judgment to be

void, at the time of the agreement he had a legal right to levy execution and to advertise the property for sale, the forbearance of which constitutes good consideration. *Henderson v. Kendrick,* (Fla. 1921) 89 So. 635.

The decision raises the question, whether or not forbearance to sue on a void claim is good consideration to support a promise. See 10 Harvard L. Rev. 113. The early English rule was that forbearance to sue on a claim which had no foundation in law or fact was no consideration, on the ground that it was an attempt to give up that which the party did not have. There was no detriment to the promisee. *Barnard v. Simon,* (1668) 1 Rolle Abr. 26, pl. 36; see 12 Harvard L. Rev. 515, 517. Early American cases were in accord. *Palfrey v. Portland, etc., R. Co.,* (1862) 4 Allen (Mass.) 55. This strict rule, however, has since been abandoned, and now, by the weight of authority both in England and in the United States, if there is a bona fide belief on the promisee's part that he has a claim and reasonable grounds for this belief, it will be a sufficient consideration. *Callisher v. Bischoffsheim,* (1870) L. R. 5 Q. B. 449, 452; *Daly v. Busk Tunnel R. Co.,* (1904) 129 Fed. 513, 64 C. C. A. 87. Minnesota adopted this view, *Perkins v. Trinka,* (1883) 30 Minn. 241 (claim under tax deed void on its face); *Neibles v. Minneapolis, etc., R. Co.,* (1887) 37 Minn. 151, 33 N. W. 332, and has recently reaffirmed it, *Kies v. Searles,* (1920) 146 Minn. 359, 178 N. W. 811. But, while the fundamentals of the rule are generally accepted, there are points of difference on which the authorities are divided. Well settled rules are: (1) that the claim need not be a valid one, for no claim is certain to be valid until litigated, *Sears v. Grand Lodge A. O. U. W.,* (1900) 163 N. Y. 374, 57 N. E. 618, 50 L. R. A. 204; (2) that the claim must not be based on illegal grounds, such as a gambling debt, *Union Collection Co. v. Buckman,* (1907) 150 Cal. 159, 88 Pac. 708, 119 A. S. R. 164, 11 Ann. Cas. 609, 9 L. R. A. (N.S.) 568; (3) that the promisee must believe in its validity, *Gering v. Sch. Dist.,* (1906) 76 Neb. 219, 107 N. W. 250; (4) that it is immaterial that the promisor has a defense to the claim, *Cantonwine v. Bosch Bros.,* (1910) 148 Ia. 496, 127 N. W. 657. Questions on which the courts take issue are in some cases purely technical, but for the most part important. (1) Some courts distinguish between a "doubtful" claim, which gives good consideration, and a "disputed" claim, which is insufficient, *Emmittsburg v. Donoghue,* (1887) 67 Md. 383, 10 Atl. 233, 1 A. S. R. 396. (2) As to the status of a groundless claim, some courts hold it to be valid consideration even if the claim has no foundation whatsoever, as long as the promisee in good faith believes he has grounds, *Blount v. Dillaway,* (1908) 199 Mass. 330, 85 N. E. 477, 17 L. R. A. (N.S.) 1036. Others reject this doctrine, and attempt to determine when a claim is "doubtful" and when it is "baseless," *U. S. Mortg. Co. v. Henderson,* (1886) 111 Ind. 24, 12 N. E. 88. (3) As to the element of good faith in the promisee's belief, it quite commonly is held that it must be the belief of a reasonable man, and not obviously absurd. *Neikirk v. Williams,* (1918) 81 W. Va. 558, 94 S. E. 947, L. R. A. 1918F 665. But a few courts hold it immaterial that a man better versed in the law could have had no belief in the validity of the claim, if the party actually had a bona fide belief, *Heubacher v. Perry,* (1914) 57 Ind. App.

362, 103 N. E. 805. It is definitely settled in Minnesota that the claimant must have had grounds sufficient to justify a good faith belief in the merits of his claim, *Montgomery v. Grenier,* (1912) 117 Minn. 416, 136 N. W. 9, and that to constitute a mere promise to refrain from doing an act a consideration sufficient to support a contract, an advantage must accrue therefrom to the promisee or a loss or disadvantage be sustained by the promisor. *Anderson v. Nystrom,* (1908) 103 Minn. 168, 114 N. W. 742.

COURTS—CONCILIATION AND SMALL DEBTORS' COURT—CONSTITUTIONALITY OF.—Defendant asked review by certiorari of a judgment of $40.85, rendered in the Minneapolis conciliation court (established by Minn. Laws 1917, c. 263), on the ground that the act was unconstitutional. *Held,* (1) that defendant was not entitled to a jury trial in the conciliation court, such trial on removal to the municipal court being sufficient to satisfy the constitution; (2) that the requirement of a removal bond, in order to get a jury trial in municipal court, is an unconstitutional burden on the right to trial by jury; (3) that this unconstitutional feature is separable and does not affect the rest of the statute; and (4) that the provision requiring the removing party to pay $5 as a condition of removal, this being the usual jury fee and clerk's fee in municipal court, does not unduly burden the right to a jury trial, and is constitutional (Brown, C. J. and Dibell, J. dissenting on the last point only). *Flour City Fuel and Transfer Co. v. Young,* (Minn. Dec. 9, 1921).

The result of the case is that the statute creating this court, with conciliation jurisdiction of $500 and small debtors' court jurisdiction of $50, is constitutional with the exception of the removal bond provision. As to this last point the court realized the difficulty involved, being faced especially with the United States Supreme Court decision holding that the requirement of a removal bond to carry a case from justice court, where there was no constitutional right to a jury, to a court affording a jury, did not unduly restrict the right of trial by jury under the federal constitution. *Capital Traction Co. v. Hof,* (1899) 174 U. S. 1, 43, 19 S. C. R. 580, 43 L. Ed. 873. But the court reached its conclusion by following the lead of two early Minnesota cases. *State v. Everett,* (1869) 14 Minn. 439 (G. 330), holding that the requirement of a recognizance with a surety, on appeal from justice court, deprived the defendant of his constitutional right to trial by jury; *Weir v. St. Paul, etc., R. Co.,* (1871) 18 Minn. 155 (G. 139), holding that a removal bond on appeal to the district court from an award of commissioners in condemnation unconstitutionally fettered the right to trial by jury. Several other objections to the conciliation court statute were raised, but dismissed as not properly before the court in this case, although, in passing, the court expressed a doubt as to the validity of the provision that there shall be no appeal from the judgment of the municipal court, citing *County of Brown v. Winona, etc., Land Co.,* (1888) 38 Minn. 397, 39 N. W. 949. The opinion, by Dibell, J., carefully outlines the theory of the statute and its purposes, citing, William R. Vance, A Proposed Court of Conciliation, 1 MINNESOTA LAW REVIEW 107; and, The Minneapolis Court of Conciliation in Operation,

2 MINNESOTA LAW REVIEW 491. The decision in the instant case affects Minn. Laws 1917, c. 263; Minn. Laws 1919, c. 112; Minn. Laws 1921, c. 525 (providing for conciliation courts in Minneapolis, Stillwater, and St. Paul respectively); and Minn. Laws 1921, c. 317 (general provision for conciliation court in all cities having a municipal court).

HIGHWAY—NEGLIGENCE—CIVIL REMEDY FOR INJURY RESULTING FROM IMPROPER MAINTENANCE THEREOF.—Plaintiffs, travelling in an automobile on a public highway, were injured by the falling of a rotten tree growing on the highway. Plaintiffs sue the landowner. *Held*, that the servient fee owner is not liable, and dictum, that under the present state of the law the traveller must bear the risk since the authorities charged with the duty of keeping the road safe act only in a governmental capacity. *Zacharias v. Nesbitt, Cement v. Nesbitt*, (Minn. 1921) 185 N. W. 295.

The authorities are agreed that the servient fee owner of land over which the public has an easement is not liable for injuries resulting from improper condition of the highway not caused by him, because he has no obligation to keep the highway safe. 13 R. C. L. 86, 321; Elliott, Roads and Streets, 2nd Ed., sec. 710; *Gridley v. Bloomington*, (1878) 88 Ill. 554. 30 Am. Rep. 566. Furthermore, the courts hold that towns, townships, or counties, though charged by statute with the duty of highway maintenance, are not liable in a civil action for injuries resulting from a negligent performance of, or a failure to perform such duties unless expressly made so liable by statute, on the ground that the town or county is a quasi-public corporation, and that it is an arm of the state owing duties to the state only. *Altnow v. Sibley*, (1883) 30 Minn. 186, 14 N. W. 877, 44 Am. Rep. 191; *James v. Trustees of Township*, (1907) 18 Okla. 56, 90 Pac. 100, 13 L. R. A. (N.S.) 1219, and note; *Snethen v. Harrison County*, (1915) 172 Ia. 81, 152 N. W. 12; contra, *Rapho, etc., Townships v. Moore*, (1871) 68 Pa. St. 404, 8 Am. Rep. 202. Many states, not wishing to permit a situation where there is an injury resulting from another's wrong to remain unremedied, have by statute expressly imposed upon townships and counties liability for negligence in the maintenance of highways. 13 R. C. L. 308; 37 Cyc. 303; *Lynch v. Town of Rhinebeck*, (1913) 210 N. Y. 101, 103 N. E. 888; *Trebowski v. Town of Ringle*, (1917) 165 Wis. 637, 163 N. W. 165; *Ewh v. Otoe County*, (1915) 98 Neb. 469, 153 N. W. 509; *Miller v. City of Detroit*, (1909) 156 Mich. 630, 121 N. W. 490, where the statute is strictly construed. Minnesota follows authority in distinguishing between towns and municipal corporations, by holding the latter liable in civil actions for negligence on highways without a statute to that effect. *Ackeret v. Minneapolis*, (1915) 129 Minn. 190, 151 N. W. 976. But the court admits that the reasons for the distinction are shadowy. See, *Altnow v. Sibley*, 30 Minn. 186, 14 N. W. 877, 44 Am. Rep. 191. Michigan makes no such distinction. See, *Miller v. City of Detroit*, (1909) 156 Mich. 630, 121 N. W. 490. In Minnesota officers charged with the care of the highway are personally liable to a party injured by misfeasance in the performance of their duties, *Tholkes v. Decock*, (1914) 125 Minn. 507, 147 N. W. 648, 52 L. R. A. (N.S.) 142, where the court expressly left open the question of liability in

case of mere nonfeasance. It seems, therefore, that despite the dictum in the instant case that "we think the risk from falling trees located on rural highways must be assumed by the traveller, since the authorities charged with the duty of maintenance of such road act only in a governmental capacity under the law as it now exists," the plaintiff might perhaps have recovered against the township officers personally for *nonfeasance,* for which recovery is allowed by numerous authorities. See note, 52 L. R. A. (N.S.) 142, 147. But to remove all doubt in such situations as presented by the instant case, the legislature may well enact a statute making the townships and counties liable, as shown in the New York, Wisconsin, Nebraska, and Michigan cases cited above.

INSURANCE—"CHANGE OF POSSESSION" UNDER ALIENATION CLAUSE OF FIRE INSURANCE POLICY—WHAT CONSTITUTES.—Plaintiff sued for loss by fire under a policy which provided that the policy should be void if any change should take place in the interest, title, or possession of the property. Subsequent to the issuance of the policy, the insured entered into a contract of sale of the property, under which the vendee paid a part of the purchase price, and took possession. *Held,* that the provision was not violated; that possession means legal possession; and that the vendee's position was one of "occupancy under a contract," and not of "possession" within the meaning of the policy. *Budelman v. American Insurance Co.,* (Ill. 1921) 130 N. E. 513.

The decision in the instant case is contrary to the weight of authority. It has been held that where no part of the price is paid and the vendor remains in possession, there is no breach of the alienation clause. *Trumbull v. Portage Ins. Co.,* (1843) 12 Ohio St. 305. The rule is the same even though part of the price is paid. *Garner v. Milwaukee Mechanics Ins. Co.,* (1906) 73 Kan. 127, 84 Pac. 717, 4 L. R. A. (N.S.) 654, 117 A. S. R. 460, 9 Ann. Cas. 459; *Zeitler v. Concordia Fire Ins. Co.,* (1912) 169 Mich. 555, 135 N. W. 332; contra, *Manning v. North British and Merc. Ins. Co.,* (1907) 123 Mo. App. 456, 99 S. W. 1095. But where the vendee takes possession the courts are practically unanimous in holding that there has been a breach of condition. *Cardwell v. Virginia State Ins. Co.,* (1916) 198 Ala. 211, 73 So. 466; *Gibb v. Philadelphia Fire Ins. Co.,* (1894) 59 Minn. 267, 61 N. W. 137, 50 A. S. R. 405. But it has been held that even the delivery by the insured of a deed in escrow awaiting the fulfillment of conditions precedent, with the vendee in occupation of the premises, was not such a change of the vendor's interest or possession as to avoid the policy. *Pomeroy v. Aetna Ins. Co.,* (1911) 86 Kan. 214, 120 Pac. 344, 38 L. R. A. (N.S.) 142, Ann. Cas. 1913C 173. The holding of the instant case—that the vendor retains legal possession because he retains legal title, even though the vendee is in actual possession—while not surprising in view of the previous state of the Illinois law, seems unnecessary. A similar distinction, however, between "occupation" and "possession" was made in the Kansas case last quoted. It is well settled that one having legal title has constructive or legal possession only in case the land is not in the actual possession of someone else. *Larkin v. Haralson,* (1914) 189 Ala. 147, 66 So. 459;

Stadelman v. Miner, (1916) 83 Ore. 348, 155 Pac. 708; Tiedeman, Real Property, 3d Ed., sec. 493. The vendee had possession in the instant case. The purpose of the provision, i. e., to guard against increase in moral hazard, would be defeated by interpreting *possession* as meaning anything other than *actual possession* in this instance.

Subsequent to the most recent decision on this point in the Minnesota courts, *Gibb v. Philadelphia Fire Ins. Co.,* (1894) 59 Minn. 267, 61 N. W. 137, 50 A. S. R. 405, the alienation clause in the Minnesota standard policy has been altered so that it now provides only against the property's being *sold.* G. S. Minn. 1913, sec. 3318. A *sale* is the transfer of the *absolute* or *general* property in the thing for a price in money. 23 R. C. L. 1186; Benjamin on Sales, 7th Am. Ed., sec. 1; *Williamson v. Berry,* (1850) 8 How. (U.S.) 495, 544, 12 L. Ed. 1170. In view of this generally accepted definition of a sale, together with the fact that a contract for sale passes only an equitable property, *Abbott v. Molestad,* (1898) 74 Minn. 293, 119 N. W. 651, it seems clear that a mere contract for sale is not a breach of the alienation clause in the present standard policy for Minnesota.

JUSTICES OF PEACE—JURISDICTION—PLEADING—RIGHT OF PLAINTIFF TO GIVE JURISDICTION BY REMITTING PART OF LIQUIDATED CLAIM.—Plaintiff had a liquidated claim, an open account, which exceeded the jurisdiction of the court. He renounced all in excess of the jurisdictional amount. *Held,* plaintiff could not give jurisdiction to the justice court by renouncing all in excess of the statutory amount, without any consideration, when the part renounced was not severable. *Hooper Lumber Co. v. Texas Fixture Co.,* (Tex. 1921) 230 S. W. 141.

The weight of authority is contrary to the instant case. *Carpenter v. Wells,* (1872) 65 Ill. 451 (balance on an account due); *Hunton v. Luce,* (1895) 60 Ark. 146, 29 S. W. 151, 28 L. R. A. 221, and note (promissory note); *Barber v. Kennedy,* (1872) 18 Minn. 216 (G. 196) (open account); *Stewart v. Thompson & Co.,* (1890) 85 Ga. 829, 11 S. E. 1030 (promissory note); *Mcfarland v. O'Neil,* (1893) 155 Pa. 260, 25 Atl. 756; 16 R. C. L. 359; 24 Cyc. 474. In some states early decisions denying all power on the part of the plaintiff to effect jurisdiction by remission or voluntary credits have been overruled, or changed by statute. See *Raymond v. Strobel,* (1860) 24 Ill. 114; *Catawba Mills v. Hood,* (1894) 42 S. C. 203, 20 S. E. 91; *Brantley v. Finch,* (1887) 97 N. C. 91, 1 S. E. 535. The Texas decisions are in some conflict, but now seem to make the character of the claim, i. e., liquidated or unliquidated, the criterion as to the right to remit a part of the claim. *P. & N. T. Ry. Co. v. Canyon Coal Co.,* (1909) 102 Tex. 478, 119 S. W. 294; cf., however, *Fuller v. Sparks,* (1873) 39 Tex. 137. See also *Perkins v. Rich,* (1840) 12 Vt. 595, where the same test is applied. Usually a claim in the ad damnum clause of the complaint, limited to the amount within the jurisdiction of the justice court, acts per se as a remission of whatever may be due in excess thereof. But an intention to remit the excess must affirmatively appear. *Poirier v. Martin,* (1903) 89 Minn. 346, 94 N. W. 865; *Sanborn v. Contra Costa County,* (1882) 60 Cal. 425; *McVey v.*

Johnson, (1888) 75 Ia. 165, 39 N. W. 249; *Culley v. Laybrook*, (1856) 8 Ind. 285. The courts are not agreed as to whether the principal alone, or the principal plus the interest, must be considered in computing the jurisdictional amount. In the absence of a statutory provision that interest is to be excluded from the computation, the general rule seems to be that principal plus interest must be within the jurisdictional limit. *Wilson v. Sparkman*, (1880) 17 Fla. 871, 35 Am. Rep. 110 (where the leading cases are reviewed); *Butler v. Wagner*, (1874) 35 Wis. 54; *Plunkett v. Evans*, (1892) 2 S. D. 434, 50 N. W. 961. But interest accruing after suit is commenced can be recovered in addition to the jurisdictional amount. *Ormond v. Sage*, (1897) 69 Minn. 523, 72 N. W. 810. Judgment for the reduced claim bars any recovery for the balance. *Pilcher v. Ligon*, (1891) 91 Ky. 228, 15 S. W. 513; *Lucas v. LeCompte*, (1886) 42 Ill. 303. Whether plaintiff before judgment on the reduced claim can dismiss the action and sue in a proper court for the full amount is a question on which no authority has been found. The remission being without consideration, it would seem that he can do so.

LARCENY—INTOXICATING LIQUORS NOT THE SUBJECT OF LARCENY.—The defendant was accused of the crime of burglary with the intent to steal intoxicating liquors manufactured since January 20, 1921, for beverage purposes. *Held*, on demurrer to the information, that under the Volstead Act, intoxicating liquors cannot be the subject of larceny. *People v. Spencer*, (Cal. App. 1921) 201 Pac. 130.

Two cases have held, contrary to the instant case, that under the National Prohibition Act, intoxicating liquors may be the subject of larceny. *People v. Wilson*, (Ill. 1921) 131 N. E. 609; *Ellis v. The Commonwealth*, (1920) 186 Ky. 494, 217 S. W. 368, 11 A. L. R. 1030, and note. Under these cases the fact that whisky was not the subject of lawful traffic, or the fact that its sale was prohibited by law, did not deprive it of its character as "goods, wares, or merchandise," within the meaning of the statute, or of its value as goods or merchandise. A similar result has been reached under state statutes. *State v. Donovan*, (1919) 108 Wash. 276, 183 Pac. 127; *State v. May*, (1866) 20 Ia. 305; *Commonwealth v. Coffee*, (1859) 9 Gray (Mass.) 139; *Arner v. State*, (Okla. Crim. App. 1921) 197 Pac. 710 (where statute expressly declared that there should be no property in liquor). The leading case as to the property status of articles the acquisition or retention of which is unlawful, is *Commonwealth v. Rourke*, (1852) 10 Cush. (Mass.) 397, where the court said that the balance of public policy requires that larceny should be punished, though at the possible risk of omitting to discourage unlawful acquisition, rather than that property unlawfully acquired, should be deprived of all protection as such. To the same tenor, see, *Osborne v. State* (1905) 115 Tenn. 717, 92 S. W. 853, 5 Ann. Cas. 797. The court in the instant case takes the position that, under the law as it exists today in this country, there cannot be an ownership of intoxicating liquors manufactured for beverage purposes since the enactment of the Volstead Act, and manifestly, if there cannot be an ownership of such liquors, they cannot be in legal contempla-

tion property, and it necessarily follows that the charge of larceny cannot be predicated of the act of taking intoxicating liquors by one from the possession of another. The courts support this position by citing *State v. Lymus,* (1872) 26 Ohio St. 400, 20 Am. Rep. 772, which holds that a dog is not the subject of larceny, and *People v. Caridis,* (1915) 29 Cal. App. 166, 154 Pac. 1061, that a lottery ticket held in defiance of law is not the subject of grand larceny; but the theory of these cases is refuted by the liquor cases cited above.

MASTER AND SERVANT—ASSAULT AND BATTERY—LIABILITY OF MASTER FOR EXEMPLARY DAMAGES.—Plaintiff brought an action for damages for assault and battery against the master, a natural person, for the act of his servant which was in the scope of the employment, but which the master had neither authorized, ratified, nor participated in. *Held,* that the master was liable for exemplary damages. *Schmidt v. Minor,* (Minn. 1921) 184 N. W. 964.

"It is the better opinion that no recovery of exemplary damages can be had against a principal for the tort of an agent or servant unless the defendant expressly authorized the act as it was performed, or approved it, or was grossly negligent in hiring the agent or servant, or in not preventing him from committing the act." 1 Sedgwick, Damages, 9th Ed., sec. 378, p. 736-737. This rule has been laid down by high authority. *Lake-Shore, etc., R. Co. v. Prentice,* (1893) 147 U. S. 101, 13 S. C. R. 261, 37 L. Ed. 97. In line with this view it has been held that the master cannot be liable for a wanton, willful, or malicious act of the agent or servant, as such act must of necessity be beyond the scope of the agent's or servant's employment. *Mali v. Lord,* (1868) 39 N. Y. 381, 100 Am. Dec. 448, followed in *Homeyer v. Yaverbaum,* (1921) 188 N. Y. S. 849. In opposition to this view, other jurisdictions hold that if the agent or servant is liable for exemplary damages, such damages may be recovered from the principal or master, even though the act was not ratified or authorized, provided of course that the act was within the course and scope of the agent's or servant's employment. 8 R. C. L. 599; 17 C. J. 991. This rule has been vigorously condemned, *Voves v. G. N. Ry. Co.,* (1913) 26 N. D. 110, 143 N. W. 760, 48 L. R. A. (N.S.) 30, and note; *Haines v. Schultz,* (1888) 50 N. J. L. 481, 14 Atl. 488, and vigorously supported, *Boyer v. Coxen,* (1901) 92 Md. 366, 48 Atl. 161. The Minnesota court, in allowing exemplary damages in the instant case, cites corporation cases which originally were decided on the ground that a corporation would escape all liability for exemplary damages if it could not be held for the acts of its servants or agents. *Peterson v. Western Union Tel. Co.,* (1899) 75 Minn. 368, 77 N. W. 985. A corporation is liable for exemplary damages without ratification even though it may not have known that the servant was incompetent or disqualified. *Southern Express Co. v. Brown,* (1899) 67 Miss. 260, 7 So. 318, affirmed on rehearing, 8 So. 425. But the Minnesota and Maryland courts are the only ones that have been found holding a master liable for exemplary damages where the master is a natural person and he has neither authorized, ratified, nor participated in the act. *Boyer v. Coxen,*

(1901) 92 Md. 366, 48 Atl. 161. The general doctrine, difficult to defend on logical grounds, is thus carried to its extreme limit.

REAL ESTATE BROKERS—STATUTE OF FRAUDS—REQUIREMENT THAT CONTRACT TO PAY COMMISSION BE IN WRITING—RECOVERY ON QUANTUM MERUIT.—A Wisconsin statute provides that contracts to pay brokers a commission for negotiating the sale or purchase of realty shall be void unless in writing. Pursuant to an oral agreement, plaintiff sold defendant's land. He now sues for compensation. *Held*, (three judges dissenting) that plaintiff can recover in quantum meruit. *Seifert v. Dirk*, (Wis. 1921) 184 N. W. 698.

It is a general rule that a quantum meruit recovery cannot be had for services rendered under an illegal contract, 13 C. J. 508; *Barngrover v. Pettigrew*, (1905) 128 Ia. 533, 104 N. W. 904, 2 L. R. A. (N.S.) 260, 111 A. S. R. 206. The rule is otherwise as to void and unenforceable contracts, 2 Page, Contr., 2nd Ed., sec. 1413, p. 2423. Thus it is generally held that where one party renders services on a parol agreement void and unenforceable under the statute of frauds, the other party is liable as upon an implied contract to pay the value of that which he receives, Browne, Statute of Frauds, 5th Ed., sec. 118, p. 144; *Shute v. Dorr*, (1830) 5 Wend. (N. Y.) 204. This view is based on the theory that the statute of frauds was intended solely to prevent oral proof of contracts in actions thereon, and not to permit retention of benefits without paying for them. This view is generally held inapplicable to an oral contract to pay a real estate broker a commission where the statute provides that a contract to pay such commission is void unless in writing, *Paul v. Graham*, (1916) 193 Mich. 447, 160 N. W. 616. The reason is that non-compliance with the terms of the statute precludes proof of employment, which is a condition precedent to the right to compensation; and that therefore not even a quantum meruit recovery can be had, *McCarthy v. Loupe*, (1882) 62 Cal. 299; *Selvage v. Talbott*, (1911) 175 Ind. 648, 95 N. E. 114, 33 L. R. A. (N.S.) 973, Ann. Cas. 1913C 724; for to hold otherwise would nullify the legislative intent, *Weatherhead v. Cooney*, (1919) 32 Idaho 127, 180 Pac. 760; *Keith v. Smith*, (1907) 46 Wash. 131, 89 Pac. 473, 13 Ann. Cas. 975 and note; see also note in 9 L. R. A. (N.S.) 933, 935. Wisconsin, in the instant case, refuses to accept this view, deciding rather to adhere to the general rule that, regardless of the invalidity of a contract, there still remains the common law duty to pay on a quantum meruit for the value of the services received thereunder. The express contract is invalid, but not in violation of public policy. Minnesota has no statute similar to that in the instant case, but it has been held that G. S. 1913 sec. 7003, providing that an agent's contract to sell land is void unless his authority is in writing, does not preclude the agent from recovering for services rendered under an oral authorization, *Vaughan v. McCarthy*, (1894) 59 Minn. 199, 60 N. W. 1075.

SUBSCRIPTIONS—CHARITABLE CONTRIBUTIONS ENFORCED—CONSIDERATION.—Defendant subscribed $200 to a community war chest fund. Relying

on this subscription and those of others, plaintiff incurred obligations and now sues to recover the sum promised by the defendant. Defendant claims his promise is not binding because of a lack of consideration. *Held,* that since plaintiff has incurred obligations and liabilities on the faith of defendant's subscription, there is sufficient consideration to support the promise. *Scott v .Triggs,* (Ind., 1921) 131 N. E. 415.

In England, a charitable subscription is held to be a mere gratuity and unenforceable for want of consideration. *In re Hudson,* (1885) 54 L. J. Ch. 811, 33 Wkly. Rep. 819. There is early American authority for this view. *Phillips & Limerick Academy v. Davis,* (1814) 11 Mass. 113, 6 Am. Dec. 162; see note, 48 L. R. A. (N.S.) 783. But in more recent times courts in the United States have universally attempted to sustain the binding force of charitable subscriptions, on various theories: (1) the theory of the instant case, which represents the weight of authority. The argument is that the subscription contains an express or implied request to promisee to go on and render services and incur liabilities, and therefore, the promisee upon taking such action may compel payment. *Keuka College v. Ray,* (1901) 167 N. Y. 96, 60 N. E. 325; *Cottage Street Church v. Kendall,* (1877) 121 Mass. 530, 23 Ann. Rep. 286; *School Dist. of Kansas City v. Sheidley,* (1897) 138 Mo. 672, 40 S. W. 656. This view is followed in Minnesota today, *Albert Lea College v. Brown,* (1903) 88 Minn. 524, 93 N. W. 672, although the early cases maintained the English rule. *Culver v. Banning,* (1872) 19 Minn. 303, (G. 260). (2) That the promise is supported by the promise of the other subscribers. *George v. Harris,* (1829) 4 N. H. 533, 17 Am. Dec. 446. The fallacy of this reasoning is that it is an assumption contrary to the actual facts. (3) The theory of estoppel, lack of consideration being admitted. *Beatty v. Western College of Toledo,* (1898) 177 Ill. 280, 52 N. E. 432; *Simpson Centenary College v. Tuttle,* (1887) 71 Ia. 596, 33 N. W. 74. This in effect amounts to a quasi-estoppel, sometimes termed "promissory estoppel," the validity of which is an unsettled question. 1 Williston, Contracts, sec. 139. The doctrine of "promissory estoppel," is upheld by H. W. Ballantine in 11 Mich. L Rev. 425; 15 Ill. L. Rev. 318.

The view of the English courts is expressed in the case *In re Hudson,* (1885) 54 L. J Ch. 811, 33 Wkly. Rep. 819, that an act is not consideration merely because it is done on the faith of a promise, but only when it is done in return for the promise, the act done being actually bargained for. This theory is not adopted in any jurisdictions in the United States, although there are some authorities who tend to accept it. *Wis. & Mich. Ry. Co. v. Powers,* (1903) 191 U. S. 379, 386, 24 S. C. R. 107, 48 L. Ed. 229, Holmes, J. At all events it is certain the American courts reach the desired conclusion, but on a variety of questionable theories. 1 Williston Contracts, sec. 116. If the view advanced by some modern courts is accepted, which hold that a unilateral contract is binding as soon as the promisee has begun the performance of his work, H. W. Ballantine, Acceptance of Offers for Unilateral Contracts by Partial Performance of Services Requested, 5 MINNESOTA LAW REVIEW 94, then the theory of the instant case and majority view in the United States is absolutely sound

Otherwise the courts must rest on "promissory estoppel" as a substitute for consideration. Georgia has escaped the difficulty by statutory enactment, Civil Code 1910, sec. 4246, thus making certain the future of her endowed institutions and projects.

TAXATION—CONSTITUTIONAL LAW—CONFLICT OF LAWS—SEAT IN STOCK EXCHANGE AS PROPERTY TAXABLE EXTRATERRITORIALLY.—Plaintiff, a resident of Ohio, holding a seat in the New York Stock Exchange, asked an injunction against the imposition of a property tax sought to be levied by Ohio officials. Plaintiff contended that the proposed taxation in Ohio denied due process of law and equal protection of the laws under the fourteenth amendment. *Held,* (1) that membership in the stock exchange is property, and (2) that it is taxable in Ohio (three justices expressing a doubt on the last point). *Anderson v. Darr,* (1921) 42 S. C. R. 15.

This case seems conclusively to settle the status of a seat in a stock exchange as ordinary personal property with all its incidents, although some earlier cases have held it to be a mere personal privilege and not property at all. *Pancoast v. Gowen,* (1880) 93 Pa. St. 66; *Barclay v. Smith,* (1883) 107 Ill. 349. As to the second point decided, Justices Holmes, Van Devanter, and McReynolds expressed a doubt as to whether the membership was not so localized in, and so inseparably connected with the specific real estate in New York, as not to be subject to extraterritorial taxation. See, *Louisville & Jefferson Ferry Co. v. Kentucky,* (1903) 188 U. S. 385, 23 S. C. R. 463, 47 L. Ed. 513. But the court held that, since the plaintiff in Ohio enjoyed rights and privileges denied to non-members, and since he was enabled from his office in Cincinnati to conduct a lucrative business through other members in New York, the membership had a taxable domicile at the situs of the owner.

Minnesota has been a pioneer in recognizing the complete property character of a seat in a stock exchange, having held it subject to attachment and to taxation under the personal property tax law. See, 5 MINNESOTA LAW REVIEW 222.

TAXATION—INHERITANCE TAX—DEDUCTION OF FEDERAL ESTATE TAX.—In valuing an estate for the purpose of computing the state inheritance tax, lower court decided that the federal estate tax on the estate should not be deducted from the gross value of the property. *Held,* the federal estate tax is on the right of deceased to transmit, while the state inheritance tax in on the right of the beneficiaries to receive, and the amount of the federal estate tax is therefore deductible before the state tax. *In re Inman's Estate,* (Ore. 1921) 199 Pac. 615.

The federal tax, entitled an "estate tax," imposes a tax "upon the transfer of the net estate of the decedent." *Estate of Week,* (1919) 169 Wis., 316, 172 N. W. 732. U. S. Comp. Stat. Ann. Sup., 1919, 6336 3-4 b, i. e., upon the power to transmit. See *New York Trust Co. v. Eisner,* (1921) 41 S. C. R. 506, 65 L. Ed. 620; Hanson, Death Duties, 6th Ed., p. 76. An inheritance tax, on the other hand, is defined as a "tax upon the right to acquire property, passing by will or by inheritance."

Blakemore and Bancroft, Inheritance Taxes, sec. 1. It looks forward to the interest to which the successor succeeds, and it is the "succession" which accrues on death which is taxed. Hanson, Death Duties, 6th Ed., p. 76; *Plunkett v. Old Colony Trust Co.*, (1919) 233 Mass. 471, 124 N. E. 265, 7 A. L. R. 626. It would seem, therefore, that the federal tax is to be laid upon the whole estate before it is divided. The inheritance tax, looking to the property which the heir or devisee acquires, and not to that which the decedent leaves, is a tax upon the power to receive, and the measure of that tax must be, not the gross value of property of the decedent, but the net value of the property which passes to a given person. It is logical to conclude, therefore, that the federal tax first must be deducted from the estate, and the state inheritance tax computed on the balance. With the exception of the New York and Wisconsin decisions, the authorities agree with the holding of the principal case. *State v. Probate Court*, (1918) 139 Minn. 210, 166 N. W. 125; *People v. Pasfield*, (1918) 284 Ill. 450, 120 N. E. 286; *State v. First Calumet Trust & Savings Bank*, (Ind. App. 1919) 125 N. E. 200; *In re Roebling's Estate*, (1918) 89 N. J. Eq. 163, 104 Atl. 295; *Knight's Estate*, (1918) 261 Pa. 537, 104 Atl. 765; see note, 7 A. L. R. 714. The New York and Wisconsin courts declare that the federal estate tax and the state inheritance tax are of similar nature, and refuse to allow the prior deduction of the federal tax. *Matter of Gihon*, (1902) 169 N. Y. 443, 62 N. E. 561; *In re Sherman's Estate*, (1917) 166 N. Y. S. 19, affirmed without opinion, (1917) 222 N. Y. 540, 118 N. E. 1028; *Estate of Week*, (1919) 169 Wis. 316, 172 N. W. 732. For further discussion see 3 MINNESOTA LAW REVIEW 137.

TRUSTS—INSURANCE—FRAUDULENT CONVEYANCES.—A husband while insolvent took out a $10,000 life insurance policy naming his wife as beneficiary, $5,000 of the amount being exempted by statute from the claims of creditors. The defendant company paid the amount exempted to the wife on the death of her husband, and the administrator sued for the remaining $5,000, joining the wife. *Held*, that insurance in excess of the amount exempted by statute is a trust fund property recoverable by the administrator of the husband's estate for the benefit of his creditors. *Cornwell v. Surety Fund Life Co. et al.*, (S. D. 1921) 184 N. W. 211.

Ordinarily from the conveyance to a volunteer of property purchased with the money of an insolvent debtor a constructive trust arises in favor of defrauded creditors, and on the ordinary principle of tracing trust property creditors may follow the investment into whatever form it may take. 1 Perry on Trusts, 4th Ed., sec. 149, p. 177. No reason is perceived by one writer why there should be greater difficulty in following the property into the proceeds of an insurance policy than into the proceeds of a lot of land. Samuel Williston, 25 Am. Law Rev. 185. The instant case can be sustained on the theory that premiums paid for insurance in excess of the statutory exemption were a gift to the beneficiary, who holds the gift subject to a constructive trust and that the property can be followed into the chose in action against the donee. The decision is supported in at least one other jurisdiction. *Fearn v. Ward*, (1887) 80 Ala. 555, 2 So. 114. It has been held, however, without the aid of a statute, that a reasonable

amount of insurance effected by an insolvent debtor for the protection of his family is exempt from the claims of creditors in the absence of actual fraud. *Central Nat'l. Bank v. Hume,* (1888) 128 U. S. 195, 9 S. C. R. 41, 32 L. Ed. 370.

Statutes exempting insurance from the claims of creditors proceed on the theory that the interest of a man's wife and children in his life and his duty to make reasonable provision for their support are not wholly subordinate to the claims of creditors. These statutes fall into several classes: (1) those exempting all insurance effected in favor of another from the claims of creditors but providing that premiums paid in fraud of creditors are recoverable, G. S. Minn. 1913, sec. 3465; (2) those exempting a limited amount of insurance, Rev. Code, S. D. 1919, secs. 2661, 9310; (3) those exempting insurance purchased with a limited amount of annual premiums, Civ. Code S. C. 1912, sec. 2721. Proceeds or benefits of fraternal benefit insurance are exempt under some statutes from the claims of creditors of both the insured and the beneficiaries. G. S. Minn. 1913, sec. 3548.

In the absence of a specific provision in the statutes, the weight of authority confines the recovery of creditors to the premiums paid in excess of the statutory exemption. Richards, Insurance, 3rd Ed., sec. 72, p. 90; *Houston v. Maddux,* (1899) 179 Ill. 377, 53 N. E. 599; *Harriman Nat'l. Bank v. Huict,* (1916) 244 Fed. 216; see note, 88 Am. Dec. 530. The minority view holds that creditors are entitled to share in the insurance proceeds in the ratio which the amount of premiums paid after insolvency bears to the total premiums. *Pullis v. Robison,* (1880) 73 Mo. 201, 39 Am. Rep. 497; Bliss, Insurance, 2nd Ed., sec. 353, p. 592.

While the result of the instant case can be sustained on trust principles, the recovery might well, on the authorities, have been limited to the premiums paid for insurance in excess of the statutory exemption, if the defendants had made this contention.

UNLAWFUL DEATH—RIGHT OF MOTHER TO RECOVER FOR THE DEATH OF AN ILLEGITIMATE CHILD.—Plaintiff sought to recover for the unlawful death of her illegitimate child under a statute giving a right of action for death for the benefit of the wife, husband, parent or child. *Held,* that plaintiff could not recover, although a statute gave illegitimate children and their issue the right to inherit from their mother, or from each other, or from the descendants of each other. This was on the ground that no legislative intent favorable to an action founded on a tort to the illegitimate could be inferred from the enactment of the statute regarding inheritance. *State, for Use of Smith v. Hagerstown & Frederick Ry. Co.,* (Md. 1921) 114 Atl. 729.

Courts generally hold, in the absence of inheritance statutes which allow illegitimates to inherit, that a mother cannot recover for the unlawful death of an illegitimate child, as "child" contemplates legitimates only. *McDonald v. Southern Ry.,* (1904) 71 S. C. 352, 51 S. E. 138, 2 L. R. A. (N.S.) 640, and note; *Marshall v. Wabash R. Co.,* (1891) 46 Fed. 269; *Dickinson v. North Eastern Ry. Co.,* (1863) 2 H. & C. 735. A con-

flict of authority arises, however, where courts are, in addition, governed by statutes which permit illegitimates to inherit. Some courts (and these support the instant case) hold that such inheritance statutes are merely special, and legitimate the child for a specific purpose only. *Lynch v. Knoop*, (1907) 118 La. 611, 43 S. 252, 118 A. S. R. 391, 8 L. R. A. (N.S.) 480, 10 Ann. Cas. 807; *Robinson v. Georgia, etc., R. Co.*, (1903) 117 Ga. 168, 43 S. E. 452, 97 A. S. R. 156, 60 L. R. A. 555; *Harkins v. Philadelphia & Reading R. R. Co.*, (1881) 15 Phila. 286; *Alabama, etc., R. Co. v. Williams*, (1900) 78 Miss. 209, 28 So. 853, 84 A. S. R. 624, 51 L. R. A. 836, where the child could inherit from the mother, but not vice versa. Modern authority, however, does not support the instant case. Interpreting both statutes liberally, and considering incapacity of mutual inheritance as the reason for non-recovery in the earlier cases, these courts hold an illegitimate to be legitimized as to its mother for all purposes. *Hadley v. The City of Tallahassee*, (1914) 67 Fla. 436, 65 So. 545, Ann. Cas. 1916C 719; *Security Title & Trust Co. Adm. v. West Chicago St. R. Co.*, (1900) 91 Ill. App. 332; *Thompson v. Delaware, etc., R. Co.*, (1910) 41 Pa. Super. 617; *Galveston, etc., R. Co. v. Walker*, (1907) 48 Tex. Civ. App. 52, 106 S. W. 705; *Croft v. So. Cotton Oil Co.*, (1909) 83 S. C. 232, 65 S. E. 216, 217 (*dictum*). This is especially true when the right of action, or the benefit of a recovery, for wrongful death is given to "next of kin" or "lineal ancestors," which terms, in view of the inheritance statutes, are universally construed to include both legitimates and illegitimates. *Southern R. Co., v. Hawkins*, (1910) 35 App. D. C. 313; *Security Title etc. Co. v. West Chicago St. R. Co.*, (1900) 91 Ill. App. 332; *L. T. Dickason Coal Co. v. Liddil*, (1911) 49 Ind. App. 40, 94 N. E. 411; *Wheeler v. Southern R. Co.* (1916) 111 Miss. 528, 71 So. 812 (under Tenn. statutes); *Andrzejewski v. Northwestern Fuel Co.*, (1914) 158 Wis. 170, 148 N. W. 37; see also, *Rogers v. Weller*, (1870) 5 Miss. 166, Fed. Cas. 12, 022. In South Carolina a mother can now recover for the death of an illegitimate by express statute. *Croft v. So. Cotton Oil Co.*, (1909) 83 S. C. 232, 65 S. E. 216.

The question has not been passed on in Minnesota. G. S. Minnesota 1913, secs. 7240, 7241, provide that a mother and an illegitimate child shall inherit from each other, and sec. 8175 provides that recovery by the personal representative of the decedent shall be "for the exclusive benefit of the surviving spouse and next of kin." Under the usual interpretations of "next of kin" and the modern liberal view of regarding inheritance statutes for the benefit of illegitimates as remedial and legitimating the bastard for all purposes, the mother should have the benefit of a recovery for the wrongful death of her illegitimate child. See *Dickason Coal Co. v. Liddil*, (1911) 49 Ind. App. 40, 94 N. E. 411.

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THE RIGHTS OF A PLEDGOR ON TRANSFERS OF A PLEDGE

By James Lewis Parks*

IN certain communities, personal property of one kind or another is frequently deposited by way of pledge or pawn to secure the performance of an obligation. The question as to the rights of the pledgor and pledgee in the property, both before and after the maturity of the debt is of importance, and the results flowing from an improper and illegal transfer of the pledge by the pledgee are often complicated. It is, accordingly, proposed in the following pages to consider transactions involving transfers of the property by the pledgee, and to endeavor to formulate the rules which regulate the rights and obligations of the parties in this respect.

According to Story's definition, which has been universally accepted, a pledge or pawn is a "bailment of personal property as security for some debt, or engagement."[2] The pledgee therefore has no title to the property deposited, but merely possession thereof, the general property remaining in the pledgor, but the pledgee has a possessory right in the chattel to the extent of his debt, which amounts to a lien.[3] In the case of the ordinary bailment, the bailee's lien, according to the old common law, was only a personal right, and if he parted with possession of the chattel,

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[2]Story, Bailments, 5th Ed., sec. 286.

[3]Donald v. Suckling, (1866) L. R. 1 Q. B. 585; Halliday v. Holgate, (1868) L. R. 3 Ex. 299; White v. Phelps, (1869) 14 Minn. 27; Norton v. Baxter, (1889) 41 Minn. 146, 42 N. W. 865.

except to a third party to be held in turn of him in bail, he lost his lien. This was the case even though the transfer did not involve any element of conversion, but was intended to operate merely as an assignment of the debt and lien.[4] The surrender of possession of the chattel destroyed the lien. This, however, is not always the case with the pledgee for he is permitted to assign his debt and the security.[5] So too the pledgee can repledge the chattel, but for no longer time or greater amount than it was pledged to him for.[6] Apparently then in the matter of disposing of his interest to a third party, the pledgee can freely do so, so long as his act of transfer does not involve on his part an assertion of a right in the chattel greater than he was given by the contract of pledge. To this extent at least, the right of the pledgee is not only a personal right, but is in result assimilated to a property interest in the goods. This should be the case, for if the debt is assignable, then too the security, which is incidental to the debt, ought also to be, and if the pledgee has a possessory right, he ought to be able to transfer the same to any one that he may please, if only the disposition does not amount to a denial of the pledgor's general property right, and does not interfere with the latter's right of redemption.[7]

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[4]Ruggles v. Walker, (1861) 34 Vt. 488; contra, Goyena v. Berdoulay, (1915) 154 N. Y. S. 103. It is believed that the orthodox rule is unduly stringent and serves no useful purpose. As the debt is today freely assignable everywhere, the security incidental to the debt and a part thereof might well also be held to pass with the debt, where an intention to pass it on is found.

[5]Belden v. Perkins, (1875) 78 Ill. 449; Drake v. Cloonan, (1894) 99 Mich. 121, 57 N. W. 1098; Waddle v. Owen, (1895) 43 Neb. 489, 61 N. W. 731; Chapman v. Books, (1865) 31 N. Y. 75. See also, Van Eman v. Stinchfield, (1868) 13 Minn. 75.

[6]Donald v. Suckling, (1866) L. R. 1 Q. B. 585 (dictum); Meyer v. Moss, (1902) 110 La. 132, 34 So. 332, Coleman v. Anderson, (Tex. 1904) 82 S. W. 1057 (dictum); Drake v. Cloonan, (1894) 99 Mich. 121, 57 N. W. 1098. Of course the pledgee of the pledgee would acquire as security only the rights in the property that the original pledgee had.

[7]"It appears that the pawnee may deliver the goods to a stranger without consideration, or may sell and assign conditionally by way of pawn without in either case destroying the original lien, or giving the owner a right to reclaim them on any other or better terms than he could have done before such delivery or assignment." Jarvis v. Rogers, (1819) 15 Mass. 389, 408. If the right were merely personal, none of the above mentioned things could have been done. If, however, the decisions had held the other way, they would not have been beyond reason. In Donald v. Suckling, (1866) L. R. 1 Q. B. 585, 618, Cockburn, C. J. said:

"I think it unnecessary to the decision in the present case to determine whether a party with whom an article has been pledged . . . has a right to transfer his interest. . . . I should certainly hesitate to lay down the affirmative of that proposition. Such a right in the pawnee

It has been held that a pledgee may also deliver the possession of the pledge to the pledgor without losing his lien, if it is delivered in bailment for a special purpose. This has been done and the lien sustained.[8] Under these conditions, it is said that "the possession of the pledgor is perfectly consistent with the original right of the pledgee."[9] The pledgor is here holding the goods, not in his own right, but in subservience to the pledgee's special possessory interest. On the other hand, if the chattels are given in bailment to the pledgor for general use, the courts will not sustain the pledgee's lien as against innocent purchasers from, and creditors of the pledgor, even though there has been a special contract between the parties for the preservation of the lien.[10] Probably too

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seems inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. In some instances it may well be inferred from the nature of the thing pledged . . . that the pawnor though perfectly willing that the article should be intrusted to the custody of the pawnee would not have parted with it on the terms it should be passed on to others and committed to the custody of strangers." The notion of the chief justice, however, has not prevailed. But the dictum raises two important questions, to be dealt with infra, a transfer of the pledge being permissible, (1) to whom must the pledgor make tender at the maturity of the debt, and (2) if the pledged property is injured or converted by the transferee against whom may the pledgor proceed?

[8]Cooley v. Transfer Co., (1893) 53 Minn. 327, 55 N. W. 141; Palmtag v. Doutrick, (1881) 59 Cal. 154, 43 Am. Rep. 245; Thayer v. Dwight, (1870) 104 Mass. 254; Wilkinson v. Misner, (1911) 158 Mo. App. 551, 138 S. W. 931; Macauley v. Macauley, (1885) 35 Hun (N. Y.) 556. But see contra, Bodenhammer v. Newsome, (1857) 5 Jones (N. C.) 107, 69 Am. Dec. 775, holding that the lien would not be sustained as against an innocent purchaser dealing with the pledgor believing, because of the pledgor's possession, that the latter was the owner of the property. The court held the pledgee estopped to assert his lien. Obviously if the pledgee delivers back possession of the pledge to the pledgor without any agreement with respect to the lien, it is gone. The pledgee's conduct under such conditions is a waiver of the lien. Bank v. Bradshaw, (1912) 91 Neb. 210, 135 N. W. 830.

In the case of the ordinary bailment, the rule at the common law was if the bailee parted with possession of the property to the bailor the lien was lost under all conditions. "The very definition of the word lien as 'the right to retain' indicates that it must cease when possession is relinquished." McFarland v. Wheeler, (1841) 26 Wend. (N. Y.) 467, 473.

Occasionally the pledgee has given the *custody* of the property to the pledgor. The property has not been bailed with the pledgor, but has been loaned, or entrusted to the pledgor as the borrower or servant of the pledgee. In such a case it is clear that the lien should not be lost and the authority is *accord*. The possession of the borrower or servant is that of the lender or master. Reeves v. Capper, (1838) 5 Bing. N. C. 136; Clare v. Agerter, (1892) 47 Kan. 604, 28 Pac. 694. See generally as to the distinction between custody and possession, Pollock and Wright, Possession in the Common Law 138 et seq.

[9]Palmtag v. Doutrick, (1881) 59 Cal. 154, 159, 43 Am. Rep. 245.

[10]Walker v. Staples, (1862) 5 Allen (Mass.) 34; Gamson v. Pritchard,

the lien would not be sustained as against the pledgor under these conditions."[11] It is usually said that the reason for holding the lien to be invalid under these facts is because the essence of the same is the retention of the property over which it exists. If therefore, the property is not retained the lien must be gone.[12] If this is the real reason for the rule, it is difficult to understand how the lien in cases of special, limited bailments with the pledgor can be sustained, because in that case the pledgee does not keep possession of the chattels. But perhaps the cases of special bailments may be considered as cases of custody and so reconciled with, and distinguished from those now under consideration.[13] Unless, however, such a distinction can be made, it is not perceived how the cases can be reconciled. In fact, if the pledgee's right is merely a right to retain, all cases where he parts with the possession of the pledge, except for purposes of enforcing his lien, ought to result in the loss of the lien, but, as has been shown, this is not the result, and accordingly it cannot be said that the lien is a right solely to retain dependent for its existence on actual and continued possession of the goods. There are too

(1911) 210 Mass. 296, 96 N. E. 715; Colby v. Cressy, (1830) 5 N. H. 237; Jackson v. Kincaid, (1896) 4 Okla. 554, 46 Pac. 587 (statute); Fletcher v. Howard, (1826) 2 Aikens (Vt.) 115, 16 Am. Dec. 686. See also Combs v. Tuchelt, (1878) 24 Minn. 432.

[11]The cases often suggest that the lien would not be good, under these conditions, probably because of the notion which the courts have and repeatedly state, although usually obiter, that a pledgee has only a personal right to retain possession. This was the conception, which the courts had as to the lien of the ordinary bailee (see supra, note 8) and it was natural and easy to carry over the same ideas when it came to dealing with the lien of a pledgee. It is believed that this conception is unfortunate and that the actual decisions do not of necessity support the proposition. See infra note 12 and text in connection therewith. But see dictum, McFarland v. Wheeler, (1841) 26 Wend. (N. Y.) 467, 482: "Such . . . lien may be continued . . . so far as the parties are concerned even after the actual possession has been parted with; but not to the prejudice of general creditors . . ." The dictum is the obiter opinion of Chancellor Walworth. See also, Staples v. Simpson, (1894) 60 Mo. App. 73.

[12]McFarland v. Wheeler, (1841) 26 Wend. (N. Y.) 467 (dictum). "Continuance in possession is indispensable to the right of a lien; an abandonment of custody . . . frustrates any power to retain (i. e. the chattels) and operates as an absolute waiver of the lien." Walker v. Staples, (1862) 5 Allen 35. "Indeed possession may be considered as the very essence of a pledge . . . and if possession be once given up, the pledge is as such extinguished." Casey v. Cavaroc, (1877) 96 U. S. 467, 477, 24 L. Ed. 779. In the two cases, cited last, the question as to the validity of the lien was between the pledgee and an innocent person claiming under the pledgor, and the pledgor had been placed in possession of the chattels for general purposes.

[13]See supra note 8.

many cases holding the lien valid where there is no possession in the pledgee.

The proper basis for the decisions to the effect that the lien is gone, if the property is returned to the possession of the pledgor for general use, is that the pledgor's possession clothes him with apparent ownership of the pledge, and, because of this fact, makes fraud on creditors of and innocent purchasers from the pledgor too easy. The law has never favored secret liens.[14] If the lien is declared invalid on this ground, all of the cases are easily reconciled, and we are not forced to say what is not so, namely that the pledgee's right is merely one to retain possession of the pledged property. Furthermore, if this is the reason for refusing to sanction the lien, it could be said, with perfect propriety and consistency, that the lien would be good in favor of the pledgee as against the pledgor, and until the rights of a bona fide purchaser or creditor have intervened. In other words, if the pledgee is not estopped to assert the lien, he can do so, and he will not be estopped until some one has taken the goods from the pledgor, reasonably assuming that the latter's possession signified ownership. The basis for such a decision would not be that the pledgee has only a personal right, but that it would not be just to permit the assertion of his right to security against an innocent buyer from the pledgor, or the latter's creditor. But even though the law might not be willing to give the pledgee a right against the pledgor, when possession of the goods has been given to the latter, it could still so refuse to do without holding that the pledgee's right is gone because the right depended on continued possession. It could be held that, as a matter of policy, no right ought to remain in the pledgee under these conditions because of the ever present danger of fraud to third parties. Such a holding would reach the result desired, and at the same time would obviate the confusion that is bound to arise in other cases, if it is stated that the pledgee's interest is a purely personal one.

Wherever the transfer of the pledge by the pledgee to a third party is actually and expressly made, and is legal, there is no difficulty in determining the rights resulting, but occasionally the

[14] "The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception, for if the debtor remains in possession the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods." Casey v. Cavaroc, (1877) 96 U. S. 467, 490, 24 L. Ed. 779. See also Moors v. Reading, (1897) 167 Mass. 322, 45 N. E. 760, and Glenn, Creditors' Rights chap. XI.

pledgee does not transfer the property, but merely the debt, and the question then is, does the assignment of the debt operate to carry with it to the assignee the security as well? It is not possible to say that the assignment gives a legal title to the pledge to the assignee, for there has been no delivery of the chattel, actual or symbolical, and that is always essential if a possessory interest is being transferred. But even so, it might be held that the assignee in equity ought to have a right to use the chattel, if he desires to avail himself of the security. The assignor could be said to be the trustee with respect to the security for the assignee, and there is authority for such a rule.[15] It has, however, been held contra to this, it being said that in the absence of an express agreement giving the assignee the benefit of the pledge, these equitable rights ought not to pass.[16] It is a question of whether or not a court is inclined to the belief that the assignor intended to give the assignee, as a result of the transfer of the debt, all rights with respect to its collection that he had. An affirmative answer to this question would not seem to be stretching one's imagination, and accordingly it is urged that a decision, which gives the assignee of the debt, by implication, the right to the security as well, is sound and just.

Whenever the pledgee transfers his rights in the debt and security to a third party, it becomes necessary to determine the rights and obligation of the pledgor on the maturity of the debt, and how he will entitle himself to regain possession of the pledged chattel. At an early date it was suggested that the pledgor could not be required to pay the debt to a person other than the original pledgee, because he had never agreed to do so,[17] but this dictum has not been followed and the cases hold that in the event of the transfer of the debt and the security, and notice being given to the pledgor of this fact, he must pay the assignee, and cannot claim the property free from the lien unless he makes due tender to the latter.[18] Such a rule only carries out the ordinary rule in

[15]Ramboz v. Stansbury, (1910) 13 Cal. App. 649, 110 Pac. 472; Perry v. Parrett, (1901) 135 Cal. 238, 67 Pac. 144; Hawkins v. Bank, (1897) 150 Ind. 117, 49 N. E. 957; Holland, etc., Co. v. See, (1910) 146 Mo. App. 269, 130 S. W. 354. See also Ware Murphy Co. v. Russell, (1876) 57 Ala. 144, 29 Am. Rep. 710; in the last cited case the court held that the security would follow the debt, but did not go into the question whether the assignment would be an equitable one, or would amount to a legal assignment of title.

[16]Johnson v. Smith, (1850) 11 Humph. (Tenn.) 396.

[17]Donald v. Suckling, (1866) L. R. 1 Q. B. 585.

the matter of assignments. The debtor must always, on notice being given to him of the assignment, respect the rights of the assignee. Of course, if the debtor should happen to pay the debt in good faith to the pledgee, not knowing of the assignment, then he ought to be able to claim and regain the pledge from the assignee without offering to pay the debt, for the burden is on the assignee to bring home notice to the pledgor of the assignment.[19] It is difficult, however, to conceive of the last suggested case ever actually arising because, as a rule, the pledgor when he makes a tender will demand a return of the pledge, and if it is not returned to him, he will usually receive sufficient information to put him on inquiry as to whether or not there has not been an assignment of the debt. If the pledgor were thus put on inquiry, he ought to be held to pay the pledgee at his peril.[20]

It will sometimes happen that the pledgee will transfer his interest in the pledge and debt to a third party legally, and an injury to or conversion of the property will occur after the transfer. There is no question but what the pledgor could, if he so desired, sue the assignee and recover.[21] The assignee should take the property subject to the burdens and the pledgor's general property right therein. The assignee would be equally obligated with respect to the safekeeping and the return of the pledge. But perhaps the pledgor would rather sue the pledgee; perhaps an action against the latter would be more profitable and worth while. What little authority there is dealing with this problem holds that the pledgor, after the pledgee has legally passed the pledge on to another, cannot hold the pledgee to any of his original obligations as to the property. It is said that the pledgee may legally part with the debt and with his possession of the property and interest therein and, when he does, his transferee is substituted in his place. A pledgee "cannot be charged with the wrongful act of

[18]Talty v. Freedman's, etc., Co., (1876) 93 U.S. 321, 23 L. Ed. 886; Bradley v. Parks, (1876) 83 Ill. 169; Goss v. Emerson, (1851) 23 N. H. 38, holding that the pledgee's interest is assignable, but not dealing with the matter of tender. Blundell-Leigh v. Attenborough, [1921] 3 K. B. 235.

[19]Williston, Contracts, secs. 413 and 433.

[20]It might well be said that the debtor would be on inquiry and thus have notice from the very fact that the pledgee did not offer to return the pledge on the tender of the debt. This fact should indicate to the pledgor that the property might be in the hands of some other person than the pledgee, claiming a right under the latter.

[21]The cases rather assume this proposition than decide it, but see Bank of Forsyth v. Davis, (1901) 113 Ga. 341, 38 S. E. 836; Taggart v. Packard, (1867) 39 Vt. 628; Dibert v. D'Arcy, (1912) 248 Mo. 617, 651, 154 S. W. 1116.

another over which he has no control. A mortgagee might as well be held liable for the destruction of the mortgaged property after he has parted with all his interest by a valid assignment."[21] It would seem that the logical and proper result is reached in this case. After all the pledgor must be taken as knowing that the debt is assignable; that with it may go the pledged property and that as a result of the assignment the pledgee has stepped out of the transaction altogether.

A pledgee has occasionally attempted to pass the pledged property without the debt, retaining the right to collect the latter himself. It has been held, under these conditions, that the transferee of the property gets nothing, and that the lien cannot in this way be severed from the debt. The only justification for the existence of the lien is the fact that it is security for the debt, which is the principal thing. Accordingly it is right to hold that an attempted assignment of the lien without the debt is a nullity, serving to vest no rights in the transferee whatsoever.[22] It would seem to follow too that even though a pledgee has not passed the lien to his transferee that the result of his attempted transfer ought to destroy his own right to the security. While it is true that the attempted assignment or grant was not effective in the way desired, still at least it did show that the lien was not desired by the pledgee any longer as security, and this fact, coupled with the actual giving up of the possession of the property, ought to end the lien altogether. After the pledgee has abandoned his right, he ought not to be heard to say that his right is revived just because he was unable to carry out his original intent with respect to the transfer.

If the pledgee passes the property to another, and the transaction involves the assertion of a greater right in the property on

[21]Goss v. Emerson, (1851) 23 N. H. 43. In this case the debt secured was negotiable. In Bank of Forsyth v. Davis, (1901) 113 Ga. 341, 38 S. E. 836, it was held *accord*, but the court suggested, 113 Ga. 342, that if the debt was not negotiable and the pledgee's successor had converted the property that the pledgee would also be liable for this act. The court seemed inclined to the opinion that the pledgee whose debt is negotiable is licensed to freely pass the pledge to another and escape his liabilities, whereas the pledgee whose debt is non-negotiable would not be free to do so. It is to be noted, however, that this is not the underlying theory of Goss v. Emerson, (1851) 23 N. H. 43. The distinction would not seem to be well taken, for non-negotiable choses must be regarded today as being freely assignable, if not freely "alienable." But see Cockburn, C. J. in Donald v. Suckling, (1866) L. R. 1 Q. B. 585.

[22]Easton v. Hodges, (1883) 18 Fed. 677 (dictum); Van Eman v. Stinchfield, (1867) 13 Minn. 75. See also Dexter v. McClellan, (1897) 116 Ala. 184, 22 So. 461.

his part than he legally has, the transfer and disposition is illegal. This is the result if the pledgee disposes of the property as his own;[24] or if he pledges the property to secure a debt greater in amount than that secured to him;[25] or, it would seem, if he pledges the property for no greater amount, but for a longer period of time than it was pledged to him for; or if he improperly exercises his power of sale to satisfy the debt.[26] In all of these cases the question arises as to the rights of the pledgor both as against the pledgee, and the latter's transferee.

If at the time of the transfer, the debt has been paid, the pledgor could recover of the pledgee the full value of the property,[26a] and this should be recoverable in an action sounding in conversion[27] or the pledgor should be permitted to waive the tort and sue in assumpsit for goods sold and delivered.[28] A pledgor ought also to be able to sue in either one of these forms of action, if, at the time of the transfer, the debt had matured, and he had duly tendered the amount thereof to the pledgee, but in this case the amount of his recovery should be reduced by the amount of the debt with the interest thereon. The debt is proper matter for recoupment.[29]

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[24]Gay v. Moss, (1867) 34 Cal. 125; Upham v. Barbour, (1896) 65 Minn. 364, 68 N. W. 42; Wood v. Matthews, (1881) 73 Mo. 477; Wilson v. Little, (1849) 2 N. Y. 443, 51 Am. Dec. 307. See also Scott v. Reed, (1901) 83 Minn. 203, 85 N. W. 1012. In a case where the pledge is of shares of stock, it has been held that the pledgee is not bound to keep the specific shares on hand, and there is no conversion if at all times he keep in hand the same number of the same kind of shares as were pledged. Berlin v. Eddy, (1863) 33 Mo. 426. But see contra holding that the identical shares must be returned, Allen v. Dubois, (1898) 117 Mich. 115, 75 N. W. 443.

[25]Richardson v. Ashby, (1895) 132 Mo. 238, 33 S. W. 806; Smith v. Savin, (1894) 141 N. Y. 315, 36 N. E. 338; Work v. Bennett, (1872) 70 Pa. St. 484.

[26]Greer v. Bank, (1895) 128 Mo. 559, 30 S. W. 319; Feige v. Burt, (1898) 118 Mich. 243, 77 N. W. 928, 74 A. S. R. 390; Ainsworth v. Bowen, (1859) 9 Wis. 348.

[26a]Hilgert v. Levin, (1897) 72 Mo. 48 (illegal debt secured); August v. O'Brien, (1900) 50 App. Div. 626, 63 N. Y. S. 989.

[27]Jackson v. Shawl, (1865) 29 Cal. 267; Hazard v. Loring, (1852) 10 Cush. (Mass.) 267; Cass v. Higenbotam, (1885) 100 N. Y. 248, 3 N. E. 189; Southworth Co. v. Lamb, (1884) 82 Mo. 242.

[28]Whiting v. McDonald, (1790) 1 Root (Conn.) 444; Bryson v. Raynor, (1866) 25 Md. 424, 90 Am. Dec. 69 (dictum). See also Woodward, Law of Quasi Contract, sec. 277.

[29]Belden v. Perkins, (1875) 78 Ill. 449; Baltimore Marine Ins. Co. v. Dalrymple, (1866) 25 Md. 269; Farrar v. Paine, (1889) 173 Mass. 58, 53 N. E. 146; Feige v. Burt, (1898) 118 Mich. 243, 77 N. W. 928; Cropsey v. Averill, (1879) 8 Neb. 151. But see contra Ball v. Stanley, (1833) 5 Yerger (Tenn.) 199, 26 Am. Dec. 263, holding that

A pledgee may illegally transfer the pledge before the maturity of the debt, or, if it has matured, before a tender has been made or the debt paid. Under these states of facts the pledgor ought to be able to sue in case for the destruction of his general property right, and should recover the difference between the value of the property at the time of its appropriation and the amount of the debt, plus the interest allowable on the same. Such an amount would represent the value of his interest.[20] There would also appear to be no objection under the assumed facts if the pledgee's act of transfer was a sale, to permit the pledgor to sue in assumpsit for money had and received, and to recover in such an action the difference between the amount that the pledgee had received on the sale of the pledge, and the amount of the debt with interest to the date of the sale. Everything in the way of value in the property in excess of the amount of the debt belongs to the pledgor. The law has been jealous of the pledgor's "equity" and zealous to safeguard and preserve it for him whenever possible. While the pledgee is permitted, as a rule, to hold the pledge so long as the debt is unpaid, and the pledgor cannot compel the former to sell the pledge and by so doing to realize for him the excess value of the property over and above the amount of the debt,[21] still if the pledgee does sell, it ought to be for the pledgor's account, and anything in excess of the debt derived from the sale ought to be given to the pledgor. This being the duty of the pledgee, it might very well be said that the pledgor should be in a position, if the pledgee has tortiously sold the goods, to say that the money realized from the sale in excess of the debt was his and was received to his use. The only obstacle to such a contention by the pledgor would be the fact that the pledgee, when he sold the goods, did not intend to satisfy the debt, but the latter ought not to be allowed to make such a contention, because, in order to do so, he will have to explain that his sale was illegal and tortious. Of

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the pledgee may not recoup the amount of his debt, but will have to bring another action to recover the same.

[20]Nabring v. Bank, (1877) 58 Ala. 204. In this case the plaintiff had pledged shares in a corporation to the defendant, who had appropriated the same and sold them. It was held that if the defendant had transferred the shares to his own name that perhaps trover would not lie, but that case would for the destruction of the plaintiff's general property interest.

[21]Lake v. Little Rock Trust Co., (1905) 77 Ark. 53, 90 S. W. 847; Minneapolis & N. Elevator Co. v. Betcher, (1890) 42 Minn. 210, 44 N. W. 5; Cooper v. Simpson, (1890) 41 Minn. 46, 42 N. W. 601. But see National Exchange Bank v. Kilpatric, (1907) 204 Mo. 119, 102 S W. 499.

course, it might also be said, in a case where the sale happened before the maturity of the debt, that from the very nature of things it would be impossible to satisfy a debt not as yet due, but the only objection to accelerating the maturity of any obligation is that so doing may injure one of the parties by varying the terms of the bargain. The pledgee, however, here is in no position to make an objection of this kind, as he has already appropriated the debtor's money. He should not be heard to say that he did this for any purpose other than the satisfaction of the debt. So far as the pledgor is concerned, he ought to have a choice, either to say that there has or has not been a satisfaction of the debt. No authority which permits the pledgor to sue, under the assumed facts, in assumpsit for money had and received has been found, but upon general principles, because of the fact that the pledgee has been unjustly enriched to this extent, the action should lie.[32] It seems needless, however, to say that if the pledgee's act of transfer was not a sale the action for money had and received would not lie, for, without a sale, there has been no receipt of money by the pledgee at all.[33] If there was no sale, the pledgor's remedy would be in case, as above stated.

The question remains whether the pledgor may sue the pledgee in conversion if the pledgee has illegally transferred the property, and the pledgor has neither paid nor tendered the amount of the debt? This question might be presented in a case where the pledgee made the transfer before the maturity of the debt secured and the pledgor attempted to sue before that time, or in a case where the pledgee transferred the property either before or after the maturity of the debt, but the pledgor was suing after such time. An easy way of disposing of the whole question, and a way adopted by many cases is to say that when the pledgee wrongfully disposes of the property, this act ends the bailment, destroys the lien, and entitles the pledgor to the immediate possession of the goods.[34] Under such a line of decisions, all that a pledgor need show is the pledgee's act of transfer, and the court will entertain

[32]See Woodward, Law of Quasi Contract, sec. 273. It has also been held that a pledgor may sue the pledgee for breach of the contract to safely keep and restore the pledge. Brown v. First National Bank, (1904) 66 C. C. A. 293, 132 Fed. 450. The measure of damages in such an action would be the same as in case, or in assumpsit for money had and received.

[33]Woodward, Law of Quasi Contract, sec. 273.

[34]Depuy v. Clark, (1859) 12 Ind. 427; Baltimore Marine Ins. Co. v. Dalrymple, (1866) 25 Md. 269; Cortelyou v. Lansing, (1805) 2 Caines Cas. (N. Y.) 200; Glidden v. Mechanics National Bank, (1895) 53 Ohio St.

the action, usually assessing the damages at the value of the goods at the time of the pledgee's wrongful act[35] less the amount of the debt with interest thereon to the date of the judgment. Of course the reasoning adopted in these cases dispenses with the necessity of a tender, and because the bailment is at an end would permit the pledgor to sue for the conversion of the goods even before the maturity of the debt.[36] It is to be noted that the measure of damages recoverable in such an action is substantially the same as in an action on the case, or in the case of a sale by the pledgee in an action of assumpsit for money had and received, and accordingly it can be said that the result of such a holding is in the usual case, not improper. It is believed, however, that there is no proper theoretical basis for holding that the pledgor's right to sue in conversion is as of the date of the pledgee's illegal transfer of the pledge, regardless of the question whether or not the debt has matured at that time, and the pledgor tendered the same to the pledgee. It is urged that unless the pledgor can rescind the agreement, without the maturity of the debt and a tender of the same the pledgor has no right to sue in conversion, but that his remedy should be as above explained, namely case, or possibly assumpsit for money had and received if the act of transfer by the pledgee was a sale of the pledge. It is also submitted that if a pledgor may rescind the contract, he cannot claim possession of the goods without first making tender of the debt.

An action for conversion is predicated on the fact that a plaintiff is entitled to the immediate possession of the chattel and has been deprived thereof. If the theory of the action is trover, the plaintiff recovers money, but the money is allowed in lieu of the chattel, and the plaintiff has a right to the money only because he has a still more fundamental right to the chattel. In other words, money is substituted for the specific chattel, and its recovery is

588, 42 N. E. 995; Austin v. Vanderbilt, (1906) 48 Ore. 206, 85 Pac. 519, 6 L. R. A. (N.S.) 298, 120 A. S. R. 800; Work v. Bennett, (1872) 70 Pa. 484.

[35]Occasionally the courts have adopted as the measure of damages the highest intermediate value of the converted property between the time of its conversion and the date of the trial of the action. This rule for assessing damages, however, has usually been confined to cases where the property converted consisted of stocks or bonds or some article fluctuating value. See infra note 42 and text in connection therewith.

[36]No case has been found where the action has been entertained before the maturity of the debt, although as indicated such an action, under the theory adopted, would be properly brought.

not allowed unless the plaintiff has a right to the possession of the chattel at the time that he brings his action."[27] In every pledge transaction the agreement between the parties is that the property is not to be returned to the pledgor until the debt has been paid, and so by the very terms of the contract the pledgor is precluded from asserting a right to a return of the pledged property until the debt has been satisfied, or at least until he has offered to pay the same and his tender has been rejected.[28] It is because of this contractual obligation resting on the pledgor that it is urged that theoretically the action of conversion ought not to lie if only the pledgee has misappropriated the goods. To make the pledgee's conduct objectionable in this form of action, in the absence of a rescission of the contract by the pledgor, in addition to the illegal disposition of the goods by the pledgee the debt should have matured and the amount thereof either been paid, or tendered. The pledgee's wrong ought not to make the pledgor's rights greater, nor put him in a better or different position with respect to the possession of the pledge than he would have been in had there been no misappropriation by the pledgee. Accordingly the sounder cases are to the effect that the pledgor, if he is affirming his rights as a pledgor, in spite of the illegal transfer by the pledgee, cannot sue in conversion until he has tendered the amount of the debt, which could not occur until after the maturity of the same.[29]

It will be argued against this last suggestion of the writer

[27]Gordon v. Harper, (1796) 7 Durn. & East 9; Union Stock Yards & Transit Co. v. Mallory, (1895) 157 Ill. 554, 41 N. E. 888; Stearns v. Vincent, (1883) 50 Mich. 209, 15 N. W. 86, 45 A. S. R. 37; Brown v. Pratt, (1855) 4 Wis. 513, 65 Am. Dec. 330. See also Sunderland, Damages, 4th ed. sec. 1108. " . . . to entitle the plaintiff to recover two things are necessary: first property in the plaintiff; and secondly a wrongful conversion by the defendant."

[28]A tender of the debt when due ought to be the equivalent of performance so far as the bringing of the action of trover is concerned. Upon tender the pledgor has put the pledgee in default; see, McCalla v. Clark, (1875) 55 Ga. 53; Norton v. Baxter, (1889) 41 Minn. 146, 42 N. W. 865; Lawrence v. Maxwell, (1873) 53 N. Y. 19.

[29]"But it is a contradiction in fact, and would be to call a thing that which it is not to say that a pledgee consents by his act to revest in the pledgor the immediate interest or right in the pledge, which by the bargain is out of the pledgor and in the pledgee. Therefore for any such wrong an action of trover or detinue, each of which assumes an immediate right of possession in the plaintiff, is not maintainable, for that right is clearly not in the plaintiff." Halliday v. Holgate, (1868) L. R. 3 Ex. 299, 302. See also *accord* Donald v. Suckling, (1866) L. R. 1 Q. B. 585, which was followed in the Halliday case. See also *accord* McClintock v. Central Bank of Kansas City, (1893) 120 Mo. 127, 24 S. W. 1052; Scaaf v. Fries, (1901) 90 Mo. App. 111; Hopper v. Sage, (1882) 63 How. Pr. (N. Y.) 34.

that the bailment is ended as soon as the pledgee converts the pledge and that therefore an immediate right to possession of the same accrues in favor of the pledgor.[40] It is not believed, however, that such an argument can lead to such a result. There is more than a bailment involved in the transaction. The pledgor has agreed that the possession of the property shall be out of him until the debt is paid, and this agreement, even though the pledgee has breached his contract is binding on the former. Perhaps the pledgee's breach might warrant the pledgor's seeking to rescind the contract[41] and claiming as a result of the rescission that he is entitled to a return of the pledge. But in every case of rescission there must be *restitution*, which would entail the pledgor's returning the money loaned. It seems certain that the pledgor can only claim a right to the possession of the pledged property if he is either affirming the contract, or rescinding it, and in each case his right to the same can only be based on the fact that he has offered the money to the pledgee.

It might be said that requiring a tender by the pledgor is futile; why compel a man to make a tender and demand a return of the goods when his demand will only be refused, which will of necessity be the case here? It would seem that a sufficient answer to such a question would be that without the tender no right exists. But, in addition to this reason, it is believed that fixing the date of tender as the time when the pledgor will have a right to the possession of the property will in some cases make the matter of assessing damages easier and more accurate. Suppose that the appropriation of the property occurs before the maturity of the debt, and at that time the same is worth $60, but at the time of the maturity of the debt it is worth $100; if justice is to be done to the pledgor he ought to be able to compel the pledgee to account for the greater sum, and this will be easy if it is said that the right of the pledgor arises at the time when he makes a tender and not before. Or again, suppose that the goods at the time of their appropriation were worth $100, but at the time of the maturity of the debt were worth merely $60; in trover it would be proper to allow to the pledgor the value of the property at the time that he, by his agreement, would have been entitled to them and no more, yet if it is held that the pledgor's right is as of the

[40]See supra note 34, and text in connection therewith.

[41]As to this suggestion see infra note 43 and text in connection therewith.

date that the pledgee appropriated the property, the pledgor will receive $40 more than he would have gotten had there been no breach of the contract at all. The fact is that if we hold that the pledgor's right to the possession of the goods, and hence to sue in conversion, arises at the very moment of the pledgee's transfer of the pledge, we are not dealing with the situation as it is. We are not treating the matter accurately and with precision, and in the matter of measuring damages the rule will not at all times afford a proper amount of compensation. Sometimes the pledgor will not receive enough and sometimes too much. On the other hand, if we treat the rights of the parties as they actually are under the contract and hold that the pledgor's right to possession (and hence his right to sue in conversion) does not arise until he has made a tender, we shall be able to give him in the way of damages exactly the sum of money that he expected to get out of the contract, and which it was agreed that he should get.

The amount of money which a pledgor will recover, if he sues in case, and that which he will recover if he sues in conversion upon the theory that his right is as of the date of the pledgee's transfer of the property will be the same. In a loose sense therefore, it cannot be said that the latter group of decisions goes very far wrong, but the fact is that a pledgor ought to have an election between case on the one hand and trover or conversion on the other. The pledgor ought to be able to claim the value of his general property interest either at the time of the illegal disposition of the property by the pledgee, or at the time of the maturity of the debt and tender. It is the function of case to enable the pledgor to recover the first mentioned sum, and should be the function of trover to enable him to recover the last mentioned. But trover can only do this if it is held that the right to the possession of the pledge is as of the date of tender. If it is held that the right to possession is as of the date of the transfer of the pledge the result of the action is to allow the pledgor as damages only the value of his property interest at the time of its destruction. There can be no objection to this so long as the value of the pledge does not change, but if the property rises in value the pledgor will lose the amount of the increase, unless indeed some unusual measure of damages is adopted to offset the error into which the decisions have fallen. This result in some cases has been prevented by permitting the pledgor to recover in

trover as the value of the property its highest value between the time of its transfer by the pledgee and the trial of the action.[42] This measure of damages has been especially adopted in cases where the pledge has been one of stocks and bonds the value of which fluctuates from day to day in the market. Obviously where this is the rule no harm is done the pledgor, and he is not legally deprived of his election, but the rule does not set the theory of the cases aright, nor return trover to the performance of its proper role in the law of conversion.

According to some decisions, if a party to a contract breaks the same and his breach goes to the essence, his promisee in addition to being able to sue on the contract and recover damages, may rescind and upon making restitution or offering to make it may claim a right to the return of that which he has already given to his defaulting promisor by way of performance of his side of the agreement.[43] Perhaps there is room for the application of this doctrine to a case where a pledgee has illegally appropriated or disposed of the pledge. There can be no question but what such an act on the part of the pledgee is a breach of the contract which goes to the essence of the agreement; why not then permit the pledgor to return the amount of the debt with interest thereon, and demand the return of the pledge, and, in case of the pledgee's refusal, permit an action of trover to lie? If such an action were allowed it would follow that the pledgor could sue at any time after the transfer of the pledge by the pledgee upon making tender of the debt with a proper amount of interest. The writer knows of no case which has proceeded on the suggested theory, but such procedure would seem to be unobjectionable.[44]

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[42]Douglas v. Kraft, (1858) 9 Cal. 562; Markham v. Jaudon, (1869) 41 N. Y. 235. Other cases allow a plaintiff the highest intermediate value of the converted property between the time of its conversion and a reasonable time after notice of this act has been received by the plaintiff. Dimock v. United States National Bank, (1893) 55 N. J. L. 296, 25 Atl. 926; Galigher v. Jones, (1888) 129 U. S. 193, 32 L. Ed. 658, 9 S. C. R. 335. As stated in the text the "highest intermediate value" rule for measuring damages has been confined for the most part to cases of conversion of commercial securities. Some cases have refused to even apply the rule in such situations. See, Jamison & Co.'s Estate, (1894) 163 Pa. 143, 29 Atl. 100; Baltimore Marine Ins. Co. v. Dalrymple, (1866) 25 Md. 269.

[43]3 Williston, Contracts sec. 1455 et seq.

[44]"The right to rescind is not universally acknowledged. Thus a seller is held not to have the right to rescind his contract if the buyer fails to perform, Williston, Sales sec. 511. There is, however, authority recognizing the right of rescission in the case of a contract for the conveyance of land. In Ankenny v. Clark, (1892) 148 U. S. 345, 37 L. Ed. 475, 13 S. C. R. 617, plaintiff was allowed to recover the value of wheat given to the de-

In all cases of conversion, by the better considered authorities, a plaintiff may waive his tort, as it is said, and sue in assumpsit for unjust enrichment. The action will be for goods sold and delivered, or if the conversion has been a sale, for money had and received.[45] A pledgor, therefore, in the event of the pledgee's having illegally appropriated the property to his own use may sue in assumpsit instead of in conversion. In a case of this kind there are two remedies afforded for the same wrong, either of which may be availed of, *i. e.* the pledgor has an election. The action of assumpsit for goods sold and delivered is based on the conversion of the property and the same facts which must be shown by the pledgor to entitle him to sue in conversion must also be shown to entitle him to sue in assumpsit, and the measure of damages will be the same in either action. If therefore, a pledgor sues for goods sold and delivered, his right to do so ought to depend on the theory prevailing in the particular jurisdiction as to when the right to sue in conversion arises. If it is held that there is a right to sue in conversion without tender, then there ought to be a right to sue for goods sold and delivered without a tender, but if a tender is essential to the action of conversion, it should also be essential to this form of action of assumpsit.[46]

When the pledgee's appropriation of the property involves its illegal transfer to a third party, the pledgor may under proper restrictions pursue his remedy against the transferee rather than as against the pledgee. If the transferee takes the pledge innocently, not knowing of the pledgor's outstanding interest, and the pledgor seeks to hold him liable he should be regarded as the assignee of the pledgee, and be given as such appropriate rights.

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fendant in return for the latter's agreement to convey real estate, which agreement had been broken by the defendant. But there is authority contra, Williston, Contracts, sec. 1460, and cases cited.

It has been held that a plaintiff may replevy a chattel from a defendant, who has gotten title to the same from the plaintiff through false representations. The action is used for the purpose of bringing about a rescission. Porter v. Leyhe, (1896) 67 Mo. App. 540. See, Williston, Sales sec. 567, and cases cited. Trover would lie as well as replevin, id. Conceding then, a right in the pledgor to rescind upon a tender of restitution, he ought to be able to bring about this result through an action sounding in conversion. It is a legal short cut to rescission.

[45]If the action is for money had and received, it in effect amounts to a ratification of the pledgee's wrongful sale of the goods. Belden v. Perkins, (1875) 78 Ill. 449; Dimock v. United States National Bank, (1893) 55 N. J. L. 296, 25 Atl. 926 (dictum); Stearns v. Marsh, (1847) 4 Denio (N. Y.) 227; 47 Am. Dec. 248 (dictum); Bryson v. Raynor, (1866) 25 Md. 424, 90 Am. Dec. 69 (dictum).

[46]See Woodward, Law of Quasi Contract, secs. 270-272, 277.

The very fact that the pledgee has purported to transfer greater rights than he had ought to and will assure to his transferee all the rights that he did have and was legally able to pass along. While it is true that a pledgee, as a rule, cannot separate the lien from the debt, and if he does the lien is gone, and the intended transferee of the lien gets nothing, this rule ought to prevail only in cases where the taker of the property is cognizant of the real situation, and does not intend to take whatever interest the pledgee has. It is entirely correct to hold that the purchaser of the lien as such without the debt gets nothing by his purchase, but on the other hand, if A buys property from B, a pledgee, believing that B owns the same, intending to get full ownership himself, and not to get a lien without a debt, there would seem to be no real objection to holding that B's purchase operated to give him all the rights that A had, and hence as an assignment of the debt and the security.[47] In any event this is the theory that the courts have adopted when the pledgor proceeds against an innocent buyer of the pledged property, and it seems to work out as justly as possible the rights of the parties. Hence if the debt is still unpaid, the pledgor will not be permitted to hold the buyer for a conversion without a tender of the debt being first made.[48] Naturally if the debt has already been paid, there is no further obligation resting on the pledgor so far as tender is concerned, but the transferee ought not to be liable for a conversion if he still has the pledge in his possession and has exercised no acts of ownership over the same until the pledgor has given him notice of his rights.[49]

Whenever the buyer knows of the pledge at the time of acquiring the chattel from the pledgee, and therefore does not take

[47]Talty v. Trust Co., (1876) 93 U. S. 321, 23 L. Ed. 886; Donald v. Suckling, (1866) L. R. 1 Q. B. 585; Williams v. Ashe, (1896) 111 Cal. 180, 43 Pac. 599; Bradley v. Parks, (1876) 83 Ill. 169; German Savings Bank of Baltimore City v. Renshaw, (1894) 78 Md. 475, 28 Atl. 281. In Young v. Guy, (1882) 87 N. Y. 457, a vendor of land mortgaged the same to A, who took to secure an antecedent debt. It was held that A was not a bona fide purchaser, but that he did succeed to the rights of the vendor and had a lien on the land to the extent of the agreed purchase price. The case involves the same principle as applied in the pledge cases, namely that when a grantee cannot take the title, which the grantor purports to pass, still he will take whatever interest the grantor did have in the property even though such interest is merely a debt and security.

[48]See supra note 47. See also Blundell-Leigh v. Attenborough, [1921] 3 K. B. 235.

[49]This is the general rule in the case of an innocent conversion. Pease v. Smith, (1875) 61 N. Y. 477. But if the pledgee's transferee has exercised dominion over the goods, and treated them as his own through use, no demand will be essential. Robinson v. Hartridge, (1869) 13 Fla. 501; and see Hyde v. Noble, (1843) 13 N. H. 494, 38 Am. Dec. 508, holding that a mere purchase constitutes a conversion.

innocently, it is held that he becomes by the very act of taking a converter himself, and the pledgor may sue him without a tender of the debt, or a demand for the return of the pledge.[50] Certainly if the debt has been paid such a decision is correct. The position of the buyer, under such conditions, is that of a deliberate converter, but if the debt was not paid at the time of the transfer, the soundness of the rule is not so certain. It is arguable, under these facts, that the transfer still operated to assign the pledgee's interest, which would involve in some jurisdictions at least the further proposition that the pledgor could not hold the transferee for a conversion without a tender of the debt.[51] Perhaps the suggestion is sound. It is conceivable that the act which results in an assignment where the taking is innocent should have the same result where the taking is in bad faith. Of course the proposition that the innocent taker is an assignee is adopted to protect an *innocent* taker, and the right of the transferee is in the nature of an "equity." Perhaps a court ought not to fabricate an "equity" in favor of a guilty converter. But it is certain that if it is only a matter of finding an intent, the same intent can be found in the one case as in the other, and so possibly the guilty transferee ought to be regarded as standing in the shoes of the pledgee.

Apparently the courts only regard the pledgee's innocent transferee as the assignee of the debt and the pledge in cases where the pledgor is suing the transferee for the appropriation of the pledged property. This becomes apparent in the cases where the pledgor is suing the pledgee for the conversion resulting from the transfer of the pledge. In most of those cases, as already noted, the pledgee is permitted to set off or recoup the amount of the debt secured, thereby reducing the amount of the pledgor's recovery to this extent.[52] Permitting this recoupment must be because the courts regard the pledgee as still being the owner of the debt. Of course after the judgment is satisfied the pledgor no longer has a claim on the converted chattel, and the title which the pledgee originally purported to transfer to the purchaser or taker from him is a reality so far as the pledgor is concerned.[53] There is

[50]This proposition is usually assumed, but see cases cited supra note 47.
[51]See supra note 39.
[52]See supra note 29.
[53]The judgment's satisfaction operates to pass the pledgor's title to the pledgee or his successor in interest. White v. Martin, (1834) 1 Porter (Ala.) 215; Miller v. Hyde, (1894) 161 Mass. 472, 37 N. E. 760; Stirling v. Garrittee, (1862) 18 Md. 468; Johnson v. Dun, (1899) 75 Minn. 533, 78 N. W. 98.

therefore no injustice done to the pledgee's transferee. He has gotten the fullest title that he could have expected to get from the pledgee and his dealings with the latter are left undisturbed. For this reason, it is not necessary in this case in order to protect the innocent transferee to hold that he is the assignee of the debt. If, however, the pledgor sues the transferee the courts, to protect the innocent party, are forced to regard the transferee as entitled to the debt, and to permit its being set off against the value of the property. If this were not done the transferee would lose all to no one's legitimate advantage, which, as he has intentionally done no wrong, would be an undesirable result.

Occasionally the pledgee has illegally transferred the pledge to another, and after so doing has sued the pledgor for the debt. The action ought not to lie.[54] Relief should be denied, not because the debt has been necessarily satisfied; it may, or may not have been, depending on the value of the property at the time of its illegal appropriation by the pledgee. The reason for refusing to give relief should be, because the pledgee, having parted with the pledge, is unable to return it the pledgor, which act by the agreement between the parties is a condition to the pledgor's obligation to pay. It is not proper to allow a pledgee to insist upon the pledgor's performance of his obligation, while he himself is substantially in default with respect to the performance of a condition to the pledgor's duty to pay. There is also a further objection to the pledgee's recovery, namely that if the pledgee has passed the property to another, such transferee might be regarded as the owner of the debt, and has been so regarded where he took the property without notice of the pledge.[55] In spite of the apparent soundness of the above contention, some cases have allowed a pledgee to sue for the debt after an illegal disposition of the pledge to a third party, but have reduced the amount of recovery by the value of the property at the time of its transfer by the pledgee, or within a reasonable time after notice of its transfer has been brought home to the pledgor.[56] The ratio decidendi of these cases must be that the debt is something distinct and apart from the security, and so long as the debt has not been paid it ought to be recoverable, regardless of what may have happened

[54]Sproul v. Sloan, (1913) 241 Pa. 284, 88 Atl. 501.

[55]See supra note 47, and Whitney v. Peay, (1862) 21 Ark. 22.

[56]Minor v. Beveridge, (1894) 141 N. Y. 399, 36 N. E. 404, 38 A. S. R. 804; Dimock v. United States National Bank, (1893) 55 N. J. L. 296, 25 Atl. 926; Rush v. First National Bank of Kansas City, (1895) 71 Fed. 102. Professor Edward H. Warren approves such a decision, urging

to the security. It must be said that so long as the pledgor is privileged to set off the value of the pledge no harm or injustice is done. It is true that in the end each party receives his due in dollars and cents, but it is believed that the moral effect of such a decision is unwholesome. It makes it possible for a person in the position of a fiduciary to violate the confidence and trust placed in him, and then to proceed as if no wrong had been done by him.

The rule just mentioned, permitting the pledgee, in spite of his conversion, to sue upon the debt has led to the following situation: a pledgee being a converter, may sue his pledgor for the debt and a pledgor being a defaulting debtor may also sue his pledgee for conversion.[57] In the first action the pledgor in most jurisdictions may set off or recoup the value of the property[58] and in the second, the pledgee may reduce the amount of recovery by the amount of the debt.[59] Although no authority has been found it is certain that an action brought by either party and pursued to judgment, must prevent a suit by the other, if the proper matter of recoupment is duly pleaded and allowed.[60] In the pledgee's action the recoupment is a substitute for the pledgor's action of trover, and in the pledgor's action it is a substitute for the pledgee's action of debt. The result, therefore, is that whichever action is brought the rights of both parties may be finally settled and adjudicated. Moreover, if the pledgee's disposition of the property has been a transfer of the same to another, title in such transferee may be confirmed because the pledgor in either action is allowed the value of the pledge.

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that there is "no occasion for the court to lay down a rule that an unauthorized transfer of the pledge forfeits the right in personam to which the pledge was security." Warren, Cases on Property 374. It is submitted that the matter is not one of forfeiture, but is purely a matter of contract law. The pledge cannot be treated as a transaction separate and apart from the loan; it is a part of the same contract. The agreement is that when the money is paid the security will be returned. If the pledgee cannot perform this agreement, his right in personam is not enforceable. See Upham v. Barbour, (1896) 65 Minn. 364, 68 N. W. 42, where the court apparently was willing to entertain an action on the debt subject to the pledgor's counterclaim for a conversion of the pledge. But such a decision is proper as the defendant did not object to the action on the debt.

[57] See supra notes 34 and 56.

[58] See supra note 56.

[59] See supra note 29.

[60] Of course in the normal action of trover the title will not be confirmed in the defendant until the judgment is satisfied. But if the pledgee is suing the pledgor on the debt, and the debt exceeds the value of the property, and recoupment is allowed, title will be immediately confirmed, because the pledgor is allowed by the recoupment the value of the property, it being deducted from the pledgee's claim.

SUPREME COURT DECISIONS ON FEDERAL POWER OVER COMMERCE, 1910-1914. III.

By Thomas Reed Powell*

I Commerce Among the Several States (Concluded)

THE decisions reviewed in the two preceding installments° have had to do with questions raised by congressional legislation confined to interstate carriers. There remain for consideration the decisions from 1910 to 1914 on constitutional issues raised by exercises or asserted exercises of the commerce power not confined in their application to persons or corporations directly engaged in interstate transportation. The cases to be reviewed in this paper deal with regulations of the persons or things transported rather than with the agencies transporting them. Sellers of goods to be transported across state lines may come within the regulatory power of Congress though they hire others to do the transporting. Passengers on interstate journeys are subject to a degree of congressional control by virtue of the commerce power. So, too, persons who hinder interstate commerce may run afoul of congressional enactments in favor of the freedom of such commerce.

7. Height of Bridges Act

The constitutionality of the act of Congress authorizing the secretary of war to require the alteration of bridges which after a hearing he determines to be unreasonable obstructions to the interstate commerce on the stream below was reaffirmed in *Hannibal Bridge Co. v. United States.*[1] Mr. Justice Harlan declared:

"The court has heretofore held, upon full consideration, that Congress had full authority, under the constitution, to enact section 18 of the act of March 3d, 1899, and that the delegation to the secretary of war specified in that section was not a departure from the established constitutional rule that forbids the delegation of strictly legislative or judicial powers to an executive officer of the government. All that the act did was to impose upon the secretary the duty of attending to such details as were necessary in

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°For the preceding instalments see 6 Minnesota Law Review 1, 123

[1](1911) 221 U. S. 194, 55 L. Ed. 699, 31 S. C. R. 603.

order to carry out the declared policy of the government as to the free and unobstructed navigation of those waters of the United States over which Congress, in virtue of its power to regulate commerce, had paramount control. It is also firmly settled that such alterations of bridges over the navigable waters of the United States as the chief of engineers recommended, and as the secretary of war required to be made after notice and hearing the parties interested, was not a taking of the property of the owners of such bridges, within the meaning of the constitution."[2]

Complaints that the secretary of war had not followed the procedure set forth in the statute were held to be unfounded. Since the statute of Congress under which the bridge was originally authorized expressly reserved the right to alter or amend it so as to require the removal of material obstructions to the navigation of the river which the bridge spans, the complainant was held to have no basis for the contention that it was not within the rulings of prior cases.

In *United States v. Baltimore & Ohio R. Co.*[3] an order of the secretary of war to alter a certain bridge was held invalid because

[2]Ibid., 205. In Philadelphia Co. v. Stimson, (1912) 223 U. S. 605, 56 L. Ed. 570, 32 S. C. R., 340, which denied to riparian owners any right to restrain the secretary of war from fixing the high-water mark of navigable rivers at a point different from that previously established by the state, Mr. Justice Hughes observed at pages 634-635:

"'The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstructions to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes Congress possesses all the powers which existed in the states before the adoption of the national constitution, and which have always existed in the Parliament in England.' Gilman v. Philadelphia, 3 Wall. 713, 725.

"Nor is this authority of Congress limited to so much of the water of the river as flows over the bed of forty years ago. The alterations produced in the course of years by the action of the water do not restrict the exercise of federal control in the regulation of commerce. Its bed may vary and its banks may change, but the federal power remains paramount over the stream, and this control may not be defeated by the action of the state in restricting the public right of navigation within the river's ancient lines. The public right of navigation follows the stream ... and the authority of Congress goes with it....

"It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation.... And in its regulation of commerce it may establish harbor lines or limits beyond which deposits shall not be made or structures built in the navigable waters."

[3](1913) 229 U. S. 244, 57 L. Ed. 1169, 33 S. C. R. 850. Mr. Justice Pitney did not sit.

of a prior judgment that the bridge in question was not within the act of Congress. This prior judgment had not been appealed to the Supreme Court, so that the decision of the circuit court of appeals which was held controlling because of the doctrine of res adjudicata was not one that necessarily would be affirmed by the Supreme Court in proper proceedings. The act of 1862 under which the particular bridge was authorized, unlike succeeding statutes dealing with such matters, contained no express reservation of any right to alter or amend it in any respect. The circuit court of appeals had held that the erection of the bridge under such authorization "created a vested right in the use of the bridge of which the defendants could not be deprived without just compensation." The Supreme Court in the present proceeding declared that:

"how far, if at all, the grant of the right to build the bridge under the terms specified in the act of 1862, with no reservation of the right to alter or amend, will operate to limit the power of Congress to directly legislate on the subject of the removal or alteration of the bridge, is a question we are not here concerned with, and therefore express no opinion upon it."

8. Food and Drugs Act

By the Food and Drugs Act of June 30, 1906, Congress forbade the interstate transportation of adulterated or misbranded articles of food or drugs. One of the enforcement provisions of the act authorized the seizure and confiscation of articles being transported in violation of the statute or which after transportation remain unloaded, unsold, or in original unbroken packages. *Hipolite Egg Co. v. United States*[4] presented the question of the validity of the seizure of eggs in the state of destination in the possession of a bakery concern which proposed to use them in making other food products. They were still in the original package, and the bakery concern had purchased them in their state of origin and was both shipper and consignee. A contention that the statute does not apply to articles shipped not for sale but for use in making other articles was denied by the court. A further contention that the articles may not be seized under federal authority after their interstate transportation has ended was held equally unfounded. As put by Mr. Justice McKenna, "the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of federal power and state

[4](1911) 220 U. S. 45, 55 L. Ed. 364, 31 S. C. R. 364. A case on the same point in another court is considered in 24 Harv. L. Rev. 235.

power over articles of legitimate commerce." This seems to concede to the complainant more than it deserved, for goods in the original packages in which they have come from other states are not as a rule subject to state police power prior to the first sale, though they are subject to the general taxing power. If these eggs had been intoxicating liquor, the state could not have prohibited their sale in the days before Congress legislated so as to allow state laws to apply. State police laws could apply to articles of extra-state origin still in the hands of the consignee in the original package only to prevent fraud or to guard against deleterious substances. It is true, however, that in the absence of congressional action, these adulterated eggs could have been dealt with to a certain extent by the state, but it would be because of an illegitimate, rather than because of a legitimate, character. Mr. Justice McKenna answers the constitutional complaint as follows:

"The contention misses the question in the case. There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found; and it certainly will not be contended that they are outside of the jurisdiction of the national government when they are within the borders of the state. The question in the case, therefore, is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the states by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of their articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the constitution."[5]

The power of Congress was extended still further in *McDermott v. Wisconsin*,[6] in which it was held that the federal act had constitutionally dictated that the labels approved by federal authorities for goods shipped in interstate commerce should be on the immediate container of the article intended for consumption and

[6](1911) 220 U. S. 45, 58, 55 L. Ed. 364, 31 S. C. R. 364.

not merely on the outside case in which such containers were sent across state lines. The precise point of the case is that a state may not forbid, even after the original package is broken, the retention on the immediate container of the labels which are lawful under federal authority. This decision necessarily involves sanction of the power of Congress to prescribe the labels on immediate containers and to authorize or command their retention after these immediate containers have been removed from the original packages in which they arrived in the state of destination and until they have been sold. The opinion seems to go further and to extend to Congress the constitutional power to seize the containers after they have been removed from the original package. It is pointed out by Mr. Justice Day that the retention of the federal labels on the unsold containers after removal from the original package is essential to proof whether the act of Congress has been violated or not. It is "the means of vindication or the basis of punishment in determining the character of the interstate shipment dealt with by Congress." Section 10 of the federal act provides for seizure of any adulterated or misbranded article which, after having been transported in interstate commerce, "remains unloaded, unsold, or in original broken packages." The court holds that unsold articles not in the original packages may be seized under the act and under the constitution. Mr. Justice Day says that "when section 2 has been violated, the federal authority, in enforcing either section 2 or section 10, may follow the adulterated or misbranded article at least to the shelf of the importer."

To this he adds:

"To make the provisions of the act effectual, Congress has provided not only for the seizure of the goods while being actually transported in interstate commerce, but also has provided for such seizure after such transportation and while the goods remain 'unloaded, unsold, or in original broken packages.' The opportunity for inspection *en route* may be very inadequate. The real opportunity of government inspection may only arise, when, as in the present case, the goods as packed have been removed from the outside box in which they were shipped, and remain, as the act provides, 'unsold.' It is enough, by the terms of the act, if the goods are *unsold*, whether in original packages or not. Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of section 10 are clearly within

*(1913) 228 U. S. 115, 57 L. Ed. 754, 33 S. C. R. 431. See 26 Harv. L. Rev. 757, 27 Harv. L. Rev. 75, 12 Mich. L. Rev. 67, and 19 Va. L. Reg. 148.

its power. Indeed it seems evident that they are measures essential to the accomplishment of the purposes of the act.'"

9. Exclusion of Sponges Act

A question of federal power over interstate commerce was apparently dealt with in *The Abby Dodge*[8] which sustained as to foreign commerce an act of Congress prohibiting the introduction into the United States of sponges gathered by diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida. The indictment failed to specify the place from which the sponges in question were taken. As they were landed in Florida, it would appear that, had they been derived from the territorial waters of Florida, the only transportation was intra-state. Chief Justice White, however, declares broadly that "the statute is repugnant to the constitution when applied to sponges taken or gathered within state territorial limits," and does not restrict his statement to the landing of the sponges in the same state in which they originate. The cases adduced in support of the lack of congressional power are those sustaining state power over the taking

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[7](1913) 228 U. S. 115, 136. In United States v. Johnson, (1921) 221 U. S. 488, 55 L. Ed. 823, 31 S. C. R. 627, false and misleading statements as to the curative qualities of a proprietary medicine were held not to be "misbrandings" within the meaning of that term in the federal Food and Drugs Act, where such statements purport to convey no information as to the identity of the substances in the compound. Mr. Justice Hughes, in dissenting, conceded that the act forbade only false statements of fact and not mere expressions of opinion, but he thought that the concededly worthless character of the medicine in question made the statements as to its power to cure cancer false statements of fact and so within the prohibition of the act. Justices Harlan and Day concurred in the dissent.

United States v. Antikamnia Chemical Co., (1914) 231 U. S. 654, 58 L. Ed. 419, 34 S. C. R. 222, held that the requirement of the act that labels of drugs shall contain the quantity or proportion of certain substances or derivatives of such substances means that the statement of the derivatives shall include a statement of the primary substances and that regulations specifically requiring this are therefore authorized by the act. The labels held unlawful stated the quantity of acetphenetidin and added that the drug contained no acetanilid. The former is a derivative of the latter.

Savage v. Jones, (1912) 225 U. S. 501, 56 L. Ed. 1182, 32 S. C. R. 715, and Standard Stock Food Co. v. Wright, (1912) 225 U. S. 540, 56 L. Ed. 1197, 32 S. C. R. 784, held that the federal Food and Drugs Act of 1906 forbade only misbranding or adulteration and did not require a statement of the ingredients of food and drugs shipped in interstate commerce, and therefore left the states free to impose the latter requirement on goods of extra-state origin still in the original package.

The Pure Food Act and the White Slave Act are discussed in William C. Woodward, "The Exercise of Federal Authority Over Interstate Commerce As a Police Power," 1 Georgetown L. J. 23. An administrative interpretation of the Pure Food Act with respect to sausage is dealt with in 23 Yale L. J. 182.

[8](1912) 223 U. S. 166, 56 L. Ed. 390, 32 S. C. R. 310.

of fish and oysters within the territorial limits of the state. This makes possible the inference that the chief justice regards the statute as a regulation of the taking of the sponges, as later a majority of the court regarded the law forbidding the interstate transportation of products made by child labor as a regulation of manufacture.[9] Yet, since the indictment involved sponges landed in Florida and there is no hint that the territorial waters from which the sponges might have come were other than those of Florida, the chief justice may be having in mind a case in which there is no interstate transportation. It will portray, if not settle the doubt as to the scope of his declarations to quote the following excerpts:

"Broadly, the act, it is insisted, is repugnant to the constitution because, in one aspect, it deals with a matter exclusively within the authority of the states.... [This] proceeds upon the assumption that the act regulates the taking or gathering of sponges attached to the land under water, within the territorial limits of the state of Florida, and it may be of other states bordering on the Gulf of Mexico, prohibits internal commerce in sponges so taken or gathered, and is therefore plainly an unauthorized exercise of power by Congress. . . .

If the premise upon which . . . [this] rests be correct, that is to say, the assumption that the act, when rightly construed, applies to sponges taken or gathered from land under water within the territorial limits of the state of Florida or other states, the repugnancy of the act to the constitution would plainly be established by the decisions of this court."[10]

Here, as elsewhere in the opinion, the chief justice is talking about the scope of the statute, and not about the particular state of facts before the court. It is in order to avoid repugnance of the statute to the constitution that he restricts it to delivery of sponges not taken from the territorial waters of any state. This restriction of the statute would of course make it inapplicable to sponges brought to New York from Florida waters. Such a restriction necessarily goes beyond the requirements of the particular case and is therefore obiter dictum. Justices McKenna and Holmes certainly could not have intended to approve of the broad implications possible from the chief justice's statements, since they later dissented in the *Child Labor Case*.

[9]Hammer v. Dagenhart, (1918) 247 U. S. 251, 62 L. Ed. 1101, 38 S. C. R. 529. Prior to the enactment of the child labor law, the power of Congress was considered in Jasper Yeates Brinton, "The Constitutionality of a Federal Child Labor Law," 62 U. Pa. L. Rev. 487; and in William Draper Lewis, "The Federal Power to Regulate Child Labor in the Light of Supreme Court Decisions," 62 U. Pa. L. Rev. 504.

[10](1912) 223 U. S. 166, 173, 56 L. Ed. 390, 32 S. C. R. 310.

10. The Wilson Act

The act of August 8, 1890, provided that intoxicating liquor shipped into any state or territory should upon arrival therein be subject to the laws of such state or territory, enacted in the exercise of its police powers, as though such liquor had been produced therein. The constitutionality of the law was sustained in the year following its enactment. Two cases during the period now under review interpret the scope of the statute. *Louisville & Nashville R. Co. v. F. W. Cook Brewing Co.*[11] followed an earlier decision in holding that the words "upon arrival therein" mean arrival at their destination in the possession of the consignee and not arrival within the borders of the state. *De Bary v. Louisiana*[12] held that the congressional act applies to liquor from abroad as well as to liquor from another state, and that it permits the application of a state license tax which the state court had held an exercise of police power as well as a fiscal measure.[13]

11. White Slave Act

The act of June 25, 1910, familiarly known as the white slave act, forbids persons to transport or cause to be transported or to induce any woman or girl to be transported in interstate commerce for the purpose of prostitution or debauchery or other immoral purposes. The constitutionality of the statute was sustained in *Hoke v. United States,*[14] as against the objections that it abridges the privileges and immunities of citizens of the United States, is not a regulation of interstate commerce and is therefore an encroachment on the reserved powers of the states and of the people. Mr. Justice McKenna declared that the power of Congress under the commerce clause "is the ultimate determining question," since, "if the statute be a valid exercise of that power, how it

[11](1912) 223 U. S. 70, 56 L. Ed. 355, 32 S. C. R. 189. See 10 Mich. L. Rev. 492. The question of "arrival" within a state is dealt with also in 61 U. Pa. L. Rev. 206.

[12](1913) 227 U. S. 108, 57 L. Ed. 441, 33 S. C. R. 239. See 26 Harv. L. Rev. 533, 554.

[13]The Wilson Act was followed by the Webb-Kenyon Act which forbade the interstate transportation of liquor to points in a state in which its sale, etc., is forbidden by state law. Discussions of this statute prior to the Supreme Court decision sustaining it will be found in Winfred T. Denison, "States' Rights and the Webb-Kenyon Law," 14 Colum. L. Rev. 320; Allen H. Kerr, "The Webb Act," 22 Yale L. J. 567; Lindsay Rogers, "The Constitutionality of the Webb-Kenyon Bill," 1 Calif. L. Rev. 499; and notes in 14 Colum. L. Rev. 330, 348, 350, 27 Harv. L. Rev. 763, and 12 Mich. L. Rev. 584.

[14](1913) 227 U. S. 308, 57 L. Ed. 523, 33 S. C. R. 281. See 26 Harv. L. Rev. 657.

may affect persons or states is not material to be considered." Commerce, he says, includes the transportations of persons, and it is not material that women are not articles of commerce. The fact that the motives of the transportation determine its lawful or unlawful character under the statute does not deprive the act of its constitutional quality as a regulation of interstate commerce. "Motives executed by actions may make it the concern of government to exert its powers." The contention that the act was a subterfuge and an attempt to interfere with the police powers of the states was answered by saying that the means used by Congress in the exercise of its powers may have the quality of police regulations and by referring to the prohibition of the interstate transportation of obscene literature and articles designed for indecent and immoral use, of lottery tickets and of impure food and drugs. After saying that "in all of these instances a clash of national legislation with the powers of the states was urged, and in all rejected," Mr. Justice McKenna goes on:

"Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said; but it must be kept in mind that we are one people; and 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; 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."[15]

The Hoke Case was followed in *Athanasaw v. United States*,[16] *Bennett v. United States*[17] and *Harris v. United States*[18] decided at the same time. *Wilson v. United States*[19] added that the commerce power extends to transportation by others than common carriers and that the act applies when the unlawful purpose exists at the time of the transportation and that subsequent abandonment of evil intention can not defeat prosecution under the act.[20]

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[15](1913) 227 U. S. 308, 322, 57 L. Ed. 523, 33 S. C. R. 281.
[16](1913) 227 U. S. 326, 57 L. Ed. 528, 33 S. C. R. 285.
[17](1913) 227 U. S. 333, 57 L. Ed. 531, 33 S. C. R. 288.
[18](1914) 227 U. S. 340, 57 L. Ed. 534, 33 S. C. R. 289.
[19](1914) 232 U. S. 563, 58 L. Ed. 728, 34 S. C. R. 347. See 14 Colum. L. Rev. 429, 450.
[20]In 21 Yale L. J. 94 is a note on a decision on the white slave act prior to the Supreme Court decision, and in 12 Mich. L. Rev. 156 a discussion

12. Sherman Anti-trust Act

The anti-trust act of July 2, 1890, states that "every contract, combination, in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations is hereby declared to be illegal." Provision is made for the punishment of violators of this section and also of "every person who shall monopolize, or attempt to monopolize" etc., "any part of the trade or commerce among the several states, or with foreign nations." The constitutional issues raised by the enforcement of these provisions are whether the trade or commerce involved is interstate or only intra-state and whether the application of the prohibitions to any given state of facts results in a deprivation of liberty or property without due process of law. Both of these issues were raised in *Standard Oil Co. v. United States*[21] and decided in favor of the government. The commerce question was not discussed as the contention that the decree went beyond interstate commerce and dealt with "mere questions of production of commodities within the states" was declared to be foreclosed by previous decisions. The defendants bought and sold in different states from those in which they manufactured.

With respect to the due-process complaint, Chief Justice White said in part:

"Many arguments are pressed in various forms of statement which in substance amount to contending that the statute cannot be applied under the facts of this case without impairing rights of property and destroying the freedom of contract or trade which is essentially necessary to the well-being of society, and which, it is insisted, is protected by the constitutional guaranty of due process of law. But the ultimate foundation of all these arguments is the assumption that reason may not be resorted to in interpreting and applying the statute, and therefore that

of a case in the federal district court holding that the act of Congress is applicable to transportation for the forbidden object though the undertaking is without pecuniary elements.

[21] (1911) 221 U. S. 1, 55 L. Ed. 619, 31 S. C. R. 502. See Andrew A. Bruce, "The Supreme Court and the Standard Oil Case," 73 Cent. L. J. 111; Harold Evans, "The Standard Oil and American Tobacco Cases," 60 U. Pa. L. Rev. 311; Felix H. Levy, "The Federal Anti-trust Law and the 'Rule of Reason,'" 1 Va. L. Rev. 188; Herbert Noble, "The Standard Oil Case," 44 Amer. L. Rev. 1; Robert L. Raymond, "The Standard Oil and Tobacco Cases," 25 Harv. L. Rev. 31; Albert H. Walker, "The 'Unreasonable' Obiter Dicta of Chief Justice White in the Standard Oil Case," 72 Cent. L. J. 423, and "Review of the Opinions of the Supreme Court of the United States in the Standard Oil and Tobacco Cases," 45 Amer. L. Rev. 718, 73 Cent. L. J. 21; H. L. Wilgus, "The Standard Oil Decision: The Rule of Reason," 9 Mich. L. Rev. 643; and notes in 25 Harv. L. Rev. 71, 94, and 17 Va. L. Reg. 165. See also the references in note 26, infra.

the statute unreasonably restricts the right to contract, and unreasonably operates upon the right to acquire and hold property. As the premise is demonstrated to be unsound by the construction we have given the statute, of course the propositions which rest upon that premise need not be further noticed."[22]

The construction of the act, here referred to, was that "restraint of trade" as used in the statute means only such restraint of trade as was unlawful at common law, which in general was "unreasonable," "undue" or "immoderate" restraint of trade. Earlier decisions, as Mr. Justice Harlan pointed out in a separate opinion, partly concurring and partly dissenting, had put a broader interpretation upon the act and had held that "every contract in restraint of trade" means every contract that restrains trade whether such restraint was lawful at common law or not. These earlier decisions had held that this construction of the act did not render it unconstitutional, so that it is not safe to assume that the new affirmance of its constitutionality on the ground that it does not go beyond the common law necessarily means that it would thenceforth have been thought unconstitutional had the previous interpretation continued to be accepted. Chief Justice White does not concede that the interpretation of the statute has been altered. He insists that its broad language necessarily requires the use of reason in ascertaining its scope, that therefore the statute had always been interpreted reasonably, from which he assumes that the term "restraint of trade" had previously been held to exclude "reasonable" restraint of trade. Mr. Justice Harlan agrees that the statute had always been interpreted reasonably and insists that the reasonable interpretation previously given was that the court could not insert before the words "restraint of trade" the qualifying adjectives "unreasonable," "undue" or "immoderate." The contrary position of the chief justice, when analyzed, will be seen to consist of a pun on the word "reasonable."[23] This, however, had to do, not with the proper interpretation of the statute as an

[22](1911) 221 U. S. 1, 69, 55 L. Ed. 619, 31 S. C. R. 302.

[23]The dispute as to the meaning of the statute is whether it forbids all restraint of trade or only that unreasonable restraint of trade which was forbidden by the common law. Previously, as Mr. Justice Harlan points out, all the members of the court had concurred in declaring that "it has been decided that not only unreasonble but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law." These earlier decisions here referred to had not been unanimous, but in one of them the majority, as quoted by Mr. Justice Harlan had declared: "By the simple use of the term 'contract in restraint of trade', *all* contracts of that nature, whether valid or otherwise would be included, and *not*

original question, but with the issue whether the present interpretation is consistent with earlier ones.

A further constitutional contention in the case was that the statute is so indefinite that it necessarily delegates legislative power to the judiciary. Chief Justice White answers this by saying:

"The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether, in a given case, particular acts come within a generic statutory provision. But to reduce the propositions, however, to this, their final meaning, makes it clear that in substance they deny the existence of essential legislative authority, and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning. This is so clear as to require no elaboration. Yet, let us demonstrate that which needs no demonstration, by a few obvious examples. Take, for instance, the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce."[24]

Two weeks later in *United States v. American Tobacco Co.*[25] the court reiterated the interpretation of "restraint of trade" reached in the *Standard Oil Case,* though here as there the combi-

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alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but *all* contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress."

The pun by which Chief Justice White seeks to escape from these earlier declarations consists in using the word "reasonable" now in the sense of "moderate" and now in the sense of "reached through a process of reasoning." To this is added the introduction of a negative. Thus we are told in effect that the court had necessarily used its reason in interpreting "restraint of trade" and had thereby given that term a meaning which was "reasonable," not only in the sense of "sensible" or "reached by reasoning," but also in the sense of "unreasonable," "undue" or "immoderate."

[24] (1911) 221 U. S. 1, 69-70, 55 L. Ed. 619, 31 S. C. R. 502.

[25] (1911) 221 U. S. 106, 55 L. Ed. 663, 31 S. C. R. 632. See 17 Va. L. Reg. 240, and discussion referred to in note 21, supra, and note 26, infra.

nations in question were held to restrain trade unreasonably and immoderately so that it was unnecessary to determine whether the statute included or excluded reasonable or moderate restraint of trade in or from its prohibitions. Chief Justice White again wrote the opinion, and Mr. Justice Harlan repeated the objections he had advanced in the *Standard Oil Case*. A contention that "the subject-matter of the combination" and "the combination itself, are not within the scope of the anti-trust law, because, when rightly considered, they are merely matters of intra-state commerce" was left without specific refutation "because the want of merit in all the arguments advanced on such subjects is so completely established by the prior decisions of this court, as pointed out in the *Standard Oil Case*, as not to require restatement." Here as there the defendants bought and sold in different states from those in which they manufactured.[26]

Somewhat more specific consideration was given to the commerce question in a number of other cases. *Standard Sanitary Mfg. Co. v. United States*,[27] frequently called *The Bathtub Case*, dissolved a combination of manufacturers and jobbers of enameled iron ware which through restrictions in license agreements with respect to patented articles, restricted output, regulated prices, and confined sales to those in the combination. One of the members of the combination contended that it was not engaged in interstate commerce, but Mr. Justice McKenna answered:

"It appears from the testimony that the company was a man-

[26]The issues involved in the Standard Oil and Tobacco Cases and other decisions interpreting the Sherman Law are considered in Charles A. Boston, "The Spirit Behind the Sherman Anti-Trust Law," 21 Yale L. J. 341; Stuart Chevalier, "Has the Sugar Trust Case Been Overruled?," 44 Amer. L. Rev. 858; Frederick H. Cooke, "The Need and Proper Scope of Federal Legislation Against Restrictions Upon Competition," 46 Amer. L. Rev. 676; Harold Evans, "The Supreme Court and the Sherman Act," 59 U. Pa. L. Rev. 61; Roland R. Foulke, "Restraints on Trade," 12 Colum. L. Rev. 97, 220, and "The Federal Anti-Trust Act of 1890," 62 U. Pa. L. Rev. 73, 161, 241; William B. Hornblower, "Anti-Trust Legislation and Litigation," 11 Colum. L. Rev. 701; M. S. Hottenstein, "The Sherman Anti-Trust Law," 44 Amer. L. Rev. 827; Charles P. Howland, "Monopolies: The Cause and the Remedy," 10 Colum. L. Rev. 91; Victor Morawetz, "The Supreme Court and the Anti-Trust Act," 10 Colum. L. Rev. 687; Herbert Noble, "The Sherman Anti-Trust Act and Industrial Combinations," 44 Amer. L. Rev. 177; Herbert Pope, "The Reason for the Continued Uncertainty of the Sherman Act," 7 Ill. L. Rev. 201; and George W. Wickersham, "Recent Interpretation of the Sherman Act," 10 Mich. L. Rev. 1.

[27](1912) 226 U. S. 20, 57 L. Ed. 107, 33 S. C. R. 9. See 26 Harv. L. Rev. 275 and 11 Mich. L. Rev. 386. The decision in the court below is considered in 25 Harv. L. Rev. 454, 479.

ufacturer and a jobber, manufacturing about one half of what it sold. As a jobber it bought goods from other manufacturers, but it denies there was an agreement as to prices with such manufacturers.

"The testimony as to the state or interstate character of its business is that it manufactures at Elizabeth, New Jersey, and buys also from other manufacturers and jobbers. It ships from there to its warehouses in New York, Worcester, Massachusetts, and Brooklyn. The trade of its Worcester branch covers about 200 miles around Worcester, its efforts being to localize its business. It is doubtful, it is testified, if the trade goes beyond Massachusetts, the trade there being circumscribed. Sales in Connecticut are made through the New York office from the warerooms.

"It is manifest that the Colwell Company was a party to the combination and was also engaged in interstate commerce. The fact that its trade was less general than that of the other manufacturers and jobbers does not take from it the character of an interstate trader."[28]

The contract and combination held to offend against the Sherman Law in *United States v. Reading Co.*[29] was participated in by

[28](1912) 226 U. S. 20, 50-51, 57 L. Ed. 107, 33 S. C. R. 9. Two important cases interpreting the patent statute have a bearing on the scope of the Sherman Law, since restraints of trade imposed as part of the monopoly of a patentee are held not to violate the Sherman Law. Bauer & Cie. v. O'Donnell, (1913) 229 U. S. 1, 57 L. Ed. 1041, 33 S. C. R. 616, often referred to as the Sanatogen Case, held that the monopoly of the patentee does not include the right to limit by notice the resale price of articles protected by the patent. This case is reviewed editorially in 2 Calif. L. Rev. 80, 13 Colum. L. Rev. 632, 652, 27 Harv. L. Rev. 73, 96, 12 Mich. L. Rev. 394. Henry v. A. B. Dick Co., (1912) 224 U. S. 1, 56 L. Ed. 645, 32 S. C. R. 365, held that the monopoly of the patentee includes the power to limit by license restriction the use of the patented article in conjunction with other articles not patented. For editorial notes on this case see 12 Colum. L. Rev. 445, 471, 564, 10 Mich. L. Rev. 579, and 17 Va. L. Reg. 958. The relation between the patent law and the Sherman Act is considered, Edwin H. Abbot, Jr., "Patents and the Sherman Act," 12 Colum. L. Rev. 709; Walter H. Chamberlin, "Patented Articles: When Are They Emancipated from the Patent Monopoly Under Which They Are Manufactured?," 6 Ill. L. Rev. 357; Frank J. Hagan, "The Patent Monopoly," 1 Georgetown L. J. 23; Gilbert H. Montague, "The Sherman Anti-Trust Law and the Patent Law," 21 Yale L. J. 438, "The Supreme Court on Patents," 21 Yale L. J. 583, and "The Proposed Patent Law Revision," 26 Harv. L. Rev. 128; Edward S. Rogers, "Restrictions on the Use of Patented Articles," 10 Mich. L. Rev. 608, and "Predatory Price Cutting as Unfair Trade," 27 Harv. L. Rev. 139; and H. A. Toumlin, Jr., "The Patent Law and the Sherman Law," 1 Va. L. Rev. 445. See also citations and references in notes 40 and 41 infra. The case of Henry v. A. B. Dick Co. was later overruled by Motion Picture Patents Co. v. Universal Film Mfg. Co., (1917) 243 U. S. 502, 61 L. Ed. 871, 37 S. C. R. 416.

[29](1912) 226 U. S. 324, 57 L. Ed. 243, 33 S. C. R. 90. See 26 Harv. L. Rev. 379.

interstate carriers who through an intermediary acquired coal properties which were the only possible feeders of a proposed independent interstate road, thereby preventing the construction of such road. Further acts complained of by the government were contracts with independent coal operators for the sale of the entire output of their mines. On the commerce question Mr. Justice Lurton said:

"The coal contracts acquired when this proceeding was begun aggregated nearly one-half the tonnage of the independent operators. Much of the coal so bought was sold in Pennsylvania, and all of the contracts were made in that state, and the coal was also there delivered to the buying defendants. That the defendants were free to sell again in Pennsylvania, or transport and sell beyond the state, is true. That some of the coal was intended for local consumption may also be true. But the general market contemplated was the market at tide water, and the sales were made on the basis of the average price at tide water. The mere fact that the sales and deliveries took place in Pennsylvania is not controlling when, as here, the expectation was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between the mines and the general consuming markets of other states. 'Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business' . . . The purchase and delivery within the state was but one step in a plan and purpose to control and dominate trade and commerce in other states for an illegal purpose . . .

The concerted plan concerned the relations of these railroads to their interstate commerce, and directly affected the transportation and sale and price of the coal in other states. The prime object in engaging in this scheme was not so much the control and sale of coal in Pennsylvania, but the control of sales at New York harbor."[30]

A "corner" in cotton was held to violate the Sherman Law in *United States v. Patten*,[31] in which Mr. Justice Van Devanter declared:

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[30](1912) 226 U. S. 324, 368, 57 L. Ed. 243, 33 S. C. R. 90. The question who may sue for treble damages under the Sherman Law is considered in 11 Colum. L. Rev. 481; the right of a minority stockholder, in 13 Colum. L. Rev. 154, 165; the right of a private person to enjoin violations of the Sherman Law, in 26 Harv. L. Rev. 179; the question whether contracts with regard to producing grand opera are interstate in character, in 14 Colum. L. Rev. 87; the district court decision in the Harvester Trust Case, in 14 Colum. L. Rev. 658, 690; and the question whether a purchaser of goods can resist payment on the ground that the seller is a violator of the Sherman Act, in 61 U. Pa. L. Rev. 201.

[31](1913) 226 U. S. 525, 57 L. Ed. 333, 33 S. C. R. 141. See 26 Harv. L. Rev. 461.

"Of course, the statute does not apply where the trade or commerce affected is purely intra-state. Neither does it apply, as this court often has held, where the trade or commerce affected is interstate, unless the effect thereon is direct, not merely indirect. But no difficulty is encountered in applying these tests to the present case when its salient features are kept in view.

"It was a conspiracy to run a corner in the market. The commodity to be cornered was cotton—a product of the Southern states, largely used and consumed in the Northern states. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the Northern states. The corner was to be conducted on the Cotton Exchange in New York city, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country.

"Bearing in mind that such was the nature, object, and scope of the conspiracy, we regard it as altogether plain that, by its necessary operation, it would directly and materially impede, and burden the due course of trade and commerce among the states, and therefore inflict upon the public the injuries which the anti-trust act is designed to prevent . . .

"The defendants place some reliance upon *Ware v. Mobile County*, 209 U. S. 405, as showing that the operation of the conspiracy did not involve interstate trade or commerce; but we think the case does not go so far and is not in point. It presented only the question of the effect upon interstate trade or commerce of the taxing by a state of the business of a broker who was dealing in contracts for the future delivery of cotton, where there was no obligation to ship from one state to another; while here we are concerned with a conspiracy which was to reach and bring within its dominating influence the entire cotton trade of the country, and which was to be executed, in part only, through contracts for future delivery. It hardly needs statement that the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."[22]

Mr. Justice Holmes dissented on some ground not specified, and Mr. Justice Lurton and Chief Justice White dissented on the ground that the court below interpreted the count in question as failing to charge a "corner."

[22](1913) 226 U. S. 525, 542-544, 57 L. Ed. 333, 33 S. C. R. 141.

A contention that a prosecution for violating the Sherman Law sought to punish acts beyond the boundaries of the United States and therefore beyond the power of Congress was held unfounded in *United States v. Pacific & A. R. & N. Co.*[33] This involved an attempt by railway and steamship carriers, operating between Puget Sound and Yukon River points and passing through Canada, to exclude competing carriers by refusing to establish joint rates with them and by charging them the higher local rates. The charge of extraterritoriality is thus disposed of by Mr. Justice McKenna:

"The next contention of defendants is that, as part of the transportation route was outside of the United States, the anti-trust law does not apply. The consequences and, indeed, legal impossibility, are set forth to such application, and, it is said, 'make it obvious that our laws relating to *interstate* and *foreign* commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries, and . . . it is equally clear that our laws cannot be extended so as to control or affect the foreign carriage.' This is but saying that laws have no extraterritorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept. The indictment alleges that the four companies which constitute the White Pass & Yukon Route (referred to as the railroad), and owned and controlled by the same persons, entered into the combination and conspiracy alleged, with the intention alleged, with the Wharves Company and the defendant steamship companies. In other words, it was a control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations."[34]

A defendant prosecuted criminally for a violation of the anti-trust act urged in *Nash v. United States*[35] that the indefiniteness of the statute makes its criminal enforcement unconstitutional because it leaves the defendant uninformed of the nature of his crime. To this Mr. Justice Holmes answered:

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[33](1913) 228 U. S. 87, 57 L. Ed. 742, 33 S. C. R. 443.

[34]Ibid., 105-106. A question similar to that raised in the Pacific Case is considered in Warren B. Hunting, "Extra-territorial Effect of the Sherman Law: Am. Banana Co. versus U. S. Fruit Co.," 6 Ill. L. Rev. 34.

[35](1913) 229 U. S. 373, 57 L. Ed. 1232, 33 S. C. R. 780. Mr. Justice Pitney dissents. Another case on the same question is considered in 13 Colum. L. Rev. 421, 437.

"But, apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends upon his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' . . 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.'. . . If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder however little he expected the result. . . If he did no more than drive negligently through a street, he might get off with manslaughter or less. . . . And in the last case he might be held though he himself thought that he was acting as a prudent man should. . . .We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act."[36]

Cases in which defendants are held to have violated the Sherman Act involve the assumption that the commerce restrained is interstate, even though there is no specific contest on the point. The act was applied to the purchase by one interstate carrier of a controlling interest in the stock of another in *United States v. Union Pacific R. Co.*;[37] to a combination of the terminal facilities of interstate railroads in *United States v. Terminal Railroad Association*;[38] to an effort by retail lumber dealers in various states to blacklist wholesalers who sold directly to consumers in *Eastern States Retail Lumber Dealers' Ass'n v. United States*;[39] to a combination of book publishers and book sellers to boycott others who departed from the prices fixed for the sale of books in *Straus v. American Publishers' Ass'n*;[40] and to contracts between a manu-

[36](1913) 229 U. S. 373, 377-378, 57 L. Ed. 1232, 33 S. C. R. 780. United States v. Kissel, (1910) 218 U. S. 601, 54 L. Ed. 1168, 31 S. C. R. 124, which holds that a conspiracy to violate the Sherman Law continues so long as any further action is taken in furtherance of it, is commented on in 11 Colum. L. Rev. 183 and 24 Harv. L. Rev. 505. A similar case is treated in 26 Harv. L. Rev. 762.

[37](1912) 226 U. S. 61, 57 L. Ed. 124, 33 S. C. R. 53. See 26 Harv. L. Rev. 379.

[38](1912) 224 U. S. 383, 56 L. Ed. 810, 32 S. C. R. 507. See 25 Harv. L. Rev. 717, 743.

[39](1914) 234 U. S. 600, 58 L. Ed. 1490, 34 S. C. R. 951. See 27 Harv. L. Rev. 493.

facturer and dealers in different states to maintain retail prices in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[41]

II. Commerce With Foreign Nations

Notwithstanding recurring expressions in Supreme Court opinions that the power over interstate commerce is as broad as that over foreign commerce, it is likely that there are differences between the two. Congress can certainly apply to foreign commerce any regulation that is valid when imposed on commerce between the states, but the converse is less clear. It is asserted that the power over foreign commerce is absolute, while the largest adjectives applied to the power over interstate commerce are "complete" and "plenary." The difference may be due, not to conceptions of the meaning of the commerce clause separately considered, but to notions of differences in the applications of the due-process clause of the fifth amendment to foreign and to interstate commerce respectively, and of similar differences in the bearing of the reservations to the states contained in the ninth and tenth amendments. At any rate, whatever the explanation, it is fairly certain that the

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[40](1913) 231 U. S. 222, 58 L. Ed. 192, 34 S. C. R. 84. See 14 Colum. L. Rev. 163 and 12 Mich. L. Rev. 507.

[41](1911) 220 U. S. 373, 55 L. Ed. 502, 31 S. C. R. 376. See William J. Shroder, "Price Restriction on the Resale of Chattels," 25 Harv. L. Rev. 59; Archibald H. Taylow, "Is Competition Compassed by Immorality, That Sort of Unrestricted Trade Which is Favored of the Law? Dr. Miles Medical Company v. John D. Park & Sons Co., 220 U. S. 273," 46 Amer. L. Rev. 184; and notes in 24 Harv. L. Rev. 680, 60 U. Pa. L. Rev. 270, and 17 Va. L. Reg. 161. See also references in note 28, supra. Other notes on retail price fixing appear in 13 Colum. L. Rev. 445 and 59 U. Pa. L. Rev. 187.

Two cases in which the acts in question were held to constitute no offense againt the Sherman Law give no indication that the trade involved was not interstate. Virtue v. Creamery Package Mfg. Co., (1913) 227 U. S. 8, 57 L. Ed. 393, 33 S. C. R. 202, allowed a corporation selling patented articles in states other than the state of manufacture to make another corporation its exclusive sales agent and to restrict it to fixed prices. In United States v. Winslow, (1913) 227 U. S. 202, 57 L. Ed. 481, 33 S. C. R. 253, the union into one corporation of three corporations selling different patented articles which did not compete with one another was held not an unlawful restraint of trade.

For articles dealing more or less directly with questions of federal power over commerce, see Wm. Houston Kenyon, "The Kahn Act: A Criticism", 14 Colum. L. Rev. 52; Carman F. Randolph, "The Inquisitorial Power Conferred by the Trade Commission Bill," 23 Yale L. J. 672; Fitz-Henry Smith, Jr., "The New Federal Statute Relating to Liens on Vessels," 24 Harv. L. Rev. 182; Charles E. Townsend, "The Protection of Intellectual Property at International Expositions," 2 Calif. L. Rev. 291; and Harold F. White, "Legal Aspects of the Panama Canal," 8 Ill. L. Rev. 442.

power of Congress over foreign commerce is more arbitrary and more nearly absolute than that over interstate commerce. It is well, therefore, to group in a separate section two cases sustaining regulations of foreign commerce which may be influenced by considerations not applicable to the same extent to commerce among the several states.

By the act of June 20, 1906, Congress made it unlawful to land or offer for sale at any port or place in the United States any sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida, with an exception in favor of sponges over four inches in diameter which had been gathered between October 1st and May 1st in water over fifty feet deep. The constitutionality of the statute came before the court in *The Abby Dodge*[42] which was a libel of a vessel charged with bringing into a port in Florida a cargo of sponges unlawfully taken "from the waters of the Gulf of Mexico and the Straits of Florida." Chief Justice White conceded that "the statute is repugnant to the constitution when applied to sponges taken or gathered within state territorial limits," apparently without making any distinction between sponges landed in the state from which they were taken and those landed in other states. To avoid the necessity of holding the act unconstitutional he construed it as not applying to sponges taken in local waters and sent the case back with permission to the government, if it desired, "to amend the libel so as to present a case within the statute as construed." In affirming the constitutionality of the act when applied only to foreign commerce, he said:

"Undoubtedly (*Lord v. Goodall, N. & P. S. Co.*, 102 U. S. 541), whether the Abby Dodge was a vessel of the United States or of a foreign nation, even although it be conceded that she was solely engaged in taking or gathering sponges in the waters which, by the law of nations, would be regarded as the common property of all, and was transporting the sponges so gathered to the United States, the vessel was engaged in foreign commerce, and was therefore amenable to the regulating power of Congress over that subject. This being not open to discussion, the want of merit of the contention is shown, since the practices from the beginning, sanctioned by the decisions of this court, establish that Congress, by an exertion of its power to regulate foreign commerce, has the authority to forbid merchandise carried in such commerce from entering the United states. *Buttfield v. Stranahan,* 192 U. S. 470, 492, 493, and

[42]Note 8, supra.

authorities there collected. Indeed, as pointed out in the Buttfield Case, so complete is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States."[43]

This avoids specific refutation of the contention of extra-territoriality made in the objection that the act applies to "sponges taken from the bed of the ocean, which the national government has no power to deal with."[44]

A similar contention of extra-territoriality was advanced in *United States v. Nord Deutscher Lloyd*[45] which sustained an indictment for violating a federal prohibition against making any charge for the return of aliens unlawfully brought into the United States or taking security therefor. The defendant steamship company had required emigrants sailing from Germany to buy return tickets

[43](1912) 223 U. S. 166, 176-177, 56 L. Ed. 390, 32 S. C. R. 310.

"Another power by which Congress may deal with matters which occur in the bailiwick of Neptune is that of passing necessary and proper laws to carry into effect the jurisdiction over admiralty and maritime matters vested in the federal courts. An exercise of this power appears in Oceanic Steam Navigation Co. v. Mellor, (1914) 233 U. S. 718, 58 L. Ed. 1171, 34 S. C. R. 744, which holds that the Act of Congress permitting ship owners to limit liability applies to loss caused by a foreign ship on the high seas when suit therefor is brought in the federal courts. The loss in question was caused by the sinking of the Titanic after its collision with an iceberg. In support of the application of the American statute to suits in the American federal courts, Mr. Justice Holmes said:

"It is true that the act of Congress does not control or profess to control the conduct of a British ship on the high seas. . . . It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose. . . . It is competent, therefore, to Congress to enact that, in certain matters belonging to admiralty jurisdiction, parties resorting to our courts shall recover only to such extent or in such way as it may mark out. . . . The question is not whether the owner of the Titantic by this proceeding can require all claimants to come in, and can cut down rights vested under English law, as against, for instance, Englishmen living in England, who do not appear. It is only whether those who do see fit to sue in this country are limited in their recovery irrespective of the English law. That they are so limited results, in our opinion, from the decisions of this court." (pages 732-733). Mr. Justice McKenna dissented, thinking that a previous decision had implied that the law of the ship should govern the amount of recovery. For a note on the case, see 63 U. Pa. L. Rev. 133. The decision in the court below is considered in Joseph I. Kelly, "The 'Titanic' Death Liability," 7 Ill. L. Rev. 138; and notes in 14 Colum. L. Rev. 445, 27 Harv. L. Rev. 82, and 62 U. Pa. L. Rev. 547.

For an instance of the application of the federal statute permitting limitation of liability to a suit against a shipowner for a nonmaritime tort, see Richardson v. Harmon, (1911) 222 U. S. 96, 56 L. Ed. 110, 32 S. C. R. 27.

[44](1912) 223 U. S. 512, 56 L. Ed. 531, 32 S. C. R. 244.

there. To its objection that what was lawfully done in Germany could not be punished as a crime in New York, Mr. Justice Lamar replied:

"The statute of course has no extra-territorial operation, and the defendant cannot be indicted here for what he did in a foreign country. . . But the parties in Germany could make a contract which would be in force in the United States. When, therefore, in Bremen the alien paid and the defendant received the 150 roubles for a return passage, they created a condition which was operative in New York. If, in that city, the company had refused to honor the ticket, the alien could there have enforced his rights. In like manner, if by reason of facts occurring in New York the statute operated to rescind the contract, the rights and duties of the parties could there be determined, and acts of commission or omission, which were there unlawful, could there be punished.

"If, as argued, the company did nothing in New York except to retain money which had been lawfully paid in Germany, the result is not different, because, under the circumstances, nonaction was equivalent to action. The indictment charges that on December 16, 1910, it was found that the aliens had been unlawfully brought into this country. The company at once was under the duty of taking them back at its own cost. Instead of returning to them the money previously received for such transportation, the defendant retained it up to the date of the indictment, April 3, 1911, with intent to make charge and secure payment for their passage to Bremen. This retention of the money, with such intent, was an affirmative violation of the statute. The company could not take the aliens back free of charge, as required by law, and at the same time retain the fare covering the same trip."[46]

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[46]Ibid., 517-518. In the power of Congress to coin money was found the sanction for an act of the Philippine legislature prohibiting the export of silver coins which was sustained in Ling Su Fan v. United States, (1910) 218 U. S. 302, 54 L. Ed. 1049, 31 S. C. R. 21. In support of the decision Mr. Justice Lurton declared:

"The power to 'coin money and regulate the value thereof, and of foreign coin', is a prerogative of sovereignty and a power exclusively vested in the Congress of the United States. The power which the government of the Philippine Islands has in respect to local coinage is derived from the express act of Congress. . . .

"However unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin. To justify the exercise of such a power it is only necessary that it shall appear that the means are reasonably adapted to conserve the general public interest, and are not an arbitrary interference with private rights of contract or property. The law here in question is plainly within the limits of the police power, and not an arbitrary or unreasonable interference with private rights. If a local coinage was demanded by the general interest of the Philippine Islands, legislation reasonably adequate to maintain such coinage at home as a medium of exchange is not a viola-

While the power to deport aliens is not referable to the commerce clause alone, the exits and the entrances of persons from and to the country necessarily involve foreign commerce, and cases on such matters may appropriately be noted here. The procedure for deporting alien prostitutes was sustained in *Low Wah Suey v. Backus*[47] as against the complaints that it denied due process of law because the alien was not entitled to counsel at her first examination by the administrative authorities and because the immigration officer had no power to compel the attendance of witnesses. As a matter of statutory construction *Lapina v. Williams*[48] held that the act of February 20, 1907, which provides for the deportation of aliens found to be practicing prostitution within three years of their arrival in the country, applies to acts within three years of a second arrival, though prior to a return visit to her home-land the lady in question had already resided three years in the United States. *Bugajewitz v. Adams*[49] sustains the act of March 26, 1910, which strikes out the three year limitation in the act of February 20, 1907. Miss Bugajewitz had been derelict after the effective date of the second statute, and Mr. Justice Holmes observed that, as to her, "it is not necessary to construe the statute as having any retrospective effect." He declared, however, that the constitutional provision against ex post facto laws has no application to deportation proceedings, since deportation is not a punishment, but simply a refusal by the government to harbor persons whom it does not want. "It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful."[50]

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tion of private right, forbidden by the organic law. Obviously, if the Philippine government had power to prohibit the exportation or melting of Philippine silver pesos, it had power to make the violation of the prohibition a misdemeanor." (pages 310-311).

[47](1912) 225 U. S. 460, 56 L. Ed. 1165, 32 S. C. R. 734.

[48](1914) 232 U. S. 78, 58 L. Ed. 515, 34 S. C. R. 196. See 14 Colum. L. Rev. 345.

[49](1913) 228 U. S. 585, 57 L. Ed. 978, 33 S. C. R. 607.

[50]United States v. Regan, (1914) 232 U. S. 37, 58 L. Ed. 494, 34 S. C. R. 213, commented on in 2 Georgetown L. J. 39, held that the violation of the alien immigration act need not be established beyond a reasonable doubt in an action of debt brought by the government to recover a penalty, since the action is civil and not criminal.

A phase of the immigration problem is considered in Clement L. Bouve, "The Immigration Act and Returning Aliens," 59 U. Pa. L. Rev. 359. In 13 Colum. L. Rev. 346 is a note on the exclusion of ex-President Castro of Venezuela, in 9 Mich. L. Rev. 412 one on the power of the governor general to expel resident aliens from the Philippine Islands, and in 60 U. Pa. L. Rev. 279 one on the deportation of aliens after acquittal of a criminal charge.

III. Commerce With The Indian Tribes

Cases sustaining federal statutes prohibiting the sale of liquor to the Indians are frequently referred both to the commerce clause and to the more general powers of Congress as guardians of the Indians. Thus in *Perrin v. United States*[51] Mr. Justice Van Devanter observed:

"The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situated, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a state, does not admit of any doubt. It arises in part from the clause in the constitution investing Congress with authority 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, and in part from the recognized relation of tribal Indians to the federal government."[52]

The principal case sustained an indictment for selling liquor on lands formerly ceded to the United States by Indians but at the time held in private ownership by non-Indians in a duly organized municipality of South Dakota. The defendant was not an Indian and it did not appear whether the persons to whom he sold were Indians or whites. The statute against which the sale was an offense was passed by Congress as part of the act of ratifying a treaty with the Indians which provided that the ceded lands should remain dry. It seems to be sustained, not under authority to enforce the treaty or under the commerce clause, but rather as a proper measure by a guardian to protect its ward. It is recognized that its propriety would evaporate as soon as it ceased to be reasonably necessary for the protection of Indian wards in the surrounding territory.

The same idea of the government's guardianship over the Indians underlies *Johnson v. Gearlds*,[53] which sustains the application of a federal prohibitory law to land ceded by the Indians, *United States v. Sandoval*,[54] which affirms a conviction for introducing liquor into Indian pueblos, *Hallowell v. United States*,[55] which holds that a statute punishing the introduction of liquor into Indian country applies to introduction into lands held by the United States in trust for Indians though the liquor is brought

[51] (1914) 232 U. S. 478, 58 L. Ed. 691, 34 S. C. R. 387.
[52] Ibid., 482.
[53] (1914) 234 U. S. 422, 58 L. Ed. 1383, 34 S. C. R. 794.
[54] (1913) 231 U. S. 28, 58 L. Ed. 107, 34 S. C. R. 1. The decision in the court below is discussed in 13 Colum. L. Rev. 74.
[55] (1911) 221 U. S. 317, 55 L. Ed. 750, 31 S. C. R. 587.

in for personal use by an Indian who has been naturalized as a citizen, and *Ex Parte Webb*,[56] which relates to the introduction of liquor from Missouri to certain "Indian country" in Oklahoma. This last case is concerned mainly with the question whether Congress meant its laws still to apply. This question was answered in the affirmative.[57] In the course of the opinion Mr. Justice Pitney declared:

"The power of Congress to regulate commerce between the states, and with Indian tribes situated within the limits of a state, justifies Congress when creating a new state out of a territory inhabited by Indian tribes, and into which territory the introduction of intoxicating liquors is by existing laws and treaties prohibited, in so legislating as to preserve those laws and treaties in force to the extent of excluding interstate traffic in intoxicating liquors that would be inconsistent with the prohibition."[58]

Earlier in the opinion he had declared that the commerce power of Congress extends to traffic with a member of an Indian tribe although such traffic be within the limits of a state. It is wholly academic whether the power over commerce with the Indian tribes would alone sanction what is approved under a combination of the commerce clause and the guardianship theory, since the combination may always be invoked. The limits of the commerce power can appear clearly only from cases in which some regulation of traffic with Indians is held beyond the power of Congress.

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[56](1912) 225 U. S. 663, 56 L. Ed. 1248, 32 S. C. R. 769.

[57]The contrary answer by a state court is considered in 11 Colum. L. Rev. 81.

[58](1912) 225 U. S. 663, 691, 56 L. Ed. 1248, 32 S. C. R. 769.

STATE TAXATION OF NATIONAL BANK STOCKS: UNCERTAINTY OF ITS CONSTIUTIONAL BASIS

By Alfred J. Schweppe*

IT has been constantly assumed in modern decisions concerning the power of the states to levy a tax on national bank stock, that such power of the states rests solely on the permissive legislation of Congress.[1] It is the purpose of this discussion to raise two questions: (1) whether this assumption it warranted by the early decisions upon which it purports to be based; and (2)

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[1]People v. Weaver, (1879) 100 U. S. 539, 543, 25 L. Ed. 705: "That the provision which we have cited was necessary to authorize the states to impose any tax whatsoever on these bank shares is abundantly established by the cases of McCulloch v. Maryland, 4 Wheat. 316; Osborn v. Bank of United States, 9 Wheat. 738, and Weston v. City of Charleston, 2 Pet. 449.

"As Congress was conferring a power on the states which they would not otherwise have had. . ."

Owensboro National Bank v. Owensboro, (1898) 173 U. S. 664, 668, 19 S. C. R. 537, 43 L. Ed. 850: "It follows then necessarily from these conclusions that the respective states would be wholly without power to levy a tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress."

Bank of California v. Richardson, (1919) 248 U. S. 476, 483, 39 S. C. R. 165, 63 L. Ed. 372, following a full discussion of the congressional intent in passing section 5219 of the Revised Statutes of the United States: "Full and express power on that subject was given accompanied by a limitation preventing the exercise in a discriminatory manner, a power which from its very limitation was exclusive of other methods of taxation and left, therefore, no room for taxation of the federal agency or its instrumentalities or essential accessories except as recognized by the provision in question."

Smith v. Kansas City Title & Trust Co., (1921) 255 U. S. 180, 41 S. C. R. 243, 65 L. Ed. 360: "The same principle has been recognized in the Bank Tax Cases, declaring the power of the states to tax the property and franchises of national banks only to the extent of the laws authorized by Congress. Owensboro Nat. Bank. v. Owensboro, (1898), 173 U. S. 664, 19 S. C. R. 537, 43 L. Ed. 850, involved the validity of a franchise tax in Kentucky on national banks. In that case this court declared . . . that the states were wholly without power to levy any tax directly or indirectly upon national banks, their property, assets or franchises, except so far as the permissive legislation allowed such taxation."

See also note 18.

whether, assuming that a state has no such power under the constitution, Congress has the power to grant such permission.

Although the cases of *McCulloch v. Maryland*,[2] *Osborne v. Bank of the United States*,[3] and *Weston v. City of Charleston*[4] are frequently referred to as denying the power of the states to levy such a tax,[5] it seems clear that Chief Justice Marshall, who rendered those decisions, admitted the power of the states to tax national bank stock as distinguished from a tax upon the corporation, its capital, its operations, and the federal securities held by them. In *McCulloch v. Maryland* he said:

"*This opinion does not deprive the states of any of the resources which they originally possessed.* It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, *nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state.* But this is a tax on the *operations* of the bank and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."[6]

That in excepting from the scope of the decision "the interest which the citizens of Maryland may hold in this institution" Marshall expressly had in mind the power of the state to tax national bank stock seems clear not only from a careful reading of the language, but also because the exception was made with direct reference to, and the language of it in part adopted from, the argument of Mr. Pinkney, who, while contending that the state had no power to tax the bank itself, conceded that the state could tax the stock of the United States Bank in the hands of individual citizens.[7] Almost simultaneously with the decision of *McCulloch v. Maryland*, the South Carolina court decided that though the state could not tax the bank as such, it could tax United States

[2](1819) 4 Wheat. (U. S.) 316, 4 L. Ed. 579.
[3](1824) 9 Wheat. (U. S.) 738, 6 L. Ed. 204.
[4](1829) 2 Pet. (U. S.) 449, 7 L. Ed. 481.
[5]See note 1.
[6](1819) 4 Wheat. (U. S.) 316, 436, 4 L. Ed. 579.
[7](1819) 4 Wheat. (U. S.) 316, 396-397, 4 L. Ed. 579: "It is objected, however, that the act of Congress, incorporating the bank, withdraws property from taxation by the state, which would otherwise be liable to state taxation. We answer, that it is immaterial, if it does thus withdraw certain property from the grasp of state taxation, if Congress had authority to establish the bank, since the power of Congress is supreme. But, in fact, it withdraws nothing from the mass of taxable property in Maryland, which the state could tax. The whole capital of the bank belonging to private stockholders, is drawn from every state in the Union, and

Bank stock held by an individual.[8] This South Carolina case was cited to the Supreme Court in *Weston v. City of Charleston*,[9] and not discussed. Chief Justice Marshall, however, in the latter case[10] reaffirmed the exceptions made in *McCulloch v. Maryland*, the second of which in modern decisions has been ignored or has dropped out of sight. That Marshall and his contemporaries regarded the states as having power under the constitution to tax national bank stock, as distinguished from the bank itself, also appears from the dissenting opinion of Mr. Justice Thompson in *Weston v. City of Charleston*.[11] This view that the states had the power to tax, and that the congressional statute was declaratory merely of an existing state power of taxation subsisted as late as 1865.[12] Up to that time then it may be safely said that the second exception in *McCulloch v. Maryland* was believed to recognize the constitutional power of the states to tax national bank stock.

The second stage of the history of this doctrine is revealed

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the stock belonging to the United States previously constituted a part of the public treasure. Neither the stock belonging to citizens of other states, nor the privileged treasure of the United States mixed up with this private property were previously liable to taxation in Maryland; *and as to the stock belonging to its own citizens, it still continues liable to state taxation, as a portion of their individual property, in common with all other private property in the state.*"

The italics are ours. A comparison of the italicised words with Marshall's reveals a striking similarity. It should be noted, moreover, that both of those eminent men had doubts about the taxability of bank stock belonging to non-residents.

[8]Bulow & Potter v. City of Charleston, (1819) 1 Nott & McCord (S. C.) 521. To the same effect, see State ex rel. Berney v. Tax Collector, (1831) 2 Bailey (S. C.) 654, 672, 678—679, 684, 686; see also First Nat. Bank v. Peterborough, (1875) 56 N. H. 38.

[9](1829) 2 Pet. (U. S.) 449, 461, 7 L. Ed. 481.

[10](1829) 2 Pet. (U. S.) 449, 469, 7 L. Ed. 481: "It has been supposed that a tax on stock [United States bonds] comes within the exceptions stated in the case of McCulloch v. Maryland. We do not think so."

[11](1829) 2 Pet. (U. S.) 449, 479, 7 L. Ed. 481: "The broad proposition laid down in McCulloch v. Maryland that the states cannot tax any instrument of the general government in the execution of its powers, must be understood as referring to a direct tax upon such means or instrument; *and that such was the understanding of the court is to be inferred from the exemption of bank stock from the general rule.*" The italics are ours.

[12]Van Allen v. Assessors, (1865) 3 Wall. (U. S.) 573, 18 L. Ed. 229. Chief Justice Chase said in the course of the dissenting opinion at p. 595, after quoting the exceptions in McCulloch v. Maryland: "With these principles and this exception in view, Congress, in order that nothing might be left to inference, expressly authorized state taxation, of the real estate held by national banking associations, *and of the interest of private citizens in them.* This was done by the three provisos to the 41st section. . . . [tax on shares]." And at p. 597: "We think this is the plain sense of these provisos [section 5219]. They adopt the exception ad-

in the leading case of *Van Allen v. Assessors*,[12] where the majority of the court recognized the original power of the states to tax national bank stock, but ruled that Congress through the doctrine of concurrent power had the right by statute to limit the power of the states in that regard.[14] The minority of the court agreed to that view, but dissented on another point.[15]

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mitted by Chief Justice Marshall to the rule of exemption in McCulloch v. Maryland. *They subject the interest held by citizens in national banking associations* to a tax in common with other property of the same description, and they give to the exception a practical application by determining what property is of the same description with the interest to be taxed in common with it." The italics are ours. These expositions of the statute were by the way merely, and not called in question by the majority of the court.

[12](1865) 3 Wall. (U. S.) 573, 18 L. Ed. 229.

[14](1865) 3 Wall. (U. S.) 573, 585, 18 L. Ed. 229: "It is said that Congress possesses no power to confer upon a state authority to be exercised which has been exclusively delegated to that body by the constitution, and consequently, that it cannot confer the right of taxation; nor is a state competent to receive a grant of any such power of Congress. We agree to this. But as it respects a subject-matter over which Congress and the states may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the states, there is no doubt Congress may withold the exercise of that authority and leave the states free to act. . . . The power of taxation under the constitution as a general rule, and as has been repeatedly recognized in adjudged cases in this court, is a concurrent power. The qualifications of this rule are the exclusion from the taxation of the means and instruments employed in the exercise of the functions of the federal government.

"The remaining question is, has Congress legislated in respect to these associations, so as to *leave* the shares of the stockholders subject to state taxation." And at p. 584: "Now it is this interest which the act of Congress *has left subject* to taxation by the states, under the limitations prescribed. . . ."

It should be expressly noted here that the opinion does not regard bank stock as "means and instruments employed in the exercise of functions of the federal government," from the taxation of which the states are absolutely excluded, but as an object falling under the concurrent taxing power of the states and Congress. That is, this case openly recognizes that bank stock does not fall under the inhibition of the early cases on the subject.

See also Adams v. Nashville, (1877) 95 U. S. 19, 22, 24 L. Ed. 369: "The plain intention of the statute [section 5219] was to protect the corporations formed under its authority from unfriendly discrimination by the states in the exercise of their taxing power." And see Bank of California v. Richardson, (1919) 248 U. S. 476, 482, 39 S. C. R. 165, 63 L. Ed. 372, where Chief Justice White says: "The forms of expression used in the section make it certain that in adopting it the legislative mind had in view the subject of how far the banking associations created *were* or *should be made* subject to state taxation, which presumably it was deemed necessary to deal with in view of the controversies growing out of the creation of the bank of the United States and dealt with by decisions of this court." Citing the McCulloch, the Osborn, and the Weston cases.

[15]See note 12. The minority dissented on the ground that a tax on

The third stage of the doctrine begins in the assumptions made in *People v. Weaver*[16] and *Owensboro National Bank v. Owensboro*,[17] where it is said, apparently in interpretation of the early decisions of the court, that the states had no power at all to tax national bank stock, except by virtue of the congressional permission conferred by section 5219 of the Revised Statutes of the United States.[18]

Oddly enough, because of these assumptions, the question whether a state can tax national bank stock apart from the congressional restriction, has never been expressly decided by the Supreme Court as a constitutional question unless the *Van Allen case* be so regarded and its reasoning accepted.[19] The early cases merely decided that under the constitution a state cannot tax national bank notes,[20] the right of a branch Bank of the United States to do business,[21] and United States stocks [bonds].[22] These cases go no further than to hold that a state cannot directly tax a national bank or federal securities, and do not extend to bank stock. Moreover, the reasoning of these cases which, it has been assumed, covers national bank stock must be regarded as limited by the second exception made in *McCulloch v. Maryland*. And

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the bank stock was, in effect, a tax on the government securities held by the bank and therefore void under the early cases. The majority held that the stock might be taxed although the whole of the bank capital was invested in government securities, because of the separate entity of the corporation and its stockholders.

[16]See note 1.

[17]See note 1.

[18]See note 1. And see to the same effect Mercantile Bank v. New York, (1886) 121 U. S. 138, 154, 7 S. C. R. 826, 30 L. Ed. 895: "Neither the banks themselves, nor their capital, however invested, nor the *shares of stock* held by individual citizens could be taxed by the states in which they were located without the consent of Congress, being exempted from the power of the states in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient *to grant* to the states the authority to tax them within the limits of a rule prescribed by law."

[19]The majority of the court held in Van Allen v. Assessors, (1865) 3 Wall. (U. S.) 573, 18 L. Ed. 229, that the act of Congress, rightly construed, subjected national bank shares to state taxation, even though the whole of the banking capital was invested in national securities, and that the act so construed was constitutional. The constitutional questions were but casually considered, and the reasoning in support of constitutionality has apparently long since been forgotten and departed from.

[20]McCulloch v. Maryland, (1819) 4 Wheat. (U. S.) 316, 4 L. Ed. 579.

[21]Osborn v. Bank of the United States, (1924) 9 Wheat. (U. S.) 738, 6 L. Ed. 204.

[22]Weston v. City of Charleston, (1829) 2 Pet. (U. S.) 449, 7 L. Ed. 481.

when added to this is the holding in *Van Allen v. Assessors* that the shares of the stockholders are separate and distinct from the property of the bank, and that while a tax cannot be constitutionally levied on the bank itself, a tax may nevertheless be levied on the shares because it is not a tax on the bank,[23] there is perhaps some room for believing that the Supreme Court, on squarely facing the constitutional question,[24] may revert to the opinion entertained by Marshall and his contemporaries, that in regard to

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[23](1865) 3 Wall. (U. S.) 573, 584, 18 L. Ed. 229: "This [the shareholder's] is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress *has left subject* to taxation by the states, under the limitations prescribed. . . ."

This doctrine has since been many times reasserted. See Owensboro Nat. Bank v. Owensboro, (1898) 173 U. S. 664, 681, 19 S. C. R. 537, 43 L. Ed. 850, where it is said: "It cannot be doubted that as a general principle it is settled that taxation of the property, franchises, and right of a corporation is one thing, and the taxation of the shares of stock in the names of the stockholders is another and different one." See to the same effect Home Savings Bank v. Des Moines, (1907) 205 U. S. 503, 27 S. C. R. 571, 51 L. Ed. 901; Bulow & Potter v. City of Charleston, (1819) 1 Nott & McCord (S. C.) 527; see, however, Bank of California v. Richardson, (1919) 248 U. S. 476, 485, 39 S. C. R. 165, 63 L. Ed. 372, where it is said (three justices dissenting): "But it is undoubted that the statute for the purpose of preserving the state power of taxation, considering the subject from the point of view of ultimate beneficial interest, *treated the stock interest, that is, the stockholder, and the bank as one,* and subject to one taxation by the methods which it provided." That such a view of the identity of the corporation and the stockholder is erroneous and unnecessary to the decision, which might have been rested on the exclusiveness of the statute alone, see the dissenting opinion of Mr. Justice Pitney in the same case. And see Eisner v. McComber, (1920) 252 U. S. 189, 213-214, 40 S. C. R. 189, 64 L. Ed. 521, where the doctrine of separate entity of a corporation from the stockholders was reasserted by the court.

[24]It is true that the argument here suggested was referred to in the dissenting opinion of Mr. Chief Justice Chase in Van Allen v. Assessors, (1865) 3 Wall. (U. S.) 573, 592-593, 18 L. Ed. 229, as follows: "But it was urged in the argument that though the capital of a bank, so far as it consists of national securities, is exempt from state taxation, the shares of that capital *may be taxed without reference to the legislation of Congress,* and without regard to the national securities which they represent. . . .

"We do not understand the majority of the court as asserting that shares of capital invested in national securities could be taxed without authority of Congress. We certainly cannot yield our assent to such a proposition."

But it must be borne in mind that the reason for the dissent was that a tax on the bank stock was an indirect tax on the bonds, a view expressly denied by the majority of the court. The reason for the dissent appears more fully on p. 596, where the court, admitting that the early cases never passed upon state taxation of national bank stock, asserts that Marshall "would have detected taxation of bonds under the disguise of taxation of the capital or shares of capital, in which they were invested."

national bank stock *McCulloch v. Maryland* "does not deprive the states of any resources which they originally possessed."[25] States whose taxing programs have been endangered by the recent decisions of *Merchants' National Bank v. Richmond*[26] and *Eddy v. First National Bank of Fargo*[27] will have an opportunity of asking the court to determine the power of the states in this matter under the federal constitution.

The second question is this: assuming that the Supreme Court will hold that the state does not have an original power under the constitution to tax national bank stock, whence does Congress derive its authority to give the states permission to do so? In *Van Allen v. Assessors* it was said that Congress and the states possess a concurrent power to tax national bank stock, but that Congress has the right to restrict the exercise of state power in that regard,[28] and that therefore section 5219 was within the legislative province of Congress. This view seems to overlook the doctrine of *Gibbons v. Ogden*[29] that the taxing power of Congress and the taxing power of the states are separate and distinct, and sovereign in their own sphere. That is, they are not

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[25] See text for note 6.

[26] (1921) 41 S. C. R. 619; see for full discussion of the case 6 MINNESOTA LAW REVIEW 56.

[27] (C. C. A., eighth circuit, 1921) 275 Fed. 550. For a discussion of this case, see in this issue RECENT CASES, p. 239.

[28] See note 14.

[29] (1824) 9 Wheat. (U. S.) 1, 199, 6 L. Ed. 23: "Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other." And at p. 201: "But the power to levy taxes could never be considered as abridging the right of the states on that subject." See to the same effect Lane County v. Oregon, (1868) 7 Wall. (U. S.) 71, 76-78, 19 L. Ed. 67, where the doctrine of *concurrency* of the taxing power is construed to mean two co-existing independent powers, except that "in case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, is to be preferred; but with this qualification it [the state taxing power] is absolute. . . . There is nothing in the constitution which contemplates or authorizes any abridgment of this power by national legislation." See also Passenger Cases, (1849) 7 How. (U. S.) 282, 298-299. That the expression "the claim of the United States is to be preferred" does not mean that Congress may restrict existing state power, but that the federal claim may be first collected, see 26 R. C. L. 108; 11 Encyc. of U. S. Reports 389.

concurrent except perhaps in the sense of being coexistent; they are not one power exercised by both, but two powers exercised separately, and each within its proper bounds is not under the control of the other.[30] Just why Congress then can undertake to restrict the power of the states to tax an article which Marshall conceded to be within the sphere of state power is not clear. If the view of Mr. Justice Nelson in the *Van Allen* case is correct, to-wit, that the taxing power, at least in regard to bank stock, is "a concurrent power" exercisable by both the states and Congress, "but from the exercise of which Congress, by reason of its paramount authority, may exclude the states," it is not perceived why the same definition of *concurrency* does not apply to the taxing power in general, nor what limit is fixed on the excluding or restricting power of Congress, nor what becomes of the division between state and federal taxing power made by Marshall in *Gibbons v. Ogden,* where the meaning of the word *concurrent* was discussed by counsel and court at great length.[31]

Moreover, the change of view taken in *People v. Weaver,*[32] that rather than being a restriction of existing state power, section 5219 was a delegation of power by Congress to the states, "which they would not otherwise have had" is answered by the reasoning of Mr. Justice Nelson in *Van Allen v. Assessors.*[33] In *Home Saving Bank v. Des Moines*[34] it is said: "It may well be doubted whether Congress has the power to confer upon the state the right to tax obligations of the United States." Since the power to delegate to the states the right to tax shares of national bank stock, provided that the court should find that the states have no original power in spite of *McCulloch v. Maryland* and *Van Allen v. Assessors,* must rest upon the same basis as the power to confer the right to tax obligations of the United States, the court is faced with the duty of determining whether such power can be delegated at all, and whether the answer of Mr. Justice Nelson[35] is not conclusive upon the question.

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[30]See note 29.

[31]See note 29, and for arguments of counsel on the point see Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 1, 42, 88, et passim, 6 L. Ed. 23.

[32]See note 1.

[33]See first half of quotation in note 14; see also Gibbons v. Ogden, (1824) 9 Wheat. (U. S.) 1, 207, 6 L. Ed. 23, Marshall, C. J., speaking: "*Although Congress cannot enable a state to legislate,* Congress may adopt the provisions of a state on any subject."

[34] (1907) 205 U. S. 503, 27 S. C. R. 571, 51 L. Ed. 901.

[35]See first half of quotation in note 14.

If the states have no original power to tax national bank shares, and if Congress has no authority to delegate such power,[36] the shares can never be subjected to state taxation except by constitutional amendment; and state banks, unless their shares are also exempted from taxation, will soon find that their taxable

[36] In Van Allen v. Assessors, (1865) 3 Wall. (U. S.) 573, 583, 18 L. Ed. 229, Mr. Justice Nelson, in meeting the argument advanced by counsel and supported by the minority of the court, says: "Were we to admit, for the sake of argument, this to be tax of the bonds or capital stock of the bank, it is but a tax upon the new uses and privileges conferred by the charter of the association; it is but a condition annexed to the enjoyment of this new use and new application of the bonds; and if Congress possessed the power to grant these new rights and privileges, which none of learned counsel denies, and which the whole argument assumes, then we do not see but the power to annex the conditions is equally clear and indisputable. . . . The tax is the condition for the new rights and privileges conferred upon these associations." And in Clark Distilling Company v. Western Maryland Ry., (1917) 242 U. S. 311, 326, 37 S. C. R. 180, 61 L. Ed. 326, Mr. Chief Justice White, speaking for the court, says: "The argument as to delegation of power to the states rests upon a misconception. It is true that the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one state to another, but 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 the first of these excerpts the court argues that, assuming national bank stock and federal securities to be in the same class, the taxing power of the state is permitted to operate as a condition precedent to the right of the banking corporations to do business. In the second excerpt the contention of the court is that while Congress does not confer any power upon the states, it so acts as to strip intoxicating liquor of its immunity from the operation of state laws. What difference there is between making the operation of state power a condition precedent, and a recognition of power in the states; and what difference there is between stripping an article of its constitutional immunity from the operation of state laws and a delegation of power to the states to act in regard to that subject-matter, is not perceived. If in substance the act of Congress amounts to a delegation of power, the questions still remain whether Congress may constitutionally affix a condition that amounts to a delegation of power to the states, and whether Congress may strip of an immunity when it amounts to a delegation of power. Would such a condition and such a removal of immunity, involving a delegation of power, be constitutional? See discussion of this phase of the Clark Distilling case in an article by Noel T. Dowling and F. Morse Hubbard, entitled Divesting an Article of its Interstate Character, 5 MINNESOTA LAW REVIEW 100, especially at pp. 114-116.

A caution should here be observed not to misconceive the language of Marshall C. J., in Gibbons v. Ogden at p. 202, where he says: "'A duty on tonnage,' is as much a tax, as a duty on imports or exports; and the reason which induced the prohibition of those taxes, extends to this also. *This tax may be imposed by a state with the consent of Congress;* and it may be admitted that Congress cannot give a right to a state in virtue of its own powers." Congress is expressly authorized by the constitution, art. 1, sec. 10, clause 3, to consent to such a tax; and it does not follow that Congress can consent to any other tax, where such consent is not authorized by the constitution. As a matter of fact it would seem a

shares, as compared to the tax-exempt shares of national bank stock, will go begging for want of purchasers. The only manner in which the present congressional legislation, or any future congressional legislation with whatever retroactive clauses[27] may be appended thereto, is sustainable seems to be adopting the reasoning in *Van Allen v. Assessors*, that the taxing power under the constitution is a *concurrent* power, with authority in Congress to restrict the exercise of state power. If that be true, the Supreme Court will be obliged to define anew what is the meaning of the word *concurrent*[28] as applied to the taxing power.

The conclusions to be drawn from this discussion are: (1) that beginning with Marshall's time the Supreme Court has regarded the states as having, at first, full constitutional power to tax national bank stock, later, a power restrictable by Congress because of the concurrent nature of the taxing power, and finally, no power at all except such as has been delegated by Congress; (2) that the extent of the original power of the states to tax national bank stock has never been expressly decided, unless the *Van Allen* case be so regarded and its reasoning accepted; and (3) that the basis of the right by which the states to-day assume to tax national bank stock is not clear, the Supreme Court having shifted[29] its ground from considering it to be a restriction of existing state power, on the one hand, to a delegation of congressional power, on the other, the constitutional basis of both of which is involved in much uncertainty. It would seem that the time is ripe for a thorough reconsideration of all the leading cases on the important constitutional questions of the state power to

reasonable interpretation, that since the constitution has expressly defined those instances in which Congress can consent to state taxation, that Congress cannot consent in any other case. See Noel T. Dowling and F. Morse Hubbard, Divesting an Article of its Interstate Character, 5 MINNESOTA LAW REVIEW 100, at pp. 116-117.

[27]In 6 MINNESOTA LAW REVIEW 56, at p. 58, the advisability of a retroactive clause is suggested. This suggestion seems to have been adopted by the Minnesota State Tax Commission and at its recommendation incorporated in a bill now pending before Congress.

[28]It is significant that the word *concurrent* appears nowhere in the federal constitution except in the nineteenth amendment, and that the meaning of the word, although often used in the Supreme Court cases, does not seem to have a clearly defined meaning.

[29]It should be pointed out here that the Court has shifted only in its language concerning the constitutional question; and that in regard to the interpretation of the phrase that state taxation "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," the Supreme Court in a long line of decisions has not deviated. See 6 MINNESOTA LAW REVIEW 56.

tax[10] and the congressional power to restrict or delegate,[11] so that the doubt arising from the variances in the cases up to the present time may be set at rest.

[10]McCulloch v. Maryland (1819) 4 Wheat. (U. S.) 316, 4 L. Ed. 579; Osborn v. Bank of the United States, (1824) 9 Wheat. (U. S.) 738, 6 L. Ed. 204; Weston v. City of Charleston, (1829) 2 Pet. (U. S.) 449, 7 L. Ed. 481; Van Allen v. Assessors, (1865) 3 Wall. (U. S.) 573, 18 L. Ed. 229.

[11]Gibbons v. Ogden, (1824) 4 Wheat. (U. S.) 1, 4 L. Ed. 499; Lane County v. Oregon, (1868) 7 Wall. (U. S.) 71, 19 L. Ed. 67; Van Allen v. Assessors, 3 Wall. (U. S.) 573, 18 L. Ed. 229; People v. Weaver, (1869) 100 U. S. 539, 25 L. Ed. 705; Owensboro Nat. Bank v. Owensboro, (1898) 173 U. S. 664, 19 S. C. R. 537, 43 L. Ed. 850; Bank of California v. Richardson, (1919) 248 U. S. 476, 39 S. C. R. 165, 63 L. Ed. 372; Clark Distilling Co. v. Western Maryland Ry., (1917) 242 U. S. 311, 37 S. C. R. 180, 61 L. Ed. 326.

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ADMIRALTY—JURISDICTION—MARITIME TORTS.—The constitution of the United States provides that "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."[1] What characteristics a tort must possess to fall within this exclusive jurisdiction of the federal courts is, as yet, unsettled. Justice Story, after an extended examination of ancient authorities, stated that "the jurisdiction of the admiralty is exclusively dependent upon the *locality* of the act."[2] That is, the person or thing injured must have been located on the high seas or naviga-

[1] Article III, sec. 2.

[2] Thomas v. Lane, (1834) 2 Sumn. 1, 9. Fed. Cas. No. 13902, p. 960; De Lovio v. Boit, (1815) 2 Gall. 398, 464, Fed. Cas. No. 3776, p. 440, dictum in a discussion of maritime contracts; see also The Plymouth, (1865) 3 Wall. (U. S.) 20, 36, 18 L. Ed. 125. In Hughes, Admiralty Jurisdiction,

ble waters.[3] The location of the person or thing causing the injury is not important.[4] In a recent Oregon case,[5] a stevedore, working on the dock, was injured by a sling load of cement as he was unloading the vessel. Applying the locality test, the tort was held to be non-maritime as the injured party was on the dock, an extension of the land. As a result the federal courts had no jurisdiction, it being in the Oregon courts. If the sling had injured a stevedore on a floating dock or on the ship, the federal courts would have exclusive jurisdiction.[6] Other non-maritime torts are injuries by vessels to the land, or buildings thereon, bridges, marine railways and other structures attached to the earth.[7] Beacons are an exception to the general rule.[8] Persons or maritime structures on navigable waters may be injured by the land itself, or by docks or bridges.[9] The maritime structure may consist of a floating wharf, a vessel tied to a pier, or even a vessel in dry dock.[10]

Despite the wide application of the locality test, its exclusiveness has been denied by the circuit court of appeals for the ninth circuit in a decision in which it is held that in addition to satisfying the locality test, the tort must have some relation to transactions, persons, or events of a maritime nature.[11] This view is followed in England where the Court of Appeal, Queen's Bench Division, after a review of the early English cases, denied that courts of admiralty ever had jurisdiction over torts of a non-mari-

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2nd Ed. p. 19, it is said that "no satisfactory definition has yet been enunciated which will enable the student to say in advance whether a given case is marine or not."

[3] The Propeller Genesee Chief v. Fitzhugh, (1851) 12 How. (U. S.) 443, 457, 13 L. Ed. 1058, extended admiralty jurisdiction to include navigable lakes and rivers, as well as tide-waters.

[4] Martin v. West, (1911) 222 U. S. 191, 32 S. C. R. 42, 56 L. Ed. 159, 36 L. R. A. (N.S.) 592.

[5] Cordrey v. The Bee, (Oregon 1921) 201 Pac. 202.

[6] Atlantic Transport Co. v. Imbrovek, (1914) 234 U. S. 52, 34 S. C. R. 733, 58 L. Ed. 1208, 51 L. R. A. (N.S.) 1157.

[7] The Plymouth, (1865) 3 Wall. (U.S.) 20, 18 L. Ed. 125; Johnson v. Chicago, etc., Elev. Co., (1886) 119 U. S. 388, 7 S. C. R. 254, 30 L. Ed. 447; Martin v. West (1911) 222 U. S. 191, 32 S. C. R. 42, 56 L. Ed. 159, 36 L. R. A. (N.S.) 592; The Professor Morse, (1885) 23 Fed. 803.

[8] The Blackheath, (1904) 195 U. S. 361, 25 S. C. R. 46, 49 L. Ed. 236.

[9] O'Keefe v. Staples Coal Co., (1910) 201 Fed. 131; Greenwood v. Town of Westport, (1893) 62 Conn. 575, 53 Fed. 824, aff'd 60 Fed. 560.

[10] The Bart Tully, (1918) 251 Fed. 856; The Anglo-Patagonian, (1916) 235 Fed. 92, 148 C. C. A. 586.

[11] Campbell v. Hackfeld & Co., (1903) 125 Fed. 696, 62 C. C. A. 274, followed in The St. David, (1913) 209 Fed. 985, but see contra, Imbrovek v. Hamburg-American, etc., Co., (1911) 190 Fed. 229, aff'd 193 Fed. 1019. See also 16 Harvard Law Review 210.

time nature even when they occurred on the high seas.[12] The Supreme Court of the United States has left the question open. Assuming that the wrong must be of a "maritime nature," it has given these words a broad enough meaning to include an injury to one engaged in a "maritime service absolutely necessary to enable the ship to discharge its maritime duty."[13]

The reason advanced by one text writer why admiralty should not take jurisdiction of injuries of a non-maritime nature, such as slander of one passenger on a ship by another, is that admiralty jurisdiction depends on the relation of the parties to a ship or vessel, and embraces only violations of maritime rights and duties.[14] In further extension of the idea that the maritime character of the tort, rather than the locality, should be determining, it has been insisted that admiralty should take jurisdiction of all injuries a ship might cause either to a person engaged in work of a maritime nature on an instrumentality of maritime commerce such as a wharf, or to the instrumentality itself.[15] On reason it would appear that admiralty courts should have jurisdiction of all maritime transactions and events without regard to the locality of their occurrence. One of the purposes of the framers of the constitution was to secure uniform and consistent rules of law for maritime commerce. Modern commerce requires uniformity.[16] Insofar as torts of a maritime nature occur on a dock or a bridge, the state law governs and the desired uniformity is destroyed. In England the admiralty courts have been granted jurisdiction of "any claim for damages done by any ship."[17] On the continent also the maritime nature of the wrong was emphasized as the test.[18] The fact that Congress, under the constitution, can not extend our admiralty jurisdiction,[19] affords a strong reason for a

[12] Queen v. Judge of City of London Court, [1892] 1 Q. B. 273, 294.

[13] Atlantic Transport Co. v. Imbrovek, (1914) 234 U. S. 52, 62, 34 S. C. R. 733, 58 L. Ed. 1208, 51 L. R. A. (N.S.) 1157. See 25 Harvard Law Review 382.

[14] Benedict, Admiralty, 3d Ed., sec. 308, cited in Campbell v. Hackfeld & Co., (1903) 125 Fed. 696, 700, 62 C. C. A. 274.

[15] Dissenting opinion of Ross, J., in Swayne & Hoyt v. Barsch, (1915) 226 Fed. 581, 594, 141 C. C. A. 337, and concurring opinion of Brown, J., in The Blackheath, (1904) 195 U. S. 361, 368, 25 S. C. R. 46, 49 L. Ed. 236.

[16] The Lottawanna, (1874) 21 Wall. (U.S.) 558, 575, 22 L. Ed. 654.

[17] Admiralty Court Act, (1861) 24 & 25 Vict., Cap. X, sec. 7.

[18] 25 Harvard Law Review 381, citing Benedict, Admiralty, 4th Ed., sec. 106.

[19] The Blackheath, (1904) 195 U. S. 361, 365, 25 S. C. R. 46, 49 L. Ed. 236. That jurisdiction over maritime injuries is exclusively in the federal courts, and that Congress cannot delegate to the states any portion of such jurisdiction without destroying the harmony and uniformity established by the constitution, see Southern Pacific Co. v. Jensen, (1917) 244 U. S.

broad interpretation of the constitution commensurate with the needs of modern commerce.

AUTOMOBILES—GARAGE KEEPERS' STATUTORY LIENS.—The ever-increasing size and importance of the automobile and garage business and the recent attempts to revise the Minnesota motor vehicle lien law prompt an examination and study of the progress of legislation in the United States in regard to garage keepers' liens.

It is fundamental that, at the common law, the garage keeper has his lien for repairs upon the well established principle that the privilege of a particular lien is extended to those who have by their skill and labor imparted some additional value to the chattel. It is also the settled rule that the relinquishment of possession extinguishes the lien.[1] This, however, is the extent of the protection afforded, and it is here that the garage keepers invoke the aid of legislation.

For the purposes of this discussion the garage business embraces three principal features, viz: repairs, storage and the sale of accessories. As a "storer" of automobiles, the garage keeper has no common-law protection because the business necessarily involves the daily release of possession,[2] while, for the value of his labor and of the replacement parts connected with the repairing, he has a lien at the common law, but only so long as he retains possession of the vehicle.

That the courts recognize the general inadequacy of the protection is evident from the language used in the New Jersey case of *Crucible Steel Co. v. Polack Tyre & Rubber Co.*,[3] where the court in passing upon the constitutionality of the lien law of that state, said:

"Thus the statute gives the garage keeper a lien for the storing and maintaining of automobiles, a present popular means of conveyance unknown to the common law, which has in a great measure supplanted the horse and wagon and revolutionized the

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205, 37 S. C. R. 524, 61 L. Ed. 1086, L. R. A. 1918C 451, Ann. Cas. 1917E 900; 4 MINN. LAW REVIEW 444; Knickerbocker Ice Co. v. Stewart, (1920), 253 U. S. 149, 40 S. C. R. 438, 11 A. L. R. 1145.

[1]White v. Smith, (1882) 44 N. J. L. 105, 43 Am. Rep. 347; 2 Kent Com., 11th Ed., 634 to 640; 17 R. C. L. 601.

[2]Smith v. O'Brien, (1905) 46 Misc. Rep. 325, 94 N. Y. S. 673; Grinnell v. Cook, (1842) 3 Hill (N. Y.) 485, 38 Am. Dec. 663; Jackson v. Cummins, (1839) 5 M. & W. (Eng.) 342; Berry, Automobiles, 3d Ed., sec. 1317; note 3 A. L. R. 664.

[3](1918) 92 N. J. L. 221, 104 Atl. 324.

mode of transportation; it gives a right of lien for furnishing gasoline, accessories or other supplies for which no right of lien existed at the common law. The innovation which the statute makes is neither startling nor novel in so far as it enlarges and extends the right of lien to conditions not included at common law, but is in line with the natural progress of the law to meet necessities arising from new business conditions; and the wisdom of this species of legislation is not a court question, but is peculiarly within the province of the law making power to determine."

An analysis of the motor vehicle lien laws of several states shows the progress of legislation toward supplying the protection asserted to be necessary by those engaged in the garage business. There is little difference in the effect of the expressions used to designate the persons entitled to the lien. "A person keeping a garage or place for storage, repair," etc.,[4] "Every keeper of a garage,"[5] and "Every automobile repairer"[6] are standard examples. The provisions concerning the scope of the lien vary in many instances. A number of statutes extend the right to a lien to embrace repairing, storage and supplies.[7] Whether the term "supplies" includes accessories and replacement parts as well as gasoline and oil appears not to have come before the courts for decision. New York, New Jersey and New Mexico expressly include gasoline. Minnesota, Missouri and Oregon[8] use the term "materials," which may fairly be assumed to refer to replacement parts. In Massachusetts, the lien exists for storage only.[9]

A variety of expressions are used to denote who may confer the right to a lien upon the garage keeper. The legal effect of these expressions[10] seems not to have been adjudicated and it may be expected that their presentation will raise some close questions.

[4]New York, Cons. Laws, vol. 3, sec. 184, p. 2166.

[5]Wisconsin, Statutes 1917, c. 143, sec. 3346t.

[6]Oregon, L. O. L., vol. III, sec. 7497.

[7]Minnesota, G. S. 1913, secs. 7053-7057; New Jersey, Acts 1915, c. 312, p. 556; New Mexico, Laws 1917, c. 65, sec. 16; New York, Cons. Laws, vol. 3, sec. 184, p. 2166; Indiana, Acts of 1913, c. 288, p. 764. New Jersey and New Mexico expressly include "accessories."

[8]Minnesota, G. S. 1913, sec. 7053, "supplies and materials;" Missouri, Laws of 1915, p. 327; Oregon, L. O. L., vol. III, secs. 7497.

[9]Massachusetts, Statutes 1913, c. 300, sec. 1, p. 230, lien for "storage and care." The labor necessary to the repairing of tires is held to give a right to a lien under the Oregon statute. Courts v. Clark, (1917) 84 Ore. 179, 164 Pac. 714.

[10]Massachusetts, Statutes 1913, c. 300, sec. 1, "by or with the consent of the owner."

Minnesota, G. S. 1913, sec. 7053, "whether pursuant to a contract with the owner or at the instance or request of any agent of such owner,"

The request of the owner is, of course, sufficient and all states so declare. Different terms also appear in stating the amount for which the lien attaches.[11] Missouri provides that the work or materials to be furnished must be agreed upon and placed in the form of a memorandum before the work or labor is commenced.[12] This statute was doubtless intended to prevent disputes concerning the work ordered, but it is not clear that it would have that effect. The difficulty of diagnosing mechanical trouble in an automobile without "tearing it down" would appear to give rise to alterations alleged to be authorized orally which would be susceptible of equally as much dispute.

Two states have construed the liens to be dependent upon possession,[13] the statutes of four states expressly provide that the liens shall not be dependent upon possession,[14] and four states appear not to have decided the point.[15] Sec. 2 of the New Jersey act provides that the garage keeper shall not lose his right to a lien by allowing the automobile to be removed from his control and, in

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defining "owner" to include a conditional vendee or mortgagor in possession, in sec. 7057.

Missouri, Laws of 1915, p. 327, "owner," in case of repairs.

New Jersey, Acts 1915, c. 312, p. 556, "at the request or with the consent of the owner or his representative, whether such owner be a conditional vendee or a mortgagor remaining in possession or otherwise."

New Mexico, Laws 1917, c. 65, sec. 16, similar to the New Jersey provision.

New York, Cons. Laws, vol. 3, sec. 184, p. 2166, "at the request or with the consent of the owner, whether such owner be a conditional vendee or a mortgagor remaining in possession or otherwise."

Oregon, L. O. L., vol. III, sec. 7497, "at the request of the owner, reputed owner or authorized agent of the owner."

Washington, Rem. and Bal. Code, vol. 1, sec. 1154, "at the request of the owner or authorized agent of the owner," defining "owner" to include a conditional vendee, in sec. 1156.

Wisconsin, Statutes 1917, c. 143, sec. 3346t, "at the request of the owner or legal possessor."

[11]Massachusetts, "for the proper charges;" Minnesota, "for the sum agreed upon," otherwise "for the reasonable value thereof;" Missouri, "for the amount due;" New Jersey, New Mexico and New York, "for the sum due;" Oregon and Washington, "for the contract price," or in the absence of such contract price, "for the reasonable worth;" Wisconsin and Indiana, "for charges."

[12]Laws 1915, p. 327.

[13]Indiana, Vaught v. Knue, (1917) 64 Ind. App. 467, 115 N. E. 108; and New York, Grand Garage v. Pacific Bank, (1918) 170 N. Y. S. 2.

[14]New Jersey, Acts 1915, c. 312, p. 557; New Mexico, Laws 1917, c. 65, sec. 22; Oregon, L. O. L., vol. III, sec. 7497; Washington, Rem. and Bal. Code, vol. 1, sec. 1154.

[15]Massachusetts, Statutes 1913, c. 300, sec. 1; Minnesota, G. S. 1913, secs. 7053-7057; Missouri, Laws 1915, p. 327, 328; and Wisconsin, Statutes 1917, c. 143, secs. 3344 and 3346t.

the event it is so removed, he may seize it or any part or parts thereof without further process of law wherever the same may be found within the state.[16] From the general standpoint of the law of liens, it appears that this is an unusual provision and a radical departure from the common law rule.

The question of the superiority of the prior acquired rights of third parties has given rise to more litigation than any other phase of this branch of legislation. Several states have expressly given precedence to the lien over these prior acquired rights by providing that the "owner" may be a conditional vendee or mortgagor remaining in possession.[17] The difficulty arises, however, where the priority is not stated. At the common law it may be said generally that, in the absence of express or implied authority, a lien exists for services rendered at the request of the mortgagor in possession subordinate to the lien of a prior recorded chattel mortgage, upon the principle that a prior lien gives a prior claim that is entitled to prior satisfaction.[18] An exception is made, however, both at the common law and under the statutes, in cases involving repairs to machinery on the ground that the nature of the property is such that the parties are said to have contemplated at the time of the execution of the mortgage that the machine would require necessary repairs and that the mortgagee thereupon constituted the mortgagor his agent to procure the repairs to be made, and inasmuch as the repairs were for the betterment of the property, a lien exists in favor of the repairman that is superior to the lien of the mortgagee.[19] The weight of authority holds with the

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[16]Acts 1915, c. 312, sec. 2, p. 557.

[17]Minnesota, G. S. 1913, sec. 7057; New Jersey, Acts 1915, c. 312, p. 556; New Mexico, Laws 1917, c. 65, sec. 16; New York, Cons. Laws, vol. 3, sec. 184, p. 2166; Washington, Rem. and Bal. Code, vol. 1, sec. 1156, priority given over "antedating" liens; Oregon, L. O. L., vol. III, sec. 7500 same as Washington. See Jesse A. Smith Auto Co. v. Kaestner, (1916) 164 Wis. 205, 159 N. W. 738, for a statement of the effect of these provisions.

[18]Denison v. Shuler, (1882) 47 Mich. 598, 11 N. W. 402, 41 Am. Rep. 734; Storms v. Smith, (1884) 137 Mass. 201.

[19]Watts v. Sweeney, (1890) 127 Ind. 116, 26 N. E. 680, 22 A. S. R. 615, locomotive; Reeves & Co. v. Russell, (1914) 28 N. D. 265, 148 N. W. 654, L. R. A. 1915D 1149, threshing engine; Drummond Carriage Co. v. Mills, (1898) 54 Neb. 417, 74 N. W. 966, 40 L. R. A. 761, 69 A. S. R. 719, buggy; Broom & Son v. Dale & Sons, (1915) 109 Miss. 52, 67 So. 659, L. R. A. 1915D 1146, automobile; City Nat. Bank v. Laughlin, (Tex. Civ. App. 1919) 210 S. W. 617, automobile; Jesse A. Smith Auto Co. v. Kaestner, (1916) 164 Wis. 205, 159 N. W. 738, automobile; Willys Overland Co. v. Evans, (1919) 104 Kan. 632, 180 Pac. 235; notes L. R. A. 1915D 1151 and 39 Ann. Cas. 630. It should be noted that these cases carefully distinguish

exception to the rule and in connection with statutory liens holds that the statute itself operates as a notice to the mortgagee of the rights of the lienee.[20] The constitutionality of a statute under which the garage keeper attempted to assert his lien as prior to that of a prior recorded chattel mortgage was brought before the Illinois court in the case of *Jensen v. Wilcox Lumber Co.*[21] The statute was held unconstitutional on the ground inter alia that the successful assertion of the lien would deprive the mortgagee of a vested property right without due process of law, and on the further ground that it would impair the obligation of the contract rights between the mortgagor and the mortgagee, depriving the mortgagee of his right to re-take the car upon default in payment. The New Jersey and Washington courts,[22] however, see nothing unconstitutional in similar provisions, the New Jersey court basing its decision on the principle announced by the United States Supreme Court:[23]

"That which is given for the preservation or betterment of the common pledge is in natural equity fairly entitled to the first rank in the tableau of claims. Mechanics' lien laws stand on the same basis of natural justice."

Nor is the obligation of contracts impaired, since, according to the same court, the inhibition of the federal constitution is wholly prospective and it is only those contracts in existence at the time the hostile law is passed that are protected from its effect.[24]

But few states have given attention to the effect of the statutory lien upon rights subsequently acquired in the automobile by third parties, without notice of the lien, where the garage keeper has surrendered possession. It would appear that the innocent third parties should be protected from the possibility of the as-

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between a lien statute merely declaratory of a common law lien and one creating a purely statutory lien, the courts refusing to apply the common law rule to a lien not strictly a common law lien. The garage keeper's lien for repairs and materials falls within the rule granting priority but quaere as to his lien for storage, a purely statutory lien.

[20]See dictum in Smith v. Stevens, (1886) 36 Minn. 303, 31 N. W. 55. The Missouri Laws of 1917, sec. 3, p. 327, provide that the lien shall not take precedence over the prior lien of a chattel mortgage.

[21](1920) 295 Ill. 294, 129 N. E. 133, followed in Thurber Art Galleries v. Rienzi Garage, (1921) 297 Ill. 272, 130 N. E. 747.

[22]Crucible Steel Co. v. Polack Tyre & Rubber Co., (1918) 92 N. J. L. 221, 104 Atl. 324; Crosier v. Cudihee, (1915) 85 Wash. 237, 147 Pac. 1146.

[23]Provident Institution v. Jersey City, (1884) 113 U. S. 506, 5 S. C. R. 612, 28 L. Ed. 1102.

[24]Denny v. Bennett, (1888) 128 U. S. 489, 9 S. C. R. 134, 32 L. Ed. 491.

sertion against the car of any number of garage keepers' liens, the existence of which they had no means of determining. A few states[25] have approached this problem by providing for the recording of the lien with the proper officials. The Washington statute, however, expressly provides that the lien will not attach as against purchasers without "actual" knowledge, which nullifies the effect of the recording provision if such provision were intended to grant priority to the lien.[26] The Oregon law provides for record of the lien but is silent as to precedence over after acquired rights of third parties. The Minnesota statute is indefinite in this regard inasmuch as no record is required for the first sixty days following the performance of the first item of labor and whether or not the recording affects innocent third parties is an open question.

Statutory liens now in existence are of comparatively recent enactment, and sufficient time has not yet elapsed in which the difficulties of their operation may be ascertained. The sudden rise of a new mode of conveyance and transportation has resulted in a lack of uniformity in this branch of legislation.

RECENT CASES

ADMIRALTY—JURISDICTION—MARITIME TORTS.—A stevedore, while working on a dock unloading a ship, was injured by a sling load of cement operated from the ship. *Held,* that the admiralty (federal) courts had no jurisdiction, as the tort occurred on land. *Cordrey v. The Bee,* (Ore. 1921) 201 Pac. 202.

For a discussion of the principles involved, see NOTES, p. 230.

ATTORNEY AND CLIENT—CHAMPERTY AND MAINTENANCE—RECOVERY BY ATTORNEY ON QUANTUM MERUIT WHERE EXPRESS CONTRACT IS CHAMPERTOUS.—Action was brought by plaintiff, attorney for a third party, against the defendant railroad to recover compensation specified in a champertous contract with his client, the latter and the defendant having compromised the case. *Held,* although the contract between the plaintiff and the third party was champertous and void, the plaintiff did not forfeit his right to compensation and may recover on a quantum meruit. *Proctor v. Louisville & N. R. Co.,* (Ky. 1921) 233 S. W. 736.

The weight of authority seems to support this case. If the service performed by the attorney is not in itself illegal, either intrinsically or by reason of circumstances under which it is rendered, he may recover upon

[25]Minnesota, G. S. 1913, sec. 7054; Oregon, L. O. L., vol. III, sec. 7498; Washington, Rem. and Bal. Code, vol. 1, sec. 1155.

[26]The provision of the Washington statute is not found in the New Mexico statute but the court reaches the same conclusion in Abeytia v. Gibbons Garage of Magdalena, (N. M. 1921) 195 Pac. 515.

a quantum meruit for the reasonable value of his services notwithstanding that the contract is, for other reasons, champertous. *Gammons v. Johnson,* (1897) 69 Minn. 488, 72 N. W. 563; *City of Rochester v. Campbell,* (1916) 184 Ind. 421, 111 N. E. 420; *Nathan v. Peterson,* (1913) 177 Ill. App. 104; *Davis v. Weber,* (1899) 66 Ark. 190, 49 S. W. 822; *Stearns v. Felker,* (1871) 28 Wis. 594. Some states deny a recovery by the attorney upon a quantum meruit because, the contract being illegal, the law does not imply a promise to pay him the value of his services. *Butler v. Legro,* (1882) 62 N. H. 350, 13 A. S. R. 573; *Orino v. Maine,* (Maine, 1921) 113 Atl. 260. A recovery upon a quantum meruit would "overturn the very foundation upon which the rule refusing to enforce unlawful agreements is based." *Roller v. Murray,* (1911) 112 Va. 780, 72 S. E. 665, 38 L. R. A. (N.S.) 1202, and note. Where the vice is not merely in the contract for compensation, but the service rendered is in itself illegal, a recovery is not allowed. *Gammons v. Johnson,* (1899) 76 Minn. 76, 78 N. W. 1035; *Moreland v. Devenney,* (1905) 72 Kan. 471, 83 Pac. 1097; *Barngrover v. Pettigrew,* (1905) 128 Ia. 533, 104 N. W. 904, 2 L. R. A. (N.S.) 260, 111 A. S. R. 206. See also 6 MINNESOTA LAW REVIEW 167.

Attorneys rendering service under champertous contract with trustee in bankruptcy may be allowed quantum meruit by the court, because though no recovery would be allowed as between ordinary parties, the contract with the trustee is subject to the approval of the court. *Stokes v. Sedberry,* (C. C. A. 6th circuit 1921) 275 Fed. 894.

AUTOMOBILES—GARAGE KEEPERS' STATUTORY LIENS.—Plaintiff brought replevin against defendant garage keeper to recover an automobile upon which the defendant claimed a lien for repairs and supplies under a statute granting such a lien to garage keepers even though the lien claimant had released possession of the vehicle, as was the case here. Plaintiff had purchased the car without notice of defendant's lien. *Held,* that the lien created by the statute is enforceable after surrender of possession only as against the owner for whom the services were rendered, but not as against innocent purchasers without notice. *Abeytia v. Gibbons Garage of Magdalena,* (N.M.1921) 195 Pac. 515.

For a discussion of the principles here involved, see NOTES, p. 233.

BANKS AND BANKING—TAXATION—STATE TAX ON NATIONAL BANK STOCK.—Plaintiff national bank sued to enjoin the county treasurer from collecting taxes upon its capital shares in excess of the taxes "assessed upon other moneyed capital in the hands of individual citizens of such state," under section 5219 of the Revised Statutes of the United States (Comp. Stat. 1916 Annot., sec. 9784; Comp. Stat. 1918, sec. 9784). The tax on bank stock, state and national, under North Dakota statutes aggregated 35 mills on the dollar, while moneys and credits in the hands of private individuals were taxed 3 mills on the dollar of valuation. The bank tendered taxes at the three-mill rate. Upon granting of the injunction, the county treasurer appealed. *Held,* that the tax on national bank stock in excess of the three-mill tax is invalid. *Eddy v. First National Bank,* (C.C.A., 8th circuit, 1921) 275 Fed. 550.

This case was decided under a statutory situation similar to that in Minnesota. National bank shares are subjected to the rate applying to other personal property, G. S. Minn. 1913, sec. 1969, although assessed only at 40 per cent. of their true and full value. Minn. Laws 1921, Chap. 416, p. 644. But "moneys and credits" are subjected to a three-mill tax only. G. S. Minn. 1913, sec. 2316. For further discussion of this question, see 6 MINNESOTA LAW REVIEW 56. The holding of the instant case, that the tax was invalid only as to the excess, seems unwarranted, although supported by some early federal district court decisions. *First Nat. Bank v. Treasurer,* (1885) 25 Fed. 749; *Whitney Nat. Bank v. Parker,* (1890) 41 Fed. 402, 410. It has been held that such a tax is illegal and void. *Merchants' Nat. Bank v. Richmond,* (1921) 41 S. C. R. 619; *San Francisco Nat. Bank v. Dodge,* (1904) 197 U. S. 70, 25 C. R. 384, 49 L. Ed. 669. The holding of the instant case may be explained on the ground that the bank asked an injunction as to the excess only. In the instant case the question was raised in an injunction suit by the bank on behalf of its stockholders. Accord, *Hills v. Albany Exchange Bank,* (1881) 105 U. S. 319, 26 L. Ed. 1052; *Cummins v. Merch. Nat. Bank,* (1879) 101 U. S. 153, 156, 157, 25 L. Ed. 903, where it is said that the bank can only thus protect itself against actions by the stockholders on the one hand and the state on the other. The question may also be raised in an injunction suit by a stockholder against the tax collector, *Boyer v. Boyer,* (1884) 113 U. S. 689, 5 S. C. R. 706, 28 L. Ed. 1089, or in a suit by a stockholder restraining the bank and the directors from paying the tax. *Dodge v. Woolsey,* (1855) 18 How. (U. S.) 331, 342, 15 L. Ed. 401, where it is said that a stockholder is entitled to equitable relief against the directors regarding any funds improperly applied or to be misapplied. See also *Smith v. Kansas City Title & Trust Co.,* (1921) 255 U. S. 180, 41 S. C. R. 243, 65 L. Ed. 360, on jurisdiction of a stockholders' injunction suit against directors. Under the Minnesota law of 1921, the taxes levied "shall be paid by such bank as agent of the stockholders." In this situation it would seem that any possible liability of the bank as such agent, and of the directors as agents of the bank, is to be determined not by the law of corporations governing the administration of corporate property, which of course the stockholders do not own, but by the law of agency governing the administration of property belonging to the stockholders directly as principals. Moreover, in case the tax on national bank stock is deemed to be invalid, what is the status of the tax on state banks levied under the identical statute? Can it be assumed that the state legislature intended to levy a different tax on state banks from that on national banks, so that the one will stand while the other falls? As to directors' common-law liability see *Bowerman v. Hammer,* (1918) 250 U. S. 504, 512-513, 39 S. C. R. 549, 63 L. Ed. 1113. For a discussion of the constitutional questions involved in this question, see ante, p. 219.

CARRIERS—LIMITATION OF LIABILITY—PERIOD FOR FILING CLAIMS.—The plaintiff was consignee of goods which were lost in transit, and of

the shipment of which he had no other information than the consignor's statement. About nine months afterward he definitely ascertained that the goods had been shipped and filed a claim for the value. The bill of lading under which the goods were shipped required that in case of loss or damage or failure to deliver the shipment after a reasonable time for delivery, the consignee, as a condition to recovery, must file a claim within six months thereafter. *Held,* that the consignee to recover must file a claim within six months *from date of shipment* and not six months from the time he definitely ascertained that the shipment was made. *Missouri Pacific Ry. Co. v. Reed,* (Ark. 1921) 228 S. W. 1047.

The practice of limiting the time for filing claims as a condition precedent to recovery, when reasonable, has met with the approval of the courts, even at common law. *Express Co. v. Caldwell,* (1884) 21 Wall. (U. S.) 264, 22 L. Ed. 556. The Interstate Commerce Act expressly recognizes this right when the limitation is for a period not less than four months, except in case of loss or damage caused by delay while being loaded or unloaded, or damaged in transit by carelessness or negligence, in which case no notice or claim need be filed as a condition precedent to recovery. 38 Stat. 1196 (Comp. Stat. 1918, sec. 8604a), 41 Stat. 424; see *McCotter v. Norfolk, etc., Ry. Co.,* (1919) 178 N. C. 159, 100 S. E. 326. And the Uniform Bill of Lading now in use and approved by the Interstate Commerce Commission, (1908) 14 I. C. C. 346, contains a six months' limitation. Although the result reached in the principal case seems correct because of the length of time elapsing between a reasonable time for delivery and the filing of the claim, the statement of the court that the time commences to run from the date of the shipment must have been inadvertent, for it seems clearly contrary to the wording of the bill of lading, which states that the claim shall be filed within six months after a reasonable time for delivery has elapsed. The same court held in *St. Louis, etc., Ry. Co. v. Bliss, etc., Co.,* (1915) 118 Ark. 323, 176 S. W. 325, that the reckoning should be made from the time when a reasonable time for delivery had elapsed, and that four months and eleven days was reasonable, in the case of a four months' limitation. And in *Babbitt v. Grand Trunk Ry. Co.,* (1918) 285 Ill. 267, 120 N. E. 803, it was held that, on a four months' limitation, the filing of a claim four months and twenty days after the goods reached their destination was within a reasonable time from when delivery should have been made. But the delay of the plaintiff in the instant case, in view of the fact that the consignor assured him that the goods had been sent, seems clearly unreasonable.

CONSTITUTIONAL LAW—BENEFICIAL ASSOCIATIONS—WAIVER OF CONSTITUTIONAL RIGHTS—RIGHT TO COMPEL REINSTATEMENT AFTER VIOLATION OF A VOID BY-LAW.—Plaintiff joined a brotherhood having a rule that any member using his influence to defeat any action of the national council should be expelled. He was expelled for signing a petition asking the legislature to reconsider a bill which had been approved by the brotherhood, and now filed a bill in equity asking reinstatement. *Held,* that the

rule is unconstitutional and void, and that plaintiff must be readmitted because he cannot surrender or delegate his constitutional right to petition. *Spayd v. Ringing Rock Lodge, etc.,* (Pa. 1921) 113 Atl. 70.

The right of an association to expel a member for exercising a right or duty as a citizen is discussed in a note to the instant case in 14 A. L. R. 1446. The question of the power of a citizen to surrender, waive, or delegate a constitutional right, however, presents another interesting situation. Generally speaking, the rights guaranteed to every citizen by the constitution may be separated into two classes: (1) those in which the public is interested as affecting public policy; these cannot be surrendered; (2) those more in the nature of privileges which are for the benefit of the individual alone and do not affect the public interest; these may be waived. *Anderson v. Reilly,* (1876) 66 N. Y. 189; Cooley, Constitutional Limitations, 7th Ed., pp. 250-252; 6 R. C. L. 93.

Thus in criminal cases, the authorities are almost unanimous in holding that one charged with a misdemeanor may waive his right to trial by jury. *State v. Woodling,* (1893) 53 Minn. 142, 54 N. W. 1068; *Darst v. People,* (1869) 51 Ill. 286, 2 Am. Rep. 301; see also, *Schick v. United States,* (1903) 195 U. S. 65, 24 S. C. R. 826, 49 L. Ed. 99 (Harlan J., dissenting). But as to felonies, the courts are almost unanimous in holding that a defendant cannot waive a jury trial, since "the state has an interest in the preservation of the lives and liberties of its citizens, and will not allow them to be taken away without due process of law." *State v. Thompson,* (1900) 104 La. 167, 28 So. 882; *State v. Lockwood,* (1877) 43 Wis. 403. Minnesota seems to permit a waiver of a jury in both misdemeanor and felony cases, *State v. Woodling,* (1893) 53 Minn. 142, 54 N. W. 1068. Wisconsin denies the right of waiver in either case. *State v. Lockwood,* (1877) 43 Wis. 403. Constitutional provisions to protect property rights may also be waived. *Hellen v. Medford,* (1905) 188 Mass. 42, 73 N. E. 1070, 69 L. R. A. 314, 108 A. S. R. 459; *Shepard v. Barron,* (1903) 194 U. S. 553, 568, 24 S. C. R. 737, 48 L. Ed. 1115. And it has been decided in a few states, on the theory that the right waived is merely a personal privilege, that a party may, by executory agreement, entered into at the time of contracting a debt, waive his rights of exemption under a state constitution, and preclude himself from claiming them as against judgments obtained for such debt, *Brown v. Leitch,* (1877) 60 Ala. 313, 31 Am. Rep. 42; but in other states it is held that the exemption is granted on grounds of general policy, and an agreement to waive it must be deemed contrary to the policy of the law, and therefore void, *Branch v. Tomlinson,* (1877) 77 N. C. 388.

The court in the principal case declares that the right in question, which is the right to petition the legislature for the redress of grievances, cannot be surrendered, nor can it be delegated to others, and that any temporary giving up or denial of the right is as void as though permanent in character. Considering the right, as the court does, as one which affects not only the individual but the general public as well, it would seem that the rule is justified by the cases in point.

CONSTITUTIONAL LAW—POLICE POWER—DIVORCE—STATUTE GIVING WIFE A GROUND OF DIVORCE NOT ACCORDED TO HUSBAND.—A statute provided that "when the wife without support has lived separate and apart from his bed and board for five years next preceding the filing of the bill," she is entitled to divorce. The husband may not have been responsible for the separation and it does not permit the husband likewise to sue for divorce. *Held,* that the statute does not deny due process of law or the equal protection of the law in violation of the fourteenth amendment of the federal constitution (two justices dissenting). *Barrington v. Barrington,* (Ala. 1921) 89 So. 512.

The theory upon which this law is attacked as unconstitutional is that it grants an unreasonable extension of liberty or privilege to those individuals coming under the classification of wives, but denies such liberty to other individuals, their husbands, thus depriving the husbands of equal protection of the law. *Barrington v. Barrington,* (1917) 200 Ala. 315, 327, 76 So. 81. But all the authority seems to be contrary to this contention. The United States Supreme Court has held the equal protection of the law clause not denied "when the same law or course of procedure would have been applied to any other person under similar circumstances and conditions." *Tinsley v. Anderson,* (1898) 171 U. S. 101, 106, 18 S. C. R. 805, 43 L. Ed. 91. The law seems to recognize the difference between the situation and circumstances of the wife and the husband. *Fay v. Fay,* (1905) 27 Pa. Super. Ct. 328. On the basis of this distinction, statutes such as in the instant case have been held constitutional, because where the designation of the class is based on a real distinction, the law does operate uniformly; and if the law is enforced by usual and appropriate methods, the requirement of due process is satisfied. *Peterson v. Widule,* (1914) 157 Wis. 641, 648, 147 N. W. 966, 52 L. R. A. (N.S.) 778 (holding the Wisconsin eugenics law, which is applicable only to men, constitutional); *Huncke v. Huneke,* (1910) 12 Cal. App. 199, 107 Pac. 131 (holding valid a statute which makes a divorce decree binding on the defendant after six months, but which accords to the plaintiff the right to dismiss one year after entry of the decree); 6 R. C. L. 372.

CONTEMPT—ASSAULT UPON JUROR AFTER HIS DISCHARGE.—Defendant, an hour or two after return of verdict and discharge of jury, assaulted one of the jurors. *Held,* that he was guilty of an indirect contempt of court. *In re Fountain,* (N. C. 1921) 108 S. E. 342.

Contempts of court are direct when they are committed within the presence of the court, or so near to the court as to interrupt its proceedings. The contempt is constructive or indirect when it is an act done, not in the presence of the court, but at a distance, which tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice. 13 C. J. 5. The immunity from attack or abuse because of events occurring in the courts of justice extends, not only to the person of the presiding judge, but also to any one engaged in the proceedings as party, witness, juror, or otherwise. Oswald, Contempt,

2nd Ed., chap. 3, p. 36; Coke, 3 Inst. 142. The principle is that those who have duties to discharge in a court of justice are protected by the law, and shielded on their way to the discharge of such duties, while discharging them, and on their return therefrom, in order that such persons may safely have recourse to courts of justice. *In re Johnson,* (1887) L. R. 20 Q. B. D. 68, per Bowen, L. J. at p. 74.

To what extent this immunity persists after the case is ended depends upon the peculiar circumstances of each case. As a general rule, nothing done after a case is finished, unless it is a disobedience of an order of the court, can be adjudged contempt of court. Thus, the great weight of authority upholds the doctrine that every citizen has a right to comment upon and criticise rulings of the court after the litigation is concluded without committing contempt. *State v. Dunham,* (1858) 6 Ia. 245; *Storey v. People,* (1875) 79 Ill. 45, 22 Am. Rep. 158; *State ex rel. Att'y. Gen. v. Circuit Court,* (1897) 97 Wis. 1, 72 N. W. 193, 38 L. R. A. 554, 65 A. S. R. 90. This however is predicated upon the theory that, since the proceedings are over, the comment or criticism does not tend to hinder or delay the administration of justice, and the person abused may have full redress of his grievances by a personal suit for damages. *Storey v. People,* (1875) 79 Ill. 45, 22 Am. Rep. 158.

The proceedings in the instant case are laid under a statute defining indirect contempt as conduct tending "to impede and hinder the proceedings of the court and to impair the respect and authority for the proceedings of the court." The court holds that the acts of the defendant tend to impede and hinder the proceedings of the court by rendering less certain the impartial and fearless administration of justice. This position is fully supported by the only case exactly in point, *Regina v. Martin,* (1848) 5 Cox C. C. 356, and by the general policy of the courts upon this question. See *ex parte McCown,* (1905) 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N.S.) 603; *Weldon v. State,* (Ark. 1921) 234 S. W. 466, where a defendant was held guilty of contempt for assaulting a judge at a bathing beach during a recess of court. For Minnesota statutes on direct and constructive contempts, see G. S. Minn. 1913, secs. 8353, 8354.

DIVORCE—CONSTRUCTIVE DESERTION.—Defendant husband, who in the past had been extremely cruel to the plaintiff, his wife, came home drunk and struck and abused her. She left the house at once and swore out a warrant for his arrest. That night she slept apart from him but under the same roof. He was arrested the next morning, indicted, convicted, and sentenced to a term in the state prison. Plaintiff sued for divorce on the ground of constructive desertion. *Held,* that she was entitled to a divorce; that a constructive desertion is one where an existing cohabitation of the parties is put an end to for the statutory period by the misconduct of one of them, provided such misconduct is itself a ground of absolute or limited divorce; and that it is not a necessary ingredient in constructive desertion that the husband shall entertain in connection with his acts of cruelty any settled purpose to drive his wife from him, it be-

ing enough if such is the natural consequence of his acts. *Csanyi v. Csanyi,* (N. J. Ch. 1921) 115 Atl. 76.

The majority of cases hold that wherever one spouse, without justifiable reason, refuses for the statutory period to cohabit with the other and withdraws from all marital duties other than merely living under the same roof, the desertion exists, and the one who has caused the situation against the will of the other is the offender. *Rector v. Rector,* (1911) 78 N. J. Eq. 386, 409, 79 Atl. 295; *Axton v. Axton,* (1918) 182 Ky. 286, 206 S. W. 480 (dictum). And it has been held that where a husband so cruelly treated his wife that he rendered it impossible for her to live with him in safety, peace, and concord, and due to this treatment she left him, he is guilty of deserting and abandoning her as if he himself had left the home with the intention never to return to it. *Davenport v. Davenport,* (1908) 106 Va. 736, 56 S. E. 562. The instant case goes further than this in holding that under such circumstances the husband may be guilty of desertion though neither of the parties leaves the home.

The instant case is in accord with the majority rule in holding that it is not a necessary ingredient in constructive desertion that the husband shall entertain, in connection with his acts of cruelty, any settled purpose to drive his wife from him, and that it is enough if that is the natural consequence of his acts. *McVickar v. McVickar,* (1890) 46 N. J. Eq. 490, 19 Atl. 249, 19 A. S. R. 422; *Grierson v. Grierson,* (1909) 156 Cal. 434, 105 Pac. 120, 134 A. S. R. 137. But it has been held that constructive abandonment, to constitute grounds for divorce, must be the deliberate act of the party complained of, done with the intent that the marriage relation should no longer exist. *Lynch v. Lynch,* (1870) 33 Md. 328.

EVIDENCE—SEARCHES AND SEIZURES—DEMAND FOR RETURN OF PROPERTY SEIZED—SEASONABLE OBJECTION TO EVIDENCE.—Prohibition officers entered upon defendant's premises in his absence and, without a warrant, seized and destroyed articles claimed to be parts of a still, and testified to this effect on the trial of the defendant. Defendant failed to object to the testimony, and failed to move for a directed verdict at the close of plaintiff's evidence, but raised the question for the first time, after the general charge to the jury, by submitting special instructions asking that the jury be directed to acquit on the ground that all the information against the defendant was obtained by an unconstitutional search and seizure. No demand for the return of the articles had been made. *Held,* that the instructions should have been given; that no demand for return of the articles was necessary since they had been destroyed, and that the delay in raising the objection to the testimony was not fatal. *Holmes v. United States,* (C. C. A., 4th circuit, 1921) 275 Fed. 49.

The later federal cases show a consistent tendency to strengthen the protection afforded by the fourth amendment of the federal constitution forbidding unreasonable searches and seizures. *Adams v. New York,* (1904) 192 U. S. 585, 24 S. C. R. 372, 48 L. Ed. 575, established the strict rule that property of a defendant, even though taken from him by a violation of his constitutional right to be protected against unreasonable

searches and seizures, is admissible in evidence against him, on the theory that the court will not stop at the trial to try the collateral issue as to how evidence, otherwise competent, was obtained. In *Weeks v. United States,* (1914) 232 U. S. 383, 34 S. C. R. 341, 58 L. Ed. 652, L. R. A. 1915B 834, Ann. Cas. 1915C 1177, the Court took the first step away from that rule, by holding that the defendant, by making a demand before trial, may secure the return of the property to him and so prevent its use at the trial. The case of *Silverthorne Lumber Co. v. United States,* (1920) 251 U. S. 385, 40 S. C. R. 182, 64 L. Ed. 319, went further and held that where the defendant had secured the return of his property by a demand before trial, the government could not use information obtained by such seizure in issuing a subpoena duces tecum for their production by the defendant, and that such a subpoena was void. *Gouled v. United States,* (1921) 41 S. C. R. 261, is the first case which recognizes a right to object at the trial to the introduction of evidence unconstitutionally obtained, the defendant having established his right to so object by making a demand for the return of the property before the trial. The case of *Amos v. United States,* (1921) 41 S. C. R. 266, made a further departure from the early rule by holding that a demand for the return of the property, made after the jury was sworn, was a sufficient demand. The instant case is another step in advance, and holds that the defendant may object to the evidence even though he fails to raise the issue until the final charge to the jury is made, a futile demand being unnecessary. The development of the law in these cases raises the inquiry, will the court ultimately reach the point of holding that where a right under the fourth amendment is involved, it may be exercised at any time during the trial. See further on the development of search and seizure law, 4 MINNESOTA LAW REVIEW 447; 5 MINNESOTA LAW REVIEW 465; 6 MINNESOTA LAW REVIEW 70.

EXECUTORS AND ADMINISTRATORS—CLAIM FOR CAUSING DEATH AS "ASSETS" AUTHORIZING APPOINTMENT OF ADMINISTRATOR FOR NON-RESIDENT.—An action was brought against defendant administrator to cancel letters of administration. The decedent was a non-resident of Indiana and had no assets there at the time of his death. *Held,* that under Burns' Ann. Stat. 1914, sec. 2743, a claim for damages for causing the death of a person is not "assets," and where a non-resident leaves no other assets within the county, an administrator cannot be appointed. *Tri-State Loan & Trust Co. v. Lake Shore, etc., Ry. Co.,* (Ind. 1921) 131 N. E. 523.

The great weight of authority is contrary to this decision. *McCarron v. New York Central R. Co.,* (Mass. 1921) 131 N. E. 478; 8 R. C. L. 768. In most jurisdictions an administrator may be appointed to prosecute the action, although the decedent was a non-resident and left no other assets in that jurisdiction. This result is reached on the ground that, although technically the cause of action created by statute is a new one and did not belong to the deceased, yet the statute, by giving the right to sue to the personal representative, implies the right to appoint an administrator to enforce it, or contemplates that there shall be such personal rep-

resentative appointed to give effect to the statute; otherwise the right would, in certain cases, be simply nugatory for the want of a proper party to institute and prosecute the action. *Hutchins v. St. Paul,* (1890) 44 Minn. 5, 46 N. W. 79; *Morris v. Chicago, etc., Ry. Co.,* (1885) 65 Ia. 727, 23 N. W. 143; *Richards' Adm'r v. Riverside Iron Works,* (1904) 56 W. Va. 510, 49 S. E. 437; *C. & O. Ry. Co. v. Ryan's Adm'r,* (1919) 183 Ky. 428, 209 S. W. 538; *So. Pac. Co. v. Devalle de Costa,* (C. C. A., 1911) 190 Fed. 689. The minority view is represented by the instant case, following an early Indiana case, and by a Kansas case. *Jefferson R. R. Co. v. Swayne's Adm'r,* (1866) 26 Ind. 477; *Perry v. St. Joseph & W. R. Co.,* (1883) 29 Kan. 420. These cases rest on the ground that the term "assets" means property, rights, or choses in action held by, or belonging to, the intestate at the time of his death, i. e., something which passes to the administrator to pay the costs of administration and the debts of the decedent. Tennessee treats the action for wrongful death as surviving and not a new cause of action, and hence it passes to the administrator as an asset of the estate. *Sharp v. Cincinnati, etc., Ry. Co.,* (1915) 133 Tenn. 1, 179 S. W. 375. While statutory differences may perhaps have influenced results somewhat in regard to this question, *Finley v. Chicago, etc., Ry. Co.,* (1895) 106 Mich. 700, 64 N. W. 732; note 1 L. R. A. (N.S.) 885, it would seem that the principle of the Indiana and Kansas cases cannot be reconciled with the majority rule.

FOREIGN CORPORATIONS—SUBSCRIPTION TO STOCK AS "DOING BUSINESS." —Plaintiff as indorsee brings suit on a note executed by the defendant to a foreign corporation for the purchase of stock in the said corporation. *Held,* that the sale of stock was void, the corporation not having complied with statutory prerequisites. *Langston v. Phillips,* (Ala. 1921) 89 So. 523.

Statutes restricting operations of foreign corporations within the state before compliance with statutory prerequisites, as regards the nature of the acts prohibited, have taken two distinct forms. A few states have adopted statutes essentially similar to that involved in the instant case. Code of Alabama 1907, sec. 3653 prohibits not only the "transaction of business" but declares "all contracts, engagements, or undertakings, or agreements with, by, or to such corporation null and void." Under this statute the result in the instant case is obviously correct. The contracts prohibited are not confined to acts constituting a "transaction of business" as such a construction would render the latter provision of the statute superfluous. *Southwestern Slate Co. v. Stephens,* (1909) 139 Wis. 616, 120 N. W. 408, 29 L. R. A (N.S.) 92. But the statutes adopted by a great majority of the states, e. g., G. S. Minn. 1913, sec. 6206, amended in 1917, and sec. 6208, prohibit only the "doing" or "transacting" of business. With a single exception decisions construing this form of statute hold that the sale of stock by a foreign corporation does not constitute the "doing" or "transacting" of business. The courts by their construction confine the prohibition to such acts of business as are in themselves the ultimate object of incorporation. *Payson v. Withers,* (1873) 5 Biss. 269, Fed. Cas. No. 10, 864; *Home Lumber Co. v. Hopkins,* (1920) 107 Kan. 153,

190 Pac. 601, 10 A. L. R. 879; note 29 L. R. A. (N.S.) 92; contra, *Williams v. Scullin,* (1894) 59 Mo. App. 30; but see *Clark v. Kansas Petroleum Co.,* (1910) 144 Mo. App. 182, 129 S. W. 466. It would seem that the terminology of statutes of this latter kind might well have been construed to prohibit not merely acts of the specific business for which the company was incorporated but also business transactions ancillary to the specific business and especially those as essential to the pursuit of all corporate business as the sale of stock.

INFANTS—MISREPRESENTATION AS TO AGE AS ESTOPPEL TO DENY CONTRACT.—Plaintiff, an infant, representing that he was of age, executed a deed of trust, with power of sale, to the defendant's vendor. He now seeks in equity to annul both the deed of trust and the conveyance thereunder. *Held,* that plaintiff's deceit estops him to reassert his title. *Stallard v. Sutherland et al.,* (Va. 1921) 108 S. E. 568.

The cases in point resolve themselves into two general classes: first, where the contract is sought to be enforced against the infant; and second, where the infant seeks affirmative relief against the contract. As to the first class, the majority view holds that the infant is not estopped, because estoppel would have the effect of validating the contract, contrary to the policy of the law. *Conrad v. Lane,* (1880) 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412 (law); *International Text Book Co. v. Connelly,* (1912) 206 N. Y. 188, 99 N. E. 722, 42 L. R. A. (N.S.) 1115 (law); *Leslie v. Sheill,* [1914] 3 K. B. 607, 6 B. R. C. 738, 83 L. J. (N.S.) K. B. 1145, 111 L. T. (N.S.) 106, Ann. Cas. 1916C 992 (law); see note 6 A. L. R. 416, 418, 421. The minority view holds the infant estopped, but apparently not in actions on purely executory contracts, *Commander v. Brasil,* (1906) 88 Miss. 668, 41 So. 497, 9 L. R. A. (N.S.) 1117 (equity); *Pemberton Bldg. & L. Ass'n v. Adams,* (1895) 53 N. J. E. 258, 31 Atl. 280 (equity); and see *Damron v. Commonwealth,* (1901) 110 Ky. 268, 61 S. W. 459, 96 A. S. R. 453 (law). In some states, by statute, an infant, having misrepresented his age, cannot disaffirm a contract entered into by another in reliance on such misrepresentation. Ia. Comp. Code. 1919, sec. 6639; Kan. G. S. 1909, sec. 5062; Wash. G. S. 1910, sec. 5294; Utah Comp. Laws, 1907, sec. 1543. As to the second class, the weight of authority, with which the instant case is in accord, holds the infant estopped from claiming relief in equity, on the theory that he who seeks equity must do equity, *Int'l. Land Co. v. Marshall,* (1908) 22 Okla. 693, 98 Pac. 951, 19 L. R. A. (N.S.) 1056; *County Bd. of Ed. v. Hensley,* (1912) 147 Ky. 441, 144 S. W. 63, 42 L. R. A. (N.S.) 643; and it has been held that this is also the rule in a court of law, *La Rosa v. Nichols,* (1918) 92 N. J. L. 375, 105 Atl. 201, 6 A. L. R. 412; *Gregson v. Law,* (1914) 19 B. C. (Can.) 240, 15 D. L. R. 514; and see note 6 A. L. R. 416, 420, 423. A respectable minority reaches a contrary result. *Wieland v. Kobick,* (1884) 110 Ill. 16, 51 Am. Rep. 676 (law); *Alt v. Graff,* (1896) 65 Minn. 191, 68 N. W. 9 (equity); but see *U. S. Invest. Corp. v. Ulrickson,* (1901) 84 Minn. 14, 86 N. W. 613, 87 A. S. R. 326 (equity), where the *Alt Case* does not appear to have been before the court, but where an exception hinted at therein

at page 195 is apparently applied. The reason for this view is that estoppel in pais is inapplicable to infants, for a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Sims v. Everhardt*, (1880) 102 U. S. 300, 26 L. Ed. 87 (equity); *Tobin v. Spann*, (1908) 85 Ark. 556, 109 S. W. 534, 16 L. R. A. (N.S.) 672 (law). See 3 MINNESOTA LAW REVIEW 273.

INTOXICATING LIQUORS—CRIMINAL LAW—RIGHT OF JURY TO SMELL OR TASTE ALLEGED LIQUOR.—During a prosecution for selling whiskey, the jury was permitted, in court, to look at and smell the liquor sold by the defendant, in order to determine its character. *Held*, that this was not error. *Enyart v. People*, (Col. 1921) 201 Pac. 564.

Attitudes ranging from extreme strictness to extreme liberality have been taken by the courts on the question presented by the instant case. (1) It is improper to allow the jury, in court, to taste and smell the contents of bottles believed to contain whiskey. *State v. Lindgrove*, (1895) 1 Kan. App. 51, 46 Pac. 688; see, however, *State v. Coggins*, (1900) 10 Kan. App. 455, 62 Pac. 247, where the error was held to be sufficiently corrected by an instruction totally to disregard the evidence so received. (2) The proposal that the jury on their retirement take with them bottles of liquor "to be smelled or drunk or tasted" was properly overruled, and it was the duty of the court to prohibit their introduction into the jury room. *Wadsworth v. Dunnam*, (1897) 117 Ala. 661, 23 So. 699. (3) The fact that a bottle of liquor was handled by the jury in court, and that they smelled of its contents, without drinking of them, would present no error. *Thompson v. State*, (1913) 72 Tex. Crim. App. 6, 160 S. W. 685. (4) A bottle containing liquor may be carried into the jury room for the inspection of the jurors, but the contents must not be tasted. *State v. Olson*, (1905) 95 Minn. 104, 103 N. W. 727; *State v. Lindquist*, (1910) 110 Minn. 12, 124 N. W. 215. (5) An offer that liquor be given to the jurors to taste and test in court is properly rejected. "There are grave reasons against giving a jury liquor to drink for the purpose of determining whether it is or is not intoxicating." *Commonwealth v. Brelsford*, (1894) 161 Mass. 61, 36 N. E. 677. (6) It would not be error for the jury to taste the liquor in court. *People v. Kinney*, (1900) 124 Mich. 486, 83 N. W. 147. (7) Misconduct of the jury in sampling and drinking whiskey which, as an exhibit in the case was taken to the jury room, is not prejudicial error, where there is no affirmative showing that any of the jurors were under the influence of liquor while deliberating on the verdict. *State v. Burchain*, (1920) 109 Wash. 625, 187 Pac. 352, but the court discouraged the practice by saying that the jury should be required to determine the character of the liquor by smelling and tasting during the course of the trial and in the presence of the court.

The reasons given for the strict view in the extensive discussions in the Kansas and Alabama cases are: that a juror cannot be permitted to give a verdict founded on his own private knowledge, but that the verdict must be rendered solely upon the legal and open testimony in the cause, and that a juror who has knowledge of any material facts must

give notice, so that he can be sworn and cross-examined, because the accused has a constitutional right to be faced with the witnesses against him. In addition to reasons of practical policy, this view on principle has much to commend it.

LANDLORD AND TENANT—NECESSITY OF NOTICE TO QUIT WHERE TENANT HOLDS OVER LEASE FOR DEFINITE TERM.—Plaintiff, who had occupied premises under a three-year lease, held over for several years and paid rent to defendant landlord as before. On being ordered to leave, plaintiff contended that he was tenant from year to year, and so entitled to notice to quit. *Held,* (two justices dissenting) that the plaintiff, though called a tenant from year to year, was not entitled to notice to quit. *Rice v. Atkinson-Deacon-Elliott Co.,* (Mich. 1921) 183 N. W. 762.

There is much authority to the effect that a tenant holding over after a lease for a definite term, with express or implied consent of the landlord, is a tenant from year to year, and is entitled to notice to quit, in order to set a date for its termination. 2 Tiffany, Landlord and Tenant, secs. 210, 197; *Conway v. Starkweather,* (1845) 1 Denio (N.Y.) 113; *Streit v. Fay,* (1907) 230 Ill. 319, 82 N. E. 648, 120 A. S. R. 304; *Brown v. Kayser,* (1884) 60 Wis. 1, 18 N. W. 523; *Critchfield v. Remaley,* (1887) 21 Neb. 178, 31 N. W. 687. Minnesota follows this rule, although by statute in the case of urban real estate no term can be implied for a longer period than that between times of rent payment. G. S. Minn. 1913 secs. 6811, 6812; *Hunter v. Frost,* (1891) 47 Minn. 1, 49 N. W. 327, (substantially a tenancy at will, requiring notice to terminate); *Shirk v. Hoffman,* (1894) 57 Minn. 230, 58 N. W. 990. Some courts distinguish between the ordinary tenancy from year to year (by which they mean those tenancies which when created have no definite ending, including those under a void lease) and a tenancy arising from a holding over after a fixed term. In the former class, the term is continuous until notice to quit establishes a date of termination, and therefore, notice is necessary to end the tenancy. See, *Gladwell v. Holcomb,* (1899) 60 Ohio St. 427, 54 N. E. 473, 71 A. S. R. 724. The Minnesota court (*Hunter v. Frost, supra,*) seems entirely to have overlooked the distinction, and to have held merely that the tenancy from year to year is substantially a tenancy at will, hence not impliedly abolished by reason of the statutory definition of estates, and therefore, as a matter of course, requiring a notice to quit. The later, and it is believed the better view is that a tenant who holds over after the termination of a lease for a definite period with the consent of the landlord is a tenant for *another year,* and that each succeeding year is a new term, separate and distinct from that which preceded it, related to it only in the conditions of the original lease which the law reads into the new tenancy, and therefore requiring no notice. *Kennedy v. New York,* (1909) 196 N. Y. 19, 89 N. E. 360, 25 L. R. A. (N.S.) 847, 855 note.

MASTER AND SERVANT—RAILROADS—ORDINANCE REQUIRING CROSSING SIGNAL—APPLICABILITY TO EMPLOYEES.—Plaintiff's husband, a switchman, was killed when the switch engine on which he was riding backed across

a street without signaling its approach, as required by city ordinance, and struck a vehicle. The railroad company defended on the ground that the duty to give a signal was not a duty owing to the decedent. *Held*, that the ordinance is for the protection of railroad employees as well as for the warning of the public. *Cleveland, C. C. & St. L. Ry. Co. v. Mann*, (Ind. App. 1921) 132 N. E. 646.

It is unquestionably settled that the violation of a statute or ordinance not intended for one's benefit or protection does not constitute actionable negligence. *Hamilton v. Minneapolis Desk Mfg. Co.*, (1899) 78 Minn. 3, 80 N: W. 693; and see note, 9 Ann. Cas. 427. In applying this rule, however, the authorities conflict as to the scope of the various ordinances and statutes requiring a signal to be given upon the approach of a train to a crossing. The majority view holds that the sole object of the law is to warn the public using the crossing, and not to protect employees of the railroad. *Louisville & N. R. Co. v. Holland*, (1909) 164 Ala. 73, 51 So. 365, 137 A. S. R. 25; *Randall v. Baltimore & O. R. Co.* (1883) 109 U. S. 478, 3 S. C. R. 322, 27 L. Ed. 1003 (dictum); and see note, 9 Ann. Cas. 427, 429. And it has been held that this is the rule even though the statute declares that failure to give the signal "shall render the company liable for all damages . . . sustained by any person. . ." *Lepard v. Michigan Central R. Co.*, (1911) 166 Mich. 373, 130 N. W. 668, 40 L. R. A. (N.S.) 1105, and note. The minority view holds that the employees of a railroad are entitled to the same rights as other persons. *Indiana, etc., R. Co. v. Otstot*, (1903) 113 Ill. App. 37, 44, affirmed in 212 Ill. 429, 72 N. E. 389; *Illinois Central R. Co. v. McIntosh*, (1904) 118 Ky. 145, 80 S. W. 496; see also, *Cincinnati, etc., R. Co. v. Harrod's Adm'r*, (1919) 132 Ky. 445, 453, 115 S. W. 699; *Houston, etc., R. Co. v. Burnett*, (1908) 49 Tex. Civ. App. 244, 108 S. W. 404. It is said that this view is more in keeping with modern tendencies. 18 R. C. L. 618. Minnesota has not passed directly on this point, but it might hold contrary to the instant case. See *Everett v. Great Northern R. Co.*, (1907) 100 Minn. 309, 111 N. W. 281, 9 L. R. A. (N.S.) 703, 10 Ann. Cas. 294, where G. S. Minn. 1913, sec. 8776, requiring a signal to be given on approach to a crossing, was held not for the protection of a person not intending to use the crossing.

PUBLIC UTILITIES—CONSTITUTIONAL LAW—COAL MINING AFFECTED WITH A PUBLIC INTEREST.—A statute of Colorado makes it unlawful for any employer to declare a lockout, or for any employee to go on strike on account of any dispute prior to or during any investigation or arbitration of such dispute by the commission; provided, that it shall not apply to any industry not affected with a public interest. It was sought under this act to enjoin coal miners from striking. *Held*, that coal mining is an industry affected with a public interest, that the statute does not compel involuntary servitude, and that therefore the injunction should be granted. *People v. United Mine Workers of America*, (Col. 1921) 201 Pac. 54.

Among the reasons for holding a business to be affected with a public interest are: (1) that it is a practical monopoly, *Munn v. Illinois*, (1876)

94 U. S. 113, 24 L. Ed. 77; *German Alliance Insurance Co. v. Kansas,* (1913) 233 U. S. 389, 416, 34 S. C. R. 612, 58 L. Ed. 1011, L. R. A. 1915C 1189; (2) that it is in the production or distribution of a highly necessary commodity, *Jones v. City of Portland,* (1917) 245 U. S. 217, 38 S. C. R. 112, 62 L. Ed. 252; (3) that it is incidental to some essential public necessity such as transportation or the health and safety of citizens, *Block v. Hirsh,* (1921) 41 S. C. R. 458, 64 L. Ed. 589. For several years, law making bodies have been trying to find a way to regulate the coal producing industry. One of the first tendencies in this respect was evidenced in 1903 when Massachusetts legislature was precluded from passing a law conferring authority to maintain municipal fuel yards. *Opinion of the Justices,* (1903) 182 Mass. 605, 66 N. E. 25. But somewhat later, a like attempt by the Maine legislature was sustained by the supreme courts of Maine and the United States, *Jones v. City of Portland,* (1917) 113 Me. 123, 93 Atl. 41, affirmed in 245 U. S. 217, 38 S. C. R. 112, 62 L. Ed. 252. In 1909, the Indiana court held that a statute regulating the size of entries in a coal mine was constitutional, among other reasons because coal mining was affected with a public interest, since it was concerned in the production of a highly necessary commodity, and since it involved the health and safety of the miners. *State v. Barrett,* (1908) 172 Ind. 169, 179, 87 N. E. 7. In 1920, the Kansas legislature consummated these tendencies by a statute which asserted that coal mining is affected with a public interest, and declared that no one should hinder the continuous and efficient operation of such industry. This was upheld by the supreme court, *State v. Howat,* (Kan. 1921) 198 Pac. 686; see 6 MINNESOTA LAW REVIEW 69, 159. The court in this case, as the courts in the previous cases, was assisted in reaching its conclusion by an express legislative declaration.

But the court in the instant case, without legislative declaration, finds that coal mining is affected with a public interest and that therefore the industry falls within the purview of the statute prohibiting strikes and lockouts pending an investigation. This decision is important, not only as asserting that a business is public without an express legislative declaration, but because it seems to foreshadow a greater measure of legislative control over the whole coal business. The court gives as its reasons for holding it so affected, all three of the reasons above, and even says, "We must take judicial notice of the fact that the coal industry is vitally related not only to other industries but to the health and even the life of the people."

STRIKES AND BOYCOTTS—TRADE UNIONS—PICKETING—INJUNCTIONS—WHAT CONSTITUTES LAWFUL PICKETING.—Plaintiff corporation brought suit for an injunction to restrain the Tri-City Central Trades Council and 14 individual defendants from carrying on a conspiracy to prevent the plaintiff from retaining and obtaining skilled laborers to operate its plant. Three or four groups of pickets, each group composed of 4 to 12 men, who were members of the various unions involved, were posted in the streets through which the employees had to pass. On several oc-

casions assaults and combats ensued. *Held,* that the strikers should be limited for picketing purposes to one representative for each point of ingress and egress in the plant; that all others be enjoined from congregating or loitering at or near the plant; and that the pickets should operate singly and confine their efforts to observation, communication, and persuasion. *American Steel Foundries v. Tri-City Central Trades Council,* (1921) 42 S. C. R. 72 (Mr. Justice Clark dissenting).

Thus the Supreme Court of the United States adopts an intermediate view in regard to this much controverted question. Some courts have enjoined picketing altogether, on the theory that it necessarily leads to violence and threats, and that there can be no such thing as peaceful picketing. *Vegelahn v. Guntner,* (1896) 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 A. S. R. 443; *Atchison, etc., Ry. Co. v. Gee,* (1905) 139 Fed. 582. Other courts hold that picketing is not unlawful per se, and apparently place no restriction on the number of "peaceful pickets." *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union,* (1905) 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N.S.) 788; *Everett Waddey Co. v. Richmond Typographical Union,* (1906) 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N.S.) 792; see full discussion of picketing in 1 MINNESOTA LAW REVIEW 437; 4 MINNESOTA LAW REVIEW 544. Mr. Chief Justice Taft in the instant case lays down the position of Supreme Court as follows:

"Each case must be determined on its own circumstances. It is a case for the remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too drastic, may change it. We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant, that such representatives should have the right of observation, communication, and persuasion, but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases. It becomes a question for the judgment of the chancellor who has heard the witnesses, familiarized himself with the locus in quo, and observed the tendencies to disturbance and conflict. The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries. . . . It [the judgment of the circuit court of appeals] ignores the necessary element of intimidation in the presence of groups as pickets."

TAXATION—BANKS AND BANKING—NATIONAL BANKS—EXEMPTION OF FEDERAL SECURITIES FROM STATE TAXATION.—Plaintiff, a national bank, holding a large amount of tax-exempt securities of the United States government, demanded that the valuation of its shares for purposes of assessment under state tax laws should be diminished by the amount of such securities. *Held,* that such deduction is not permissible. *Des Moines Nat. Bank v. Fairweather,* (Ia. 1921) 184 N. W. 313.

The questions involved in the instant case have been the source of much litigation in both the state and federal courts. See 3 MINNESOTA LAW REVIEW 257; 31 Harv. L. Rev. 321; 57 U. Pa. L. Rev. 505. National banks are considered exempt from state taxation except as permitted under section 5219 of the Revised Statutes of the United States (Comp. Stat. 1918, sec. 9784). *Owensboro Nat. Bank v. Owensboro,* (1899) 173 U. S. 664, 19 S. C. R. 537, 43 L. Ed. 850; *Bank of California v. Richardson,* (1919) 248 U. S. 476, 39 S. C. R. 165, 63 L. Ed. 372. A state, therefore, is forbidden to levy a direct tax on the property of a national bank, but under the federal statute may tax the full value of the shares of stock in the hands of its stockholders. *Van Allen v. Assessors,* (1865) 3 Wall. (U.S.) 573, 18 L. Ed. 229, where it was held (three justices dissenting) that the corporation and its stockholders are distinct and separate entities, that a tax on the interest of the stockholders is not a tax on the bank, and that the state could tax national bank stock although the capital of the banks was all invested in stocks and bonds of the United States. The law is stated as now settled that "a tax upon owners of shares of stock in corporations, in respect of that stock, is not a tax upon United States securities which the corporation owns." *Home Savings Bank v. Des Moines,* (1906) 205 U. S. 503, 27 S. C. R. 571, 51 L. Ed. 901; *Cleveland Trust Co. v. Lander,* (1902) 184 U. S. 111, 22 S. C. R. 394, 46 L. Ed. 456; dissenting opinion in *Bank of California v. Richardson,* (1919) 248 U. S. 476, 39 S. C. R. 165, 63 L. Ed. 372. The first departure from the principles laid down in the *Van Allen case* and those following it (see 37 Cyc. 838) occurred in *Iowa Loan & Trust Co. v. Fairweather,* (1918) 252 Fed. 605, in which a federal district court, citing and misinterpreting the *Home Savings Bank case,* held that Liberty Bonds owned by state banking associations could not be included in the value of shares of stock assessed to the individual stockholders. This conclusion was based on the theory that a tax which is assessed on a bank's capital, surplus, and undivided profits as the measure of the value of the capital stock, is necessarily a tax on the corporation's assets, as the shares are merely representative of partial ownership of such assets. The result derives some support from the rather questionable decision in *Bank of California v. Richardson,* (1919) 248 U. S. 476, 39 S. C. R. 165, 63 L. Ed. 372, where it was held (three justices dissenting) that, on account of the essential identity of a corporation with its stockholders under the federal statute, shares of a national bank, when held by another national bank, are taxable only to the latter as shareholder, and are not to be included in valuing the shares of the latter when taxing its shareholders. The *Iowa Loan & Trust Co. v. Fairweather case,* fully discussed in 3 MINNESOTA LAW REVIEW 257, is overruled by the decision in *Hannan v. First Nat. Bank,* (C. C. A. 1920) 269 Fed. 527, which was followed and held to be controlling in the principal case.

TAXATION—WHETHER INCOME TAX IS AN EXCISE OR PROPERTY TAX.—A Mississippi statute provided for a tax on all annual incomes, with certain exceptions, in excess of $2,500. Plaintiff, a state revenue agent, sued

to recover from the defendant corporation an income tax for the years 1914-1919 inclusive. Defendant contended that the tax was one on property and void because the property was not assessed in proportion to value as required by the state constitution. *Held,* (two justices dissenting) that it was an excise and not a property tax, and therefore plaintiff should recover. *Hattiesburg Grocery Co. v. Robertson,* (Miss. 1921) 88 So. 4, 89 So. 369.

There are cases in accord with this view. *Waring v. Savannah,* (1878) 60 Ga. 93, holding that income is not property, and that a tax on income is not a property tax. An income does not come within the constitutional provision requiring taxation on property to be in proportion to value. *Glasgow v. Rowse,* (1869) 43 Mo. 479; *Ludlow, etc., Co. v. Wollbrinck,* (1918) 275 Mo. 339, 205 S. W. 196 (three justices dissenting). It is the recipient of the income that is taxed and not his property. The tax is upon the right or ability to produce, create, receive, and enjoy, and not upon the specific property. *State ex rel. Moon v. Wis. Tax Commission,* (1917) 166 Wis. 287, 163 N. W. 639; *Income Tax Cases,* (1912) 148 Wis. 456, 504, 507, 134 N. W. 673, 135 N. W. 164 (where, however, a constitutional amendment permits a state tax on incomes). The weight of recent decisions, however, seems to hold that income is property, and that a tax on income is a property tax. *State v. Pinder,* (1919) 7 Boyce (Del.) 416, 108 Atl. 43 (no constitutional provision that taxation shall be uniform); *Eliasberg Bros. v. Grimes,* (1920) 204 Ala. 492, 86 So. 56, 11 A. L. R. 300 (involving income from salary). A tax upon income from money on deposit or on interest from bonds, notes, or other debts due, and as dividends from stock, is in substance and effect a property tax and a tax upon the property from which such income is derived. *Opinion of the Justices,* (1915) 220 Mass. 613, 624, 108 N. E. 570. A tax on income is a property tax. *Maguire v. Tax Commission,* (1918) 230 Mass. 503, 120 N. E. 162; *Hart v. Tax Commissioner,* (Mass. 1921) 132 N. E. 621. In the instant case, as pointed out in the dissenting opinion, the court apparently deviates from its reasoning in previous cases. *Thompson v. Kreutzer,* (1916) 112 Miss. 165, 72 So. 891; *Thompson v. McLeod,* (1916) 112 Miss. 383, 73 So. 193; *Chicago, etc., R. Co. v. Robertson,* (1920) 122 Miss. 417, 84 So. 449.

Some courts, however, draw a distinction as to the source of the income. The Supreme Court of the United States has held that a tax on income derived from engaging in the profession of an attorney at law, and from interest on United States bonds, was an excise or duty and not a direct or a property tax, *Springer v. United States,* (1880) 102 U. S. 586, 26 L. Ed. 253, while the same court has held that a tax on the income from real estate is a tax on the property itself and hence a direct tax. *Pollock v. Farmers' Loan & Trust Co.,* (1895) 157 U. S. 429, 583, 15 S. C. R. 673, 39 L. Ed. 759, affirmed on rehearing, 158 U. S. 601, 15 S. C. R. 912, 39 L. Ed. 1108. See also 6 MINNESOTA LAW REVIEW 83. But even in jurisdictions holding that an income tax is a property tax, it is often hard to determine whether a tax is an income tax or a privilege or occupation tax. Thus, while the Alabama court in *Eliasberg Bros. v. Grimes,*

(1920) 204 Ala. 492, 82 So. 56, 11 A. L. R. 300, held that a tax on income from salaries was a property tax, the same court decided that a tax on the gross receipts of a specified enterprise or business is an occupation or privilege tax and not a property tax. *Capital City Water Co. v. Board of Revenue,* (1897) 117 Ala. 303, 23 So. 970; *Goldsmith v. Huntsville,* (1898) 120 Ala. 182, 24 So. 509. On these points the federal courts follow the decisions of the state courts, *Dawson v. Kentucky Distilleries,* (1921) 41 S. C. R. 272, holding that, even in the absence of a state decision, a tax of fifty cents a gallon on all whiskey withdrawn from bond was a property tax and void under the state constitution requiring taxation to be "uniform upon all property of the same class." In view of the modern authorities, it would seem that states desiring to levy a tax on incomes will fare most safely by passing a constitutional amendment.

TORTS—CONTRIBUTORY NEGLIGENCE—AUTOMOBILES—AMOUNT OF CARE REQUIRED OF GUEST IN AUTOMOBILE.—The plaintiff received injuries while riding as a guest in a rear seat of an automobile which was struck by the defendant's train because of the concurring negligence of the driver and the trainmen. *Held,* that one riding in the rear seat and having no authority over the driver and not having seen the train, is not guilty of personal negligence as a matter of law in not attempting to make the driver stop. *Bergert v. Payne,* (C. C. A. sixth circuit, 1921) 274 Fed. 784.

The question of when a guest who has been injured by the concurring negligence of the driver and the third person, is guilty of such contributory negligence as will bar his recovery from the third person, is, by the great majority of cases, one for the jury. *White v. Portland Gas & Coke Co.,* (1917) 84 Ore. 643, 165 Pac. 1005; *Hines v. Johnson,* (1920) 264 Fed. 465, L. R. A. 1915B 955 (note); Berry, Automobiles, 2nd Ed., sec. 326. But the rules that should be submitted to the jury for guidance vary. The better authorities hold that the guest need not use the same care as the driver, but that the degree necessary is determined by the circumstances. *Bradley v. Interurban Ry. Co.,* (Ia. 1921) 183 N. W. 493 Berry, Automobiles, 3rd Ed., sec. 522. Age and sex are taken into consideration, *Montague v. Salt Lake, etc., R. Co.,* (1918) 52 Utah 368, 174 Pac. 871; *Noakes v. New York Central, etc., R. Co.,* (1907) 106 N. Y. S. 522, 121 App. Div. 716. And it is especially true that if seated in the rear seat or in an inconvenient place, the guest may rely on the driver and owes but a very limited degree of care. *Brommer v. Penn. R. R. Co.,* (1910) 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N.S.) 924; *Beall v. Kansas City R. R. Co.,* (Mo. 1920) 228 S. W. 834; Berry, Automobiles, 3rd Ed., sec. 534. A second line of authority holds that the invitee is not required to warn the driver unless he actually sees danger. *Bradley v. Interurban Ry. Co.,* (Ia. 1921) 183 N. W. 493; *Coughlin v. Rhode Island Co.,* (R. I. 1921) 115 Atl. 323. The most liberal view is that the guest may rely on the driver if the ride is accepted without knowledge of the driver's incompetency, and if the guest has no control over him. *Birmingham, etc., Co. v. Barranco,* (1920) 203 Ala. 639, 84 So. 839; *Beach v. City of Seattle,* (1915) 85 Wash. 379, 148 Pac. 39; see, in general, Berry,

Automobiles, 3rd Ed., sec. 520, et seq. The contrary and stricter rule requires the guest to use the same degree of care as the driver where he has the opportunity to learn of the danger, *Brommer v. Penn. R. R. Co.*, (1910) 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N.S.) 924, where, in three companion cases, the rules of care for the driver, the guest in the front seat, and the guest in the rear seat are clearly laid down.

In Minnesota, the policy of the court seems to be to submit the question to the jury, even where other courts would hold that there was or was not contributory negligence as a matter of law. *Praught v. G. N. Ry. Co.*, (1919) 144 Minn. 309, 175 N. W. 998. In general, the Minnesota rule seems to be that the primary duty of caring for the safety of the vehicle and its passengers rests upon the driver, that the guest may rely in some measure on the driver, and that the guest is not contributorily negligent unless he participates in the negligence of the driver, or is aware of the driver's incompetency, or fails to warn the driver of dangers of which the guest is aware. *Carnegie v. G. N. Ry. Co.*, (1914) 128 Minn. 14, 150 N. W. 164, where the guest sat beside the driver in a runabout.

VENDOR AND PURCHASER—BREACH OF CONTRACT TO SELL REAL ESTATE DUE TO INABILITY TO GIVE TITLE—RIGHT OF PURCHASER TO RECOVER FOR LOSS OF BARGAIN.—Defendant, believing that he had title to land, contracted to convey it to the plaintiff, but upon discovering his inability to give title returned the installment paid, with interest. Plaintiff now sues for loss of bargain. *Held*, that he cannot recover. *Grenshaw v. Williams*, (Ky. 1921) 231 S. W. 45.

It is the general common-law rule that the measure of damages for breach of contract is the actual loss sustained at the time of the breach. *Hall v. Paine*, (1916) 224 Mass. 62, 112 N. E. 153, L. R. A. 1917C 737. But an exception thereto, recognized in the instant case, is apparently supported by the numerical weight of authority, namely, that where a vendor who contracts to sell land believing he has title, fails to perform through honest inability to do so, he is not liable to the purchaser for loss of bargain. *Flureau v. Thornhill*, (1775) 2 W. Bl. 1078; *Baldwin v. Munn*, (1829) 2 Wend. (N. Y.) 399, 20 Am. Dec. 627; *Ontario, etc., Co. v. Montreuil*, (1916) 52 Can. S. Ct. 541, Ann. Cas. 1917B 852, and note; 39 Cyc. 2105; 27 R. C. L. 633. Some states have statutes to the same effect. Cal. Civ. Code 1906, sec. 3306; S. D. Rev. Civ. Code 1910, sec. 2298; Mont. Rev. Civ. Code, sec. 6054. A few courts have extended the rule to vendors who, knowing they have no title, contract with the belief that they will procure it in time for performance, but who fail to do so. *Bain v. Fothergill*, (1824) L. R. 7 H. L. 158, 43 L. J. (N.S.) Exch. 243, 31 L. T. R. 387, 23 Wkly. Rep. 261; *Rineer v. Collins*, (1893) 156 Pa. 342, 27 Atl. 28; *Gerbert v. Trustees*, (1896) 59 N. J. L. 160, 35 Atl. 1121, 69 L. R. A. 764, 59 A. S. R. 578; Sedgwick, Damages, 9th Ed., vol. 3, sec. 1009, p. 2112; contra, *Pumpelly v. Phelps*, (1869) 40 N. Y. 59, 100 Am. Dec. 463; see also, *Wall v. City etc., Co.* (1874) L. R. 9 Q. B. 249, 43 L. J. (N.S.) Q. B. 75, 30 L. T. R. (N.S.) 53; *Arentsen v. Moreland*, (1904) 122 Wis. 167, 99 N. W. 790, 65 L. R. A. 973, 106 A. S. R. 951, 2 Ann. Cas. 628 (where both knew the

vendor had no title). But wilful inability to convey disentitles the vendor to the benefits of the rule, *Engell v. Fitch,* (1869) L. R. 4 Q. B. 659, 10 B. & S. 738, 38 L. J. (N.S.) Q. B. 304, 17 Wkly. Rep. 894; contra, unless there is fraud, *Thompson v. Sheplar,* (1872) 72 Pa. 160 (parol contract). The rule was originally based on the theory that because of the complicated nature of evidences of title to real estate, often rendering it difficult for the vendor to be certain of showing title, every contract for the sale of realty was impliedly conditioned upon the vendor's actually having title. *Flureau v. Thornhill,* (1775) 2 W. Bl. 1078. The more recent authorities justify their holdings on the principle of stare decisis, *Bain v. Fothergill,* (1874) L. R. 7 H. L. 158, 43 L. J. (N.S.) Exch. 243, 31 L. T. R. (N.S.) 387, 23 Wkly. Rep. 261; or on grounds of public policy in that such contracts will be unduly discouraged by the fear of consequences that the vendor could not forsee, *Morgan v. Bell,* (1892) 3 Wash. 554, 577, 28 Pac. 925, 16 L. R. A. 614; or on the analogy between this action and actions for breach of warranty, wherein the measure of damages is in most jurisdictions the contract price, *Hammond v. Hannin,* (1870) 21 Mich. 374, 4 Am. Rep. 490. The minority view holds that the purchaser is entitled to recover full compensation for the loss of his bargain, without reference to the good faith of the vendor, on the theory that the vendor's liability is measured by the contract; that he could stipulate against an unexpected inability to convey; and that the damage to the purchaser is the same regardless of whether the vendor acted in good faith or not. *Fleckten v. Spicer,* (1896) 63 Minn. 454, 65 N. W. 926; *Hopkins v. Lee,* (1821) 6 Wheat. (U. S.) 109, 118, 5 L. Ed. 218; *Doherty v. Dolan,* (1876) 65 Me. 87, 20 Am. Rep. 677; *Hartzell v. Crumb,* (1886) 90 Mo. 629, 3 S. W. 59; *Hallett v. Taylor,* (1900) 177 Mass. 6, 58 N. E. 154; *Beck v. Staats,* (1908) 80 Neb. 482, 114 N. W. 633, 16 L. R. A. (N.S.) 768 and note; 27 R. C. L. 634; 39 Cyc. 2110. This latter view seems the correct one on principle, 3 Sedgwick, Damages, 9th Ed., p. 2121.

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SOCIAL ASPECTS OF MINNEAPOLIS COURTS

By Edward F. Waite*

WHAT do I mean by "social aspects"? I am willing to let the reader make the definition. If he will tell me what is social work, who is a social worker, what is social legislation, what a social institution, I will use his terminology to define my topic. We know well enough what is meant by each of these familiar though rather elusive terms, but attempts at defining any of them have not been wholly satisfactory. And yet a lawyer addressing lawyers ought to have a clear enough idea of what he is writing about to risk a definition.

From time immemorial the prevailing aim, method and product of the courts have been highly individualistic. When one thinks of a civil action the concept is naturally of a controversy between A and B as to their respective rights and obligations. Cases are rare in which the community is a party or has any interest in the result other than a general concern that justice shall be done. While in criminal proceedings society is seeking to protect itself, the obvious issue is usually the punishment of C for an offense against the person or property of D. Speaking generally the social status and relationships of A and B, and of C except as an alleged foe of the social order, have been ignored. In court they stand as individuals isolated from everything that is not relevant to the matters in dispute.

In other departments of organized society status and relationships count for much. In their light individuals are appraised

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and dealt with and community obligations measured. Few fail to see that the community is so knit together that the welfare of each intimately involves the welfare of all. The courts have not been strangers to this conception. I think it can be traced—though such is not my present purpose—from the early assumption by chancery of the authority and duty of the sovereign as parens patriae, ultimate guardian of all who by reason of infancy or incompetency were not able to care properly for themselves. The growth within the courts of this idea of social interest and obligation, manifesting itself through changes in organization and procedure, is what I understand by the phrase "socialization of the courts," the use of which has spread from philanthropic and academic to legal circles. That such a process is going on is undeniable. Whether it is for good or ill I shall not here discuss. Its purpose is to adapt judicial machinery more closely to the varied needs of the community; its method sometimes involves new forms of organization, sometimes new procedure, sometimes the assumption of functions which are administrative rather than judicial, and which seem to many unwise departures from traditional standards. Such organization and method constitute the social aspects of courts, local manifestations of which it is my aim in this paper to point out.

We find a beginning in a sort of rudimentary probation system that prevailed in the municipal court at least twenty-five years ago. In the criminal branch there were many petty offenders whom to punish by fine or imprisonment was an evident social waste and likely to be a serious hardship to innocent persons. Accordingly the judges devised a plan, then thought to be of doubtful legality, but good so long as nobody questioned it, of staying the execution of sentence during good behavior, and presently suspending or annulling it altogether if the conduct of the offender proved satisfactory. There was no supervision, "good behavior" merely meant keeping out of court. In 1899[1] a probation officer was provided by law for the supervision of minors with whom the court thus dealt for their correction rather than punishment. In 1905[2] a juvenile court was established as a branch of the district court. This was a fundamental departure in judicial organization. It was in essence and in its

[1]Chapter 154, Laws 1899.
[2]Chapter 285, Laws 1905.

development has more and more shown itself to be a socialized court. Indeed, so much do its administrative overshadow its judicial functions that it is in fact more truly a social institution than a court of the traditional sort.

About 1905 adult probation began to be enlarged and developed in the municipal court. In 1907 it was expressly recognized by law and a probation officer provided for adults. In 1909[3] adult probation in the district court was established, with equipment for supervision. There was an almost continuous enlargement of the functions of the juvenile court, which took on physical and mental adjustments of delinquents about 1911, and "mothers' pensions"—so called—in 1913[4]. In 1917 it was charged with new duties by the revised "children's laws," while its constituency was increased (effective in 1918) through the addition of the eighteenth year to the age of legal juvenility[5].

In 1917 another socialized court was established by an amendment of the Minneapolis Municipal Court Act[6]—the court of conciliation and small claims. The same year saw provision in Hennepin County[7] for that modern and humane agency for the protection of poor persons charged with crime, the public defender. And all along there has been an increasing co-operation between the courts and social agencies, public and private, whereby the agencies have resorted more and more to the courts for aid in solving their difficult problems, and the courts have called increasingly upon the agencies for investigation, adjustment and supervision in appropriate cases.

This bird's-eye view of the progress of the socializing tendency in Minneapolis courts brings us to a consideration of the present status. I shall discuss somewhat more in detail adult probation, the juvenile and conciliation courts and the public defender.

The probationary method is an outgrowth of changes in society's attitude toward convicted violators of criminal laws. Gradually it came to be realized that the best protection of the community against anti-social conduct lies in reformation, when possible, rather than retribution. With the first step in the new

[3]Chapter 391, Laws 1909.
[4]Chapter 130, Laws 1913.
[5]Chapter 397, Laws 1917.
[6]Chapter 263, Laws 1917.
[7]Chapter 496, Laws 1917.

order, the reformatory prison, came the parole system, liberation upon good behavior before the expiration of sentence. Thus granting to the offender the opportunity to avoid part of his penalty by good conduct after release from prison walls easily suggested the next step,—a chance to escape judicial punishment altogether by showing throughout a limited period of surveillance such amendment of purpose and life as should give promise of future obedience to law. This is probation. Plainly it is a method not to be applied without wise discrimination. With the hardened and inveterate offender it would be worse than folly. It is predicated upon desire to reform and capacity for reformation. Naturally it was first tried with juveniles,—a judicial adaptation of an expedient familiar in home and school. In its application to adults Massachusetts led the way more than forty years ago. But it was not until the first juvenile court, organized in Chicago in 1899, had magnified probation for delinquent children and demonstrated its possibilities, that the method was rapidly extended to adults.

In Minneapolis misdemeanors are tried in the municipal court. Before and since prohibition a large proportion of these have been cases of drunkenness; many others, non-support, commonly traceable more or less directly to the liquor traffic. While municipal court probation has not been confined to offenders of those two sorts, they have always comprised the majority of subjects. The method is to impose a workhouse sentence, stay its execution for a definite time upon appropriate conditions, and place the case under the care of the probation officer. Fortunately this officer has been a man of remarkable qualifications, and the results of his work have been worthy of more publicity than they have received. His reports show 10,446 probationers during the fifteen years ending with 1921. Of these 7813 (74.8%) made good and were honorably discharged; 1745 (16.7%) violated the terms of their probation and were committed to the workhouse, while the remaining 888 were still under supervision at the end of 1921. Not to speak of other considerations, there is evident economic significance in saving an average of 521 persons per year, many of them heads of families, from wasteful and degrading imprisonment.

In 1921 the probationers numbered 1487, of whom 510 were honorably discharged and 89 committed. It may be interesting to

note in passing that during the first six months of 1919, before prohibition, there were 322 placed on probation for drunkenness; during the last six months of 1921, 237.

In non-support cases and other cases where the husband has failed to provide for his family an order of court is often made for the collection of wages by the probation officer or the wife, to be expended under supervision. The sum handled thus in 1921 was $60,955.55. During the year four probationers bought homes on monthly payments. Thirteen others started bank accounts and at the end of the year had on deposit $1,030.22. There seems to be a reflection of economic conditions in the comparison with 1919, when the corresponding figures were eighteen, nineteen and $2,292.60. Through the efforts of the probation officer seventeen men and four women who in previous years were unable to hold any employment procured relatively permanent positions. In thirty-four cases reconciliations were effected between husbands and wives who came into court estranged and separated.

Probation in the district court is also effective though less striking in its reported results. Here the offenses are more serious, being either felonies or gross misdemeanors, and the offenders as a class less amenable to constructive treatment. Summarized figures for 1921 are as follows:

On probation January 1, 1921	146		
Placed on probation during the year	197		343
Discharged during the year	116	(33.6%)	
Committed during the year	59	(17%)	175
On probation January 1, 1922			168

The number placed on probation was about one-eighth of the criminal cases disposed of. Collections were $6,737, ninety per cent. for family support, the remainder for restitution. No use has been made of the district court probation officer for the enforcement of alimony in divorce cases.

In the municipal court the probation officer has one assistant. In the district court there is but a single officer for adults. Probation for women has not yet been satisfactorily organized in either court. Until within the last two or three years there have not been cases enough to warrant a full time woman officer. As a rule the regular officer of the court is used; sometimes a friendly woman on whom the judge has felt at liberty to call. The number of women on probation at a given time has been small in the

district court. In the municipal court, however, there were one hundred and twenty-five on January 1, 1922. This number is now fairly constant and seems to indicate that a woman officer is needed. A woman of the requisite qualifications would be of great assistance in non-support cases, where the incompetence and wastefulness of the wife is often the occasion, if not an excuse, for the husband's delinquency.

The juvenile court is, as has been stated, a branch of the district court. Under the law a judge must be assigned for at least a year's service, whose first duty it is to do the work of this court, his other time being available for the trial of cases from the regular district court calendar. Apparently the assignment is not considered by the bench to be a very desirable one, and any judge who is willing to keep it indefinitely may do so. The first judge was in charge six years; his successor somewhat more than ten. The third is now in his first year of service. His schedule is two days per week in the juvenile court and three and one-half days on the regular district court calendar. Much administrative work must be done outside of court hours. There is a staff of nineteen persons, including clerk, reporter, bailiff, probation officers, nurse, investigators of county allowances ("mothers' pensions") and office assistants, all on full time; also two physicians, dentist and psychologist on part time. Two correctional schools for delinquents are managed jointly by the judge and county commissioners,—one for boys and the other for girls. The Glen Lake School for Boys is a farm of about one hundred and sixty acres owned by the county, with three cottages capable of accommodating about fifty boys, school house and other appropriate buildings and equipment. A superintendent, matron and eight helpers conduct this school, besides two teachers furnished until recently by the Minneapolis Board of Education, but now paid by the county. The Home School for Girls on Penn Avenue North is a rented place, ten acres, with two houses, barn, etc. The staff consists of a superintendent and four helpers, besides a teacher. Twenty girls can be cared for.

There were 798 new cases of delinquency in the juvenile court during 1921,—154 girls and 644 boys. About half were placed on probation; the others disposed of in various ways. The totals given omit a large number of cases disposed of by the chief probation officer for juveniles without formal hearing before the judge.

Much of the time of the court is taken up with cases of dependency and neglect. In new cases of this sort during 1921, there were 339 children who were cared for in various ways. Here the work of investigation and supervision is done by agencies outside the probation office,—chiefly by the Children's Protective Society and the County Child Welfare Board.

The system of county allowances to mothers or "mothers' pensions" is a modern device to keep children of worthy but destitute mothers in their homes under wholesome living conditions, —not as charity but, like public education, for the ultimate good of the state. The details of the administration of the law are too complicated for summary explanation. The net result, in spite of the obvious dangers, has been good. At the end of 1921 there were in the county 216 mothers drawing allowances on account of 793 children. All of these cases had been either originally adjudicated or reconsidered during the year, besides many others in which the allowances had not yet been granted when the year closed, or had been discontinued. The amount dispensed was $92,857.96. In 1920 it was $90,195.53; the estimated amount for 1922 is $100,000.

Nearly all cases of whatever sort are kept on the calendar of the court for periods ranging from six months to several years. The agents of the court are constantly in touch with them, and they come repeatedly before the judge for action according to the kaleidoscopic changes in individual conduct or family conditions.

This glimpse of the juvenile court is designed to give some impression of the nature and volume of its work. Concerning its methods there is not space to speak. Its spirit and purposes probably need no explanation to readers of the Minnesota Law Review. It is not a piece of legal mechanism, grinding out its product according to rules and precedents; but an organization for human contact, equipped, to be sure, with judicial power, but working with freedom, adaptability and constructive helpfulness,—a truly *social* enterprise.

The Minneapolis court of conciliation and small claims was established by the legislature in 1917 as a branch of the municipal court. The judge is elected under a special designation, but has all the powers of the other municipal judges. In actual practice, however, he performed no duties outside the conciliation branch until quite recently, when there were added to his

functions, by agreement among the municipal judges, the disposition of cases under the traffic ordinances; and in vacation he now assists in the criminal branch.

The original bill for the establishment of the court was proposed by the State Bar Association and modeled upon the Norwegian system of conciliation. It provided for: (1) voluntary application for the good offices of the court to effect conciliation in disputes within the jurisdiction of the municipal court. (2) Compulsory application for conciliation in controversies involving not more than $100. If the parties could not be brought to an agreement the case was to be dismissed without prejudice to the right of the plaintiff to bring suit in regular form. Without the application, however, an action could not be brought. (3) Optional application to the court for trial in informal and summary fashion of disputes involving not more than $50.

In the legislature the compulsory features of the bill were eliminated, so that the act as passed established a small claims court rather than a true conciliation court. As such, however, it performs a highly useful function.

Several years ago the present Chief Justice of the United States said in a noteworthy address before the Bar Association of Virginia:

"Of all the questions which are before the American people I regard no one as more important than the improvement of the administration of justice. We must make it so that the poor man will have as nearly as possible an equal opportunity in litigation with the rich man; and under present conditions, ashamed as we may be of it, this is not the fact."

The criticism was just and is still only too well merited; but courts like the one now under consideration go far to lighten the reproach. There are no lawyers, no formal pleadings, no costs. In watching the proceedings one thinks of two quarreling schoolchildren, coming to a sensible and kindly teacher to have their mutual grievances adjusted. Though the amounts involved are small they are often of much importance to those concerned; and the fact that there is a tribunal where small claims can be enforced means much to those whose rights would be sacrificed if the alternative were the expense and delay of an ordinary lawsuit. About twenty-five per cent. of the cases are wage claims, and all cases are promptly disposed of.

A summary of the court's work covering its first four years, August, 1917, to August, 1921, shows:

Total number of cases handled	21,264
Settled before hearing	4,983
Settled in court	2,146
Tried in court	15,581

(The discrepancy in totals arises from duplication in the record of settlements).

There is a cheap and easy appeal, but only 209 persons have taken advantage of it.

The court has been twice discussed in the Minnesota Law Review by former Dean W. R. Vance,[8] the earlier article dealing with the court as proposed, with true conciliation features, and the later one describing its operation as actually established and doing business. The constitutionality of the act creating the court was recently considered by the Minnesota Supreme Court and sustained except in a detail relating to appeals.[9] In the opinion (Dibell, J.) the spirit of the court is admirably interpreted as follows:

"The theory, from a conciliation standpoint, is that many disputes may be amicably settled if the parties are brought together, face to face, before an unprejudiced and sympathetic judge, who will painstakingly inform them of their rights under the law, suggest what may be done, and tactfully help them to an amicable ending of their controversy. The theory from the standpoint of a small debtors' court is that litigation by the common-law method over small claims is wasteful, and fails to bring practical justice because of an expense out of proportion to the amounts involved, the time of the parties consumed in the litigation when they should be engaged otherwise, and the attendant delay in reaching a result."

The public defender represents another modification of court procedure in the direction of justice for the poor. It has long been the law in Minnesota that when a person accused of a felony or gross misdemeanor is unable by reason of poverty to procure counsel, the court shall appoint to appear in his behalf a lawyer who is paid out of funds of the county. The compensation is small and competent lawyers are not always available for appointment. The result has been that defendants in criminal cases who have not been able to select their own legal advisers have often

[8] 1 Minnesota Law Review 107; 2 Minnesota Law Review 491.
[9] Flour City Fuel & Transfer Co. v. Young, (1921) 185 N. W. 934; 6 MINNESOTA LAW REVIEW 161.

been represented in court by inexperienced or incompetent counsel. It must be confessed that judges have sometimes been too careless and complaisant, appointing men who had little business and whose very presence in the court-room, waiting for crumbs from the professional table, was evidence of unfitness. But even when carefully administered the old system had inherent disadvantages. To remedy these evils there has been tried in a number of progressive cities, during the last dozen years, the experiment of providing for the defense of indigent persons accused of crime by a public official, selected for fitness and paid a fixed compensation. Hennepin County has been the only Minnesota community to adopt the innovation. Four years of experience seem to justify it, and it is likely to extend before long to the other populous counties of the state. Defendants are not the only gainers. Doubtless considerable expense is saved to the county by the entry of pleas of guilty in many cases where a lawyer less capable and conscientious than the public defender, with fees contingent upon the numbers of days spent in court, would have wasted time and public funds in useless trials.

Some idea of the work of the public defender may be drawn from the figures for 1921. There were referred to him 320 cases, about one-sixth of the total number of criminal cases pending in the district court during the year, and more than one-fifth of the cases disposed of. Of these fourteen employed other counsel after the reference, 245 pleaded guilty either to the crime charged in the indictment or to a lesser degree, twenty-four were acquitted and sixteen convicted on trial. Indictments nolled or cases dismissed numbered twenty-one. Total figures for the four year period are as follows:

Cases referred	793
Pleas of guilty	585
Convictions	57
Acquittals	42
Indictments nolled and cases dismissed	62
Private counsel retained	27

A discussion of our subject would be incomplete without further reference to the remarkable increase, during recent years, in the use by the courts of social agencies, private and public. In Minneapolis the efficient "attendance department" of the public schools aids in the administration of child-labor and school-at-

tendance laws; several active organizations cooperate in the prevention and correction of juvenile delinquency, dependency and neglect; non-support cases and cases of abandonment of children present distinctly social problems, and courts have learned that social workers can here give aid in all constructive efforts. The State Children's Bureau and County Child Welfare Board work intimately with the district court to safeguard children born out of wedlock and those proposed for adoption in foster homes. From the same sources valuable aid is rendered the probate court in dealing with the feeble-minded, and sometimes the insane. Occasionally a perplexed district judge calls upon juvenile probation officers, or upon some unofficial agency, for aid in the disposition of children involved in actions for divorce. But no regularly organized assistance is available in this field,—much to the detriment of the children and ultimately of the community in which they grow up and live. This obvious need, together with the pitiful inefficiency of district court methods for collecting alimony, in contrast with the success of the municipal court in non-support cases, furnishes a strong argument to the proponents of a court of domestic relations or "family court."

Naturally the large cities of the state have been the experimental ground for innovations of the sort we have considered. The original juvenile probation act of 1899 related only to Hennepin, Ramsey and St. Louis Counties, containing the cities of Minneapolis, St. Paul and Duluth. The same is true of the juvenile court act of 1905, extension to rural counties being initiated in 1909[10] but not made fully effective until 1917.[11] In form the adult probation law of 1909 was of general application throughout the state, but outside the cities named the courts were slow to act under it; and the same is true of the first "mothers' pension" law, passed in 1913. As we have seen, provision for a "public defender" has been limited to Hennepin County. The original act establishing a court of conciliation and small claims was limited to Minneapolis. Substantially similar courts were created for Stillwater in 1919[12] and for St. Paul in 1921.[13] Chapter 317, Laws 1921, authorizes the governing body of any city to engraft upon its municipal court the same procedure prescribed for Minneapolis

[10] Chapter 232, Laws 1909.
[11] Chapter 397, Laws 1917.
[12] Chapter 112, Laws 1919.
[13] Chapter 525, Laws 1921.

in 1917. A bill was introduced in the legislative session of 1921 providing for compulsory conciliation proceedings, without the intervention of lawyers, in controversies involving less than $1,000. Since it did not apply to Minneapolis, St. Paul or Duluth its failure to make headway can hardly be charged to the city lawyers. Indeed, the Minneapolis bar has been notably open-minded toward projects designed to bring the courts into closer touch with the changing conditions of our complex social order.

RIGHTS OF PARTIES AND DUTIES OF CARRIERS UNDER ORDER NOTIFY BILLS OF LADING

By Mac Asbill*

IN an order-notify shipment the shipper bills the goods to his own order or to the order of another person and adds a direction that the carrier notify a third party of the goods' arrival. This third party is the order-notify consignee. At the present time the volume of shipments moving under such bills is exceedingly large considering that this method of shipment is of comparatively recent origin. Such a bill of lading operates as a protection to shippers, many of whom do not know the financial condition of their customers and consequently, for this or other reasons, wish to do business on a cash basis and retain control over the shipment until the invoice is actually paid. It is now quite customary to consign goods to shipper's order, order notify the buyer, and to send the bill of lading with draft attached to a local bank with instructions to deliver the bill of lading on payment of draft. Having possession of the bill of lading the purchaser, order-notify consignee, can by its surrender then secure the goods from the carrier. But until the draft is paid, or payment waived, and the bill of lading indorsed and delivered to the consignee, the ownership in and title to the goods remain in the shipper and he alone can give orders with respect to the goods.

The rights of the consignor and consignee in an order-notify shipment differ widely from those of the consignor and consignee in an ordinary shipment, and the same principles of law which govern the latter relationship are not applicable to the former. Likewise the duties of the carrier to the consignor and consignee in an order-notify shipment differ from those owed the ordinary consignor and consignee. Because of the actual difference in fact between the two types of shipment, a new branch of the law has been developed to apply to order-notify shipments. This law is briefly discussed herein and the differences in the rights, duties and liabilities of the parties consignor, consignee and carrier, under it reviewed and compared with the rights, duties and liabilities of

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like parties in an ordinary shipment under a straight or order bill of lading.

In an ordinary shipment made by the seller to fill an order when the buyer is the consignee, title to the goods usually passes to him on delivery to the carrier of goods of the quality and character ordered. Title having passed and the consignee being the real owner of the goods, any damage to them in transit must be borne by the owner unless the contract between the parties provides that the risks of transportation are to be borne by the consignor. In such shipments the consignor has no ownership in and little control of the goods after their delivery to the carrier, but possesses merely a personal right against the consignee for the price of the merchandise. Ownership being in the consignee, the carrier may lawfully surrender possession of the goods to him upon their arrival at destination.

On the other hand, an order-notify shipment is held to be notice to the carrier and to all outsiders that the shipper reserves title to the goods,[1] and that he is the only person who may legally exercise the rights of ownership over the shipment, such as, for instance, to order diversion, etc., until the bill of lading is indorsed and delivered to the order-notify consignee, which is usually done after payment of draft for the purchase price and a compliance with all conditions.[2] When ownership of the goods is in the shipper, or consignor, as in an order-notify shipment, all risks of transportation must be borne by the owner unless he has contracted with the buyer for the latter to assume such risk.[3] Therefore the consignor is the party who should properly file a claim for loss or damage to the shipment, although under the decisions of the courts the consignee may file a claim. Some courts hold that an order-notify consignee has no such interest as will allow him to maintain an action for loss or damage to the goods[4] although other courts hold to the contrary.[5] In jurisdictions where an order-notify consignee cannot sue for the loss or injury to the goods,

[1]Liberty National Bank v. Hines, (1920) 115 S. C., 82, 104 S. E. 313.
[2]Lust, Loss & Damage Claims, p. 98, note 55.
[3]Lust, Loss & Damage Claims, p. 99, note 56.
[4]Dalbey v. Mexican Cent. R. Co., (Tex. 1907) 105 S. W. 1154; Bennett v. Railway, (1920) 107 Kans. 17, 190 Pac. 757.
[5]Nashville, etc., R. Co. v. Abrahamson Boone Produce Co., (1917) 199 Ala. 271, 74 So. 350; Askew & Co. v. Southern Ry. Co., (1907) 1 Ga. App. 79, 58 S. E. 242; Seaboard Air Line Ry. Co. v. Luke, (1917) 19 Ga. App. 100, 90 S. E. 1041.

he may obtain an assignment of the consignor's claim and bring the action in his own name.

Interstate shipments are governed by federal statutes. Under the Pomerene Bill of Lading Act the consignor may indorse the bill of lading to the order-notify consignee and invest him with the title and right to possession of the goods. Section 20, par. 11 of the Interstate Commerce Act provides that an interstate carrier, after issuing a through bill of lading, "shall be liable to the lawful holder of such receipt or bill of lading or to any party entitled to recover thereon . . . for the full actual loss, damage or injury to such property . . . ." The meaning of the words "lawful holder" is fully explained in various court decisions[4] and in *Adams Express Co. v. Croninger,* it was said:

"What is the liability imposed upon the carrier? It is the liability to *any* holder of the bill of lading which the primary carrier is required to issue, 'for any loss, damage, or injury to such property caused by it' or by any connecting carrier to whom the goods are delivered."

Since the order-notify consignee may become the lawful holder of the bill of lading, it is believed that after such acquisition he is the proper party to sue for loss or damage to an interstate shipment, it being immaterial at what time the damage occurred.[7]

This view is in keeping with the decision of various courts holding that such a consignee who has paid the draft attached to the bill of lading owns the goods and can not, by refusing to accept them, avoid the payment of freight and demurrage charges due the carrier,[8] or that having surrendered the bill of lading and received the goods he is liable for the freight charges in all respects as an ordinary consignee would be.[9]

An order-notify bill of lading ordinarily provides that the carrier shall not deliver the goods without a surrender of the bill of lading properly indorsed. In one case the shipper made an order-notify shipment from New York to Denver, Colorado. The delivering carrier received no notice that this was an order-notify

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[4]Pennsylvania R. Co. v. Olivit Bros., (1917) 243 U. S. 574, 61 L. Ed. 908, 37 S. C. R. 468; Adams Express Co. v. Croninger, (1913) 226 U. S. 491, 57 L. Ed. 314, 33 S. C. R. 148; Carr v. Pennsylvania R. Co. (1916) 88 N. J. Law 235, 96 Atl. 588.

[7]Askew & Co. v. Southern Ry. Co., (1907) 1 Ga. App. 79, 58 S. E. 242.

[8]Southern Flour & Grain Co. v. Seaboard Air Line Ry. Co., (1918) 22 Ga. App. 403, 95 S. E. 1001.

[9]Wabash R. v. Bloomgarden, (1920) 212 Mich. 410, 108 N. W. 443.

shipment but delivered the same to the consignee without a surrender of the bill of lading. A draft was drawn upon the consignee with bill of lading attached, which was not paid, and thereupon suit was brought against the delivering carrier for a conversion. The plaintiff recovered and the court held that it was the duty of the delivering carrier to ascertain the terms of the bill of lading and if it had done so it would have found that this was an order-notify shipment and that delivery was improper without a surrender of the bill of lading.[10]

In another case the consignor, by mistake, sent the original bill of lading direct to the order-notify consignee unindorsed, and the carrier delivered the goods without requiring any indorsement to a consignee who became insolvent before paying the purchase price. When suit was brought against the carrier for an improper delivery, the court held that the loss was the result of the carrier's negligence in failing to require a proper indorsement of the bill of lading.[11]

That delivery without a proper indorsement of the bill of lading amounts to a conversion and renders the carrier liable for the full value of the goods has been held in other cases.[12]

Hence, the carrier's duty under an order-notify shipment is not complete when the goods reach destination. To carry out its contract with the shipper the carrier must then notify the order-notify consignee of the goods' arrival and keep possesssion of them until such consignee has secured possession of the bill of lading properly indorsed, and offered to surrender it to the carrier in return for the goods. Should the carrier either erroneously or intentionally deliver the goods to the order-notify consignee without requiring the latter to surrender the bill of lading, the carrier would be liable for a wrongful conversion of the property if such consignee did not hold the bill of lading,[13] and such misdelivery was the cause of the shipper losing the goods. The liability of the carrier in this respect is strictly enforced, but where delivery is made to a person who has the bill or who has authority from the holder of the bill and the cause of the shipper's loss is not the

[10]Furman v. Union Pacific R. Co., (1887) 106 N. Y. 579, 13 N. E. 587.
[11]Southern Ry. Co. v. Massee & Felton Lumber Co., (1919) 23 Ga. App. 309, 98 S. E. 106.
[12]Keystone Grape Co. v. Hustis, (1919) 232 Mass. 162, 122 N. E. 269,
[13]Lust, Loss & Damage Claims, p. 105, note 57; King v. Barbarin, (1917) 249 Fed. 303; Southern R. Co. v. Hodgson Bros. Co., (1919) 148 Ga. 851, 98 S. E. 541.

failure to require surrender of the bill but the improper acquisition of it by the deliveree, or his improper subsequent conduct, the mere failure to require presentation and surrender of the bill will not make the delivery a conversion.[14]

At the request of the consignor, the carrier may, of course, deliver to the order-notify consignee without a surrender of the bill of lading, since this would be a new agreement altering the provision of the first one. Where a terminal carrier refused to deliver a car of potatoes until the order-notify bill of lading was produced, although the initial carrier directed it to deliver without a surrender of the bill of lading, and because of such delay in delivery the shipment froze, the initial carrier was held liable.[15]

After an unauthorized delivery by the carrier, the failure of the shipper to even attempt to recovor possession would not relieve the carrier of its liability for a conversion, nor would the carrier be relieved of liability if, by its own efforts, it recovered the goods and tendered them to the shipper, though the latter act might mitigate the damages.

The matter of delivery by the carrier in order-notify shipments being so important to it and the shipper, it is necessary to see what acts of the carrier amount to a delivery. The weight of authority holds that where the consignee receives carload freight on its private side track, delivery is complete when the car is set for unloading at the usual and customary place for doing this on such side track.[16] In an order-notify shipment the carrier is, therefore, not under a duty to place the car on such a delivery track until the consignee is prepared, by the presentation of the bill of lading, to receive the contents of the car;[17] and should such a delivery, as above described, be made without requiring a surrender of the bill of lading, the carrier would be liable for a conversion, that is, for the full price of the goods. The mere fact that the carrier was instructed to notify a party of the arrival of the goods would not give such a party the right to require their delivery without the production and surrender of the bill of lading properly indorsed.[18]

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[14]Pere Marquette R. Co. v. J. F. French & Co., (1921) 41 S. C. R. 195.
[15]McCotter v. Norfolk & Southern R. Co., (1919) 178 N. C. 159, 100 S. E. 326.
[16]Lust, Loss & Damage Claims, p. 103, note, bottom first column.
[17]Lyons v. New York Central, etc., Ry. Co., (1909) 119 N. Y. S. 703.
[18]Killingsworth v. Norfolk & Southern Ry., (1916) 171 N. C. 47, 87 S. E. 947.

A delivery to a private side track for the sole purpose of inspection, even though such an inspection is unauthorized, is not such a delivery to the consignee as would render the carrier liable for a conversion of the goods. For such liability there must be an absolute and unqualified delivery to the consignee.[19]

Inasmuch as the carrier, by delivering a shipment at a prepay station on an order-notify bill of lading, would lose possession of the shipment, or at any rate possession of the shipment could be taken at that point, without a surrender of the bill of lading, the carrier is justified in refusing to issue such bill of lading covering a shipment consigned to a prepay or non-agency station.

Bearing in mind the decision of the United States Supreme Court in the *Mark Owen Co. case*[20] in considering the liability of the carrier in an order-notify shipment, it seems clear that it is important to ascertain the nature of the track upon which delivery is alleged to have been made. Much depends upon whether the track was a private or a public one. In the *Owen Case*, above, a car filled with grapes arrived in Chicago and was placed on a public side track. Notice of its arrival was given and Owen broke the seals on the car and removed a part of its contents. The loss occurred after unloading had commenced and while the car remained on the public track. The court held that there had been no delivery and that access was given to the car merely in order that the goods might be removed, and that the forty-eight hour period of free time mentioned in section 5 of the bill of lading was given for the purpose of allowing removal. In line with this decision it is thought that the carrier can not be held liable for a conversion for delivering an order-notify car to a public track until after the free time has expired, provided, of course, the consignee has not sooner removed the goods. In other words, goods on a public track are during the continuance of the free time period considered in the possession and under the dominion of the carrier.

In an ordinary shipment where title passes to the consignee on shipment, he has the right to inspect the goods on their arrival; but in an order-notify bill of lading a provision usually exists excluding the right to inspect unless provided by law or unless permission is indorsed on the bill of lading or given in writing by the shipper. This provision being a term of the contract between the

[19]Schopp Fruit Co. v. Missouri Pacific R. Co., (1905) 115 Mo. App. 352, 91 S. W. 402.

[20]Michigan Central Ry. v. Mark Owen & Co., (1921) 41 S. C. R. 534.

shipper and the carrier, the order-notify consignee has not even the right to demand inspection of the shipment from the carrier before a surrender of the bill of lading is made unless proper permission is obtained. The carrier also has no right to allow an inspection in such cases and violates its contract with the shipper if an unauthorized inspection is allowed. In case of such a violation, what is the liabiity of the carrier? The law is that such an unauthorized inspection does not render the carrier liable for a conversion so as to make it chargeable for the entire value of the shipment,[21] but the carrier is liable in such cases for the actual damage which results from its breach of contract with the shipper in permitting an unauthorized inspection. In most cases this damage would be the difference between the market value of the shipment at the time of rejection and the price at which the goods were later sold at destination or elsewhere, including all costs attached to the resale. On this point an Iowa court said:[22]

"If, however, it placed the goods on the side track and notified the consignee that it was there simply for inspection, then if the bill of lading did not contain a provision to allow inspection or the carrier otherwise authorized to permit it, the inspection would be unauthorized and the carrier liable for damages resulting from the same. It would not be liable as for a conversion but for the difference between the invoice price to the consignee at the time and place of shipment, as defined in section 3 of the uniform bill of lading, if made thereunder, and the market value of the shipment at the time of rejection in the nearest available market."

In another recent case the court said:[23]

"It is clear upon authority that where a carrier grants a right of inspection in such a case (inspection not authorized in bill of lading), his act does not amount to a conversion of the goods although it may result in a rejection of the goods and subsequent non-payment of the draft by the drawee."

In the ordinary course of business, the draft is attached to the order-notify bill of lading and the two documents deposited with a bank for collection. Should the bank give credit for the amount of the draft, less exchange, it acquires a special property in the goods and its rights can only be divested by the acceptance and

[21]Dudley v. Chicago, etc., R. Co., (1906) 58 W. Va. 604, 52 S. E. 718, 112 A. S. R. 1027.

[22]Anchor Mill Co. v. Burlington, etc., Ry. Co., (1897) 102 Ia. 262, 71 N. W. 255.

[23]Model Mill Co. v. Carolina, etc., Ry. Co., (1916) 136 Tenn. 211, 188 S. W. 936.

payment of the draft by the consignee. In such a case the rights of the bank would supersede an attempted attachment of the goods, and where the credit given because of the draft had been applied as payment on a past due obligation of the consignor, the creditor of the consignor could not divest the bank's rights in the goods by attaching them.[34]

Prior to a recent decision of the United States district court,[35] affirmed by the circuit court of appeals,[36] it was the opinion of lawyers and business men that the Pomerene Bill of Lading Act[37] made an order and order-notify bill of lading a negotiable instrument. A large volume of business of the country moves under both types of bills of lading. Business men have hitherto acted on the assumption that the bona fide purchaser of such bills acquires valid rights to the property therein described. In the case cited, the bills of lading were of the order-notify type and plaintiffs were the bona fide holders thereof who had paid the full value for all the cotton recited in the bills of lading and had received 26,-839 pounds less cotton than was recited in the bills of lading. The bills of lading contained printed words just above the weight of the cotton reading "weight (subject to correction)." The court held that the limited words in the bills of lading destroyed their negotiability and denied plaintiffs' contention that provisions in conflict with the statutory purposes of the Bill of Lading Act are not valid. The effect of the decision is that many order and order-notify bills of lading have no negotiability. The result follows that business interests should and must exercise precaution in taking up drafts secured by such bills of lading since no one can know definitely what the rights of the bona fide purchaser of such bills are until the question of their negotiability is settled by the United States Supreme Court.

As the writer is of counsel in the above case, which is now before the United States Supreme Court by way of writ of error and application for writ of certiorari[38] its merits will not be discussed.

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[34]Owensboro Banking Co. v. Buck, (1918) 16 Ala. App. 346, 77 Sou. 940.

[35]Leigh Ellis & Co. v. Davis, (1921) 274 Fed. 443, affirmed, 276 Fed. 400.

[36]Act of Congress of August 29, 1916, 39 Stat. 538; Watkins' Shippers & Carriers pp. 1201 to 1214.

[37]Writ of error filed January 12, 1922; application for certiorari presented January 16, 1922. Certiorari denied January 30, 1922.

THE WASHINGTON CONFERENCE

By Quincy Wright*

1. Objects of the Conference.

THE objects of the international conference which sat in Washington from November 12, 1921, to February 6, 1922, were set forth in President Harding's formal invitation to Great Britain, France, Italy and Japan of August 11, 1921:[1]

"Productive labor is staggering under an economic burden too heavy to be borne unless the present vast public expenditures are greatly reduced. It is idle to look for stability, or the assurance of social justice, or the security of peace, while wasteful and unproductive outlays deprive effort of its just reward and defeat the reasonable expectation of progress. The enormous disbursements in the rivalries of armaments manifestly constitute the greater part of the encumbrance upon enterprise and national prosperity; and avoidable or extravagant expense of this nature is not only without economic justification but is a constant menace to the peace of the world rather than an assurance of its preservation. Yet there would seem to be no ground to expect the halting of these increasing outlays unless the powers most largely concerned find a satisfactory basis for an agreement to effect their limitation. The time is believed to be opportune for these powers to approach this subject directly and in conference; and while, in the discussion of limitation of armament, the question of naval armament may naturally have first place, it has been thought best not to exclude questions pertaining to other armament to the end that all practicable measures of relief may have appropriate consideration. It may also be found advisable to formulate proposals by which in the interest of humanity the use of new agencies of warfare may be suitably controlled.

"It is, however, quite clear that there can be no final assurance of the peace of the world in the absence of the desire for peace, and the prospect of reduced armaments is not a hopeful one unless this desire finds expression in a practical effort to remove causes of misunderstanding and to seek ground for agreement as

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[1]On July 10, 1921, the Department of State announced that these powers had been "approached with informal but definite inquiries" on the subject.

to principles and their application. It is the earnest wish of this Government that through an interchange of views with the facilities afforded by a conference, it may be possible to find a solution of Pacific and Far Eastern problems, of unquestioned importance at this time, that is, such common understanding with respect to matters which have been and are of international concern as may serve to promote enduring friendship among our peoples.

"It is not the purpose of this Government to attempt to define the scope of the discussion in relation to the Pacific and Far East, but rather to leave this to be the subject of suggestions, to be exchanged before the meeting of the conference, in the expectation that the spirit of friendship and cordial appreciation of the importance of the elimination of sources of controversy, will govern the final decision."

After acceptance of this invitation by the five powers and of an invitation including merely the last two paragraphs by China, (subsequently by Belgium, Netherlands and Portugal also[2]) these objects were rendered more concrete by publication of the following agenda on September 21, 1921:[3]

Limitation of Armament

One. Limitation of naval armament, under which shall be discussed
- (a) Basis of limitation.
- (b) Extent.
- (c) Fulfillment.

Two. Rules for control of new agencies of warfare.

Three. Limitation of land armament.

Pacific and Far Eastern Questions

One. Questions relating to China.

First: Principles to be applied.

Second: Application.

Subjects: (a) Territorial integrity.
(b) Administrative integrity.
(c) Open door,—equality of commercial and industrial opportunity.

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[2]Invitations to these three powers were extended on October 4, 1921.

[3]In a note of July 26, 1921, prior to her formal invitation to the conference, Japan had suggested that introduction on the agenda of "problems such as are of sole concern to certain particular powers or such matters that may be regarded as accomplished facts should be scrupulously avoided." In a note formally accepting the American invitation on August 24, Japan hoped that the conference would be "arranged in harmony with the suggestion made in the memorandum of the Japanese Ministry of Foreign Affairs of July 26, 1921." The Chino-Japanese controversy over Shantung, the twenty-one demands treaty of 1915, and the American Japanese controversy over Yap and the mandates seemed to fall under these heads, so were not brought before the conference, though they were in fact settled by special negotiations conducted in Washington at the same time, with exception of the second.

(d) Concessions, monopolies or preferential economic privileges.
(e) Development of railways, including plans relating to Chinese Eastern Railway.
(f) Preferential railroad rates.
(g) Status of existing commitments.

Two. Siberia. (similar headings.)

Three. Mandated Islands. (unless questions earlier settled.)
Electrical Communications in the Pacific.

Under the heading of "Status of existing commitments" it is expected that opportunity will be afforded to consider and to reach an understanding with respect to unsettled questions involving the nature and scope of commitments under which claims of rights may hereafter be asserted.

In addition however to the two major problems here indicated, another was in the back of every one's mind, suggested by the platform on which President Harding had been elected.

"The Republican party stands for agreement among the nations to preserve the peace of the world. We believe that such an international association must be based upon international justice, and must provide methods which shall maintain the rule of public right by the development of law and the decision of impartial courts, and which shall secure instant and general international conference whenever peace shall be threatened by political action, so that the nations pledged to do and insist upon what is just and fair may exercise their influence and power for the prevention of war."

This object came to the surface after the conference had begun through President Harding's announcement to a group of newspaper men on November 25 that the administration would "set on foot a movement to bring out of the armament conference a system of similar but broader annual conferences to deal with the troubles of the world."

Thus the objects of the conference extended to three distinct topics, *Limitation of Armament, Pacific and Far Eastern Questions, Association of Nations.*

2. Organization of the Conference.

The conference consisted of plenary sessions and committees. The plenary sessions were formal occasions attended by all the delegates, in which announcement was made of programs for discussion or agreements reached. They were not intended for negotiation but for declaration. They were held in Continental

Memorial Hall, a handsome marble building on 17th street erected by the Daughters of the American Revolution and were open to members of the Senate and House of Representatives, representatives of the press and such of the public as had cards of admission from the State department.

The delegates sat at a "U" shaped green covered table with Mr. Hughes as chairman at the head of the "U". The remaining American delegates sat at his right, the British at his left and then in regular alternation the French, Italian and Japanese delegations. Thus an alphabetic order was followed as is customary in such gatherings. The powers attending merely the Far Eastern but not the Limitation of Armament Conference sat at the ends of the "U" in a similar order, Belgium, China, Netherlands, Portugal. In the center of the "U" sat the secretary of the conference and the efficient interpreter, M. Camerlynck, ready to repeat instantly every English speech in French and vice versa, for both these languages were official in the conference. Back of the delegates sat their technical experts. Since the auditorium seated only about 1200 persons, subtraction of the space occupied by delegates, experts, senators, representatives and the press left a remainder of forty seats to rotate among those of the public who would like to attend.

The real work of negotiation was conducted by committees. There was a committee of the whole on armaments with five powers represented and a committee of the whole on the Far East and Pacific with nine powers represented. These appointed many subcommittees, some of delegates, some of experts, and some mixed. Committee or subcommittee meetings went on almost continuously in the Pan-American building next door to Continental Memorial Hall and closely guarded by marines with fixed bayonets.

The delegations were assisted by technical experts, of which Japan had the most. The American delegation was also assisted by an "advisory committee" selected by the president so as to represent prominent organizations of the country, and designed to form a liaison between the conference and the public.

Publicity was handled in the manner customary with international conferences. Plenary sessions were public, committee and subcommittee meetings were private. The public gained only such information of the latter as was given out in communiqués prepared for the press by the committee itself or in press interviews

by plenipotentiary delegates. The latter method gave ground for occasional protest by certain delegations who felt that confidential discussions had been prematurely published. News of committee happenings sometimes came to Washington via London, Paris or Tokyo where it had leaked out through the foreign offices of those countries. Finally the fertile imaginations of newspaper correspondents was a source for filling news columns if not always for distributing accurate information. Stories of violent disagreement in committee meetings, one of which occasioned an anti-French riot in an Italian town, had to be officially denied by the plenipotentiaries, reputed to have participated. Although this type of rumor was something of an embarrassment, on the whole the progress of the conference endorsed the experience gained at Versailles and in the League of Nations, that negotiations can be most satisfactorily conducted withdrawn from the glare of public opinion but that agreements should be published as soon as reached.

It seems probable that the United States Senate will discuss the Washington treaties in open session as they did the treaty of Versailles. To facilitate this discussion the president in submitting the treaties to the Senate on February 10, 1922, accompanied them with complete minutes of both plenary session and committee meetings and a copy of the official report of the American delegation.

3. Negotiations.

"Our hundred millions frankly want less of armament and none of war." Thus President Harding struck the keynote of the conference at its opening meeting, and in spite of much haggling for national advantage in committee meetings, the pitch was not wholly lost through the seven plenary sessions which marked the progress of negotiations.

On the opening session, November 12, 1921, after President Harding's address of welcome, Secretary of State Hughes was elected chairman and surprised the conference and the world by laying down a concrete program for the limitation of naval armaments. On November 14 a session was held in which Mr. Balfour for Great Britain, Premier Briand for France, Admiral Baron Kato for Japan and Senator Schanzer for Italy accepted the American proposal "in principle."

Committee negotiations upon the details of this proposal began at once as also upon the Far Eastern problems, but before any conclusions had been reached another plenary session was held, on November 21, to afford Premier Briand the opportunity to say that France was unwilling to discuss an agreement for the limitation of land armament until Germany was "morally" as well as "physically" disarmed. He cited passages from General Ludendorff's recent book to prove that this happy state had not been reached. Delegates of the other powers diplomatically voiced their disappointment, Senator Schanzer of Italy expressing the hope, doomed to disappointment, that the land armament item on the agenda would not be abandoned.

After three sessionless weeks filled with committee negotiations over the Japanese demand for a 10, 10, 7 naval ratio instead of the 5, 5, 3 ratio proposed in the American plan, the conference again sat in plenary session on December 10. Previous to the meeting, information had reached America from foreign capitals that a Pacific alliance was being negotiated and at this meeting Senator Lodge of the American delegation presented the four-power Pacific Pact, which he noted covered islands "so diverse that we might describe them in the words of Browning as the

'Sprinkled isles,
Lily on lily that o'erlace the sea—'"

islands ranging in size from "Australia, continental in magnitude to atolls where there are no dwellers but the builders of coral reefs," islands upon which "still shines the glamour of some of the stories of Melville and the writings of Robert Louis Stevenson." Unfortunately he neglected to refer to the home islands of Japan which the committee had agreed were included, thus misleading President Harding who offered a contrary interpretation in a press statement of December 20. This was, however, withdrawn six hours later with the comment that the president had "no objections to the construction" which the delegates had agreed upon. It appears that the inclusion of the Japanese Home Islands had been originally insisted upon by Great Britain as a sop to the pride of Australia and New Zealand which were also included. The attitude of the United States Senate, however, seemed to jeopardize the whole agreement and as Japan was not averse, a subsequent resolution expressly excluded her home islands.

The next plenary session was held on February 1, the seven weeks' interim being filled with difficult committee negotiations. The United States, Great Britain and Japan announced substantial agreement upon the American naval limitation program on December 15, the most important modification being the concession to Japan, whereby she was to retain the "Mutsu," which was to have been scrapped. This was a new vessel built by popular subscription and of sentimental importance. Great Britain and the United States were in consequence to complete two new Post-Jutland battleships. More older vessels were to be scrapped thus leaving the total tonnage and the ratios substantially as in the original proposal. More formidable difficulties in the naval treaty were presented by the French demand for the privilege of building ten Post-Jutland battleships of 35,000 tons each, only withdrawn after Mr. Hughes had cabled Premier Briand, who had returned to France, that insistence upon this demand would wreck the treaty. France, however, accepted the 1.75 ratio for capital ships, with the understanding that she be allowed a larger ratio of "defensive ships" in which category she included submarines. In spite of the British demand for total abolition of submarines,[1] and the American desire to limit their number to 60,000 tons for United States and Great Britain with tonnage on the adopted capital ship ratios for the others, France was obdurate. With the failure of submarine limitation, efforts to limit the total tonnage of surface auxiliaries, which certain powers thought necessary to combat them, also failed and the conference had to be content with the Root resolution declaring submarine use against merchantmen piracy and limiting the size of naval fighting auxiliaries except air craft carriers to 10,000 tons. Vessels of larger tonnage were to be regarded as capital ships. Perhaps the warmest debates of the conference occurred on the submarine issue, since Great Britain regarded the French demand as a menace to her safety.

Discussion of the Chinese problem, was begun by the presentation on November 16 of ten points by Mr. Sze. These were abandoned and four general principles formulated by Mr. Root and restating the Hay Open Door notes of 1899 and 1900 were

[1] This demand was in accordance with British traditions. Earl St. Vincent of the British Admiralty said to Robert Fulton, when the latter presented plans for a submarine in 1804: "It is a mode of war which we who command the seas do not want, and which if successful would deprive us of it." (Bywater, Atlantic Monthly, Feb. 1922, 129: 267).

adopted. Detailed application of these principles proved difficult and several Chinese technical experts resigned in disgust. In fact all progress threatened at times to be held up by the failure of China and Japan to agree in their special conversations on Shantung begun at Washington on December 1 through the good offices of Mr. Hughes and Mr. Balfour.

These negotiations finally succeeded, and in the plenary session of February 1, the Shantung treaty was published together with the five power naval limitation treaty, the five power treaty restricting the use of submarines and poison gases, and a number of resolutions on the Far East which had been previously adopted in committee.

A session of February 4 published two nine power treaties on China, one attempting to assure the territorial and administrative integrity of China and the open door, the other providing for Chinese customs administration. At the final meeting February 6, the five treaties were formally signed and President Harding made a concluding address.

Thus the work of the conference is embodied in five treaties explained and amplified by fourteen resolutions and ten unilateral declarations. The treaties with the resolutions directly pertinent thereto, were presented to the United States Senate by President Harding in person on February 10, with the comment:

"All the treaties submitted for your approval have such important relationship, one to another, that, though not interdependent, they are the covenants of harmony, of assurance, of conviction, of conscience, and of unanimity. . . . I submit to the Senate that if we can not join in making effective these covenants for peace, we shall discredit the influence of the republic, render future efforts futile or unlikely, and write discouragement where today the world is ready to acclaim new hope."

In addition to the work of the conference, three treaties, relating to Shantung, Yap and Pacific cables have been negotiated at Washington concurrently with the conference.

These various treaties, resolutions and declarations embody achievements, more or less complete in the three fields which the conference had before it. We may therefore consider in succession its results as to Limitation of Armament, Far Eastern and Pacific Questions, and an Association of Nations.

4. Limitation of Armament.

Efforts to limit armament by international agreement did not

begin in recent years.[5] A treaty to this effect is said to have been made in the Chinese Age of Confusion (6th Century B. C.). In 1766 Prince Kaunitz, the Austrian Chancellor, suggested an army limitation agreement to Frederick the Great and in 1787 France and England actually signed a treaty reducing navies. Army limitation agreements were proposed by Alexander I of Russia (1816), Louis Phillippe of France (1831), the Italian General Garibaldi (1860), Richard Cobden of the British House of Commons (1861), and Napoleon III of France on several occasions (1863, 1867, 1870). More important, however, was the proposal of Czar Nicholas II. The Mouravieff circular of August 12, 1898, calling the First Hague Conference, issued under his authority, suggests President Harding's invitation of August 11, 1921:

"The ever-increasing financial charges strike and paralyze public prosperity at its source; the intellectual and physical strength of the nations, their labor and capital, are for the most part diverted from their natural application and unproductively consumed; hundreds of millions are spent in acquiring terrible engines of destruction, which though today regarded as the last word of science are destined to-morrow to lose all value in consequence of some fresh discovery in the same field. National culture, economic progress, and the production of wealth are either paralyzed or perverted in their development.

"Moreover, in proportion as the armaments of each power increase, so do they less and less attain the object aimed at by the governments. Economic crises, due in great part to the system of amassing armaments to the point of exhaustion, and the continual danger which lies in this accumulation of war material, are transforming the armed peace of our days into a crushing burden which the peoples have more and more difficulty in bearing. It appears evident, then, that if this state of affairs be prolonged, it will inevitably lead to the very cataclysm which it is desired to avert, and the impending horrors of which are fearful to every human thought.

"In checking these increasing armaments and in seeking the means of averting the calamities which threaten the entire world lies the supreme duty today resting upon all States.

"Imbued with this idea, his majesty has been pleased to command me to propose to all the governments which have accred-

[5]For a history of efforts to limit armaments see Wehberg, Limitation of Armaments, Washington, 1921, pp. 5-6, translated from French edition, 1914; the same authors more exhaustive, Die Internationale Beschränkung der Rüstungen, Stuttgart und Berlin, 1919, pp. 3-9; Fried, Handbuch der Friedensbewegung, Berlin and Leipzig, 1913, 2:3-56; and Wright, Limitation of Armament, Institute of International Education, Syllabus No. XII, November, 1921.

ited representatives at the imperial court the holding of a conference to consider this grave problem."

The First Hague Conference which met in response to this call in the summer of 1899 failed to limit armaments as did its successor in 1907. Germany was the stumbling block, as she was in the numerous overtures for a naval holiday made by England from 1910 to the outbreak of the world war. This obstacle was, however, removed by the treaties of Versailles, St. Germain, Trianon, Neuilly, and Sevres which provided for the effective disarmament of the Central Powers, "in order to render possible the institution of a general limitation of the armaments of all nations." The members of the League of Nations had, in the covenant, recognized "that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations." In the two assemblies of the League the armament question had received thorough consideration with the conclusion that effective action toward limitation would be impossible without cooperation of the United States who was taking the lead in naval building.

The United States Congress, however, by the Hensley amendment to the large naval appropriation act of 1916 had declared that "it looks with apprehension and disfavor upon a general increase of armament throughout the world, but it realizes that no single nation can disarm, and that without a common agreement upon the subject every considerable power must maintain a relative standing in military strength." Consequently it had authorized the president to call a conference "not later than the close of the war in Europe" to "formulate a plan for a court of arbitration or other tribunal" and to "consider the question of disarmament," and to suspend the naval program provided in the act, in case the results of such conference should "render unnecessary the maintenance of competitive armaments."

Thus the time was ripe for agreement on the subject. In his speech of July 22, 1920, accepting the republican nomination for president, Mr. Harding said he could "hear in the call of conscience an insistent voice for the largely reduced armaments through the world" and a resolution introduced in the Senate by Mr. Borah was passed as an amendment to the Naval Appropriation act of July 12, 1921. This amendment

"Authorized and requested" the president "to invite the Gov-

ernments of Great Britain and Japan to send representatives to a conference, which shall be charged with the duty of promptly entering into an understanding or agreement by which the naval expenditures and building programs of each of said governments, to wit the United States, Great Britain and Japan, shall be substantially reduced annually during the next five years to such an extent and upon such terms as may be agreed upon, which understanding or agreement is to be reported to the respective governments for approval."

Two days before passage of this amendment, however, President Harding announced that he had already approached the powers informally with reference to a conference of broader scope and more extended membership. These informal approaches lead to the formal invitations of August 11.

The Washington treaties on naval armament limitation are based on four general principles laid down in Mr. Hughes's original proposal:

"(a) The elimination of all capital ship building programs, either actual or projected.

(b) Further reduction through scrapping of certain of the older ships.

(c) That regard should be had to the existing naval strength of the conferring powers.

(d) The use of capital ship tonnage as the measurement of strength of navies and a proportionate allowance of auxiliary combatant craft prescribed."

In detail they provide for a discontinuance of all capital ship building for ten years, certain replacement being allowed France and Italy after 1927. Capital ships include every "vessel of war, not an air craft carrier, whose displacement exceeds 10,000 tons standard displacement or which carries a gun with a calibre exceeding 8 inches."

Existing capital ships are to be scrapped so as to leave the United States 18 (525,850 tons), Great Britain 20 (558,980 tons), Japan 10, (301,320 tons), France 10, (221,170 tons), Italy 10, (182,800 tons). After 1931 ships over 20 years old may be replaced so as to maintain ratios of 525, 525, 315, 175, 175 among the five powers, no vessel being over 35,000 tons. The treaty is to be effective for fifteen years and to continue after that unless denounced with two years' notice. It may be suspended in time of war with exception of the articles relating to scrapped vessels.

Aircraft carriers are limited with regard both to total tonnage and individual tonnage, but air craft themselves are not

limited. Submarines and fighting surface auxiliaries may not exceed 10,000 tons displacement or carry guns of over 8 inches, but there is no limitation in their total tonnage. Merchant vessels may not be prepared for military use in time of peace except to stiffen decks for guns, of not over six inches.

No limitation is placed on land forces or armament. The status quo "with regard to fortifications and naval bases" is to be maintained in the American, British and Japanese insular possessions in the Pacific except Hawaii, Australia, New Zealand, the Japanese home islands, and the islands near the American continent exclusive of the Aleutians.

Rules were adopted declaring the use of submarines against merchant vessels to be piracy and prohibiting the use of noxious and poisonous gases, and a resolution urged the calling of a conference to consider laws of war.

These armament limitation provisions go an enormous step beyond all previous treaties on the subject. They should result in a genuine saving of money through the discontinuance of capital ship programs. "This treaty" said Mr. Hughes in the plenary session of February 1, "ends, absolutely ends, the race in competitive armament." Without minimizing the achievements of the conference it is well to recall that the problems of land armaments, submarines, naval vessels under 10,000 tons and air craft remain. Competition in these types of armament is still possible without violation of the treaty. The importance of this is emphasized through the opinion of many professional naval men that, even in the absence of international agreement, future navies would have been composed of smaller vessels, because of the increasing difficulty of properly defending super-dreadnaughts from submarines and aircraft.

While the illegitimate use of submarines and the use of poison gases were prohibited it is well to recall that the same prohibitions were recognized under customary international law and the Hague Conventions on August 2, 1914. Too much should not be expected of rules of warfare. Unless framed so that their observance serves the *military aims* of belligerents better than their violation, they will be of remedial rather than preventive value. They will give the victor a ground of action but will not mitigate the horrors of war.

"We may grant, "said Mr. Root in presenting the treaty, "that rules limiting the use of implements of war made between diplo-

mats will be violated in the stress of conflict. We may grant that the most solemn obligation assumed by governments in respect of the use of implements of war will be violated in the stress of conflict, but beyond diplomatists and beyond governments there rests the public opinion of the civilized world, and the public opinion of the world can punish."

5. Far East and Pacific Questions.

International conferences have occasionally been called to consider general principles or methods for conducting international relationships. Of this character were the Geneva Conferences on the Red Cross (1864, 1906), the St. Petersburg and Brussels Conferences on land warfare (1868, 1872), the Hague Peace Conferences, (1899, 1907) and the London Naval Conference (1909).

Of a somewhat different character are international conferences called to settle particular political problems or controversies. These have usually followed wars as did the Congresses of Westphalia (1648,), Utrecht (1715), Vienna (1815), Paris (1856), Berlin (1878), and Versailles (1919). Sometimes, however, they have been called in time of peace to prevent war. Examples may be found in the various African conferences participated in by the European powers and the United States at Berlin (1885), Brussels (1890), and Algeciras (1906). Often, it is true, this type of conference establishes general principles, but its prime object is to settle an immediate political problem.

The Washington Conference combined both types. The five power negotiations on limitation of armament were of the first, the nine power negotiations on Far East and Pacific Questions were of the second type. The latter was concerned primarily with China, but Pacific Islands and Siberia were also on the agenda.

The absence of Russia from the conference precluded action on the latter beyond a resolution taking cognizance of the Japanese declaration of intention eventually to withdraw its troops from Siberia and northern Saghalien. No time was stated.

On Pacific Islands the fortification status quo provision of the naval limitation treaty has been referred to. More important is the four-power pact by which the United States, Great Britain, France and Japan "agree as between themselves, to respect their rights in relation to their insular possessions and insular dominions in the region of the Pacific Ocean" and "if the said rights

are threatened by the aggressive action of any other power" to "communicate with one another fully and frankly in order to arrive at an understanding as to the most efficient measures to be taken, jointly or separately, to meet the exigencies of the particular situation." A subsequently adopted resolution excludes the Japanese home islands from the treaty. Attached resolutions exclude domestic questions from the controversies which may be a subject of discussion under article 1, and reserve the privilege to the United States to negotiate with reference to mandated islands which are declared within the scope of the treaty. The agreement is to continue for ten years and more unless denounced with a year's notice. Its dual object, from the American standpoint, of superseding the Anglo-Japanese alliance and protecting the Phillippines seems to have been achieved, the first expressly. The treaty is between only four powers and is confined to insular possessions and dominions in the Pacific but in other respects it seems to bear a close resemblance to article X of the League of Nations Covenant by which

"The members of the league undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the league. In case of any such aggression or in case of any threat or danger of such aggression the council shall advise upon the means by which this obligation shall be fulfilled."

Mr. Lodge, however, in presenting the four power pact to the Conference on December 10 distinguished it from this article, and in offering the treaties to the Senate on February 10, President Harding said:

"There is no commitment to armed force, no alliance, no written or moral obligation to join in defense, no expressed or implied commitment to arrive at any agreement except in accordance with our constitutional methods. It is easy to believe, however, that such a conference of the four powers is a moral warning that an aggressive nation, giving affront to the four great powers ready to focus world opinion on a given controversy, would be embarking on a hazardous enterprise."

This statement, however, leaves some doubt as to the President's interpretation of the pact. If the clauses of the first sentence are separable and the parties are under "no written or moral obligation to join in defense" it is difficult to see why an aggressive enterprise would be any more "hazardous" with the treaty than without it. If on the other hand, the final qualification applies to all the preceding clauses, the president seems to

imply that there is a "commitment to armed force" provided "our constitutional methods" are followed.[6]

Closely connected with this treaty are the negotiations over the island of Yap, between the United States and Japan, conducted independently of, but concurrently with, the conference. These began in the summer of 1921 and resulted in a treaty signed February 11, 1922. By this treaty the United States recognizes the Japanese mandate in Yap under the League of Nations and Japan agrees to accord the United States full rights in all that relates to cables on the island. The United States, Great Britain, France, Italy, Japan and the Netherlands have also practically concluded a negotiation dividing the former German Pacific cables between the United States, Japan and the Netherlands.

Since the first opium war and the treaty of Nanking (1842) Chinese sovereignty has suffered progressive impairments. These impairments extended to customs autonomy and jurisdiction over resident aliens before the Chino-Japanese war of 1895. Soon after the European acquisitions of leaseholds and spheres of interest jeopardized Chinese territorial and administrative integrity while the privileges of the favored powers in these spheres threatened to deprive other powers, most notably the United States, of all share in the economic development of China. Finally the Japanese policy which began to develop in Manchuria after the Russo-Japanese war of 1905, seriously menaced the political independence of China. This policy culminated in the 21 demands, the treaty of May, 1915, based thereon, whereby China agreed to recognize any Japanese settlement with Germany, and the treaty of Versailles transferring former German rights to Japan. It should be noted, however, that Japan had declared an intention to return some of these rights to China as soon as the Chinese government, divided and insecure since the revolution of 1911, gave signs of stability. The Hay open door notes of 1899 and 1900, the Root-Takahira agreement of 1908 and the Lansing-Ishii agreement of 1917, though all affirming the territorial integrity, the administrative entity of China and the open door had been of little material assistance to that power, while the last, by recognizing that "territorial propinquity" creates special interests actually strengthened Japan's position.

[6]Although the latter interpretation is more in accordance with the language of the pact and of the President's statement, the former is in accord with his language earlier in the message. "The four-power treaty contains no war commitment"

The Washington treaties with their appended resolutions go immeasurably beyond earlier agreements. The tariff treaty does not restore Chinese tariff autonomy but does provide for periodic revisions to assure China 5 per cent on imports, in exchange for which China agrees to abolish liken or domestic sales taxes, and to fulfill existing treaties with respect to taxation.

The more important Chinese treaty begins by reiteration of general principles in respect to China formulated by Mr. Root and resembling the Hay statements. The powers other than China agree:

"1. To respect the sovereignty, the independence, and the territorial and administrative integrity of China.

"2. To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government.

"3. To use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations through the territory of China.

"4. To refrain from taking advantages of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly states, and from countenancing action inimical to the security of such states."

The powers agree to refrain from making treaties, agreements, arrangements or understandings "either with one another or individually or collectively with any other power or powers which would infringe or impair" these principles. A more substantial guarantee is given to the last two principles through the creation of an international board of reference in China to investigate and report whether future concessions in China are in accord with the open door. The original proposal to give the board authority to consider past as well as future concessions failed of acceptance, though a resolution provided that past concessions be published. China herself agrees not to permit unfair discrimination in economic matters, particularly railways.

Various agreements, resolutions, and declarations connected with the treaty aim to give concrete application to the first two of the Root principles. Some of the resolutions are considered within the scope of executive agreements and so will not be submitted to the Senate for ratification. The Shantung treaty between China and Japan greatly assists toward restoring the territorial integrity of China. Japan agrees to restore the leased

port of Kiau Chau and to sell back the Tsing-Tao-Tsinanfu railway for Chinese Treasury notes redeemable in fifteen years or at Chinese option in five years. Japan is to have a traffic manager and chief accountant under a Chinese managing director until payment is complete. Following announcement of this treaty Mr. Balfour declared the British willingness to restore her leased port of Wei-Hai-Wei to China. France indicated a willingness to negotiate for the restoration of Kwang-chow. If these negotiations are successful the Japanese lease of Port Arthur and part of the Liaotung Peninsula and the British lease of Kow-Loon near Hong Kong would alone remain. China declared her intention to make no more leases. Aside from the two leases, the British island of Hong Kong, the Portugese port of Macao and the Japanese island of Formosa and privileges in Manchuria remain as substractions from the territorial integrity of China as she existed before contact with Europe.

The administrative integrity of China gained through resolutions providing for withdrawal of foreign postoffices by January, 1923, and of unauthorized foreign radio stations; for a commisson to report on the practicability of removing exterritorial jurisdiction, and for a consultation looking toward the removal of foreign troops in China. In the Shantung treaty Japan agreed to withdraw troops from that area and the powers requested China to reduce her military forces. Japan also declared her willingness to abandon group five of the twenty-one demands of 1915 which China had never accepted.

Though China has by no means regained full territorial and administrative integrity, yet substantial steps in this direction have been taken. The United States will have less cause to worry about the Phillippines, agreement has been reached on the vexing problems of Yap and the Pacific cables, and the Anglo-Japanese alliance has been superseded. Made in 1902 against Russia, renewed in 1905 and 1911 against Germany it seemed to have no objective unless the United States in 1921. Yet to denounce it after the loyal observance of Japan during the World War would hardly comport with British honor. The addition of France and the United States seemed the easiest way out and this was achieved by the four power pact.

6. Association of Nations.

The problem of an association of nations though not on the

agenda, lay in the background of the conference. An international conference is certain to end with its purposes only partly achieved and so seeks to perpetuate itself. Thus in his instructions to the American delegates at the second Hague Conference, Mr. Root, then Secretary of State, wrote:

"After reasonable discussion, if no agreement is reached, it is better to lay the subject aside, or refer it to some future conference in the hope that intermediate consideration may dispose of the objections. . . . The immediate results of such a conference must always be limited to a small part of the field which the more sanguine have hoped to see covered, but each successive conference will make the positions reached in the preceding conference its point of departure, and will bring to the consideration of further advances toward international agreement opinions affected by the acceptance and application of the previous agreements. Each conference will inevitably make further progress, and, by successive steps, results may be accomplished which have formerly appeared impossible."

Consequently he suggested further conferences and a recommendation to this effect was adopted.

However, the problem of an association of nations was emphasized in the Washington Conference because of the struggle in the United States over the League of Nations. President Harding and Senator Lodge had voted for the league with reservations while Senator Underwood had voted for it without reservations. Secretary Hughes and Mr. Root had openly favored the league in public speeches and had signed a letter on October 14, 1920, with twenty-nine other prominent republicans urging the election of President Harding as the shortest route to American entry into the league. The republican platform subsequently adopted contained a clause drafted by Mr. Root favoring an association of nations, but without assuming a definite position on the league. In an address before the American Society of International Law on April 27, 1921, Mr. Root had explained this as capable of fulfillment by American entry into the league.

"It is apparent" he said, after quoting the Republican platform article, "that the attitude of the league and the attitude of America toward this subject do not differ in substance, however much they may differ as to the specific modes of effectuating the common purpose. . . .

"There remain the hindrances of differing forms and methods favored by the nations within and the nations without the existing league. But the idea that by agreeing at this time to a formula the nations can forever after be united in preventing war by mak-

ing war seems practically to have been abandoned; and the remaining differences are not of substance and ought not to prevent the general desire of the civilized world from giving permanent form to institutions to prevent further war. In the long run, from the standpoint of the international lawyer, it does not much matter whether the substance of such institutions is reached by amending an existing agreement or by making a new agreement."

President Harding, however, interpreted the republican platform otherwise and in his message of April 12, 1921, held his election to the presidency to be a rejection of the league by the United States. But in making this statement he referred to

"the American aspiration" for "an association of nations based upon the application of justice and right, binding us in conference and cooperation for the prevention of war and pointing the way to a higher civilization and international fraternity in which all the world might share. In the national referendum to which I have adverted, we pledged our efforts towards such an association, and the pledge will be faithfully kept."

All of the powers in the Washington Conference except the United States were members of the league and most of the delegates, including Messrs. Balfour, Viviani, Schanzer, Koo, and Karnebeek had taken a prominent part in its work, notably in the discussions of armament limitation at the second assembly of the league, which ended a few weeks before the Washington Conference met. Nothing, however, was said about the league in the conference deliberations, though the United States recognized that organization through recognition of the Japanese mandates under it in the Yap treaty negotiated at the same time.

On November 25, President Harding suggested to a group of newspaper men that the limitation of armament conference might well furnish a precedent for future conferences, thus creating a loose association of nations and in his concluding address on February 6 he said:

"Since this conference of nations has pointed with unanimity to the way of peace today, like conferences in the future, under appropriate conditions and with aims both well conceived and definite, may illumine the highways and byways of human activity. The torches of understanding have been lighted, and they ought to glow and encircle the globe."

Though no association is formally referred to in the treaties, numerous clauses authorize the calling of future conferences or the establishment of commissions. The functions of these bodies vary from political and administrative to quasi-judicial, in cha:-

acter. Thus the United States is to arrange for a conference in eight years to revise the naval limitation agreement. Other powers may call such a conference in emergency and one must be called after a war which has suspended a treaty. A conference to revise the rules of war is authorized, as is one to revise the Chinese customs tariff. A commission is appointed to consider the question of exterritoriality in China and by the four-power pact the powers agree to meet in joint conference if a question arises over Pacific possessions. Finally a board of reference to consider questions under the open door agreement is provided for.

These provisions for future conference are not in any sense a substitute for the League of Nations with its permanent secretariat, periodical council and assembly, administrative commissions and permanent court of international justice. The experience of Washington has undoubtedly convinced European statesmen of the utility of the league and of its permanence, whether or not the United States elects to enter it. The league has greeted the efforts at Washington as helpful cooperation in its own work, but sees no association of nations which could possibly become a rival.

"The American people," writes Mr. Frank H. Simonds, "will have to make up their minds to the fact that in spite of the Washington Conference, or on account of it, the European nations which have been represented here and the European nations which were not represented have not been shaken in their adherence tc the Geneva organization and that the French, the Dutch, and not impossibly even the English, have seen in the circumstances of the Washington Conference reasons for having increased, rather than diminished, respect and faith in and for the League of Nations."

Thus the Washington Conference has brought both the United States and Europe to an increased understanding of the value and necessity of international organization. It has begun to liquidate the political bankruptcy into which the world was plunged in 1920, through the exigencies of American party politics. In his eulogy of the unknown soldier on armistice day President Harding had a vision of a united world:

"His patriotism was none less if he craved more than triumph of country; rather it was greater if he hoped for a victory for all human kind."

The method of achievement he tried to express in his address terminating the conference:

"I once believed in armed preparedness. I advocated it. But I have come now to believe there is better preparedness in a public mind and a world opinion made ready to grant justice precisely as it exacts it. And justice is better served in conferences of people than in conflicts of arms."

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CORPORATIONS—NATURE OF STATUTORY LIABILITIES IMPOSED ON OFFICERS AND STOCKHOLDERS.—Parallel with the growth of modern corporations has come increased legislation guiding and controlling corporate conduct for the public protection. Many of these enactments have taken the form of liabilities imposed on officers and stockholders for corporate debts in favor of creditors, over and beyond the liabilities existing at common law. Apart from constitutional provisions[1] or statutes, a stockholder could be held only to the extent of his unpaid subscriptions,[2] and an officer

[1]The Minnesota Constitution, Art. 10, par 3, provides a stockholders' liability to the amount of stock held, with certain exceptions.
[2]2 Morawetz, Priv. Corp., 2d Ed., sec. 869; note 3 A. S. R. 834.

was not liable except as an agent.[3] An important and frequently arising question is whether these statutory liabilities are by nature penal, contractual, or otherwise. Courts agree that the definite and fixed statutory liability of a stockholder for debts of an insolvent corporation, not contingent on some breach of duty, is contractual by nature,[4] on the theory that it is a liability knowingly undertaken by the stockholder when he voluntarily subscribes for stock; and that he impliedly agrees with the corporation creditors to perform the obligations imposed on stockholders by the constitution and the laws then in force.

With regard to a second class of statutes, namely those which impose a personal liability, usually unlimited, upon officers and sometimes stockholders for official neglect or breach of statutory duty, the decisions are not in harmony.[5] A majority of the courts has considered this liability to be strictly penal,[6] on the ground that it is purely a statutory punishment for the violation of a law created for the public benefit, and the fact that a remedy is afforded private persons is indirect and incidental. One jurisdiction holds that only the liability imposed for a breach of a prohibitive statute is penal, and that the liability under a permissive statute, that is, one which merely imposes liability if certain things are or are not done, is contractual.[7] The more recent authorities, however, have adopted what is believed to be a better and more liberal view of this class of statutes, namely, that they are penal only in part and are remedial with regard to creditors,[8] since the duty is to the creditors

[3]Mitchell v. Hotchkiss, (1880) 48 Conn. 9, 40 Am. Rep. 146; note 48 A. S. R. 916.

[4]Flash v. Connecticut, (1883) 109 U. S. 371, 3 S. C. R. 263, 27 L. Ed. 966; Howarth v. Lombard, (1900) 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Bernheimer v. Converse, (1907) 206 U. S. 516, 27 S. C. R. 755, 51 L. Ed. 1163; 1 Page, Contracts, 2d Ed., sec. 66, n. 5; 1 Cook, Corporations, 6th Ed., sec. 223, p. 585.

[5]The distinction between the two classes of statutes indicated is clearly pointed out in Adler v. Baker-Dodge Theatre Co., (Ia. 1921) 181 N. W. 254.

[6]For failure to publish certain notices and reports required by statute, Cable v. McCune, (1858) 26 Mo. 371, 72 Am. Dec. 214; Halsey v. McLean, (1866) 12 Allen (Mass.) 438, 90 Am. Dec. 157 and note; Adler v. Baker-Dodge Theatre Co., (Ia. 1921) 181 N. W. 254; for contracting excessive debts, First National Bank of Plymouth v. Price, (1870) 33 Md. 487, 3 Am. Rep. 204; notes 37 A. S. R. 168 and 96 A. S. R. 989; 3 Thompson, Corporations, sec. 4164; 2 Morawetz, Priv. Corp., 2d Ed., sec. 907.

[7]Diversey v. Smith, (1882) 103 Ill. 378, 42 Am. Rep. 14, cited in Vestal Co. v. Robertson, (1917) 277 Ill. 425, 115 N. E. 629.

[8]Machinery Co. v. Smith, (1912) 87 Kan. 331, 124 Pac. 414, 41 L. R. A. (N.S.) 379 and note, 30 Ann. Cas. 243 and note; Credit Men's Co. v. Vickery, (1916) 62 Colo. 214, 161 Pac. 297; Northern Pac. Ry. Co. v.

and not to the public, the liability in many instances is not for an arbitrary fixed amount, and the remedy is private and civil. This doctrine was first asserted by the United States Supreme Court in *Huntington v. Attrill*,[9] which held that these statutes are not penal in the international sense, i. e., with respect to extraterritorial enforcement, though they may be considered penal for other purposes.[10] Strengthened by this decision, many of the recent cases have drawn away from the former doctrine holding the statutory liabilities penal, and have taken the position long since assumed by the Georgia court that these liabilities are not penal, but are more in the nature of contractual,[11] or purely remedial statutory obligations,[12] since primarily the legislative intent was to provide a remedy rather than to punish. This view is set forth in *Parks Shellac Company v. Harris*,[13] a recent Massachusetts case, in which the court held that the liability of corporation officers under a Massachusetts statute for knowingly making false reports is not penal and so cannot be governed by the penal statute of limitations, on the ground that "the liability is not based on a public wrong but protects private rights . . . and is created for the creditors' benefit only; that since the creditor had a right to rely upon it when the debt was created, it constituted an implied term of every contract between the corporation and its creditors."

A conception of the effects of holding these liabilities entirely penal, penal in part only, or not at all penal can best be obtained from an examination of the results of each view. 1. Penal statutes cannot be enforced extra-territorially because the penal laws of one state are not recognized in another.[14] But a contrac-

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Crowell, (1917) 245 Fed. 668; 3 Thompson, Corporations, sec. 4166; 2 Morawetz, Priv. Corp., 2d Ed., sec. 908; and 3 Clark and Marshall, Priv. Corp., sec. 833, p. 2675.

[9](1892) 146 U. S. 657, 13 S. C. R. 224, 36 L. Ed. 1123.

[10]The court says, p. 676, "As the statute imposes a burdensome liability on the officers, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. We can see no just ground for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country."

[11]Farr v. Briggs' Estate, (1900) 72 Vt. 225, 47 Atl. 793, 82 A. S. R. 930.

[12]Neal v. Moultrie, (1852) 12 Ga. 104; Nebraska National Bank v. Walsh, (1900) 68 Ark. 433, 59 S. W. 952, 82 A. S. R. 301; see also Commercial National Bank v. Kirk, (1909) 222 Pa. St. 567, 71 Atl. 1085, 128 A. S. R. 823.

[13](Mass. 1921) 129 N. E. 617.

[14]Halsey v. McLean, (1866) 12 Allen (Mass.) 438, 90 Am. Dec. 157 and

tual or remedial liability may be so enforced,[15] and a judgment based thereon must be recognized in a foreign state because of the full faith and credit clause of the federal constitution.[16] Liabilities considered contractual or penal in part only are enforceable extra-territorially on the ground that only those liabilities which are entirely penal, their sole purpose being to punish for a public wrong, are denied recognition in a foreign state.[17] 2 Many states have a shorter statute of limitations for penalties than for contractual or remedial actions. Liabilities considered penal only in part are generally held penal for this purpose.[18] 3. If a statutory liability is penal the legislature may repeal the statute at any time before an action is brought thereon and judgment rendered.[19] If a contractual liability, it cannot be taken away by legislative action, because the obligations of a contract cannot be so impaired.[20] 4. A penal liability does not survive in case of death, while a contractual liability survives to the personal representative.[21] 5. Lastly, penal statutes are more strictly construed than contractual or remedial ones.[22] Those penal only in part are held to a strict construction.[23]

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note; First National Bank of Plymouth v. Price, (1870) 33 Md. 487, 3 Am. Rep. 204.

[15]Whitman v. Oxford National Bank, (1900) 176 U. S. 559, 20 S. C. R. 477, 44 L. Ed. 587. But see Marshall v. Sherman, (1895) 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 A. S. R. 654.

[16]Huntington v. Attrill, (1892) 146 U. S. 657, 13 S. C. R. 224, 36 L. Ed. 1123. See notes 34 L. R. A. 737 and 33 L. R. A. (N.S.) 895.

[17]Machinery Co. v. Smith, (1912) 87 Kan. 331, 124 Pac. 414, 41 L. R. A. (N.S.) 379 and note, 30 Ann. Cas. 243 and note; 72 Cent. Law Journal 245.

[18]State Savings Bank v. Johnson, (1896) 18 Mont. 440, 45 Pac. 662, 33 L. R. A. 552, 56 A. S. R. 591; 1 Cook, Corporations, 6th Ed., sec. 223, p. 588. See, however, Nebraska National Bank v. Walsh, (1900) 68 Ark. 433, 59 S. W. 952, 82 A. S. R. 301. The case of Merchant's National Bank v. Northwestern, etc., Co., (1892) 48 Minn. 349, 51 N. W. 117, terms the liability penal in this connection, but is asserted to be overruled in Flowers v. Bartlett, (1896) 66 Minn. 213, 216, 68 N. W. 976, where the court broadly states that the statutory liability "is not in any proper sense a penalty."

[19]Gregory v. German Bank, (1877) 3 Colo. 332, 25 Am. Rep. 760; see also Globe Publishing Co. v. State Bank of Nebraska, (1894) 41 Neb. 175, 59 N. W. 683, 27 L. R. A. 854; Adler v. Baker-Dodge Theatre Co., (Ia. 1921) 181 N. W. 254, effect of a curative act.

[20]See Bernheimer v. Converse, (1907) 206 U. S. 516, 27 S. C. R. 755, 51 L. Ed. 1163. But note Moss v. Smith, (1916) 171 Cal. 777, 155 Pac. 90.

[21]Mitchell v. Hotchkiss, (1880) 48 Conn. 9, 40 Am. Rep. 146; 3 Thompson, Corporations, sec. 4169; note 3 A. S. R. 869.

[22]Cable v. McCune, (1858) 26 Mo. 371, 72 Am. Dec. 214.

[23]See Huntington v. Attrill, (1892) 146 U. S. 657, 676, 13 S. C. R. 224, 36 L. Ed. 1123.

The divergence of the courts in determining the nature of officers' and stockholders' liabilities may be due in a degree to the effect of the language of the respective statutes, as expressing the legislative intent. However, though the weight of authority, as previously stated, considers the liability imposed by the class of statutes under consideration to be penal by nature, recent decisions evidence a tendency to abandon the strict application of the penal theory in favor of the more liberal interpretation that the statutes are remedial or contractual.

BANKRUPTCY—EXEMPTION OF INSURANCE POLICIES ALLOWED BY STATE LAW.—Section 70-a (5) of the Bankruptcy Act vests in the trustee property which the bankrupt might by any means have transferred or which was subject to judicial levy and sale, with the proviso "That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives," he may pay its cash surrender value to the trustee and continue to hold such policy "free from the claims of creditors."[1] Section 6 provides the act shall not affect exemptions allowed by state laws.[2] These two sections have caused much litigation, and various interpretations have been placed upon them by the lower federal courts. The Supreme Court has finally set at rest certain points. 1. Where there is no local exemption statute, all the life and endowment policies of the bankrupt, whether payable to the bankrupt, his estate or representatives or to any other person, pass to the trustee, provided there was power in the bankrupt to obtain the cash surrender value.[3] 2. The power of the insured to change the beneficiary and thus obtain the cash surrender value of the policy by its terms payable to another is an asset which will pass to the trustee.[4] 3. The interest of the trustee extends only to the cash surrender value at the time of bankruptcy.[5] 4. The "cash surrender value" embraces not only policies which by their terms so provide, but also policies having such value by the practice or con-

[1]30 Stat. 565, Chap. 541, sec. 70; U. S. Comp. Stat. 1918, sec. 9654a (5).
[2]30 Stat. 548, chap. 541, sec. 6; U. S. Comp. Stat. 1918, sec. 9590.
[3]Cohen v. Samuels, (1917) 245 U. S. 50, 38 S. C. R. 36, 62 L. Ed. 143.
[4]Cohen v. Samuels, (1917) 245 U. S. 50, 38 S. C. R. 36, 62 L. Ed. 143; Cohn v. Malone, (1919) 248 U. S. 450, 39 S. C. R. 141, 63 L. Ed. 352.
[5]Burlingham v. Crouse, (1913) 228 U. S. 459, 473, 33 S. C. R. 564, 57 L. Ed. 920.

cession of the company issuing them.[6] 5. Policies which are exempt by state law do not pass to the trustee, because of section 6 of the Bankruptcy Act. Nor is section 6 limited by section 70a[7]

Many states have exemption statutes to the effect that if the bankrupt has insurance and the beneficiary named therein is his wife, or children, or in some statutes simply "another," the policy shall inure to such beneficiary's separate use and benefit free and clear from the claims of the creditors of the insured.[8] The question then arises as to what effect the right to change the beneficiary, reserved to the insured, will have in bankruptcy proceedings. Since the Supreme Court has held that the power of the insured to change the beneficiary and obtain the cash surrender value is an asset which passes to the trustee in bankruptcy,[9] it is necessary to rely on the interpretation of the state statute, to ascertain whether or not it denies the trustee the right to take under the power reserved in the bankrupt to change the beneficiary, or in other words, whether a policy containing such a power is within the terms of the exemption statute.

The federal court in allowing exemptions under a state statute is governed by the interpretation given by the highest court of the

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[6]Hiscock v. Mertens, (1907) 205 U. S. 202, 212, 27 S. C. R. 488, 51 L. Ed. 771.

[7]Holden v. Stratton, (1905) 198 U. S. 202, 213, 25 S. C. R. 656, 49 L. Ed. 1018; notes 26 L. R. A. (N.S.) 451 and 41 L. R. A. (N.S.) 123.

[8]G. S. Minn. 1913, secs. 3465, 3466. A similar provision is found in some state constitutions. North Carolina, Art. X, sec. 7. See 24 Green Bag 419.

[9]Cohen v. Samuels, (1917) 245 U. S. 50, 38 S. C. R. 36, 62 L. Ed. 143; Cohn v. Malone, (1919) 248 U. S. 450, 39 S. C. R. 141, 63 L. Ed. 352. By the weight of authority, the beneficiary under a mutual benefit certificate takes no property, but rather a mere expectancy of benefit under the contract. Richmond v. Johnson, (1881) 28 Minn. 447, 10 N. W. 596; Hoeft v. Supreme Lodge K. of H., (1896) 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174; 5 MINNESOTA LAW REVIEW 316. It would seem therefore that the property remained in the insured. Vance, Insurance, sec. 136. The Virginia court in Leftwich v. Wells, (1903) 101 Va. 225, 43 S. E. 364, 99 A. S. R. 865, treated the right to change the beneficiary merely as a power. The general doctrine of powers is that where the donee has an absolute power of appointment and the power is not executed, a court of equity will not treat the subject-matter of the power as assets for the payment of the donee's creditors, that is, the beneficiary's rights are protected. Crawford v. Langmaid, (1898) 171 Mass. 309, 50 N. E. 606; 22 Am. & Eng. Ency. of Law 1146. See 24 Green Bag 419, 425. The Supreme Court in Cohen v. Samuels "buttressed its decision by a reference to clause (3) of sec. 70a which confers on the trustee all powers which the bankrupt might have exercised for his own benefit." 27 Yale L. J. 403. It is not clear whether the court relied solely on clause (3) to pass this right to the trustee or not.

state,[10] but if the statute has not been construed, general rules of construction are applied.[11] The authorities are divided as to the rights of the trustee. Those refusing the trustee any benefit contend that if such a construction were placed on exemption statutes it would practically nullify them, for the reason that nearly all modern policies give the insured the right to change the beneficiary.[12] On the other hand, a minority allow the trustee the cash surrender value on the ground that the power to change the beneficiary gives the insured such dominion over the policy as to make it an asset of the estate.[13] The Supreme Court in *Cohn v. Malone*[14] seems to favor the latter view, though the question is not squarely presented. Such a result, it is submitted, defeats the purpose of the exemption statute.

BANKS AND BANKING—DISTINCTION BETWEEN SPECIAL DEPOSITS AND DEPOSITS FOR A SPECIFIC PURPOSE.—Whatever distinction may have existed in the past between these two classes of deposits, since the early case of *Farley v. Turner*[1] the courts have largely disregarded it, perhaps in an effort to avoid hard cases. The two deposits are in fact distinct, and the distinction is of practical importance whenever the bank becomes insolvent and is sued by a depositor claiming a preference over general creditors. "A

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[10]In re Gunzberger, (1920) 268 Fed. 673.

[11]Richardson v. Woodward, (1900) 104 Fed. 873, 44 C. C. A. 235, 5 A. B. R. 94.

[12]In re Orear, (C. C. A., 8th Cir., 1911) 189 Fed. 888, 111 C. C. A. 150, 26 A. B. R. 521; In re Pfaffinger, (1908) 164 Fed. 526, 21 A. B. R. 255; In re Johnson, (D. C. Minn. 1910) 176 Fed. 591, 24 A. B. R. 277; In re Pittman, (1921) 275 Fed. 686. The supreme court of Minnesota in Murphy v. Casey, (1921) 184 N. W. 783, construed its statute, G. S. Minn. 1913, secs. 3465, 3466, as an exemption statute, and held that the cash surrender option and the power to change the beneficiary did not make the interest of the person insured liable to the claims of his creditors. The Bankruptcy Act was not involved.

[13]In re Herr, (1910) 182 Fed. 716, 25 A. B. R. 142; In re Loveland, (1912) 192 Fed. 1005, 27 A. B. R. 765, both cases of endowment policies. In re Young, (D. C. Ohio, 1912) 208 Fed. 373, distinguishes between endowment policies and ordinary policies, holding that the former are purely speculative investments for the sole benefit of the bankrupt, not his wife, and therefore pass to the trustee, while the latter are clearly within the terms of the exemption statute and beyond the reach of the trustee.

[14](1919) 248 U. S. 450, 39 S. C. R. 141, 63 L. Ed. 352; 28 Yale L. J. 603.

[1](1857) 26 L. J. Ch. (N.S.) 710, 5 W. R. 666. For a sounder case see In re Barned's Banking Co., (1870) 39 L. J. Ch. (N.S.) 635, 22 L. T. R. 853, 18 W. R. 818.

special deposit is where the whole contract is that the thing deposited [as a chattel] shall be safely kept, and that identical thing returned to the depositor."[2] On the other hand, "when money is deposited to pay a specified check, drawn or to be drawn, or for any purpose other than mere safe keeping, or entry on general account, it is a *specific deposit* [deposit for a specific purpose] . . ."[3] The special deposit is merely a bailment, title does not pass to the bank, and by the application of the ordinary principles of bailment, the depositor is entitled to recover his deposit whether the bank is solvent or insolvent.[4]

But the matter is not so simple nor are the authorities in harmony, in cases of deposits for a specific purpose. Here the circumstances of the deposit may give rise to an agency relation, a contract for the benefit of a third person,[5] or, infrequently, a trust. The trust theory is often invoked to sustain the depositor's claim for a preference, but in most, if not all, of these cases there is no trust relation. The difficulty encountered is the lack of a definite trust res. Depositors are familiar with the present banking practise of commingling funds, particularly when the deposit is made to meet an obligation accruing at some distant point. Accordingly in the majority of cases it is never in the contemplation of the parties that the funds should be kept separate. The want of a specific trust res, however, is often ignored by the courts,[6] a trust is recognized, and an unwarranted preferential recovery allowed.[7] It should be noted that special circumstances may justify the application of the trust theory, i. e., where a deposit is made for a

[2] 1 Morse, Banks and Banking, 5th Ed., secs. 183, 190. See also In re Mutual Building, etc., Bank, (1876) Fed. Cas. No. 9976, 2 Hughes 374.

[3] 1 Morse, Banks and Banking, 5th Ed., sec. 185.

[4] Trover will lie to recover in specie. If the special deposit has been converted by the bank, i. e., if the fund has been commingled with other funds, assumpsit will lie. 1 Morse, Banks and Banking, 5th Ed., sec. 205.

[5] 1 Ames, Cases on Trusts, 2d Ed., 43, note, reprinted in Scott, Cases on Trusts, 80, note.

[6] Moreland v. Brown, (1898) 86 Fed. 257, 30 C. C. A. 23; Massey v. Fisher, (1894) 62 Fed. 958; 11 Harvard L. Rev. 202; 12 Harvard L. Rev. 221; 16 Harvard L. Rev. 228. Some courts have sidestepped the difficulty by invoking the equitable maxim that considers as done that which ought to have been done, declaring that the depositary ought to have kept the funds separate, and hence that it will be presumed to have done so. 3 Pomeroy, Eq. Jur., 4th Ed., note p. 2245. As a general rule there is no room for the application of this maxim in deposits for a specific purpose, since a separation of funds is not intended.

[7] 1 Morse, Banks and Banking, 5th Ed., secs. 186, 210; Scott, Cases on Trusts, note p. 69, 70.

specific purpose and the depositor expresses a clear intent that the identical fund and no other be used, there is a definite res and since title to the fund is in the bank,[8] the essentials of a trust are present, and the bank may be charged as trustee and a preference upheld in case of insolvency. But as previously stated, the depositor rarely intends that the fund be kept separate, and the class of cases in which the contrary is true is so limited as not to be important in modern banking transactions.[9]

It is argued by some courts that in the case of a deposit for a specific purpose, the title remains in the depositor and does not pass to the bank,[10] and hence a recovery is allowed from the bank as trustee. Obviously the whole legal title cannot be in two persons simultaneously, and if title does not pass to the bank, it cannot be in the bank as trustee. If it remains in the depositor, he himself must be trustee, and his deposit of the trust funds in the bank gives him no right to a preference over general creditors by reason of his trusteeship, in case of the subsequent insolvency of the bank.[11] However it is apparent that in the case of a deposit for a specific purpose, the statement that title does not pass to the bank is untrue, in view of the fact that the parties do not intend a separation of funds and that title passes even when such a separation is expressly provided for.[12]

In the case of deposits for a specific purpose then, with the exception of the narrow class of cases before noted, no preference should be shown the depositor when the bank has become insolvent.[13] Such cases are often hard cases, but no harder than if the

[8]Ames, Lectures on Legal History, 118-120; 19 Harvard L. Rev. 55. Title to a fund, not in a bag or box and therefore a special deposit, passes to the bank even though the fund is to be returned or applied in specie.

[9]The unsatisfactory decisions of many courts allowing the depositor an undeserved preference are caused by the application of the trust theory to all cases of deposits for a specific purpose, whereas the theory is in fact applicable only to the restricted class of cases indicated.

[10]Montagu v. Pacific Bank, (1897) 81 Fed. 602, 608; see also Southern Exch. Bank v. Pope, (Ga. 1921) 108 S. E. 551; 1 Morse, Banks and Banking, 5th Ed., sec. 185; and 7 C. J. p. 632. Some of the authorities cited on this point by Corpus Juris are not applicable. See for instance Woodhouse v. Crandall, (1902) 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 385, which is not a case of a deposit for a specific purpose. The same is true of Anderson v. Pacific Bank, (1896) 112 Cal. 598, 44 Pac. 1063, 32 L. R. A. 479, 53 A. S. R. 228.

[11]7 C. J. sec. 308, p. 633; 1 Morse, Banks and Banking, 5th Ed., sec. 186.

[12]Ames, Lectures on Legal History, 118-120; 19 Harvard L. Rev. 55.

[13]By considering the depositor and the bank as "tenants in common"

same depositor had on the same day in the same bank opened a general account, in which case, in the absence of special circumstances, there would be no preference.

FOREIGN CORPORATIONS— SERVICE OF PROCESS ON SOLICITING AGENT AS CONSTITUTING DUE PROCESS OF LAW.—The recent decisions of *Farmers' Co-op. Equity Co. v. Payne*[1] and *Stephan v. Union Pac. Ry. Co.*[2] call attention again to the conflict between the decisions of the Minnesota supreme court and the federal district court of Minnesota as to the sufficiency of process served on a soliciting agent of a foreign corporation.[3] The desirability of sustaining such service is not here questioned, and it is reasonable to suppose that the same consideration prompted Start, J., in an earlier case, to suggest that had a statute authorized service on a soliciting agent the service might be sustained.[4] In its initial decision under the statute amended to conform with the suggestion mentioned, the court definitely recognized the desirability of sustaining service on soliciting agents,[5] and its conclusion holding the process sufficient has been commended.[6] In arriving at this conclusion, however, it is submitted that the state court maintains a position inconsistent with its own decisions on what constitutes due process of law under the fourteenth amendment to the federal constitution and also inconsistent with the constructions it has placed on decisions of the United States Supreme Court.

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of the commingled fund, the depositor possessing an interest in the bank's funds to the extent of his specific deposit, a preferential recovery might be sustained where the depositor can trace his deposit to the vaults and find that at all times there were sufficient funds on hand to meet the obligation. This suggestion finds no support in the adjudged cases but is analogous to the grain-elevator cases in which the depositor's grain is mingled with grain owned by the warehouseman. It is believed that this view does less violence to the actual intent of the parties than any of the other theories upon which preferential recoveries are based.

[1](Minn. 1921) 186 N. W. 130.

[2](1921) 275 Fed. 709.

[3]Minn. G. S. 1913, sec. 7735 (3), "provided that any foreign corporation having an agent in this state for the solicitation of freight and passenger traffic or either thereof over its lines outside of this state, may be served with summons by delivering a copy thereof to such agent."

[4]North Wisconsin Cattle Co. v. Oregon Short Line R. Co., (1908) 105 Minn. 198, 206, 117 N. W. 391.

[5]W. J. Armstrong Co. v. New York C. & H. R. R. Co., (1915) 129 Minn. 104, 111, 151 N. W. 917, L. R. A. 1916E 232 and note, Ann. Cas. 1916E 335 and note.

[6]33 Harvard L. Rev. 114, but note that the writer does not recognize the fact that Minnesota holds that solicitation is not "doing business."

Whether the process is sufficient is without dispute recognized to involve fundamentally the question of due process under the federal constitution, and since it is a federal question the Supreme Court of the United States is the final arbiter.[7] The constitutional requirement of due process is recognized as placing "a limit beyond which the state cannot go in subjecting foreign corporations to the jurisdiction of its courts."[8] This line of demarcation would seem to have been as clearly established as literal description permits, for in reference to the service prescribed by a statute in *Atkinson v. United States Operating Co.*,[9] the Minnesota court said,

"But this is not determinative of the question of jurisdiction. The service of process upon the agent designated by a state statute in order to confer jurisdiction must constitute due process of law under the requirements of the fourteenth amendment to the constitution of the United States. Whether it does or not is a federal question, ruled by federal decisions. To meet the requirement of due process of law in an action against a foreign corporation there must not only be service of process upon an officer or agent within the state, *but the corporation must be doing business in the state.*"

What constitutes "doing business" in general is not here in question. Neither is it pertinent to consider the practical objections to the view that solicitation is not "doing business" for the state court has frequently held that solicitation does not constitute "doing business."[10]

If a foreign corporation is not "doing business" and is thus beyond the limit imposed by the fourteenth amendment, and if the statute is not determinative of the question of jurisdiction, on what ground may the service of process under consideration be consistently upheld? A prior number of the MINNESOTA LAW REVIEW[11] enumerates the various theories invoked to justify ser-

[7] See W. J. Armstrong Co. v. New York C. & H. R. R. Co., (1915) 129 Minn. 104, 108, 151 N. W. 917, L. R. A. 1916E 232, Ann. Cas. 1916E 335; Callaghan v. Union Pac. R. Co., (1921) 148 Minn. 482, 182 N. W. 1004; Farmers' Co-op. Equity Co. v. Payne, (Minn. 1921) 186 N. W. 130.

[8] W. J. Armstrong Co. v. New York C. & H. R. R. Co., (1915) 129 Minn. 104, 107, 151 N. W. 917, L. R. A. 1916E 232, Ann. Cas. 1916E 335.

[9] (1915) 129 Minn. 232, 233, 152 N. W. 410, L. R. A. 1916E 241. Note that this case was decided after the Armstrong case. The decision is but a reaffirmation of the position taken by the court before the statutory amendment in question. See Wold v. J. B. Colt Co., (1907) 102 Minn. 386, 389, 114 N. W. 243; North Wisconsin Cattle Co. v. Oregon Short Line R. Co., (1908) 105 Minn. 198, 205, 117 N. W. 391.

[10] North Wisconsin Cattle Co. v. Oregon Short Line R. Co., (1908) 105 Minn. 198, 207, 117 N. W. 391; see Archer-Daniels Linseed Co. v. Blue Ridge Despatch, (1911) 113 Minn. 367, 372, 129 N. W. 765.

[11] 1 MINNESOTA LAW REVIEW 192.

vice on foreign legal entities. The difficulties are more apparent when considered in the light of the early doctrine that a corporation cannot be *found* outside of the state of its incorporation.[12] In the *Armstrong Case* the court expressly recognizes a departure from this doctrine[13] and although the exact theory there adopted to sustain jurisdiction is not clearly outlined, a later decision under the same statute definitely states that jurisdiction is founded on the "presence" of the corporate entity.[14] It is to be noted that Start J., did not suggest that a statute in the present form would be of assistance under the application of this latter doctrine but specified the "consent" doctrine.[15] The court in the *Armstrong case* refuses to be content with placing its decision on such "narrow ground." The consent doctrine has been severely criticized.[16]

It has been contended that what constitutes this "presence" under the fourteenth amendment is a broader question than what constitutes "doing business"[17] and thus, it may be argued, service on a foreign corporation not "doing business" would still be permissible and would constitute due process so long as the corporation was "present." In sustaining process under the statutory amendment in question, the Minnesota court has made statements which might be construed as establishing such a distinction.[18] It

[12]Sullivan v. La Crosse & Minnesota Packet Co., (1865) 10 Minn. 386 (308); Tolerton & Stetson Co. v. Barck, (1901) 84 Minn. 497, 88 N. W. 19. Note that the doctrine here invoked to sustain jurisdiction rests on the right of the state to impose conditions precedent to the right of a foreign corporation to do business therein, a doctrine since abandoned. For a criticism of this doctrine see 1 MINNESOTA LAW REVIEW 192, 32 Harvard L. Rev. 871, 878.

[13]W. J. Armstrong Co. v. New York C. & H. R. R. Co., (1915) 129 Minn. 104, 107, 151 N. W. 917, L. R. A. 1916E 232, Ann. Cas. 1916E 335.

[14]Nienhauser v. Robertson Paper Co., (1920) 146 Minn. 244, 178 N. W. 504.

[15]By directing its agents to enter a foreign state the corporation impliedly consents to service of process in manner prescribed by the law of that state. North Wisconsin Cattle Co. v. Oregon Short Line R. Co., (1908) 105 Minn. 198, 206, 117 N. W. 391.

[16]1 MINNESOTA LAW REVIEW 192; 30 Harvard L. Rev. 676, 689-695; 32 Harvard L. Rev. 871, 881.

[17]30 Harvard L. Rev. 676, 695, but the citations given by the writer in support of the theory advanced show only a distinction as to what constitutes "doing business" for purposes of taxation and the imposition of license fees, etc., as contrasted with what constitutes "doing business" for purposes of serving process, and not a distinction between what constitutes "doing business" and what constitutes "presence" for the purpose of serving process. See 32 Harvard L. Rev. 871, 881, which approves the doctrine of jurisdiction founded on "presence" but distinctly uses the term "doing business" as a designation of that "presence."

[18]Instead of defining the limit beyond which states cannot go in subjecting foreign corporations to the jurisdiction of their courts, the re-

would seem, however, that prior decisions preclude the taking of this position in that the court has consistently used the terminology "doing business" to designate that limit which is now described as "presence." Does the desirability of the result attained warrant the severe strain on the former decisions and the constructions there placed on decisions of the Supreme Court of the United States on a federal question?

RECENT CASES.

ADMIRALTY—HYDROAEROPLANE WHILE ON WATER IS A "VESSEL" WITHIN ADMIRALTY JURISDICTION.—Claimant was employed in the care and management of a hydroaeroplane which was moored in navigable waters at Brooklyn. To save the plane, which had begun to drag anchor and drift toward the beach, from being wrecked, claimant waded into the water and was injured by the propeller. The State Industrial Commission awarded compensation to the claimant. *Held,* that, while on the water, the plane was within admiralty jurisdiction, and therefore the Commission had no jurisdiction. *Reinhart v. Newport Flying Service Corporation,* (N. Y. 1921) 133 N. E. 371.

Thus this new craft which, according to Cardozo, J., writing the illuminating opinion, "would have mystified the lord high admiral in the days when he was competing for jurisdiction with Coke and the courts of common law," has, as to its water activities at least, found its legal pigeon-hole, although while in the air it is not the subject of admiralty. *Crawford Bros., No. 2,* (1914) 215 *Fed.* 269.

BANKRUPTCY—BUSINESS TRUSTS—APPLICABILITY OF FEDERAL BANKRUPTCY ACT.—On motion to dismiss an involuntary petition in bankruptcy on the ground that a business or Massachusetts trust did not come within sections 4 and 5 of the federal Bankruptcy Act (Comp. Stat. 1918, secs.

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quirement "doing business" has been said to be but an incident in the determination of whether there is a proper agent as designated by the statute, and at least in these instances has lost its fundamental function of determining whether under the federal constitution the corporation is subjected to the jurisdiction of the courts of that state. W. J. Armstrong Co. v. New York C. and H. R. R. Co., (1915) 129 Minn. 104, 110, 151 N. W. 917, L. R. A. 1916E 232, Ann. Cas. 1916E 335; see Rishmiller v. Denver & Rio Grande R. Co., (1916) 134 Minn. 261, 265, 159 N. W. 272, aff'd., 159 N. W. 947, where it is stated that a foreign corporation "is present in the state when it has an agent there transacting its business, *whatever the character of the business may be,*" the court concluding that "Neither the nature of the business nor the volume of the business transacted is important so long as the corporation can fairly be said to be doing business in the state." Evidently the Minnesota Court is resolved to retain the jurisdiction until squarely overruled by the federal Supreme Court.

9588, 9589) declaring persons, partnerships, corporations, and unincorporated companies subject to adjudication as bankrupts, *Held,* that such a trust comes within the act under the term "unincorporated company." *In re Parker,* (Dist. Ct., Ill. 1921) 275 Fed. 868.

The instant case follows a prior federal district court decision. *In re Associated Trusts,* (1914) 222 Fed. 1012, 34 Am. Bankr. Rep. 851. The court in that case expresses itself cautiously and bases its decision seemingly on the alleged analogy which the particular trust there in question bore to a corporation and on the fact that the certificate holders had the ultimate control over the trust business. The present case proceeds on the wider ground of congressional intent. The court was required to interpret words of a most general and comprehensive meaning. The ruling finds some support in *In re Order of Sparta,* (1916) 238 Fed. 437, in which case, however, the court was dealing with a legal nondescript which was clearly not a business trust. See also *In re Order of Sparta,* (1917) 242 Fed. 235; *In re Associated Trust Hotels, Inc.,* (1915) 228 Fed. 767. Some light may be thrown on the question by the ruling of the United States Supreme Court in *Crocker v. Malley,* (1919) 249 U. S. 223, 234, 39 S. C. R. 270, 63 L. Ed. 573, 2 A. L. R. 1601, a case under the Income Tax Act, where a tax upon "every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships," was held not to apply to a Massachusetts trust because it did not fall within the meaning of "joint-stock company or association, . . . no matter how created or organized." See, Sears, Trust Estates as Business Companies, 2nd Ed., sec. 168.

BANKRUPTCY—EXEMPTION OF INSURANCE POLICIES WHERE RIGHT TO CHANGE BENEFICIARY IS RESERVED.—The bankrupt had taken out a life policy for the benefit of his wife, but reserved the right to change the beneficiary, which right he had not exercised at the time of the bankruptcy. The constitution of North Carolina, Art. X, sec. 7, provides that a husband may insure his life for the benefit of his wife and that the policy will be free from the claims of his creditors. *Held,* the right of the bankrupt to change the beneficiary is a personal privilege and not "property" which he may transfer within the meaning of the Bankruptcy Act, and this privilege is not subject to be controlled by any other person or by any court; therefore the trustee takes no interest in the policy. *In re Pittman,* (Dist. Ct. 1921) 275 Fed. 686.

The case turns on the construction of the constitutional exemption provision, which is somewhat similar to G. S. Minn. 1913, secs. 3465, 3466. For a discussion of these principles, see NOTES, p. 304.

BILLS AND NOTES—EVIDENCE—BURDEN OF PROOF AS TO BONA FIDE HOLDERSHIP—MEANING OF THE TERM "BURDEN OF PROOF" AS USED IN THE NEGOTIABLE INSTRUMENTS LAW.—In an action by an indorsee on a note that had its inception in fraud, *Held,* that the term "burden of proof" as used in the Negotiable Instruments Law, sec. 59, placing on the holder the

burden to prove that he is a holder in due course, means the "burden of evidence," as contrasted with "burden of proof" in its strict sense, and is satisfied by the holder's showing that the circumstances under which he acquired the note created no suspicion of its validity, whereupon it devolves upon the defendant to prove the holder's knowledge or notice; and that if the defendant fails to offer any such evidence, the holder is entitled to a directed verdict. *Downs v. Horton,* (Mo. 1921) 230 S. W. 103.

The presumption under the law merchant in favor of a holder's title to negotiable paper, 3 R. C. L. 1037, throws the burden of proving such title defective upon the person attacking it. 8 C. J. 980-981. But where it is shown that the instrument was fraudulently obtained from the maker, there is a conflict of opinion as to who has the burden of proof. The minority view, followed in the federal courts, holds that the burden of proving the holder's bad faith remains on the defendant. *First Nat. Bank of Council Bluffs v. Moore,* (1906) 148 Fed. 953, 958. The state courts, while declaring that the burden "shifts" to the holder to prove good faith, apply the rule in various ways, and evidently do not in all cases use the term "burden of proof" in its strict sense. Thus, in a few courts the holder, by proving he paid full value, *First Nat. Bank of St. Thomas v. Flath,* (1901) 10 N. D. 281, 283, 86 N. W. 867; *National Bank of N. A. v. Kirby,* (1871) 108 Mass. 497, 500, and in others, by showing all the circumstances under which he took the instrument, *Cover v. Myers,* (1892) 75 Md. 406, 23 Atl. 852, 32 A. S. R. 394; *Kellogg v. Curtis,* (1879) 69 Me. 212, 31 Am. Rep. 273, re-establishes his prima facie case, whereupon the burden is shifted back to the defendant to prove the holder's actual knowledge or notice. *Commercial Bank of Danville v. Burgwyn,* (1892) 110 N. C. 267, 14 S. E. 623, 17 L. R. A. 326, and note; *Davis v. Bartlett,* (1861) 12 Ohio St. 534, 80 Am. Dec. 375; and see note, 11 A. S. R. 326; 8 C. J. 988; 1 Daniel, Neg. Inst., 6th ed., 977; 3 R. C. L. 1041. A third line of courts maintain that upon the defendant's proof of fraud, the holder must affirmatively prove that he is a holder in due course, *Union Collection Co. v. Buckman,* (1907) 150 Cal. 159, 162, 88 Pac. 708, 9 L. R. A. (N.S.) 568, 11 Ann. Cas. 609, 119 A. S. R. 164; *Cummings v. Thompson,* (1872) 18 Minn. 246 (Gil. 228); *First Nat. Bank of Rolette v. Andersen,* (1919) 144 Minn. 288, 175 N. W. 544; *Snelling State Bank of St. Paul v. Clasen,* (1916) 132 Minn. 404, 157 N. W. 643, (where the Minnesota authorities are collected); *McKnight v. Parsons,* (1907) 136 Ia. 390, 395, 113 N. W. 858, 22 L. R. A. (N.S.) 718, 15 Ann. Cas. 665, 125 A. S. R. 265; 3 R. C. L. 1039-40, note 8.

The Negotiable Instruments Law, sec. 59, was evidently intended to settle the confusion on this point by providing that "if the title of any person who has negotiated the instrument is defective, the burden is on the holder to prove that he . . . acquired the title as a holder in due course." Nevertheless, some courts hold, as in the instant case, that since the Negotiable Instruments Law is merely declaratory of the common law, they will follow their former holdings. *American Nat. Bank v. Lundy,* (1910) 21 N. D. 167, 129 N. W. 99; *German-Am. Nat. Bank v. Lewis,* (1913) 9 Ala. App. 352, 63 So. 741. But the general tendency is

to impose upon the holder the burden to prove a due course holding, *American Nat. Bank v. Fountain,* (1908) 148 N. C. 590, 62 S. E. 738; *Shellenberger v. Nourse,* (1911) 20 Idaho 323, 333, 118 Pac. 508, on the theory that, contrary to the holding in the instant case, "burden of proof" as used in the Negotiable Instrument Law means the burden of proof in its strict sense. *Leavitt v. Thurston,* (1911) 38 Utah 351, 353, 113 Pac. 77; see also, 1 Daniel, Neg. Inst., 6th ed., 970.

CARRIERS—LIABILITY OF CARRIER FOR BAGGAGE NOT ACCOMPANIED BY PASSENGER.—Plaintiff purchased a ticket and checked baggage but later tore up the ticket and traveled by another route. The baggage was stolen from the station where it was first checked. *Held,* that the carrier was liable as an insurer although the baggage was not accompanied by the passenger. *Caine v. Cleveland C. & St. L. Ry. Co.,* (Mich. 1921) 185 N. W. 765.

The ancient rule that a passenger must accompany his baggage in order to fix the liability of the carrier as insurer, although still followed in England, has been almost entirely abandoned in this country. The rule originated at a time when there was no checking system and it was necessary for the traveler to identify his baggage at destination. 5 R. C. L. 179; note, 55 L. R. A. 650, 654. But it is undoubtedly still the general rule that the relation of carrier and passenger must exist. 3 Hutchinson, Carriers, 3rd Ed., secs. 1274-1275. The passenger may then precede or follow his baggage without lessening the liability of the carrier. *McKibbin v. Wis. Cent. Ry. Co.,* (1907) 100 Minn. 270, 110 N. W. 964, 8 L. R. A. (N.S.) 489, 117 A. S. R. 689; *Larned v. Central, etc., Ry. Co.,* (1911) 81 N. J. L. 571, 79 Atl. 289; 10 C. J. 1203-1204; 3 Hutchinson, Carriers, 3rd Ed., sec. 1278; *Southern Ry. Co. v. Dinkens,* (1913) 139 Ga. 332, 77 S. E. 147, 43 L. R. A. (N.S.) 806, and note (where a contract on the ticket that baggage will be transported "only over such lines and between such stations as purchaser of this ticket will travel *on date* baggage is presented for checking" was nevertheless given effect). The weight of authority, perhaps, is against the principal case and holds that, unless the relation of carrier and passenger exists, the carrier is liable as a gratuitous bailee only. *Marshall v. Pontiac, etc., R. Co.,* (1901) 126 Mich. 45, 85 N. W. 242, 55 L. R. A. 650, and note (leading case); *Wood v. Maine Cent. R. Co.,* (1903) 98 Me. 98, 56 Atl. 457, 99 A. S. R. 339, and note; *Hicks v. Wabash R. Co.,* (1906) 131 Ia. 295, 108 N. W. 534, 8 L. R. A. (N.S.) 235. In the instant case the owner did not even intend to become a passenger. Although the opinion tries to reconcile this with the Marshall case, cited above, it in effect overrules it, and four justices concurring did so only with the understanding that the Marshall case be considered squarely overruled. *Alabama, etc., R. Co. v. Knox,* (1914) 184 Ala. 485, 63 So. 538, 49 L. R. A. (N.S.) 411, apparently is the only case precisely in point holding with the instant case. The court said, "It is illogical to hold that a carrier, which [has issued] a ticket entitling the owner and his baggage to transportation, becomes a gratuitous bailee

simply because the owner did not intend to, and in fact did not, avail herself of the right to put the entire burden upon the carrier." It has also been said, "Having paid for two privileges, there is no reason why he should be compelled to avail himself of both, or neither, unless the carrier's burden in respect to one of them is increased by his failure to exercise the other. It is not possible to see how this is the case." Note, 55 L. R. A. 650, 654. The repudiation of the established rule in Michigan by the instant case indicates a tendency toward the Alabama doctrine.

There is no case in Minnesota directly in point. Although the gratuitous bailment doctrine was laid down by the lower court in the *McKibbin case,* cited above, the supreme court did not decide whether that portion of the instruction was sufficiently favorable to the plaintiff, although it was so held as to the defendant.

CARRIERS—LIABILITY OF CONSIGNOR FOR FREIGHT CHARGES WHERE BILL OF LADING PROVIDES PAYMENT BY CONSIGNEE.—Defendant consignor was sued by a carrier for the balance of freight charges remaining due after an undercharge to the consignee, the owner of the goods, who had become insolvent. The bill of lading contained the usual provision that "the owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery." Defendant contended that this provision was an express agreement by which the owner or consignee was made liable for the freight charges, releasing the consignor. *Held,* that the provision is for the benefit and security of the carrier, enabling him to proceed against the consignee but, in case of failure to so collect, the consignor is still liable on his contract. *Montpelier, etc., R. v. Charles Bianchi & Sons.* (Vt. 1921) 113 Atl. 534.

The great weight of authority permits the carrier to recover from the consignor any unpaid freight charges remaining due after goods have been delivered to the consignee and no charge or a charge less than that called for by the lawful tariffs has been collected. 4 R. C. L. 857; 10 C. J. 445; see also *Chicago, M. & St. P. R. Co. v. Greenberg,* (1918) 139 Minn. 428, 166 N. W. 1073, L. R. A. 1918D 158, Ann. Cas. 1918E 456, where the consignee was nevertheless held liable for the deficit on the ground of a contract implied from acceptance of the goods and partial payment of the freight, the consignor being then insolvent. The construction contended for by the defendant in the instant case, to-wit, that the carrier by the provision in the bill of lading has by implication released the consignor, has not been recognized by the courts, which generally hold that the provision is for the benefit of the carrier only, and that liability on the part of both consignor and consignee is not inconsistent. *Coal & Coke Ry. Co. v. Buckhannon River Coal & Coke Co,* (1915) 77 W. Va. 309, 87 S. E. 376, L. R. A. 1917A 663; *Great Northern Ry. Co. v. Hocking Valley Fire Clay Co.,* (1918) 166 Wis. 465, 166 N. W. 41, where it is said that "the condition confers on the carrier the right to collect the freight from the owner or consignee without changing the liability of the consignor." While it may well be doubted whether the con-

signor can confer on the carrier an express contract right against the consignee, the liability of the consignor on his express contract, and the liability of the consignee on a contract implied from ownership or from acceptance of the shipment seem firmly established. For a full discussion of this question see, Edgar Watkins, Liability of Consignors and Consignees of Interstate Shipments for Unpaid Freight Charges, 6 MINNESOTA LAW REVIEW 23.

COMMERCE—PURCHASE OF GRAIN FOR INTERSTATE SHIPMENT AS A PART OF INTERSTATE COMMERCE.—By a contract made in Kentucky, the defendant agreed to sell grain to the plaintiff and to deliver the grain on board cars of a common carrier in Kentucky, the plaintiff intending to ship the grain out of the state, in accordance with its practise on previous occasions. The wheat was to be delivered and paid for, and the contract fully performed, at the place of shipment within the state. In defense to an action for breach of contract for failure to deliver, the defendant contends that the contract is void because the plaintiff had not complied with the statutes of Kentucky giving foreign corporations the right to do business within the state. *Held,* reversing the state court, that the transaction was one of interstate commerce and therefore not affected by the state statutes. *Dahnke-Walker Milling Co. v. Bondurant,* (1921) 42 S. C. R. 106.

This case goes further than any previous decision in the language it employs, when it says, "where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation," citing *American Express Co. v. Iowa,* (1905) 196 U. S. 133, 143, 25 S. C. R. 182, 49 L. Ed. 417. But in that case, the contract of purchase itself called for delivery in another state, and therefore hardly is authority for holding that a contract of purchase to be completed by delivery within a state, is a transaction in interstate commerce if made with the intention of shipping the goods out of the state. In the instant case, the court says that the fact that the contract of purchase called for delivery on board cars of a common carrier and that the plaintiff in continuance of its prior practice was purchasing the grain for shipment out of the state, have a material bearing on the nature of the contract, and show that what otherwise seems an intrastate contract is a part of interstate commerce. It seems from the language used that the court did not consider the actual delivery on the cars as an essential part of the transaction in order to render it interstate, but that the intention of the buyer to have the wheat so delivered within the state according to the contract, and then to send it out of the state according to his custom, was sufficient to determine the character of the contract. Previous cases have held that the intent of the buyer, at the time of purchasing, to ship the goods out of the state does not render the purchase a part of interstate commerce. *In re Conicuh, etc., Co.,* (1910) 180 Fed. 249; *Brunner v. Mobile & Gulfport Lumber Co.,* (1914) 188 Ala. 248, 66 So. 438. See 6 MINNESOTA LAW REVIEW 61 on intent as determining the interstate character of a shipment.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—CHILD LABOR LAW.—Plaintiff sought an injunction to restrain the collection of a tax levied pursuant to an Act of Congress approved February 24, 1919, 40 Stat. 1138, 1919 Supp. U. S. Compiled Stat. sec. 6336 7/8a. Under this law industries employing children under a designated age were assessed ten per cent. of their net profits. *Held*, that the law is unconstitutional, and that the injunction be granted. *George v. Bailey*, (1921) 274 Fed. 639; also *Drexel Furniture Co. v. Bailey*, (1921) 276 Fed. 452.

This is the second time that the efforts of Congress have been frustrated in attempting to enact a federal child labor law. The court, following the reasoning of *Hammer v. Dagenhart*, (1918) 247 U. S. 251, 38 S. C. R. 529, 62 L. Ed. 1101, judged the act, not by its immediate, but by its natural and reasonable effect, and held that it was not an act to raise revenue, but was in effect an attempt on the part of Congress to regulate the internal affairs of the states. In the *Dagenhart case*, the court, by a five to four decision, declared invalid a law having the same end in view, and seeking to attain it by prohibiting the transportation of products of child labor in interstate commerce. 39 Stat. 675, U. S. Comp. Stat. 1916 sec. 8819a. Although on its face it purported to regulate commerce, the court declared the law invalid on the ground that it did not regulate commerce among the states, but aimed to "standardize the ages at which children may be employed in mining and manufacturing within the states." The Lottery Case, *Champion v. Ames*, (1903) 188 U. S. 321, 23 S. C. R. 321, 47 L. Ed. 492; the "Pure Food Case," *Hipolite Egg Co. v. United States*, (1911) 220 U. S. 45, 31 S. C. R. 364, 55 L. Ed. 364; and the "White Slave Traffic Cases," *Hoke v. United States*, (1913) 227 U. S. 308, 33 S. C. R. 281, 57 L. Ed. 523; and *Caminetti v. United States* (1917) 242 U. S. 470, 37 S. C. R. 192, 61 L. Ed. 442, were distinguished in the Dagenhart case on the ground of the inherent evil in the commodities which were the subjects of commerce, while in the case of child labor the goods are harmless in themselves and interstate commerce is not necessary to accomplish harmful results. For a full discussion of this subject see A. A. Bruce, Interstate Commerce and Child Labor, 3 MINNESOTA LAW REVIEW 89; 3 MINNESOTA LAW REVIEW 452.

CONTRACTS—IMPOSSIBILITY—SCHOOLS AND SCHOOL DISTRICTS—RECOVERY BY TEACHER WHERE SCHOOL CLOSED ON ACCOUNT OF EPIDEMIC.—Appellee agreed to teach appellant's school for six months. After a time, the health authorities, acting under an express authority given by statute, ordered the school closed temporarily during an epidemic. At the expiration of the six months' term appellee refused to make up the time lost unless paid additional compensation. *Held*, that no recovery can be had for the time the school was closed by the health authorities, the performance being made impossible by act of law. *Gregg School Tp., Morgan County v. Hinshaw*, (Ind. 1921) 132 N. E. 586.

As a general rule, a school teacher is entitled to compensation for the period during which the school is closed by reason of an epidemic, *Smith v. School Dist.*, (1913) 89 Kan. 225, 131 Pac. 557, Ann. Cas. 1914D

139, and note; *Libby v. Douglas,* (1900) 175 Mass. 128, 55 N. E. 808; *Dewey v. Union School District,* (1880) 43 Mich. 486, 5 N. W. 646, unless a stipulation is inserted in the contract authorizing a discontinuance by the school directors; *Goodyear v. School Dist.,* (1889) 17 Ore. 517, 21 Pac. 664, or unless the school is closed by public health authorities under an act of law, the law of the land being considered a part of every contract. *School Dist. v. Howard,* 5 Neb. Unof. 340, 98 N. W. 666; and see *Mackay v. Barrett,* (1900) 21 Utah 239, 60 Pac. 1100, 50 L. R. A. 371, the language of which seems to support the instant case. Whenever a contract is made impossible of further performance by an act of law, and such act is only temporary in character, performance under the contract is not discharged, but merely suspended equally as to both parties. *Baylies v. Fettyplace,* (1811) 7 Mass. 325. It appears that if a request had been made on the appellee by the school authorities to hold herself in readiness, a recovery would have been allowed, she still being considered a teacher in the schools, *Board of Educ. v. Couch,* (Okla. 1917) 162 Pac. 485, and unable to seek other employment during that time. *Randolph v. Sanders,* (1899) 22 Tex. Civ. App. 331, 54 S. W. 621. The duration of the discontinuance and the necessity of remaining in readiness are considered important factors by the better authorities. 3 Williston, Contracts, sec. 1958. In at least one state teachers are protected by statute against loss of compensation during temporary discontinuance. See *Sandry v. School Dist.,* (N. D. 1921) 182 N. W. 689. The result of the instant decision is that, in case of a personal service contract, a mere temporary impossibility created by law excuses non-performance during the interval of legal prohibition, though the contract continues binding when the prohibition is removed. It would seem, however, that a teacher under the circumstances of the instant case, necessarily holds herself in readiness to perform, and is therefore entitled to compensation. See *Sandry v. School Dist.,* (N. D. 1921) 182 N. W. 689. But the tendency of the law is to enlarge the defense of impossibility. 3 Williston, Contracts, secs. 1952, 1931.

COPYRIGHT—NEWS—EXTENT OF PROTECTION.—Defendant in error published in its newspaper an article containing news, the article having previously been copyrighted by plaintiff in error. *Held,* that though the form in which news is printed can be protected by the copyright statute, the news itself cannot. *Chicago Record Herald Co. v. Tribune Ass'n.,* (C. C. A., seventh circuit, 1921) 275 Fed. 797.

It is well settled that news, as such, is not intended to be protected by the federal copyright statute. *Nat'l. Tel. News Co. v. Western Union Tel. Co.,* (1902) 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805. But facts which have been compiled through the exercise of skill and which are intended to be of more than passing interest are properly copyrighted. See *Natl. Tel. News Co. v. Western Union Tel. Co.,* (1902) 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805. It is held, for example, that a volume which shows readily the order of historical events cannot be reproduced without the author's permission, if the author has copyrighted his work.

Hanson v. Jaccard Jewelry Co., (1887) 32 Fed. 202. Likewise, the compiler of a directory is protected by the federal statute. *Hartford Printing Co. v. Hartford Dir., etc, Co.*, (1906) 146 Fed. 332. Nor can a compilation of statistics pertaining to railroads, telegraph companies, and post-offices be copied if copyrighted. *Bullinger v. Mackey*, (1879) 15 Blatch 550, Fed. Cas. No. 2127. A book of credit ratings of persons engaged in a particular line of business is entitled to copyright protection where the information therein has been collected from original sources. *Ladd v. Oxnard*, (1896) 75 Fed. 703, 731. A book prepared from public records showing abstracts of title to lands with the encumbrances on such lands is subject to copyright. *Banker v. Caldwell*, (1859) 3 Minn. 94; but see *Stover v. Lathrop*, (1888) 33 Fed. 348. Likewise a map is protected, *Woodman v. Lydiard-Peterson Co.*, 192 Fed. 67, affirmed, 204 Fed. 921, 123 C. C. A. 243, 205 Fed. 900, 126 C. C. A. 434. The manner of arranging law reports for reading can be copyrighted, *Callaghan v. Myers* (1888) 128 U. S. 617, 9 S. C. R. 177, 32 L. Ed. 547, as can also a digest of judicial opinions. *West Pub. Co. v. Edward Thompson Co.*, (1910) 176 Fed. 833, 100 C. C. A. 303. A cable code book can likewise be copyrighted. *Reis v. National Quotation Bureau*, (1922) 276 Fed. 717.

CORPORATIONS—NATURE OF OFFICERS' STATUTORY LIABILITY.—Plaintiff creditor brought action against defendant officer of a corporation to enforce his liability under a Massachusetts statute, which imposed personal liability on officers, for corporate debts incurred while in office, for knowingly making certain false reports. Defendant contended that since the liability is penal, it was barred by the short penal statute of limitations. *Held*, that the officers' statutory liability is not penal but is remedial, and therefore the cause of action was not barred by the statute of limitations applicable to penalties and forfeitures. *Parks Shellac Company v. Harris*, (Mass. 1921) 129 N. E. 617.

For a discussion of the principles involved, see NOTES, p. 300.

CRIMINAL LAW—SOLICITATION TO CRIME BY A DETECTIVE.—The defendant, a bellboy, was induced by a detective, for the purpose of apprehending him, to send a questionable woman to the detective's room in a hotel. The defendant was convicted of pandering. *Held*, that where a detective persuaded the defendant to commit the crime, which he would not otherwise have committed, for the purpose of convicting him, a conviction will not be upheld, *State v. McCornish*, (Utah, 1921) 201 Pac. 637.

By the weight of authority, solicitation of, or entrapment into the commission of a crime, by public authorities, is no defense. *State v. Abley*, (1899) 109 Ia. 61, 80 N. W. 225, 46 L. R. A. 862, 77 A. S. R. 520; 8 R. C. L. 127-129; 16 C. J. 88. This rule is undisputed in cases where a person is suspected, or has the intention to commit a crime, and he is encouraged into its commission and entrapped. *Billingsley v. United States*, (C. C. A. 1921) 274 Fed. 86. A second situation arises where one is instigated and solicited to commit a crime which he had no intention of committing and which would not have been committed but

for the instigation. The majority of cases, under these circumstances, allow the defense because it is contrary to public policy to create crimes. *Woo Wai v. United States,* (1915) 223 Fed. 412, 137 C. C. A. 604. The contrary opinion is that the mere fact that the accused yielded to temptation and influence is no justification for the commission of a crime. *Strother v. State,* (1916) 15 Ala. App. 106, 72 So. 566. An intermediate position hinging on the character of the crime is taken by some courts, which hold that incitation of a crime against the public for purposes of apprehension is justifiable, but that solicitation of a crime against a private individual is unjustifiable and is a defense to prosecution. *Commonwealth v. Wasson,* (1910) 42 Pa. Super. Ct. 38. Hence, if the purpose of the detective or public agent is not to solicit the commission of the crime but to ascertain whether the defendant is engaged in an unlawful business, solicitation is no defense. *Grimm v. United States,* (1894) 156 U. S. 604, 15 S. C. R. 470, 39 L. Ed. 550. Of course, if, because of solicitation, one of the essential elements of the crime is absent, such as "lack of consent" in permitting one to take property in order to convict of larceny, the crime is not committed. *Topolewski v. State,* (1906) 130 Wis. 244, 109 N. W. 1037, 7 L. R. A. (N.S.) 756, 118 A. S. R. 1019, 10 Ann. Cas. 627. It has been said elsewhere, as well as in the instant case, that solicitation is a crime on the part of the detective himself. *Connor v. People,* (1893) 18 Colo. 373, 380, 33 Pac. 159, 25 L. R. A. 341, 36 A. S. R. 295. And it may be that detectives or other persons buying or obtaining liquor for the purpose of securing evidence are guilty of "receiving," "transporting," or "possessing" liquor under the state and federal prohibition acts, Minn. Laws 1919, chap. 455, sec. 22; Minn. Laws 1921, chap. 391, sec. 2; 41 Stat. 317, unless and until protected by testifying under an immunity statute. G. S. Minn. 1913, sec. 3199; 41 Stat. 317.

The facts of several Minnesota cases have been such as might have suggested the interposition of solicitation as a defense.' *State v. Rogers,* (1920) 145 Minn. 303, 177 N. W. 358; *State v. Johnson,* (1918) 140 Minn. 73, 167 N. W. 283; *State v. Meyers,* (1916) 132 Minn. 4, 155 N. W. 766; *State v. Brand,* (1914) 124 Minn. 408, 145 N. W. 39. But it seems that the supreme court has not been obliged to go further than to say that "the evidence of detectives and informers is carefully scrutinized by the courts, . . . especially when the witness claims to have induced the criminal act for the express purpose of prosecution." *State v. Bryant,* (1905) 97 Minn. 8, 105 N. W. 974.

DAMAGES—RECOVERY FOR MENTAL ANGUISH IN CASE OF NEGLIGENT ACTS.—The defendant carelessly and negligently published a picture of the plaintiff's son in connection with a report of the death of a person of the same name. *Held,* that the plaintiff has no cause of action for the mental pain and anguish which she suffered from the belief that her son was dead. *Herrick v. Evening Express Pub. Co.,* (Maine 1921) 113 Atl. 16.

The rule of the instant case, that mental suffering arising from a merely negligent act does not give a cause of action, is supported by the great weight of authority, and is law in Minnesota. *Nichols v. Central*

Vermont Ry. Co., (Vt. 1919) 109 Atl. 905, 12 A. L. R. 333; *Beaulieu v. Great North. R. Co.*, (1907) 103 Minn. 47, 114 N. W. 353, 19 L. R. A. (N.S.) 564, 14 Ann. Cas. 462. Mental anguish will be considered as an element of damage in an action for physical injury. *Bahr v. Northern Pac. R. Co.*, (1907) 101 Minn. 314, 112 N. W. 267; and see 5 MINNESOTA LAW REVIEW 391. Or if a tort has been willfully committed, plaintiff can recover for mental suffering, though there is no other damage. *Wilson v. St. Louis & S. F. R. Co.*, (1912) 160 Mo. App. 649, 142 S. W. 775. The law on this question was left in some doubt by *Larson v. Chase*, (1891) 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 A. S. R. 370, which case has been misunderstood as applying to negligent as well as willful acts. *Wright v. Beardsley*, (1907) 46 Wash. 16, 89 Pac. 172. But in the decision of *Beaulieu v. Great North. R. Co.*, (1907) 103 Minn. 47, 114 N. W. 353, 19 L. R. A. (N.S.) 564, the court points out that in the prior case, the court intended to say that a recovery could be had for mental anguish only in case of a willful tort. Texas is the principal expounder of the minority rule, which would allow a recovery in the instant case, holding that damages for mental suffering resulting from mere negligent acts may be recovered. *Wells-Fargo Express Co. v. Fuller*, (1896) 13 Tex. Civ. App. 610, 35 S. W. 824; *Western U. Teleg. Co. v. Broesche*, (1888) 72 Tex. 654, 10 S. W. 734, 13 A. S. R. 843.

Fright is a form of mental suffering which is classed by itself and is governed by a special rule. 34 Harv. L. Rev. 260; 3 MINNESOTA LAW REVIEW 539.

DEATH—HUSBAND AND WIFE—REAL PROPERTY—DESCENT OF ESTATE BY ENTIRETIES ON SIMULTANEOUS DEATH OF OWNERS—PRESUMPTION OF SURVIVORSHIP.—Husband and wife, owners of an estate by entireties, perished in the same fire. The estate was sold and one-half of the proceeds given to the heir of the wife while the other half was given to the five heirs of the husband who in this action contend that the heir of the wife was only entitled to one-sixth. *Held*, that the heir of the wife takes one-half since the land descends as a tenancy in common. *McGhee v. Henry*, (Tenn. 1921) 234 S. W. 509.

At common law there is no presumption whatever as to survivorship when two or more persons die in the same disaster. In the absence of evidence of survivorship, their property descends as if they had died simultaneously. *Coye v. Leach*, (1844) 8 Metc. (Mass.) 371, 41 Am. Dec. 518, and note; *Middeke v. Balder*, (1902) 198 Ill. 590, 64 N. E. 1002, 92 A. S. R. 284, 59 L. R. A. 653; *Y. W. C. Home v. French*, (1903) 187 U. S. 401, 23 S. C. R. 184, 47 L. Ed. 233; *Wing v. Angrave*, (1860) 8 H. L. Cas. 183, 30 L. J. Ch. 65, 8 Eng. Rul. Cas. 519; note, 14 Ann. Cas. 716. At civil law there exist certain well-defined presumptions of survivorship based on age, sex, and condition of health. Note in 51 L. R. A. 864. California and Louisiana have adopted the civil law doctrine of survivorship in their codes. *In re Louck's Estate*, (1911) 160 Cal. 551, 117 Pac. 673, Ann. Cas. 1913A 868, and note; Cal. Code of Civil Proc., sec. 1963, subd. 46; La. Code, arts. 930-3. Since there is no presumption of sur-

vivorship, the question of the descent of an estate by entireties when both owners die simultaneously is raised which apparently has never arisen before. An estate by entireties is based on the common law unity of married persons. *Hardenbergh v. Hardenbergh,* (1828) 10 N. J. Law 42, 18 Am. Dec. 371, and note; 2 Bl. Comm. 204-6. In divorce actions, it has been held that, since an estate by entireties is dependent upon marital unity, a decree of divorce, which destroys that legal unity and creates a separate legal existence, also destroys the estate by entireties and changes it into one in common. *Ames v. Norman,* (1857) 4 Sneed (Tenn.) 683, 70 Am. Dec. 269; *Stelz v. Schreck,* (1891) 128 N. Y. 263, 28 N. E. 510, 13 L. R. A. 325, and note. On the basis of this reasoning it is consistent to hold, as did the principal case, that an estate by entireties terminates by the simultaneous death of the owners, and that the property descends as in a tenancy in common. In most jurisdictions, estates by entireties have been abolished, and in some they have never existed. 30 L. R. A. 305, 314. Minnesota has abolished them inferentially by a statute which makes "joint conveyances" to husband and wife tenancies in common. *Wilson v. Wilson,* (1890) 43 Minn. 398, 45 N. W. 710.

DIVORCE—CONFLICT OF LAWS—VALIDITY OF FOREIGN DECREE DEPENDS UPON RECOGNITION IN STATE OF DOMICILE OF SPOUSE.—Spouses were married in Missouri, and the husband thereafter left his wife and on constructive service procured a divorce in the state of Nevada on ground of cruel and inhuman treatment. The wife later, in Washington, D. C., married the plaintiff, a resident of the state of New York. Plaintiff brings action to annul the marriage on ground that it was invalid for the reason that at the time it was contracted, the defendant already had a husband. *Held,* that whether a decree of divorce rendered in a foreign state on service by publication is valid depends upon the effect given by the state in which is domiciled the party so served, and if the decree is there recognized as valid, it is valid everywhere. *Ball v. Cross,* (N. Y. 1921) 132 N. E. 106.

The United States Supreme Court has upheld the New York courts in refusing to recognize a foreign decree granted upon constructive service upon one a citizen of New York as not being in conflict with the "full faith and credit clause" of the federal constitution. *Haddock v. Haddock,* (1906) 201 U. S. 562, 26 S. C. R. 525, 50 L. Ed. 867, 5 Ann. Cas. 1. On the other hand, the New York courts have repeatedly refused to extend the doctrine to include those not residents of the state. *Hubbard v. Hubbard,* (1920) 228 N. Y. 81, 126 N. E. 508. It appears from the facts shown in the instant case that, the husband having left the wife for cause, she being in the wrong, her domicile followed his. *North v. North,* (1905) 93 N. Y. S. 512, affirmed 11 App. Div. 921, 96 N. Y. S. 1138. And the state of Nevada having jurisdiction over both her domicile and his, such decree, by *Atherton v. Atherton,* (1901) 181 U. S. 155, 21 S. C. R. 544, 45 L. Ed. 794, is valid everywhere, and it is not necessary to determine whether the decree would be valid in Missouri or Texas, the place of residence. In the decision of *Atherton v. Ather-*

ton, (1901) 181 U. S. 155, 21 S. C. R. 544, 45 L. Ed. 794, where the New York court found that the wife left because of cruel and inhuman treatment, and the Kentucky court had previously found that she deserted him, on appeal the United States Supreme Court held that the New York court could not disregard the findings of the Kentucky court. Nothing appeared in the instant case to overthrow the findings of the Nevada court. See *Checver v. Wilson,* (1869) 9 Wall. (U. S.) 108, 123, 19 L. Ed. 604; *Harding v. Alden,* (1832) 9 Me. 140, 23 Am. Dec. 547. That the holding of the instant case is sound, however, is urged by Professor Lorenzen in 31 Yale Law Journal 194, as follows: "The advantage of the position taken by the New York court of appeals is that a foreign decree of divorce rendered upon constructive service would have, with respect to the party so served, the same effect in all jurisdictions." See also, 35 Harv. L. Rev. 454.

EXECUTORS AND ADMINISTRATORS—EXECUTOR, THOUGH PRACTICING LAWYER, MAY EMPLOY ATTORNEY.—Plaintiff, a practicing attorney, was administrator of an estate, and engaged an attorney for the performance of the usual and ordinary services incident to probate proceedings and paid him out of the estate. *Held,* that he was entitled to do so. *In re Graham's Estate,* (Cal. 1921) 201 Pac. 456.

By the weight of authority an executor or administrator, though himself an attorney, may engage an attorney to perform legal services for the estate. *Succession of Pizzata,* (1917) 141 La. 645, 75 So. 498; *Powell v. Foster's Estate,* (1898) 71 Vt. 160, 44 Atl. 96; and see *St. John v. McKee,* (1883) 2 Dem. (N. Y.) 236; contra, *Noble v. Whitten,* (1905) 38 Wash. 262, 80 Pac. 451. But there is a difference of opinion whether this attorney may be his own law partner. Fear is expressed that he would be tempted to incur useless expenses if he were allowed to appoint his own partner, as he might be compensated indirectly for his services. *Taylor v. Wright,* (1883) 93 Ind. 12. However, the majority of cases allow him to appoint his own partner, *Bendall v. Bendall,* (1854) 24 Ala. 295, 60 Am. Dec. 469, but sometimes with the understanding that he is not to share in any of the payments. *Parker v. Day,* (1898) 155 N. Y. 383, 49 N. E. 1046; *Bushby v. Berkeley,* (1912) 138 N. Y. S. 831; and see *Succession of Pizzata,* (1917) 141 La. 645, 678, 75 So. 498. Counsel on both sides in the principal case admitted that if the lawyer executor performed the legal services himself, he could not charge for them, because public policy would forbid him to be his own employer. Numerous cases support this rule, *Slusher v. Weller,* (1912) 151 Ky. 203, 151 S. W. 684; *Estate of Young,* (1892) 4 Wash. 524, even though the legal services are extraordinary. *Hough v. Harvey,* (1873) 71 Ill. 72; *Collier v. Munn,* (1869) 41 N. Y. 143; 11 R. C. L. 231; note, 138 A. S. R. 582; 1 Perry, Trusts, 5th Ed. sec. 432. Colorado reaches the same result by statutory construction. *Doss v. Stevens,* (1899) 13 Col. App. 535, 59 Pac. 67. But several cases hold that if the charges are reasonable, the lawyer executor can be compensated for legal services rendered by himself. *Harris v. Martin,* (1846) 9 Ala. 895; *In re Mabley's Estate,* (1899) 74

Mich. 143, 41 N. W. 835; *Fulton v. Davidsen*, (1871) 50 Tenn. 614, 643; *Porter v. Long*, (1900) 124 Mich. 584, 83 N. W. 601 (for expenses of litigation, though not for compensation). And in some instances the lawyer executor is compensated, not for legal services in terms, but for "extraordinary services" during administration. *In re Carmody*, (1914) 163 Ia. 463, 145 N. W. 16; *Sloan v. Duffy*, (1903) 117 Wis. 480, 94 N. W. 342; and see *Follansbee v. Outhet*, (1913) 182 Ill. App. 213; Bogert, Trusts, p. 412.

In Minnesota the right of a personal representative to compensation and to engage attorneys is governed by Minn. Laws 1921, chap. 210, p. 260, amending G. S. Minn. 1913, sec. 7298, but none of the questions here discussed seem to have been raised in this state. It would seem a fair rule to give a personal representative, who is also an attorney, and as such renders legal services to the estate, not the usual professional charges, but a reasonable allowance under the direction of the court, which can determine the value and necessity of the services in view of all the circumstances of the estate, and protect the estate from exploitation. See *Clark v. Knox*, (1881) 70 Ala. 607, 45 Am. Rep. 93; and see last clause in the new Minnesota statute above cited.

FOREIGN CORPORATIONS—SERVICE OF PROCESS ON SOLICITING AGENT AS CONSTITUTING DUE PROCESS OF LAW.—The plaintiff sues for the loss of a quantity of grain in transit between points on defendant's road in Kansas. The defendant neither owns nor operates any line of railway in Minnesota but maintains within the state a resident agent for the solicitation of freight and passenger traffic over its lines outside the state. The summons and complaint were served on this agent in compliance with G. S. Minn. 1913, sec. 7735 (3). *Held*, that the service was sufficient. *Farmers' Co-op. Equity Co. v. Payne*, (Minn. 1921) 186 N. W. 130. On identical facts the federal district court of Minnesota reaches the opposite conclusion. *Stephan v. Union Pac. Ry. Co.*, (1921) 275 Fed. 709.

For a discussion of the principles involved, see NOTES, p. 309.

HOMESTEAD—CONVEYANCE BY SEPARATE DEEDS OF HUSBAND AND WIFE.—The defendants secured a deed to the plaintiff's homestead, which deed the husband alone signed. Later they secured a separate deed signed by the wife. The husband and wife then brought an action to cancel the deeds. *Held*, that the husband's deed and the wife's subsequent separate deed were insufficient to convey title. *Hawkins v. Corbit*, (Okl. 1921) 201 Pac. 649; *Thomas v. James*, (Okl. 1921) 202 Pac. 499.

These cases are in accord with the great weight of authority. 13 R. C. L. 627; *Lott v. Lott*, (1906) 146 Mich. 580, 109 N. W. 1126, 8 L. R. A. (N.S.) 748, and note; *Alvis v. Alvis*, (1904) 123 Ia. 546, 99 N. W. 166; 2 MINNESOTA LAW REVIEW 64. But it has been held where the wife alone makes a contract to sell the homestead, which contract is subsequently ratified by the husband, that the purchaser cannot repudiate the contract so long as the owners of the homestead are ready and willing to carry out

the contract on their part. *Lennartz v. Montgomery,* (1917) 138 Minn. 170, 164 N. W. 899 (two justices dissenting); see 2 MINNESOTA LAW REVIEW 63. This decision was based upon the view that the statute was not intended for the protection of the purchaser but for the owners of the homestead only. The Minnesota court has also held that, although the joint act of both husband and wife is required to alienate the homestead, where both intend to alienate it, and both give expression to that intention by executing and delivering formal separate deeds for the purpose of conveying it to the purchaser, these acts lay such a foundation for the operation of the principles of estoppel that the purchaser may invoke the protection of that doctrine whenever, in honest reliance upon such acts, he has placed himself in a position where permitting such grantors to deny the validity of such conveyances would result in manifest injustice to him. *Bullock v. Miley,* (1916) 133 Minn. 261, 158 N. W. 244. In the instant case there were no facts that could give rise to an estoppel.

HOMESTEAD—MORTGAGES—ESTOPPEL OF MORTGAGOR WHO REPRESENTS HIMSELF TO BE UNMARRIED.—The plaintiff, in obtaining a loan from the defendant by giving him a mortgage on the plaintiff's homestead, stated to the defendant that plaintiff was a single man. Plaintiff now sues, after the death of his wife, to have mortgage cancelled. *Held,* that the plaintiff now is estopped to assert the invalidity of the mortgage, although his wife failed to join in the mortgage as required by statute. *Bozich v. First State Bank of Buhl,* (Minn. 1921) 184 N. W. 1021.

There are few cases directly in point. This case seems, however, to be in accord with the authorities that have passed on the question. *Pittman v. Mann,* (1904) 71 Neb. 257, 98 N. W. 821; *Schwartz v. Nat. Bank of Texas,* (1887) 67 Tex. 217, 2 S. W. 865. It is held that covenants of title in a deed of the homestead, the wife not joining, will not work an estoppel against the husband. *Alt v. Banholzer,* (1888) 39 Minn. 511, 40 N. W. 830. And it should be noted that the false representations of one of the parties to a marriage cannot affect the homestead rights of the other, there being no participation nor knowledge on his part of such representations. *Mason v. Dierks Lumber & Coal Co.,* (1910) 94 Ark. 107, 125 S. W. 656, 26 L. R. A. (N.S.) 574, and note. But a wife, who finds out after her husband's death that during his lifetime he conveyed land (not homestead) falsely representing himself to be a single man, may be estopped when she knowingly permits others to improve the property without seasonably asserting her claim. *Holcomb v. Independent School District,* (1897) 67 Minn. 321, 69 N. W. 1067. In the instant case the estoppel is not based on the covenants, but rather upon a fraudulent representation apart from, and in addition to, the covenants. The homestead laws are enacted for the protection of the family; and where the rights of the family are no longer involved, or are perhaps otherwise saved, the protection is rightfully withdrawn when a party seeks to use it as a shield in unconscionable dealings with innocent parties.

INNKEEPERS—POLICE POWER—REGULATION OF HOTEL RATES—PREVENTION OF PROFITEERING.—A statute of Ohio requires that a diagram or list, showing the price of each room in a hotel, be filed with the state fire marshal, and that no advance be made in this schedule without twenty days' written notice to the state fire marshal. Defendant was indicted for charging higher rentals than provided in the schedule filed with the state fire marshal. Defendant's demurrer to the indictment was sustained, and the state appeals. *Held,* that the business of keeping a hotel is affected with a public interest and subject to reasonable public regulation. *State v. Norval Hotel Co.,* (Ohio, 1921) 133 N. E. 75.

The principle is well established that when private property becomes affected with a public interest, it becomes subject to public regulation, both as to its use and as to the maximum rates to be charged. *Munn v. Illinois,* (1876) 94 U. S. 113, 24 L. Ed. 77 (grain elevator rates); *German Alliance Insurance Co. v. Lewis,* (1914) 233 U. S. 389, 34 S. C. R. 612, 58 L. Ed. 1011, L. R. A. 1915C 1189, and note (insurance rates); *Block v. Hirsch,* (1921), 41 S. C. R. 458, 65 L. Ed. 531 (rentals). The regulation of hotels and inns is a matter closely related to the health and welfare of the public and is properly within the police power of the state. *Russellville, Town of, v. White,* (1883) 41 Ark. 485; *City of Chicago v. Drake Hotel Co.,* (1916) 274 Ill. 408, 113 N. E. 718, L. R. A. 1917A 1170; Wyman Public Service Corporations, Sec. 19, 20, pp. 16, 17; see 17 Harv. L. Rev. 156, 159. Thus, states have been held to have the power of classifying hotels or inns according to the number of rooms contained in them. *Hubbell v. Higgins,* (1910) 148 Iowa 36, 126 N. W. 914, Ann. Cas. 1912B 822, and note; *State v. McFarland,* (1910) 60 Wash. 98, 110 Pac. 792, 140 A. S. R. 909. They have also the power of requiring fire escapes. *Perry v. Bangs,* (1894) 161 Mass. 35, 36 N. E. 683. In view of the rate regulation of modern public utilities it would not, therefore, seem unreasonable to require that hotels and inns, among the oldest of public utilities known to the law, be subjected to some kind of rate control. The merits of a statute of the kind involved in the instant case are such as would seem likely to lead to its adoption in other states. As said in the instant case, "It is a matter of common knowledge that, at times, when large numbers of the public meet in cities or towns for conventions, or similar gatherings, the capacity of hotels and places for public accommodation is overtaxed and opportunity is thereby given for the exaction of exorbitant or unfair charges."

JUDGMENTS—CONSTITUTIONALITY OF STATUTE AUTHORIZING DECLARATORY JUDGMENTS.—The defendant had been elected a member of the board of commissioners of the city of Wichita. Before he attempted to enter upon the discharge of the duties of his office, a proceeding was brought against him for the purpose of determining his legal capacity to hold that office. This proceeding was authorized by a statute permitting courts of record to render declaratory judgments. The defendant challenged the constitutionality of this law. *Held,* the act was constitutional. *State ex rel. Hopkins v. Grove,* (Kan. 1921) 201 Pac. 82.

Save for the addition of the words "in cases of actual controversy," the statute in question, so far as its constitutionality is affected, is almost identical with the Michigan statute, which was held unconstitutional. *Anway v. Grand Rapids Ry. Co.,* (1920) 211 Mich. 592, 179 N. W. 350, 12 A. L. R. 26, and note. The court in the instant case refused to follow the reasoning of the Michigan case and held (1) that declaratory judgments were not advisory opinions nor decisions in moot cases; (2) that a right need not be violated to give rise to a controversy, and (3) that rendering a decision in a case like the one in question is a judicial act which may be conferred upon the courts.

By G. S. Minn. 1913, sec. 7920 parties may agree to submit for decision to a court certain facts upon which a controversy depends. See *Snow v. Village of Excelsior,* (1911) 115 Minn. 102, 132 N. W. 8; *Manley v. Scott,* (1909) 108 Minn. 142, 121 N. W. 628. But it may be doubtful whether the courts can be authorized to render declaratory judgments by a mere legislative declaration in view of the constitutional provision limiting the jurisdiction of the district courts and the supreme court to "cases" in law and equity. Minn. const. art. 6, secs. 2, 5. In *Muskrat v. United States,* (1911) 219 U. S. 346, 31 S. C. R. 250, 55 L. Ed. 246, it is said, "The exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the constitution, the power to exercise it is nowhere conferred," followed by a discussion of the terms "cases" and "controversies." Elsewhere in the same case it is said, "The judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction." And see *Osborn v. Bank of United States,* (1824) 9 Wheat. (U.S.) 738, 819, 6 L. Ed. 204. See, however, James Schoonmaker, Declaratory Judgments, 5 MINNESOTA LAW REVIEW 32 and 172; 19 Mich. L. Rev. 86; 31 Yale L. J. 419.

LANDLORD AND TENANT—ESTOPPEL—TENANT NOT ESTOPPED TO DENY TITLE OF LANDLORD WHEN TITLE IS IN THE GOVERNMENT.—Plaintiff leased certain land to the defendant. Later the defendant filed an application with the United States government to homestead the land, at the same time giving notice to the plaintiff that he no longer regarded him as his landlord. After an extended contest, plaintiff derived good title from the government, entered the land and sued the defendant for rent. Defendant denied liability since title was in the government at the time of his occupation. *Held,* that the tenant may deny the title of his landlord if he shows title to be in the government. *Ellis v. Sutton,* (*Miss.* 1921) 88 So. 519.

The general rule is accepted by all courts that a tenant is estopped to deny the title of his landlord. *Jackson v. Rowland,* (1831) 6 Wend. (N. Y.) 666, 22 Am. Dec. 557; *Beck v. Minn., etc., Co.,* (1906) 131 Ia. 62, 107 N.W. 1032, 7 L. R. A. (N.S.) 930; *Hoen v. Simmons,* (1850) 1 Cal. 119, 52 Am. Dec. 291. For exceptions to the rule, see 24 Cyc. 934; 16 R. C. L. 649. But there is no direct authority for allowing the tenant

to deny his landlord's title on the ground that title is in the government, as held in the instant case. What cases are found, are contra. *Ellis v. Fitzpatrick*, (1902) 118 Fed. 430, 55 C. C. A. 260, affg. 3 Ind. T. 656, 64 S. W. 567; *St. Anthony etc. Co., v. Morrison*, (1867) 12 Minn. 249 (Gil. 162). It appears that some courts do not even raise the question, although government title is admitted. *Hall, etc., Co. v. Wilbur*, (1892) 4 Wash. 644, 30 Pac. 665. The authority cited in the instant case was *Welder v. McComb*, (1895) 10 Tex. Civ. App. 85, 30 S. W. 822. That case may be distinguished from the instant case in that the court held that the tenant could deny his landlord's title, not merely because title was in the government, but because in Texas, public domain could not be made the subject of lease without a right from the state. This is in accord with the majority rule, which allows the removal of the estoppel when the making of the lease is unlawful or contrary to public policy. *Dupas v. Wassel*, (1870) 1 Dill. 213, Fed. Cas. 4, 182; *Milton v. Haden*, (1858) 32 Ala. 30, 70 Am. Dec. 523; note, 89 A. S. R. 74-75. There were no facts in the instant case tending to make the lease unlawful or at variance with public policy.

MONOPOLIES—COMBINATIONS IN RESTRAINT OF TRADE—EXCHANGE OF PRICE INFORMATION—INVALIDITY OF "OPEN COMPETITION PLAN."— Hardwood lumber manufacturers controlling a third of the hardwood lumber production of the country formed a voluntary association which devised an "open competition plan" for the declared purpose of disseminating trade information with a view to stabilizing the market and supplanting cutthroat competition with "co-operative competition." Under the plan, members made daily, weekly, and monthly reports of the minutest details of their business to a skilled analyst employed by the association to harmonize and digest the members' reports and send out reports to the members. Changes in prices by any member were immediately communicated to all members through this same clearing house of trade information. The analyst's reports were always accompanied with advice or appeals to self-interest. The members also held frequent meetings. The reports and meetings were open. There was no coercion, and membership in the plan was optional. The majority of the court found that the plan had effected a rise in prices and had restrained competition. It appeared to be skeptical of the avowed purposes of the plan. *Held*, (Justices Holmes, Brandeis, and McKenna dissenting) that this was a combination in restraint of competition in interstate commerce within the terms of the Sherman Anti-Trust Act. *American Column and Lumber Co., v. United States*, (1921) 42 S. C. R. 114.

This case seems to adopt an attitude contrary to *United States v. American Linseed Oil Co.*, (Dist. Ct. Ill. 1921) 275 Fed. 939, where it was held that association under an "open price plan" was not obnoxious to the anti-trust laws, that the burden of proof was on the government to show that the combination had in fact controlled prices, and that evidence of opportunity to control prices was not alone sufficient. In the instant case, however, there was proof of actual control. Mr. Justice Clarke,

speaking for the majority of the court in the instant case, says, "This is not the conduct of competitors. . . . To pronounce such abnormal conduct on the part of 365 natural competitors, controlling one third of the trade of the country in an article of prime necessity, a 'new form of competition,' and not an old form of combination in restraint of trade, as it so plainly is, would be for this court to confess itself blinded by words and forms to realities which men in general very plainly see, and understand and condemn, as an old evil in a new dress and with a new name." On the other hand, Mr. Justice Holmes replies, "I should have supposed that the Sherman Act did not set itself against knowledge—did not aim at a transitory cheapness unprofitable to the community as a whole because not corresponding to the actual conditions of the country. . . . I must add that the decree as it now stand seems to me surprising in a country of free speech that affects to regard education and knowledge as desirable."

MUNICIPAL CORPORATIONS—ORDER OF PAYMENT OF VILLAGE WARRANTS —IMPAIRMENT OF THE OBLIGATION OF CONTRACT BY VILLAGE ORDINANCE.— On April 21, 1921, the defendant village had an indebtedness of $600,000 in excess of the moneys in the hands of its treasurer, which indebtedness was evidenced by village warrants properly presented but not paid for want of funds. In June, 1921, according to its interpretation that Minn. Laws 1921, chap. 417 (effective April 21, 1921), was meant to put the business of the villages on a cash basis, the village council passed a resolution instructing the treasurer to pay only such warrants as had been issued since April 21, 1921. The plaintiffs held $240,000 worth of warrants issued prior to that date and contended that their warrants should first be paid, pursuant to G. S. Minn. 1913, sec. 1300, which provided that warrants shall be paid in the order of their presentation. Upon appeal by the village from an order enjoining it from carrying the resolution into effect, *Held,* that the injunction was proper, and that the order was an attempt to impair the obligation of village contracts. *First National Bank of Buhl, et al. v. Village of Buhl,* (Minn. 1922) 186 N. W. 306.

The result of this case is unquestionable, although it compels villages to use their entire annual tax levy to pay past-due warrants, and to issue new warrants for current expenses. Moreover, village employees and others currently contracting with a village thus find the payment of their warrants indefinitely postponed, especially where such warrants are sold with difficulty or only at great discount. And it may be that in view of the discount to which such warrants are subject, accounts against villages may be padded sufficiently to cover it, so that the municipality pays too much for anything it buys. But "the necessity of following for a time the unsound plan of finance heretofore adopted" cannot entitle villages to impair the obligation of their contracts.

MUNICIPAL CORPORATIONS—ELECTIONS—CONSTITUTIONAL LAW—PERMITTING ONLY TAXPAYERS TO VOTE ON BOND ISSUES—GOVERNMENTAL AND

PROPRIETARY CAPACITY OF MUNICIPALITY.—The state constitution provided that all persons having the qualifications prescribed by the constitution shall be entitled to vote on all questions submitted to the electors at any election. A municipal charter restricted the right to vote on bond issues, to tax-payers. *Held,* the charter provision is constitutional, the word "elections" in the constitution being construed to apply, in city elections, only to questions of a governmental nature as distinguished from those of a proprietary character. *Carville v. McBride,* (Nev., 1922) 202 Pac. 802.

The instant case is a novel application of the doctrine of the dual nature of a municipal corporation. The distinction between the governmental and proprietary functions of a municipality often has been resorted to to give the municipality the rights and liabilities, incident to the ownership of private property, of a private corporation, in certain actions in contract and tort. See 6 MINNESOTA LAW REVIEW 32, p. 41-54. No case has been discovered which relies on this distinction for the purpose of construing a statute or constitutional provision. A provision in a village charter prescribing other qualifications for voters at an election upon a proposition to raise money for village purposes than those prescribed by the constitution for the right to vote at general elections, has been held constitutional on the ground that the word "elections" in the constitution applied only to elections on questions submitted to the whole people of the state, and not to purely local matters. *Spitzer v. Village of Fulton,* (1900) 68 N. Y. S. 660, 33 Misc. Rep. 257. The court in the instant case might have placed its decision on this ground. The result reached in the instant case, viz., that only taxpayers can vote on municipal bond issues, is regarded as desirable by many, but it seems questionable whether such a result should be reached by constitutional construction and by further extending the doctrine of the dual nature of a municipal corporation.

NEGLIGENCE—DOCTRINE OF RES IPSA LOQUITUR APPLIED TO EXPLOSION OF STEAM BOILER.—The defendant laundry company owned and operated a steam boiler on premises leased from the plaintiff. It had exclusive control of the operation and management of the boiler. The boiler exploded and injured the plaintiff's property. Plaintiff sued for damages. *Held,* that the doctrine of res ipsa loquitur applies. *Kleinman v. Banner Laundry Co.,* (Minn. 1921) 186 N. W. 123.

There are two distinct holdings on this question. The majority of the courts have concurred in the opinion that there is no presumption of negligence to be deduced from the explosion of the boiler and that the doctrine of res ipsa loquitur does not apply. *Bishop v. Brown,* (1900) 14 Colo. App. 535, 61 Pac. 50; 20 R. C. L. 192; 29 Cyc. 594; note, 113 A. S. R. 1015; note, Ann. Cas. 1912A 980. This view is based on the theory that as a general proposition, boilers do not explode; that even educated engineers have been unable to find out the reasons why they explode; and that there is no known cause to which a boiler explosion can be attributed without proof of some specific act of negligence. It

is said that a contrary rule would almost forbid the use of boilers for many purposes to which they are now regarded as indispensable. *Bishop v. Brown,* (1900) 14 Colo. App. 535, 61 Pac. 50. There is a minority rule holding with the instant decision that in the case of the explosion of a boiler the doctrine of res ipsa loquitur does apply. *Lykiardopoulo v. New Orleans, etc., R. Co.,* (1910) 127 La. 309, 53 So. 575, Ann. Cas. 1912A 976, and note. This is based on the idea that as a rule the injured party is without information upon which he may with certainty allege the exact cause of the explosion and that the person having charge of the instrumentality would have the actual proof, if any, of the cause of the explosion. *Lykiardopoulo v. New Orleans, etc., R. Co.,* (1910) 127 La. 309, 53 So. 575, Ann. Cas. 1912A 976, and note.

The Minnesota court has held that the bursting of a boiler on a steamboat was prima facie evidence of negligence, but that holding was based on a federal statute. *McMahon v. Davidson,* (1867) 12 Minn. 357 (Gil. 232). The court in the instant case takes a decided stand and adopts the minority rule on the ground that by the application of the doctrine in such cases justice may be more practically and fairly administered.

NEW TRIAL—IMPEACHMENT OF VERDICT—AFFIDAVIT OF JUROR—QUOTIENT VERDICT.—To set aside a verdict, defendant presented affidavits of two jurors who had participated in the verdict, and other affidavits tending to prove that the verdict was a quotient verdict. *Held,* that evidence by jurors to impeach their verdict is inadmissible, and that a quotient verdict, not the result of a prior agreement, is valid. *Okla., K. & M. Ry. Co. v. McGhee,* (Okla. 1921) 202 Pac. 277.

It is well settled that affidavits of jurors tending to impeach their verdict are inadmissible on grounds of public policy, *Bradt v. Rommel,* (1880) 26 Minn. 505, 5 N. W. 680; *Ruckle v. American Car & Foundry Co.,* (1912) 194 Fed. 459, affirmed in C. C. A., 200 Fed. 47, although some courts have drawn a distinction between evidence as to "overt acts accessible to the knowledge of all the jurors" and "matters resting in the personal consciousness of a single juror" and admit evidence of jurors as to the former but not as to the latter. *Mattox v. United States,* (1892) 146 U. S. 140, 13 S. C. R. 50, 36 L. Ed. 917. Thus where the verdict is reached by resorting to chance, the affidavits of the jurors will be admitted. *Johnson v. Husband,* (1879) 22 Kan. 277. Some states reach the same result by statute. *Long v. Collins,* (1900) 12 S. D. 621, 82 N. W. 95; *Manix v. Malony,* (1858) 7 Ia. 81. The general rule above stated applies as well to the case of jurors dissenting from non-unanimous verdicts, where such verdicts are allowed. *Saltzman v. Sunset Tel. & Tel. Co.,* (1899) 125 Cal. 501, 58 Pac. 169; *Mobile & O. R. Co. v. Farrior,* (1917) 115 Miss. 96, 75 So. 777. Where extraneous evidence is adduced, however, to prove that the verdict was the result of a prior agreement to render a quotient verdict, the verdict is universally set aside. *Chicago, etc., R. Co. v. McDaniel,* (1892) 134 Ind. 166, 32 N. E. 728; *Ill. Cent. R. Co. v. Able,* (1871) 59 Ill. 131. The vicious feature of a quotient verdict

consists in the agreement of the jurors to disregard their own judgment and be bound by the result obtained by such a method; but where no such agreement is proved, the court will not disturb the verdict. *Reick v. Great Nor. Ry. Co.*, (1915) 129 Minn. 14, 151 N. W. 408; *Janesovsky v. Rathman*, (Neb. 1921) 185 N. W. 411; *Fox v. McCormick*, (Kan. 1921) 202 Pac. 614. It follows logically that where the amount arrived at by the quotient method is subsequently assented to by each juror as a just verdict and as the expression of his judgment, the verdict will be upheld. *Dana v. Tucker*, (1809) 4 Johns. (N. Y.) 487; *Consol. Ice Mach. Co. v. Trenton, etc., Co.*, (1893) 57 Fed. 898; *Florence, etc., Co. v. Kerr*, (1915) 59 Colo. 539, 151 Pac. 439. But in general, such verdicts are not considered commendable. *Inter. etc., R. Co. v. Lane*, (Tex. Civ. App. 1910) 127 S. W. 1066. For further discussion see 1 MINNESOTA LAW REVIEW 189; 5 MINNESOTA LAW REVIEW 235.

STRIKES AND BOYCOTTS—PICKETING—TRADE UNIONS WITHIN MEANING OF ANTI-TRUST STATUTE—INJUNCTION AGAINST STATEMENTS IN LABOR NEWSPAPER.—Plaintiff, proprietor of a motion picture theatre, in order to cut down expenses, dismissed operators of the defendant union and operated his own machine. After abortive attempts at compromise by the plaintiff, the defendant had a resolution passed in the Trades & Labor Assembly, an association of unions to which the defendant belonged, declaring plaintiff and his theatre unfair to organized labor; in addition, it aggressively picketed and bannered his theatre, and published his name in the "We Do Not Patronize List" of the Minneapolis Labor Review, together with articles charging plaintiff with unfairness. At the trial the evidence showed that as a direct result of the picketing and boycotting plaintiff suffered serious financial damage, and therefore an injunction was issued enjoining all of the above practices. *Held*, (Justices Dibell and Hallam dissenting) that the injunction was proper; that a private person may enjoin a violation of the anti-trust statute even though the violation is also a criminal offense; that a combination by labor unions to boycott a theatre was a combination in restraint of trade under the state anti-trust act; that the publication of the statement that plaintiff was unfair to organized labor was made in furtherance of an unlawful combination to restrain plaintiff's trade; and that the judgment enjoining continued publication was not too broad and did not deprive the defendants of the freedom of speech guaranteed by the constitution. *Campbell v. Motion Picture Operators' Union of Minneapolis, Local 219, et al.*, (Minn. Jan. 27, 1922).

The majority opinion, after a careful analysis and comparison of the state and federal anti-trust statutes and the decisions under them, expresses what is perhaps the main reason for the decision as follows: "It would be an anomalous situation to have the federal courts sitting in this state administering one rule in the adjustment or control of labor troubles, while the state courts at the same time are administering another and different rule upon the same facts—a condition inviting disrespect for law and leading to confusion and disorder."

The recent United States Supreme Court decisions of *American Steel*

Foundries v. Tri-City, etc., Council, (1921) 42 S. C. R. 72, and *Truax v. Corrigan*, (1921) 42 S. C. R. 124, are cited as fully supporting, and do support, the attitude of the majority of the court in regard to the defensive activities of labor unions. The dissenting opinion proceeds on the grounds (1) that the state anti-trust act was not intended to apply to labor unions, and (2) that viewed as an injunction on common law principles, the judgment went too far in restricting the activities of labor in peaceably putting its side of the controversy before the public and advocating its views through its newspaper organ. "It is going a long way," it is said, " for equity . . . to supervise the conduct of a trade paper in the midst of a class struggle." For previous discussions of the Minnesota boycotting and picketing cases see 1 MINNESOTA LAW REVIEW 437; 4 MINNESOTA LAW REVIEW 544; see also 6 MINNESOTA LAW REVIEW 252.

TAXATION—CONSTITUTIONAL LAW—MOTOR VEHICLES—UNIFORMITY OF TAXATION—PRIVILEGE OR PROPERTY TAX.—The relator presented an application blank in due form for the registration of his motor truck under the Motor Vehicle Registration Act of Missouri, tendering one dollar in payment of fees. Registration of the truck was refused unless the relator paid the statutory fee of ten dollars, which fee was calculated according to a graduated schedule of horse-power ratings. *Held*, that the fee so fixed was a license tax imposed for the privilege of using the highways of the state, and not a tax on property, and that therefore the tax was not rendered unconstitutional under the uniformity clause of the state constitution. *State ex rel. McClung v. Becker, Secretary of State*, (Mo. 1921) 233 S. W. 54.

The great weight of authority supports the instant case in holding that the provision of state constitutions requiring that taxes shall be uniform on the same class of subjects is not violated by a law imposing fees and taxes for the privilege of using the public highways, where the proceeds are directed to be paid into a fund for road-building purposes. *Atkins v. State Highway Dept.*, (Tex. Civ. App. 1918) 201 S. W. 226; *In re Kessler*, (1915) 26 Idaho 764, 146 Pac. 113, L. R. A. 1915D 322; Ann. Cas. 1917A 228; *Kane v. New Jersey*, (1911) 81 N. J. L. 594, 80 Atl. 453, L. R. A. 1917B 553, affirmed, 242 U. S. 160, 37 S. C. R. 30, 61 L. Ed. 222; 17 R. C. L. 483, 518; 26 R. C. L. 261-2; Berry, Automobiles, 3rd Ed., p. 115. It is nevertheless a license tax and not a property tax although levied "in lieu of all taxes, general and local, to which motor vehicles may be subject." *State ex rel. City of Fargo v. Wets*, (1918) 40 N. D. 299, 168 N. W. 835, 5 A. L. R. 731, and note, 759. Nor does the fact that an ad valorem tax is also levied upon the same vehicle render the statute objectionable on the ground of double taxation. *Ex parte Schuler*, (1914) 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915C 706.

The question of the constitutionality of the Minnesota motor vehicles tax law (Minn. Laws 1921, chap. 461, passed pursuant to article 16 of the state constitution, reprinted Minn. Laws 1919, chap. 530, and popularly known as the Babcock Amendment) was recently raised in

Dohs v. Holm, before Hanft, J., in the Ramsey County district court and is now before the supreme court on appeal. It appears that the court will be called upon to determine at the outset whether the payment required by statute is a property or excise tax, also known as a license or privilege tax. See 26 R. C. L. 34-35; 17 R. C. L. 478; 35 Harv. L. Rev. 70.

In *Mutual Benefit Insurance Co. v. County of Martin*, (1908) 104 Minn. 179, 116 N. W. 572, upholding the validity of the mortgage registration tax, the Minnesota court, the difference not having been urged, seems to regard as a property tax, and applies the test of the uniformity clause to, what is elsewhere generally considered to be a privilege tax. See *Trustees, etc., v. Hooton*, (1915) 53 Okla. 530, 157 Pac. 293, L. R. A. 1916 E 602; note to *Wheeler v. Weightman*, (1915) 96 Kan. 50, 149 Pac. 977, L. R. A. 1916A 846; and later Minnesota cases, *First State Bank of Boyd v. Haydn*, (1913) 121 Minn. 45, 50, 140 N. W. 132; Greenfield v. Taylor, (1919) 141 Minn. 399, 170 N. W. 345, which seem to show that the tax is not imposed in virtue of the mere ownership of the mortgage, but only as a condition precedent to recording, etc., that is, as a privilege tax.

The phrases in the recent Amendment and statute such as "tax imposed on motor vehicles," "listing for taxation," "such tax shall be in lieu of all other taxes, except," etc., are not alone determinative of the question. If the basis of differentiation is the use of the highway, and the higher tax payable only if the highway is used, the tax strongly approaches an excise or privilege tax. If the tax is held to be a property tax, it must then conform to Minn. const., art. 9, sec. 1, requiring that "taxes shall be uniform upon the same class of subjects," and, it would seem, that, to satisfy due process, it must be reasonably proportioned to the *actual value* of the specific vehicle, and not according to an artificial value, contrary-to-fact, fixed by legislative fiat. Cooley Taxation 3rd Ed., p. 753-754; *Webb v. Renfrew*, (1898) 7 Okla. 198, 205, 54 Pac. 448; *Taxation of Mining Claims*, (1886) 9 Colo. 635, 638; *Ellis v. Frazier*, (1901) 38 Ore. 462, 63 Pac. 642, 53 L. R. A. 454; *Slaughter v. Louisville*, (1889) 89 Ky. 112, 123, 8 S. W. 917; *Matter of Trustees of Union College*, (1891) 129 N. Y. 308, 29 N. E. 460; *In re Page*, (1899) 60 Kan. 842, 58 Pac. 478, 47 L. R. A. 68; 26 R. C. L. 342, 365, ff;see also *Cent. R. R. v. Board of Assessors*, (1886) 49 N. J. L. 1, 7 Atl. 306 (cost not a guide). Minn. const., art. 9, sec. 1, seems to imply the requirement of an actual cash valuation. On the other hand, if the court decides that the vehicle tax is a tax upon the privilege of using the highway, it appears from the cases first cited above that there are no constitutional limitations upon the action of the legislature except that the classifications must be reasonable, and that the tax must operate equally upon all persons of a given class. See also 17 R. C. L. 508; 26 R. C. L. 258-261. If an excise, it does not become a property tax because proportioned to the value of the property used in connection with the privilege. *Salt Lake City v. Christenson Co.*, (1908) 34 Utah 38, 95 Pac. 523, 17 L. R. A. (N.S.) 898; 26 R. C. L. 36, 261. But if value is made the basis of classification, it would seem that only the *actual value*, and

not a fictitious value fixed without regard to actual depreciation, can constitutionally satisfy the requirement of due process. Where only a flat rate is exacted for a privilege without reference to the value of the property enjoying it, there is no such difficulty. It is suggested in the instant Missouri case that where a vehicle tax is a license tax, it is properly based, not upon the value of the machine, but upon the amount of destruction caused by it to the road, i. e., the basis of taxation ought to have some relation to the character of the privilege. See also *Ex parte Schuler,* (1914) 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915C 706; *Kane v. New Jersey,* (1911) 81 N. J. L. 594, 80 Atl. 453, L. R. A. 1917B 553. Under the Minnesota act it is difficult to perceive how the manufacturer's retail price, based as it is on competition and subject to frequent fluctuation, bears this relation. But it may be that the minimum taxes fixed by the statute, which are based on weight without regard to the original purchase price, are so severable from the rest of the statute that they can stand alone as a privilege tax. If the court holds the statute unconstitutional, in whole or in part, the state road program will be seriously embarrassed, but it has been said that "delay in road construction . . . is far better, far less hurtful, than constitutional destruction." *Johnson v. Craft,* (1921) 205 Ala. 386, 405, 87 So. 375.

UNFAIR COMPETITION—MONOPOLIES—RESTRAINT OF TRADE—FEDERAL TRADE COMMISSION—CONTROL OF RESALE PRICES.—Defendant corporation by co-operating with jobbers and retailers in the detection of price cutters and refusing to sell its products to such jobbers and retailers as refused to sell at prices suggested by it or to jobbers who sold to price-cutting retailers, succeeded in dictating the wholesale and retail prices of its products. *Held,* affirming and modifying an order of the Federal Trade Commission, that even in the absence of contract (or patent or copyright monopoly) the methods used to maintain prices were against public policy as unduly tending to hinder competition and to create monopoly, and constituted unfair methods of competition. *Federal Trade Commission v. Beech-Nut Packing Co.,* (1922) 42 S. C. R. 150 (four justices dissenting).

Prior to the instant case, the same court has held that the clusive right to vend a copyrighted work given by the copyright act does not give the right to prescribe or control a resale price of the article after the power to vend has once been exercised by passing title to a wholesaler or other dealer. *Bobbs-Merrill v. Straus,* (1908) 210 U. S. 339, 28 S. C. R. 722, 52 L. Ed. 1086. The same rule was held to apply to patented goods. *Bauer v. O'Donnell,* (1913) 229 U. S. 1, 33 S. C. R. 616, 57 L. Ed. 1041. Nor can the holder of a patent dictate resale prices by such subterfuges as "license contracts" purporting to retain title in the said holder and granting a license to use only under restrictions when in fact title had passed to the retailer. *Straus v. Victor Talking Machine Co.,* (1917) 243 U. S. 490, 37 S. C. R. 412, 61 L. Ed. 866. It has likewise been held that the manufacturer of an unpatented article cannot control or maintain resale prices by means of contract after title to the goods has

passed to the retailer. *Dr. Miles Co. v. Park and Sons Co.*, (1911) 220 U. S. 373, 31 S. C. R. 376, 55 L. Ed. 502. And in *Motion Picture Patents Co. v. Universal Film Co.*, (1917) 243 U. S. 502, 37 S. C. R. 416, 61 L. Ed. 871, it was held that the exclusive right to use, as given by the patent laws, did not extend to the holder of the patent the right to prescribe resale prices after a sale to wholesalers or to restrict the use of the machine to certain articles prescribed by the holder of the patent, overruling *Henry v. Dick*, (1912) 224 U. S. 1, 32 S. C. R. 364, 56 L. Ed. 645. In another case it was held that an attempt to maintain retail prices of copyrighted books by an association of copyright holders by refusal to sell to price cutters was in violation of the Sherman Anti-Trust Act. *Straus v. American Pub. Ass'n.*, (1913) 231 U. S. 222, 58 L. Ed. 192, 34 S. C. R. 84. In *Boston Store v. American Graphophone Co.*, (1918) 246 U. S. 8, 38 S. C. R. 257, 62 L. Ed. 531, the right to control resale prices of patented goods after a completed sale to the retailer, through contract to that effect, was reasserted. White, C. J., reviewed the decisions of the court to date and pointed out that the cases held such price fixing contracts "contrary to the general law and void."

The instant case extends the doctrine of the former cases by including a case where there is no contract to maintain prices, and by restraining such unfair methods of competition through the Federal Trade Commission Act,—where the Sherman Act could perhaps not be resorted to,—regardless of contract, or patent or copyright monopoly. See for a case under the Sherman Act, *American Column & Lumber Co. v. United States*, (1921) 42 S. C. R. 114, discussed *supra*, p. 329.

BOOK REVIEW

MODERN DEMOCRACIES. By James Bryce (Viscount Bryce). The MacMillan Company, New York, 1921. In two volumes, 508 and 676 pages.

No one can read MODERN DEMOCRACIES without being filled with a missionary zeal to make his neighbor read it, for the neighbor's good and the country's welfare. And yet it is no mark of pessimism to recognize that the proportion of tired business men or even of tired lawyers who will actually peruse the eleven hundred pages of these two sturdy volumes, entertaining as they are, will be pitiably small. The greater the number, however, of the citizens who know something about this great book even if they do not read it, or read all of it, the more vigorous and far-reaching will its influence be. No further justification than this need be sought for adding another published comment to the long list of reviews in newspapers and periodicals which greeted its appearance some nine months ago.

The death of Lord Bryce in January of this year called forth such a mass of biographical comment in the Anglo-American press that it would be superfluous to discuss at any length the man himself. It is sufficient to say that no one else could have written Modern Democracies. He was a scholar not only in his wide and profound learning in history,

law and the science of government, but in his easy familiarity with that which is best in the literature of the world, ancient and modern. He travelled to the ends of the earth and visited most of the countries about which he writes, not once, but again and again. His active participation in politics made him a member of numerous British Liberal cabinets and assigned him to important diplomatic posts. Upon his wealth of learning, observation and practical experience he brought to bear a sanity and ripeness of judgment, a moderation and sympathy in the treatment of controversial matters which compels both admiration and confidence, and which has led one reviewer to exclaim, "Would that daily doses of Bryce might be ministered to all who are afflicted with the easy arrogance of ignorance." And finally he could write. Not only is he clear but he is entertaining, with a wealth of illustration, a picturesque and striking mode of expression and a keenness of humor which never becomes ill-natured. These were the qualities which produced Modern Democracies.

The book itself undertakes to examine the multitudinous phenomena of democratic government in the modern world in order to determine how it has worked, why it has worked that way, what its merits and defects are, and what its future may be expected to be. With a precision and clarity of organization which characterizes all his work the author divides his book into three parts. The first of these he devotes to "Considerations Applicable to Democratic Government in General." Here, in about one hundred and fifty pages, one finds a brief survey of the ideas and doctrines upon which popular government rests, such as liberty and equality, together with certain operative factors which have determined its working. These include education, religion, the press, traditions, party spirit and organization, and public opinion.

The major portion of the book is devoted primarily to a description of six modern democratic governments. Those chosen for treatment are France, Switzerland, the United States, Canada, Australia and New Zealand. From this list of modern democracies Lord Bryce reluctantly excludes England, not because he does not regard its government as democratic, but, because to use his own words, "no citizen of Britain, and certainly no citizen who has himself taken a part in politics as a member, during forty years, of legislatures and cabinets, can expect to be credited with impartiality, however earnestly he may strive to be impartial. I have therefore been reluctantly obliged to leave this branch of the subject to some one, preferably some American or French scholar, who is not affected by a like disability." The study of the six governments selected for extended treatment is preceded by a brief chapter on the republics of ancient Greece. Another on the Spanish American Republics is included because these republics "indicate what happens when an attemt is made to establish popular self-government where the conditions necessary for it working are absent." (p. 188). It is impossible to do more than comment most briefly upon the masterly essays in which the six democracies mentioned above are presented for consideration. They do not aim to present all the facts about any of these

governments, but only those facts which relate to the problems and operation of democratic government. In each case there is a brief survey of the physical and economic character of the country and the main steps in its constitutional history. There follows a compact description of the essentials of its frame of government. The actual working of democracy in its various ways is then traced in chapters dealing with political parties and public opinion. Finally there is a summary of the unique contributions which each government considered has made to the science of democratic government and an estimate of its relative merits and defects. In each case the description and analysis are based on careful and penetrating observation. Shortcomings and mistakes are laid bare with friendly frankness, and adverse comments are buttressed by an amount of evidence and a clarity of reasoning which disarms resentment. The American reader will note with interest and with some shock to his pride that Lord Bryce regards Switzerland as the country in which on the whole democratic government has worked most successfully. "Democracy is there more truly democratic than in any other country." (II, 449).

The third part of the book is devoted to the statement of conclusions and deductions drawn from the study of the six democracies mentioned. The first group of these take the form of general criticisms of democratic institutions. Here are Lord Bryce's chapters upon the "decline" and "pathology" of legislatures, democracy and foreign policy, the executive and judiciary, direct legislation, and kindred topics. There follow four short chapters of observations on certain phenomena which bear on the working of democracy everywhere such as the money power in politics, the problem of responsibility in government, and the relation of democracy to art and letters. Finally the author sums up his views upon the actual results of democracy, compares it with other types of government, analyzes its present tendencies, and with caution forecasts its future.

There is space here to do no more than indicate some of the more striking and interesting of the author's views. It is his deep-rooted conviction in the first place, that "the best school for democracy, and the best guarantee for its success is local self-government." (I, 133). It is the practice of citizenship rather than learning derived from books and schools which makes democracy succeed. This is not a criticism of education but merely a recognition of the fact that "attainments in learning and science do little to make men wise in politics." (I, 78). In the second place, Lord Bryce applies throughout practical rather than theoretical tests to the working of democratic government. Democracy is desirable for a nation, if at all, not because it is democracy, but because conditions make its operation possible. "Whatever the plans of theorists and the exhortations of the wise, every people comes sooner or later to that kind of government which the facts prescribe." (I, 204). Thus the people do not rule in the nominal democracy in Mexico because they cannot rule and similar considerations would render it "folly to set up a full-blown democracy" in any of the really backward nations

such as China, Persia, Russia or Egypt. In this connection Americans are criticized for the slavish adherence to the dogma of popular sovereignty which led them not only to enfranchise negroes obviously unfit for the suffrage but also to impose upon the American electorates duties more numerous and complex than they have ever shown themselves capable of performing. Bryce makes no effort to conceal his disapproval of our insistence upon the popular election of long rows of insignificant officials. In the third place, lawyers will note with interest that the author is vigorously opposed to the popular election of judicial officers, the recall of judges or decisions, and views with concern any evidence of diminution in the respect in which the bench is held. At the same time he does not spare our American system of civil procedure which is bad and of criminal procedure which is worse. (II, Ch. XLIII). It may be noted, in the fourth place, that one of the greatest causes for discouragement which the author finds in the working of democratic government is the indifference to civic obligations not of the voter merely but of that highly trained and educated class who ought to provide capable leadership but who are too absorbed in their personal and private concerns to do so. Finally it may be observed that a certain undercurrent of something akin to pessimism runs through the book. It may not actually be pessimism but it is certainly a guarded and reserved enthusiasm for past achievements of democracy on the part of one who quite obviously would have liked to find those achievements altogether noble and inspiring. Democracy has not failed. On the whole it is better than the other forms of government, monarchy and oligarchy. But it has fallen far short of its possibilities and early promises and it is in these modern days beset by new dangers so menacing and insidious in character as to give grounds for grave concern. So run the author's conclusions. And yet Lord Bryce is unwilling to write himself down as discouraged and the concluding paragraphs of this great book voicing his hope for the future of democracy may be left with the reader.

"Less has been achieved than they [modern reformers] expected, but nothing has happened to destroy the belief that among the citizens free countries the sense of duty and the love of peace will grow steadily stronger. The experiment has not failed, for the world is after all a better place than it was under other kinds of government, and the faith that it may be made better still survives. Without Faith nothing is accomplished and Hope is the mainspring of Faith. Throughout the course of history every winter of despondency has been followed by a joyous springtime of hope.

"Hope, often disappointed but always renewed, is the anchor by which the ship that carries democracy and its fortunes will have to ride out this latest storm as it has ridden out many storms before. There is an Eastern story of a king with an uncertain temper who desired his astrologer to discover from the stars when his death would come. The astrologer, having cast the horoscope, replied that he could not find the date, but had ascertained only this, that the king's death would follow immediately on his own. So may it be said that Democracy will never perish till after Hope has expired."

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ELECTION OF REMEDIES

By Amos S. Deinard and Benedict S. Deinard*

THE rule of election of remedies is to the effect that the choice of one among inconsistent remedies bars recourse to the others.[1] The requirements for operation of the rule are all implied in its definition. Two remedies in fact must coexist.[2] Otherwise, choice would be impossible. The remedies must be in law inconsistent.[3] Otherwise, choice of one could not conceivably be prejudicial. The remedies must exist for the same wrong. Otherwise, there could be no necessity for choice.

The entire significance of the rule thus lies in the fact that it works to preclude resort to further remedies. Thereby it makes a choice between inconsistent remedies conclusive and irrevocable from the start. Nothing in the law would seem better settled than this result. It has been repeated in almost identical terms in numberless cases in every jurisdiction.[4] It has attained to the sanctity of a legal maxim, and is quoted with the same platitudinous assurance. In the profound manner of Ulpian when he allowed himself to proclaim that "just as the Greeks say, some laws are written and some unwritten,"[5] so judges thrill to an-

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[1]Moss v. Marks, (1904) 70 Neb. 701, 97 N. W. 1031.

[2]Bierce v. Hutchins, (1906) 205 U. S. 340, 27 S. C. R. 524, 51 L. Ed. 828.

[3]Zimmerman v. Harding, (1912) 227 U. S. 489, 33 S. C. R. 387, 57 L. Ed. 608.

[4]20 Corpus Juris, sec. 18 ff.

[5]Institutes, I, 2, sec. 3.

nounce that "when a man has two inconsistent remedies, by pursuing one he bars resort to the other."

But this rule, of such easy definition and simple consequence, requires a more searching analysis, to enable us to discover its meaning and the basis of its operation. Granted the uniqueness of its effect, which is so consistently admitted, is there any corresponding definiteness in the situations to which it is properly to be applied? The definition can give no more than the formal incidents and conclusion of the rule ex vacuo. The problems lie deeper. When are legal alternatives to be classified as remedies? When and why are they inconsistent in law? What constitutes a choice or election between them?

Anyone who supposes that the rule is of easy application need only glance at the digests, with their hundreds of heterogeneous cases grouped under the caption of "Election of Remedies," to be convinced that the compilers at least have not found it so. Under the purported guidance of the rule, the courts have settled diverse questions of law having few if any points of similarity. The only thread of identity that runs through them all is the assumed conclusiveness of choice. Consider, for instance, this simple statement: "The term has been generally limited to a choice by a party between inconsistent remedial rights,"[6] in support of which the following is adduced:[7]

"Thus, 'if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election: Co. Lit. 145a. So a man may ratify or repudiate an unauthorized act done in his name. . . . He may take the goods or the price when he has been induced by a fraud to sell. . . . He may keep in force or may avoid a contract after the breach of a condition in his favor,' *Bierce v. Hutchins.* 205 U. S. 340, 346, 27 S. C. R. 524, 51 L. Ed. 828."

It will be submitted that none of the examples in fact involve an election between remedies. To suppose the contrary is simply to assert that every irrevocable choice, or election, is an election between remedies. So stated, such an assertion is patently false. Yet from this assertion, implicity made, the confusion in the cases proceeds. *Election of remedies* is taken to comprehend the entire field of *election*: the inevitable consequences of an election in some other department of the law are predicated as of course to an election between remedies. No necessity for dis-

[6] 20 Corpus Juris, sec. 1.
[7] 20 Corpus Juris, sec. 1, N. 3a.

crimination is considered: "Election" and "conclusiveness" are assumed to rest in a preordained and universal harmony.

It is therefore necessary to consider the meaning and scope of "election" as a descriptive term, to ascertain the occasions of its occurrence, and to distribute the cases properly.

ELECTION

"Election," in its generic sense, describes the right or duty of a person faced by a given situation to make a definitive choice between various courses of action. It may as well mean a choice of substantive rights in a given transaction as a selection of remedies for a specific wrong. "An election is the choice between two or more courses of action, rights or things, by one who cannot enjoy the benefits of both."[8] As the nature of the situation is different in almost every case, so a priori the right to elect may mean quite different things. Originally underlying every case is only the simple necessity of selecting one possibility and discarding the others. "For the situation in all classes of cases is to this extent the same: One person is possessed of the right of choice (between two properties, between continuation and termination of a contract, between two remedies), and some other person's interest will be affected by the choice. So far there is identity; but it may very well be that for the proper adjustment of rights, different rules may be found to be necessary for the different classes of cases."[9]

It is a difficult matter to dissolve this complexity of situations. We have found no better analysis or classification than that made by Mr. Ewart in his brilliant polemic on "Waiver Distributed among the Departments: Election etc." He, it is true, was concerned primarily with the demolition of the concept of "waiver." But he found that "waiver" on a true interpretation of the facts can be nothing but an "election" based upon contract, or, less frequently, an estoppel, contract, or release. And he found it possible to classify all the important cases of election in the following way:

"1. Election between two properties;

2. Election (part of the substantive law) between termination and continuation of contractual relations; in other words, election between two legal situations;

[8] Allis v. Hall, (1904) 76 Conn. 322, (339), 56 Atl. 637.
[9] Ewart, Waiver 71.

3. Election (part of the adjective law) between two or more remedies."[10]

It is to the third category, that of election of remedies, that the present inquiry is directed. For to that category only the so-called rule of election of remedies by definition applies. But we shall first briefly discuss the necessity and consequences of an election in the two other categories, with the view of tracing their relationship, if any, to an election between remedies. We shall therefore follow the schema of Mr. Ewart.

Election Between Properties

Between Property and Devise. This *doctrine* of election, often known as the doctrine of equitable election, is of restricted operation, and is pertinent in this connection only as it will furnish useful analogies, and as it may help to explain the derivation and basis of the related *rule* of election of remedies. The most familiar instance of the doctrine is that of election under a will, as where a testator in disposing of his own property purports to dispose of property that does not belong to him. X devises land to A upon condition that A transfer his own property to B, or release an obligation running to A from B. A must elect whether to take under the will or against it. Mr. Jarman seemed to consider the doctrine as necessary to the unified interpretation of the will, in order to carry out the testator's intent.[12] "The doctrine of election," he said, "may be thus stated: That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it." Mr. Pomeroy thought the doctrine an expression of the Chancellor's maxim that "He who seeks equity must do equity."[13] Mr. Ewart explains it on the ground of the "attachment of a tacit condition to the gift."[14] These are the varying views of the commentators. Among the English Chancellors and Judges there was as great diversity of opinion.

[10]Ewart, Waiver 67.

[11]For analogous cases see Bigelow, Estoppel, 5th Ed., 673 ff.

[12]Jarman, Wills, 6th Eng. Ed., 538. The editors seem to have repudiated Mr. Jarman's idea, for in another place they say: "The doctrine does not depend on any supposed intention of the testator, but is based on a general principle of equity." Ibid. 534. This view is supported by the holding that the doctrine applies when a gift is made under an erroneous belief of ownership. Whistler v. Webster, (1794) 2 Ves. Jun. 367. But see 1 Sw. 401.

[13]Pomeroy, Equity, Jur., 3rd Ed., sec. 395, 461, 466.

[14]Ewart, Waiver 68.

Lord Commissioner Eyre declared: "There never can be a case of election, but upon a presumed intention of the testator."[15] Lord Rossalyn represented Chief Justice de Grey to have referred the doctrine to a natural equity as distinguished from an implied condition.[16] But it has been said that "Lord Chief Justice de Grey meant to state the distinction, not between an implied condition and an equity, but between an express condition, and an equity arising from an implied condition."[17] Lord Redesdale said: "The rule of election, I take to be . . . a rule of law, as well as of equity." But Lord Hardwicke and Lord Eldon described the right as founded on a benevolent equity alone.[18]

In *Sherman v. Lewis*,[19] Judge Mitchell excellently summarized the basis of an election. "It must be clear," he said, "beyond reasonable doubt that the testator has intentionally assumed to dispose of the property of the beneficiary, who is required on that account to give up his own gift." Thus, in *Brown v. Brown*,[20] X, the owner of an entire city lot, deeded one quarter to her son A, who built a house and resided there; afterwards X by will devised to A and his two brothers, share and share alike, the entire lot including the quarter previously deeded to A. It was held that A must elect whether to accept the share of the property devised to him and consent to its disposition as provided in the will, or to retain the part he owned.

Between Dower and Devise. We have considered a situation in which the testator gives away property already belonging to the devisee, in return for the devise. Once the law was settled, each case required only a fair interpretation of the document under which the devisee claimed. But the application is complicated when the devisee has only a spouse's interest in the testator's property. If X devises land to his widow A, must A relinquish her right to dower in the other lands disposed of by the will, in order to claim the devise? If X really intended A to take her devise only on condition of giving up her dower interest in the other lands, there would be a clear case for election between her

[15]Crosbie v. Murray, (1792) 1 Ves. Jun. 555 (557).
[16]Rutter v. MacLean, (1799) 4 Ves. 531 (538).
[17]Dillon v. Parker, (1818) 1 Sw. 359, Note at 401 ff.
[18]Birmingham v. Kirwan, (1805) 2 Schoales & Lefr. 444 (450); Gretton v. Haward, (1818) 1 Sw. 409, Note at 425 ff.
[19](1890) 44 Minn. 107, 46 N. W. 318. Acc., Washburn v. Van Steenwyk, (1884) 32 Minn. 336, 30 N. W. 324; Johnson v. Johnson, (1884) 32 Minn. 513, 21 N. W. 725; In Re Gotzian, (1885) 34 Minn. 159, 24 N. W. 920.

claims as devisee and as doweress. But since there was rarely any express direction to this effect, the common law was driven to presumptions. In case of a general devise, A was not required to elect, for it was said that X had not intended the devise in satisfaction of dower. However, if X introduced into the devise a special provision irreconcilable with A's claim of dower, then the expression of the testator's intention was unequivocal, and A was forced to elect between her dower and the benefits under the will.[21] The test was regarded as one of intention to be collected from the whole will.[22]

Since the Statute of 1834, in England dower may be barred by a general disposition of the property, by an incumbrance placed thereon, by a declaration in the will, or by various gifts in satisfaction of dower. In these cases A cannot disappoint the will but must elect between its terms and her right of dower.[23]

The same doctrine of election between dower and devise, where the testator intended the devise to be in lieu of dower, prevails in the United States. Page states the rule as follows:[24]

"Where it is clear, either from specific provisions, or from the will as a whole, that the testator intends a provision for the surviving spouse to be in lieu of the curtesy or dower rights of such surviving spouse, full effect is to be given to such intention, and the surviving spouse must then elect between the two provisions."

This intention may be declared by express language, or may be created by necessary implication, as where it would be impossible to effectuate the provisions of the will if the surviving spouse were allowed to take both devise and dower interest.

By statute Minnesota has repudiated the common law rule.[25] The Statute now in force enacts[26] that if a deceased parent by will

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[20](1890) 42 Minn. 270, 44 N. W. 250.

[21]Jarman, Wills, 6th Eng. Ed., 547 ff.

[22]In Re Harris, [1909] 2 Ch. 206, 23 H. L. R. 138.

[23]3 & 4 Will. 4, c.105.

[24]Page, Wills, sec. 711. Snell, Principles of Equity, Ch. on Election; Stalman, Law of Election, Appendix (1827).

[25]The first statute of the state provided that a devise in the will should be in lieu of a widow's right unless a contrary intention "plainly appears by the will to have been so intended by the testator." See Rev. St. 1851 c.49, sec. 18, 19; Gen. St. 1866, c.48, sec. 18, 19; Page, Wills, sec. 713. Then by statute abolishing dower (Gen. Laws 1875 c.40) the common law rule was revived, under which it was "so well settled that the widow is entitled to both the statutory and testamentary provisions, unless a contrary intention appears from the will . . ., the presumption is that a legacy or devise is intended as a bounty, and not as a purchase or satisfaction of the statutory provision for the wife." McGowan v.

makes provision for a surviving spouse in lieu of statutory rights, if such spouse fails to renounce the provisions of the will by a writing filed in the probate court within six months after probate, such spouse is deemed to elect to take under the will. Further, provision in the will for the surviving spouse is presumed to be in lieu of statutory rights, unless the contrary appears.

Election Between Continuation and Termination of Contractual Relations.

The law of election between properties, it has been shown, applies to one definite and restricted problem. It originates in inconsistent or alternative donations; "a plurality of gifts, with intention, express or implied, that one shall be a substitute for the rest. In the judgment of tribunals, therefore, whose decision is regulated by that intention, the donee will be entitled, not to both benefits, but to the choice of either."[37] On the other hand, the law of election of the second type (described as election between continuation and termination of contractual relations) occurs throughout the substantive law. It is an important part of the law of sales, contracts, insurance, landlord and tenant, etc. It rests not on claims of equity, but on the logical impracticability of the contemporaneous assertion of contrary rights. An investigation of the rights arising from its exercise concerns the substantive law in the branches above mentioned, and would be entirely beyond the purpose of this inquiry, which is to deal primarily with remedial rights, and the nature of an election between them. But a general analysis of the nature of substantive election is necessary here to point the distinction from the other category of election of remedies. For as has been said the rule of election of remedies strictly is concerned only with rules of the adjective law. And the great difficulty into which the subject has fallen is traceable to the disregard of this essential fact. The courts have mingled wholly dissimilar cases; they have refused

Baldwin, (1891) 46 Minn. 477, 49 N. W. 251, (widow not required to elect between her homestead rights and a general devise in her husband's will).

[36] Gen. Laws 1897, c.240; Amending sec. 4472 Gen. St. 1894. R. L. 1913, sec. 7238 (same, R. L. 1905, sec. 3649). Where widow elects under a will in lieu of dower, it bars her dower in property deeded by testator during coverture. Fairchild v. Marshall, (1890) 42 Minn. 14, 43 N. W. 563; Howe v. Parker, (1908) 105 Minn. 310, 117 N. W. 518; Eddy v. Kelly, (1898) 72 Minn. 32, 74 N. W. 1020.

[37] (1818) 1 Sw. 394. N. 6.

to recognize any material distinction between rights and remedies, in considering the necessity and consequences of an election.

This confusion has arisen both from a deficiency in terminology, and from a habit of regarding rights in terms of pleadings. "Election of remedies" has served indiscriminately to describe substantive elections as well as elections between remedial rights, even when the distinction was appreciated. The reason for this interchange is fairly explicable. Historically, perhaps it is truer than any rigid analytical division would be. Researches into the system of common law writs have justified the conclusion that the substantive rights of property and status in our law are largely the creation of specialized remedies. First came the remedies and then the rights. Thus procedural matters were not mere incidents in the enforcement of ascertained rights: they were the presuppositions, and the substantive rights their implications.[28] Even today, when rights are more clearly defined than was true at common law, and remedial law has become of distinctly secondary importance, there are no hard and fast lines of distinction: the substantive and adjective law often merge and become indistinguishable. Nevertheless it remains important to keep the well defined cases of each class distinct.

The other reason for the confusion is closely allied. It arises from the method of viewing rights in terms of the allegations necessary to support a cause of action for their assertion. Especially is this true when acts of substantive election are themselves acts in litigation. So, where the vendee under a fraudulent sale sues in deceit, it is often said that he has exercised an election of remedies and cannot afterwards resort to a suit for recission of the contract of sale, when it is plain that what is meant is that by affirming the sale the vendee is precluded from ever disaffirming, and that commencement of suit for damages is a decisive act of affirmance.[29]

For purposes of clear definition therefore, we shall employ "election of remedies" for the choosing of procedural rights alone,

[28]Law begins by granting remedies; by allowing actions. In time we generalize from these actions and perceive rights behind them." Pound, The Spirit of the Common Law 204.

[29]"It could not affirm the existence of a contract of sale, for the purpose of a recovery under it, and subsequently treat the contract as avoided by the fraud of the vendee. . . . This is the principle upon which is based the doctrine of election of remedies, where two exist in a given case which are substantially inconsistent." Droege v. Ahrens & Ott Etc., (1900) 163 N. Y. 466, 57 N. E. 747.

after a party's substantive rights have been wholly ascertained. B finds that he has a cause of action against A for the wrongful taking of B's horse. His rights are clearly settled. He may redress the wrong by suit in either of two ways: in trover, or in assumpsit. This is the plainest case for an election of remedies. "Election" we shall reserve to describe a choice between substantive rights. We shall defer all consideration of the nature of election of remedies, until we have outlined the character of "election." We shall select only typical situations throughout the substantive law.

Executed Contracts of Sale. Let us suppose the following case. The assignee of an insolvent debtor, who sold goods in fraud of creditors, brings action against the vendee on notes given by him for the price of the goods, and secures the demand by attaching his property, but never brings the action to trial. Later he sues the vendee in trover to recover the value of the goods. He adopts the theory that the sale was void as to creditors, and that he, as representative of the creditors, may avoid the sale and reclaim the goods, or on refusal to deliver sue for the conversion. The vendee pleads the prior action on the notes.

The sufficiency of the plea can be determined only by considering the substantive rights of the assignee when he learns of the fraudulent sale. The sale was not illegal, nor ipso facto void, nor could the fraudulent party avoid it. It was only voidable at the option of the creditors of the vendor or the assignee on their behalf. The assignee may affirm or disaffirm the sale as he pleases, but he is forever bound by his election. If he finds it more beneficial for the creditors to collect the notes than to attempt recovery of the property, he may sue on the notes. But thereby he necessarily affirms the sale and can never more sue to recover the goods. If he sues to recover the goods instead, he disaffirms the sale and repudiates the notes.

The situation arose in the leading case of *Butler v. Hildreth,*[20] and Chief Justice Shaw analyzed it in this way:

"The assignee has an election, not of remedies merely, but of rights. But an assertion of one is necessarily a renunciation of the other. This results from the plain and very obvious con-

[20] (1842) 5 Met. 49. But see Powers v. Benedict, (1882) 88 N. Y. 605, that effort by the vendor to retake the entire property when successful in part only does not bar his right to pursue the vendee for the value of the unfound portion, nor is his effort a defense to an action to recover possession against one in whose hands the part is found.

sideration, that the assignee cannot affirm the sale in part, and disaffirm it in part; if it is to stand as a valid sale, the property of the goods remains vested in the purchaser, and he remains liable for the price. But if the sale is avoided and set aside, it stands as if it had never been made; the property may be taken possession of by the representative of the creditors as if no sale had been made, and the purchaser ceases to be liable for the price. When therefore the assignee has made that election, if he receives or demands the price, it is equivalent to an express declaration that he does not impeach the sale, and has no claim to the goods. But if he takes possession of the goods, or demands them of the purchaser, on the ground that the sale was void as to creditors, it is equivalent to a renunciation of all claim for the price."

It should be noted that in the instant case, bringing suit was not an election of remedies. Its significance was in the field of real election. It was an unequivocal declaration by the assignee that he had chosen to affirm the sale. All rights were now determined. The assignee could never afterwards lay claim to the property.

Affirmance. From this analysis may be drawn the general legal consequence of a conclusive affirmance of a voidable executed transaction. When the vendee discovers that he has been induced to enter a contract of sale by reason of fraudulent representations of the vendor, he may elect to affirm or repudiate the sale.[21] If with knowledge of his right he commences action for damages in deceit, he is conclusively bound by an election to affirm the sale and cannot afterwards bring action to rescind. Of course, he may sue in deceit and also compel delivery of the goods, since both actions proceed on the theory of affirmance and are therefore consistent. The rights of the defrauded vendor are the same. He may affirm the sale by any decisive step. Commencement of suit on notes given in payment, or acceptance of money with knowledge of his rights conclusively binds him.[22] For instance, in a conditional sale of personalty title may be reserved during the credit period, with option in the vendor in default of payment either to retake possession or to conclude the sale. Suppose the vendee resells, and the vendor files claim in bankruptcy against him. Later he attempts to recover the goods. By filing in bankruptcy the vendor affirms the sale; thereby property passes

[21]Droege v. Ahrens, & Ott, (1900) 163 N. Y. 466, 57 N. E. 747; Moller v. Tuska, (1881) 87 N. Y. 166; Conrow v. Little, (1889) 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693.

[22]N. Y. Land Imp. Co. v. Chapman, (1890) 118 N. Y. 288, 23 N. E. 187; Bulkley v. Morgan (1878) 46 Conn. 393.

irrevocably to the vendee. His resale is legal, and the conditional vendor cannot sue for the goods. This was the decision in *American Process Co. v. Florida White Pressed Brick Co.*, which is, absurdly enough, decided in the language of election of remedies, and cited as a leading case on that subject.

"In this case the plaintiff had its election to maintain its relation as owner of the property or to treat the title as having passed and to sue for the value or price thereof. Either remedy could have been adopted, but not both, for the reason that to do so would assert inconsistent relations between the parties with reference to the property. The plaintiff pursued a remedy in the bankruptcy court for the price of the property, which necessarily conceded that the title to the property had passed from the plaintiff."[81]

Similarly in an unconditional sale action in replevin for chattels by the vendee, or assumpsit by the vendor for the price would be a conclusive affirmance, and preclude further action to rescind.

Disaffirmance. The converse case, where at the time of election there is an attempt to repudiate the sale and recover the property parted with, is more difficult. The difficulty lies generally in the circumstance that, while affirmance is always unifactoral, rescission in the case of the sale of land is bilateral and partakes of the nature of a contractual act. The defrauded vendee in a land contract cannot return title to the vendor by his own act. In the absence of agreement, an equitable action for rescission is necessary. And if plaintiff fails for want of equity, or for some reason that does not go to the merits and foreclose his right of action, his gesture has been impotent. The sale still subsists as a valid transaction. Thereafter the vendee may bring action or damages in deceit and recover judgment, except when barred, as was said, on the familiar principles of res adjudicata. The situa-

[81](1908) 56 Fla. 116, 47 So. 942, 16 Ann. Cas. 1054; Acc. Wright v. Pierce (1875) 4 Hun 351. The case undoubtedly correct, by the doctrine in force in the bankruptcy courts, that a secured creditor cannot prove for the full amount of his claim without surrendering his security. But apart from bankruptcy, it is certainly questionable whether the conditional vendor should be required to choose between the property and an action for the price. Mr. Williston urges that a conditional sale is essentially a chattel mortgage. Williston, Sales, sec. 330, 579. Under that view, the vendor should be allowed to proceed in the same way as the mortgagee of a chattel, by suing for the price and retaining title until his debt be satisfied. The Minnesota court has always taken the contrary position, Minneapolis Harvester Works v. Hally, (1881) 27 Minn. 495, and other cases collected in 3 Dunnell's Dig. sec. 8651 and Dunnell's Suppl. same section.

tion is more simple in the case of a chattel. Here the defrauded vendee may throw back the title by his own act. Whether this is because a rescission of the sale of chattels is non-contractual, or whether, as Mr. Ewart explains,[24] because the original agreement stipulates for such a right in the vendee, is here immaterial. By a positive declaration of his will to rescind, as by tender of the benefit, or by commencement of suit for rescission, the transfer of title is rescinded. The vendee cannot afterwards sue for damages in deceit, or for breach of warranty. Such action would presuppose the existence of a valid obligation. The rights of the vendor of chattels after rescission are similar.[25]

Summary. Now all that has been decided in regard to the necessity and conclusiveness of an election in the foregoing cases is perfectly acceptable. For the requirements of commerce, a great measure of certainty in executed transactions is imperative. Buyers and sellers of goods cannot keep their affairs in an equivocal position for an indefinite time. It is true that there need be no immediate election. For a reasonable time one may wait and consider, and during that time may do acts consistent with either position. But eventually some act must mark "the point at which the line of equivocal acts ends, the dividing of the way after which one step in either direction excludes any progress in the other."[26] For a man "cannot say at one time that a transaction is valid, and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage."[27]

Executory Contracts. The general principles governing the rights of a person induced to enter into a contract voidable for fraud or other reason, are well settled.[28] The analysis of the previous cases of executed transactions is determinative of them. In general these actions are decisive acts of affirmance: a suit for specific performance by either party (possible only in land contracts and other exceptional obligations); a suit for reformation and enforcement as reformed; an action for damages for breach, or to recover a specific sum due upon the contract, or for damages in deceit.[29] In general, the following conclude a party's disaffirm-

[24]Ewart, Waiver 75.
[25]Williston, Sales, sec. 567-569. Cf. Nash v. Minn. Title Ins. Co., (1895) 163 Mass. 574 40 N. E. 1039.
[26]16 Law Quar. Rev. 161.
[27]Smith v. Baker, (1873) L. R. 8 C. P. 350, 5 Moak's Rep. 323.
[28]McGibbon v. Schmidt, (1916) 51 Cal. Dec. 195, 4 Cal. L. R. 346.
[29]Connihan v. Thompson, (1873) 111 Mass. 270.

ance: assumpsit to recover the purchase price paid in accordance with the contract, when pursued far enough to effect rescission; replevin for goods delivered in pursuance of the agreement; ejectment for recovery of possession of land, etc. Where they are consistent, one action does not bar the other. For example, where a lender of money recovers judgment on a note given as security, the judgment unsatisfied is no bar to a further action for damages for fraudulent representation.[40]

Principal and Agent. Another instance of substantive election is found in the doctrine of ratification of unauthorized acts, a branch of the law of principal and agent. C, without authority, presumes to contract with A in the name of, or on behalf of B. If B adopts and ratifies the act of C, it becomes binding on him as if he had been originally a party to it, from the date of inception of the agreement. Of course, B may ignore what C has assumed to do for him, or may affirmatively repudiate it, and then no contractual obligation arises. But if B elects to accept, he "becomes immediately liable upon the contract, and liable as well for any fraud committed by the agent in its formation, or any tort connected with its performance."[41] If B elects to ratify, but does so under misapprehension of the essential facts relating to the transaction, he may afterwards repudiate all liability. But when made with full knowledge, ratification, by claim of benefits or otherwise, is conclusive upon him.[42]

In a very recent case before the Court of Appeals in England,[43] the facts showed that B had delivered margarine to C, forwarding agent and carrier, to be carried to Hull, and then forwarded as B should direct. The goods had been originally consigned to A, a buying agent of B; but on arrival at Hull B instructed C not to deliver to A. Contrary to orders, C did deliver to A, who resold. After notice of the misdelivery, B invoiced the goods to A, sued and recovered judgment for the price of the goods as sold and delivered, and proceeded in bankruptcy against A. Now B

[40]Oben v. Adams, (1915) 89 Vt. 158, 94 Atl. 506, 15 Col. L. R. 631.

[41]Huffcut, Agency, 2nd Ed., 60; Mechem, Agency, 2nd Ed., sec. 490 ff.

[42]Robb v. Voss, (1894) 155 U. S. 13, 15 S. C. R. 4, 39 L. Ed. 52; Huffcut, agency, 2nd Ed., 42ff.

[43]Verschures Creameries Ltd. v. Hull & Netherlands S. S. Co. Ltd.., [1921] 2 K. B. 608. Though no precedents were cited on the point, the case was governed by a line of authorities, chiefly Armstrong v. Allen, (1893) 67 L. T. 738; Smith v. Baker, (1873) L. R. 8 C. P. 350. See also 16 Law Quar. Rev. 160, for criticism of the case of Rice v. Reed, (1900) 1 Q. B. 54, answered in 16 Law Quar. Rev. 379.

sues C for negligence and breach of duty. C pleads that B was concluded by his election to sue A. Judgment is given for C, and affirmed on appeal. The ground of the decision is not so well defined as one might wish. Scrutton L. J. intimates that the case is one of waiving a conversion and suing in assumpsit—a true case of election of remedies. But Bankes and Atkins L. JJ. base the decision on the conclusiveness of the ratification of C's act. Per Bankes L. J:

"When the appellants discovered this (the misdelivery) they had a right to elect; they might refuse to recognize the action of the respondents in delivering the goods to Beilin (A), and sue them for conversion or breach of duty, or they might recognize and adopt the act of the respondents and sue Beilin for goods sold and delivered. They elected to take the latter course, and they sued Beilin to judgment. Having elected to treat the delivery to him as an authorized delivery they cannot treat the same act as a conversion."[4]

In a like connection Mr. Ewart criticizes the statement, so often found in the cases, that the rule of election of remedies is to be found when "it is held that one who has sued on the theory that an unauthorized act done in his name has been ratified, cannot afterwards maintain an action on the theory that such act, and the assumed agency of the person by whom it was performed have been repudiated," in this terse manner:

"This is a case of election between two rights and not between two remedies. It is not a case of choice between different methods of enforcing one ascertained right but a selection of the right to be enforced. It is an option between two legal situations; and, when one of them has been selected, there are not two possible remedies

[4]For an uncritical comment on the case see 35 H. L. R. 209. The note-writer argues that by suing Beilin, B acknowledges that he has title, but does not relieve C from liability for breach of duty. The two cases cited in support of this contention are no authority for such a doctrine. Pacific Vinegar & Pickle Works v. Smith, (1907) 152 Cal. 507, 93 Pac. 85 would allow recovery against the agent after ratification of a sale made by him only in case the agent had ostensible authority to make the sale, and the principal therefore could not have rescinded the sale. Robinson Machine Works v. Vorse, (1879) 52 Ia. 207, 2 N. W. 1108, is either decided on the ground that there was no ratification in law, or is unsupportable. No cases were cited in the opinion. See Huffcut, Agency, 2nd Ed., 60-61; Mechem, Agency, 2nd Ed., Sec. 490-494, 440, 1249, 1268, 1324. See Triggs v. Jones, (1891) 46 Minn. 277, 48 N. W. 1113: "by a ratification of an unauthorized act, the principal absolves the agent from all responsibility for loss or damage growing out of the unauthorized transaction, and [that] thenceforward the principal assumes the responsibility of the transaction, with all its advantages and all its burdens," per Mitchell J. Whether a contrary doctrine might not have been preferable is quite a different question, and is, of course, arguable.

but one only. If the act be ratified there is but one remedy; and if it be repudiated there is another. The two remedies do not co-exist."[45]

The probable reason for confusion in these cases is that the act determinative of the plaintiff's right is the commencement of a legal action.

Insurance. A much more difficult situation arises in the case of an ordinary insurance policy, for instance, a fire policy. The contract generally provides that it shall be void in a number of events, e. g., if the insured is not the sole and unconditional owner of the property, or if there is other prior insurance, of if inflammable materials be brought upon the premises. In any of these events, the insurance company has the right to cancel the policy. This, Mr. Ewart argues with much persuasiveness, is a plain case of election: the policy does not become ipso facto void upon breach, but only voidable at the election of the company.[46] By this analysis a duty rests on the company to communicate promptly to the insured its election to terminate, for silence on its part will be evidence of election to continue the contract, or by lapse of time will put an end to its right to elect. The courts generally take a different view of the problem, and reason that the breach of condition is itself a forfeiture of the policy; then the insured may introduce testimony of a "waiver" of the forfeiture (more correctly, of the breach) and revivor of the policy by the company.[47] That is to say, the insured is allowed to testify that the agent of the company knew of the facts constituting the breach of contract when he delivered the policy, accepted the premium, or otherwise treated the policy as in force. This leads to the inference that the parties intended to ignore the condition or its breach. It is a question of insurance law, not pertinent here, whether in reality the insured incurs a true forfeiture making the policy ipso facto void, and requiring a waiver by the company to reinstate it, or, on the other hand, whether the breach allows the company, for whose protection the condition was made, to elect to cancel the contract or not as it pleases.

Landlord and Tenant. The simplest case is this: The ordinary lease of real property provides that the lease shall be void if

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[45]Ewart, Waiver 70.

[46]Ewart, Waiver; 12 Col. L. R. 619; 13 Col. L. R. 51; 18 H. L. R. 364; 29 H. L. R. 458; 29 H. L. R. 724; Williston, Sales, sec. 192.

[47]See Vance, Insurance 346 ff; 12 Col. L. R. 134.

the tenant defaults in the rent on the stipulated rent days. Usually, this does not mean that the lease will then become automatically void; it will only be voidable by reentry or otherwise at the option of the landlord. On breach of the covenant to pay rent, the landlord has his election: He may cancel the lease on account of the breach, or he may continue the tenancy notwithstanding the breach. If he cancels the lease, it cannot be revived except by the creation of a new tenancy. If he elects to continue, his right to terminate is then lost, until there is another default in the rent, or other breach sufficient to warrant a forfeiture.[48] This is an election between substantive rights. Whichever course he pursues, the remedies available are all consistent with his determined rights. If he elects to terminate, he may sue to recover possession and may also collect back rent, though not subsequent rent. If he elects to continue the tenancy, he may sue for rent and upon the covenant for any damages he has sustained.[49]

We have here followed the same analysis of Mr. Ewart; but, since the question of "waiver" is of much less importance than it has become in insurance law, the ordinary analysis by the courts in terms of forfeiture of lease, and "waiver" of breach, leads to identical conclusions as to the substantive rights of the parties, through terminology less exact, but sufficiently adequate for the simplicity of the transaction.[50]

The same situation exists at the termination of a lease; the landlord may elect to permit the former lessee to remain there longer as a tenant, or to treat him merely as a trespasser. If the landlord elects to treat him as a trespasser, the former lessee by remaining in possession does not enlarge the character of the tenancy. Therefore the landlord cannot later enforce a claim for rent, unless there has been a new contract of tenancy.[51]

Partnership. One important instance of election in the law of partnership has arisen, and should be considered here because it is often incorrectly cited as a case for the application of the rule of election of remedies, whereas in fact the election is one between substantive rights. In *Scarf v. Jardine*,[52] A and B carrying on

[48] 1 Underhill, Landlord and Tenant 649.

[49] Cole, Ejectment 82 (Preliminary points). But see also Ibid 408-410 (waiver of forfeiture), Jones v. Carter (1846) 15 Mees. & W. 718.

[50] See Croft v. Lumley, (1858) 6 H. L. C. 705, 27 L. J. Q. B. 321, per Bramwell B.; Conger v. Duryee, (1882) 90 N. Y. 600.

[51] 1 Wood, Landlord and Tenant 38, sec. 13.

[52] [1882] 7 A. C. 345, 16 Law Quar. Rev. 160.

business as B & Co, dissolved partnership by the retirement of A. B took another partner, C, and with C carried on business under the old firm style of B & Co. Plaintiff, a customer of the old firm of A and B, sold and delivered goods to the new firm of B and C after the change, but without notice of it. On receiving notice of the change, he sued B and C for the price, and upon their bankruptcy proved against their estate. Now he brings action against A for the price. The court holds that plaintiff at his option might have sued A and B, or B and C, but not the three together; and that by electing to sue B and C he had abandoned his right to sue A.

"He [plaintiff] had the undoubted right to select his debtor, to hold either the old firm or the new firm responsible to him for the fulfillment of the contract; but I know of no authority for the proposition that the respondent could hold his contract to have been made with both firms, or that having chosen to proceed against one of these firms for recovery of his debt he could thereafter treat the other firm as his debtor."[52]

When a "corporation by estoppel" incurs liability, there may be the same election by its creditors to treat the members as an association or as individuals. In *Clausen v. Head*,[53] an action was brought against defendants as partners. They had pretended to be a corporation, and had now assigned for creditors. Plaintiff had presented his claim to the assignee, but the assignee had disallowed it. The case squarely raised the question whether former action against the defendants had barred the plaintiff's suit. The court discussed the rights of the creditor in this way:

"He could proceed against the association outside of or in the assignment proceedings, as a corporation, or against the members thereof as partners. Having made an election between two courses with knowledge of the facts, he waived the one not chosen. . . . At best he had two remedies which were inconsistent, one against the corporation, and one against the members thereof. He was where he could take either of two roads, but not both. The roads reached out in different directions, so that to travel one necessarily required the abandonment of the other. . . . His situation was no better than that of a person who had dealt with another as principal, when such other is in fact the agent for third persons, such person can pursue either the ostensible or actual principal at his election, but not both."[54]

[52] For criticism of the decision see Ewart, Estoppel 516-518, 526-528; Burdick, Partnership, 3rd Ed., 71; Lindley, Partnership, 7th Ed., 78.

[53] (1901) 110 Wis. 405, 85 N. W. 1028, 84 A. S. R. 933.

[54] The illustration is unfortunate, for there seem to be no cases that hold a third person barred, short of merger of the cause of action by judgment, Kingsley v. Davis, (1870) 104 Mass. 178; Wambaugh, Cases

Election Between Remedial Rights

"Election," we have seen, describes generically the act of choosing one of several rights or remedies. We have traced the effect of an election in two of the great categories, namely, between properties, and between substantive rights. We have found that election had significant legal effect only when the rights or properties to be chosen from were mutually inconsistent. The equitable doctrine of election requires one who accepts benefits under a deed or will, to conform to the entire intention expressed in the instrument and to abandon every right which would defeat its provisions. It is described briefly as the rule that in equity one cannot occupy two inconsistent positions. Similarly the principle of substantive election, as that one cannot affirm and disaffirm the same contract, rests upon the logic that a man cannot at different times insist on the truth of each of two inconsistent provisions. The third type of election now to be considered, is by definition though unfortunately not always by use, confined to procedural rights alone. It deals with the method of enforcing a determined right. The rule of election of remedies describes the legal effect of making a choice between remedial rights. Its effect, so all the authorities repeat, is to bar recourse to any inconsistent remedies.

An appreciation of this fact, that the rule of election of remedies is a matter of pleading, concerned with the adjective law and not with the substantive law, is a point of departure for a discrim-

on Agency 702; Priestly v. Fernie, (1865) 3 Hurl. & C. 977, Wambaugh, Cases 698; (contra, Beymer v. Bonsall, (1875) 79 Pa. 298, that even unsatisfied judgment was no bar to a subsequent action), by an election to regard either the agent or the undisclosed principal responsible, though there seems also to be no reason on principle why the doctrine should not apply. Merrill v. Kenyon, (1880) 48 Conn. 314, Wambaugh, Cases on Agency 720; Curtiss v. Williamson, (1874) L. R. 10 Q. B. 57, Wambaugh, Cases 713; Hutchinson v. Wheeler, (1862) 3 Allen (Mass.) 577, Wambaugh, Cases 725; Cobb v. Knapp, (1877) 71 N. Y. 348, 27 Am. Rep. 51, Wambaugh, Cases 726. Thus in Lindquist v. Dickson, (1906) 98 Minn. 369, 107 N. W. 958, an action to recover from defendant as an undisclosed principal on a contract made by her husband, as her agent, defendant pleaded in bar a prior judgment against the agent. The court adopted the rule of Kingsley v. Davis, supra, saying: "We therefore hold upon principle, and what seems to be the weight of judicial opinion, that: If a person contracts with another who is in fact an agent of an undisclosed principal, and, after learning all the facts, brings an action on the contract and recovers judgment against the agent, such judgment will be a bar to an action against the principal. But an unsatisfied judgment against the agent is not a bar to an action against the undisclosed principal when discovered, if the plaintiff was ignorant of the facts as to the agency when he prosecuted his action against the agent."

ination of the cases. That a vendee who has sued for breach of warranty in sale of a chattel, cannot afterwards rescind and sue for his money back is a clear proposition of law. But we have seen that it treats only of substantive rights. The vendee had an election to treat the contract as in force or to sue to annul it. That he cannot do both must be obvious. But it is not a case for an election of remedies. A true election of remedies arises only after the plaintiff has determined his substantive rights, and finds that he has two forms of action available to redress the identical wrong.

The extent of the rule, in its specific sense, is thus strictly limited. Only after subtracting the cases that involve a choice of substantive rights, can we discover the genuine cases of election of remedies. But even after such a subtraction, when all substantive rights are known to be determined, it is hornbook knowledge that in the great preponderance of cases a suitor may prosecute one or all of his remedies. "He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final."[56] Until satisfaction is had, in the absence of facts creating an equitable estoppel or merger by judgment, or bar by res adjudicata, it is axiomatic that pursuit of one remedy does not preclude resort to the others. The question is regularly dismissed with the statement that the remedies are analogous, consistent, and concurrent. Thus, "all consistent remedies may in general be pursued concurrently even to final adjudication; but the satisfaction of the claim by one remedy puts an end to the other remedy."[57] Examples of this fact might be cited at will. Restitution proceedings and ejectment for land are cumulative remedies, and election of one does not bar the other.[58] Similarly, a creditor holding collateral security for his claim may prosecute simultaneously his actions on the principal and collateral obligations, e. g., on a promissory note and on the original debt,[59] on the property pledged or against the pledgor personally.[60] And one

[56]Dilley v. Simmons Nat. Bank, (1913) 108 Ark. 342, 158 S. W. 144.

[57]"No matter what right the party wronged may have of electing between remedies or of pursuing different defendants for the same cause of action, when he once obtains full satisfaction from one source, his cause of action ends, and he can assert it no further," McLendon v. Finch, (1908) 2 Ga. App. 421, 58 S. E. 690.

[58]McKinnon v. Johnson, (1910) 59 Fla. 332, 52 So. 288.

[59]Alexander v. Righter, (1912) 21 Pa. Dist. 842. Likewise on the debt of a partnership and the collateral note of a partner, Parsons Partnership, 4th Ed., sec. 89, page 95, note 1. Also Corn Exchange Ins. Co. v. Babcock, (1867) 8 Abb. Pa. (N.S.) 256.

[60]Ricks v. Johnson, (1917) 62 Okl. 125, 162 Pac. 476.

suing in assumpsit under a statute for damages from a fraud may after dismissal bring an action on the case for the same fraud.[61] Another clear instance is the case of a joint wrong. An action against a bank to recover stock or its value does not bar action against the defendant for false representations in obtaining the stock from the plaintiff.[62] All these are cases where the rule of election admittedly does not apply to co-existing remedies.

What then are the authentic cases in which courts have applied the rule of election to remedies? It must be already apparent that the possible residuum that must embrace every such case is fairly restricted. Even then, in view of the confident assertions to be found everywhere, the result revealed by a search of the cases is astonishing. It is said that "the doctrine of election is not restricted to any class of remedies. Thus a party may be required to elect between two or more actions ex contractu, or two or more ex delicto; or between remedies one or more of which belong to one class and one or more to the other or between remedies all equitable, or remedies one or more of which are equitable and the residue of legal cognizance."[63] But the results belie such extravagant statements. In the books there seem to be only two cases where the rule has ever in fact been applied to remedies. We shall set them out at some length, but without any analysis of their theoretical justification.

The most important case is the wrongful taking of a chattel. Originally the remedies of the plaintiff were confined to the writs of trover, trespass, and, in case the property remained in the possession of the wrongdoer, replevin. But in order to facilitate redress, the remedy of assumpsit was added. Dean Ames writes:[64] "It was decided accordingly in *Phillips v. Thompson*,[65] 1675, that assumpsit would not lie for the proceeds of a conversion. But in the following year the usurper of an office was charged in assumpsit for the profits of the office, no objection being taken to the form of action[66] . . . Assumpsit soon became concurrent with trover, where the goods had been sold.[67] Finally, under the influence of Lord Mansfield, the action was so much encouraged that it became almost the universal remedy where the defendant

[61] Mintz v. Jacob, (1910) 163 Mich. 280, 128 N. W. 211.
[62] Maxwell v. Martin ,(1909) 130 App. Div. 80, 114 N. Y. S. 349.
[63] 20 Corpus Juris, sec. 6.
[64] Ames, Lectures Legal History 164.
[65] 3 Lev. 191.
[66] Woodward v. Aston, (1616) 2 Mod. 95.
[67] Lamine v. Dorrell, (1705) Ld. Raym. 1216.

had received money which he was 'obliged by the ties of natural justice and equity to refund.' "[68]

Thus today it is well settled that the owner may sue in tort for the value or in assumpsit for the price. And while a replevin action is not barred by an action in trover which has not gone to judgment, it is equally well settled that the rule is to the contrary, when either action is on implied contract. A non-suit in trover would not prevent replevin any more than a non-suit in account would prevent debt. But when the suit is in assumpsit, the rule is different. Thus in *Thompson v. Howard*,[69] plaintiff sued in tort for enticement of his minor son into the service of the defendant. The defendant pleaded a prior action in assumpsit for the value of the boy's services, which had been discontinued by disagreement of the jury. It was held that the plaintiff was barred. "The election involved in the first suit precluded the plaintiff from maintaining this action for the wrong." Though the plaintiff could have brought another action in assumpsit, he could no longer sue in tort. Even when the defendants are joint tort feasors by joinder in the conversion, the result is the same. In *Terry v. Munger*,[70] it was held that an unsatisfied judgment against one of two joint tort feasors, obtained in an action in assumpsit, was a bar to an action in trover against the other tort feasor. But on this point there is authority to the contrary.[71]

The other instance is that of election between an action in assumpsit for rents and profits, and action in ejectment coupled with damages for mesne profits, in case of a cotenancy. A and B are tenants in common of an estate. A takes the whole of the rents and profits, though B is entitled to a moiety. At common law no action would lie unless A had been appointed bailiff by B.[72] But by early statute in England[73] an action of account was provided, as though A were in fact bailiff. The statute was held to

[68] Jacob v. Allen, (1703) 1 Salk. 27; Longchamp v. Kenney, (1779) 1 Doug. 137; Hambly v. Trott, (1776) 1 Cowp. 371 (375); Addison, Torts 33.

[69] (1875) 31 Mich. 312 Acc. Nield v. Burton (1882) 49 Mich. 53, where the suit in assumpsit failed because the court did not have jurisdiction.

[70] (1890) 121 N. Y. 161, 24 N. E. 272, 18 A. S. R. 803, 8 L. R. A. 216.

[71] Huffman v. Hughlett, (1883) 11 Lea (Tenn.) 549; Kirkman v. Phillips' Heirs, (1871) 7 Heisk. (Tenn.) 222; Cohen v. Goldman, (1878) 43 N. Y. Super. Ct. 436.

[72] Co. Lit. 172a, 200b; Wheeler v. Horne, (1740) Willes 208; Bac. Abr. Joint-tenants, (L) Vol. IV, p. 517 (7th Ed.), Dane's Abr. Ch. 8, Art. 3, Sec. 13; Vin. Abr., Joint-tenants (R a. pl. 14). See Hurley v. Lamoreaux, (1882) 29 Minn. 138, 12 N. W. 447.

[73] 4 & 5 Anne, c. 16, sec. 27.

be a part of the common law of Massachusetts.[74] B need only allege and prove his tenancy, and that A has received more than his just share. Where the action of account at law is obsolete or abolished, indebitatus assumpsit in the same case undoubtedly lies. But suppose B sued in ejectment or by real action instead, and recovered judgment on his title and possession. He could then recover the profits for the intermediate time in an action of trespass, but his remedy in assumpsit would be gone.[75]

(To be continued)

[74]Brigham v. Eveleth, (1813) 9 Mass. 538; Jones v. Harraden, (1813) 9 Mass. 540 N.

[75]Munroe v. Luke, (1840) 1 Met. 459; Bigelow, Estoppel 718.

THE POWER TO SUSPEND A CRIMINAL SENTENCE FOR AN INDEFINITE PERIOD OR DURING GOOD BEHAVIOR

By Andrew A. Bruce*

Section 2 of article II of the constitution of the United States provides that the president "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

Section 4 of article V of the constitution of Minnesota provides that:

"He [the governor] shall have power in conjunction with the board of pardons, of which the governor shall be ex-officio a member, . . . to grant reprieves and pardons after conviction of offenses against the state, except in cases of impeachment."

Section 76 of article III of the constitution of North Dakota provides that:

"The governor shall have power in conjunction with the board of pardons, of which the governor shall be ex-officio a member, . . . to remit fines and forfeitures, to grant reprieves, commutations and pardons after conviction for all offenses except treason and cases of impeachment."

Section 8496 of the General Statutes of Minnesota for 1913 provides that:

"The several courts of record of this state having jurisdiction to try criminal causes shall have power, upon the imposition of sentence against any person who has been convicted of the violation of a municipal ordinance or by-law, or of any crime for which the maximum penalty provided by law does not exceed imprisonment in the state prison for five years, to stay the execution of such sentence whenever the court shall be of the opinion that by reason of the character of such person, or the facts and circumstances of his case, the welfare of society does not require that he shall suffer the penalty imposed by law for such offense, so long as he shall thereafter be of good behavior."

Section 1 of chapter 136 of the North Dakota laws of 1913 provides that:

"In all prosecutions for misdemeanors where the defendant has been found guilty, and where the court or magistrate has power to sentence such defendant to the county jail, and it ap-

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pears that the defendant has never before been imprisoned for crime, either in this state or elsewhere (but detention in an institution for juvenile delinquents shall not be considered imprisonment), and where it shall appear to the satisfaction of the court or magistrate that the character of the defendant and circumstances of the case are such that such defendant is not likely again to engage in an offensive course of conduct, and where it appears that the public welfare does not demand or require that the defendant shall suffer the penalty imposed by law, said court or magistrate may suspend the execution of the sentence or may modify or alter the sentence imposed in such manner as to the court or magistrate, in view of all the circumstances, seems just and right."

Similar constitutional provisions and similar statutes are to be found in a large number of the American states. Where there is no statute, has the trial court an inherent power to suspend the execution of its sentence during good behavior or for an indefinite period? Are the statutes constitutional? The first question must be answered in the negative.

In the case of *Ex parte United States, Petitioner,*[1] the court, by Chief Justice White, said:

"Indisputably under our constitutional system the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial, and it is equally to be conceded that in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority. But these concessions afford no ground for the contention as to power here made, since it must rest upon the proposition that the power to enforce begets inherently a discretion to permanently refuse to do so. And the effect of the proposition urged upon the distribution of powers made by the constitution will become apparent when it is observed that indisputable also is it that the authority to define and fix the punishment for crime is legislative and includes the right in advance to bring within judicial discretion, for the purpose of executing the statute, elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment, fixed by law and ascertained according to the methods by it provided, belongs to the executive department. . . .

"If it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the con-

[1](1916) 242 U. S. 27, 61 L. Ed. 129, 37 S. C. R. 72.

clusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced. . . .

"While it may not be doubted under the common law as thus stated that courts possessed and asserted the right to exert judicial discretion in the enforcement of the law to temporarily suspend either the imposition of sentence or its execution when imposed to the end that pardon might be procured or that a violation of law in other respects might be prevented, we are unable to perceive any ground for sustaining the proposition that at common law the courts possessed or claimed the right which is here insisted upon. No elaboration could make this plainer than does the text of the passages quoted. It is true that, owing to the want of power in common law courts to grant new trials and to the absence of a right to review convictions in a higher court, it is we think to be conceded: (a) That both suspensions of sentence and suspensions of the enforcement of sentence, temporary in character, were often resorted to on grounds of error or miscarriage of justice which under our system would be corrected either by new trials or by the exercise of the power to review. (b) That not infrequently, where the suspension either of the imposition of a sentence or of its execution was made for the purpose of enabling a pardon to be sought or bestowed, by a failure to further proceed in the criminal cause in the future, although no pardon has been sought or obtained, the punishment fixed by law was escaped. But neither of these conditions serves to convert the mere exercise of a judicial discretion to temporarily suspend for the accomplishment of a purpose contemplated by law into the existence of an arbitrary power to permanently refuse to enforce the law."

In the case of *State ex rel. Cary v. Langum*,[3] the supreme court of Minnesota said:

"There is a marked distinction between an order staying proceedings after sentence, to enable the convicted party to perfect an appeal, and an order suspending sentence for no definite purpose other than to vest in the court subsequent disciplinary supervision over the conduct of the condemned party for an indefinite period. It might, in a given case, be an act of mercy to suspend the sentence of imprisonment or dispense with it altogether; but prerogatives of mercy are for the pardoning power and not for the courts. In particular instances the power to hold a suspended judgment in a criminal case over the head of the convicted party might lead to abuses of various sorts and reflect seriously upon the administra-

[3](1910) 112 Minn. 121, 127 N. W. 465.

tion of justice. However the courts of last resort in several of the states sustain this power.[2] . . .

"We do not decide the question. It is not before us. As already suggested, there is a marked distinction between an indefinitely suspended sentence and a stay of proceedings for a reasonable time to facilitate an appeal, and the question in the case at bar narrows down to the inquiry whether the trial courts of this state have the power, irrespective of statute, to grant a reasonable stay of proceedings for that purpose. We are unable to adopt the view of the North Dakota and Nevada courts that such power does not exist, except as expressly given by statute. Our statutes provide a manner in which a person convicted of crime may obtain a stay of proceedings as a matter of right; but this does not exclude the inherent power in the court to grant the same whenever in its discretion it is deemed proper. This the authorities generally sustain, remarking, in some instances, that it should be exercised with caution. *State v. Vaughan*, 71 Conn. 457, 42 Atl. 640; 20 Enc. Pl. & Pr. 1252, 1263, and cases there cited. We affirm the rule that the trial court has the inherent power, in its discretion, to grant a stay of proceedings for a definite time after conviction to enable defendant to perfect an appeal, or to take such other proceedings as he may be advised are necessary or proper in the protection of his rights.

"It does not appear in the case at bar whether relator requested a stay of proceedings at the time of the sentence or subsequently; but this is not important. During the continuance of the stay he took advantage thereof, and brought his case to this court for review. Nor are we to be understood as holding that the court may, of its own motion, force upon a defendant in such case a stay of proceedings, nor in the form of a stay of proceedings in effect indefinitely suspend its judgment for conviction."

Although there are numerous cases to the contrary, there can be but little doubt of the force of these distinctions and that there is no warrant in the history of the English courts and of the development of the English common law for the claim of the existence in the American courts of an inherent power to suspend their sentences save and in so far as may be necessary to facilitate an appeal to the higher courts or to the executive clemency or to prevent the execution of an insane man or a pregnant woman, in which

[2]The court cites: Note to Ex parte Clendenning (1908) 22 Okla. 108, 97 Pac. 650, 19 L. R. A. (N.S.) 1041; In re Collins, (1908) 8 Cal. App. 367, 97 Pac. 188; Mann v. People, (1901) 16 Colo. App. 475, 66 Pac. 452; Allen v. State (1827) Mart & Y. (Tenn.) 294; Fults v. State, (1854) 2 Sneed (Tenn.) 232; Sylvester v. State, (1889) 65 N. H. 193, 20 Atl. 954; State v. Hatley, (1892) 110 N. C. 522, 14 S. E. 751; People ex rel. Forsyth, etc. v. The Court of Sessions of Monroe County (1894) 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856; Weber v. State, (1898) 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472; 25 Am. & Eng. Enc. 2nd ed., 313.

last instances it would be used as a means to prevent an act which in itself would be a violation of the law.[4]

There can, indeed, be little doubt of the distorical accuracy of the court of appeals of Texas, when in the case of *Snodgrass v. Texas*[5] it said:

"In the early days of England a person upon trial as to his guilt or innocence was not permitted to introduce any witnesses to prove himself innocent of an offense charged against him, nor in mitigation of the punishment. The Crown introduced its evidence to prove his guilt, and if that testimony showed his guilt to the satisfaction of the jury, they so found. If the court had a doubt of his guilt from the testimony, it could not grant a new trial on this ground. Under this condition the plea of benefit of clergy arose. It was first claimed by officials of the church alone, who claimed the right to be tried in the ecclesiastical court. This plea was then permitted to all persons eligible to clerk or other position in the church,—that is, all men who could write,—and finally broadened to apply to all persons charged with crime. Not being permitted to offer testimony showing his innocence on the trial, nor offer testimony in mitigation of the punishment after being found guilty by verdict, when granted the 'benefit of clergy,' persons adjudged guilty of crime were first permitted in the ecclesiastical court to expurgate themselves or prove their innocence, and offer evidence in mitigation. Later the courts that tried the cases, after verdict, but before assessment of the punishment by sentence, would permit a defendant to introduce testimony in mitigation of the punishment to be assessed by the sentence or judgment of the court, and under this system there grew up the custom of suspending the sentence until the evidence was heard under this plea, so that the court might have the benefit of it in arriving at the punishment he would assess. Upon hearing this testimony the court frequently refused to inflict the death penalty, which was virtually the penalty for all felonies, and would only assess a penalty of burning in the hand to mark the man; later, burning in the face, and still later sentencing the person adjudged guilty to transportation to America or some other point beyond the seas, and other penalties. From this power of the courts of England, claimed and exercised in an early day, must we look to any inherent power in a court to ameliorate or relieve any person of punishment adjudged guilty of an offense. In Chitty's Crim. Law, vol. 1, p. 624, the rule at that time is said to have been: 'By the common law . . . the prisoner was not even permitted to call

[4]"Reprieve may also be ex necessitate legis, as where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, in favorem prolis." Blackstone Com. Book IV. Ch. xxxi, pp. 394, 395.

[5](1912) 67 Tex. Ct. App. 615, 15 S. W. 162, 41 L. R. A. (N.S.) 1144.

witnesses, . . . but the jury were to decide on his guilt or innocence according to their judgment upon the evidence offered in support of the prosecution. And though . . . this latter practice of rejecting evidence for the prisoner was abolished about the time of Queen Mary, yet the witnesses could not be sworn on behalf of the prisoner, but were merely examined without any particular obligation, and therefore obtained but little credit with the jury.' In his work he recites that Queen Mary, in appointing Sir Richard Morgan chief justice of the common pleas, enjoined him 'that, notwithstanding the old error (of the law) which did not admit any witnesses to speak, or any other matter to be heard, in favor of the adversary, her Majesty being party, her Highness's pleasure was that whatsoever could be brought in favor of the subject should be heard.' Mr. Blackstone in his Commentaries says that, shortly after the Revolution of 1688, among the chief alterations of the law was the 'regulation of trials by jury, and the admitting of witnesses for prisoners under oath.' Other learned commentators and writers of that period could be cited as showing that the 'plea of benefit of clergy,' or suspending sentence, was the outgrowth of that condition, when, during the trial, not only was his mouth closed, but the mouths of all persons who would testify in his favor were also closed, and this plea or suspension of sentence or reprieve, as it was called in that day and time, was but a way of permitting those who would testify in his favor to be heard in mitigation of the punishment to be assessed, although in the common pleas court on this hearing they were not allowed to dispute the verdict of guilt which had been found by the jury, but the testimony was received alone to aid the judge in passing sentence after the verdict of guilt, and in mitigation of the punishment. But in the beginning and for a long time this plea was not allowed in cases except where the penalty was death, and was never applied to petit theft or misdemeanors. This can have no application to our jurisprudence, for the jury in their verdict fix the punishment as well as pass on the guilt or innocence of an accused person. After it became the law in England that witnesses were permitted to testify on oath in behalf of a defendant on trial of his guilt or innocence, this plea and custom rapidly waned, and by statute it was provided it could not be pleaded in many cases, and finally, in 1827, it was wholly abolished, and has not been the rule in that country since that date. Bishop, Crim. Law, sec. 937. Yet we find some trying to work out a theory whereby our courts would inherit that power from the jurisprudence of England, although it was taken away from the courts of England nearly a century ago, and arose under conditions wholly at variance with our system of jurisprudence."

It is true that in perhaps the majority of the American states the sentence is determined by the judge within the limits pre-

scribed by the statute and not by the jury, but nowhere do we find any basis for the belief that the right of indefinite suspension was ever claimed by the English courts. Much less then can it be claimed in the American jurisdictions where we have written and not unwritten constitutions, where as a rule everything has been formulated and prescribed, and where the power to pardon, to commute and to reprieve has been expressly given to the chief executive or to the boards of pardon. Almost all of the American courts, indeed, which recognize the existence of the power do so because it is humane and just and has long been acquiesced in rather than because it has any definite legal or historical sanction.*

But what of the validity of the statutes which recognize or confer the power? Are they unconstitutional in that they encroach upon the prerogatives of the chief executives and of the boards of pardon to whom the constitutions expressly grant the power? Do they, in any sense of the term, give to the trial judges the power to pardon, to commute and to reprieve?

We believe that they are constitutional. We believe, however, that, with few exceptions, the American courts that have sustained them have given erroneous or at any rate inconclusive reasons for their holdings.

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*Concerning this practice the Supreme Court of the United States in the case of Ex Parte United States, Petitioner, (1916) 242 U. S. 27, 61 L, Ed. 129, 37 S. C. R. 72, says:

"There is no doubt that in some states, without reference to probation legislation or an affirmative recognition of any doctrine supporting the power, it was originally exerted and the right to continue to do so came to be recognized solely as the result of the prior practice. Gehrmann v. Osborne, Warden, (1911) 79 N. J. Eq. 430, 82 Atl. 434.

"As to the courts of the United States, in one of the circuits, the first, especially in the Massachusetts district, it is admitted the practice has in substance existed for probably sixty years as the result of a system styled 'laying the case on file.' The origin of this system is not explained, but it is stated in the brief supporting the practice that courts of the United States have considered the existing state laws as to probation and have endeavored in a certain manner to conform their action thereto. It is true also, that in the courts of the United States, sometimes in one or more districts in a circuit and sometimes in other circuits, in many instances the power here asserted was exerted, it would seem without any question, there being no question raised by the representatives of the United States; indeed it is said that in Ohio where the power, as we have seen, was recognized as existing, it was exerted by Mr. Justice Matthews of this court when sitting at circuit, and there and elsewhere, it is pointed out, the power was also exerted in some instances by other judges then or subsequently members of this court. But yet it is also true that, numerous as are the instances of the exertion of the power, the practice was by no means universal, many United States judges, even in a district where the power had been exerted, on a change of incumbency persistently

In the case of *People ex rel. Forsyth v. Court of Sessions*,[1] the court held that a statute which in terms authorized courts of criminal jurisdiction to suspend sentences in certain cases, merely reasserted a power which was inherent in such courts at the common law, which was understood when the constitution of New York was adopted to be an ordinary judicial function, and which ever since its adoption had been exercised by the courts, and that it was a valid exercise of legislative power under the constitution. The court said:

"It does not encroach in any just sense upon the powers of the executive as they have been understood and protected from the earliest times. The power to suspend the judgment during good behavior, if understood as explaining a condition upon the compliance with which the offender would be absolutely relieved from all punishment and free from the power of the court to pass sentence, is open to much doubt. The legislature cannot authorize the courts to abdicate their own powers and duties or to tie their own hands in such a way that after sentence has been suspended they cannot, when deemed proper and in the exercise

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refusing to exert the power on the ground that it was not possessed. Indeed so far was this the case that we think it may be said that the exertion of the power under the circumstances stated was intermittent and was not universal but partial.

"As amply shown by the case before us, we think also it is apparent that the situation thus described was brought about by the scrupulous desire of judges not to abuse their undoubted discretion as to granting new trials, and yet to provide a remedy for conditions in cases where a remedy was called for in the interest of the administration of the criminal law itself, as well as by the most obvious considerations of humanity and public well-being,—conditions arising in the nature of things from the state of proof in cases coming before them which could not possibly have been foreseen and taken into consideration by the law-making mind in fixing in advance the penalty to be imposed for a particular crime. And the force of this conclusion will become more manifest by considering that nowhere except sporadically was any objection made to the practice by the prosecuting officers of the United States, who indeed it is said not infrequently invoked its exercise. Albeit this is the case, we can see no reason for saying that we may now hold that the right exists to continue a practice which is inconsistent with the constitution, since its exercise in the very nature of things amounts to a refusal by the judicial power to perform a duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the constitution. The fact that it is said in argument that many persons, exceeding two thousand, are now at large who otherwise would be imprisoned as the result of the exertion of the power in the past, and that misery and anguish and miscarriage of justice may come to many innocent persons by now declaring the practice illegal, presents a grave situation. But we are admonished that no authority exists to cure wrongs resulting from a violation of the constitution in the past, however meritorious may have been the motive giving rise to it, by sanctioning a disregard of that instrument in the future."

[1] (1894) 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

of justice, inflict the proper punishment in the exercise of a sound discretion. Nor can the free and untrammeled exercise of this power of the right to pass sentence according to the discretion of the court be made dependant upon compliance with some condition that would require the court to try a question of fact before it could render the judgment which the law prescribes. The statute must not be understood as conferring any new power. The court may suspend sentence as before but it can do nothing to preclude itself or its successors from passing the proper sentence whenever such a cause appears to be proper. . . .

"The practice had its origin in the hardships resulting from peculiar rules of criminal procedure, when the court had no power to grant a new trial, either upon the same or additional evidence, and the verdict was not reviewable upon the facts by any higher court. The power as thus exercised is described in this language by Lord Hale: 'Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment is insufficient, or doubtful whether within clergy. Also when favorable or extenuating circumstances appear and when youths are convicted of their first offense. And these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their sessions be adjourned or finished, and this by reason of common usage.' (2 Hale P. C. ch. 58, p. 412.) This power belonged of common right to every tribunal invested with authority to award execution in a criminal case. (1 Chitty Cr. L. (1st ed.) 617, 758).

"The power to suspend sentence and the power to grant reprieves and pardons, as understood when the constitution was adopted, are totally distinct and different in their origin and nature. The former was always a part of the judicial power; the latter was always a part of the executive power. The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it and all civil disabilities remain and become operative when judgment is rendered. A pardon reaches both the punishment prescribed by the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt so that in the eye of the law the offender is as innocent as if he had never committed the offense. It removes the penalties and disabilities and restores him to all civil rights. It makes him, as it were, a new man and gives him a new credit and capacity. . . .

"The framers of the federal and state constitutions were perfectly familiar with the principles governing the power to grant pardons and it was conferred by these instruments upon the executive with full knowledge of the law upon the subject, and the words of the constitution were used to explain the authority formally exercised by the English court or by its representative in the colonies."

The case of *People v. Stickle*[9] follows the reasoning of *People ex rel. Forsyth v. Court of Sessions,*[10] both as to the right at the common law and the distinction between a suspension of a sentence and a reprieve or a pardon.

In the case of *Ex parte Giannini,*[11] the statute limited the right of suspension to the term of the sentence. The court contented itself with saying that the power conferred by the enactment did not in any manner interfere with the functions and duties of the chief executive. It cited no cases and made no argument.

In the case of *In re Hart,*[12] a special concurring opinion ignores under a statute which authorized it during good behavior. The court said nothing concerning the question of an interference with the pardoning power, but quoted the language of the case of *People ex rel. Forsyth v. Court of Sessions,*[13] which intimated that the power was an original power and so original that the statute could not restrict it by providing that the judge could not afterwards revoke the suspension which he had allowed.

In the case of *Belden v. Hugo,*[14] the constitutional question was not considered. In the recent case of *Richardson v. Commonwealth,*[15] the reasoning of the supreme court of New York in the case of *People ex rel. Forsyth v. Court of Sessions* is again followed.

In the case of In re Hart,[16] a special concurring opinion ignores the fact that the constitution of the state vests the power to reprieve[17] as well as to pardon in the board of pardons and follows

[9] See also People ex rel. Sullivan v. Flynn, (1907) 55 Misc. Rep. 639, 106 N. Y. S. 925.

[10] (1909) 156 Mich. 557, 121 N. W. 497.

[11] (1894) 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

[12] (1912) 18 Cal. App. 166, 132 Pac. 831.

[13] (1911) 65 Wash. 287, 119 Pac. 42.

[14] (1894) 141 N. Y. 288, 36 N. E. 386 23 L. R. A. 856.

[15] (1914) 88 Conn. 500, 91 Atl. 369.

[16] (Va. 1921) 109 S. E. 460.

[17] (1914) 29 N. D. 38, 149 N. W. 568, L. R. A. 1915C 1178.

"1. A reprieve, from reprendre, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first, ex arbitrio judicis; either before or after judgment; as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commission expired: but this rather by common usage, than of strict right." 4 Black. Com. ch. xxxi, pp. 394, 395.

the New York court in drawing a distinction between the power to pardon and the power to suspend a sentence,[18] while the major-

[18]In his concurring opinion, Chief Justice Spalding said:

"Neither can I concur in their intimation that, except for imagining that the law was enacted solely with a view to permitting the defendant to apply for executive clemency, it would be unconstitutional. There is a wide difference between the suspension of the execution of sentence, as provided in this statute, and the granting of a pardon or conditional pardon. A pardon is a remission of guilt, and a conditional pardon is one which does not become operative until the grantee has performed some specific act, or which becomes void when some specified event transpires. 1 Bishop, Crim. Law, sec. 914. A remission of guilt reinstates the offender as nearly as possible in the same condition as he would have occupied had he never been charged with committing the offense. A pardon, releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as though he had never committed the offense. It makes him, as it were, a new man and gives him a new credit and capacity. People ex rel. Forsyth etc. v. Court of Sessions of Monroe County (1894) 141 N. Y. 288, 23 L. R. A. 856, 36 N. E. 386, 15 Am. Crim. Rep. 675. This is not true of the suspension of execution of a judgment. In such case the court, in effect, says: This is your first conviction. Your record heretofore has been good. The offense is only a misdemeanor. The circumstances surrounding it and your relations to society have been such as to indicate that you are not naturally criminal and that you are not likely to become a confirmed criminal. From these facts it appears that the welfare of society does not demand that at this time the sentence be executed. The policy of the law is to give every person the greatest opportunity for development that due protection to society will permit him to have. Hence you are put on probation. The court will see whether you are disposed to become a criminal and whether in fact you are entitled to its consideration, and society still be protected. We will therefore not execute the sentence until we have an opportunity to note your conduct and learn more of your disposition. Should you be guilty of further infraction of law, and not deport yourself as a good citizen at all times within the period for which the sentence was pronounced, the suspension will be revoked, and you will be required to pay the penalty of the offense which you committed and of which you were convicted.

"This does not constitute a pardon, either full or conditional. It does not absolve him from guilt. It is not a remission. It does not restore to him his rights as a citizen, or wipe out the record of his conviction; the defendant enjoys his liberty outside the walls of the jail, yet he remains under the sentence to which he has been condemned, and may be imprisoned at any time. George v. Lillard, (1899) 106 Ky. 820, 51 S. W. 793, 1011.

"In my judgment, so long as the statute is construed to not extend the power of suspension beyond the maximum limit of the time for which the defendant was sentenced, by express terms, and does not permit a revocation thereof except within such period, it is valid, and not subject to attack as an invasion of the pardoning power. All that is necessary is to read and construe the statute as applying only to the time during which the sentence would have been running, had there been no suspension. It is then made to harmonize with the modern policy of dealing with criminals for the first time guilty of minor offenses. It gives them an opportunity to prove their worth, and that society will not suffer if the full penalty is not executed, and it minimizes the punishment rather than increases it, as is done by the construction given the statute by my brethren."

ity opinion takes refuge in the theory that it is the duty of the supreme court, if possible, so to construe a statute as to sustain its validity and therefore interprets the clause "to suspend during good behavior" as if there had been added to it the words "and but only for the purpose of affording to the accused the opportunity of appealing to the executive clemency." It concedes and holds that at any time after the expiration of that reasonable period the convict may be rearrested, but evidently fervently hopes and prays that as long as his conduct is good no one will urge or take these measures.

These are the leading cases which sustain the validity of the statutes under consideration. When they premise an inherent power in the trial courts they hardly seem to be justified by the facts of history. Some of them absolutely ignore the fact that the constitutions usually vest in the governor or in the board of pardons the power both to reprieve and to pardon, while the distinction between an indefinite suspension which shall be irrevocable during good behavior or after the term of the sentence has expired and a pardon is hardly satisfactory.

The real solution of the problem lies in the suggestion of the Supreme Court of the United States when in the case of *Ex parte United States, Petitioner,*[19] it said:

"So far as wrong resulting from an attempt to do away with the consequences of the mistaken exercise of the power in the past is concerned, complete remedy may be afforded by the exertion of the pardoning power; and so far as the future is concerned, that is, the causing of the imposition of penalties as fixed to be subject, by probation legislation or such other means as the legislative mind may devise, to such judicial discretion as may be adequate to enable courts to meet by the exercise of an enlarged but wise discretion the infinite variations which may be presented to them for judgment, recourse must be had to Congress whose legislative power on the subject is in the very nature of things adequately complete."

The solution is to be found in considering the suspension as a part of the sentence which the legislature has itself authorized.

It must, of course, be conceded that the legislature has the inherent power to define crimes and that it is the imposition of the penalty that turns a tort into a criminal act. It must be conceded that it is within the power of the legislature to impose any penalty it pleases as long as that penalty is not cruel or unusual, and it has

[19](1916) 242 U. S. 27, 61 L. Ed. 129, 37 S. C. R. 72.

been generally held that the test of that which is cruel or unusual is not the novelty of the penalty but its barbarity."

The legislature then can impose a prison sentence; it can impose a fine; it can impose a sentence of imprisonment which shall not begin to run until a number of weeks after the rendition of the judgment; it can impose a penalty which shall involve the mere giving a peace bond; it can impose a penalty which shall be nothing more than a reprimand; it can provide that in certain instances no penalty at all shall be imposed.

Having created and defined the offense, it perhaps, under the constitutional provisions, would have no power to grant to the trial judge the power to pardon the act, that is to say to wipe away the guilt. If, however, the penalty which was imposed by the legislature involved no term of imprisonment or no fine, there would be nothing to reprieve, nothing to pardon, no punishment to wipe away (as opposed to the guilt) except the suspended

"In the case of State v. Moilen, (1918) 140 Minn. 112, 117, 167 N. W. 345, the court among other things, said:

"The contention that the penalty fixed by the statute violates the provisions of the constitution against excessive fines and cruel and unusual punishments for crime is not sustained. The nature, character and extent of such punishments are matters almost wholly legislative. The legislature may prescribe definite terms of imprisonment, a specified amount as a fine, or fix the maximum and minimum limits of either, which the courts are bound to respect and follow. In fact the court has jurisdiction to interfere with legislation upon this subject only when there has been a clear departure from the fundamental law and the spirit and purpose thereof and a punishment imposed which is manifestly in excess of constitutional limitations. 14 Am. & Eng. Enc. (2d ed.) 436; State v. Poole, 93 Minn. 148, (1904) 100 N. W. 647, 3 Ann. Cas. 12; State v. Durnam, (1898) 73 Minn. 150, 75 N. W. 1127. The term cruel and unusual punishment, as used in the Constitution, has no special reference to the duration of the term of imprisonment for a particular crime, though it would operate to nullify the imposition by legislation of a term flagrantly in excess of what justice and common humanity would approve. The purpose of incorporating that particular provision in the Constitution was to prevent those punishments which in former times were deemed appropriate without regard to the character or circumstances of the crime, but which later standards in such matters condemned as unjust and inhuman; such punishments as burning at the stake, the pillory, stocks, dismemberment and other extremely harsh and merciless methods of compelling the victim to atone for and expiate his crime. The intention was to guard against a return to such inhuman methods. The punishments fixed by this statute do not exceed the limit of legislative discretion, and the statute must stand. It is possible that an excessive punishment may in a particular case be imposed by the court. But that possibility will not destroy the statute. The sentence may be reviewed on appeal and if found excessive proper correction may be made or ordered. No sentence has yet been pronounced in this case, and we assume that it will be in harmony with the special facts of the case. Section 9219, G. S. 1913."

sentence itself. There is therefore no conflict with the constitution, and the courts have too often confused the power of the legislature or of the trial judge to pardon, to reprieve, and to commute with the undoubted legislative power to define crimes and to prescribe their penalties. Though, indeed, many statutes have been sustained on more or less mistaken and inconclusive theories, and still more have been allowed to remain unchallenged, so far the Texas court of appeals[21] appears to be the only court

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[21]In the case of Baker v. State (1913) 70 Tex. Ct. App. 618, 158 S. W. 998, the Texas court of criminal appeals, said:

"While the power of the governor alone, under our constitution, to grant pardons cannot be questioned, yet it is equally beyond question that the legislature has the sole power to define offenses and fix the punishment to be inflicted on the offender. Our Penal Code provides, article 3: 'In order that the system of penal law in force in this state may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, unless the same is made a penal offense, *and a penalty is affixed thereto by the written law of this state.*' The power to determine that penalty is not conferred on the executive nor the judiciary, but is confided solely to the legislative branch of the government, and we, nor the governor, have authority nor power to prescribe to the legislative department what acts of omission or commission shall be made penal offenses, nor what punishment shall be assessed for a violation of such penal laws. This power is confided solely to the legislative branch of the government, and in this act the legislature has not sought to excuse from punishment any one after conviction and penalty assessed. As the code has provided in defining principals that all persons are guilty who act together in the commission of an offense, and even though one should commit an offense, if another is present and encourages him in the act he is likewise guilty, which general provision is applied to and read into each and every article of the Code defining offenses, so should this general provision in regard to punishment be read into and applied to each article of the code prescribing the punishment for such offense. Section 1 of article 2 of the constitution provides that the powers of the government shall be divided into three distinct departments. Those which are legislative to one; those which are executive to another; and those which are judicial to another, and no person being of one of these departments shall exercise the power properly attached to either of the others. And section 1 of article 3 provides that the legislative power shall be vested in a Senate and House of Representatives, which together shall be styled 'the Legislature,' and in article 13 certain powers are specifically conferred on the legislature, which is to enact laws, and the governor nor the judiciary have no more authority to invade the power conferred on the legislature than has the legislature to invade and usurp the power of the governor to grant pardons. The passage of this law, misnamed a 'suspension of sentence,' is a legislative act, passed within the scope of the power which they and they alone possess, to fix by law the punishment of any and all penal offenses. It does not authorize a jury nor the courts to suspend any law of this state, but the legislature *by law* has provided that in given contingencies no punishment shall be suffered for the first violation of certain provisions of the Penal Code."

which has satisfactorily faced the issues and satisfactorily solved the problem.

There is in fact no suspension of the sentence at all. The sentence is merely conditional and such a one as the legislature has prescribed. It is that the convicted person shall not be incarcerated or fined but shall be held under the surveillance of the court and of the law. It is much like giving a peace bond. It is much in common with our statutes against habitual offenders but includes more of the element of mercy. The prisoner is told to go and to sin no more, but that if he does sin again, his punishment shall be that which was awarded for the first offense. The suspension, if suspension it be, must be entered as a part of the judgment of conviction and as a part of the original sentence. It can not be allowed on a subsequent petition, for in that case it would be an exercise of the power to reprieve if not of the power to pardon.[22]

There is no real merit in the objection which was raised by the supreme court of Minnesota in the case of *State ex rel. Cary v. Langum*,[23] that:

"In particular instances the power to hold a suspended judgment in a criminal case over the head of the convicted party might lead to abuses of various sorts, and reflect serious results upon the administration of justice."

These words, indeed, were used in connection with the contention of an inherent power on the part of the courts to suspend a sentence and not in connection with a power which was given by statute and which was given as a part of the penalty. In answer to the contention some courts intimate that such a suspension would be invalid against the opposition of the defendant; but even this concession appears to be unnecessary. The fundamental question would be whether the suspended sentence was itself cruel or unusual. It could only be revoked in case of bad behavior, and on that charge the defendant would have a day in court. If there were no new offense there would be no penalty. The safeguard would exist in the construction of the term bad behavior. We are satisfied that the construction which would be given would require a violation of the law to be proved. The Standard Dictionary in fact defines "during good behavior" as "while conducting oneself conformably to law."[24]

[22] State of Indiana v. Smith, (1909) 173 Ind. 388, 90 N. E. 607.
[23] (1910) 112 Minn. 121, 127 N. W. 465.
[24] United States v. Hraskey, (1887) 120 Ill. 560, 88 N. E. 130 A. S. R. 288.

There can be no doubt of the wisdom and of the imperative necessity[25] of granting our trial judges the power to suspend sen-

[25]In 1918 the United States Census Report on Prisoners and Juvenile Delinquents was given to the public and although this report was much belated and was based on the figures and investigation of the year of 1910, it contained much valuable information and is well worth considering. In speaking of it Miss Edith Abbott, on September 3, 1919, in an address before the American Institute of Criminal Law and Criminology said:

"The recently published United States Census Report on Prisoners and Juvenile Delinquents contains important data with regard to the need for adult probation in the United States. This report shows that several hundred thousand persons each year experience the demoralization of a short sentence in one of our minor prisons and that nearly three hundred thousand persons are committed annually for the non-payment of fines.

"This Census Report presents, for the first time in this country, statistics showing the total number of persons imprisoned in a given year for the non-payment of fines. The report shows that 58 per cent of all the persons committed to prison in our country are committed not for their crimes, but for their poverty, because they were too poor to pay the fines imposed by our courts. The extent of this modern system of imprisonment for debt is shown by the following figures: In a single year, 291, 213 poor persons were imprisoned for non-payment of fines, and among them were more than 6,000 children of juvenile court age (seventeen or under). For inability to pay fines of less than $5, 35,363 persons were imprisoned, and 129,713 for fines of less than $10.

"Imprisonment for non-payment varies in different sections of the country and is, of course, more common in the South than in the North. Sixty-eight per cent of all prisoners in the South Atlantic States are committed only for inability to pay fines, and the percentage falls to 48 per cent in the Middle Atlantic States and to 43 per cent in New England.

"To members of this Institute, to those who know the noisome, verminous, dark, ill-ventilated local prisons to which these persons are sent to spend their time in idleness and demoralizing companionship, the cruelty and waste of such punishment is obvious.

"These facts as to the extent of imprisonment for the non-payment of fines should be the more carefully considered in our country in view of the fact that the whole evil system has been practically swept away in Great Britain by the successful operation of the Criminal Justice Administration Act of 1914. In democratic America it appears that in the second largest city in the country the judges are still sending annually to the city workhouse from ten to twelve thousand persons who are too poor to pay their fines, and in the country as a whole more than 290 000 persons suffer this imprisonment for poverty in a single year; while Great Britain has adopted the more efficient and humane policy of doing away with the last surviving remnant of the mediaeval system of imprisonment for debt. Since 1905, it had been optional with the British courts to give a man time to pay his fine, but in 1914 it ceased to be optional and became mandatory. The first section of the Criminal Justice Administration Act of 1914 provides that in all cases time must be given for the payment of fines and the time must not be less than seven clear days. At the end of this time further time may be allowed by the court and payment in installments may be allowed. The Act con-

tences and of the social need of the statutes to which we have referred, and which we believe to be constitutional.

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tains the further humane provision that in imposing a fine the court is to take into consideration 'the means of the offender so far as they appear or are known to the court.' This provision puts an end to what the Prison Commissioners for Scotland called the 'abuse which . . . . arises from the imposition for certain offenses of fines upon a stereotyped scale, which necessarily press much more hardly upon the very poor than upon those who are better off.' Reports of the three Prison Commissions of England, Scotland, and Ireland all testify to the beneficial results of the Act of 1914 in operation. The experiment appears to have been entirely successful during the five years that have elapsed since the Act became effective.

"A twin evil that has recently been abolished in Great Britain is the short sentence. The Criminal Justice Administration Act of 1914 contains two provisions designed to do away with short and useless sentences of imprisonment: (1) The courts are given power to substitute for a sentence of imprisonment, an order that the offender be detained for one day within the precincts of the court. (2) If a sentence of imprisonment does not exceed four days, the offender is not to be sent to jail, but is to be detained in a 'suitable place' certified as such by the Home Secretary. The Commissioners of Prisons for England and Wales emphasize in their 1915 report the importance of the Act of 1914 in preventing the development of a criminal class. As to the short sentence they say that it has not a 'single redeeming feature.' 'It carries with it all the social stigma and industrial penalties of imprisonment with no commensurate gain to the offender or the community. If there still survives in the minds of administrators of justice the obsolete and exploded theory that prison is essentially a place for punishment—and for punishment alone—for the expiation of offenses in dehumanizing, senseless tasks, and arbitrary discipline truly there could be devised no more diabolical form of punishment than the short sentence oft repeated.'

"In America the short sentence, like imprisonment for fines, is still with us. The recently published Census Report shows that 24,970 persons were given sentences of less than ten days in our county jails alone. In the municipal jails, it appears that 4,513 persons were sentenced to terms of imprisonment of four days or less than four days. It may be asked what the Committee on Probation has to do with the problem of the short sentence or with imprisonment for the non-payment of fines. The answer is, of course, everything, for probation is the accepted American substitute for these evils."

LEGAL PHASES OF THE SHANTUNG QUESTION

By HAROLD SCOTT QUIGLEY*

THE Versailles Peace Conference awarded the German rights, title and privileges in Shantung Province to Japan.[1] This award was the climax of nearly five years of military and diplomatic effort through which Japan had captured Tsingtao, taken possession of the German and Sino-German properties, both public and private, throughout Shantung, and made "gentlemen's agreements" with Great Britain, France, Russia and Italy, recognizing her right to retain what she had won.[2] To this award China refused to become a signatory, resting her refusal upon legal and ethical grounds.[3] To examine the former, some phases of which have received scant attention, is the purpose of this article.

The legal argument of the Chinese Government for the direct restitution of the leased territory of Kiaochao, together with the railway and mining rights which Germany possessed in Shantung before the war, advanced one principal and two secondary points. If this presentation of alternatives is prejudicial to China's case the ambiguity of international law as applied to certain elements of the problem justly counterbalances prejudice. Even in courts of municipal law, furthermore, the parties are reluctant to rest a case upon a single legal principle or line of reasoning.

The principal legal proposition put forward by Mr. Lu Cheng-hsiang and his associates at Versailles and maintained consistently by the Chinese Government since, is that, in consequence of China's declaration of war on the Central Powers and accompanying declaration of abrogation concerning " agreements and conventions heretofore concluded between China and Germany, and between China and Austria-Hungary, as well as such parts of the international protocols and international agreements as

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[1]Treaty of Peace, Articles 156, 157, 158.

[2]2 MacMurray, J. V. A., Treaties and Agreements with and concerning China, 1894-1919, 1919-21, 1488. Also in China Year Book, 1921-2, 707-711.

[3]China Year Book, 1921-2, 711-713.

concern only the relations between China and Germany and between China and Austria-Hungary,"[4] the lease convention of 1898 under which Germany had administered Kiaochao and enjoyed other specified privileges had been abrogated.[5] Anticipatory of the necessity of meeting the argument that in ratifying in 1915 a treaty with Japan by which "the Chinese Government agrees to give full assent to all matters upon which the Japanese Government may hereafter agree with the German Government relating to the disposition of all rights, interests and concessions which Germany, by virtue of treaties or otherwise, possesses in relation to the Province of Shantung,"[6] China's argument distinguishes the position of China after her declaration from that which she occupied at the time the Sino-Japanese treaty of May 25, 1915 was concluded. At the latter date China was neutral and her ratification was "clearly subject . . . to the implied condition that China remained neutral throughout the war, and therefore, would be unable to participate in the final Peace Conference . . ." China's entry into the war so vitally changed the situation contemplated in the treaty, that, on the principle of rebus sic stantibus, it ceases to be applicable.[7]

Regarding this argument as sound the Chinese Government nevertheless included in its brief two alternative propositions; both of these contemplate the contention that the abrogation declaration was ineffective against a prior treaty guaranteeing that of which the abrogation would operate as a deprivation; the first sets up the alternative that the treaty was void ab initio because imposed with force majeure;[8] the second alleges the incompetency of Germany to transfer the leased territory to a third power.[9] This allegation is based upon the fifth article of section 1, Lease of Kiaochao, by which "Germany engages at no time to sublet the territory leased from China to another Power."[10]

Since the Chinese Government has relied rather upon the former than the two latter lines of argument, the latter will be dealt with first. That which rests the incompetency of the Sino-

[4]Ministry of Foreign Affairs, Official Documents relating to War (for 1917), 14.
[5]China Year Book, 1921-2, 667-8.
[6]Same, 667.
[7]China Year Book, 1921-2, 667.
[8]Chinese White Book, cited in 10 New York Times Current History Magazine, ii, 550.
[9]China Year Book, 1921-2, 667-8.
[10]Same, 669.

Japanese treaty of 1915 upon Japan's use of force majeure appears to be without adequate basis in international law. No statement could be clearer than the following from a recent revision of Oppenheim's treatise: "It must, however, be understood that circumstances of urgent distress, such as either defeat in war, or the menace of a strong state to a weak state, are, according to the rules of international law, not regarded as excluding the freedom of action of a party consenting to the terms of a treaty. The phrase 'freedom of action' applies only to the *representatives* of the contracting states."[11] John Bassett Moore points out that: "Coercion, while invalidating a contract produced by it, does not invalidate a treaty so produced."[12] He also quotes Bernard to the same effect: "It is commonly laid down that neither the plea of duress nor that of laesio enormis, [a degree of hardship, that is, so plain and gross that the sufferer cannot be supposed to have contemplated what he was undertaking]—pleas recognized, directly or circuitously, in one form or another, by municipal law both ancient and modern, can be allowed to justify the nonfulfilment of a treaty."[13] Vattel takes the same view: "On ne peut se dégager d'un traité de paix en alléguant qu'il a été extorqué par la crainte ou arraché de force."[14] Phillipson, writing in 1916, qualifies his statement of the law: "In the case of conventions established during peaceful relationships, duress may generally be deemed a ground for repudiation; but in a treaty of peace, force and compulsion cannot be so held."[15] He does not, however, cite any cases in support of this distinction. Hall attaches to his general statement that international law "regards all compacts as valid, notwithstanding the use of force and intimidation" the condition that these compacts "do not destroy the independence of the State which has been obliged to enter into them."[16] Westlake and Lawrence do not qualify the rule.[17] The practical unanimity of these authorities is sufficient warrant for rejecting the argument from force majeure on legal, however strong it may be on moral, grounds.

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[11] 1 International Law, 3rd ed., 660.
[12] 5 International Law Digest, 183.
[13] Lectures on Diplomacy, 184; quoted in I. L. D. V. 184.
[14] Droit des gens, liv. IV, chap. iv., sec. 37.
[15] Phillipson, Coleman, Termination of War and Treaties of Peace, 162.
[16] International Law, 6th ed., 319.
[17] 1 Westlake International Law 290; Lawrence Principles of International Law, 6th ed., 327.

The second alternative proposition advanced by the Chinese Government is that Germany was estopped from the transfer of her lease to Japan by a term of the lease itself.[18] This provision is peculiar to the Kiaochao lease; those of Port Arthur, Wei-Hai-Wei, Kowloon and Kuang-Chow-Wan have no explicit statement; an argument that the latter are non-transferable may, however, be made on the basis of the general nature of such leases. Involving, as they do, a temporary grant of administrative jurisdiction as well as the possession of territory, the consent of the transferor has been "overborne by superior force, and the argument is concluded under duress . . . If the lessor is unwilling, though he is by force of circumstances constrained, to make the conveyance, it is inconceivable that he should consent to its transfer to a third party."[19] It is difficult to see the logic of Dr. Tyau's inference; if a forced lease is legal ab initio, its legality would appear to be unaffected by a continuance of the application of force majeure such as a transfer of lease would imply. In 1905, it is true, Russia transferred the Liaotung peninsula to Japan "with the consent of the Government of China" but that the consent was ex post facto is revealed by the paragraph following that of the transfer, in which "the two High Contracting Parties mutually engage to obtain the consent of the Chinese Government mentioned in the foregoing stipulation."[20] The consent, given by that government in the Komura treaty, was given under duress and to the transferee, not the transferor.[21] The two treaties of transfer, like the original treaty of lease, recognize the ultimate sovereignty of China over the leased area. In neither situation does there appear to be apprehension that such recognition would operate against transfer.

Where, however, an express agreement not to transfer has been incorporated in the treaty of lease, the issue becomes twofold. That Germany was bound not to make a voluntary assignment of Kiaochao is evident; to that extent the special stipulation was of importance since it guaranteed the Chinese Government against any exchange which Germany might regard as ad-

[18] "Germany engages at no time to sublet the territory leased from China to another Power." Art. 5, sec. 2; 1 MacMurray 1898-4 114.

[19] Tyau, Treaty Obligations between China and other States, 69.

[20] Treaty of Portsmouth, Art. V.; 1 MacMurray, 1905-8, 523. Also in Takahashi, International Law applied to the Russo-Japanese War, Appendix IV.

[21] 1 MacMurray, 1905-18, 550.

vantageous. The probability of such voluntary transfer was, however, extremely remote. On the other hand there was the possibility, later to become reality, that Germany would be compelled by force majeure to surrender her lease to another Power. In that contingency the obligation of Germany would be dissolved under the doctrine of rebus sic stantibus[22] or become void through impossibility of performance.[23] Since the transfer of the Kiaochao lease took place under conditions of force majeure, the necessary reply to the second alternative proposition of the Chinese Government is a denial of its legal effectiveness.

Throughout the argument upon this proposition the word "transfer" has been used as equivalent to the German words "weiter verpachten" which are properly translated "sublet" in English texts of the treaty.[24] The broader words *"jang," "chuan jang,"* and *"chuan,"*[25] all meaning transfer, have been used interchangeably with the narrower word *"chuan ch'u,"* which appears in the Chinese text of the original lease,[26] by the spokesmen of the Chinese Government at the Peace Conference and subsequently. To this wider interpretation of the terms of Article V the Japanese Government appears to have taken no exception. To sublet is to set up a relationship between the lessee and a new tenant, clearly a different proceeding from that involved in the Japanese conquest of Kiaochao. The translation "sublet," therefore, would be still less advantageous to the argument of the Chinese Government than that of "transfer" though it may be argued that an agreement not to sublet would imply the obligation to refrain from transfer.

The principal legal proposition advanced by China does not depend upon either of the propositions discussed above. It rests upon the "general rule that war abrogates the treaties existing between the belligerents . . ."[27] In accordance with this principle, in declaring a state of war to exist between China and the two

[22]See 1 Oppenheim 688-693; 1 Westlake 295-297; Foster, Practice of Diplomacy 299-300.

[23]1 Oppenheim 694.

[24]"Deutschland verpflichtet sich, das von China gepachtete Gebiet niemals an eine andere Macht weiter zu verpachten." Second paragraph of Article V., "Convention for the Lease of Kiaochow, 1898;" in Treaties, Conventions, etc. between China and Foreign States, 3 Imperial Maritime Customs, 30 Miscellaneous Series II, 946.

[25]Memorandum concerning Shantung (prepared for the use of the Chinese delegates to the Peace Conference) 4, 15.

[26]Customs, Treaties, etc. 947.

[27]2 Westlake 32.

principal Central Powers, the Chinese Government declared the consequent abrogation of its treaties and other agreements with them. At Versailles and in the recent interchange of correspondence with Japan, the position of China has been that the "lease of Kiaochao Bay expired immediately on China's declaration of war with Germany."[28]

To the general rule that war abrogates all inter-belligerent treaties international law admits exceptions. Arrangements to regulate war, transitory or dispositive treaties, and conventions including signatory third powers are the exceptions usually recognized.[29] Whether the treaty for the lease of Kiaochao is to be included under the general rule or under an exception depends upon the nature of the lease.

The leases of territory which have been embodied in conventions are of two principal types, the lease in perpetuity and the lease for a term of years. In the first category are the lease of the Panama Canal Zone held by the United States,[30] the lease by the Sultan of Zanzibar of his mainland possessions to the British East Africa Company, made perpetual in 1891 and later annexed to the Crown,[31] and the leases of "concessions" for foreign settlement at Tientsin, Hankow, Kiukiang, Newchwang, Canton and other Chinese ports;[32] in the second the group of leases secured by four of the powers from China in 1898, in each of which a term of years was specified.[33] Agreement is unanimous that the lease in perpetuity is equivalent to cession. The rescission of the German concessions at Hankow and Tientsin and the Austro-Hungarian concession at Tientsin, which resulted from the Great War, was not a product of the declaration of abrogation but of the defeat of Germany. There is excellent authority to support the contention that leases for a term of years are "disguised" cessions. Writers who take this view make no distinction between leases in perpetuity and leases for a term of years and none on the basis of length of term. They regard the reservation of sovereignty, express or implied, as a disguise for a situation amounting to annexation and contemplated as leading to annexa-

[28] "Chinese Memorandum to Japan," Oct. 5, 1921, Peking and Tientsin Times, Oct. 7, 1921.
[29] 2 Westlake 32-34; 2 Oppenheim, 2nd ed, 129-131; Lawrence 360-365.
[30] Malloy's Treaties.
[31] 1 Westlake 135.
[32] Morse, Trade Administration of China, Chap. VIII.
[33] 1 MacMurray (Liaotung) 1898-5, 119-121; (Wei-Hai-Wei) 1898-14

tion. It is somewhat surprising that this view is frequent in the French treatises since the French school of international law is notable rather for its emphasis upon the letter of the law than the practice which often evades it. Among others Ernest Nys,[24] A. Rivier,[25] Perrinjaquet,[26] and Louis Gerard[27] may be cited as liberal constructionists upon the issue in question. Lawrence,[28] Westlake,[29] who quotes Despagnet, and, following him, Pitt-Cobbett[30] also emphasize the "disguise" to be detected in what purport to be leases for a term of years only. Hershey classifies the lease for a term of years as a "disguised or indirect" cession.[31]

The qualifying terms, such as "unlikely," "practical," "matter of fact," etc., which modify the views of these writers indicate their hesitation to support the establishment of a principle by reading between the lines when the lines of the lease themselves clearly favor the lessor state by the reservation of sovereignty during the existence of the lease and by prescribing a definite duration of its existence:

"His Majesty the Emperor of China . . . engages, while reserving to himself all rights of sovereignty in a zone of 50 kilometres (100 Chinese li) surrounding the Bay of Kiaochow at high water . . ." His Majesty the Emperor of China leases to

152-3; (Kiaochao) 1898-4, 112-116; (Kwangchouwan) 1898-7, 124.

[24]"L'acquisition du territoire et le droit international," in Revue de Droit International 36, 1904, 376.

[25]1 Principles du Droit des gens 180.

[26]Revue generale de Droit international public 16, 1909, 349-367.

[27]Des cessions deguises de territoires en Droit international public 286.

[28]Principles 176-177.

[29]1, 135-136.

[30]1 Leading Cases 110.

[31]Essentials of International Public Law 184.

[32]Article 1; The respective German and Chinese words used in this sentence are rechte der Souveränität and chu chüan, both meaning sovereignty; in article III. (II. 946) where some English translations, e. g. that used by Professor Hershey in 13 American Journal of International Law 533, read, "in virtue of rights of sovereignty over the whole of the water area of the bay . . .," while others read rights of administration, the respective German and Chinese words are hoheitsrechte and kuan shih, meaning respectively rights of sovereignty and rights of administration. From the Chinese point of view no distinction was intended between the status of the water area and the land area involved in the lease; over both China's sovereignty was reserved. The official announcement of the German Government made no distinction between the status of the land and the water area: "the Imperial Chinese Government has transferred to the German Government, for the period of the lease, all its sovereign rights in the territory in question." (1 Westlake 136). Since this statement recognizes that the lease is for a period of years it recognizes by inference the reservation of China's sovereignty; hence the terms rights of sovereignty and rights of administration are

Germany, provisionally for ninety-nine years, both sides of the entrance to the Bay of Kiaochow."[43]

Westlake recognizes that "when property is leased, the lessor retains a proprietary right which runs concurrently with the lessee's right of enjoyment. If therefore the analogy were closely pressed, the state which grants a lease of territory would be held to retain all the time some sort of sovereignty over it."[44] Pitt-Cobbett prefaces the conclusion stated above with premises that hardly lead him logically to his conclusion:

"As to the effect of such international leases, it would seem strictly that, whilst conferring rights of user and enjoyment on the lessee, yet the territory remains subject to the sovereignty of the lessor, and subject also to any prior obligations specifically attached thereto. The reservation of sovereignty, moreover, might also be said to imply the obligation on the part of the lessee not to use the territory to the prejudice of the lessor."[45]

Oppenheim points out that while "such cases comprise, for all practical purposes, cessions of pieces of territory . . . in strict law they remain the property of the leasing state."[46] His position is directly contradictory to that taken by writers cited above:

"And such property is not a mere fiction, as some writers maintain, for it is possible for the lease to come to an end by expiration of time or by rescission. Thus the lease of the so-called Lado Enclave, granted in 1894 by Great Britain to the former Congo Free State, [which an anonymous writer in I, R. G. D. I. P., 380, cited by Westlake, I, 136 , n. 1, declared to be 'not a true letting but an alienation'] was rescinded in 1906."[47]

Hall takes an even more definite stand for strict interpretation:

"These and such like privileges or disabilities are the creatures, not of law, but of compact . . . They conform to the universal rule applicable to jura in re aliena. Whether they be customary or contractual in their origin, they must be construed strictly. If, therefore, a dispute occurs between a territorial sovereign and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it lies the burden of proving its claim beyond doubt or question."[48]

The Naval War College concluded that: "the general position

practically identical. See 2 Customs, Treaties, etc., 944, also 1 MacMurray, 1898-4 113.

[43] Article II.

[44] I, 135-136.

[45] 1 Leading Cases 110.

[46] I, 310.

[47] Same.

[48] International Law 158-159.

assumed by the powers is not that sovereignty has passed, but that the jurisdiction to the extent named in the treaty of cession has passed to the leasing power."[49] John Bassett Moore does not admit political considerations into the interpretation of a lease. In a letter responding to an inquiry from a friend of the writer he wrote:

"The English versions that have been published . . . are not accurate. They are even more favorable to Germany than the German text of the agreement, while the Chinese text is distinctly less favorable to Germany than is the German text . . . From this it is easy to infer that, in the case of those who have sought to treat the Chinese leases as 'disguised cessions,' the wish has been father to the thought. Personally I am not inclined to accord to governments, any more than to individuals, the benefit of the doubt in the interpretation of instruments the acceptance of which they impose upon others by force."[50]

As would be anticipated, Chinese writers are strict constructionists. M. T. Z. Tyau regards the leases granted by China as "a species of international servitudes" to be "construed strictly against the beneficiary states."[51] Wen Sze King takes the same view.[52]

From the foregoing summary of opinion regarding the nature of the leases of which that of Kiaochao is typical, the necessary conclusion from the legal standpoint is that they are what they are entitled, leases for a definite term of years, to be surrendered at the expiration of the term. Thus the Sino-German lease treaty of 1898 was not a pactum transitorium, setting up a permanent state of things such as would be done by a peace treaty in determining a boundary. Since there can be no argument that it belonged to either of the other excepted categories it fell necessarily within one of those susceptible of abrogation by war or by declaration upon the outbreak of war. In view of its clauses providing for administrative powers, the better conclusion would seem to be that it was a political treaty not contemplated as establishing a permanent condition of things.

The question now arises: did China forfeit her right of abro-

[49] Naval War College 1902, p. 32.
[50] Letter of Mar. 25, 1921.
[51] Treaty Obligations 68.
[52] "The Lease Conventions between China and the Foreign Powers," in 1 Chinese Social and Political Science Review, 25-26. He quotes Bluntschli, Le Droit international 209, 1 Phillimore International Law 391, and Wilson, International Law 153, in support of strict construction of international servitudes.

gation by consenting to the Shantung clauses of the Twenty One Demands quoted above? As already stated China's argument invokes the principle of rebus sic stantibus. The status of a co-belligerent and participant in the peace treaty, she has contended, is vitally different from that of a neutral. As a neutral she had no right to abrogate treaties and as such she submitted to the Japanese ultimatum. It would hardly be argued that the ultimatum would have been served upon China had she been associated with the Allies at that time. In logic, the difference in her circumstances upon becoming a belligerent was entitled to the same respect as it would have received two years previously; a vital difference in 1915, it was equally so in 1917. In view of all the circumstances her argument is sound.[58]

It might have been argued by the Chinese Government that the word "possesses," used in the first article of the 1915 treaty with Japan, was contemplated as to become applicable at the date when China actually was to "give full assent," i. e., at the date of the treaty of peace. Until then, Japan's title could be one of conquest only. If, in the meantime, Germany's possessions in Shantung province should be brought under the title of China, the "rights, interests and concessions which Germany, by virtue of treaties or otherwise, possesses in relation to the Province of Shantung" would be nil. Hence there would be nothing for the German Government to transfer to Japan and nothing for China to agree to. Under this interpretation the question of the estoppel of the right of abrogation would not arise.

China did not request Japan to release her from the Shantung agreement, nor did she declare herself no longer bound by it. In her mind, release from that engagement was implied in the declaration of abrogation of German privileges in Shantung which accompanied her declaration of war. By that declaration China resumed the leasehold and other concessions, subject to

[58] According to Dr. Ferguson's testimony, quoted by Willoughby, Foreign Rights and Interests in China 392, n. 13, in reaching her conclusion in China "took the advice of two eminent French international lawyers, of the most eminent Russian jurist who was known to the President of the Board of Foreign Affairs, who formerly had been Minister in St. Petersburg; of an eminent Dutch jurist of Holland and of an eminent international jurist from Belgium, and based her claim on the advice which was given her by the jurists, that is, that her declaration of war against Germany, notwithstanding her contract which had already been made in 1915 with Japan, of itself vitiated not only the German lease but also the treaty with Japan." Dr. Ferguson stated that this was the unanimous opinion of these jurists.

such private claims as international law would allow. Her resumption did not wait upon the peace conference but was legally complete immediately. Thereupon Japanese possession should have come to an end.[54]

The Chinese Government has not questioned the legality of Japan's conquest of the leased territory, though, as above noted, it has denied the validity of the transfer by Germany; its claims of violated neutrality have been concerned with the use of Chinese territory not under lease. In 1904 Secretary Hay, after consulting with the representatives of other interested powers, requested Russia and Japan to respect the neutrality of China. His note suggested that this could be done by localizing and limiting the area of hostilities as much as possible. Both the belligerents acquiesced in this policy, with the explicit reservation by Japan, of "the regions occupied by Russia" and by Russia, of Manchuria; the United States accepted both constructions of neutrality as satisfactory.[55] The Japanese limitation, narrower than the Russian, was put into force by the Chinese Government, which made no protest against the use of the Liaotung peninsula, east of the Liao river, as an area of war; inter alia Prince Ch'ing wrote thus to Minister Conger:

"But at such places in Manchuria as are still in charge of a foreign power and from which its troops have not yet withdrawn, China's strength is insufficient, and it will be perhaps difficult to strictly observe the laws of neutrality there."[56]

Lawrence concluded that "the experience of the Russo-Japanese struggle of 1904-1905 shows conclusively that for all purposes of war and neutrality leased territory must be regarded as a part of the dominion of the power that exercises full control over it."[57] During the joint attack of the Japanese and British forces upon Tsingtao the Chinese Government was concerned, not with protesting against the carrying of war into a leased territory, nor even against the use of adjacent territory for the movement of Japanese troops, but with the delimitation of a military zone extending about 100 miles west of Tsingtao, beyond which she would maintain neutrality.[58] When the German Government pro-

[54]Japan raised no protest against the abrogation declaration until the peace conference.
[55]Foreign Relations of the United States, 1904, 2-3.
[56]Same 121-2.
[57]Principles 176-7.
[58]Declaration of Sept. 3 (5), 1914; in China Year Book, 1921-2, 662.

tested against the military zone, China replied that while desirous of preventing belligerent operations upon her territory, she had been unable to do so and refused to be held responsible for the enforcement of strict neutrality within the zone.[59] Logically there seems to be no reason for denying to a belligerent the right to attack the possessions as well as the property of his enemy, nor is the failure to deny the right an admission that a lease is merely a cession in disguise, since the restrictions upon the former tenant continue upon the new. The consideration shown to the lessor is indeed cavalier but no less so than at the original demand for the lease. As stated by Prince Ch'ing in 1904: "No matter which of the two powers may be victorious or defeated the sovereignty of the frontier territory of Manchuria will still revert to China as an independent government."[60] China held the same view regarding Kiaochao in 1914.

This argument does not resolve the question whether Japan was legally capable of occupying the Shantung Railway throughout its length. Since China is her own sole guarantor of neutrality, Japan's right to disregard her proclamation of neutrality is clear, provided that no arrangement had been made, as in the Russo-Japanese War, to respect it. No such arrangement has been published though the Chinese Government has asserted that an "understanding" was reached with the Japanese Government according to which Japanese troops were not to encroach westward of the Weihsien station.[61] Japan argued however that her occupation of the railway was not a violation of Chinese neutrality, since the road was German property and a menace to her position in Kiaochao; she justified her conquest of the railway by assimilating its status with that of the leased territory.[62] As the concession for the railway was a term of the lease and in view of the control exercised over it by the German Government, the railway in fact was a projection of the leased area.

Account must be taken of two subsequent agreements, one of September 24, 1918, between China and Japan, the other of May 20, 1921, between China and Germany.

The secret agreement of 1918 was secured by Japan as an "adjustment of Questions concerning Shantung;" it contemplates

[59] Phillipson, International Law and the Great War 276.
[60] United States Foreign Relations 1904, 122.
[61] China Year Book 1921-2, 662.
[62] China Year Book 1921-2, 680.

the continuance in force of the 1915 agreement and disregards the intervening abrogation declaration; except for the last article, in which Japan promises to abolish the civil administration established by her in Shantung, it deals entirely with the Kiaochao-Tsinan or, as it is usually called, the Shantung Railway, providing for its policing under Japanese regulation and for the employment of Chinese citizens on its administrative staff. Article 6 states that "The Kiaochao-Tsinan Railway, after its ownership is definitely determined, is to be made a Chino-Japanese joint enterprise."[63] China's signature to this arrangement raises the question whether it is an admission by her Government of the ineffectiveness of the declaration of abrogation as applied to the Shantung concessions.

It is difficult to come to any other than an affirmative conclusion so far as the railway is concerned. It is significant that the Chinese Government, on the same day it entered into the agreement, signed another, also secret, by which, in return for a loan of 20,000,000 yen, it gave Japan the concession for building two branch lines for the Shantung Railway. The time of these agreements, within two months of the armistice, was not one likely to find the Powers anxious to assure themselves of continued Japanese aid by an open support of these new demands. Had China revealed them and requested the Powers to recognize her services as an ally by using their good offices to restrain Japan it would seem that public opinion would have compelled the Powers to do so. At least it might well have prevented Japan from pressing her demands. China's delegates at the Peace Conference would have been in a much stronger position, though it is doubtful whether the final decision would have been altered. As it happened, when the agreements of 1918 were published at Paris, the Chinese delegation felt that the ground had been cut from under them and the Chinese people united in bitter crimination of the corrupt officials who had signed the agreements. It seems altogether likely that the compelling cause back of their signature was not force but money.[64] Had it been force majeure,

[63]Same 702.

[64]"And to complete the chain of the work of consolidation she (Japan) induced China last year when Germany was collapsing to commit herself with regard to the disposal of the Shantung Railway and the Kaomei Line. Thus an open avowal was obtained from China as to her succession to Germany's rights and privileges in Shantung, in part and parcel . . . and what was the price of this cession on the part of those

the agreement to let the Peace Conference decide the status of the railway would still be valid.

The lease itself and the economic privileges not specified in the agreements of 1918 remained in the status secured by the declaration of abrogation. Although the Chinese repudiation of their own declaration in its bearing upon the railway, the principal asset of Shantung, might be construed as raising the issue of its validity in toto, strict interpretation would maintain it in all matters not specifically excepted.

The Chinese Government declined to sign the Treaty of Peace with Germany. The non-settlement of the Shantung Question prior to the Sino-German Commercial Agreement of May 20, 1921, led the Japanese Government, in a note of October 20, 1921, to assert that in it Germany took the Japanese view, that the Treaty of Versailles effected the transfer of the German rights and interests to Japan, and that China, as a party to the agreement, had declared herself cognizant of the transfer.[65] The Japanese assertion was based upon the article which "affirms that Germany has been obliged by the events of the war and by the Treaty of Versailles to renounce all the rights, interests and privileges which she acquired by virtue of the Treaty concluded by her on March 6, 1898 and other Acts concerning the Province of Shantung, and finds herself deprived of the possibility of restituting them to China."[66] The reply of the Chinese Government is an adequate rebuttal of the Japanese contention:

"As to the criticism directed to the declaration made by the German representatives to China, it is to be observed that at the time when they came to negotiate the Commercial Agreement with China, China still insisted on her demand for the restoration of Kiaochao. But, owing to the conditions of the war and the Treaty restraint, Germany lost, by force majeure, her power of returning Kiaochao to China, for which she expressed her regret to the Chinese Government. To this, it must be also noted, the Chinese Government has only declared its acknowledgment of Germany's explanation as such and no more."[67]

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who did the 'job' it might be asked? It was the paltry sum of twenty million Japanese yen which supplied the government with funds after August 10, 1918, when the new President was installed." From an article by Liang Chi-Chao on "The Causes of China's Defeat at the Peace Conference," in 9 Millard's Review, July 19, 1919, 262-3. The 20,000,000 yen were squandered in fruitless military operations; North China Herald, Feb. 8, 1919, 322.

[65] Peking and Tientsin Times, Oct. 21, 1921.

[66] China Year Book 1921-2, 738.

[67] Peking and Tientsin Times Nov. 5, 1921.

In other words the affirmation in the Commercial Agreement may be interpreted only as a mutual recognition by China and Germany of the *actual* dispossession of Germany and her consequent inability to make restitution, without prejudice to either country's judgment upon the legality of the Versailles decision.

In accordance with the introductory statement of intention this argument has refrained from reference to the considerations of international good will and good morals which might well have restrained Japan from the Shantung enterprise, which has brought her little more than obloquy and increased budgets. The degree to which Japanese activities in Shantung have been found legally justifiable is an indication of the gap that still separates law and ethics, revealed when a strong power deals with a weaker one. Nevertheless China's abrogation declaration is upheld, as it would, very probably, have been upheld at Versailles, had the Powers possessed freedom of action.

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RECOVERY IN QUANTUM MERUIT AFTER NEGLIGENT FAILURE TO PERFORM AN ENTIRE CONTRACT—MEASURE OF RECOVERY. —The right of a party who has broken his indivisible contract without legal excuse, but not wilfully, to recover for such benefit as he may have conferred on the other party by part performance is not easy to work out. Two legal principles seem in conflict: the one forbids a plaintiff in material default to recover, and the other allows recovery to prevent an unjust forfeiture.[1] The recovery, where it is allowed, is not on the contract but in quasi

[1] 3 Williston, Contracts, Chap. XL, especially at sec. 1473. H. W. Ballantine, Forfeiture for Breach of Contract, 5 MINNESOTA LAW REVIEW 329. The discussion in this note is limited to those cases in which the plaintiff's breach of contract is merely negligent.

contract, on the ground that the defendant should not be unjustly enriched.[2]

In their decisions the courts are not in harmony as to the measure of recovery and frequently their statements are inaccurate.[3] On principle it would appear that if a recovery is allowed it should be measured by that which will leave the defendant in the same situation as if he had recovered damages for breach of the contract.[4] As the court points out in *Michigan Yacht & Power Co. v. Busch*,[5] "In justice the defendants have no right to more of the money than will compensate them for loss by reason of the plaintiff's refusal to carry out the contract."

The authorities show that in many cases the plaintiff recovers the *contract price* less the damages resulting to the defendant from the plaintiff's breach,[6] or less the cost to the defendant of completing the work.[7] Such a statement of the recovery fails to distinguish the situation under discussion from recovery on the contract as for substantial performance.[8] Another statement of the measure of recovery is that the plaintiff is entitled to the value of the part performance, not exceeding the contract price, less the damages suffered by the defendant.[9] The value of the part performance must be the value to the defendant and that is said to be "the fair market value of the thing produced," not exceeding the contract price.[10] Where the contract is merely unfinished, but readily capable of completion, the measure of recovery should be limited to the reasonable value of the plaintiff's part performance, not exceeding such portion of the contract price for full performance as the value of the part performance bears to the value of full performance, less the damages resulting to the defendant from the plaintiff's breach.[11]

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[2]McCurry v. Purgason, (1915) 170 N. C. 463, 87 S. E. 244, Ann. Cas. 1918A 907.

[3]3 Williston, Contracts, sec. 1480; Woodward, Quasi Contracts, sec. 178.

[4]Britton v. Turner, (1834) 6 N. H. 481, 487, 26 Am. Dec. 713.

[5](1906) 143 Fed. 929.

[6]Hayward v. Leonard, (1828) 7 Pick. (Mass.) 181; Woodward, Quasi Contracts, sec. 178, p. 282 and cases cited. See, however, Gillis v. Cobe, (1901) 177 Mass. 584, 59 N. E. 455.

[7]McClay v. Hedge, (1864) 18 Ia. 66; Hillyard v. Crabtree's Adm'r., (1854) 11 Tex. 264, 62 Am. Dec. 475.

[8]Woodward, Quasi Contracts, sec. 178; 3 Williston, Contracts, sec. 1475.

[9]United States v. Molloy, (1906) 144 Fed. 321, 75 C. C. A. 283, 11 L. R. A. (N.S.) 487.

[10]Gillis v. Cobe, (1901) 177 Mass. 584, 59 N. E. 455; 3 Williston, Contracts. secs. 1483 and 1485.

Just how to compute the defendant's damage is a point upon which the courts are not in harmony. Where the thing produced is incapable of being made to conform to the contract without its entire demolition, and where the acceptance was involuntary or was made only through necessity, as in the case of improvements to real estate, and an action is allowed the plaintiff in quasi contract, the damages to the defendant, according to a Vermont decision,[11] should be such a sum as will fully compensate the defendant for the imperfection in the work, so that he will be placed in as good a position pecuniarily as if the contract had been strictly performed. After deducting this amount, the remainder is payable to the plaintiff for his part performance.

According to Professor Williston, the defendant should be allowed as damages, by recoupment or counterclaim, the difference between the contract price of the building (or other performance) and the cost in the market of making such a building,[12] this rule of damages to apply in every case in which the plaintiff, failing to perform his contract, sues in quantum meruit. It is assumed that the defendant has paid for something totally different from what the contract called for, and that it therefore stands totally unperformed.[13] This theory of the measure of damages may be correct where the assumption is supported by the facts, but has not been followed, nor in justice should it be, where the part performance has been in substantial compliance with the contract and has therefore mitigated the damages that would flow from a breach of the contract.

JOINT ADVENTURES—PARTNERSHIPS.—A joint adventure has been defined as "an association of two or more persons to carry out a single business enterprise for profit."[14] At common law

[11] Woodward, Quasi Contracts, sec. 178, p. 285; 3 Williston, Contracts, sec. 1485, p. 2642; 3 Sutherland on Damages, 3d. Ed., sec. 711, p. 2167.

[12] Kelly v. Bradford, (1860) 33 Vt. 35; 3 Sutherland on Damages, 3d. Ed., sec. 711, p. 2168.

[13] 3 Williston, Contracts, sec. 1484; Eaton v. Gladwell, (1899) 121 Mich. 444, 80 N. W. 292; City of Sherman v. Connor, (1895) 88 Tex. 35, 29 S. W. 1053.

[14] 3 Williston, Contracts, sec. 1484.

[1] 2 Rowley, Modern Law of Partnership, sec. 975, p. 1339. A joint adventure is also defined as "an enterprise undertaken by several persons jointly," 23 Cyc. 452, and as an enterprise arising "by contract or agreement between the parties to join their efforts in furtherance of a particular transaction or series of transactions," Nat. Surety Co. v. Winslow, (1919) 143 Minn. 66, 71, 173 N. W. 181.

co-adventurers in an enterprise were recognized in the courts only when the element of partnership was disclosed, and upon proof of the essentials of a partnership.[3] Now, however, the courts hold that a joint adventure may exist where parties engage in a common enterprise for their mutual benefit without entering into a strict partnership relation.[4] In its general nature, the "venture" is similar to a partnership and is governed largely by the same rules of law,[5] but the two are not identical,[6] and several points of difference deserve attention.

A joint adventure usually relates to a single transaction, although that transaction may comprehend a business to be continued for several years, while a partnership relates to a general business of some particular kind.[7] However, a partnership may be created for the consummation of a single transaction,[8] and accordingly it has been held in one jurisdiction that a joint adventure is merely a partnership of limited scope and duration.[9] In jurisdictions where the Uniform Partnership Act has not been adopted, a corporation is incapable of becoming a partner,[10] but it may bind itself by a contract for a joint adventure, the purpose of which is within the scope of the corporate business.[10]

One of the essentials or results of the partnership relation is that each partner is the agent for the other partners and the partnership in the partnership business.[11] In a joint adventure, the

[3]Goss v. Lanin, (1915) 170 Ia. 57, 61, 152 N. W. 43.

[4]Jackson v. Hooper, (1909) 76 N. J. Eq. 185, 197, 74 Atl. 130; Sanders v. Newman, (Wis. 1921) 181 N. W. 822.

[5]Butler v. Union Trust Co., (1918) 178 Cal. 195, 172 Pac. 601; Cain v. Hubble, (1919) 184 Ky. 38, 211 S. W. 413, 6 A. L. R. 146; Menefee v. Oxnam, (1919) 42 Cal. App. 81, 183 Pac. 379.

[6]Hurley v. Walton, (1872) 63 Ill. 260; Williams v. Gillies, (1878) 75 N. Y. 197; 2 Rowley, Modern Law of Partnership, sec. 975, p. 1339. Bush v. Haire, (1917) 197 Mich. 85, 163 N. W. 875, a bill framed on the theory of a partnership was dismissed for want of proof of a partnership, without prejudice to the plaintiff to institute proceedings on the theory of joint adventure.

[7]23 Cyc. 453; 2 Rowley, Modern Law of Partnership, sec. 975, p. 1340.

[8]Bates v. Babcock, (1892) 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745, 29 A. S. R. 133.

[9]"A joint adventure is a limited partnership; not limited in a statutory sense as to liability, but as to its scope and duration; and under our law joint adventures and partnerships are governed by the same rules." Ross v. Willett, (1894) 76 Hun (N. Y.) 211, 27 N. Y. S. 785.

[10]1 Rowley, Modern Law of Partnership, secs. 193, 194, p. 197. Under the Uniform Partnership Act a corporation may be a partner.

[10]Mestier & Co. v. Chevalier Paving Co., (1901) 108 La. 562, 32 So. 520.

[11]Flarsheim v. Brestrup, (1890) 43 Minn. 298, 45 N. W. 438; Harvey v. Childs, (1876) 28 Ohio St. 319, 22 Am. Rep. 387; Pahlman v. Taylor,

authority of one associate to bind the others contractually as the mere result of the relation is more doubtful.[12] A joint adventurer can bind his associates in a matter respecting which express or apparent authority is given,[13] and it has been stated that each one of the parties has the power to bind the others in matters which are strictly within the scope of the enterprise,[14] but the power is more restricted than that of a partner in a general business.[15] In one case where the parties were held not to be partners because neither had the power to bind the other, the court held them to be joint adventurers on the theory that no mutual agency exists in the latter relation.[16] This case, however, goes farther than most decisions, and has been so criticised by one writer.[17]

The principal distinction between a partnership and a joint adventure is said to be that, in the latter, one party may sue the other at law for a breach of the contract, a share of the profits, or a contribution for advances made in excess of his share,[18] whereas a partner cannot sue his co-partner at law upon matters involving partnership transactions, but must look to equity for relief.[19] It should be noted, however, that the general rule in partnership is held not to apply and an action at law is allowed where the partnership is for a single transaction and no accounting is necessary, i. e., where the partnership is similar in form to a joint adventure.[20] Thus any distinction based on the nature of the remedies between parties seems unjustifiably drawn.

(1874) 75 Ill. 629; Mechem, Partnership, 2nd Ed., sec. 244, p. 217. The Uniform Partnership Act, sec. 9 (1), is to the same effect.

[12]Donahue v. Haskamp, (1920) 109 Wash. 562, 187 Pac. 346; Mechem, Partnership, 2nd Ed., sec. 245, p. 218.

[13]Jones v. Gould, (1913) 209 N. Y. 419, 103 N. E. 720.

[14]Anderson v. Weber, (1914) 148 N. Y. S. 133.

[15]2 Rowley, Modern Law of Partnership, sec. 980, p. 1349.

[16]Jackson v. Hooper, (1909) 76 N. J. Eq. 185, 74 Atl. 130.

[17]2 Rowley, Modern Law of Partnership, sec. 980, p. 1350.

[18]23 Cyc. 453; Hurley v. Walton, (1872) 63 Ill. 260; see also Saunders v. McDonough, (1914) 191 Ala. 119, 67 So. 591. It should be noted that the remedy at law does not preclude a suit in equity for an accounting. Botsford v. Van Riper, (1910) 33 Nev. 156, 196, 110 Pac. 705; Saunders v. McDonough, (1914) 191 Ala. 119, 67 So. 591; Harvey v. Sellers, (1902) 115 Fed. 757; Reece v. Rhoades, (1917) 25 Wyo. 91, 165 Pac. 449; Keyes v. Nims, (Cal. App. 1919) 184 Pac. 695; Mechem, Partnership, 2nd Ed., sec. 206, p. 187.

[19]Mechem, Partnership, 2nd Ed., secs. 203, 221; 2 Rowley, Modern Law of Partnership, sec. 743, p. 1029; Burdick, Partnership, 2nd Ed., p. 333; Noyes v. Ostrom, (1910) 113 Minn. 111, 129 N. W. 142, action between firms having a common partner.

[20]Mechem, Partnership, 2nd Ed., secs. 205, 206, p. 187; 2 Rowley, Modern Law of Partnership, sec. 748, p. 1038; Burdick, Partnership, 2nd Ed., p. 336.

A contract of joint adventure need not be express, but may be implied from the conduct of the parties.[21] The mutual promises of the parties to give their aid and assistance in furthering the adventure are sufficient consideration to support the contract.[22] The presumption is that the profits arising from a joint adventure are to be divided equally among the joint adventurers, without regard to any inequality of contribution,[23] although the proportion in which profits are to be shared may of course be fixed by contract.[24] Parties to a joint adventure stand in a fiduciary relation to each other, similar to that existing between partners. It is therefore improper for any one of the parties to acquire a secret advantage, and he will be held strictly to account to his co-adventurers for any secret profits.[25] If title to property purchased with funds contributed for the joint adventure is taken in the name of one party, he holds it as trustee for the other adventurers,[26] and

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[21]Hoge v. George, (Wyo. 1921) 200 Pac. 96; 23 Cyc. 453.

[22]See Alderton v. Williams, (1905) 139 Mich. 296, 102 N. W. 753. Thus where plaintiff and defendant mutually agreed to secure an option and defendant furnished the capital and did the work, plaintiff merely giving advice and suggestions, the agreement was held a sufficient consideration to support the contract and plaintiff recovered a share of the profits. Botsford v. Van Riper, (1910) 33 Nev. 156, 191, 110 Pac. 705.

[23]Lind v. Webber, (1913) 36 Nev. 623, 134 Pac. 461, 50 L. R. A. (N.S.) 1046, Ann. Cas. 1916A 1202 and note; Hoge v. George, (Wyo. 1921) 200 Pac. 96. These cases hold, of course, that money advanced by one party to the joint adventure is a loan for which the party is entitled to be reimbursed out of the proceeds of the venture. See also Buckmaster v. Grundy, (1846) 8 Ill. 626. The same rule applies to sharing losses as to sharing profits, i. e., they are to be divided equally between the parties. Claflin v. Godfrey, (1838) 21 Pick. (Mass,) 1, 15; see also Hoge v. George, (Wyo. 1921) 200 Pac. 96, 99. It has been held that where one party furnished the capital and the other the services, the latter was not liable for any part of the losses. Rau & Rieke v. Boyle & Boyle, (1868) 5 Bush (Ky.) 253.

[24]Hammel v. Feigh, (1919) 143 Minn. 115, 173 N. W. 570. Where the parties consisted of a firm of two partners and a third person, the profits of the venture were divided into two parts, one for the firm and one for the other party. Warner v. Smith, (1863) 32 L. J. Ch. (N.S.) 573, 8 L. T. (N.S.) 221, 11 W. R. 392.

[25]Church v. Odell, (1907) 100 Minn. 98, 110 N. W. 346; Gasser v. Wall, (1910) 111 Minn. 6, 126 N. W. 284, aff'd in 115 Minn. 59, 131 N. W. 850; Jones v. Kinney, (1911) 146 Wis. 130, 131 N. W. 339, Ann. Cas. 1912C 200 and note; Menefee v. Oxnam, (1919) 42 Cal. App. 81, 183 Pac. 379; Sanders v. Newman, (Wis. 1921) 181 N. W. 822. See also Nelson v. Lindsey, (1917) 179 Ia. 862, 162 N. W. 3. For a discussion of the liability imposed upon third persons dealing with joint adventurers, see 4 MINNESOTA LAW REVIEW 299; also Selwyn & Co. v. Waller, (1914) 212 N. Y. 507, 106 N. E. 321, L. R. A. 1915B 160.

[26]Irvine v. Campbell, (1913) 121 Minn. 192, 141 N. W. 108, Ann. Cas. 1914C 689. See also Botsford v. Van Riper, (1910) 33 Nev. 156, 191, 110 Pac. 705.

property bought with the proceeds of a joint adventure belongs to all the adventurers as joint property. If no date is fixed by the contract for the termination of the adventure, the agreement remains in force until the purpose is accomplished, and neither party can end it at will,[27] nor will equity dissolve the joint adventure for any cause other than those which justify the dissolution of partnerships.[28]

TAXATION—VALUATION OF CAPITAL STOCK AND FRANCHISE OF A CORPORATION—INDEBTEDNESS.—One of the most serious difficulties encountered in working out rules for the taxation of corporations, has been the proper disposal of the corporate indebtedness in evaluating the capital stock of the corporation. Various courts have adopted different rules which can be generally classified as follows: first, those which deduct the indebtedness from the value of the capital stock;[1] second, those which do not consider the indebtedness at all;[2] and third, those which add the indebtedness to the value of the capital stock.[3]

The intention of the law is to tax corporations in the same manner as individuals are taxed, so that taxes shall be uniform and equal.[4] In the absence of statutes there can be no deduction of the indebtedness of either the individual or the corporation,[5] and a statute giving a corporation the right to deduct its indebtedness is unconstitutional when the same right is not given to the individual.[6] Each state has different rules for assessment to apply under varying circumstances. When the market value of

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[27]Saunders v. McDonough, (1914) 191 Ala. 119, 130, 67 So. 591, aff'd in 201 Ala. 321, 78 So. 160, 11 A. L. R. 419; Hubbell v. Buhler, (1887) 43 Hun (N. Y.) 82; 2 Rowley, Modern Law of Partnership, sec. 988, p. 1360; Lindley, Partnership, 7th Ed., p. 143.

[28]Hubbell v. Buhler, (1887) 43 Hun (N. Y.) 82; Marston v. Gould, (1877) 69 N. Y. 220, joint adventure terminable at will.

[1]People ex rel. S. A. R. R. Co. v. Barker, (1894) 141 N. Y. 196, 36 N. E. 184.

[2]Commonwealth v. N. Y., etc., R. Co., (1898) 188 Pa. 169, 191, 41 Atl. 594, and cases following. The indebtedness is here held to be a relevant fact tending to reduce the value of the stock, although not to be specifically deducted.

[3]State Board of Equalization v. People, (1901) 191 Ill. 528, 549, 61 N. E. 339, 58 L. R. A. 513, and note, p. 577, 599. For a later note, see L. R. A. 1915C 380.

[4]37 Cyc 1029; Cooley, Taxation, 3d Ed., p. 273.

[5]See Re Oklahoma Nat. L. Ins. Co., (Okla. 1918) 173 Pac. 376, 13 A. L. R. 174, 184.

[6]State v. Duluth Gas & Water Co., (1899) 76 Minn. 96, 104, 78 N. W. 1032, 57 L. R. A. 63; State v. Karr, (1902) 64 Neb. 514, 90 N. W. 298.

the capital stock is not readily ascertainable, the assessment may be made by adding together the value of all the property, real and personal, tangible and intangible, including all assets and the franchise, and in the absence of statute, no deduction of the indebtedness should be allowed under this rule.[7] But when the capital stock of a corporation has a market value, or a cash value, many states adopt this value as the basis of the assessment,[8] and then the question of the disposal of the indebtedness becomes more complex.

As a preliminary matter, it is necessary to determine what is meant by the terms market value, actual value, or cash value of the capital stock. These different expressions, found in various statutes, amount to the same thing, and are indirectly determined by a comparative consideration of the assets and liabilities of the corporation. The "market value" is a composite photograph of all the elements giving value to the capital stock. As surely as the corporate indebtedness increases without a corresponding increase of assets, the market value of the capital stock decreases and vice versa. Therefore, starting with the market value of the stock as a basis, it is apparent that there has already been a deduction of the corporate indebtedness.[9] New York has long sustained the rule that the indebtedness should be specifically deducted from the market value of the capital stock.[10] This deduction is available to the corporation, since by statute individuals are allowed the same deduction.[11] But, as previously indicated, one deduction is made when the market value of the stock is taken as a basis, and by force of the statute a second deduction is effected.

The rule that the indebtedness shall be neither added nor deducted is well established in Minnesota, Kentucky, Pennsylvania,

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[7]Commonwealth v. Henderson Bridge Co., (1896) 99 Ky. 623, 641, 642, 31 S. W. 486, 29 L. R. A. 73, aff'd in 166 U. S. 150, 17 S. C. R. 532, 41 L. Ed. 953.

[8]State Board of Equalization v. People, (1901) 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513.

[9]State v. Duluth Gas & Water Co., (1899) 76 Minn. 96, 104, 78 N. W. 1032, 57 L. R. A. 63.

[10]People ex rel. S. A. R. R. Co. v. Barker, (1894) 141 N. Y. 196, 36 N. E. 184; People ex rel. Cornell S. Co. v. Dederick, (1900) 161 N. Y. 195, 209, 55 N. E. 927. Apparently a statutory deduction of the corporate indebtedness is provided in North Dakota. See Grand Forks County v. Cream of Wheat Co., (1918) 41 N. D. 330, 343, 170 N. W. 863.

[11]Revised Statutes and General Laws of N. Y., vol. 3, c. 24, Art. 1, sec. 6a, p. 3530.

Iowa, Oklahoma, and Missouri.[12] As stated before, the use of the market value of the stock as a basis has the effect of a deduction of the corporate indebtedness. Why should corporations in these states be taxed upon the "market value," i. e., the net value of the stock, instead of on the gross value thereof? The landowner cannot thus deduct his indebtedness, nor can a merchant, but a corporation obtains a deduction indirectly by the fact that the market value of its stock is below par. For instance, a corporation free from debt has capital stock, including its franchise, to the value of $10,000. If the same corporation, still retaining the same property, is, however, indebted $5,000, this reduces the aggregate value of the stock on the market to $5,000. Clearly a rule of assessment taxing this amount is incorrect in that it exempts the corporation to the extent of its indebtedness and gives the corporation an unfair advantage over the individual.

The rule that the indebtedness should be added to the market value appears to be, after careful analysis, the most logical and reasonable basis of assessment. It has been ably expounded by the Illinois court, on the theory that the indebtedness has, in fact, been deducted in fixing the market value of the shares of capital stock, and that since the corporation is not entitled to this deduction, it is necessary to add the value of the debt to counterbalance the prior deduction.[13] The Minnesota court in the *Duluth Gas & Water Co.* case recognized the double deduction resulting from a statutory provision for a deduction of indebtedness from the market value of the stock.[14] Accordingly this provision was omitted in the later statute.[15] Since by the better opinion a corporation is not entitled to even one deduction, it might be well to amend the present statute so as to conform to the rule applied in Illinois.

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[12]State v. Duluth Gas & Water Co., (1899) 76 Minn. 96, 104, 78 N. W. 1032, 57 L. R. A. 63; Commonwealth v. Henderson Bridge Co., (1896) 99 Ky. 623, 31 S. W. 486, 29 L. R. A. 73; Commonwealth v. N. Y., etc., R. Co., (1898) 188 Pa. 169, 191, 41 Atl. 594; Marshalltown, etc., Co. v. Welker, (1919) 185 Ia. 165, 169, 170 N. W. 384; Oklahoma Furniture Mfg. Co. v. Bd. of Com'rs, (Okla. 1918) 175 Pac. 227; State ex rel. Marquette Hotel Inv. Co. v. State Tax Commission, (1920) 282 Mo. 213, 221 S. W. 721.

[13]Oak Ridge Cemetery Corp. v. Tax Commission, (Ill. 1921) 132 N. E. 553. This rule of assessment was approved by the United States Supreme Court in State R. Tax Cases, (1875) 92 U. S. 575, 605, 23 L. Ed. 663.

[14]State v. Duluth Gas & Water Co., (1899) 76 Minn. 96, 104, 78 N. W. 1032, 57 L. R. A. 63, by Mitchell, J., "The practical effect of this provision is to allow a double deduction of the amount of the corporate indebtedness."

[15]Minn. G. S. 1913, sec. 2015.

RECENT CASES

ASSIGNMENT—SET-OFF AND COUNTERCLAIM—PLEADING—NECESSITY THAT BOTH ASSIGNED CLAIM AND SET-OFF, AT LAW, BE DUE AT TIME OF ASSIGNMENT.—Plaintiff, the assignee of a chose in action, sued defendants who pleaded two set-offs. The assignee contended his claim was not subject to set off since the contract assigned was not due or matured at the time of assignment. The trial court excluded evidence of the two set-offs pleaded by defendants. *Held,* construing G. S. Minn. 1913, sec. 7675, that although the contract had not matured at the time of assignment, that fact did not deprive defendants of any set-off they then had or might have acquired against the assignor before notice of the assignment. *Nordsell v. Neilsen et al.,* (Minn. 1921) 184 N. W. 1023.

The instant case is contrary to the weight of authority, which holds that in order to entitle a party to use a set-off at law, a present right of action must exist at the time of assignment, in favor of the holder of each demand, and consequently, a demand against the assignor, to be a set-off at law, in an action by the assignee must exist in the form of a debt due and payable from the assignor at the date of the transfer and cannot arise afterwards. 24 R. C. L. 840, 841; 34 Cyc. 746; 5 C. J. 963; *Kinsey v. Ring,* (1892) 83 Wis. 536, 53 N. W. 842; *Huse v. Ames,* (1890) 104 Mo. 91, 15 S. W. 965; *Chipman v. Bank,* (1888) 120 Pa. St. 86, 13 Atl. 707; *Stadler v. Helena First National Bank,* (1899) 22 Mont. 190, 56 Pac. 111, 74 A. S. R. 582; Burrill, Assignments, 6th Ed. (1893), sec. 361, p. 499; Waterman, Set-Offs, sec. 103, p. 118. And conversely, the claim or demand assigned must have been due and enforceable at the time of the transfer to permit a matured claim existing against the assignor being used as a set-off against the assignee. 24 R. C. L. 841; 34 Cyc. 747; *Henderson v. Mich. Trust Co.,* (1900) 123 Mich. 688, 82 N. W. 510; *King v. West Coast Grocery Co.,* (1913) 72 Wash. 132, 129 Pac. 1081; *Fuller v. Steiglitz,* (1875) 27 Oh. St. 355, 22 Am. Rep. 312. The reason for the foregoing view is that to allow a debt not due to be set-off against one already due and payable would be to change the contract and advance the time of payment. 24 R. C. L. 839; *Hayes v. Hayes,* (1859) 2 Del. Ch. 191, 73 Am. Dec. 709. In some states, the rule is that to prevent or defeat the set-off of a claim against an assignor in an action by the assignee, defendant must be charged with notice of the assignment before he acquired the set-off. *Adams v. Leavens,* (1849) 20 Conn. 73; *Taylor v. Buckner,* (Ore. 1921) 196 Pac. 839; 23 L. R. A. 306. In still other states, it is sufficient if defendant's claim against the assignor exists at the time suit is brought. *Brown v. Wieland,* (1902) 116 Ia. 711, 89 N. W. 17, 61 L. R. A. 417; *Bank v. Gay,* (1894) 101 Cal. 286, 35 Pac. 876; *Russell v. Redding,* (1874) 50 Ala. 448. And in a few jurisdictions, a claim owned at the time of the commencement of the action may be allowed as a set-off if it matures before the trial. *Bates v. Pricket,* (1854) 5 Ind. 22, 61 Am. Dec. 73; *Campbell v. Fox,* (1860) 11

Ia. 318; see note, 17 Ann. Cas. 428. Statutory differences are, in part, responsible for the divergent results in the solution of this question.

BILLS AND NOTES—ESTOPPEL RAISED BY ACCEPTANCE—FORGERY.—One Manning rifled a mail box and secured a draft drawn on the plaintiff bank, payable to the order of a given firm. Manning forged his name on the face of the draft as payee in place of the firm originally named. The forgery was such that it could not be detected. Manning offered the draft in payment for certain jewelry, indorsing the draft at that time. The merchant refused to take it at once and in person presented it at the plaintiff bank where it was accepted, the merchant then returning to his shop and delivering the jewels. The merchant deposited and received credit for the draft in the defendant bank. The plaintiff having paid the draft through the clearing house sues for recovery of the amount of the draft. *Held,* that plaintiff by its general acceptance bound itself to pay a draft of the amount stated, payable to the order of the illegally inserted payee and hence is not entitled to recover the money so paid. *National City Bank v. National Bank of the Republic,* (Ill. 1921) 132 N. E. 832.

The court feels bound to arrive at this conclusion by the provision of the Negotiable Instruments Law, sec. 62, which provides that the acceptor admits "the existence of the payee and his then capacity to endorse." The conclusion is obvious under the court's explanation that "if this section means anything it means just what it says; that is by accepting this draft plaintiff admitted the existence of the payee *then named in the draft* and the capacity of the *named* payee to indorse the draft." The court recognizes the aim of the act to be a codification of the law rather than a reformation of it and yet the decisions prior to the act in its own state are disregarded. *First Nat. Bank v. Northwestern Nat. Bank,* (1894) 152 Ill. 296, 312, 38 N. E. 739, 26 L. R. A. 289, 43 A. S. R. 247 in definite language states that the acceptor engages to pay to the person legally entitled to it, and further, the acceptance does not warrant the genuineness of the body of the draft either as to the payee or the amount. See also *State Bank v. Mid-City Trust & Savings Bank,* (1920) 295 Ill. 599, 129 N. E. 489, 12 A. L. R. 989. Nor would it seem that any confusion in the decisions of the various states demanded a departure from the decisions cited in order to maintain uniformity. 1 Daniel, Neg. Inst., 6th Ed., p. 629. *Interstate Trust Co. v. United States Nat. Bank,* (1919) 67 Colo. 6, 185 Pac. 260 and *Central Nat. Bank v. Drosten Jewelry Co.,* (1920) 203 Mo. App. 646, 220 S. W. 511, decided under the Act, arrive at a conclusion contrary to that of the instant case. The court in the instant case asserts that where the language of the act is unambiguous a reference to the decisions will but tend to create confusion. However, in view of the fact that the original draftsman of the phrase under consideration, Chalmer, in incorporating such phrase into the original English act, does not so much as suggest the meaning here attributed to this section, Chalmer's Bills of Exchange, 6th Ed., p. 188, and judging from the material nature of the interpolations that the court

found essential to give it that meaning, it would seem that the act was sufficiently ambiguous to warrant reference to the decisions prior to the enactment of the Negotiable Instrument Law. For an extensive discussion of the principles involved and here violated and the practical objections to the construction placed on this section in the instant case see 22 Col. L. Rev. 260.

The argument of the court that this construction of section 62 is consistent with the rule of equity "that where one of two innocent parties must suffer a loss the law will leave the loss where it finds it" is not obvious, in fact it would seem obvious that the rule of equity has no bearing on the question. The purpose of the section, however it may be construed, is to fix the acceptor with definite liabilities which are unaffected by the incidental fact that he may or may not have paid the money over when the action is brought. It is hardly possible that the court means that had the bank in the instant case refused to pay the draft and was here being sued to compel such payment, the holder could not recover under its construction of section 62, though the rule of equity mentioned would certainly lead to that conclusion.

BILLS AND NOTES—UNIFORM NEGOTIABLE INSTRUMENTS LAW—PAYEE AS HOLDER IN DUE COURSE.—The defendant gave the note in suit in payment for shares of stock in a mining company. The agents selling the stock obtained a blank note from the acting president of the plaintiff bank and when the sale of stock was consummated the note was made out to the plaintiff bank as payee. The agents later sold the note to the plaintiff, the named payee. It was contended that the defense of fraud was not available as against the plaintiff. *Held,* that the named payee *may* be a holder in due course within the provisions of the Negotiable Instruments Law. *Bank of Commerce & Savings v. Randell,* (Neb. 1921) 186 N. W. 70.

In the instant case the Nebraska court does not commit itself to the doctrine that in *every* case the payee of a note may be a holder in due course but expressly confines that possibility to those cases wherein the named payee takes the instrument "from a holder, not the maker, to whom it was negotiated as a completed instrument." In so holding the Nebraska court would apparently accept the doctrine asserted in the leading case, *Vander Ploeg v. Van Zuuk,* (1907) 135 Ia. 250, 112 N. W. 807, 124 A. S. R. 275, 13 L. R. A. (N.S.) 490, and maintain the instant decision under the exception expressly mentioned in that case. For a discussion of the principles and a comprehensive citation of authorities see, 1 MINNESOTA LAW REVIEW 446, 6 MINNESOTA LAW REVIEW 156, and note 15 A. L. R. 437. Though Minnesota has not expressly passed on the point it was assumed in *State Bank v. Missia,* (1920) 144 Minn. 410, 175 N. W. 614, that the named payee might be a holder in due course, but the named payee failed to establish the fact that he acted in good faith.

CONFLICT OF LAWS—RECORDING OF CONDITIONAL SALE CONTRACTS.—The Hyland Motor Co. sold an automobile to one Keightley in Utah under a

conditional sale contract. Keightley took the automobile to Colorado and sold it to Bell who mortgaged it to the plaintiff. The defendant took the automobile as agent for one Jones who claimed title under an assignment of the contract of sale. The contract was not filed or recorded in either state. Utah did not require the filing or recording of conditional sale contracts made therein to make them good against bona fide purchasers, but Colorado did. The plaintiff brought an action to recover possession. *Held,* that plaintiff could recover. *Turnbull v. Cole,* (Colo. 1921) 201 Pac. 887.

It is generally held, that if a conditional sale is valid in the state where made, without recording, but the buyer, without the knowledge or consent of the seller, thereafter removes the property to another state, and there sells it to a bona fide purchaser, the seller may recover the property in that state, notwithstanding the conditional sale would have been invalid there for want of recording. 24 R. C. L. 453; notes 64 L. R. A. 833, and 35 L. R. A. (N.S.) 387; *Parker-Harris Co. v. Stephens,* (1920) 205 Mo. App. 373, 224 S. W. 1036, 5 MINNESOTA LAW REVIEW 310. The instant case adopts the minority view which holds that to enforce such a contract would be against public policy and would result in detriment to the interests of a citizen of the state which required the registration of such contracts. *Consolidated Garage Co. v. Chambers,* (Tex. 1921) 231 S. W. 1072. For further discussion of this question see 5 MINNESOTA LAW REVIEW 310; 6 MINNESOTA LAW REVIEW 153. The court in the instant case changes the rule in Colorado by overruling the case of *Harper v. People,* (1892) 2 Colo. App. 177, 29 Pac. 1040; note, 64 L. R. A. 833. The court could have reached the same decision upon the theory that the laws of Colorado (on a principle somewhat akin to market-overt in England) may be held to cut off the right of the Utah vendor when the mortgage was made in Colorado to a bona fide mortgagee. In this view the Colorado statute does not purport to determine what rights the Utah vendor had by virtue of the Utah statute but what rights the Colorado mortgagee acquired by the mortgage made in Colorado.

CONSTITUTIONAL LAW—INJUNCTIONS—FOREIGN CORPORATIONS—STATUTE PROVIDING FOR REVOCATION OF LICENSE OF FOREIGN CORPORATION WHEN IT REMOVES CAUSE TO A FEDERAL COURT HELD UNCONSTITUTIONAL.—Plaintiff corporation, organized under the laws of Missouri, and doing business in Arkansas under a proper license, brought one original suit in the federal courts of Arkansas and had another suit removed there. An Arkansas statute provided that the secretary of state should revoke the license of any foreign corporation which brought any suit against a citizen of Arkansas in the federal courts, or removed a suit there, without the consent of such citizen. Plaintiff obtained an injunction restraining the secretary of state from revoking the license. *Held,* affirming the decree by a unanimous court, and expressly overruling *Security Mutual Life Ins. Co. v. Prewitt,* (1906) 202 U. S. 246, 26 S. C. R. 619, 50 L. Ed. 1013, that a statute exacting a waiver of the constitutional right to resort to the federal courts is void. *Terral v. Burke Construction Co.,* (U. S. 1922) 42 S. C. R. 188.

After stating that the decisions of the Supreme Court on this much litigated question cannot be harmonized, and deprecating the distinctions attempted in some of the cases, Mr. Chief Justice Taft, who delivered the opinion of the court, points out that "the federal constitution confers upon citizens of one state the right to resort to federal courts in another," and that "state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitation of the supreme fundamental law."

CONTRACTS—COVENANT TO MAINTAIN AS REQUIRING COVENANTOR TO REBUILD.— Defendant covenanted to construct and plaintiff to maintain a fence bounding a right of way. The fence was built, and eventually became so worn that it could not be effectually repaired. A cow belonging to the plaintiff got through the defective fence and onto the railroad tracks of defendant, where it was killed by a passing train. *Held,* that plaintiff cannot recover, his covenant to maintain the fence imposing upon him the duty to rebuild it if it deteriorated beyond the possibility of repair. *Ponsler v. Union Traction Co. of Ind.*, (Ind. App. 1921) 132 N. E. 708.

Whether the duty to maintain a physical object includes the duty to rebuild in case of destruction has been the subject of considerable dispute. Webster defines "maintain" as meaning "to hold or keep in a particular state or condition, especially in a state of efficiency or validity; to support, to sustain, not to suffer to fail or decline." See also Words and Phrases, 1st and 2d series. Apparently all courts are satisfied with this definition; yet decisions show that the word is subject to different interpretations, consistent with the inferred intentions of the parties concerned. Thus, a statute which gave authority to maintain and keep in good condition certain bridges and ferries was construed as not requiring or authorizing replacement of the same. *Kadderly et al. v. Multnomah County Court*, (1898) 32 Ore. 560, 52 Pac. 515. On the other hand, an agreement to maintain a railroad extension has been held sufficient to obligate the promisor to rebuild where the extension was destroyed by an extraordinary flood. *Louisville & N. R. Co. v. U. S. Iron Co.*, (1916) 118 Tenn. 194, 101 S. W. 414, 419. Likewise, where a statute requires a railroad to erect and maintain a viaduct, it was held that the railroad must rebuild same in case of destruction. *State ex rel. Boddenhagen v. Chicago, etc., R. Co.*, (1916) 164 Wis. 304, 159 N. W. 919. This latter view seems the more common. There is some analogy between a covenant to "maintain" and a covenant to "repair," the latter of which, by the weight of authority, obliges the covenantor not only to repair but to rebuild. 3 Williston, Contracts, sec. 1967. In Minnesota a contract to "maintain" has been held to be sufficiently satisfied, after destruction of the property involved, by rebuilding in a reasonable time. *Coleman v. Boom Co.*, (1910) 114 Minn. 443, 131 N. W. 641, 35 L. R. A. (N S) 1109.

CORPORATIONS—DISSOLUTION OF SOLVENT CORPORATION—DISSENSION AMONG STOCKHOLDERS—DE FACTO AND DE JURE DISSOLUTIONS.—Plaintiff, owner of one-half the stock in the Nashville Packet Company, brought this suit in the name of the corporation against the defendant, the owner of the other half of the stock, for dissolution of the corporation although it was solvent. Plaintiff averred that the defendant had been guilty of various misdeeds in connection with corporate affairs, and that the relations between them had become so hostile as to make it impossible for them to carry on the business. The defendant answered, denying the necessity and propriety of winding up the corporation. *Held,* that equity will intervene and appoint a receiver to wind up a solvent corporation where there is such bad feeling between the stockholders that the business cannot be harmoniously and successfully continued. *Nashville Packet Co. v. Neville,* (Tenn. 1921) 235 S. W. 64.

The general rule is that a court of equity has no authority, at the suit of an individual, to decree the dissolution of a corporation, unless such authority has been conferred by statute. 7 R. C. L. 731, 740-41; *Wheeler v. Pullman Iron, etc., Co.,* (1892) 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; note, 15 Ann. Cas. 422. The reason upon which this rule rests is that corporations are the creatures of the statute; hence, in general, their life depends upon the action of the state, or the stockholders as a whole. See note, 39 L. R. A. (N.S.) 1032. The trend of the more recent judicial opinion is that dissension among stockholders, if of such a character as to defeat the end and purpose for which the corporation is organized, will give a court of equity jurisdiction to dissolve it, even though there is no statute authorizing such dissolution. 14a C J. 1123-1124; *Green v. National Adv., etc. Co.,* (1917) 137 Minn. 65, 162 N. W. 1056, L. R. A. 1917E 784; *Brent v. Brister Sawmill Co.,* (1912) 103 Miss. 876, 60 So. 1018, 43 L. R. A. (N.S.) 720, Ann. Cas. 1915B 576. In some states, a dissolution under the circumstances of the instant case is apparently permitted by statute. *Application of Brown Bros.,* (1920) 181 N. Y. S. 460.

The instant case makes a distinction between dissolutions de facto and dissolutions de jure. By the former is meant such dissolution as takes place in substance and fact when a corporation suspends business without availing itself of the statutory procedure provided for that purpose. 14a C. J. 1081; 3 Thompson, Corp., sec. 3345, p. 2410; *Parker v. Bethel Hotel Co.,* (1896) 96 Tenn. 252, 273, 34 S. W. 209, 31 L. R. A. 706. A dissolution in any other form is a dissolution de jure. 14a C. J. 1082. *Brock v. Poor,* (1915) 216 N. Y. 387, 401, 11 N. E. 229. A legal dissolution, in the absence of a saving statute, renders it impossible for a creditor to prosecute a judgment against the corporation. 3 Thompson, Corp., sec. 3367, p. 2430. But in case of a de facto dissolution, a claimant against a corporation may be required to reduce his demand to a judgment at law against the corporation before seeking the aid of equity against the stockholders. See 3 Thompson, Corp., sec. 3369, pp. 2434, 2435.

EXECUTORS AND ADMINISTRATORS—PRINCIPAL AND ANCILLARY ADMINISTRATION—DISTRIBUTION WHERE ASSETS OF ESTATE ARE IN SEVERAL JURISDICTIONS.—A resident citizen of Illinois died testate in Illinois, leaving property in both Illinois and Wisconsin. The widow became principal executrix in Illinois and ancillary executrix in Wisconsin. The assets in Illinois were sufficient to pay only ten per cent. of the Illinois claims, and the Wisconsin assets were sufficient to pay ninety per cent. of the Wisconsin claims. The executrix prayed that no Wisconsin claims be paid until after final adjudication in both states of all claims, and that upon payment of the Wisconsin claims out of the combined assets in both states on a pro rata basis, the surplus from the Wisconsin assets be turned over to the executrix to be applied to the Illinois claims. The trial court denied the petition, and the petitioner appealed. *Held,* reversing the judgment, that where an estate is insolvent, the total assets, wherever situate, will be treated as one fund to be distributed pro rata to all the creditors in the several jurisdictions. *In re Hanreddy's Est.,* (Wis. 1922) 186 N. W. 744.

Where the entire estate is solvent, the rule is that resident creditors of the state of ancillary administration are paid in full without regard to the state of principal administration. 11 R. C. L. 444; 24 C. J. 1125; *Churchill v. Boyden,* (1845) 17 Vt. 319; note, 35 Am. Dec. 488. Where the ancillary estate is insolvent and the principal estate is solvent, it seems that the non-resident creditors should look to the latter for payment. See 11 R. C. L. 444; *Miner v. Austin,* (1876) 45 Ia. 221, 24 Am. Dec. 763. Where both the principal and the ancillary estates are insolvent, the weight of authority, with which the instant case is in accord, is to the effect that all property applicable to the payment of debts should be distributed among the creditors pro rata without regard to where the assets may be found or the creditors reside. 11 R. C. L. 444; 24 C. J. 1125; 2 Schouler, Wills, 5th ed., sec. 1015a, p. 887; *Ramsay v. Ramsay,* (1902) 196 Ill. 179, 63 N. E. 618. The principle of these cases is clearly laid down in a New York case: "The true principle which governs in all cases of double administration is . . . so to marshal the different funds under administration as to produce equality among all creditors, whether foreign or domestic." *Lawrence v. Elmendorf,* (1848) 5 Barb. (N. Y.) 73. But there is respectable authority to the contrary. *Bedell v. Clark,* (1912) 171 Mich. 486, 137 N. W. 627 (statutory construction); *Commonwealth v. Gregory,* (1918) 261 Pa. 106, 104 Atl. 562 (semble).

EXTRADITION—PROCESS—PRACTICE AND PROCEDURE—IMMUNITY FROM SERVICE OF PROCESS TO ONE ATTENDING COURT.—Defendant was brought from Utah to Oregon by extradition proceedings to answer to a criminal charge in a state court. While thus held pending trial, he was personally served with summons from a state court in a civil suit, which was then removed to a federal court. He appeared specially and moved to quash the service of summons. *Held,* that the motion be granted. One who is brought into a state by extradition proceedings is exempt

from service of civil process, until after he has had a reasonable time in which to return to his home. *Bramwell v. Owens,* (D. C. Ore. 1921) 276 Fed. 36.

The rule is well established and supported by the weight of authority, that persons in attendance on court in civil actions, whether as suitors or witnesses, are exempt from the service of process. *Hale v. Wharton,* (1896) 73 Fed. 739; *Richardson & Leach v. Smith,* (1906) 74 N. J. L. 111, 65 Atl. 162. The immunity is given in civil actions on the ground of public policy, to encourage persons to attend court voluntarily. *Feister v. Hulick,* (1916) 228 Fed. 821; *Notograph Co. v. Scrugham,* (1910) 197 N. Y. 377, 90 N. E. 962, 27 L. R. A. (N.S.) 333, 134 A. S. R. 886. But a diversity of opinion arises as to whether the same immunity is given to the defendant in a criminal action. Although cases in which attendance is compulsory, as in the instant case, can well be said to be outside the reasons for granting the immunity, the rule recognizing such immunity is too well established in the United States courts to be disregarded. *Feister v. Hulick,* (1916) 228 Fed. 821. But the great majority of the state courts adopt the contrary and more logical rule, that the immunity can be given only to a person who attends court voluntarily. *In re Thaw,* (1915) 152 N. Y. S. 771, 167 App. Div. 104; *Ex parte Frank Henderson,* (1914) 27 N. D. 155, 145 N. W. 574, 51 L. R. A. (N.S.) 328; *Reid v. Ham,* (1893) 54 Minn. 305, 56 N. W. 35, 21 L. R. A. 232, 40 A. S. R. 333. The rule in the intermediate situation, where the same person is affected by civil process and criminal prosecution in the federal and state courts respectively, is laid down in a recent federal case. It was there held, apparently contrary to the instant case, that where a person attending a criminal prosecution involuntarily in a state court, is served in a civil action by a subpoena from a federal court, the federal rule as to privilege from civil process does not apply, on the ground that a federal court will not invoke a rule affording the prosecution attended in a state court a greater protection than the courts of that state regard as necessary. *Crittenden v. Barkin,* (D. C. N. Y. 1921) 276 Fed. 978. The cases may be distinguished perhaps on the ground that the Oregon supreme court had not yet laid down a state rule which the federal court might have followed.

INJUNCTION—JURISDICTION OF EQUITY TO ENJOIN LEGAL PROCEEDINGS IN FOREIGN JURISDICTIONS—RECOGNITION OF EQUITABLE DECREE ISSUED IN A FOREIGN JURISDICTION.—Plaintiff and defendant were both residents of Wisconsin. Defendant, having been severely injured in Wisconsin, brought an action in Minnesota under the Federal Employers' Liability Act. Plaintiff railroad company sued in Wisconsin to enjoin further proceedings in the Minnesota action, or the institution of any action outside the state of Wisconsin. *Held,* that the facts of the instant case do not warrant an injunction, and that in any event an injunction would only issue in respect to the action then pending in Minnesota. *Chicago, M. & St. P. R. Co. v. McGinley,* (Wis. 1921) 185 N. W. 218.

The *power* of a court of equity to enjoin persons within its jurisdic-

tion from prosecuting transitory actions in other states cannot be questioned. In so functioning, the court is exercising no supervisory power over the tribunals of the foreign state, but rather it is regulating the conduct of persons within its jurisdiction and by so operating in personam seeks to prevent the individual from using a foreign tribunal as an instrument of fraud or oppression. 14 R. C. L. 411. The courts seem to require that, to warrant equitable interference, both parties must be residents. *Carpenter v. Hanes*, (1913) 162 N. C. 46, 77 N. E. 1101; *American Express Co. v. Fox*, (1916) 135 Tenn. 489, 494, 187 S. W. 1117. Or, if a corporation, it must be suable within the jurisdiction. *Wabash R. v. Peterson*, (1919) 187 Ia. 1331, 175 N. W. 523. In one decision, it is suggested that in an extreme case a bill might be entertained where both parties are non-residents. *Grover v. Woodward*, (1920) 91 N. J. Eq. 250, 260, 109 Atl. 822, reversed without mention of this point in 92 N. J. Eq. 227, 112 Atl. 412. The exercise of the power is generally justified to prevent a multiplicity of suits, to enjoin suits brought solely to harass an adversary, or to prevent the evasion of domestic laws. See notes, 59 A. S. R. 879; 21 L. R. A. 71; 25 L. R. A. (N.S.) 267; 10 Ann. Cas. 26; 16 Ann. Cas. 673; Ann. Cas. 1913B 204. It is almost uniformly held that the mere fact of additional expense will not justify an injunction. See notes mentioned, and also, *Illinois L. Ins. Co. v. Prentiss*, (1917) 277 Ill. 383, 115 N. E. 554. And some courts do not feel justified in scrutinizing the motives that prompt the individual in bringing his action in a foreign state. *Jones v. Hughes*, (1912) 156 Ia. 685, 137 N. W. 1023. But there is a marked tendency in several late cases to encroach on these settled limitations and to use the injunction more liberally. Attempted evasion of either statute law or judicial decision is sufficient ground. *Weaver v. Alabama G. S. R. Co.*, (1917) 200 Ala. 432, 76 So. 364; see criticism in 33 Harvard L. Rev. 92. Heavy expense is also recognized lately as a reason justifying injunction. *Wabash R. Co. v. Peterson*, (1919) 187 Ia. 1331, 175 N. W. 523; *Reed's Adm. v. Illinois C. R. Co.*, (1918) 182 Ky. 455, 206 S. W. 794; and see *Freick v. Hinkly*, (1913) 122 Minn. 24, 28, 141 N. W. 1096, 46 L. R. A. (N.S.) 695. Discouraging "ambulance chasing" is likewise considered in the instant case as a "strong reason" for the issuance of an injunction. See also *Reed's Adm. v. Illinois C. R. Co.*, (1918) 182 Ky. 455, 206 S. W. 794. These courts seem to have probed and weighed the causes that prompt citizens to secure the aid of foreign courts.

While all jurisdictions recognize this doctrine, all jurisdictions will not, as a matter of comity, refuse to entertain or refuse to continue an action because of an injunction issued in a foreign state. This is true even though the enjoined party seeking the aid of the courts of the forum in a transitory action is a nonresident. *State ex rel. Bossung v. District Court*, (1918) 140 Minn. 494, 168 N. W. 589, 1 A. L. R. 145, and note; contra, *Fisher v. Life Ins. Co.*, (1916) 112 Miss. 30, 72 So. 846.

INJUNCTION—RIGHT OF EQUITY TO RESTRAIN A CRIMINAL PROSECUTION. —The defendants, a racing association, obtained an injunction against

the district attorney to prevent enforcement of a certain criminal statute on the ground that the supreme court had already decided that their methods of conducting races did not violate the statute, and that attempted enforcement, against which there was no adequate remedy at law, would ruin a business in which they had invested huge sums. The district attorney, however, proceeded with the prosecution. The defendants applied to the supreme court for a writ of prohibition to prevent the criminal court from proceeding further. *Held,* (two justices dissenting) that the criminal court cannot be prevented from trying the case. *State v. Letellier et al.,* (La. 1921) 90 So. 218.

The general rule is that equity will not enjoin a criminal prosecution, because equity is concerned, not with criminal matters, but with civil and property rights. *In re Sawyer,* (1888) 124 U. S. 200, 210, 8 S. C. R. 482, 31 L. Ed. 402; and see note, L. R. A. 1916C 263, 264, note 3. However, as a first exception to the rule, equity will interfere where the restraint of the criminal prosecution is merely incidental to the adequate protection of a personal or property right. *Coal & Coke R. Co. v. Conley,* (1910) 67 W. Va. 129, 67 S. E. 613. Thus, equity may intervene where irreparable damage to property will result by prosecutions under an invalid law, *Clark v. Harford, etc., Assn.,* (1912) 118 Md. 608, 85 Atl. 503; *Dobbins v. Los Angeles,* (1904) 195 U. S. 223, 25 S. C. R. 18, 49 L. Ed. 169, reversing 139 Cal. 179, 72 Pac. 970, 96 A. S. R. 95; or, contrary to the instant case, under a law not invalid, but inapplicable or unlawfully applied to the particular case. *Philadelphia Co. v. Stimson,* (1912) 223 U. S. 605, 621, 32 S. C. R. 340, 56 L. Ed. 570; *Zweigart v. Chesapeake & O. R. Co.,* (1914) 161 Ky. 463, 170 S. W. 1194. But the damage to the property right must be one which necessarily flows from the enforcement of the law, and not incidentally from the prosecution of the party under it. *Milton Dairy Co. v. Great North. R. Co.,* (1914) 124 Minn. 239, 144 N. W. 764, 49 L. R. A. (N.S.) 951; *Davis v. The American Soc., etc.,* (1878) 75 N. Y. 362, 368; but see *Huntworth v. Tanner,* (1915) 87 Wash. 670, 687, 153 Pac. 523; see also, *Truax v. Raich,* (1915) 239 U. S. 33, 36 S. C. R. 7, 60 L. Ed. 131, L. R. A. 1916D 545, Ann. Cas. 1917B 283, where the enforcement of an unconstitutional statute was enjoined in order to safeguard the complainant's right of employment. Another exception to the general rule exists where a party to a pending suit in equity commences a criminal prosecution involving the same parties and the same subject matter. *Davis, etc., Mfg. Co. v. Los Angeles,* (1903) 189 U. S. 207, 23 S. C. R. 498, 47 L. Ed. 778; *Kelly & Co v. Conner,* (1909) 122 Tenn. 339, 123 S. W. 622, 25 L. R. A. (N.S.) 201; see note, 21 L. R. A. 84. A third exception exists where equity's failure to act will cause a multiplicity of prosecutions, there being no adequate remedy at law, *Mobile v. Orr,* (1913) 181 Ala. 308, 61 So. 920, 45 L. R. A. (N.S.) 575; *Alexander v. Elkins,* (1915) 132 Tenn. 663, 179 S. W. 310, L. R. A. 1916C 261, unless the complainant can avoid the multiplicity of prosecutions by simply desisting from committing the alleged unlawful act pending the first prosecution. *Bisbee v. Arizona Ins. Agency,* (1912) 14 Ariz. 313, 127 Pac. 722. The holding of the instant case seems to go unwarrantably far in permitting

the criminal court to take jurisdiction in violation of an injunction properly issued.

INSURANCE—SUICIDE UNDER "SANE OR INSANE" CLAUSE—DEGREE OF INSANITY PERMITTING RECOVERY.—Plaintiff, as beneficiary, brought suit on an insurance policy providing that there should be no recovery in case of death by suicide, sane or insane. The insured took his own life while insane. *Held,* that plaintiff was entitled to recover if insured's mind was so unbalanced that he did not know the nature of his act. *Columbia Nat. Life Ins. Co. v. Wood,* (Ky. App. 1922) 236 S. W. 562.

By the weight of authority suicide under the "sane or insane" clause avoids the policy regardless of the degree of insanity of the insured. *Moore v. Ins. Co.,* (1906) 192 Mass. 468, 78 N. E. 488, 7 Ann. Cas. 656, and note; Vance, Insurance 522. The case of *Bigelow v. Ins. Co.,* (1876) 93 U. S. 284, 287, 23 L. Ed. 918, is sometimes cited as supporting this view. See Vance, Insurance 523. But in that case the court, without deciding whether there might not be such an extreme degree of insanity as to permit recovery, merely held recovery barred "if the insured was conscious of the physical nature of his act and intended by it to cause his death, although, at the time, he was incapable of judging between right and wrong and of understanding the moral consequence of what he was doing." The minority view, with which the principal case is in accord, holds that if the insured is so far bereft of his reason as not to know the nature of the act he is committing, the policy is not avoided. *Cady v. Ins. Co.,* (1908) 134 Wis. 322, 113 N. W. 967, 17 L. R. A. (N.S.) 260, and note (delirium). Agreeably to this interpretation it is held that suicide by a person so insane as to be unconscious of the physical nature and consequences of his act is an accident within the meaning of an accident policy and will not prevent recovery. *Andrus v. Accid. Assoc.,* (1920) 283 Mo. 442, 223 S. W. 70, 13 A. L. R. 779.

In view of the history of the suicide exception in insurance policies and of the obvious intent of the modern clause, it seems that the sounder construction of the condition ought to include any self-destructive act of an insane man even though its physical consequence be not known or intended. Vance, Insurance 523. At all events, it appears that the words "self-destruction, sane or insane," in place of the technical term "suicide," would protect insurance companies even against the extreme construction indulged in by the court in the instant case. *Clarke v. Equitable Assur. Co.,* (1902) 118 Fed. 374, 55 C. C. A. 200; *Potter v. Royal Neighbors,* (1899) 76 Minn. 518, 79 N. W. 542. In Minnesota the argument as to the degree of insanity in connection with the "sane or insane" clause does not seem to have expressly been made. See *Robson v. Order of Foresters,* (1904) 93 Minn. 24, 100 N. W. 381.

JOINT ADVENTURES—PARTNERSHIPS.—Plaintiff, at defendant's suggestion to purchase land for speculative purposes, arranged for the purchase of a valuable option, defendant furnishing all the capital. Plaintiff now sues for his share of the profits. *Held*, that a contract of joint adventure had been entered into, and that, in the absence of an express or implied agreement to the contrary, the parties were entitled to an equal share of the profits. *Hoge v. George*, (Wyo. 1921) 200 Pac. 96.

For a discussion of the principles of partnership governing joint adventures, see NOTES, p 397.

MANDAMUS—UNIVERSITIES AND COLLEGES—REMEDIES OF STUDENTS AGAINST EDUCATIONAL INSTITUTIONS IN CASE OF DISMISSAL—NECESSITY OF JURISDICTION AND HEARING.—A senior in the Albany law school was expelled by the faculty for engaging in seditious propaganda and for making statements such as, "To hell with the American government." The faculty held a hearing and gave the student an opportunity to be heard. On his application for a writ of mandamus to compel reinstatement, *Held*, that mandamus will not issue to control discretion, but will be allowed only where the faculty had no jurisdiction to act or where there was no exercise of discretion. *People ex rel. Goldenkoff v. Albany Law School*, (1921) 191 N. Y. S. 349.

Clearly the proper remedy against a public educational institution of a student who has been wrongfully expelled or wrongfully denied a degree is mandamus. *Gleason v. University of Minnesota*, (1908) 104 Minn. 359, 116 N. W. 650; 18 R. C. L. 168. Mandamus is also the proper remedy against a private educational institution. *Baltimore Univ. v. Colton*, (1904) 98 Md. 623, 57 Atl. 14, 64 L. R. A. 108; *People, etc. v. Bellevue Med. College*, (1891) 14 N. Y. S. 490, 60 Hun. 107; 20 Yale L. J. 341. But there is a decided minority which maintains that since the relations between a student and a private school are purely contractual, the proper remedy is not mandamus but the same as for any other breach of contract, *State, etc. v. Milwaukee College*, (1906) 128 Wis. 7, 106 N. W. 116, 3 L. R. A. (N.S.) 1115, 116 A. S. R. 21, 8 Ann. Cas. 407; *Booker v. G. R. Med. College*, (1909) 156 Mich. 95, 120 N. W. 589, 24 L. R. A. (N S.) 447; note, Ann. Cas. 1912C 890. How far courts will delve into the discretionary acts of college and university authorities is interesting to note. Faculties, in their exercise of authority over students both as to their studies and general conduct, must necessarily be clothed with broad discretion. The conduct of private schools is less closely scrutinized than that of public institutions, supported partially by taxes and which are created and controlled by statute. *Gott v. Berea College*, (1913) 156 Ky. 376, 161 S. W. 204, 51 L. R. A. (N.S.) 17; *Koblitz v. Western Reserve Univ.*, (1901) 21 Oh. Cir. Ct. 144. However, in either case, though the courts cannot control the discretion of the faculties, *Gleason v. University of Minnesota*, (1908) 104 Minn. 359, 116 N. W. 650; *People etc. v. N. Y. Law School*, (1893) 68 Hun. 118, 22 N. Y. S. 663, yet they will determine whether or not the faculty has jurisdiction to act; and if so, whether that jurisdiction was exercised according to lawful procedure, providing a fair trial with

its incidents. *Baltimore University v. Colton*, (1904) 98 Md. 623, 57 Atl. 14, 64 L. R. A. 108. Again, the courts may compel a faculty to use its discretion and not to act arbitrarily or maliciously, which is repugnant to the exercise of discretion. *Illinois State Board etc. v. People*, (1887) 123 Ill. 227, 13 N. E. 201; *Jackson v. State ex rel. Majors*, (1898) 57 Neb. 183, 77 N. W. 662, 42 L. R. A. 792; *State, etc. v. Lincoln Med. College*, (1908) 81 Neb. 533, 116 N. W. 294, 17 L. R. A. (N.S.) 930; note, 12 Ann. Cas. 112. The instant case seems to be clearly in accord with the authorities.

MARRIAGE—ANNULMENT FOR FRAUDULENT REPRESENTATION AS TO PREGNANCY.—Plaintiff was induced by the defendant to marry her by fraudulently representing that she was pregnant by him when she knew that she was pregnant by another. Plaintiff relied on her statements and took no steps to ascertain the truth. Plaintiff asked to have the marriage annulled. *Held*, that the marriage be annulled. *Jackson v. Ruby*, (Maine, 1921) 115 Atl. 90.

The earlier cases on this question held almost uniformly that if a man marries a woman whom he knows to be pregnant, and with whom he previously has had sexual intercourse, being induced to marry her by her assurances that the child was his, and not taking any further steps to ascertain its paternity, the courts will not declare the marriage void, though it appears that the child must have been in fact begotten by another man. 9 R. C. L. 298; note 18 L. R. A. 375; note L. R. A. 1916E 650; *Foss v. Foss*, (1866) 12 Allen (Mass.) 26; *States v. States*, (1883) 37 N. J. Eq. 195. This conclusion was reached upon the theory that a person cannot escape from obligations he has voluntarily assumed, on the ground that he has been deceived, when he had neglected to avail himself of information within his reach;—and that the condition in which he found himself was the result of his own participation in crime. *States v. States*, (1883) 37 N. J. Eq. 195. The more recent cases have adopted the opposite view and under the same circumstances allow the marriage to be annulled. *Gard v. Gard*, (1918) 204 Mich. 255, 169 N. W. 908, 11 A. L. R. 923; *Winner v. Winner*, (1920) 171 Wis. 413, 177 N. W. 680, 11 A. L. R. 919, and note. These decisions are based upon the theory that the concealment by the woman of the paternity of her child is a fraud so vital that it goes to the essentials of the marriage relation, and that to refuse annulment on such grounds would furnish opportunity for any designing woman pregnant with child, to seduce a man whom she desires to become the putative father of her child. *Winner v. Winner*, (1920) 171 Wis. 413, 177 N. W. 680, 11 A. L. R. 919. The question in the instant case was one of first impression in Maine and the court in adopting the theory of the recent cases followed what is now the weight of authority and the most reasonable rule. The English courts do not adopt the more liberal view of the American courts and have held that unless the party imposed upon has been deceived as to the person, and has thus given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made. *Moss v. Moss*, L. R. (1897) P. 263, 66 L. J. Prob. N. S. 154, 77 L. T. N. S. 220, 45 Week. Rep. 635.

PRINCIPAL AND SURETY—RELEASE OF SURETY BY FAILURE TO FILE CLAIM AGAINST PRINCIPAL'S ESTATE.—Plaintiff was payee of a promissory note on which defendant was surety for her husband, now deceased. Plaintiff failed to present its note for payment within the time allowed for filing claims against the husband's estate. *Held,* overruling *Siebert v. Quesnel,* (1896) 65 Minn. 107, 67 N. W. 803, 60 A. S. R. 441, that the defendant was not released as a surety by the failure of the plaintiff to file his claim within the time limited. *Manchester Sav. Bank v. Lynch, et al.,* (Minn. 1922) 186 N. W. 794.

Thus Minnesota falls into line with the great weight of authority. See 5 MINNESOTA LAW REVIEW 485, which was cited by the court in the instant case, and where it was suggested that on reconsideration of the question the Minnesota court, in view of the trend of the authorities elsewhere, might overrule the former decision, a result which the instant case accomplishes. The court points out that the conclusion reached in the *Siebert Case* is "out of harmony with settled principles of the law of suretyship," that the desirability of uniformity in matters of commercial law furnishes an additional reason for overruling the decision, and that the result of the instant case is not to overturn a rule of property but merely to give a creditor a remedy of which he was heretofore deprived.

PUBLIC UTILITIES—MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—POLICE POWER—EFFECT OF INCREASE OF RATES BY PUBLIC SERVICE COMMISSION ON CONTRACT WITH MUNICIPALITY.—The defendant city contracted with a water company to rent hydrants at $30 a year. The Public Service Commission in 1916 found the rate confiscatory and raised it to $45. The city having refused to pay more than the old contract rate, the water company sued for the difference. The city contended that the action of the commission abrogated the contract, and that until a new contract was entered into with the city, it was liable only at the old rate. *Held,* that the contention that the increase of rates abrogated the contract is untenable, but that the contract, as modified by the commission, is binding and obligatory on both parties until such time as the commission may determine to reopen the case. *City Water Co. v. City of Sedalia,* (1921) 231 S. W. 942.

It is absolutely clear by the great weight of authority that any rate contracted for by agreement between a municipality and a public utility, which rate by a change of conditions becomes confiscatory, is subject to be increased under the police power of the state exercised by the legislature through an administrative body created for the purpose. Note, 3 A. L. R. 730, 738; *City of Sapulpa v. Gas Co.,* (Okla. 1920) 192 Pac. 224; *City of San Antonio v. Public Service Co.,* (1921) 255 U. S. 547, 41 S. C. R. 428, 65 L. Ed. 518; *Woodburn v. Public Service Commission,* (1916) 82 Ore. 114, 161 Pac. 391, L. R. A. 1917C 98, Ann. Cas. 1917E 996; *Hackensack W. Co. v. Public Utilities Comm.,* (1921) 115 Atl. 528. This is because the right to exercise the police power of the state cannot be abridged or bartered away. *City of Mitchell v. Board of R. R. Comm.,* (1921)

184 N. W. 246; *City of Lead v. Western Gas & F. Co.*, (1921) 184 N. W. 244. As to suspension of the police power of the state for a particular time, see *Southern Iowa Elec. Co. v. City of Chariton*, (1921) 255 U. S. 539, 542, 41 S. C. R. 400, 65 L. Ed. 514; *Vicksburg v. Vicksburg Waterworks Co.*, (1907) 206 U. S. 496, 515-516, 27 S. C. R. 762, 51 L. Ed. 1155; *San Antonio v. San Antonio Pub. Serv. Co.*, (1921) 255 U. S. 547, 556, 41 S. C. R. 428, 65 L. Ed. 518; 4 MINNESOTA LAW REVIEW 526, 527. On the other hand, it is also true that a city having the power to make such contracts cannot itself reduce the rate below the contract price because that would be impairing the obligation of contract. *Minneapolis v. Minneapolis St. R. Co.*, (1909) 215 U. S. 417, 30 S. C. R. 118, 54 L. Ed. 259; see 3 MINNESOTA LAW REVIEW 529. The important question which the courts, in view of the downward trend of prices, will soon be called upon to determine is: what is the effect of the rise of rates upon the original contract? If the rate contract, as said in the instant case, is still binding and obligatory, will an attempt by the state to lower the rate amount to an impairment of the obligation of contract, so that the rate cannot be lowered? To this it has been answered: "The sovereign police power of the state is preserved intact, irrespective of contracts with reference to rates for public service. Under it no contract as to rates will stand as against the order of the Public Service Commission for reasonable rates, whether such reasonable rates be lower or higher than the contract rate." *State ex rel. Sedalia v. Public Serv. Comm.*, (1918) 275 Mo. 201, 212, 204 S. W. 497. The effect of the statement is that every such contract rate, although binding when made, is subject to the implied condition that it can be raised or lowered by the police power of the state. See also *Hackensack W. Co. v. Public Util. Comm.*, (N. J. 1921) 115 Atl. 528. It has also been suggested that the moment the contract rate is raised, the rate term of the contract is abrogated, so that thereafter the rate is solely within the control of the proper governmental agency, to be raised or lowered at will in the exercise of the police power. 4 MINNESOTA LAW REVIEW 526, 530; see also 3 MINNESOTA LAW REVIEW 529. Both of the suggestions seem sound. The statement in the instant case, that the "contract as modified" continues binding, seems to ignore the fact that all the elements of voluntary consent to the new rate are absent. And although a municipality is regarded as an arm of the state. it can hardly be said that the state consents for the municipality, because in "rate-fixing" there appears not the slightest element of contract. At any rate, even if it be assumed that the municipality would be thus contractually bound by the assent of the state as its representative, the state in its own capacity would not be, and could still freely exercise the police power. In one case, however, it is held that the state, through its agency, the corporation commission, mutually *agrees* with the utility upon a new rate. *City of Sapulpa v. Okla. Natural Gas. Co.*, (1920) 192 Pac. 224. In Iowa the difficulty here discussed is obviated by a statute depriving cities of the power to make binding contracts with public utilities. *Southern Iowa Elec. Co. v. City of Chariton*, (1921) 255 U. S. 539, 41 S. C. R. 400, 65 L. Ed. 514.

RELEASE AND SATISFACTION—JOINT AND SEVERAL TORTFEASORS—LIABILITY OF NEGLIGENT ATTENDING PHYSICIAN AFTER RELEASE OF ORIGINAL TORTFEASOR.—Plaintiff employee instituted two suits for $30,000 and $25,000 against his employer for injury resulting in loss of his leg and for furnishing an unskilled physician. He dismissed the suits and executed complete releases for $1300 and $50, reserving the right to sue the physician for malpractice, which action he now brings. *Held*, that the physician was not released because the releases operated respectively as satisfaction for the first injury only and as a covenant not to sue the employer. *Staehlin v. Hochdoerfer*, (1921) 235 S. W. 1060.

The doctrine of releases is based upon the fundamental principle that there can be but one satisfaction for an injury. At common law a technical release under seal of one joint tortfeasor released all, because the law raised a conclusive presumption that it was given in full satisfaction of the injury. See *Ellis v. Esson*, (1880) 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830, 58 L. R. A. 293, note II, a. In releases not under seal but for a consideration, a majority of the courts have adopted a more equitable doctrine that in order for a release of one joint tortfeasor to discharge the others it must be intended as entire satisfaction of the injury, 58 L. R. A. 295, note III, a, c. The tendency, however, is to look into the adequacy of the consideration to determine that intention, especially where the damages are not conjectural but are subject to computation. *Ellis v. Esson*, (1880) 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830. And if the parties intend only a partial satisfaction of the injury, the release will operate only as a bar pro tanto in an action against the other joint tortfeasors. *Wright v. McCord*, (1920) 205 Ala. 122, 88 So. 150; *Louisville Gas, etc., Co. v. Beaucond*, (1920) 188 Ky. 725, 224 S. W. 179; 58 L. R. A. 301, note b. These same rules of satisfaction apply where the tortfeasors are severally and not jointly liable for the same injury. *State v. Maryland, etc., Ry. Co.*, (1915) 126 Md. 300, 95 Atl. 43, L. R. A. 1917A 270, and note; *Hartigan v. Dickson*, (1900) 81 Minn. 284, 83 N. W. 1091; see 28 Yale L. J. 90-1. Thus in the principal case where the tortfeasors were considered severally liable for the same injury, and in *Martin v. Cunningham*, (1916) 93 Wash. 517, 161 Pac. 355, L. R. A. 1918A 225, discussed in 1 MINNESOTA LAW REVIEW 278, where on similar facts it was held to be a joint liability, the same results were reached. See also 5 MINNESOTA LAW REVIEW 232 and 4 MINNESOTA LAW REVIEW 78. Minnesota has adopted a different view of this class of cases, namely, that the employer is not liable for the physician's negligence but is only bound to select a competent one. Consequently both are not liable for the same injury and a release given and satisfaction received from one does not discharge the other from liability on his separate cause of action. *Viita v. Fleming*, (1916) 132 Minn. 128, 155 N. W. 1077, L. R. A. 1916D 644. See 1 MINNESOTA LAW REVIEW 279. But see *Almquist v. Wilcox*, (1911) 115 Minn. 37, 137 N. W. 796. In holding the release with reservation of the right to sue the physician to be a covenant not to sue, the instant case has followed the better and more liberal view based upon the intent of the parties. See 2 Va. Law Review 476; 24 Yale Law Journal 505; 28 Yale Law

Journal 90. The contrary view holds such a reservation to be repulsive to the legal effect of a release. *Abb v. N. P. Ry. Co.*, (1902) 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 A. S. R. 864; *Flynn v. Manson*, (1912) 19 Cal. App. 400, 126 Pac. 181.

SALES—BILLS OF LADING—PERSONAL PROPERTY—TITLE FROM PURCHASER WHO SECURES PROPERTY WITHOUT BILL OF LADING.—Plaintiff company, a distributor, sold and shipped three automobiles to a dealer, on an order bill of lading naming plaintiff as consignee, notify dealer, risk of loss to be on the dealer. A draft attached to the bill of lading was sent to a bank in the dealer's town for collection. Without obtaining the bill of lading or paying the draft, the dealer wrongfully secured the automobiles from the carrier and sold them to three innocent purchasers, who were joined with the dealer in an action to recover the automobiles or their value. *Held*, that title passed to the dealer upon delivery to the carrier; and that while plaintiff company could recover from the dealer, it could not recover from the purchasers of the automobiles. *Shaw Co. v. Coleman et al.*, (Tex. Civ. App. 1922) 236 S. W. 178.

If the instant case had been decided under the Sales Act, sec. 20 (2), it must have been held that while the beneficial ownership had passed to the buyer, the security title created by the form of the bill of lading remained in the seller; and that, with the bill of lading outstanding, the subvendees of the purchaser could not get a good title against the holder of the bill of lading. Williston, Sales, secs. 283, 284. But the Sales Act is not in force in Texas. Handbook of National Conference on Uniform State Laws, 1921, p. 30. And the court was bound by a decision of the supreme court of Texas holding, contrary to many common-law authorities, that under a bill of lading to the shipper's own order the full right of property passes to the buyer, the shipper retaining as security nothing more than a mere right of possession until the draft is paid and the bill of lading presented. *Robinson & Martin v. H. & T. R. R.*, (1912) 105 Tex. 185, 146 S. W. 537. Hence, the bill of lading as a document of title being eliminated and remaining operative only as a control of the right to possession, the case presented is whether a subvendee purchasing innocently from a vendee who owns the property but who has wrongfully obtained the *actual physical possession*, though not the *legal right to possession*, from a carrier acting as agent of the original vendor, is protected against a recovery by that vendor. Two situations may arise: (1) where the possession is negligently delivered by, but innocently obtained from the carrier by a general owner who is not aware of the outstanding bill of lading and right to possession. In that case the seller may be estopped by the negligent delivery of the carrier, his agent, who has not demanded the bill of lading which controlled the right to possession. See *Norfolk So. R. v. Barnes*, (1889) 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611, in which case there was a clear estoppel against the carrier who had voluntarily delivered the goods, the remarks about the rights of the seller being doubtful dicta merely. (2) Where, as in the instant case, the delivery is knowingly received wrongfully from the carrier. Here the vendor has not created a misleading situation; there is no apparent authority on the part of the carrier because the vendee knows that he is not entitled; and the carrier

is clearly, to the knowledge of both parties, acting beyond the scope of his authority. Hence, while the *actual possession* is obtained, the *legal right to possession* is not. The vendee, therefore, although the owner of the property, is a converter, and it seems to follow logically that his innocent subvendees are also converters, liable to the original consignor. See Williston, Sales, sec. 292, p. 442; Schouler, Bailments, 3rd Ed. sec. 202, p. 207. It has been held that one having a right to possession merely, e. g., a pledgee, who voluntarily delivers the pledged property back to the general owner for a special purpose, is protected if the pledgor wrongfully gives innocent third parties rights in the property. *Clare v. Agerter,* (1892) 47 Kan. 604, 28 Pac. 694; *Thacher v. Moors,* (1883) 134 Mass. 156, 165; *In re Dreuil & Co.,* (1913) 205 Fed. 568; note, Ann. Cas. 1915B 1004; Story, Bailments, 7th Ed., sec. 299; contra, *Bodenhammer v. Newsom,* (1857) 50 N. C. 107, 69 Am. Dec. 775. A fortiori, if the property has *wrongfully* been taken by the general owner from the person having the legal right to possession, third parties holding under the general owner ought not to be protected against the person entitled to the possessory lien. *Brownell v. Hawkins,* (1848) 4 Barb. (N.Y.) 491; Schouler, Bailments, 3rd Ed. sec. 292, p. 442.

The Texas court in the instant case cuts off the vendor's right to possession by citation of cases holding that a bona fide purchaser from a fraudulent vendee is protected. In those cases, however, the vendor has *voluntarily* relinquished both title and possession, retaining nothing but an *equitable* right of rescission, which is cut off by a bona fide purchase. But in the instant case the vendor was *involuntarily* deprived of his *legal* right to possession, which ought not to be cut off even by a bona fide purchase. Failure to distinguish between the legal *right to possession,* which, if properly gotten in, may create an estoppel, *Walker v. Staples,* (1862) 5 Allen (Mass.) 34, and the *actual physical possession,* which is not alone sufficient to create an estoppel even if united with the general ownership of the goods, accounts for the result in the instant case, which in the light of both technical reasoning and business expediency seems unsupportable.

As to order-notify bills of lading see generally, Mac Asbill, Rights of Parties and Duties of Carriers under Order-Notify Bills of Lading, 6 MINNESOTA LAW REVIEW 271.

TAXATION—CORPORATIONS—RULE FOR VALUATION OF CAPITAL STOCK AND FRANCHISES.—On an appeal from an assessment by the tax commission of appellant's capital stock and franchise, the Supreme Court of Illinois in affirming the assessment, *held,* that for the purpose of ascertaining the fair valuation of the capital stock and franchises of any corporation, the fair cash value of the shares of capital stock and the amount of the indebtedness, except indebtedness for current expenses etc., should be added together. *Oak Ridge Cemetery Corporation v. Tax Commission,* (Ill. 1921) 132 N. E. 553.

For a discussion of the principles involved, see NOTES, p. 401.

VENDOR AND PURCHASER—FORFEITURE FOR BREACH OF CONTRACT—RELIEF WHERE AMOUNT PAID BY VENDEE EXCEEDS ACTUAL DAMAGE TO VEN-

DOR.—Plaintiff and defendant entered into an escrow agreement for the purchase and sale of certain lots. The purchaser defaulted after paying $2,250, and the vendor recalled the deed. The purchaser sued to recover the amount of payments and improvements. No allegation of unjust enrichment appeared in the complaint. *Held,* that these facts did not show a cause of action on the part of the purchaser. *Quinlan v. St. John,* (Wyo. 1921) 201 Pac. 149.

The dictum expressed in the instant case is of greater interest on this subject than the decision itself. The court intimated that if the purchaser had shown in her complaint that the payments and the value of the improvements made exceeded the rental value of the property and damages caused by breach, a court of equity would have required the vendor upon terminating the contract to place the vendee in statu quo; in other words, that the vendor ought to be left in no better position than if he had sued for breach of contract and had recovered damages from the vendee. While the forfeiture clauses in land contracts are almost universally strictly enforced, relief has been granted to the purchaser on various theories: (1) In *Lytle v. Scottish Am. Mortg. Co.,* (1905) 122 Ga. 458, 50 S. E. 402, the contract expressly provided for forfeiture upon default, yet the court held that upon default of the purchaser, "if the vendor elects to take back the land, he must return the purchase money less damages and rent," such election amounting to a rescission of the contract. (2) the relation of vendor and purchaser of realty even under an executory contract has been likened to the relation of mortgagor and mortgagee. 1 Pomeroy, Equity Jur., 4 Ed., sec. 368; *Button v. Schroyer,* (1855) 5 Wis. 598; 2 Williston, Contracts, sec. 791, p. 1515. It is well-known that the forfeiture clauses in mortgages, enforced strictly by the common-law courts were later relieved against by equity. That equity still has that same power cannot be questioned. In *Wade v. Major,* (1917) 36 N. D. 331, 162 N. W. 399, L. R. A. 1917E 633, a mortgagor was even allowed to redeem a day after the statutory period of redemption had expired. While the wisdom of such a course may be doubted, the authority of a court deriving its equitable powers from the constitution to give grace beyond the period fixed by the legislature does not seem open to question. The vendor-and-purchaser relation is, in this situation at least, analogous to the mortgagee-mortgagor relation, title in both cases being retained as security merely. Since legislatures have not seen fit to grant the vendee a period of redemption after foreclosure of the contract, it seems that in a proper case the exercise of equitable jurisdiction would be just. Under the present state of the law, the longer the vendee pays installments, the greater penalty he pays for breach of the contract. For a full discussion of this subject, see, Henry W. Ballantine, Forfeiture for Breach of Contract, 5 MINNESOTA LAW REVIEW 329.

BOOK REVIEWS

THE LAW OF SALES. By John Barker Waite. Callaghan & Company. 1921. pp. XII, 385.

The law of a commercial subject like sales of goods changes slowly. The social interest in the security of transactions and of acquisitions demands that no radical innovations or alterations be made suddenly. Hence, although it is a dozen years since Williston's Sales of Goods was published, probably there has not been sufficient development in that field to demand a complete restatement or bringing down to date of the law. At any rate Professor Waite attempts no such ambitious task. The purpose of his small book of 286 pages of text printed in large type is to "bring something of value by way of explanation and of reason for the rules" which he thinks have been already sufficiently developed and presented as to their substance.

Any scholarly attempt to rationalize the law is welcome. Professor Waite's work is scholarly. Yet one cannot but feel somewhat disappointed by his failure to do more. In his preface he recognizes that eventually complete textbooks may "include an analysis of economic and social factors likely to affect judicial decision, which they will correlate with their discussion of precedent." (p. VII). Such an attempt by one who is a master of his subject would have been well worth while. But, although the idea of a sociological study "is most intriguing" to Professor Waite, he has rejected it in favor of the conventional method of following and explaining precedent by logical, and, in good part, formalistic reasoning.

Whatever else may be said about Professor Waite's work it has the distinguished merit of lucidity both in analysis and statement. It is this very quality which throws into clearer relief those statements to which exception may be taken. Perhaps the most conspicuous of these is his attempt to work out the cases on conditional sales without reference to the theory incorporated in the Uniform Conditional Sales Act. He sees only two possibilities. (p. 108) Either the courts will treat the passing of the possession or of the title as the real consideration for the buyer's agreement. He ignores the simple explanation that the buyer gets not only possession but the whole beneficial ownership, while the seller, like his analogue, the mortgagee, has the bare legal title for security purposes only. In justice to the author it must be said he is trying to work out some principles behind the hopelessly conflicting cases already adjudicated. But such an effort does not absolve him from the failure to point out not only what the law ought to be but what, through legislation, it is going to be.

Again, his explanation of the general presumption that title does not pass so long as something remains to be done by the seller is open to doubt. He bases it upon the intention of the buyer not to take title, with its attendant risk, until he has the right to take possession and thereby protect the goods from loss. (p. 22) That is, of course, a possible reason for it. But the more obvious one is that it rests on the very natural and justifiable belief by the average person that there will be more pressure upon the seller to perform his obligations in regard to the chattel while the sale is still executory than after title has passed to the buyer. Cases where the seller still has something to do to the goods such as assembling after the parts have been delivered, support such a view.

In the same connection his interpretation of the case of Hanson v.

Meyers as deciding that title couldn't pass until the price was paid (p. 24 n.) is rather surprising. Lord Ellenborough expressly put it upon the ground that the seller had to do acts to ascertain the price. Further it would seem very remarkable that so learned a judge at so late a date should think it the law that payment of the price had to be made concurrent with or precedent to the passing of title.

On the other hand Professor Waite's discrimination between those "terms of description which serve to identify goods contracted for" which "must be complied with before title will pass and those terms which describe but do not identify the goods" is clarifying, (pp. 180-184). The former he calls true conditions precedent; the latter are warranties. This distinction would make simple the problem as to whether title to goods passes upon shipment when, although the goods are the ones agreed upon, they are defective.

Also, in treating the rights of the seller and of the buyer his separation in treatment of the situations on the basis of the rights retained and the rights passed to the buyer is to be commended.

The text of the Uniform Sales Act is printed at the end of the book. Under each section is a selected digest of decisions purporting to throw light upon the interpretation or application of the rules.

It is a matter of regret that Professor Waite did not see fit to attempt anything like a complete reference to law periodical articles and notes, such as so enhanced the value of short outlines like Bogert and Clark. In a work whose chief aim it is to add to the theoretical discussion of the law it would have been peculiarly appropriate.

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TRAITE DE DROIT INTERNATIONAL PUBLIC. Par Paul Fauchille. Huitiéme édition. Entierement refondue, complete et mise au courant, du Manuel de droit international public de M. Henry Bonfils. Tome II Guerre et Neutralité. Rousseau & Co. Paris, 1921.

For the time being it seemed as if the whole subject of international law would be swept away by the World War. Many of its precepts and practices were discredited if not destroyed, but fortunately the destruction was not as great as it threatened to be at first. With the passing of the terrible storm, the more courageous jurists again set to work to repair the damage which had been done to its ancient principles.

The present work which constitutes the eighth edition of Mr. Bonfils' well-known manual "De Droit International Public" is the most elaborate piece of reconstruction that has yet appeared. A large part of the original text has been entirely recast; so much so in fact as to constitute a new work in many important respects, particularly in relation to the subjects of neutrality and maritime war. The manual has accordingly been enlarged into two large comprehensive volumes, the second of which on "War and Neutrality" has been given priority of consideration.

The editor and author has already made many valuable contributions to the study of diplomatic history and international law. The present volume ably sustains his reputation as one of our greatest international

jurists. The work is characterized by those qualities of clear thinking, lucid expression and sound learning, which are the glory of French scholarship. Throughout his treatment the author maintains a sense of judicial fairness even when dealing with matters which have profoundly affected the life and welfare of his country. Seldom does he permit his feelings to run away with his judgment or betray him into a mistake of denying or condoning the illegal actions of his countrymen or allies when legal principles are at stake.

The work will be invaluable to English and American students of international law by reason of its liberal use of the executive decrees, legislative acts and judicial decisions of the various belligerent states. It is a veritable mine of original information, affording a comprehensive, comparative survey of the legal, historical and many of the political aspects of the war. In this respect the study stands out in striking contrast to the provincialistic attitude of many Anglo-American publications, which too often concern themselves almost exclusively with a national interpretation of the activities of their own governments and courts.

A review of this wealth of official material brings out clearly the fact that the war has had one beneficial result at least, inasmuch as it has contributed largely to the unification of the former divergent rules of international law, particularly in the case of the much controverted principles of contraband, blockade, visit and search. In the case of naval warfare, the European states, enemies as well as allies, were forced to adopt to a large extent the law and practice of English and American courts. They could not help but reflect in their policies the Anglo-American domination of the seas.

The author has been equally successful in his treatment of the extensive modifications which the war has effected in international law. Many of the old principles had to be recast to adapt them to changing political as well as naval and military conditions. The former distinction between combatants and non-combatants broke down entirely in practice. The World War was not a struggle between governments, according to the theory of Rousseau, but between peoples, in which the whole economic, scientific and political forces of the nation were involved. The rights of neutrals were likewise ruthlessly sacrificed in many cases on the ground of national necessity. The policy of reprisals threatened to wipe out the whole theory of neutrality, since the neutral states were too weak in power and resources to maintain their rights against the respective belligerents. The learned author traces these developments with meticulous care and with a keen appreciation of their legal and political significance for the future of international law. He recognizes the arbitrary character of many of the acts of the allies, but at the same time is prone to justify them not on the ground of reprisals only, but rather as an application of well-established legal principles to new sets of facts and conditions. These modifications represent on the whole, in his judgment, a progressive development of the principles of international law and not a hopeless reaction to international anarchy and force.

Probably the least satisfactory part of Mr. Fauchille's study is the

relatively small consideration he gives to the decisions of English and American prize courts. He apparently fails to recognize as do many of the continental jurists the large part that the courts have played in the growth of international law in these two nations. In truth the courts of England and America have been largely responsible for the development of those distinctive principles which may well be called the Anglo-American school or interpretation of international law. But the author is much more concerned with the actions of the legislative and executive departments of the government than with the adjudication of the courts, and by reason of this emphasis he has sometimes lost sight of the important limitations which the judiciary of the English speaking nations have frequently placed upon the policy of the political departments. In short, through their powers of judicial construction the courts have been in many cases the real makers of international law; they have been the true defenders of the international character of its principles against the nationalistic attacks of the sister branches of the government.

In his final chapter, Mr. Fauchille attempts to forecast the international law of the future. In this connection he makes several suggestions as to the probable course of development, one of the most interesting of which is a proposal to set up an international tribunal with the power of trying all persons who have been guilty of violating the law of nations. The principle of personal responsibility, laid down in the treaty of Versailles in respect to those guilty of war crimes, would thus be given a general international application. To this end it will be necessary to formulate an international penal code which, it is safe to predict, will be no easy matter to accomplish, in view of the strong spirit of nationalism which now prevails. But the greatest need for the future, according to the author, is the growth of an international spirit among the nations, without which all the existing or suggested international organizations and institutions will be useless.

Although the author has made excellent use of the works of the leading authorities on international law, he does not appear to have drawn heavily upon the vast mass of supplementary material which is to be found in the various legal and political magazines, particularly in this country. An examination of some of this material would have helped him on more than one occasion to clear up a point of somewhat doubtful import.

This volume, we may conclude, is a masterly piece of work in style, method and content. If the first volume on peace is of the same high quality as the one on war, the work will undoubtedly stand forth as one of the most authoritative expositions of the principles of international law to be found in any language.

University of Minnesota. C. D. ALLIN

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SOME APPLICATIONS OF THE RULES OF LEGAL ETHICS

By Rome G. Brown*

THERE is very much current discussion on the subject of Legal Ethics. It is a subject as old as the institution of courts or of the profession of the law. Many phases of this subject have been discussed and illustrated by precedents. Such treatises and discussions have become a voluminous part of the literature of the law.

There are, however, certain phases of the subject as to which there persist much misunderstanding and even dispute, and in respect of which certain practices, even by some prominent attorneys, are so frequent as to threaten to cast reflection upon the entire profession.

I shall assume that the commonly discussed rules of legal ethics and their applications are well understood and recognized, and shall only emphasize the existence and application of certain rules as to which practice too often fails to conform with principle and which have not been adequately treated in previous discussions.

I shall refer only to the ethics of the practicing lawyer. Another branch of legal ethics would be the ethical standards of the Bench, as to which no formal canons yet exist to emphasize the various duties of judges in and out of court to the lawyer, to liti-

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gants and to judges of the same or other courts. Such ethical codes for the judges should be formulated,—but not alone by the judges themselves. The practicing members of the bar could make valuable suggestions promotive of courtesy and efficiency by the Bench and of the elevation of its standards, and, therefore, promotive of the administration of justice. This work already has been undertaken by the judicial section of the American Bar Association.

Rules of legal ethics are only the general rules of conduct as applied to the practitioner of the science of the law, the practitioner who has relations, peculiar to his profession, with his client, with his fellow practitioners, and with the courts of which he is an officer duly bound to promote the administration of justice.

The Progressive Development of Legal Ethics

Rules of ethics, by which the distinctions of "ought,"— to do or not to do,—are established, change with all the changing conditions of civilization and environment and vary under varying laws and customs. As applied to the practice of the law, these changes in the rules of conduct have been increasing and growing more complex as the position of the lawyer and at the same time the standards set for his conduct have been elevated from those of comparative outlawry to those of a representative of the highest recognized profession.

It was not until 1836 that the law of England permitted an advocate to plead the cause of one accused of felony.[1] Until well into the eighteenth century lawyers had little or no recognition either in the social or political institutions of the American Colonies. In Massachusetts it was not until 1663 that an attorney was permitted to sit in the general court, and it was a long time after that before he was allowed to receive any fee or compensation for his professional services.[2] With the passing of some of the crude prohibitions of earlier times and with the evolution of the law itself, and of its study and practice, into a science, there has emerged that body of learned experts and practitioners who com-

[1] "Ethics of the Legal Profession", by Orrin N. Carter, Judge of Illinois Supreme Court, p. 17. Judge Carter's treatise is a most comprehensive brief of legal ethics, with full references. (In the following notes this book will be cited as "Carter").

[2] "Ethics in Service," by Wm. H. Taft, pp. 13-14. This book by Chief Justice Taft contains his Page lecture series given at Yale in 1914 and his first two chapters treat particularly of the ethics of the legal profession. (In the following notes this book will be cited as "Taft").

prise the bar of modern times, with certain recognized duties and responsibilities expressed either by statute law or by formulated codes applying to the conduct of the members of the bar and to their practice.

The "Common Law" of Legal Ethics

It is impossible to formulate, either for the present or for the future conduct of lawyers, a definite code precisely applicable to every instance of professional conduct. Therefore, no formulas, written or unwritten, no statute nor any canons of the profession can comprise all that is necessarily a part of the code of legal ethics. As with general ethics, written codes can only partly express the principles and spirit of rules of conduct, so, in applying legal ethics in particular instances, we must draw upon both the written and the unwritten law, seeking precedents where available, and deciding each problem with due regard, not only for the written law or canon of conduct, but also for its spirit and its reasons and also for precedents and their basic principles and the analogies and conclusions therefrom reasonably to be drawn. In short, as the unwritten or common law of English and American jurisprudence is the light and guide for the application of the law in the defining of legal rights and duties, so there is, in respect of the conduct of lawyers in particular instances, a common law of legal ethics, so to speak, in the light of which all formulated statutes and codes should be construed and applied.[8]

Of course, a particular statute or court decision touching upon the subject of the conduct of lawyers creates a rule by precedent which remains paramount until modified or reversed. But what are generally understood as "codes of legal ethics" are in the nature of common-consent rules laid down by members of the profession without statutory authority. They may be partly or fully incorporated in the more authoritative form of statute law or of court decisions, thereby adding weight to the consensus-opinion of the profession itself. The authority of precedent is further added by the cases passed upon by committees of bar associations or by disciplinary boards, such as the committee of the New York County Lawyers' Association. Then there are the

[8] Canons of Ethics of the American Bar Association—Introduction. These canons were adopted by the American Bar Association in 1908 and are printed annually in the Reports of the Association. (In the following notes these Canons will be cited as "Canons A. B. A.").

opinions of the profession on various phases of the subject which are published from time to time in treatises and in legal periodicals. All these are developments of the common law of legal ethics. But neither statute, code, precedent, nor opinion should narrow or obscure the broadest vision of the real spirit and purpose which are the sources and foundation of that common law.[4]

Canons Not to be Narrowly Construed

The lawyer is too much inclined to read a rule of ethics in the same attitude of mind in which a judge of the old English courts was wont to read one kind of "plea in abatement" which, by the rules of Chitty, must express "certainty to a certain extent in every particular,"—that is, it must expressly allege every fact possibly vital to the contention and must expressly deny every fact possibly fatal to the plea. Such search for technical loopholes involves a smothering of conscience, to which alone appeal properly lies, and ignores the real precepts and sources of rules of conduct.

Circumstances often make the rules of legal ethics prohibitory of actions which in themselves are neither unlawful nor immoral, just as statutory law makes unlawful, not only acts which are in themselves immoral, as larceny, criminal assault or murder, but sometimes also an act, —malum prohibitum,—in itself involving no element of immorality, such as restrictions on the parking or driving of automobiles or the plucking of even a wild rose growing upon certain city property. So, narrowly viewed, an unethical act of a lawyer may in itself not be immoral while from a broader view, taking into consideration all the circumstances of the lawyer's peculiar duties and responsibilities, his confidences and advantages, his action may in fact be grossly unethical. No unlawful or immoral act by a lawyer can be ethical, but the common distinctions of unlawfulness or of immorality can not suffice to define as ethical or unethical every act of a lawyer in his professional practice.

[4] "Cases on Legal Ethics", by George P. Costigan, Jr. This book is one of the West Publishing Company's Case Book Series, edited by Professor William R. Vance of the Yale Law School. It contains court decisions and also many decisions of the New York County Lawyers' Association on questions of legal ethics. It also includes the American Bar Association Canons and the Canons of the Boston Bar Association and the classic Fifty Resolutions of David Hoffman, which latter have not been surpassed as a codification of the ethics of the practicing lawyer. Mr. Costigan also presents extensive quotations from treatises on legal ethics and from discussions of various phases of the subject which have been contributed by leading members of the legal profession to the various law reviews and other legal publications. (In the following notes this book will be cited as "Costigan").

In the light of the foregoing suggestions, let us consider some concrete examples of the application of the code of legal ethics in actual practice.

Safeguarding Rights of Defense and Appeal

A lawyer is not only privileged but is bound by every principle of legal ethics to use all reasonable endeavor to safeguard every person charged with crime in the latter's right of defense and appeal and to prevent a conviction except through the orderly procedure provided by law. It is unethical for a lawyer to solicit clients, whether in civil or criminal cases, but it is not immoral. Such solicitation becomes even criminal if made with the intent of extortion or of treating the client otherwise than with utmost good faith. It is only in exceptional cases that a lawyer is bound to furnish his services either in civil or criminal proceedings. It is, however, with reference to such exceptions, where he is bound, that the greatest misconception of a lawyer's privileges and duties is often shown. He is at all times an "officer" of the court and as such has, under some circumstances, not only the privilege of being heard, but the duty to make himself heard; and to him in his capacity as "amicus curiae" the ears of the court are always open for suggestions of aid to the court in performing its primary function, the administration of justice.

Only extreme exigencies should excuse him from using his best efforts and skill in any instance where his services may prevent any wrong to the poor or the oppressed. His very oath demands his interference against such wrong. While he must not allow himself to be the instrument of wrong-doing, much less the instigator, he must not shrink from his duty of safeguarding to any person charged with crime the right of a speedy and orderly trial and that conviction shall be only by due process of law. Such privilege and duty are imposed independently of the prospects of compensation and whatever be the knowledge or belief of the lawyer as to the guilt or innocence of the accused. This duty arises, not to protect a guilty person from conviction, but to safeguard him in his right of not being deprived of life, liberty or property except by due process of law.[5]

[5] See 4, 5 and 15, Canons A. B. A. This duty, which has become part of the established code of legal ethics in the jurisprudence of every English-speaking people, is stated by Blackstone in the following words: "Let the circumstances against the persons be ever so atrocious, it is still the duty of the advocate to see that his client is convicted according to those

The venerable Luther Martin, leader of the American Bar of his time, defended Aaron Burr, when charged with treason, and prevented a conviction, not because Burr was innocent, but because the terms of the federal constitution defining the evidence of treason had not been met. Martin performed the lawyer's duty to safeguard the accused in the right of defense and in the right to be convicted only "according to those rules and forms which the wisdom of the legislatures has established as the best protection and security of the subject." During the Civil War one Milligan was tried and convicted of traitorous and disloyal practices against the defense of such distinguished lawyers as David Dudley Field and James A. Garfield. Having undertaken such a defense, whether voluntarily or by appointment, it is the lawyer's duty to see it through, using all legitimate and honorable means for preventing conviction. The duty of the lawyer extends to the obligation of defense whenever appointed by the court for that purpose. Thus Guiteau, the slayer of President Garfield, and Czolgosz, the murderer of President McKinley, were protected in their right of defense by eminent and honorable members of the bar.

An Illustrious Example of Fidelity to Duty

Steadfastness in the observance of his ethical rights and duties will always bring honor to a lawyer within the ranks of his own profession and among all appreciative laymen. At the same time fearless refusal to swerve from a proper course may bring upon him the obloquy of those who are not able, or who do not wish, to understand. Calumny and personal spite may make a martyr of one to whom fair and intelligent judgment would give honor. The ideal lawyer must be able to defy unjust criticism and to disdain its resulting disadvantages. He must possess certain of the qualities of which heroes are made.

The rights of defense and appeal are too often misunderstood. The existence and extent of those rights are too often confounded

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rules and forms which the wisdom of the legislatures has established as the best protection and security of the subject."

Lord Erskine, when criticized for undertaking the defense of a criminal on account of whose apparent guilt there was great public clamor for conviction without observing the legal forms of procedure, said: "From the moment that any advocate says that he will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end."

with the fact or the degree of the guilt of the accused. Such misconceptions, I am confident, are the source of certain criticisms of General Samuel T. Ansell in connection with his defense of the famous slacker, Bergdoll. Of Bergdoll's guilt there has never been any reasonable doubt. Nevertheless, when apprehended and brought to the bar of justice, he had his right of orderly defense and appeal, including the right to be brought to trial on proper charges and in such court as the law of his case required. Ansell was then in private practice in Washington. He had shown himself the ablest expert in military law in the country. He had been for years legal adviser of the War Department and, during the later years of the World War, Acting Judge Advocate General of the United States. While in the War Department, he had experienced the militaristic tendencies of his associates and superiors to ignore the orderly methods of trial by court martial which were prescribed by law, and frequently to execute sentences of long imprisonment, or even of death, upon soldiers in training camps or at the front, as punishment sometimes for offenses which in civil life would scarcely have been dignified as misdemeanors; and this, too, without having the sentence reviewed by the Judge Advocate General at Washington, as expressly required by court-martial statutes. As to these and other abuses of the court-martial system as administered, he had sought to bring about remedies. But his attempts only brought upon him the personal enmity of his associates in the War Department. He then resigned and carried on his fight for justice to the enlisted men through his appeals as a private citizen and lawyer to the American Bar Association and to the Congress. He succeeded, but only against the most vicious opposition from the militaristic clique in the War Department and from its coadjutors both inside and outside the Congress.

These hostile influences brought about the charge against Ansell of conniving for the escape of Bergdoll from Governor's Island, and a Congressional investigating committee report criticising Ansell's entire conduct in connection with the Bergdoll case including his action in having undertaken, as a lawyer in private practice, the defense of Bergdoll. Ansell had raised the point as to the proper forum for the trial, which, with other points, went to the question of Bergdoll's rights under due process of law. The Bergdoll case, moreover, had its very beginning subsequent to Ansell's retirement from public office to private practice.

Without reward or hope of reward, except the satisfaction of their lawyer's conscience in complying with their duty to promote justice, a number of American lawyers, including many of great eminence, have carefully studied the records of the proceedings in the congressional investigation referred to and have reported their conclusion that the record clearly exculpates Ansell from the charge of any misconduct in any phase of the Bergdoll case. Indeed, the record shows that Ansell urged on the War Department safeguards against the possible escape of Bergdoll which were entirely ignored, not only by the heads of departments but by the army guard which was detailed to conduct Bergdoll during his temporary absence from Governor's Island.

This Ansell incident is here pertinent as a conspicuous example of the effects of partisan propaganda of criticism and prejudice against the motives and acts of a lawyer in respect not only of his duty as official legal adviser to remedy unjust and unlawful practices in his department but also in respect of his observance as a private practitioner of his rights and duties in criminal cases. Just because Ansell would not view the disclosures of abuses as a greater stigma than their perpetuation, he became the object of the unrelenting enmity of a powerful clique whose tendencies are towards a reign of tyranny and absolutism and against an orderly administration of justice. He will emerge from it all as an heroic figure in the profession of the law, an illustrious example of fearless adherence to the highest principles of legal ethics.*

The Lawyer as Fiduciary and Trustee

It is too often assumed that employment of a lawyer, whether by retainer or otherwise, involves a shrinking of his personal ideals of honor or a submergence of his own conscience in that of his client. In the accomplishment of the objects which the client has in view, the lawyer is not a mere agent or employe, much less a tool. The usefulness and loyalty of the lawyer are too often measured by the degree of his subservience to the client's wishes and plans. Such a view degrades the legal profession. I am not referring to the bald cases of connivance and participation with the client in furthering illegal or immoral purposes. Such commissions or undertakings by the lawyer are prohibited by every

*See Lawyer and Banker, issues of Sept.,-Oct. and of Nov.-Dec. 1921; also The Nation of Nov. 9, 1921.

written and unwritten code of legal ethics.[7] Neither have I here in mind merely the lawyer's right and duty to control, without dictation from his client, certain details of the proceedings in litigated cases.[8]

It is not only the right and privilege, but it is the professional and personal duty of the lawyer, to be judicial in the formulation of his conclusions with reference to his client's business and, above all, to use his utmost endeavor, even to the extent of shrinking or even losing his standing with his client, to keep his client from doing injustice.[9]

The lawyer's function is in the nature of that of a fiduciary or trustee, and he is answerable as such, not only to the particular person standing in direct relation to him of client, but answerable also to all those, whether it be the public or individuals, to whom the client himself owes an accounting. This is particularly true in instances where the client himself occupies a representative position, as when he is the officer or manager for the interests of another or of several others through appointment,—for example, when he is a corporation officer or an executor of an estate or a trustee of property or of moneys for either present or prospective beneficiaries. In such cases the lawyer and his conscience, as guardians of a trust, are answerable not merely to the client in person but to the client *as trustee*. The fiduciary capacity of the lawyer, with all its accompanying duties and responsibilities, runs side by side with that of his trustee-client and through and unto

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[7] 16, Canons A. B. A.; Taft, pp. 24, 27-28; Carter, p. 51; Costigan, P. 424.

[8] Carter, p. 52; 24 Canons A. B. A.

[9] Hoffman's Resolutions XIV (Costigan, p. 557) says:
"My client's conscience and my own are distinct entities; and though my vocation may sometimes justify my maintaining as facts and principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go."

As stated by Judge Carter, (p. 51):
"It seems to be a popular belief that by the ethics of the profession the lawyer owes a duty to no one except his client. This is not, and never has been the professional standard. By his official oath the lawyer is expressly bound to honesty and fidelity to the court as well as to his client. . . . He is no man's man. He is not knowingly to urge an unjust cause nor contribute to the prejudice or gratification of his client."

The same duty is emphasized by Judge Taft (pp. 24-28):
"There are limitations upon the duty of counsel to their clients. There are also limitations upon a lawyer's action which he cannot violate without a breach of his duty to the court, of which he is an officer, and to the public interest in the maintenance of the proper administration of justice. . . . He must obey his own conscience and not that of his client."

the end of every transaction which affects the interests of the ultimate beneficiaries. Much more is this the case when the lawyer in question has been the attorney for the maker of the will or other writings creating the trust and has drawn such writings with the full knowledge of the real intent and purpose of their maker.

Because of these fiduciary capacities and duties, the lawyer must insist, and sometimes even dictate, that the client shall perform fully and honorably all his obligations. His duty persists beyond the point of spirited controversies or even of irreconcilable differences with his client. He must not at the first instance of divergence hold up his hands in despair or sever his professional relations in defiance. Sometimes a client, ordinarily fair, becomes subject to a selfish or other ulterior motive or influence or even to an honest obsession of error which may pervert his mental processes and seem to stultify his conscience. Then is just the time when the lawyer should stick, and with a persistence, too, that may involve temporarily some sacrifice of his personal or professional pride. But he should persist in his efforts to accomplish in the end his greater duty and responsibility of bringing his client to a right state of mind and to a right view of the facts and of the conclusions upon the points in conflict. The issue may be one involving the jeopardy of large financial interests of the client or it may be one only incidentally and in a small degree affecting the client's finances, but at the same time involving the question of great prejudice or injustice to a beneficiary of a trust or other third party. It is the lawyer's duty to keep the client from putting a black mark on his business record and never to yield, nor to permit his client to yield, to the purpose or intent of following a course of persecution or oppression or of any form of fraud or of injustice. In such instances a lawyer should treat his client as a doctor would treat a patient stricken temporarily with bodily or mental weakness. He must not yield his judgment or conscience to the control or dictation of error. Neither must he, by withdrawing, try to avoid responsibility by leaving the client free to injure himself or others. He must never falter in the full performance of his duty as fiduciary or trustee. He should be patient and tactful, but he should never surrender on a square issue of good faith, even though the favor of his client be forever jeopardized.

These phases of applied legal ethics could never be solved by

reference to reported cases. They arise from the confidential conflicts between the lawyer and his client. In private practice they are a part only of the esoteric experience of the profession. In public service, however, there has recently been disclosed a notable illustration.

Lansing, the Lawyer, and the Peace Conference

While President Wilson, in organizing the Peace Commission representing the United States at the World's Peace Conference, and in insisting upon heading it in person and in his actions and procedure at that Conference, kept technically within his constitutional powers as President of the United States, nevertheless, his attitude both at the Conference and afterwards toward Robert Lansing, the legal advisor of the Commission, and certain criticisms against Lansing, which have appeared in the press, seem to show lack of appreciation of certain ethical rules governing the relations between lawyer and client.

At that Conference the United States Commissioners, including Mr. Wilson as President of the United States and as head and spokesman of the Commission, were acting only in a representative capacity. They were for the time being fiduciaries or trustees of the interests of the United States and of the whole people of the United States in the work of accomplishing a World's Peace. In the negotiations in which they participated there was no function of greater scope or importance than that which pertained to the legal phases of the questions involved. There was never an instance where the exigencies of the occasion required greater confidence and cooperation between lawyer and client or demanded, both in negotiations and in the drafting of notes, propositions and articles, a higher degree of legal skill, knowledge and foresight. Lansing was not there as the personal attorney of Mr. Wilson, nor merely as attorney for the President of the United States. Neither was he there merely as attorney for the Commission. His duties as a lawyer included those of a lawyer for trustees, of whom he himself was one, and extended to a conscientious protection of the interests of the beneficiaries for whose interests alone those trustees were bound to act. He was answerable, not merely to Mr. Wilson, nor to the President, nor to the Commission. He was answerable to the whole United States and it was his right and duty to advise for or against action with full knowledge of all the

facts, and for that purpose to receive all information obtainable which might relate to the interests of his country or affect his conclusion upon the issues as they arose. His duties and his responsibilities and his right to participate in all the confidential information and negotiations were imposed by all ethical standards of conduct between lawyer and client.

In the interests of his client and of its managing representatives at the time, he owed the professional duty of insisting that he should have the opportunity of considering all the facts and circumstances, in order that he might give advice, in this instance to his client's representative, the President, and give that advice intelligently according to his conscience and not by direction.

All these privileges were denied him. He was not informed of the negotiations as they proceeded. In many instances he was not even consulted on most important points of the law of his country and of international law, in both of which he alone, of all the Commissioners, was an expert. He was not permitted to exercise the functions for which he was appointed nor for which his position and experience qualified him. He detected that his client, through the President as its representative, was falling into errors which threatened to jeopardize not only the interests of the United States but also the great cause for the accomplishment of which his client was struggling, the Peace of the World. The relations between him and Mr. Wilson became strained. So it must be whenever a client, or his representative in charge, blindly and obstinately tends to rush into error and injustice against the protests of his lawyer, or when he acts in violation of the duty of the client to disclose to his lawyer, and disregards the right of the lawyer to know from his client, all the facts in the fullest confidence. Moreover, Lansing was also Secretary of State, the executive whose function is to receive and transmit all communications between this country and foreign nations.

Lansing, the man, might have been justified in following his first impulses to resign. But this was unthinkable to Lansing, the lawyer. He shrank his personal pride, swallowed the slights and criticisms of his fellow Commissioner, and continued, as far as possible under the circumstances, to fulfill his duty of preventing his client from becoming the means either of jeopardizing the accomplishment of the great cause which was the goal or of injustice in the methods of accomplishment. Neither did he sulk at the end.

He attached his official signature to the Treaty, though worded against his judgment and advice, feeling that it was the best that, with Mr. Wilson's permission, could be accomplished at that time to make this country a party to a world compact for peace.

Faithful to his official and professional duties, Lansing kept secret what he regarded to be the erratic and dangerous methods and actions of President Wilson during the Conference and afterwards, until the latter's public attack upon Lansing's conduct and loyalty, as a pretext for discharge, terminated all obligations upon Lansing of professional confidences and not only justified but compelled his publication of the facts in self-defense.

That the wisdom of his judgment or that the unwisdom of the President's judgment was or was not demonstrated by subsequent events, does not affect the questions here involved. Neither is it pertinent here to argue criticism of Mr. Wilson's proposals in connection with the Conference or of his later treatment of Lansing. The point here is, that the President, in his attitude toward Lansing, failed to recognize the reciprocal duties and responsibilities existing between lawyer and client. On the other hand, Mr. Lansing, from the time before he started for Paris and up to his forced retirement from the Cabinet, and including his personal report to his client, the people of the United States, has proved himself to be one of the highest type of the legal profession. He showed fullest ethical appreciation of the duties and responsibilities of the lawyer under the most trying circumstances.[10]

Duties to Fellow Lawyers

The rule that a lawyer shall not solicit business, either by direct advertising or otherwise, is not alone for the protection of other lawyers or of clients nor merely an aesthetic rule to preserve the dignity of the profession.[11] To comply with the full spirit as well as with the letter of ethical codes, the lawyer must carefully consider all the conditions of the employment which he is asked to undertake and especially whether a would-be client is himself in position to solicit his aid. His duty to his profession and to fellow practitioners, as well as to clients in general, may make it improper not only to solicit business but also to accept a commission for active or advisory aid. A law firm or a lawyer who is general coun-

[10] "The Peace Negotiations," by Robert Lansing.
[11] Carter, p. 659; 27 Canons A. B. A.

sel and attorney in a particular matter or who constitutes the legal department of his client's business, is entitled to direct all legal matters within the scope of his employment. The lawyer in charge should generally acquiesce in his client's desire to procure additional assistance either for litigation or for advice, but no other lawyer, without full conference with the lawyer in charge, or without his express consent, should undertake any service, either with or without compensation, which pertains to the legal business of such client. Moreover, such consent should not be construed beyond the limits for which it is expressly given. For a lawyer to exceed the scope of his commission is a wrong not only to the lawyer in charge, but to the client. It is an inexcusable breach of professional ethics. And all the more so if accompanied with secret intrigue to accomplish results against what is known to be the wish and judgment of the lawyer in charge.

The too common practice of some self-touting lawyers of the larger cities to insinuate themselves into employment in matters in charge of lawyers of other communities is unethical. This is sometimes attempted through subtle or direct disparagement of the lawyer in charge or by sly ingratiation with his client. Indeed, in some cases, resort is had to a propaganda of calumniation of a lawyer to his client and friends, both before and after the fact, in order to create doubt or distrust and thereby facilitate the encroachments planned and also to fore-guard or build up a pretended justification against criticism by those who hold in esteem the victim of the offending lawyer. Meanwhile, before his intended victim and the latter's friends he hides his horns and teeth behind a mask of hypocritical friendliness in the manner of the confidence man; and finally strikes without warning. All attempts by a lawyer to "edge in" on another lawyer's case or practice, as well as all attempts to discredit the lawyer in charge to his clients or to his friends, or to the opposing parties or their lawyers, violate all rules of personal honor and all rules of professional decency. They are not only unethical, but despicable. The fact that some client of the offending lawyer wishes or demands the results intended only aggravates the offense, for, as shown above, unethical conduct cannot be excused because it is committed at the behest of, or to appease, a client. I have known of a lawyer not only assuming but actually stating that he was acting as "general counsel" for certain interests, for which in fact

another lawyer had for years been and still was the general counsel in charge of all legal matters; and that, too, although the pseudo-general counsel was still appearing as representing certain other clients who had been at variance with the interests referred to.

Sometimes a lawyer of disrepute at his own bar and in his own community, who at home is shunned as unscruplous or feared as dangerous, appears temporarily in another community where his home reputation is not known and there poses as a Choate or as a Taft, or, perhaps as an expert in business and in the law, although distrusted at home either as a business man or as a lawyer. There are instances of a lawyer posing as having been instrumental in bringing to a judge his judicial position and claiming that he has a "pull," for the purpose of getting the privilege of appearing on briefs and displacing the lawyer in charge so far as leadership of the case is concerned. Such tactics are not only a reflection on the judge in question, but a most unethical method of getting business, involving not only soliciting employment, but also a snatching away of the laurels belonging to another lawyer who had the case well in hand. Such substitutions or displacements are often very prejudicial to the client. But discovery sometimes comes too late. To such predatory practitioners codes of ethics are but Belgic strips whose sanctity may be invoked for selfish defense but to be ignored as mere scraps of—nothing—and violated both in letter and spirit for every vandal invasion or for selfish offense. The duty of courtesy to fellow attorneys is not one of form but of substance.

The opposing lawyer in a dispute, whether litigated or under negotiation, should deal with the opposite side only through the recognized lawyer for that side. He must not negotiate or consult with the other lawyer's client, or with any person, lawyer or otherwise, assuming to represent such client, except with the express and clear understanding and consent of the lawyer in charge.

These are rules involving more than mere questions of courtesy. They are to protect the interests of all clients and to safeguard lawyers in their right and duty to see that their clients are properly advised against error and against injustice. No honorable lawyer would view any breach of these rules otherwise than as most prejudicial and dishonorable.[12]

[12]Carter, p. 61; II and XLIII, Hoffman's Resolutions (Costigan p. 556, 567).

Other Applications of Ethical Rules

Illustrations of the application of the canons of legal ethics could be continued without end, but even such treatment would be useless, as the canons themselves would be useless, unless read in the light of the underlying spirit and purpose of the formulated rule, without due regard for which no practitioner can govern his actions rightly, either in a particular instance or generally. It may be helpful, however, to emphasize certain instances which are sometimes considered doubtful or even controverted.

A lawyer should present to the court his client's side of the case, both as to the facts and as to the law. Opposing counsel will do the same for their client. The court will listen to both sides, weigh the evidence and the arguments as to the law in the light of its own knowledge and experience, and decide all issues.[13] The lawyer has the right to demand of his client the fullest disclosure of all facts, but in the utmost confidence as between lawyer and client. Such confidences must never be betrayed. The lawyer must not allow himself to be the instrument of deceit, wrong or oppression by his client, but where the issues of fact or of law are fairly doubtful, it is his duty and privilege to present that view which is most favorable to his client. He must be fair to the courts and must not deceive them, but this does not mean that he shall furnish to the court information which has been received as part of his confidences with his client[14]

The lawyer must not act in conflict with the interests of his client. When, however, he is in charge of a matter, it is his privilege and duty to investigate on his own initiative and to consider all viewpoints and to act and advise in such a way that, at the same time that he protects his client's interest, he prevents anybody from suffering injustice from himself or from his client. The lawyer's conscience should always be awake and active. He can never excuse himself on the ground of lack of conscience in his client.

The direct and indirect fiduciary duties of a lawyer, already re-

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[13]Costigan, p. 40; Taft, p. 24-5.

[14]On this point, too often assumed to be doubtful, Judge Taft (pp. 31-32) writes emphatically:
"To require the counsel to disclose the confidential communications of his client to the very court and jury which are to pass on the issue which he is making, would end forever the possibility of any useful relation between lawyer and client. It is essential for the proper presentation of the client's cause that he should be able to talk freely with his counsel without fear of disclosure."

ferred to above, make him, within the scope of his employment, a trustee of his client's business and confidences. Therefore, his knowledge of his client's affairs must never be used either directly or indirectly to the disadvantage of his client, or for his own advantage or for that of others. He may have business dealings with his client, but in respect thereof his duties as trustee continue and he must act only with the fullest frankness and after making sure that his client is fully informed of every fact pertinent to the transaction which he himself knows or even suspects.[15] Moneys collected for his client should be paid over immediately and if payment is delayed should not be commingled with his own funds.[16] He should not accept or retain as his own any perquisites, bonuses, rebates or profits coming to him through his client's business, except with his client's full knowledge and consent. His expense charges to his client should never exceed his actual disbursements, even when abnormally low, as when traveling on an excursion rate or on a pass or when he obtains lodging or meals free or at below regular rates. Advertising rebates, allowed by some publishers for legal advertising, do not belong to the lawyer but to his client.[17]

In his charges for services, the lawyer should at all times be fair,—but he should be fair not only to his client but also to himself. He should use his utmost endeavor to satisfy his client and be willing to sacrifice wherever necessary to avoid a dispute. But not so without limit. He has a moral and legal right to the fair worth of his services and, where there has been an agreement for compensation upon the strength of which he has worked and sacrificed, he is morally and legally entitled to compel his client to pay in full. No lawyer should shrink from preventing unjust exactions by a client whether it be from himself or from others.[18]

Lawyers and Newspapers

However unethical for the lawyer to advertise, there are no ethics of the business of publishing which should make a publisher hesitate to insert in his advertising columns a card or even more extensive bids by a lawyer for business. But both the

[15]Carter, pp. 38-39.
[16]Carter, pp. 49-50.
[17]Costigan, pp. 484-519.
[18]Costigan, pp. 484-5; 12 and 14 Canons A. B. A.

publisher and the lawyer fall far short of the ethical standards which each should maintain when they or either of them permit litigated cases, civil or criminal, to be discussed in the public press on their merits, at least before verdict or judgment has been rendered. Such methods are a breach of the lawyer's duty to his clients and to the courts and to the public. They are a breach by the newspapers of their duty to the courts and to the public. The instigating of prejudice to litigants by inciting in a community a bias of popular opinion in respect of cases in court, tends to undue influence not only upon juries but upon the courts themselves and is perversive of the proper administration of justice. Not that a fair report of the proceedings at a public trial should not be published. What should be avoided is discussion of the merits or of facts extraneous to the record of the official trial. Attorneys in both civil and criminal cases, and especially public prosecutors, are often flagrant violators of the rules of ethics, decency and public policy in this regard. They are thereby impeding the due administration of justice and, therefore, breaching the duty of the lawyer and of the press.

There has grown up in some parts of the West, including Minnesota, a practice by the newspapers of having the witnesses who are called before a grand jury interviewed, either as to what they expect to testify or as to what they have testified before the grand jury, and then to publish from day to day, while the grand jury is in session, the details or purport of such interviews, and even to publish interviews with the grand jurors themselves concerning their proceedings and deliberations. The statutes governing the grand jury system contemplate, for reasons of great public policy, that the testimony before a grand jury shall be confidential and that the jury's deliberations and votes shall be known only to themselves, and for that purpose the presence, when a vote is taken, of any person other than a jury member,—even that of the prosecuting attorney himself,—invalidates the indictment. The jury members are sworn to secrecy, and, as to the witnesses examined, the law intends that even their names should not be disclosed unless and until returned on an indictment. I have advised newspaper clients that such publications constitute contempt of court, but the courts hesitate to take such drastic action, even to protect themselves and their orderly administration.[19]

[19]13 Corpus Juris, 34; Toledo Newspaper Co. v. U. S., 247 U. S., 402; State v. Shephard, 177 Mo. 205.

Los Angeles newspapers, with the connivance of certain lawyers, sent reporters to spy upon the jury in the recent Burch murder trial after the jury had been locked in their rooms to reach a verdict. The reports published from day to day of the gestures, the arguments, remarks and conversations, as well as of the successive votes and their results, were such that the jury might better have reached their verdict in open session on the stage of a theatre to which the public had free admittance.

These vicious practices could not be continued if either the lawyers concerned or the newspapers observed their duties to the courts and to the public.[20]

An Enlightened Conscience the Safeguard

There is no sure remedy for the tendency of some lawyers to read into the canons of legal ethics things which are inconsistent with or directly repugnant to their real spirit and purpose. Much more hopeless is the reform of those lawyers, always with us,—but we trust in decreasing numbers,—who ignore or defy both the terms and spirit of any ethical code. Canons of legal ethics cannot be applied by the searching of their mere terms or by running over an index of their contents. The code of legal ethics is much more comprehensive than anything which has ever been written. At the most it can only reflect the composite conscience of the profession. It should be read only as an appeal to the conscience of the lawyer,—not to the undeveloped conscience of a limited vision, but to an enlightened conscience, the conscience developed by education and by long and careful training. It is an appeal to those whose learning and experience qualify them to feel and to apply high ideals of conduct. It is effective only in the degree that the conscience and learning of the lawyer are effective. But learning must be the basis, for, without learning as a source and guide, conscience cannot work out to applications which are intelligently consistent.

The solution, then, seems most promising through an elevation of the standards of learning required of the members of the bar. The constitution of Indiania compels the lawyer's franchise to be granted to any citizen who can make a prima facie and ex parte showing of good moral character. In some instances law-school admittance requirements are of the lowest grades of educa-

[20]Carter, p. 71; Costigan, p. 166; 20 Canons A. B. A.

tion. There are law schools where a college A. B. degree is a prerequisite for admission. If a law-school certificate is to entitle a law student to take his examinations for admission to the bar, it should be accepted only from a law school requiring for a law degree at least a three years law course and not less than a two years academic course in a college or university of high standing. Uniform statutes for admittance to the bar should be passed by the several states confirming these educational requirements. While the rule of courtesy permitting a non-resident attorney to participate in a particular trial should be continued, he should not be allowed to move into another state and be there admitted to practice except upon complying with all the conditions required of local lawyers.

Such is the recommendation of the recent American Bar Conference at Washington and urged by Mr. Elihu Root as a means of preventing criminal and all unethical practices "under the protection of a shingle."[21]

[21]American Bar Association Journal of March, 1922.

CONCURRENT POWER UNDER THE EIGHTEENTH AMENDMENT

By Noel T. Dowling*

THE term "Concurrent power" occurs for the first time in the federal fundamental law in the second section of the eighteenth amendment:[1] "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."[2] Though it has been recognized that this amendment marked a new departure in the relationship of the state and federal governments in the enforcement of law, and though the amendment has been before the United States Supreme Court, many of the inferior federal courts, and the courts of almost half the states, there has come from the first-named court no pronouncement of the positive meaning of concurrent power, nor have the other courts, federal and state, disclosed a clear and definite agreement in that regard. In fact a justice[3] of the United States Supreme Court has declared that "it is impossible now to say with fair certainty what construction should be given to the eighteenth amendment," and that "because of the bewilderment which it creates, a multitude of questions will inevitably arise and demand solution" in that court.[4]

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[1]The eighteenth amendment is as follows:

"Sec. 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

(Sec. 3 limits the time within which ratification may be effected and is immaterial here).

The amendment was proposed December 18, 1917, (40 Stat. 1050, 1941); was ratified January 16th, 1919 (Dillon v. Gloss, (1921) 41 S. C. R. 510); and proclaimed by the secretary of state January 29th, 1919.

[2]The term "concurrence" appears three times in the constitution, and the term "concur" twice.

[3]Mr. Justice McReynolds, concurring in the National Prohibition Cases, (1920) 253 U. S. 350, 64 L. Ed. 946, 40 S. C. R. 486.

[4]"A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. it involves a moral and physical impossibility." Mr. Justice McLean, in the Passenger Cases, (1849) 7 How. (U. S.) 283, 12 L. Ed. 702.

It is the purpose of the writer to try to ascertain, from the reported cases and other contributions on the subject, whether there is any plausible escape from this "bewilderment." The course of the inquiry will involve several stages: first, the presentation of the diverse meanings suggested for "concurrent power;" second, an examination of the judicial usage of "concurrent power" prior to the eighteenth amendment to see whether it had acquired an established meaning; third, an investigation of some phases of the movement resulting in the adoption of the amendment and an inspection of congressional debates and reports to learn whether a definite meaning was intended in its proposal and adoption; and finally, a consideration of the suggested meanings in the light of the recent cases and comment thereon.

In the footnote[3] will be found a table of cases, federal and state, arising under or relating to the enforcement section of the

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"Obviously the grant of concurrent jurisdiction may bring up from time to time many and some curious and difficult questions." Nielson v. Oregon, (1909) 212 U. S. 315, 53 L. Ed. 528, 29 S. C. R. 383. See footnote 24 as to effect of "concurrent jurisdiction" including "concurrent power."

[3] FEDERAL COURTS. National Prohibition Cases, (June 7, 1920) 253 U. S. 350, 64 L. Ed. 946, 40 S. C. R. 486; Martin v. U. S., (C. C. A. 8th C. Feb. 28, 1921) 271 Fed. 685, Rhg. denied May 12, 1921; Ex parte Crookshank, (D. C. Cal., Feb. 3, 1921) 269 Fed. 980; Feigenspan v. Bodine, (D. C. N. J. Mar. 9, 1920) 264 Fed. 186; Ex parte Finnegan, (D.C.N.Y., Feb. 7, 1921) 270 Fed. 665, Ex parte Ramsey, (D.C. Fla., July 17, 1920) 265 Fed. 950; U. S. v. Bostow, (D.C. Ala. June 14, 1921) 273 Fed. 535; U. S. v. Holt, (D.C. No. Dak., Jan. 3, 1921) 270 Fed. 639; U. S. v. Peterson, (D.C. Wash., Oct. 18, 1920) 268 Fed. 864; U. S. v. Ratagczak, (D.C N.D. Ohio, Sept. 15, 1921) 275 Fed. 558; U. S. v. Regan, (D. C. N. H., June 3, 1921) 273 Fed. 727; U. S. v. Viess, (D.C. Wash., June 1, 1921) 273 Fed. 279; Woods v. City of Seattle, (D.C. Wash., Jan. 15, 1921) 270 Fed. 315.

ALABAMA.—Ewing v. State, (Ct. of App., Apr. 5, 1921) 90 So. 136, Rhg. granted May 31, 1921; Powell v. State, (Ct. of App., Apr. 5, 1921) 90 So. 138; Ricketts v. State, (Ct. of App., Apr. 12, 1921) 90 So. 137, Rgh. denied May 31, 1921; Jones v. State, (Ct. of App., Apr. 12, 1921) 90 So. 135.

ARKANSAS.—Alexander v. State, (May 9, 1921) 148 Ark. 491, 230 S. W. 548.

CALIFORNIA.—Harris v. Superior Court, (Dist. Ct. App., Mar. 4, 1921) 196 Pac. 895, Hearing denied by Sup. Ct.; Ex Parte Volpi (Dist. Ct. App. June 17, 1921) 199 Pac. 1090; Ex Parte Kinney, (Dist. Ct. App. Aug. 20, 1921) 200 Pac. 966; Carse v. Marsh, (Sept. 3, 1921) 36 Cal. App. Dec. 73, 10 Cal. Law Rev. 70; People v. Capelli, (Dist. Ct. App., Nov. 30, 1921) 203 Pac. 837, Rhg. denied Jan. 26, 1922; People v. Collins, (Dist. Ct. App., Dec. 12, 1921) 202 Pac. 344.

CONNECTICUT.—State v. Ceriani, (Apr. 20, 1921) 96 Conn. 130, 113 Atl. 316.

FLORIDA.—Burrows v. Moran, (May 3, 1921) 89 So. 111; Wood v. Whitaker, (May 3, 1921) 89 So. 118; Hall v. Moran, (May 13, 1921) 89 So. 104; Johnson v. State, (June 4, 1921) 89 So. 114.

GEORGIA.—Jones v. Hicks, (Nov. 11, 1920) 104 S. E. 771; Scroggs v. State, (Dec. 17, 1920) 105 S. E. 363; Edwards v. State, (Dec. 17, 1920) 105 S. E. 363; Smith v. State, (Dec. 17, 1920) 105 S. E. 364; Bryson v. State,

eighteenth amendment, which have come to the writer's attention up to this date (April 6, 1922). The cases are classified under

Ct. of App., June 17, 1921) 108 S. E. 63; Barbour v. Benton, (July 13, 1921) 108 S. E. 61; Raskin v. Dixon, (July 14, 1921) 108 S. E. 61; Neville v. State, (Oct. 14, 1921) 108 S. E. 802; Neville v. State, (Dec. 15, 1921) 110 S. E. 180; Cooley v. State, (Jan. 10, 1922) 110 S. E. 449.

INDIANA.—Palmer v. State, (Dec. 20, 1921) 133 N. E. 388; Hess v. State, (Feb. 1, 1922) 133 N. E. 880.

KENTUCKY.—Youman v. Commonwealth, (Jan. 27, 1922) 237 S. W. 6.

LOUISIANA.—City of Shreveport v. Marx, (Nov. 3, 1920) 148 La. 31, 86 So. 602; State v. Green, (Jan. 3, 1921) 148 La. 376, 86 So. 919; City of Lake Charles v. Rose, (Oct. 31, 1921) 89 So. 884; State v. Boudreaux, (Jan. 2, 1922) 90 So. 751, Rehg. denied Jan. 30, 1922.

MARYLAND.—Ulman v. State, (Jan. 13, 1921) 113 Atl. 124.

MASSACHUSETTS.—Commonwealth v. Nickerson, (Sept. 17, 1920) 236 Mass. 281, 128 N. E. 273; Jones v. Cutting, (Mar. 18, 1921) 130 N. E. 271; In re Opinion of Justices, (Nov. 21, 1921) 133 N. E. 453.

MISSISSIPPI.—Meriweather v. State, (Mar. 7, 1921) 125 Miss. 435, 87 So. 411; Kyzar v. State, (Mar. 7, 1921) 125 Miss. 79, 87 So. 415.

MONTANA.—State v. District Court, (Dec. 18, 1920) 58 Mont. 684, 194 Pac. 308.

NEW YORK.—People v. Foley, (Oct. 1, 1920) 113 Misc. Rep. 244, 184 N. Y. S. 270; People v. Mason, (Jan. 18, 1921) 186 N. Y. S. 215; People v. Commissioner of Correction, (April 1921) 115 Misc. Rep. 331, 188 N. Y. S. 46; People v. Cook, (May 11, 1921) 197 App. Div. 155, 188 N. Y. S. 291; People v. Wicka, (Dec. 1921) 192 N. Y. S. 633.

NORTH CAROLINA.—State v. Fore, (Dec. 24, 1920) 180 N. C. 744, 105 S. E. 334; State v. Muse, (May 25, 1921) 181 N. C. 506, 107 S. E. 320; State v. Barksdale, (June 7, 1921) 181 N. C. 621, 107 S. E. 505; State v. Campbell, (Dec. 21, 1921) 188 N. C. 911, 110 S. E. 86.

OREGON.—State v. Smith, (July 12, 1921) 199 Pac. 194, Annotated 16 A. L. R. 1220.

PENNSYLVANIA.—Commonwealth v. Vigliotti, (May 26, 1921) 115 Atl. 20.

SOUTH CAROLINA.—State v. Hartley, (Apr. 1, 1921) 115 S. C. 524, 106 S. E. 766.

TEXAS.—Ex parte Gilmore, (Dec. 1, 1920) 88 Tex. Cr. R. 529, 228 S. W. 199, Rhg. denied Feb. 23, 1921; Franklin v. State, (Jan. 12, 1921) 88 Tex. Cr. R. 342, 227 S. W. 486; Banks v. State, (Jan. 26, 1921) 88 Tex. Cr. R. 380, 227 S. W. 670, Rhg. denied Feb. 23, 1921; Rozier v. State, (Nov. 9, 1921) 234 S. W. 666, Rhg. denied Nov. 30, 1921; Hardaway v. State, (Ct. Cr. App. Jan. 4, 1922) 236 S. W. 467; Russell v. State, (Mar. 2, 1921) 88 Tex. Cr. 582, 228 S. W. 948; Thomas v. State, (Ct. Cr. App. Mar. 9, 1921) 232 S. W. 826, Rhg. granted June 22, 1921.

VIRGINIA.—Allen v. Commonwealth, (Jan. 20, 1921) 129 Va. 723, 105 S. E. 589; Lowry v. Commonwealth, (Jan. 19, 1922) 110 S. E. 256; Pollard v. Commonwealth, (Jan. 19, 1922) 110 S. E. 354.

WASHINGTON.—State v. Turner, (Mar. 29, 1921) 196 Pac. 638; State v. Woods, (June 21, 1921) 198 Pac. 737; State v. Stephens, (Aug. 12, 1921) 200 Pac. 310; State v. Gibbons, (Jan. 4, 1922) 203 Pac. 390; State v. Cole, (Jan. 26, 1922) 203 Pac. 942.

WEST VIRGINIA.—State v. Knosky, (Jan. 25, 1921) 87 W. Va. 558, 106 S. E. 642.

PERIODICALS

8 California Law Rev. 205; 10 Id. 70; 88 Central Law Journal 31; 90 Id. 397; 91 Id. 1, 205; 92 Id. 46; 19 Columbia Law Rev. 144, 21 Id. 818; 6 Cornell Law Quarterly 443; 33 Harvard Law Rev. 968; 34 Id. 317; 23 Law Notes 200; 25 Id. 126; 13 Maine Law Rev. 121; 18 Mich. Law Rev. 213; 19 Id. 329, 435, 647; 6 Va. Law Register (N.S.) 301; 8 Va. Law. Rev. 133.

federal and state jurisdictions, and the latter are arranged alphabetically according to states. For chronological purposes the date of each decision is given in the parenthesis following the case. The table is not offered as complete, but it contains the results of an attentive and, for the most part, unbroken search of the advance sheets as they have appeared. In addition to the cases, there is included similarly a list of articles, notes and comments in legal periodicals.

I. Suggested Meanings

No less than ten meanings for the term "concurrent power" have been suggested.[6] Some of these meanings vary from others only in slight particulars. Briefly stated, with short descriptive titles, the suggestions are:[7]

1. *Joint Power*: That it is a joint power, and congressional legislation under the amendment to be effective shall be approved or sanctioned by the several states.

2. *Divided Power*: That the power to enforce the amendment is divided between Congress and the several states along the lines which separate and distinguish foreign and interstate commerce from intrastate affairs.

3. *Action Within Different Areas*: That the concurrent powers are to be exerted in different areas (called "historical fields of jurisdiction"), and consequently cannot conflict each with the other.

4. *Substitute Action*: That an equal power is given to Congress and the states, not, however, to be concurrently exercised, but separately exercised, the inactivity of one to be supplied by the activity of the other.

5. *More Drastic Displacing Less Drastic Action*: That Congress and the states may both legislate under the amendment and whatever legislation, congressional or state, "is the most prohibitive, subserves best" and "displaces less restrictive legislation and becomes paramount."

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[6]Examples of definitions from standard dictionaries:

Century: Concurring, or acting in conjunction; agreeing in the same act; contributing to the same event or effect; operating with; coincident. Conjoined; joint; concomitant; coordinate; combined.

Bouvier: Running together; having the same authority; . . . such and such courts have concurrent jurisdiction,—that is, each has the same jurisdiction.

[7]The sources and discussion of the suggested meanings are dealt with on subsequent pages, see p. 464.

6. *Concurrent Action*: That concurrent action of Congress and the several states is necessary to enforce the prohibition, and that in the absence of such concurrent action no enforcing legislation can exist; congressional legislation not effective unless concurred in by state, and vice versa.

7. *United Action*: That there must be united action between Congress and the states, or at any rate concordant and harmonious action.

8. *United Administrative Action*: That the national and state administrative agencies are united in giving effect to the amendment and the legislation of Congress enacted to make it completely operative; in other words, concurrent power to enforce the amendment as the amendment is "defined and sanctioned" by Congress.

9. *Separate and Independent Action—Congressional Supremacy*: That concurrent action is not necessary, but Congress and the states may act separately and independently, the congressional action to be supreme over the state action in the event of conflict between the two.

10. *Separate and Independent Action*: That the concurrent power may be exerted by Congress or the states independently of each other, the validity of the action of one to be tested under the amendment without regard to the action of the other.

II. "Concurrent Power" in Judicial Usage

Had the term "concurrent power" acquired an established meaning by judicial usage prior to the adoption of the eighteenth amendment? If so, is it to be read into the amendment? To both of these questions an affirmative answer has been given, particularly by the proponents of the ninth suggested meaning. That the term "concurrent power" has appeared again and again in the language of the Supreme Court of the United States is not to be denied, but that it has acquired an established meaning may be questioned.

Perhaps the term "concurrent power" appears more often in cases involving the interstate commerce clause than in any other class of cases. In *Gibbons v. Ogden*,[8] Mr. Oakley, on behalf of the state of New York, made what is probably the most elaborate argument yet reported on concurrent powers. He undertook to

[8](1824) 9 Wheat. (U. S.) 1, 6 L. Ed. 23.

demonstrate that the power to regulate interstate commerce was concurrent. As examples of concurrent powers he enumerated, among others, the power of taxation which he said was "admitted on all hands to be concurrent," and the power to provide for the punishment of counterfeiting.

Mr. Chief Justice Marshall, in declaring the state law invalid in that famous decision, did not accept the argument so advanced. He said that "when a state proceeds to regulate commerce with foreign nations or among the several states, it is exercising the *very power that is granted to Congress* and is doing the very thing which Congress is authorized to do."

Cooley v. The Board of Wardens,[9] however, is relied upon for the view that there is a concurrent power over interstate commerce. The state pilotage laws in question were described by counsel supporting their validity as "local in character and object" and were asserted to be "an essential exercise of one branch of the police power of the state to aid and not to regulate commerce." Elaborating the argument in reference to the police power, counsel referred to it as "inherent or *concurrent*;" again, in reference to the effect of congressional legislation, as "inherent or *co-existent*;" still again, that such laws have been recognized as "justified either by the inherent or *co-existent* power" of the states. While "inherent" was used in each of the three groupings, "concurrent" in the first was replaced by "co-existent" in the others and with no apparent difference in meaning.

Mr. Justice Curtis wrote the majority opinion upholding the pilotage laws as "enacted by virtue of a power residing in the state." He did not use the word "concurrent" in his opinion. "The grant of commercial power to Congress," he wrote, "does not contain any terms which expressly exclude the states from exercising an authority over its subject-matter," and diversities of opinion "have arisen from the different views taken of the nature of this power." And continuing,

"But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. . . . Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them,

[9](1851) 12 How. (U. S.) 299, 13 L. Ed. 996.

what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain."[10]

In *Gilman v. Philadelphia*[11] it was said that "the states may exercise concurrent or independent[12] power in all cases but three: (1) where the power is lodged exclusively in the federal constitution. (2) Where it is given to the United States and prohibited to the states. (3) Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively."

Notwithstanding all this, is it correct to say that there is a concurrent power to regulate interstate commerce? Under the constitution there is but one power on that subject and that power is delegated to Congress. It is submitted that what is usually referred to as concurrent power over interstate commerce is not a concurrent power at all but rather two separate and distinct powers: one federal, i. e., power to regulate interstate commerce, the other state, i. e., police power. The former is exercisable by Congress, *e.g.*, with respect to commodities in interstate commerce, and the latter by the states, *e.g.*, with respect to commodities within their territorial jurisdiction. But obviously a commodity may be, at the same time, within a state's territorial jurisdiction and in interstate commerce. In other words, the *subject matter* is so situated that two powers may be said to converge upon it. If it cannot obey both, it must obey the stronger—which, under the sixth article of the constitution, is the federal law. It is believed that this is in harmony with the distinction drawn in *Cooley v. Board of Wardens* between the nature of the *power* and the *subject matter* upon which it operates, and is supported by the guarded way in which the court, as in *Robbins v. Shelby County Taxing District*,[13] speaks of the "established principle" that the "only way in which commerce between the states can be legiti-

[10]While several remarks by the court suggest that the states' power was different from, though similar to, and coexisting with, that of Congress, other remarks treat it as an exercise of the same power, and still another declares the pilotage law to be "a regulation of commerce" within the meaning of the commerce clause.

[11](1866) 3 Wall. (U. S.) 713, 18 L. Ed. 96.

[12]From the context it appears that "concurrent" and "independent" are used as expressing the same idea.

[13](1887) 120 U. S. 489, 30 L. Ed. 694, 7 S. C. R. 592.

mately affected by the state laws is when" a state makes provision for safety, health, comfort, etc., "by virtue of its police power, and its jurisdiction over persons and property within its limits." State police regulations may "incidentally affect commerce." It is quite a different thing to say the states have concurrent power to regulate interstate commerce.

Other cases also speak in terms of concurrent power. As noted above, the argument on behalf of the state laws in *Gibbons v. Ogden* proceeded largely upon the assumption that the power of taxation was a power admitted on all hands to be concurrent. Mr. Marshall announced a contrary conclusion in that case, namely, that the power to tax is the power which each government possesses, a separate and distinct power indispensable to each, and that when "each government exercises the power of taxation, neither is exercising the power of the other."

In *McCulloch v. Maryland*,[14] speaking more of the exercise than of the nature of the power, Mr. Marshall said:

"That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by grant of a similar power to the government of the union; that it is to be concurrently exercised by the two governments, are truths which have never been denied."

Seventy odd years later, the court, in *Pollock v. Farmers' Loan and Trust Company*,[15] declared that by the constitution the states "gave to the nation the concurrent power to tax persons and property directly." The changing terminology is interesting: separate and distinct powers, "concurrently exercised," "concurrent power." The notion of federal supremacy does not prevail here, yet the term concurrent is applied.

In the matter of bankruptcy, the supreme court,[16] through Mr. Chief Justice Marshall, speaks of "this concurrent power of legislation."[17]

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[14](1819) 4 Wheat. 316, 4 L. Ed. 579.

[15](1895) 157 U. S. 429, 39 L. Ed. 759, 15 S. C. R. 673; 158 U. S. 601, 39 L. Ed. 1108, 15 S. C. R. 673, 912.

[16]Sturges v. Crowninshield, (1819) 4 Wheat. 122, 4 L. Ed. 529.

"It is manifest to us that the explicit words of section 2 vesting 'concurrent power' to enforce prohibition both in Congress and in the states means something more than the 'concurrent power' to which reference is made in Sturges v. Crowninshield as existing without express words." Commonwealth v. Nickerson, (1920) 236 Mass. 281, 128 N. E. 279.

[17]The control of the election of senators and representatives has been said to involve a concurrent power, with state action yielding to Congressional enactment. Ex parte Siebold, (1880) 100 U. S. 371, 25 L. Ed. 717.

Speaking generally on the subject of concurrent power the court had said in *Southern Ry. Co. v. Reid*:[18] "It is well settled that if the state and Congress have a concurrent power, that of the state is superseded when the power of Congress is exercised." And to the same effect Mr. Justice Story, concurring in *Houston v. Moore*:[19]

"In cases of concurrent authority where the laws of the state and of the union are in direct and manifest collision on the same subject, those of the union being 'the supreme law of the land,' are of paramount authority, and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield."

In all these cases, however, where the court employed the term "concurrent power," this is to be remembered: the court was not defining the term as part of the constitution for the very simple and conclusive reason that the term at that time was not a part of the constitution. The court was using the term descriptively—generally, but not always,[20] as a convenient means of describing a situation where two sovereignties could act in respect of the same subject-matter, but where, under the constitution as it then stood, particularly with reference to the sixth article, the result was that the federal would prevail over state action.[21] At the same time, the court used the term to describe other situations, e. g., taxation, where that result did not follow. Nevertheless, it may be admitted frankly that the element of state subserviency running through most of the decisions where the court speaks in

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The subject-matter here is peculiarly federal: No such offices exist apart from the constitution, and the states had no power in that regard except as it was given to them by the constitution. 22 Columbia Law Review 54.

The states in a sense were designated as the agents of the United States to prescribe the "times, places and manner" of holding elections, but by the express terms of the constitution Congress may at any time by law make or alter such regulations. The state's power is subordinate and dependent by the specific language above quoted as to the superior right of Congress to alter the state regulations. Nevertheless, the court called this "concurrent power".

[18] (1912) 222 U. S. 424, 56 L. Ed. 257, 32 S. C. R. 140.

[19] (1820) 5 Wheat. (U. S.) 1, 5 L. Ed. 19.

[20] "The expression 'concurrent power' occurs frequently in the opinions of courts and judges dealing with the powers of Congress and the States; but it is often loosely used and not always in the same sense." O. K. Cushing in 8 Calif. Law Rev. 205.

[21] "The Supreme Court decisions . . . concerning the supremacy of the federal power have reference to subjects concerning which the power of legislation has been, expressly or by necessary implication, granted to the federal government by the United States constitution, so as to lodge such power in the federal government exclusively when it has taken possession of the field of legislation." Allen v. Commonwealth (Va. 1921) 105 S. E. 589.

terms of "concurrent power" furnishes considerable support for the ninth suggested meaning, that, in case of conflict, state law yields to federal law on the same subject.

But there are other cases in which the Supreme Court or its justices have had something to say about the meaning of concurrent power. In the *Passenger Cases*[22] there was no opinion by the court, but on the contrary a group of opinions by those concurring in the judgment and also a group of dissenting opinions. Among the former was Mr. Justice McLean, who declared that: "A concurrent power excludes the idea of a dependent power." This was quoted by Mr. Justice McKenna, dissenting in the *National Prohibition Cases*,[23] who added that "opposing laws are not concurring laws, and to assert the supremacy of one over the other is to assert the exclusiveness of one over the other, not their concomitance."

While, as said above, the court has used the term "concurrent power" descriptively and was not called upon, prior to the eighteenth amendment, to define it as a term of the constitution, there is a group of cases where the court has been compelled to define the term concurrent jurisdiction[24] in written documents and compacts. *Wedding v. Meyler*[25] is one of this group. There the court had before it a provision in the Virginia compact of 1789 that the jurisdiction of the proposed state of Kentucky on the Ohio River should be "concurrent only with the states which may possess the opposite shores of the said river." The Court speaking through Mr. Justice Holmes said:

"Concurrent jurisdiction, properly so called, on rivers, is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase."[26]

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[22](1849) 7 How. 283, 470, 559, 12 L. Ed. 702.

[23]See footnote five for citation.

[24]"The difference in terms, concurrent *jurisdiction* instead of concurrent *power*, does not seem to be material.

"Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and effect laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judicial and executive—as that possessed by Kentucky over so much of the Ohio River as flows between them." Robertson, C. J., in Arnold v. Shields, (1837) 5 Dana (Ky.) 18.

[25](1904) 192 U. S. 573, 48 L. Ed. 570, 24 S. C. R. 322.

[26]In Nielson v. Oregon, (1909) 212 U. S. 315, 53 L. Ed. 528, 29 S. C. R. 383, involving the construction of an act of Congress conferring concurrent jurisdiction upon Oregon and Washington, the court restated and reaffirmed the doctrine of the Wedding case, but, pointing out the un-

Finally, *Fox v. Ohio*[27] should be mentioned, not because it specifically decided anything concerning concurrent power but because the matter involved in the case and the reasoning of the court have been referred[28] to as illustrating the congressional intent in inserting "concurrent power" in the eighteenth amendment. The case sustains the validity of a state law punishing the offense of circulating counterfeit coin of the United States. The court treats the offense against the state as distinct from any offense against the United States and the decision generally has been accepted as establishing the proposition that, whatever one might think of the policy of double punishment therefor, the same act may constitute an offense against both the state and the United States and be punishable by each.[29]

From the foregoing considerations, it does not appear that the term "concurrent power" had acquired an established meaning by judicial usage. Consequently there is nothing conclusive from this source to be read into the eighteenth amendment.[30]

III History of the Amendment

Is a meaning for the term "concurrent power" to be found in the movements resulting in the adoption of the amendment, or in its legislative history?

Police control over traffic in intoxicating liquors (barring such limitations as were made in cases under the original package rule as applied to interstate commerce and other limitations of jurisdiction) was originally in the states and reserved to them under the tenth amendment.[31] The history of the prohibition movement has not disclosed any appreciable desire or willingness on the part

doubted purpose of the grant, declined to apply the doctrine on the facts of the case then in hand.

[27](1847) 5 How. (U. S.) 410, 12 L. Ed. 213.

[28]Mr. Webb, in charge of the Resolution proposing the Amendment, called attention to the counterfeiting cases in explaining the effect of, and reasons for, the introduction of the words "concurrent power." See page 463.

[29]See also Gilbert v. Minnesota, (1920) 254 U. S. 325, 65 L. Ed. 146, 41, S. C. R. 125, approving the reasoning in State v. Holm, (1918) 139 Minn. 267, 166 N. W. 181.

[30]"We are unable to deduce from these decisions a universal definition of 'concurrent,' or one so well settled as to lead to the conviction that it was employed in the Eighteenth Amendment in reliance upon a judicially established meaning." Commonwealth v. Nickerson, (1920) 236 Mass., 281, 128 N. E. 279.

[31]South Carolina v. United States, (1905) 199 U. S. 437, 50 L. Ed. 261, 26 S. C. R. 110; Commonwealth v. Nickerson, (1920) 236 Mass. 281, 128, N. E. 273.

of the states to surrender this power. To the contrary, the states were engaged almost continuously in efforts to find ways and devise methods whereby they could strengthen their own power and carry it effectively into execution.[22] In furtherance of these efforts the states applied to Congress for such aid as the general legislature could give them. They secured the Wilson Act,[23] which declared intoxicating liquors to be subject to the state's police power upon arrival in the state, and the Webb-Kenyon Act,[24] the effect of which was declared judicially[25] to divest intoxicating liquors of their interstate character in certain cases so that they fell within a state's jurisdiction as soon as they crossed the state line, notwithstanding the incompletion of the actual interstate transaction. With these two acts, particularly the latter, on the books and their validity sustained by the Supreme Court, the states were, generally speaking, enabled to get at and control the liquor traffic, even to the extent of prohibiting the introduction of liquors into the states. Power in this respect, however, rested not on solid constitutional grounds but rather on the insubstantial and more or less ephemeral basis of congressional permission. Congress enacted the Webb-Kenyon Act; the same body could repeal it. Sentiment and public opinion were running high; the time was ripe to crystallize it in lasting form. While they were about the business, the states desired to make a thorough-going and permanent job of it. Nothing less than a constitutional amendment would do.[26] The eighteenth amendment followed.

Looking at the matter from the point of view of the states and what they were seeking to do, it may be said that the power which the states exercise in the limitation of traffic in intoxicating liquors is still the power originally possessed and subsequently reserved. In other words, there is no change in either the source[27] or the nature of the states' power. Excepting the re-acquisition of power presently to be noticed, the states in adopting the eighteenth

[22]For an account of the successive efforts of the states to control the liquor traffic, see 5 MINNESOTA LAW REVIEW 102-110.

[23]26 Stat. 313, Act of August 8, 1890.

[24]37 Stat. 699. Act of March 1st, 1913.

[25]Clark Distilling Co. v. Western Maryland R. R. Co., (1917) 242 U. S. 311, 37 S. C. R. 180, 61 L. Ed. 326.

[26]Mr. Webb in closing the debate on the constitutional amendment in the House, said: "I am filled with unspeakable happiness when I realize that we now have the traffic back to its last trench . . . and I am praying that one more drive will result in ending the business on our shores forever." 56 Cong. Rec. 469.

[27]See page 478.

amendment appeared to have intended only to accept and admit within their own borders the federal government henceforth as a force in controlling the liquor traffic.[38] Nowhere, it should be observed, is there serious consideration of the proposition, much less acquiescence therein, that the states might be ousted or excluded from their own power and jurisdiction by the newly admitted force, the federal government.

It is worth bearing in mind that the amendment gave the federal government no power over intoxicating liquor traffic generally, but only in so far as intoxicating liquors were manufactured, etc., for *beverage purposes,*[39] so that the states' power over all other phases of the traffic—e. g., for sacramental, medicinal and mechanical purposes, is unaffected by the eighteenth amendment.

Not only did the states surrender none of their existing power over the intoxicating liquor traffic, but they reacquired some power previously surrendered. Through the medium of the commerce clause the states originally surrendered, delegated to Congress, their power over interstate and foreign commerce. Under the eighteenth amendment, however, the states are authorized to enforce by appropriate legislation the prohibition against "transportation of intoxicating liquor within, the *importation* thereof into, or the *exportation* thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." That is to say, the commerce clause notwithstanding, the states may now control the transportation, importation and exportation of intoxicating liquors for beverage purposes.[40] Inasmuch as control must be by "appropriate legislation," it would seem that no individual state could legislate on interstate or foreign commerce generally, but would have power only over transportation in and importation into or exportation from that particular state. Even so this establishes constitutionally one phase of the power which the states

[38] "There was a surrendering by the states of the power to permit the liquor traffic but no diminution of their power to prohibit it." Ex parte Crookshank, (1921) 269 Fed. 980.

[39] The extent of the power conferred upon Congress was vigorously debated in the Senate in relation to the so-called Willis-Campbell Beer Bill. This bill was aimed at prescriptions of beer for *medicinal* purposes. It is now law. Pub. No. 96, 67th Cong. approved Nov. 23, 1921.

[40] There seems to be a kind of quid pro quo effect in the readjustment of enforcing power between Congress and the states. Bearing in mind that the eighteenth amendment is concerned only with intoxicating liquors for beverage purposes, this interchange takes place: the states admit the federal government into the field of intrastate enforcement, and the federal government, popularly speaking, admits the states into the field of interstate and foreign commerce enforcement.

so long endeavored to exercise, namely, to stop the introduction of intoxicating liquors into the state, and which they had been permitted to enjoy under the Webb-Kenyon Act."

Now for the legislative history of the eighteenth amendment or at least of the enforcing section of it.[42]

The enforcing section as embodied in the original resolution was as follows:

"The Congress shall have power to enforce this article by appropriate legislation, and nothing in this article shall deprive the several states of their powers to enact and enforce laws prohibiting the traffic in intoxicating liquors."[43]

As amended and passed by the Senate it read as follows:

"The Congress shall have power to enforce this article by appropriate legislation."[44]

And as further amended and passed by the House and concurred in by the Senate, and as ratified by the states, it read as follows:

"It is interesting to observe a state still relying on the Webb-Kenyon Act. Pollard v. Commonwealth, (Va. 1922) 110 S. E. 354.

If the amendment includes importation and exportation only in the technical sense applying exclusively to foreign commerce, it might be necessary for the states to rely on the Webb-Kenyon Act in the matter of interstate commerce.

[42]The successive steps in the history of the adoption of the eighteenth amendment from the day of its introduction in the Senate as Senate Joint Resolution 17 to its being proclaimed by the secretary of state are:

April 4th, 1917, S. J. Res. 17 introduced by Senator Sheppard of Texas and referred to the Senate Committee on the Judiciary. 55 Cong. Rec. 197, 198.

June 11th, 1917, reported, with amendments, (Sen. Rep. 52, 65th Cong. 1st Ses.) by the Senate Committee on the Judiciary. 55 Cong. Rec. 3438.

July 30th-August 1st, 1917, debated and, as amended, passed by the Senate. 55 Cong. Rec. 5548-60, 5585-5627, 5636-66. Four unsuccessful attempts had been made during July to raise the resolution for consideration in the Senate and it was not until July 26th that a unanimous consent agreement could be obtained for debate and a vote. 55 Cong. Rec. 5522-24.

August 3d, 1917, referred to the House Committee on the Judiciary. 55 Cong. Rec. 5723.

December 14, 1917, reported, with amendments, (H. Rep. 211, 65th Cong. 2d Ses.), by the House Committee on the Judiciary. 56 Cong. Rec. 337.

December 17, 1917, debated and, as amended, passed by the House. 56 Cong. Rec. 422-470.

December 18, 1917, Senate concurred in House amendment. 56 Cong Rec. 477-478. Examined and signed by the vice-president, (56 Cong. Rec. 490) and by the speaker of the House. 56 Cong. Rec. 520.

December 19th, 1917, deposited in the Department of State.

January 16, 1919, ratified by the states.

January 20, 1919, proclaimed by the secretary of state.

[43]55 Cong. Rec. 5548.

[44]55 Cong. Rec. 5664. The committee declared (Senate Report 52, 65th Cong. 1st Ses.) that the substance of the proposed amendment had been before every congress since and including the 44th.

"The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."[45]

Taking the meaning of the term "concurrent power" to be in doubt, the familiar doctrine restated in the recent Wisconsin rate case[46] may be invoked: recourse may be had to committee reports and statements by those in charge of the bill to ascertain its proper construction.

The reports of both the Senate and the House make an inadequate presentation of the matter in regard to the effect of the proposed amendment. The burden of the reports is that, the people of the country being so insistent about it, Congress really ought to submit the proposed amendment to them and thus give them an opportunity to vote on the prohibition question.

Without the statement of any reasons therefor the Senate Committee on the Judiciary, to which was referred the original resolution introduced by Senator Sheppard, struck from the enforcing section the words "and nothing in this article shall deprive the several states of their powers to enact and enforce laws prohibiting the traffic in intoxicating liquors," leaving the section to read, "the Congress shall have power to enforce this article by appropriate legislation."[47] The effect of this amendment would seem to be plain. The analogy of the thirteenth, fourteenth and fifteenth amendments, with substantially identical enforcing clauses, would lead to the conclusion that the power would be delegated to Congress—in other words, that the states would be handing over to Congress the problem of suppressing the traffic in intoxicating liquors. True, it was denied on the floor that the amendment would have any such effect and there were extracts in the committee report tending to support that denial. The amendment was passed by the Senate in the form in which it was reported by the committee. Thus the amendment at this stage appeared to involve a surrender of state power to Congress.

But the House declined to accept the amendment as passed by the Senate. Like the Senate committee the House committee disclosed no reasons for their action but merely reported the proposal amended to read "The Congress and the several states shall have concurrent power to enforce this article by appropriate legisla-

[45] 56 Cong. Rec. 477-478.
[46] Railroad Commission of Wisconsin v. Chicago, B. & Q. Ry., 42 S. C. R. 232, (decided February 27, 1922).
[47] Senate Report No. 52, 65 Cong. 1st Ses.

tion."[48] In that form it passed the House, was concurred in by the Senate, and ultimately ratified by the states.

One thing, then, seems clear from the committee reports and action thereon: the amendment does not in and of itself involve surrender of state power.

Portions of the Senate report indicate quite definitely the view that the purpose of the amendment was to have both the federal and state governments using their power at the same time and in the same territory to eradicate the liquor traffic. Thus the Senate report, quoting from an earlier Senate report on the same subject said:

"National law, enacted under an amended constitution, could prohibit importation, could prohibit transportation and sale, and in concurrence with like legislation by the states (the union of the power of the nation and the power of the states), thus securing the entire strength of the whole community, could soon put an end to the traffic."

Again quoting from the same report:

"The timorous, uncertain, and ineffectual efforts of the states should not be relied upon. It is indispensable for the very existence of their police powers, . . . that the powers of society, as a whole, operating in and through the national functions, should re-enforce, protect, and preserve the police powers of the state."

While the force of the argument of the two quotations which are reproduced seems somewhat at variance from the apparent effect of the amendment which the report was supporting, they nevertheless indicate a very clear conviction on the part of the Senate committee that the police power of the states was not being destroyed or surrendered, but that on the other hand it was being protected and preserved, and, through the introduction of the federal enforcing power, was being re-enforced. Hence, there is at least inferential support in the reports for the conclusion that the states' police power over the intoxicating liquor traffic is not even superseded or impaired by the actual exercise by Congress of the power conferred by the amendment.

Statements made on the Senate and House floors by those in charge of the resolution confirm the foregoing conclusions. Thus, even in the Senate, with the enforcing clause as above mentioned, Senator Sheppard, author and proponent of the measure, said:

"As I introduced the joint resolution originally, I will say

[48]House Report 211, 65 Cong. 2nd Ses.

that the language [and nothing in this article shall deprive the several states of their powers to enact and enforce laws prohibiting the traffic in intoxicating liquors] stricken out by the committee was added by me in order to emphasize and make plain what was really an existing condition. The Judiciary Committee, with practical unanimity, said that the states would not be deprived of the power to enact and enforce laws prohibiting the traffic in intoxicating liquors, and therefore did not deem it advisable to place it in the joint resolution. I trust, therefore, that the amendment will be adopted."[55] . . . "If the liquor traffic is to be eradicated, the aid of the federal goverment must be invoked. . . . What nation widers want is to stop this superior control by the federal government and compel it to join with the states in eradication of the liquor traffic on equal terms. . . . The nation-wide amendment puts the states in a far more dignified position in regard to the liquor traffic than that they now occupy. At present the power of the states to authorize, control, and regulate is secondary to that of the federal government. The nation-wide amendment clothes the federal government with a jurisdiction and power to prohibit and does not in any way deprive the State of an equal power of prohibition which they already exercise within their respective borders. It deprives both the federal government and the states of the power to authorize the liquor traffic, treating the nation and the states absolutely alike."[56]

In the House, Mr. Webb, Chairman of the Judiciary Committee and in charge of the resolution on the floor, opened the final debate by explaining the purpose and result of his committee's amendments:

"The first amendment adopted in the Judiciary Committee was the new section two. As it passed the Senate it provided that the 'Congress should have power to enforce it by appropriate legislation. Most of the members, including myself, of the Judiciary Committee, both wet and dry, felt that there ought to be a reservation to the state also of power to enforce their prohibition laws. And, therefore, we amended the resolution by providing that the Congress 'and the several states' shall have 'concurrent' power to enforce this article by appropriate legislation. . . I believe, regardless of our division on the dry and wet question, every Member will agree with us that this is a wise and proper amendment. Nobody desires that the federal government shall take away from the various states the right to enforce the prohibition laws of these states."

"I recall the crime of counterfeiting. It is peculiarly a national offense, because it is offensive to the integrity of the national money, and yet nearly all the states have statutes condemning and

[55] 55 Cong. Rec. 5640.
[56] 55 Cong. Rec. 5652.

punishing counterfeiting. But there the jurisdiction is concurrent. . . We thought it wise to give both the Congress and the several states concurrent power to enforce this article."[51]

During the debate Mr. Webb was interrogated by several members as to the effect of the introduction of the term 'concurrent power" in the amendment. In reply to the inquiry,

"Suppose the state of Ohio should by its legislature pass a law or laws for the enforcement of this constitutional amendment. Suppose that law was not in conformance with the regulations as passed by Congress for the enforcement of this same provision of the constitution. Which of the two powers would be supreme?"

He said:

"The one getting jurisdiction first, because both powers would be supreme, and one supreme power would have no right to take the case away from another supreme power."[52]

Mr. Webb went further, on this phase, when he was asked what he thought of the "exercise of power by the one excluding the exercise of power by the other:"

"I do not think the punishment of the offense by the state governments would be followed by the punishment of the same offense by the federal government, or vice versa. . . . But one punishment ought to be sufficient, although the offense may be committed against two sovereignties. Now having concurrent power, I think the federal government can not do it if the state government does it, and vice versa."[53]

To the question, "Suppose there is a conflict . . . between the laws of the state and the laws of the federal government?" Mr. Webb replied:

"There would be none, because there would be no conflict of jurisdiction."[54]

All in all, then, it appears to be the consensus of committee reports and congressional debate, confirmatory of the indications found in the history of the prohibition movement, that the eighteenth amendment was not intended, either by itself or as a result of congressional action in pursuance of it, to destroy, alienate, or impair, but rather to preserve, supplement, and reinforce, the police power of, and its effective exercise by, the states.

IV. Consideration of Suggested Meanings

The first and second suggested meanings were rejected expressly by the United States Supreme Court in the eighth conclu-

[51]56 Cong. Rec. 423-24. See also 56 Cong. Rec. 464 for similar statements by Mr. Graham, floor manager for the opposition in the House.
[52]56 Cong. Rec. 424. [53]Id. [54]Id.

sion of the *National Prohibition Cases*. In fact this double negation represents a large part of what the court said on the meaning of the term "concurrent power."[58] True, Mr. Chief Justice White, Mr. Justice McKenna, and Mr. Justice Clarke, in opinions filed with the conclusions of the court, expressed their individual views on the subject, as will be shown presently. Mr. Justice McReynolds, while concurring in the conclusions of the court, declined to commit himself further as to the meaning of the term.

The separate opinions of Mr. Chief Justice White, Mr. Justice McKenna, and Mr. Justice Clarke, however indicated not alone the construction which they deemed justified, but disclosed their rejection of certain suggested meanings. Thus Mr. White deemed the third meaning unsound. As a matter of fact, this third suggestion, made and supported on behalf of New Jersey does not seem essentially different from the second. The third suggested meaning deals with a division of power between the federal and state governments in "historical fields of jurisdiction," where-

[58]It will be recalled that in the National Prohibition Cases the court did not formulate an opinion but announced only the conclusions. Of the eleven conclusions so announced, five are related to the subject matter of this discussion and are as follows:

"6. The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act, whether by Congress, by a state Legislature, or by a territorial assembly, which authorizes or sanctions what the section prohibits.

7. The second section of the amendment—the one declaring "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation"—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means.

8. The words "concurrent power," in that section, do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.

11. While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (title 2, § 1), wherein liquors containing as much as one-half of 1 per cent, of alcohol by volume and fit for use for beverage purposes are treated as within that power. Jacob Ruppert v. Caffey, (1920) 251 U. S. 264, 40 S. C. R. 141, 64 L. Ed. 260."

as the second contemplates a division along the lines which separate interstate and intrastate affairs. Probably both involve the same idea, the opinion of Mr. White being but an elaboration, of the terse conclusions announced by the court. The very idea of separate and distinct fields or areas wherein the federal and state power could come into play, whether the separation be along historical lines or as between interstate and intrastate affairs, seems in conflict with any idea of concurrency under the amendment (unless it be mere concurrence in time, contemporaneous), and it was to be expected that such a construction would be denied.

The fourth and fifth suggested meanings were discussed by Mr. Justice McKenna, and, scant importance being accorded them, they were rejected by him. He does not say specifically by whom these contentions were advanced, though he does suggest that the fifth was one of the "intimations" made by the government. The fourth does not commend itself as having merit for it would, in fact, reduce the business of enforcing the amendment to a kind of shuttle-cock affair. The fifth suggestion, however, while on its face apparently open to the same criticism as just expressed with respect to the fourth, is susceptible of an interpretation not without some weight and perhaps involving some difficulty for the court. Congress declares, as in the Volstead Act,[46]* that intoxicating liquors shall include beverages containing one-half of one per cent or more of alcohol, and the Supreme Court has sustained that declaration. Three views have been expressed as to the basis of this congressional legislation. First, that in making such a declaration Congress was but writing into the statute the common understanding of what the term "intoxicating" meant in the amendment itself.[46] Second, that the term "intoxicating" not having a definite meaning must be defined in order to give it any effect, and that it is the function of Congress to define it.[47] Third,

[46]*41 Stat. 305; also referred to herein as the National Prohibition Act.

[46]House Report No. 91, 66th. Cong. 1st Ses., where the committee, reporting the Volstead Bill, referred to numerous state constitutional amendments on prohibition, and declared: "This clearly argues that as this phrase [intoxicating liquor] is understood in those amendments it includes all liquor that contains any alcohol in excess of one-half of one per cent." Similar reference was made to prohibition laws of most of the states, and the statement made: "No one who supported this [eighteenth] amendment had in mind that there could be any question as to the meaning of the term."

See Ruppert v. Caffey, (1920) 251 U. S. 264, 64 L. Ed. 260, 40 S. C. R. 141 for a survey of the liquor laws of the states, in the prevailing opinion by Mr. Justice Brandeis.

[47]House Report No. 1143, 65th. Cong. 3rd. Ses. House Report No. 91,

that irrespective of whether liquor with the specified content is or is not intoxicating, Congress may exercise an incidental control over it if necessary effectually to enforce the amendment as to liquors actually intoxicating.[66] The difficulty involved in the fifth suggested meaning arises in connection with the second view just stated. Notwithstanding the contention that it is a congressional function to define the terms of the constitution, it is safe to say that the Supreme Court, while admitting to Congress a reasonable latitude in that field, is not bound by any definition ascribed to a term by Congress. The ultimate decision as to the meaning of the constitution rests with the Supreme Court, though as a matter of fact the court may be influenced strongly by the judgment of Congress in arriving at a conclusion as to what the constitution does mean. Now, if the court, even when guided by the declarations of Congress or otherwise, has reached the conclusion that liquor containing one-half of one per cent of alcohol is intoxicating, it would seem that a term of the constitution has been defined, that the court has concluded a question of fact. If the court sustains laws prescribing a decreasing alcoholic content, the meaning of the word "intoxicating" in the eighteenth amendment is being restricted gradually to a more drastic definition. In this sense it may be said that the more drastic tends to displace the less drastic.

The sixth suggested meaning was rejected by Mr. Chief Justice White as practically nullifying the amendment, but accepted by Mr. Justice Clarke as an appropriate interpretation. This suggestion, notwithstanding its distinct phraseology, seems to be not unlike the first suggestion, which, as seen above, was rejected by the court in the *National Prohibition Cases*. Evidently Mr. Clarke treats it as similar to the first for in one place he speaks of concurrent power as being a joint power, and he dissents from that conclusion which rejects the joint power suggestion.

The seventh suggested meaning was offered by Mr. Justice McKenna as a proper construction to be put upon the amendment. When one seeks to analyze this proposal of "united action," by Congress and the states, which must be at once harmonious and

66th. Cong 1st Ses. Concurring opinion of the Chief Justice in the National Prohibition Cases. See also, the opinion of Chief Justice White in Clark Distilling Co. v. Maryland Ry., (1917) 242 U. S. 311, 61 L. Ed. 376, 37 S. C. R. 180.

[66]House Report No. 1143, 65th. Cong. 3rd. Ses. House Report No. 91, 66th. Cong. 1st Ses. See also, eleventh conclusion in footnote 55 and case there cited.

concordant, he finds himself with more terms to define than the amendment itself contains, and terms at that not less difficult, perhaps, to reduce to concrete meanings. There is, however, some similarity between this view and the concurrent action of the sixth proposal and the joint power of the first proposal, and presumably something of that nature was in Mr. Justice McKenna's mind, for he spent considerable effort in combating the argument of the Chief Justice that to require concurrent action is in effect to nullify the amendment. Mr. McKenna did not consider that it would have any nullifying effect.[60]

Mr. Chief Justice White also stated what he conceived to be the true construction of the amendment. In substance his construction is the eighth suggested meaning. Where Mr. Justice McKenna suggested united action between Congress and the states, the Chief Justice proposed united *administrative* action. The distinction to Mr. White was sharp and controlling. It rested upon a doctrine which has appeared before in Mr. White's reasoning,[61] namely, that Congress has the power to define the terms of the constitution. The doctrine as applied here works out much in this way: The constitution prohibits the sale, manufacture, etc., for beverage purposes of intoxicating liquors, and it is the function of Congress to define the constitution; it is then, a congressional affair to say what is and what is not intoxicating; moreover, it is for Congress to provide the substantive rules for making the amendment completely operative; and *thereafter* it is competent for the states to step in and through their administrative agencies assist in enforcing the amendment as so "defined and sanctioned" by Congress. This view, to say the least of it, minimizes the power of the state over the liquor traffic and would seem to reduce the state to a condition of helplessness in the event (improbable but not impossible) Congress did not define or give its sanction to the amendment. It runs counter to what, according to the history of the times and the record of congressional consideration, the states were seeking to obtain.[62]

[60] See 19 Mich. Law Rev. 329 for discussion of Mr. Justice McKenna's view.

[61] Particularly in Clark Distilling Co. v. Maryland Ry., (1917) 242 U. S. 311, 61 L. Ed. 376, 37 S. C. R. 180.

[62] Mr. White's view apparently has been accepted by a California court (Carse v. Marsh, (1921) 36 Cal. App. Dec. 73 see 10 Calif. Law Rev. 70). is cited approvingly by the Connecticut court (State v. Ceriani, (1921) 96 Conn. 130, 113 Atl. 316) but seems to be rejected by the Montana court (State v. Dist. Ct. (1920) 58 Mont. 684, 194 Pac. 308).

The two remaining suggested meanings, the ninth and tenth, are the ones most frequently encountered. In fact, they, together with the first, constitute, according to some authorities,[42] the only plausible interpretations of the term "concurrent power." Of these it already has been seen that the first was rejected by the Supreme Court in the *National Prohibition Cases*. While neither of the others has yet received the approval or disapproval of the Supreme Court, both have been subjected to the most exhaustive examination and discussion by other courts, both state and federal. This is especially true of the state courts, and for a plain reason: the state courts, called upon to interpret and apply local prohibition laws, necessarily must decide whether and to what extent the local laws are affected by the eighteenth amendment and congressional legislation in pursuance of it.

State courts have been challenged at the very outset on jurisdictional grounds: first, no jurisdiction at all over the subject-matter, power in that regard being delegated to Congress; second, no operative jurisdiction over the subject-matter, the concurrent field already having been occupied by Congress; third, no operative jurisdiction of the particular offense, the local law on that point being in conflict with and superseded by the federal statute. Practical, if, indeed, not actual, unanimity has characterized the state courts' reply that the first contention is unsustainable, and substantial accord exists in saying that the states are not ousted by the mere entrance of Congress into the field. The contention that state law is superseded by federal law in case of a conflict[43] has furnished a predominating theme for many, if not most, of the decisions. It will be observed that this is the substance of the ninth suggested meaning.

The first state to deal with the question was Massachusetts in the case of *Commonwealth v. Nickerson*.[44] The law of that state, existing prior[45] to the ratification of the amendment, prohibited, except in accordance with license provisions, the sale of intoxicating liquors, which were defined as containing more than one per cent of alcohol. Defendant sold whisky containing 47 per cent

[42]State v. Ceriani, (Conn. 1921) 113 Atl. 316; see also Jones v. Hicks, (1920) 150 Ga. 657, 104 S. E. 771; 33 Harv. Law Rev. 968.

[43]By "conflict" is meant such a direct and manifest conflict that both the federal and state law cannot stand together.

[44](1920) 236 Mass. 287, 128 N. E. 273.

[45]The cases in which the point is discussed agree with Commonwealth v. Nickerson that state laws antecedently existing as well as subsequently enacted may be "appropriate" under the eighteenth amendment.

of alcohol. When put on trial, defendant offered no evidence and claimed no authority, either state or federal, for the sale. Conviction below was appealed to the supreme court and affirmed. The "single question," according to the court, was whether the state statute "prohibiting such sales without a license and providing penalty for the violation thereof is valid and enforceable since the adoption of the eighteenth amendment . . . and the enactment of the national prohibition law." This question the court answered in the affirmative, holding it to be "plain that since the enactment of the eighteenth amendment the provisions of this chapter [Mass. Law] so far as they authorize under any circumstances whatsoever sales of intoxicating liquor for beverage are inoperative." The license features were held separable from the remainder of the act, and were eliminated as contrary to the amendment. The remainder of the state law was prohibitory in character and appropriate under the amendment. To quote from the opinion of Mr. Chief Justice Rugg:

"We are of opinion that the word 'concurrent' in this connection means a power continuously existing for efficacious ends to be exerted in support of the main object of the amendment and making contribution to the same general aim according to the needs of the state, even though Congress also has exerted the power reposed in it by the amendment by enacting enforcing legislation operative throughout the extent of its territory. Legislation by the states need not be identical with that of Congress. It cannot authorize that which is forbidden by Congress. But the states need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor. It is conceivable also that a state may forbid under penalty acts not prohibited by the act of Congress. The concurrent power of the states may differ in means adopted provided it is directed to the enforcement of the amendment. Legislation by the several states appropriately designed to enforce the absolute prohibition declared by the eighteenth amendment is not void or inoperative simply because Congress, in performance of the duty cast upon it by that amendment, has defined and prohibited beverages and has established regulations and penalties concerning them. State statutes, rationally adapted to putting into execution the inexorable mandate against the sale of intoxicating liquors for beverage contained in section 1 of the amendment by different definitions,

regulations and penalties from those contained in the Volstead Act and not in conflict with the terms of the Volstead Act, but in harmony therewith, are valid."

The concluding words of the extract just quoted indicate what the court elsewhere expressly declared, that state legislation in conflict with congressional legislation must yield to the latter.

This is easily the leading case among state decisions. It is referred to by practically all other state courts and frequently by federal courts. Its doctrine is accepted by the great majority of them, and in a few instances the courts frankly quote from this opinion in preference to an independent expression of their own views. The doctrine has been approved in the Harvard Law Review[66] and in the Michigan Law Review.[67] In short, from the cases and other material now at hand the preponderating opinion is that while the states and Congress may legislate at the same time on the subject of prohibition, state law falls before that of Congress in case of conflict. The ninth suggestion, according to this strong array of opinion, contains the correct interpretation of the eighteenth amendment. A contention in accord with this view, it should be added, was urged in the *National Prohibition Cases,* though it was not acceptable to Mr. Chief Justice White, to Mr. Justice McKenna, or to Mr. Justice Clarke.

But while the courts, with at least a majority of voices, have declared the foregoing to be the true construction of the amendment, it is rare, indeed, for them to render an actual decision to that effect. *Commonwealth v. Nickerson* did not so decide, for the state law, minus the license features which were held to violate the amendment, was sustained and a conviction thereunder affirmed.[68] An inspection of the cases cited in footnote five will disclose that in several a similar question was raised as to the validity of license provisions in state laws. Such provisions uniformly have been declared to be invalid. A statement of the il-

[66] 33 Harv. Law. Rev. 968.
[67] 19 Mich. Law Rev. 329, 435.
[68] The court draws a distinction between provisions of the law violating the amendment and those conflicting with the act of Congress. After holding that the license features violated the amendment, the court, referring to certain other provisions of the state law, said: "Of course the implied authority conferred . . . to sell liquor containing alcohol in excess of one-half of one per cent and less than one per cent inferable from the failure to prohibit such sales is no longer operative in view of the *Volstead Act.*" No question under those provisions was before the court.

lustrative cases of this group is given in the footnote.[10] From this it appears that none of them squarely supports the ninth suggestion. Even if the laws in question there were actually held to be invalid the decision might be rested also on the ground that there was a conflict with the amendment, as in *Commonwealth v. Nickerson*. This is the better ground, for the sixth conclusion in the *National Prohibition Cases*[11] declares that the amendment "of its own force" invalidates all laws which authorize what the amendment prohibits. License laws for intoxicating liquors for beverage purposes certainly fall in this class.

A group of Florida decisions[12] have held state laws, or parts thereof, invalid for reasons not met with elsewhere. The state law prohibited the possession of intoxicating liquors, even in pri-

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[10]State v. Ceriana, (1921) 96 Conn. 130, 113 Atl. 316. Statute prohibited sale of liquor containing any percentage of alcohol, without license. Defendant, with application on file for license, sold liquor containing more than one-half of one per cent. Conviction affirmed. "Amendment supplemented by the National Act" forbids sale of liquors containing one-half of one per cent. or more, says the court, and hence invalidates state laws purporting to authorize such sale. License provisions separable, and remainder of act valid.

State v. Green, (1921) 148 La. 376, 919. Statute prohibited sale of intoxicating liquors without license. Held unconstitutional, in that by implying the right to obtain a license it is "absolutely violative of the amendment." No discussion of separabilitiy of license provisions. In this respect it seems to stand alone among the state cases.

Jones v. Cutting, (Mass. 1921) 130 N. E. 271. Statute (redefining intoxicating liquors) contained provisions for authorizing sale of liquors containing not more than two and three-fourths per cent. of alcohol and for submitting the question whether licenses should be issued. Petition for mandamus to compel town selectmen to ignore provisions for submitting vote. Petition dismissed: "mere vote will violate no provision of the eighteenth amendment or of the Volstead Act." Discussion of state statute being "void" or "suspended" because in conflict with act of congress unnecessary to decision.

People v. Mason, (N. Y. 1921) 186 N. Y. S. 215. Statute prohibited sale of liquors containing two and three-fourths per cent. or less alcohol unless certificate secured. Defendant, indicted for selling liquors without certificate, demurs. Overruled. Court expressly declares it unnecessary to decide whether statute violates eighteenth amendment because it can be held, at least insofar as the permissive features are concerned, inoperative for conflicting with the National Prohibition Act. (Statute authorized sale of liquors with higher alcoholic content than specified in act of congress.) Permissive features separable, remainder of act valid. This is only case found by the writer where court rests decision squarely on theory of conflict with congressional legislation. It is to be noted, however, that the permissive features of the statute are held separable from remainder, and that, whether such permissive features were operative or inoperative, defendant had not complied with them. Consequently it does not seem necessary for the court to pass upon their effect.

[11]See footnote 55 for text of the conclusion.

[12]Hall v. Moran, (Fla. 1921) 89 So. 104; Johnson v. State, (Fla. 1921) 89 So. 114.

vate homes, in excess of specified quantities. The Volstead Act expressly excepts possession of liquors in private dwellings for personal use, and no limit on quantity is imposed. Thus the state law prohibited what the federal law permits. This was held invalid. The court was doubtful whether the decision could be rested on the doctrine of conflict with federal law but apparently was sure that the provision in question was void under the fourteenth amendment. The basis of the decision on this point is: congressional permission makes it a privilege and immunity of federal citizens to possess intoxicating liquors under the conditions specified in the Volstead Act, and under the fourteenth amendment the states cannot make or enforce a law abridging those privilege or immunities.

Assuming for the instant that a fatal conflict may exist between state and federal prohibition laws, the courts are agreed that certain circumstances do not present such a conflict. Thus, state laws need not necessarily conform to the federal, different phases of the evil may be aimed at, and with differing methods and degrees of punishment. The Massachusetts law sustained in *Commonwealth v. Nickerson* differed from the Volstead Act not only in the definition of intoxicating liquors but also in the penalties imposed. There the court said that "the amendment does not require that the exercise of the power by Congress and by the states shall be coterminous, coextensive and coincident." Occasionally it is said that the states cannot permit what Congress prohibits.[72] And Florida holds that a state cannot prohibit what Congress permits.

In the absence of any decisive material on the subject, and yet in the presence of so many acceptances of the doctrine involved, the inquiry naturally arises: what *would* constitute such a conflict between state and federal laws? Probably the illustration first occurring to any one would be the situation where Congress defines intoxicating liquors as including beverages containing one-half of one per cent or more of alcohol and a state defines it as containing, say, two and three-fourths per cent. The Act of Congress is valid and the only question is as to the state act. Now a state may legislate on the subject of prohibition or not just as it sees fit. The eighteenth amendment is not mandatory on the states as to affirmative legislation. They are stayed by the amend-

[72]See, for example, Ex parte Crookshank, (1921) 269 Fed. Rep. 980.

ment from permitting the sale, etc., of intoxicating liquors for beverage purposes. It would seem, however, that the state could make its penalties fall wherever the state chooses,—that is, that the state may say, "whatever other jurisdictions may do on the subject, we will not set our criminal machinery in motion against any person unless he deals in liquors containing two and three-fourths per cent or more of alcohol."[13] State laws to this effect have been sustained. In fact, as pointed out above, the Massachusetts law sustained in *Commonwealth v. Nickerson* defined intoxicating liquors as those containing a higher alcoholic content than that prescribed in the Volstead Act.

The question goes still further: *can* there be, under the eighteenth amendment, a conflict between state and federal laws? It is not without significance that in the period since the amendment became effective and with an extensive and explicit National Prohibition Act and with state prohibition statutes as diverse and detailed as could well be imagined, no state law has been held invalid solely because it conflicted with the congressional law.[14] No fatal conflict yet has been brought to light from this prolific source of possibilities. Mr. Webb, in charge of the resolution on the floor of the House, explaining the term concurrent power, specifically declared it to be his judgment that there could be no conflict[15] between state and federal laws. Several of the courts, while accepting the theory of the subordination of the state law if it conflicts with federal, have expressed doubts as to what circumstances would produce such a conflict.[16] The writer has not examined the cases in a specific quest for information on this phase of the subject, but a reading of all the cases cited in footnote five leaves in his mind the general impression that the later decisions evince a growing scepticism about conflicts and at least disclose that the courts are paying less attention to the possibility that they may occur. It appears to be of decreasing importance.

Before leaving this aspect of the general subject, it may be inquired whether two laws, both in harmony with a fundamental standard, can conflict with each other? That is to say, if a state

[13]People v. Commissioner, (1920) 115 Misc. Rep. 331, 188 N. Y. S. 46.

[14]A New York decision alone purports to rest on that ground. But see footnote 69.

[15]See page 464.

[16]Ex parte Gilmore, (1920) 88 Tex. Cr. R. 529, 228 S. W. 199. See also Youman v. Commonwealth, (Ky. 1922) 237 S. W. 6.

law conforms to the limit on state action set by the eighteenth amendment and the federal law is within the measure of the power delegated to the Congress in that amendment, in what respect can they conflict? The writer is not prepared to say a conflict is impossible, but he is not yet convinced that it does exist. To him it seems that in discussing the effects of such conflicts, the courts are dealing with a contingency which, even if possible, has not assumed any substantial importance in the cases so far decided; and that what has actually happened in the disposition of these cases is that the courts have examined the state legislation to see whether it is "appropriate" under, is reasonably designed to effectuate the purpose of, the eighteenth amendment." If that observation is justified, it points to the conclusion that the real test of the validity of the state law is the eighteenth amendment. If it conforms to that amendment it is valid; if it does not it is invalid. From the point of view of the state's power, then, congressional action would be of no controlling consequence.

"In a way, it is rather natural that the courts should speak in terms of *conflict* between state and federal laws and of the *supremacy* of the latter. The constitution itself and more than one hundred years of litigation as to the respective jurisdictions of the states and the federal government necessarily had made these words a part of the judicial vocabulary. It came to be more or less self-evident that if a state law conflicted with a federal, of course the former went down. The sixth article of the constitution so declared.

"Having regard only to the words of the eighteenth amendment the Congress and the several states are placed upon an equality as to the legislative power. It is only when the amendment is placed in its context with other parts of the Constitution that the supremacy of the act of Congress if in direct conflict with state legislation becomes manifest." Commonwealth v. Nickerson, (1920) 236 Mass. 281, 128 N. E. 279.

The mind is not altogether satisfied with the assertion that the sixth article controls the interpretation of the eighteenth amendment. If the eighteenth amendment were concerned with the distribution of powers along the lines of the original constitution such an assertion might be more convincing. But the eighteenth amendment is concerned with a distribution—or perhaps it would be more accurate to say an exercise—of powers not known to, at least not mentioned in, the constitution. It is a novelty in the federal constitution. The better view would seem to be that, being later in time, the eighteenth amendment modifies earlier provisions of the constitution in so far as it departs from the prior plan of the constitution. Under that view and assuming a conflict possible, the rule of federal supremacy under the sixth article is not applicable in respect of prohibition laws under the eighteenth amendment. Such is the position in State v. Dist. Court, (1920) 58 Mont. 684, 194 Pac. 308. A few other courts supporting the tenth suggested meaning have shown a tendency in the same direction, though none of them has expressed so definite a view in that regard as the one just cited.

This view, of course, is opposed by the courts which accept the "conflict-supremacy" doctrine.

Less than two months after the decision in *Commonwealth v. Nickerson*, the Georgia court was called upon to determine the validity of the state prohibition law. This was the case of *Jones v. Hicks*,[78] next to the *Nickerson Case* cited more frequently than any other state decision so far rendered on the subject. The court speaking through Mr. Justice Gilbert, announced its conclusion as follows:

"We reject the view that the legislation of Congress will supersede and abrogate the laws of the state which are appropriate for the enforcement of the amendment. We conclude that the power of Congress and of the state is equal and may be exercised by the several states for the purpose of enforcement concurrently within their legitimate constitutional spheres."[79]

Thus the tenth suggested meaning comes to the forefront in judicial consideration.

In the argument, the Georgia court remarked that " 'concurrent power' does not mean 'concurrent legislation,' and concurrent 'power' to enforce is quite a different thing from 'concurrent enforcement,' " while the Montana court[80] points out that "the authority of the states is not to enforce the Acts of Congress, but to enforce the amendment itself." "Independent, equal, and complete power," in each sovereignty is the way the Florida court[81] describes the effect of the amendment, while Indiana[82] does "not perceive anything in this amendment which can operate to repeal or affect a state statute forbidding traffic in intoxicating liquors," and Virginia[83] declares the "federal government is powerless to interfere under the eighteenth amendment" with state legislation.[84]

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[78](1920) 104 S. E. 771.

[79]Georgia's affirmance of equal and independent power is hardly to be explained on the mere ground of a survival of the doctrine of states' rights. One of the peculiar developments of the prohibition struggle, particularly insofar as the adoption of the eighteenth amendment was concerned, has been the new line-up of forces for the preservation of state sovereignty. Thus, in the National Prohibition Cases, on behalf of New Jersey and Rhode Island, as well as others, there was advanced the doctrine of an "indestructible Union, composed of indestructible states." On the ground that the amendment would "usurp" the police powers of the states, Senator Warren opposed the submission of the amendment (55 Cong. Rec. 5652); Senator Lodge thought it was a "long step on a dangerous path when we take this police power from the states," (55 Cong. Rec. 5587); and the late Senator Penrose, opposing the amendment, not only thought "the doctrine of state rights . . . is more important today than at any other time in the history of the country" but actually quoted from Thomas Jefferson to support his position (55 Cong. Rec. 5637).

[80]State v. Dist. Court, (1920) 58 Mont. 684, 194 Pac. 308.

[81]Wood v. Whitaker (Fla. 1921) 89 So. 118.

[82]Palmer v. State, (Ind. 1921) 133 N. E. 388.

Unfortunately for the supporters of the tenth suggested meaning, the foregoing statements are subject to the same criticism levelled at the language of the courts in support of the ninth suggested meaning: not all of it is necessary to the decisions.

This tenth suggestion, however, has actual support, not only in recent cases but also in a well recognized doctrine of long standing. Pleas of former jeopardy have compelled decisions on the question whether trial in a state court for violating state prohibition laws bars another trial in federal courts for violating federal prohibition laws, or vice versa. So far the writer has found six such decisions, five federal and one state. Of these, four (all federal) disallowed the plea. One state court and one federal court held contra.[85] The most recent of these cases, disallowing the plea, puts the decision squarely on the ground that the "doctrine of independent sovereignties and separate offenses is applicable to violations by the same act of both the state and national prohibition laws."[86] And the court thinks this is a construction of concurrent power logically to be deduced from the eighth

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[84]Allen v. Commonwealth, (Va. 1921) 105 S. E. 589.

[85]"The proposed amendment simply gives authority to both the state and federal government to enact laws to carry out the purpose of the amendment. The state already had that power under what is known as the police power but the federal government did not have such power. This amendment confers the same authority on both state and federal government, to prohibit the liquor traffic. It did not take away from the state its power to prohibit the traffic, it simply made clear that both the state and federal government had this power." Wayne B. Wheeler, in 88 Central Law Journal 31.

[85]Disallowing the plea: United States v. Holt, (1921) 270 Fed. 639; United States v. Bostow, (1921) 273 Fed. 535; United States v. Regan, (1921) 273 Fed. 727; United States v. Ratagczak, (1921) 275 Fed. 558. See also strong dictum in Cooley v. State, (Ga. 1922) 110 S. E. 449 and Allen v. Commonwealth, (Va. 1921) 105 S. E. 589. Allowing the plea: United States v. Peterson, (1920) 268 Fed. 864 (plea sustained as to former state trials but not as to *municipal*); State v. Smith, (Ore. 1921) 199 Pac. 194, annotated in 16 A. L. R. 1220. See also dictum in Burrows v. Moran, (Fla. 1921) 89 So. 111.

[86]"True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. . . . So, too, if one passes counterfeited coin of the United States within a state, it may be an offence against the United States and the state: the United States, because it discredits the coin; and the state, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both." United States v. Cruikshank, (1876) 92 U. S. 542, 23 L. Ed. 588.

Could there be municipal punishment in addition to state and federal? See discussion in State v. Lee, (1882) 29 Minn. 445, and City of Virginia v. Erickson, (1918) 141 Minn. 21, 168 N. W. 821.

and ninth propositions declared by the Supreme Court in the *National Prohibition Cases.*

Back of these cases lies the question as to the source of the power exercised by the federal and state governments. If they derive their power from the same source, only one punishment is permissible; but if from different sources, more than one punishment may be inflicted.[87] Of course there can be no doubt as to the source of federal power: It comes through the eighteenth amendment. In respect of state power, however, two opinions exist.[88] One, that in adopting the amendment the states surrendered all their power over the traffic in intoxicating liquors for beverage purposes and received back, through the amendment, a grant like that made to Congress; hence, that there is a common source. The other, that the states never surrendered but merely limited the power which admittedly was theirs prior to the amendment; hence, that there are distinct sources. Of these opinions, the latter appears more in accord with the reason and purpose of the amendment and is supported by the weight of authority.[89]

To sum up: There does not appear to have been any definite meaning attached to the term "concurrent power" in judicial usage prior to the eighteenth amendment and consequently no meaning from that source can be imported in to the amendment; in adopting the amendment the states have not surrendered their power over intoxicating liquors except that they may no longer permit the sale, etc., for beverage purposes; the purpose of the amendment was to bring additional forces into play by admitting the federal government into the field of intrastate enforcement but with no willingness on the part of the states to be excluded from that field by the advent of the federal government; state and federal laws being required to be in harmony with the amendment, a conflict between them seems remote if not impossible; if a conflict does, or can, exist there is fair ground for saying that the amendment modifies the sixth article so as to remove the necessity for federal supremacy; the doctrine of separate and independent sovereignties, particularly as illustrated in the coun-

[87] 21 Columbia Law Review 818, discussing United States v. Regan, (1921) 273 Fed. 727. See particularly Grafton v. United States, (1907) 206 U. S. 333, 51 L. Ed. 1084, 27 S. C. R. 749.

[88] See 10 California Law Rev. 70 for alignment of cases. 34 Harv. Law Rev. 317.

[89] See above, footnote 85; 16 A. L. R. 1220; 21 Colum. Law Rev. 818; 19 Mich. Law Rev. 647; 8 Va. Law Rev. 133.

terfeiting cases, appears to furnish a solution in accord, first, with long established principles, second, with the purposes of the states in adopting the amendment, third, with the specifically declared intent of the Congress in changing the form of the proposed amendment, and, fourth, with the weight of authority.

The eighteenth amendment is at once the measure of federal power and a limit on state power. If Congress acts within that measure its action is constitutional; for, in the language of the court in the *National Prohibition Cases,* congressional power "is in no wise dependent on or affected by action or inaction on the part of the several states or any of them." Under the doctrine of separate and independent sovereignties, if a state acts within the limit set by the amendment its action would be constitutional and in no wise dependent on or affected by action or inaction on the part of Congress. The amendment marks the limit of state action. It furnishes a sufficient test for state laws. It ought to furnish the only test.[90] It is submitted, therefore, that the constitutionality and operation of state statutes reasonably adapted to effectuate the prohibition of the amendment should be determined, as a matter of law,[91] without regard to what Congress may or may not do.

[90] "The amendment contemplates independent legislation, both on the part of Congress and the several states; and the constitutionality of a state statute must be determined alone by a resort to the provisions of the amendment." State v. Hartley, (1921) 115 S. C. 524, 106 S. E. 766.

[91] Insofar as congressional action may throw light on the meaning of any term in the amendment it will be important, not because such action *as law* limits state action but because as a determination of fact entitled to great respect it assists the court in ascertaining what the limit is which the amendment itself imposes. See pp. 466-7.

ELECTION OF REMEDIES*

By Amos S. Deinard and Benedict S. Deinard

In Minnesota

THE foregoing, we believe, are the only authentic cases of election between remedies."[*] They stand as the only, isolated applications of the rule. In relation to them, this rule bears no necessary kinship to the doctrines of election between properties, or between substantive rights, which rest upon settled principles of equitable jurisprudence and of the substantive law. Its acceptance could not support, nor its rejection endanger the validity of those doctrines. As we shall later submit, those doctrines lend

*Continued from 6 Minnesota Law Review 362.

"Although no other cases have been found *at law*, there should be mentioned a *rule of bankruptcy administration* which prevailed for some time in England until abolished by statute in 1869, except when its obligations are all incurred in the same transaction. A creditor holding a joint and several obligation or security of a partnership was not allowed to prove against both the joint estate of the firm and the separate estate of the partners, but was required to elect against which estate he would go. The rule was established by Lord Talbot in Ex Parte Rowlandson, (1735) 3 P. Wms. 405. "His Lordship held, that as at law, when A and B are bound jointly and severally to J. S. if J. S. sues A and B severally, he cannot sue them jointly, and, on the contrary, if he sues them jointly, he cannot sue them severally, but the one action may be pleaded in abatement of the other; so, by the same reason, the petitioner in the present case ought to be put to his election, under which of the two commissions he would come." This decision settled an arbitrary rule for double mercantile specialties as well, where it was confessedly in violation of the rule of law. Lord Eldon in Ex Parte Bevan, (1804), 10 Ves. 106 (109), said: "The principle seems obvious; yet in bankruptcy for some reason, not very intelligible, it has been said, the creditor shall not have the benefit of the caution he has used. I never could see, why a creditor, having both a joint and a several security, should not go against both estates. But it is settled, that he must elect." In Ex Parte Moult, (1832) Montague's Cases, 321 (337), Sir A. Pell said: "Does the rule correspond with the law? It is admitted it does not. We are, therefore, called upon to give our assent to an arbitrary doctrine, not founded on law or justice."

The rule must therefore be regarded as only an anomalous rule of administration, with no satisfactory legal basis. It was repudiated in the United States in In The Matter of Peter Farnum, (1843) 6 Boston Law Rep. 21, Ames, Cases on Partnership 356, where Sprague J. said as to the right of double proof: "This right, founded both in law and justice, I do not think myself bound or authorized to set aside on account of an arbitrary rule, justly reprobated by the most eminent judges and jurists in England, and never recognized in this country." For a citation of the cases, see Ames, Cases on Partnership 348 N., 359 N. See Collyer, Partnership (1832) 549-554, for the rule prior to its abrogation by statute in England. See also Collyer, Partnership, 6th Ed. Wood's Notes, Sec. 932.

only analogical argument for its validity. But as an independent rule, it would appear to be explicitly and unqualifiedly accepted in the decisions of the supreme court of Minnesota.

"The rule is as undoubted as it is familiar that, where a party has inconsistent rights or remedies, he may claim or resort to one or the other at his election, and that once made his election is irrevocable."[77]

"The doctrine of election of remedies is well settled in this state and is to the effect following: where a party has a right to choose one of two or more appropriate, but inconsistent, remedies and with full knowledge of all the facts and his rights makes a deliberate choice of one of them, he is bound by his election, and is estopped[78] from again electing and resorting to the other remedy."[79]

These quotations are taken from the numerous dicta of the court, and fairly express its avowed attitude. What the cases in reality decide, it is our task to ascertain.

In Dunnell's Digest, under the title "Election of Remedies," the subject matter is classified under the following heads: Definition; Distinguished from Estoppel; Necessity; Forms of Action at Common Law; Finality of Election.[80] Here are annotated some twenty-five decisions of the Minnesota supreme court. In the Supplement of 1916 seven cases are added.[81] From 1916 to date an equal number of cases is to be found similarly indexed in the state reports. One would surely suppose that a rule of such simple operation was now well settled. We shall endeavor to analyze all the cases mentioned in terms of the previous discussion, to ascertain what the cases have precisely held, beyond the stock generalities repeated as prefatory to most of them.

It is necessary as a preliminary consideration to notice those cases where the court has stated that the rule of election of remedies applied, but where in fact on analysis, the rule could not possibly operate since no election of any sort was involved.

The simplest case is that of submission to the power of a court in spite of a jurisdictional defect, in order to be able to come into court and have the litigation decided on its merits. This was the situation in *Rheiner v. Union Depot*,[82] after a railway

[77]Per Mitchell J., In re Van Norman, (1889) 41 Minn. 494, 43 N. W. 334.

[78]The court uses "estopped" only in the non-technical sense of barred.

[79]Aho v. Republic Iron & Steel Co., (1908) 104 Minn. 322, 116 N. W. 590.

[80]I Dunnell's Digest, sec. 2910-2914.

[81]Dunnell's Digest, Suppl. 1916, sec. 2910, 2914, 2914a.

company had petitioned for condemnation of plaintiff's property. The proceedings instituted on the petition were defective for lack of jurisdiction of the person of the plaintiff. Plaintiff, however, appealed from the decision of condemnation, and thereby discarded the objection he might have raised to the jurisdiction of the tribunal. Later plaintiff brought action to restrain defendant from occupying his land. The court held that the remedy sought was inconsistent with his former appeal, and that he was thereby barred.

"At the time when plaintiff appealed from the award of the Commissioner, two courses lay before him, either one of which he might pursue. As yet, the proceedings having been without jurisdiction as to himself, he might seek relief on that ground; or, the jurisdictional defects being such that he might waive them, he might disregard them and accept the award; or, if that was deemed inadequate, appeal to the district court. Having chosen the latter course, he is precluded by his own election from availing himself of the former. . . . The two remedies are inconsistent. Having made his election between them, and having waived the defects for the purpose of securing what benefit he might in a reassessment of his damages before the court and jury on appeal, he is precluded thereby, and cannot now be allowed to recall his waiver, and make again invalid what his own acquiescence had rendered valid."

It will be noted that the court, rested its decision equally on a waiver and an election. It is submitted that the case really depends on neither. Since the procedure of condemnation was defective, the court did not acquire jurisdiction over the plaintiff, unless he consented and chose thereby to confer that jurisdiction which the court hitherto lacked. When he consented and the court acquired jurisdiction, plaintiff surrendered his defense on that ground. Appeal to the district court was simply conclusive as to his consent. He did not elect between his remedies, for he had only one, and he surrendered that one by consenting to the irregular proceeding. If by "waiver" the court meant only a failure to raise an available defense to the action, and by "election" a determination so to "waive," the language of the opinion is wholly inadequate and obscures the ratio decidendi of the case.

A case that is just as clearly distinguishable from cases involving an election of remedies is *Wright v. Robinson*.[88] The court had appointed B receiver of the property of A. C, a judgment creditor of A, caused a levy to be made on a portion of the prop-

[88] (1883) 31 Minn. 289, 17 N. W. 623.
[89] (1900) 79 Minn. 272, 82 N. W. 632.

erty in the hands of B. On motion of B, the court made an order restraining C from levying, but providing for retention by B, who was to sell the property, of sufficient money from the sale to satisfy the execution, awaiting any steps C might take to protect his rights. C availed himself of this part of the order, and sued B to recover the money. Later C appealed from the order. B was holding the money pending determination of the suit against him. C's appeal was dismissed. The court based its decision on the ground that:

"The creditor had an election of inconsistent remedies. It could appeal, and thus have its rights determined as against the receiver; or could do what it did do,—institute the action to determine whether or not it was entitled to the money. . . . It could not do both. . . . As soon as the choice was made, and one of these alternative remedies proffered by the law, adopted, the act operated as a final and absolute bar as regards the other."

The appellant here is presented as acting under an interlocutory order in receivership proceedings by taking advantage of the rights secured to him by that order, and, pending action to determine those rights, attempting also to appeal from the order. The grounds of appeal are his right to levy upon and take immediate possession of the property, and the impropriety of remitting him to further action against the avails of the sale. The court in effect refuses to hear him as to the impropriety, for the reason that he has already debarred himself by taking advantage of the order. This refusal of the court is undoubtedly correct. There is abundant authority for the principle that one who takes the benefits of a judicial order cannot at the same time appeal from it; his conduct amounts to a release of errors, and he will not be heard to say that it was unjust.[*] But the mere fact that a litigant in a court of justice will not be allowed to acquire advantages by assuming inconsistent positions, in no way argues that it is a case for the application of the rule of election of remedies. It is true that remedies, it is always said, must be held inconsistent in order to require election between them. But there must always be the two remedies. The right of appeal is not a remedy for the alleged wrong; the only remedy is that against the receiver; the repugnancy resides in accepting and repudiating the identical remedy; because of this repugnancy the litigant forfeits his right to appeal by pursuing the remedy.

[*]Exhaustive note, 29 L. R. A. (N.S.) 1.

An unusual situation arose in *Pederson v. Christofferson.*[84] In that case, C, the natural daughter of the deceased, filed a petition in the probate court. The petition stated that the deceased had left an estate, and a last will and testament (as she was informed and believed), that she was the daughter of the deceased, and a legatee under the will, and set out the names of the other known heirs and legatees. The petition prayed that probate be granted to her. The will was in the possession of the probate court. On the day set, hearing was adjourned on application of the other heirs, to enable them to offer proof of the will and to file objections to granting letters to C. On the adjourned day, these heirs appeared in support of the will. C now filed objections to its allowance on the grounds of improper execution, lack of testamentary capacity, and undue influence. The court admitted the will to probate; C took an appeal to the district court; the heirs moved to dismiss the appeal on the ground that C had elected to take under the will, and was thereby barred from contesting it. The court found that the heirs were themselves estopped from raising the objection. The court thus avoided a decision as to whether in the absence of such estoppel of the heirs, C would have barred herself from contesting the will.

"Such being the case it is unnecessary to consider what the respective rights of the parties would have been if the proponents had seasonably asserted the claim that the contestant had elected to have the will probated and is therefore estopped from contesting it."

But the court did not hesitate to say that the situation facing C was one calling for an election of remedies.

"Briefly stated, the claim of the proponents is that the contestant was at liberty to institute proceedings for the probate of the will or to contest it, but she could not do both, and, having elected to institute proceedings for the probate of the will, she is estopped from changing her position. This presents the question of election of remedies, not an election under the will; for, if the will be valid the contestant would, upon its being probated, take as legatee although she may have contested the will."

It is submitted that this statement of the court is correct in only one point, that it is not the case of an election under a will. The doctrine of election under a will, as drawn probably from the civil law,[85] applied in Scotland, and later introduced into equity,

[84] (1906) 97 Minn. 401, 106 N. W. 958.
[85] 1 Sw. 396, 398; 2 Story, Equity Juris, sec. 1078, 1080 ff.

is limited to the case where a testator bequeaths property to A and directs A in turn to give certain of his own property to B. If A accepts the bequest he must surrender his property; if he refuses to surrender he renounces the bequest. A must take his choice: therein lies his election.[87] That is all of the doctrine. Obviously it does not apply to the instant case.

Just as clearly there is no choice between substantive rights. For it is admitted that if C is in fact named as legatee in the will, she must be allowed to take whether she propounds or contests it. Participation in the proceedings for probate is not relevant to the question of her rights as legatee. What she demands, and what the heirs deny her, is only a locus standi in court to take part in the contest. The inherent vice in her assertion is that she has previously taken a wholly inconsistent position in propounding the will. It may well be as the court intimates, though the proposition is certainly doubtful, that C has forfeited her right because of this inconsistency. Some support may be found in the decision that a creditor acquiescing by any significant act in a general assignment is debarred from attacking it.[88] Still as in the case of *Wright v. Robinson*,[89] there was only one remedy available to C: the question at issue is whether that remedy remains to her. There is no basis for any estoppel: C makes no representation by filing her petition; the heirs are neither misled nor damaged by it. At worst, C has played various roles. The false assumption that anything smacking of contradictory attitudes

[87] The earlier dicta on the point of forfeiture were later repudiated, and the doctrine authoritatively declared as follows: that if A refuse to give up the property, of which the testator had assumed to dispose, he did not absolutely forfeit the bequest, but was only obliged to compensate B for his disappointment, and equity would sequester the bequest for that purpose. But this rule of compensation applies only where the election is to take against the will, not where the election is to take under it. See the learned annotation to the case of Gretton v. Haward, (1818) 1 Sw. 409, 433; Ker v. Wauchope (1819) 1 Bli. [25], for Lord Eldon's statement of the doctrine; Van Dyke's Appeal, (1869) 60 Pa. St. 481: but contra, Sugden, Powers, 8th Ed. sec. 576. That where the legatee has no assignable interest in the property with which the testator professes to deal there can be no election, see re Lord Chesham, (1886) 31 Ch. Div. 466, 54 L. T. 154, 55 L. J. Ch. 401, per Chitty J. The English cases are fully considered in Jarman, Wills, 6th English Ed., 531-557.

[88] Rapalee v. Stewart, (1863) 27 N. Y. 310. Acc., that a creditor accepting under a general assignment as a valid trust for creditors cannot afterwards petition the assignor into bankruptcy, by reason of the inconsistency, although if others petition the assignor into bankruptcy, he may share in the estate, In Re Romanow, (1899) 92 Fed. 510, Williston, Cases in Bankruptcy 114.

[89] (1909) 79 Minn. 272, 82 N. W. 632.

must be a case for the application of the rule of election of remedies forces the court to the laborious creation of a counter-estoppel of dubious validity—erecting one straw man to destroy another.

The rule of election of remedies, by definition, applies only when remedies are inconsistent with each other. There are many cases of alternative remedies for the same cause of action, which are analogous and concurrent, and involve no inconsistency. Thus trespass, trover and replevin all proceed upon the ground of continued ownership in the plaintiff, and may be brought for the same wrong. And at common law either covenant or debt would lie for breach of an agreement under seal.[90] An action for malicious trespass in seizing plaintiff's goods under an execution against a stranger is not inconsistent with a replevin suit to recover the goods.[91] The cases might be multiplied indefinitely. But when action is once pursued to satisfaction in one form of action, the plaintiff cannot avail himself of suit by any other remedy. For satisfaction discharges the cause of action and operates as a bar. The rule is the same where there are several defendants, even when each remedy is available against one defendant alone. Thus if the defendant against whom judgment has been recovered and satisfied was one of joint tort-feasors, his associates are no longer answerable. Where the parties are not equally responsible, as in cases of insurance and guaranty, discharge of one by satisfaction also discharges the others. But where the party secondarily liable has satisfied a judgment against him, the party primarily liable is still answerable to him, on the familiar principles of subrogation.

In *Carlson v. Minneapolis Street Ry. Co.*,[92] a scavenger in the employ of plaintiff was killed in a collision with defendant's streetcar. The state Workmen's Compensation Act had added to the common law remedy (or actionable negligence in case of injury, or under Lord Campbell's Act in case of death) a statutory remedy against the employer for compensation. Though the court said that "if he elects to pursue the former remedy, he waives the latter," what is really meant is that he can be satisfied only once, for the court quoted and approved the following statement:

[90]For a nonsuit on an action on account is no bar to an action of debt. Co. Lit. 146.

[91]Crockett v. Miller, (1901) 112 Fed. 729, 50 C. C. A. 447.

[92](1919) 143 Minn. 129, 173 N. W. 405.

"It is conceded, as the fact is, that, in case of an employee, in the course of his employment, being injured by the actionable negligence of a third person, a statutory remedy accrues to him for compensation, against his employer and a common law remedy against such third person though he can (not) have but one satisfaction."[33]

Just as the plaintiff will not be allowed to harass the defendant on a cause of action which has been discharged by satisfaction, so by the operation of the rule of res adjudicata, he will not be permitted to sue in an action when the issues involved have been fully tried and decided against him in a prior suit. The entire doctrine of conclusiveness of judgment depends upon adherence to this salutary rule. If B thinks he has a cause of action against A for the wrongful taking of his chattel he may declare in assumpsit or in trover. If he sues in trover, and on the trial it appears that the chattel in fact belonged to A, and judgment is thereupon given for A, B can never make use of his alternative action in assumpsit. But this is not because the rule of election of remedies operates against him, but because in one action it has appeared that he could have no rights in any action. The issue in suit is res adjudicata.

Nothing more is necessary to understand the case of *Thomas v. Joslin*,[34] constantly cited as a leading case for the rule of election of remedies. Plaintiff in a former action had sued for specific performance of a land contract, but had been defeated on the merits. The issuable fact was the authority of the defendant's agent, who had contracted with the plaintiff. In form the contract was to convey the land free and clear; in fact, the court had found that to the plaintiff's knowledge, and necessarily therefore as part of the agreement, the contract was to be subject to a prior lease. Now, in an action to reform the contract (into a contract to convey free and clear) and to enforce it as reformed, defendant plead the former judgment as a bar. The court upheld the plea. The substance of the controversy was the extent of the authority of the defendant's agent. Since the first case was allowed to go to trial on the merits, the evidence disclosed that the agent's authority was inadequate to make the kind of contract that plaintiff needed to establish. Therefore the matter was

[33] McGarvey v. Independent Oil & Grease Co., (1914) 156 Wis. 580, 146 N. W. 895.

[34] (1886) 36 Minn. 1, 29 N. W. 344, 1 A. S. R. 624 and N. 626.

res adjudicata. For the new issue, though different in form, was merely incidental to the identical right.

"Plaintiff elected to bring his action upon the contract in its imperfect form and proceeded to trial and judgment thereon. There was, however, in fact but one contract between the parties, and but one claim or right upon which to base a recovery, though it may not have been fully evidenced by the writing. This claim has once been litigated, and, as defendants contend, finally."

The court, however, intimated, though it did not expressly say, that the matter was also one for the rule of election of remedies. "We are unable to see, however, why the matter should not be held to be res adjudicata, and the plaintiff bound by his election." In a later case, counsel relied upon this intimation to contest an action to reform a policy of insurance and recover upon it as reformed,[85] on the ground that plaintiffs had previously commenced an action to recover upon the policy, though they had taken a dismissal without prejudice and before submission on the merits. The court in considering the plea stated:

"The doctrine of election as between inconsistent remedies is relied upon. . . If such were the case, the proper remedy having been misconceived merely by reason of the failure of the plaintiffs to correctly apprehend the legal construction of the written instrument . . . and that action having been dismissed without determination on the merits, the plaintiffs were not precluded from maintaining this action. In *Thomas v. Joslin* the former action had proceeded to a judgment for the defendant on the merits."

The court therefore denied the plea. There had been no determination of the issues in the previous action; the remedies were not inconsistent; there was no reason why the plaintiff should be concluded in his legal rights.

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[85]Spurr v. Home Ins. Co., (1889) 40 Minn. 424, 42 N. W. 206. In Eder v. Fink, (1920) 147 Minn. 438, 180 N. W. 542, the court reviewed the two cases. It held that a judgment for defendant in an action to charge him as indorser barred further action for reformation of the indorsement. "He elected to pursue the former course. . . . He is bound by an election made under such circumstances."

A simple example of the application of the rule of res adjudicata, mis-cited as a case of election of remedies, is the case of Middlestadt v. City of Minneapolis, (1920) 147 Minn. 186, 179 N. W. 890. An attorney has a statutory lien for his services, and if the parties settle before trial, he may enforce his lien either by intervening in the original action, or by bringing an independent action against the defendant. Where an attorney so intervened, and on motion it was found that he had surrendered his lien, he could not thereafter resort to an independent action. For authority in a somewhat similar situation see Leigh v. Laughlin, (1906) 130 Ill. App. 530, where plaintiff was not allowed to resort to replevin of the fee bill after the question has been determined against him on

Summary. The six cases we have so far considered are regarded as the most authoritative statements of the rule of election of remedies in Minnesota. We have seen on analysis, however, that none of them involved a true election of any sort, and are easily disposable on accepted principles. We shall next consider another group of cases where an election actually operated, in order to determine whether in the light of our preliminary discussion such election is properly referable to the substantive or to the adjective law.

In *Kraus v. Thompson*,[28] plaintiffs had sold furniture, and recovered judgment by confession for the purchase price. Later, when they discovered that a fraud had been perpetrated on them, they rescinded the sale. In an action to recover the property, the trial judge excluded all evidence of rescission, charging the jury that rescission was impossible after judgment for the purchase price had been entered. The appeal presented the question of the correctness of the charge.

The case clearly involved an election between substantive rights. That the vendor had once elected to regard the sale as in force was admitted. The controversy was as to its conclusiveness. Judge Mitchell stated the issue as follows:

"Does the fact that a vendor of goods, in ignorance of fraud on the part of his vendee sufficient to authorize a rescission of the sale, has obtained judgment against his vendee for the purchase price of the goods, amount to an affirmance or ratification of the contract of sale, so as to preclude him from subsequently rescinding, upon discovery of the fraud?"

The court rightly held that it did not.

"Any act of ratification of the contract, after knowledge of the facts authorizing rescission, amounts to an affirmance and terminates the right to rescind; but, if done before such knowledge, it will have no such effect. And, in our opinion, the act of obtaining judgment against the vendee for the purchase price stands in that respect on the same footing as any other act recognizing the existence of the contract of sale and must be governed by the same rules."

The point of interest for us in the case is the last remark of the court, that the exercise of a remedial right here was of consequence only as the equivalent of any extra-judicial act of affirmance, and had no other elective operation. With the problem of

motion to retax costs. As to what matters are concluded by judgment see Southworth v. Rosendahl, (1916) 133 Minn. 447, 158 N. W. 717.

[28](1882) 30 Minn. 64, 14 N. W. 266.

election in ignorance of substantive rights, this inquiry is not concerned.

Raymond v. Kahn[97] was an action of replevin by a conditional vendor to recover machinery sold. It suffices to quote from the decision:

"It is thoroughly well settled in this state, that after retaking or recovering the property under a contract of this kind for a default of the buyer, the seller cannot thereafter maintain an action to recover a balance due on the purchase price, or on notes given therefor. The seller has the election (1) to reclaim the property; (2) to treat the sale as absolute and sue to recover the debt; (3) to bring an action to foreclose his lien. But the assertion of either right is the abandonment of the other."

A somewhat different application of the same doctrines of substantive election was involved in *Bauer v. O'Brien Land Co.*[98] The defrauded party in an exchange of farms sued for rescission and restitution. He had upon discovering the fraud offered to rescind, and had tendered a reconveyance of the land deeded to him; but his offer had been spurned. The defense was predicated on the contention that the plaintiff had an adequate remedy at law for damages, and should be remitted to it. The court answered the contention in this way:

"It is true that, where a defrauded party has rescinded by his own act, he may sue at law and recover his damages to the value of what he parted with. But that does not mean that, where his offer of rescission had been spurned, he may not pursue his remedy in equity. His unaccepted tender of rescission did not destroy the equitable remedy."

Defiel v. Rosenberg[99] contains only a further discussion of the rights of substantive election of a person induced to enter into a contract by fraud, upon discovery of the fraud, where the contract has been fully executed, remains wholly executory, or has been only partially performed.

Hoidale v. Cooley[100] is a case of ratification. McGinnis, an insurance agent, delivered life insurance policies to the defendant. His instructions had been to deliver them only on receipt of the first premium in cash; but he disobeyed instructions and took two notes of defendant indorsed in blank.. After maturity he transferred them to plaintiff. Plaintiff sued on the notes. The in-

[97] (1914) 124 Minn. 426, 145 N. W. 164.
[98] (1919) 144 Minn. 130, 174 N. W. 736.
[99] (1919) 144 Minn. 166, 174 N. W. 838.
[100] (1919) 143 Minn. 430, 174 N. W. 413.

surance company intervened, claiming the notes. The court indicated intervenor's rights in the situation as follows:

"When intervenor learned that McGinnis had disobeyed instructions, and had delivered the policies, and taken the notes, three courses were open to it: first, it might repudiate his act and demand a return of the policies. It did not do this. It chose to have the policies in force. Second, it might charge McGinnis with its proportion of the premiums, in which event the notes would belong to McGinnis. [The court found it did not do this.] . . Third, it might ratify McGinnis' unauthorized act in taking the notes and demand delivery of the notes to it. This, the court found, intervenor did do."

The election was of a course of action to determine its substantive rights.

In *Johnson v. Johnson*,[101] the defendant, a tenant at will, held over after notice of termination of the lease; the landlord then recovered possession by action under the forcible entry and detainer statute. Later he brought action to recover rent for the period of occupancy after notice of termination. His claim depended on the existence of the conventional relation of landlord and tenant. The court found that the plaintiff had elected to treat the defendant as a trespasser, and not as a tenant.

"We are of the opinion that, when a landlord has the right of election, and may treat the tenant as a trespasser or as a tenant holding over, the exercise of that right is conclusive against him, and that thereafter he cannot impose new terms upon the tenant without his consent."

The conduct of the plaintiff was thus correctly treated as an election between his substantive rights of continuation or termination of contractual relations. Since the tenancy was at will, the plaintiff had at any time the right to terminate it or allow it to continue; but once he had chosen the former course, there was only one remedy open to him—to have his tenant ejected. Therefore, it became impossible for him to sue for rent without proof of subsequent acceptance of a new tenancy on defendant's part. There is no confusion here of the rule of election of remedies.

Assuming for the sake of hypothesis that a situation does exist where the substantive rights of a litigant are determined, and several remedies are available to enforce the same right on the same state of facts, it has always been repeated that the rule of election of remedies can have no operation unless the available

[101] (1895) 62 Minn., 302, 64 N. W. 905.

remedies are mutually inconsistent. If the remedies are not inconsistent, but are alternative and complementary, or otherwise so reconcilable that the law will not regard the assumption of one "position" as a repudiation of the others, then the situation does not warrant invoking the rule. As may be noticed, there is implied here an illicit translation of the problem from terms of remedial rights, which might appear inherently inconsistent, into terms of "positions" assumed in order to maintain such rights. This is traceable to the doctrine of "theories and action" underlying the plaintiff's case, which the courts read into the general provisions of the code abolishing forms of action and providing for one civil suit. How far this doctrine has in fact perpetuated the old distinctions between actions at law and suits in equity, and between actions in tort and in contract will be discussed at a later point.

The first case in Minnesota which raised the question whether the remedies available were to be regarded as so inconsistent as to require application of the rule of election of remedies was that of *Barnes v. Hekla Fire Ins. Co.*[102] In that case a property owner sued insurance company "A" for the amount of a policy of fire insurance on a loss covered by it. For defense, company "A" alleged that, after the date of the policy, insurance company "B" had reinsured the property, and had agreed with plaintiff and company "A" that it would pay plaintiff any loss she might suffer under the policy; that thereafter, but before this suit, company "B" had become insolvent and assigned for creditors under the state Insolvent Law, and that plaintiff had filed and proved her claim in the insolvency proceeding against it for payment. Plaintiff demurred to the defense, and the trial court sustained the demurrer. On appeal the order was affirmed. The court held that, by proceeding against the estate of company "B," plaintiff did not relinquish her remedy against company "A" upon the policy in suit. In answer to defendant's assertion that "by electing to proceed against the estate of the German Insurance Co. (B) the plaintiff has effectually waived her remedy against the defendant," the court said:

"A creditor is put to an election only where his remedies are inconsistent, and not where they are consistent and concurrent. In the latter case, a party may prosecute as many as he has, as in the case of several debtors. And so, if, in this instance, the remedy against the insolvent company as respects the plaintiff, was merely

[102] (1893) 56 Minn. 38, 57 N. W. 314.

cumulative, there is no reason why she may not pursue either or both."

Of course, the plaintiff could have but one satisfaction, and in case of concurrent actions, the court might interpose a stay if necessary to protect the defendants' rights.

Bell v. Mendenhall[103] is a similar case. A trust company assumed and covenanted to pay the debts of certain grantors of real estate in consideration of the grant. The creditors of the grantor brought suit on the covenant. The trust company defended on the ground that a prior judgment against the grantors had released it from its obligation. Execution on that judgment had been returned wholly unsatisfied. The court held that the trust company had become the principal debtor, and could be sued on its promise to pay the claims. The prior action against the grantors in no way prejudiced its rights.

"Its original and separate promise to pay the debt remained intact until the plaintiff obtains satisfaction of the debt. . . The plaintiff may maintain a separate action upon each promise at the same or different times, for such remedies are consistent and concurrent."

From the definition of election it is also necessarily implied that two remedies must in fact coexist. Otherwise, choice is impossible. This necessity seems to be recognized in all the cases applying the rule of election of remedies. If by mistake of fact or law plaintiff pursues a remedy that is really not available to him, his rights cannot be concluded or prejudiced by such suit.[104] We shall now consider the cases decided upon that point. It will not be necessary to point out which are substantive elections and which elections of remedies, since this necessity must exist for elections generically.

The leading case in Minnesota is *In re Van Norman*.[105] Plaintiffs levied an attachment on the property of their debtors, the defendants. On the same day defendants executed an assignment of all their property under the state insolvent law for the benefit of creditors. Plaintiffs, contesting the validity of the assignment, refused to surrender the attached property to the assignee, but issued execution and sold the property to satisfy their judgment. The assignees then brought action for the value of the property,

[103] (1898) 71 Minn. 331, 73 N. W. 1086.

[104] Fuller-Warren Co. v. Harter, (1901) 110 Wis. 80, 85 N. W. 698, 84 A. S. R. 867, 53 L. R. A. 603.

[105] (1889) 41 Minn. 494, 43 N. W. 334.

and recovered judgment. Plaintiffs paid the judgment in full. Later plaintiffs presented their claim to assignee for allowance. The assignee disallowed the claim. It was held on appeal that plaintiffs were not debarred, but might present their claim for allowance and share in the benefits of the assignment. Judge Mitchell said:

"If appellants are debarred, it must be on the ground that they had elected to pursue an inconsistent remedy, or to claim an inconsistent right. . . But it seems to us that the doctrine of election between inconsistent rights or remedies has no application to the facts of this case. The appellants never in fact had any election of rights or remedies. Their action was a mere futile attempt to assert a right which they never possessed, in which they were defeated. "A mere attempt to pursue a remedy or claim a right to which a party is not entitled, and without obtaining any legal satisfaction therefrom, will not deprive him of the benefit of that which he had originally a right to resort to or claim; this proposition if sound, fully covers the case."

The cases following *In re Van Norman* will be found in the note.[106] The principle underlying them was well summarized in the latest of them. In *Kremer v. Lewis*,[107] plaintiff bought property on fraudulent inducements by defendant. The court said:

"These principles are well settled: One who has been induced to enter into a contract by the fraud of the other party, has the

[106]Marshall v. Gilman, (1892) 52 Minn. 88, 53 N. W. 811; Cumbey v. Ueland, (1898) 72 Minn. 453, 75 N. W. 727; Schrepfer v. Rockford Ins. Co., (1899) 77 Minn. 291, 79 N. W. 1005 (Under Minnesota standard policy of insurance against loss by fire, insured sued without entering into reference to arbitration, which was condition precedent to suit; was defeated; then offered to submit to reference, when Company in return refused; now insured sues again, *Held*, she might recover). See Christianson v. Norwich etc. Soc., (1901) 84 Minn. 526, 88 N. W. 16. Also Virtue v. Creamery Package Mfg. Co. (1913) 123 Minn. 17, 142 N. W. 930, 136 L. R. A 1915 B. 1179; Mohler v. Chamber of Commerce, (1915) 130 Minn. 288, 153 N. W. 617 (A sold and delivered wheat to B who resold to C. B could not pay; A sued C, but was defeated, since court found title had passed. Now A wishes to enforce his right to a lien for the debt on B's membership, according to the bylaws of the Chamber; lien allowed); Preston v. Cloquet Tie & Post Co., (1911) 114 Minn. 398, 131 N. W. 474, (conversion of timber) Freeman v. Fehr. (1916) 132 Minn. 384, 157 N. W. 587; Gunderson v. Halvorson, (1918) 140 Minn. 292, 168 N. W. 8 (unsuccessful suit for rescission by vendee under executory contract for sale of land. "The result is not a bar to a recovery for damages for the fraud if any was committed by the defendant. It will be within the discretion of the court below, after the cause has been remanded to grant an amendment of the complaint and to permit the action to proceed as one for damages for the alleged fraud." Also Piper v. Sawyer, (1899) 78 Minn. 221, 80 N. W. 970. Aho v. Republic Iron & Steel Co., (1908) 104 Minn. 322, 116 N. W. 590, could have been rested on even a simpler basis, for the plaintiff sues in the case before the court in a quite different capacity than in the prior suit, and clearly could not be barred qua administratrix by a prior mistaken action qua beneficiary.

[107](1917) 137 Minn. 368, 163 N. W. 732.

choice of two remedies: He may stand on the contract, sue for damages in an action for deceit, or he may rescind the contract and recover what he has parted with. He cannot do both. A choice of one remedy is an abandonment of the other. The commencement of an action for rescission which fails, is no election, for, to constitute an election, there must be a real choice, that is, two courses must be really open to him, and from the fact that he has in some manner lost the right of rescission, it does not follow that his right to damages does not exist. . . Defendants can hardly contend now that the complaint [prior action in deceit] did state a cause of action. With this state of facts, we think the commencement of an action for damages on a complaint which stated no cause of action could not destroy the right of action to recover the purchase price paid which had already accrued to plaintiff by reason of a fully consummated rescission, and we find no authority for any such rule of law."

Critique of the Rule

Summary. The foregoing cases exhaust the list of cases decided under or cited in support of the supposed rule of election of remedies. However, as we have seen most of them are cases in which the matter has been discussed only for the purpose of eliminating it as a point raised in argument, on grounds equally valid in election of any type, namely, ignorance or mistake of fact or of rights, want of jurisdiction of the previous suit, premature action in the previous suit, etc. And those cases, which really hold the suitor concluded by his prior action are apparently, in the light of our discussion, cases of election between substantive rights, where the remedies could be spoken of as inconsistent only in the loose sense that they involved an unequivocal assertion of inconsistent rights. In general, actions which proceed on the theory that title to property is in the plaintiff are inconsistent with those which consider title as in the defendant. Actions based on the theory of affirmance of a contract are inconsistent with actions based on the theory of disaffirmance or rescission. Actions based on the theory that plaintiff has ratified an unauthorized transaction are inconsistent with actions based on the theory that plaintiff had repudiated the same transaction. But beyond these cases, all disposable on settled principles of substantive law without the necessity of adversion to any rule of election of remedies, there is not even a mention of the two authentic cases where in other jurisdictions it has been held that an election of one remedy, after rights were determined, concluded the suitor. Granted that

a plaintiff may "waive" his tort and sue in assumpsit, there is not even a dictum that either suit would bar the other. How this curious situation could have arisen, namely, constant reference to the rule in cases where it would be wholly inapplicable, without any reference to the two authentic instances of its operation, can be understood only in the light of the history and growth of implied assumpsit as a remedy for conversion, and of the origin of the rule of election of remedies in reference to it.

In 1676,[108] it was first held that assumpsit would lie for the proceeds of a conversion. This remedy was added to the older writs of trover, trespass, and replevin, in order to facilitate redress.

"The fiction of a promise invoked in the cases . . . was originally adopted simply for the purpose of pleading; the action of assumpsit which is in form and originally always was in fact, based on a promise, being the only remedy open to the plaintiff seeking to enforce a quasi-contractual obligation, and that the real ground of liability is the fact that it would be unjust if the defendant were not compelled, at the option of the plaintiff, to pay for value received. If such is the case, then the use of the fiction should cease with the necessity which gave rise to it; and when used it should be recognized as a fiction, and treated as a fact only for the purpose for which it was invented."[109]

But the English judges did not regard it in this way. In *Lamine v. Dorrell*,[110] in which the right to waive a tort and sue upon promises was first distinctly recognized, Powell J. said:

"It is clear the plaintiff might have maintained detinue or trover for the indentures, but the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money that they were sold for as money received to his use."

In this way the nature of the transaction was recast by a fiction of law in order to conform to the conventional allegations of an assumpsit. The fact that the property was tortiously taken from the plaintiff and was irrevocably lost to him, that he was suing only for damages, and that the form of his declaration could not make what was before tortious cease to be so, were all overlooked in the fanciful idea that the transaction was really one of sale, and that the form of action could thereby unequivocally determine affirmance or disaffirmance and change the substantive

[108] Phillips v. Thompson, 3 Lev. 191.
[109] Keener, Quasi-Contracts 211.
[110] (1705) Ld. Raym. 1216.

rights of the parties."[111] The apparent distinction between rights and remedies was entirely forgotten.

"Had not this almost self-evident proposition been lost sight of, because of the fiction of a promise involved in the action of indebitatus assumpsit when brought to enforce a right of action not resting on contract, much of the confusion in and conflict of decisions now existing would have been avoided."[112]

For instance in *Longchamp v. Kennedy*,[113] an action in assumpsit for the value of a ticket which the defendant refused to deliver to the owner, Lord Mansfield said:

"If the defendant sold the ticket and received the value of it, it was for the plaintiff's use, because the ticket was his. Now, as the defendant has not produced the ticket ,it is a fair presumption that he has sold it."

How conscientiously the common law judges regarded this fiction of the sale can only be understood by considering the technique that grew up in cases of conversion in determining the right to waive a tort and sue for the proceeds."[114] Originally the right was confined to cases where the wrongdoer had resold the chattel.

"Nevertheless, the value of the goods *consumed* was never recoverable in indebitatus assumpsit. There was a certain plausibility in the fiction by which money acquired as the fruit of misconduct was treated as money received to the use of the party wronged. But the difference between a sale and a tort was too radical to permit the use of assumpsit for goods sold and delivered where the defendant had wrongfully *consumed* the plaintiff's chattels."[115]

And today we find such statements as these:

"The bringing of the suit is nothing more than a ratification of the sale made by the wrongdoer, and the converting of him into the agent of the actual owner,"[116] in the face of the settled prohibition in the law of principal and agent against ratification of an undisclosed agency, and in clear contradiction to the parties' intent. Later, in the United States, application of the right of waiver was extended to cases where the wrongdoer put the chattels to his own beneficial use. Some states extend the right to "waive" to every case of conversion.[117] In general, recovery is

[111] 3 Alb. L. J. 141-143 (Judge T. M. Cooley).
[112] Keener, Quasi-Contracts 160.
[113] (1779) 1 Doug. 137.
[114] 3 Alb. L. J. 141.
[115] Ames, Lectures Legal History 165.
[116] 23 Cent. L. J. 534.
[117] The conflicting authorities are collected in 19 Yale L. J. 221 (A. L. Corbin); 23 Cent. L. J. 532, 556; 7 Encyc. Pl. and Pr. 368 ff; Bliss, Code Pleading, 2nd Ed., sec. 13

limited to the amount of the defendant's enrichment, not the value of the chattel. If the defendant has sold the property for immoral or illegal purpose, the owner cannot "waive" and recover the price, on the absurd theory that he would thereby participate in the illegality. Generally, the remedies of trover, trespass and replevin proceed on the same theory of continued title in the injured party. Therefore the analysis of "waiver" of action in trover applies as well to an action in trespass for damages, or replevin for the property in specie or satisfaction in damages.

It should be understood that any criticism of the fictional ratification of a conversion does not apply to cases of ratification of acts purported to be done on behalf of the party ratifying. In such case the bar is a result of a substantive election.

The enforcement of the rule in the case of an unjust enrichment of one of two cotenants, which we considered, is even more strained for the reason that both the actions available are founded on wholly fictitious allegations. In *Munroe v. Luke*,[118] Shaw, C. J. said of the artificial dilemma created by law:

"We think it arises out of the artificial rules and technical principles, upon which actions of ejectment and real actions at law proceed. To prosecute an action on contract, for rents and profits, whilst the plaintiff has treated the defendant as a wrongdoer would, as said by Mr. Justice Ashhurst, in *Birch v. Wright*, 1 T. R. 379, 'be blowing both hot and cold at the same time, by treating the possession of the defendant as that of a trespasser, and that of a lawful tenant, during the same period.' The difficulty, therefore is a technical one."

In the action in assumpsit the defendant, though treated as a bailiff, is not a bailiff in fact but is a converter; in the action in ejectment, by the consent rule, the defendant admits ouster and disseisin of the plaintiff by the causual ejector, though in fact the allegations are understood to be wholly fictitious. Nevertheless, after suit in ejectment the plaintiff cannot allege seisin to give him title to claim rents and profits on a supposed contract.

That the new remedy of assumpsit was founded on a fictional transaction could not be objectionable as long as its only effect was to give an additional remedy said to be founded on a "waiver." There was no necessity for predicating the existence of the contract between the plaintiff and defendant any farther than was necessary to allow the writ to be framed in the language of assumpsit. That the existence of the contract would persevere

[118](1840) 1 Met. 459.

to defeat the plaintiff in a later action of tort is a further development. Until the suit in assumpsit was held to involve a position so inconsistent that its assertion negatived or repudiated the existence of the tortious act on which alone the plaintiff's right of recovery rested, the so-called rule of election of remedies was unknown.

The history of the rule is a matter for speculation. It has always been assumed to be of very ancient origin. Even at the earliest common law there were concurrent remedies and the litigant might take his choice. Says Coke: "If a man has several remedies for the same thing, he has an election to use which he pleases."[119] In *Folsom v. Carli*,[120] Judge Flandrau said:

"While the forms of action were in existence a party had what was called the right of election of actions. This right in the hands of a skilful pleader could be used to great advantage. There were many cases in which a plaintiff could declare in trespass, trover, or case according to the facts, or he might elect to waive the tort and declare in assumpsit. So in general a plaintiff could elect to declare either in assumpsit or debt. One of the most usual reasons in practice for adopting a form of action ex delicto, instead of declaring in assumpsit, was to cut off an apprehended off-set, which could be interposed to the latter but not to the former."

In a later case,[121] where plaintiff brought a common law action for damages from injuries sustained in the hold of the vessel, the court enumerated the remedies as follows:

"By virtue of the saving clause [in the Judicial Act of 1789] a party so aggrieved may (1) proceed in rem in admiralty if a maritime lien arises; (2) bring suit in personam in an admiralty jurisdiction; (3) resort to his remedy at law in a state court, or (4) in the United States court at law, if there are parties proper to give such jurisdiction."

Election of forum is often quite as important as election of form of action. But no statement of the finality of such an election can be found until most recent times. The first outspoken case in England was *Smith v. Baker*,[122] decided in 1873, in which it was said:

"But if an action for money had and received is so brought, that is in point of law a conclusive election to waive the tort; and

[119]Co. Lit. 145a, cited in 3 Comyns' Dig., Title *Election*.
[120] (1861) 6 Minn. 420 (426).
[121]Lindstrom v. Mutual S. S. Co., (1916) 132 Minn. 328, 156 N. W. 669.
[122](1873) L. R. 8 C. P. 350.

so the commencement of an action of trespass or trover is a conclusive election of the other way."

Mr. Hine has shown that all the dicta in the earlier cases refer to a choice between real and personal actions, and that the early authors found no inconsistency in actions "merely personal."[123] Thus in an early case[124] it was said that,

"Cases have been cited to show that where there are two different kinds of remedies, real and personal, or otherwise specifically distinguished, a man's election of one prevents him from using the other. He may distrain or bring assise; but not both, Litt. S. 588. May bring writ of annuity or distrein, S.219, and his election is determined even though he should not recover after he hath counted thereon, Co. Litt. 145, but where both remedies are merely real or merely personal then the election is not determined until the judgment on the merits."

This curious distinction between specific writs is well illustrated by the history of trespass and replevin. They were, Dean Ames says,

"Fundamentally distinct and usually exclusive actions. The one was brought against a disseisor; the other against the custodian. The former was a personal action, the latter a real action. Trespass presupposed the property in the defendant, whereas replevin assumed the property in the plaintiff, at the time of action brought."

To which Dean Ames adds in a note:

"Accordingly, even after replevin became concurrent with trespass, if a plaintiff had both writs pending at once for the same goods, the second writ was abated for the 'contrairiositie' of the supposal of the writs."[125]

The Minnesota court, assuming that the rule of election of remedies was fully accepted in its decisions, recognized its anomalous character. The court has been at pains to point out that the rule must be one sui generis, and cannot be assimilated to the accepted doctrines of equitable jurisprudence. Thus in *Pederson v. Christofferson*[126] the court said:

"The doctrine of election of remedies differs from that of estop-

[123]26 H. L. R. 716.

[124]Hitchin v. Campbell, (1771) 2 W. Bl. 827. Acc., "But where an Election is of several Remedies, if he chooses one, he may afterwards have the other in personal Cases; as, where he has Election of several Actions." 3 Comyns' Dig., Title *Election*, Co. Lit. 145a. And Chitty says: "The circumstances of a party having elected one of several remedies by action will not in general preclude him from abandoning such suit and after duly discontinuing it, he may adopt any other remedy" (Pleading 234).

[125]Ames, Disseisin of Chattels, 3 H. L. R. 23 (31), Lectures Legal History 172 (182).

[126](1906) 97 Minn. 491, 106 N. W. 958.

pel in its broadest sense in that the party invoking it need not show that he will suffer some material disadvantage unless his adversary be required to abide by his election."

Other courts and writers have been less keen in scenting the real basis of the rule. It is often mistaken for a special application of the principle of estoppel in pais on the ground that by the misrepresentation of the party electing the other suitor has been misled to his damage.[127] In this way the whole distinctiveness and vitality of the rule is entirely disregarded and lost. If really only a branch of estoppel, the cases decided upon it are unsupportable. If fully recognized, on the contrary, the rule goes far beyond estoppel, including cases where there has been no misrepresentation, where the other party has been in no way misled—in other words, where the familiar requisites of an estoppel in pais are most prominently absent.

Nor is election a matter of waiver, as is often assumed. "Waiver," as the term is commonly used by the courts involves a voluntary act of relinquishment of a right or privilege.[128] Now if A steals B's horse, B finds that he has a right of action for the wrong committed enforceable in two different ways. He may bring action in trover for the conversion, or in indebitatus assumpsit for the value. B does not as a matter of fact voluntarily relinquish the right to sue in one action by adopting the other. What really happens is that the law beforehand determines for B that he may have his choice between them, but that he cannot in any case exhaust one and then take up the other. "When to elect there is but one, 'tis Hobson's choice; take that or none." This is the simplest statement of the rule. It does not involve either a voluntary act or a real relinquishment: it is the inference of the law from the exercise of the right. "B had a right of election between two positions, and he chose one. He did not 'waive' or

[127] 19 Yale L. J. 221 (239); Bolton Mines Co. v. Stokes, (1895) 82 Md. 50, 33 Atl. 491, 31 L. R. A. 789.

[128] "Does anybody know what waiver is? I do not Some years ago I commenced a book upon waiver, wrote several hundred pages, and then observed that what I had done was to put all the waiver cases I had come across into four other departments of the law. I resolved to go no further with my book on waiver until I had found a specimen of the supposed genus. I have never yet seen one, and cannot imagine what it will be like if it ever be discovered. . . . If it has a religious aspect, I bow respectfully and cease my demands for definition; but if it be really bilateral, I believe that every supposed sample can be put in one of four well known and perfectly respectable categories: Release, Contract, Estoppel or Election." 12 Col. L. R. 619 (Ewart). See Dawson v. Shillock, (1882) 29 Minn. 189, 12 N. W. 526.

relinquish the other. He never had it. He had a choice, and he did not waive that. He exercised it."[120]

This discussion points out the penal operation of the rule. It is not invoked for the protection of the defendant against an unjustifiable injury as an estoppel is. It is not the result of an intentional abandonment, like a waiver. On the contrary, it imposes a special limitation on the plaintiff by restricting his means of redress for an admitted wrong, and allows the defendant a gratuitous advantage in case of its infraction. It inferentially operates in terrorem by imposing a duty on the plaintiff to choose his remedy well through requiring him to choose it irrevocably.

Its real basis is the notion of inconsistency between certain writs. B "waives" the tort by declaring in assumpsit only in this loose sense: that he has alternative actions and therefore by accepting one he discards the others.

"It is customary to say, that where goods are tortiously taken and sold the owner may 'waive' the tort and sustain an action in assumpsit for money had and received; but nobody would think of saying that the owner might 'waive' his action in assumpsit and bring an action in trespass.[120] The owner has a right to elect; he makes his election; he gives up—he 'waives' nothing."[121]

Thus the rule that the elector's choice must be irrevocable does not follow so simply as has been supposed: it results from the additional fact that the law says that the interpretation of the facts in each case is on an inconsistent theory. For in form by suing in assumpsit plaintiff asserts that property is no longer in himself but has passed to the defendant by a sale, and that he is suing for the purchase price. And the fiction of a sale is expanded into a reality of substance, so that the case appears to be one for the application of the general principle of election. In other words, the law stamps the remedial alternatives with the consequences of an affirmance or disaffirmance of a sale. Therefore, after suing in assumpsit and failing to recover, the plaintiff cannot resort to an action in trover according to this mysterious dogma of "inconsistency"—a description of the prohibition the law has laid upon him against being able to try his hand at various plays.[122]

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[120]Ewart, Waiver 138.

[120]But the court said just this in Smith v. Baker, (1873) L. R. 8 C. P. 350.

[121]Ewart, Waiver 7-8.

[122]Peters v. Bain, (1890) 133 U. S. 670, 10 S. C. R. 364, 33 L. Ed. 696.

In the most recent case before the Court of Appeal in England,[123] the statements of the judges as to the basis of the doctrine were hardly more critical. Although the case was really one of ratification, it was treated by Scrutton L. J. as an election of remedies. He said apologetically:

"It is not easy to see why this act of the owners should enure to benefit of the agents, who were not parties to the action for goods sold and delivered, and who have in noway altered their position in consequence of any election involved in bringing that action, but the principle is well established."

To support the profundity of the rule he referred to the well-known couplet:

"Thoughts too deep for tears subdue the court
When I assumpsit bring, and god-like waive a tort."[124]

Bankes introduced his argument by saying: "This is an attempt to blow hot and cold as Lord Esher used to say, or to approbate and reprobate in the language of others."

Now it must be plain that the plaintiff in "waiving" a conversion never in fact regards the transaction as a sale. It is true that after judgment in trover, by the early law,[125] and after judgment and satisfaction at the present time,[126] property in chattels passes to the defendant. But this is merely by operation of law. For one need only consider the possibility of the wrongdoer suing for breach of warranty of the chattels after suit against him in assumpsit and dismissal thereof, to appreciate that the sale is entirely fictitious. Concrete support for this belief may be found in the decision that a sheriff cannot have assumpsit, though he may have trover for conversion of goods in his custody.[127]

Thus we are returned ultimately to the original thesis of the substantive law that one cannot affirm and disaffirm the same transaction, and the doctrine of equity that one cannot claim inconsistent titles, and marvel at its translation into the field of adjective law. This is a classical statement of its significance:

"Allegans contraria non est audiendus. In translation of this maxim of the law Lord Kenyon said that a man shall not be per-

[123] Verschures Creameries Ld., v. Hull & Netherlands S. S. Co. Ld. [1921] 2 K. B. 608.

[124] The Circuiteers, an Eclogue, by J. L. Adolphus, 1 Law Quar. Rev. 232.

[125] Buckland v. Johnson, (1854) 15 C. B. 145.

[126] 28 Am. & Eng. Encyc. of Law 738; Elliott v. Hayden, (1870) 104 Mass. 180; Lovejoy v. Murray, (1865) 3 Wall. (U.S.) 1.

[127] Westervelt v. Jacquelin, (1835) Anth. (N.Y.) 2nd Ed., 320. See Moffat v. Wood, Seld. Notes (N.Y.) 186, that consignor cannot waive tort in case of conversion of chattels by consignee, who is factor for consignor.

mitted to blow hot and cold with reference to the same transaction, or insist at different times on the truth of each of two conflicting allegations, according to the prompting of his private interests. Broom, Leg. Max. 168."[138]

Assuming the validity of the prohibition, the application at common law when the forms of action were carefully distinguished, and special pleading was an art, was clear. There was little possibility of mistaking an action in contract for one in tort. But with the institution of code pleading,[139] and the introduction of one civil action in place of all the common law forms of action, it might have been expected that, along with the general merger of the separate actions the rule would be lost.

"In the case supposed, however, the implied promise is a fiction, and yet to allow it is well enough in a system abounding in fictions. It is not, however, in harmony with one from which fictitious averments are supposed to be excluded. Yet I do not find that the attention of the courts, in the states that have adopted the new system, has been called to the seeming inconsistency. The common law doctrine is still realized; the old phraseology, in the old sense, is still used by the courts; and I shall be compelled to treat the subject, in this regard, according to the view taken under the common law procedure."[140]

From the earlier cases, there has been insinuated into the science of code pleading the notion that the plaintiff must adopt a particular theory of his case, corresponding at least to the general common law distinction between delictual and contractual actions, and between actions at law and suits in equity, and must recover on the theory of action adopted.

How far the courts have thus defeated the purpose of the code makers to abolish the forms of action may be illustrated by a recent case in Minnesota.[141] A sold an ironer, on a contract of conditional sale reserving title, to B who conducted a restaurant. Before final payment A wrongfully removed the ironer for alleged default. B sued to recover damages for the wrongful taking. The trial court directed a verdict for A; B appealed. The court affirmed the direction. It was conceded that trover would

[138]Kaehler v. Dobberpuhl, (1884) 60 Wis. 256 (261), 18 N. W. 841.

[139]In 1851 in Minnesota. See 6 Minn. 425.

[140]Bliss, Code Pleading 2nd Ed. sec. 12. But see Downs v. Finnegan, (1894) 58 Minn. 112, 59 N. W. 981: "The right to waive the tort and to recover as on implied assumpsit is an exception to the principles of code pleading, and there must be no extension beyond what is allowed at common law."

[141]Reinkey v. Findley Electric Co., (1920) 147 Minn., 161, 180 N. W. 236. See, however, Tuder v. Short Line, etc, Co., (1915) 131 Minn. 317, 155 N. W. 200.

lie for the wrongful retaking of the property, and that in such action full money compensation could be recovered for actual damages, including humiliation. But in this case the complaint did not allege damages for a conversion. Therefore the action was to be regarded as one for breach of contract. And in such action no recovery for injured feelings may be had in Minnesota. The net result was that the action was taken as sounding in contract, because the prayer for relief seemed to indicate that plaintiff had adopted such a theory, and therefore an allegation of damages sufficient in any action for a conversion, was rendered wholly nugatory. Two judges dissented; they were willing to break through this vicious circle by simply finding that since there were facts sufficient for a conversion, and facts sufficient to show substantial damages, the mere form of the prayer for relief could not destroy the sufficiency of the complaint.

In a similar case, *Ash v. Childs Dining Hall*,[142] the Massachusetts court reversed a judgment for personal injury suffered from swallowing a tack in a piece of pie served by defendant. The sole ground of reversal was that the complaint after setting out the facts in full, contained a further allegation that "unmindful of its duty the defendant, by its servants and agents, carelessly and negligently permitted said nail to get into such pie." On the trial no evidence of negligence had been offered. Therefore, the court said, this allegation, superfluous to the plaintiff's rights, transformed a perfect contract action for breach of implied warranty into a tort action unsupportable for failure of proof.[143]

And so, although the whole genius of code pleading would seem to oppose the retention of a rule founded in outworn formulae, and granting unearned advantage, rather than a merited protection, we find the curious rule perpetuated in many decisions under the various codes.

In the famous case of *Terry v. Munger*[144] it was held that a judgment obtained in assumpsit against one of two joint tort-feasors, though unsatisfied, would bar suit in trover against the other tort-feasor for a wrongful conversion of the property. In a criticism of the case Professor Keener wrote:

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[142](1918) 231 Mass. 86, 120 N. E. 396.

[143]For criticism see 33 H. L. R. 240, (Scott A. W., Progress of Law, Civil Procedure).

[144](1890) 121 N. Y. 161, 24 N. E. 272, 18 A. S. R. 803, 8 L. R. A. 216.

"Now everyone knows that where one man tortiously takes the goods of another, there is no sale between those parties; and yet the highest court in the state of New York gravely asserts that there was. In other words a fiction to which it is no longer necessary in New York in order to give a remedy is there resorted to to deny a right: and the court says that there is no tort where but for the proof of a tort there could have been no recovery against anyone. The decision will probably never be cited as illustrating the maxim, in fictione juris subsistit equitas."[145]

The supreme court of Tennessee in a similiar case refused to adopt the reasoning accepted in *Terry v. Munger*, and held that the action in contract could not waive the tort, since the tort was the very foundation of the action.[146]

The courts have rather diffidently connected the rule with considerations of public policy. Most attractively stated, its justification thins down to the disciplinary policy that litigants shall not experiment with the remedies afforded by the law, bolstered up by the related argument that relaxation of the rule would impose a great and useless burden on the courts by the recklessness of suitors.[147]

Its real motive may more probably be found in the regrettable conception of the early common-law lawyers that a litigation is a sporting game between the parties, and that the favors should go to the most skillful player even though sometimes he may have the less deserving case.[148]

As to the alleged public policy underlying the rule, a critic of the rule, which he thinks is spurious, says:[149]

"If the policy to prevent trifling with justice, forbids a suitor who has two remedies to dismiss a suit for one and resort to the

[145]Keener Quasi-Contracts 212.

[146]Huffman v. Hughlett, (1883) 11 Lea (Tenn.) 549; Kirkman v. Phillips Heirs, (1871) 7 Heisk. (Tenn.) 222. Acc., Cohen v. Goldman, (1878) 43 N. Y. Super. Ct. 436. Cf. Edwards, Trustee v. Schillinger Bros. Co., (1910) 153 Ill. App. 219, (223).

[147]Peters v. Bain, (1890) 133 U. S. 670, 10 S. C. R. 354, 33 L. Ed. 696.

[148]"What Dean Wigmore has called the sporting theory of justice, the idea that judicial administration of justice is a game to be played to the bitter end, no doubt has its roots in Anglo-American character and is closely connected with the individualism of the common law. Yet it was fostered by the frontier attitude towards litigation and it has flourished chiefly in recent times in tribunals such as the Texas Court of Criminal Appeals, where the memory of the frontier is still green." Pound, The Spirit of the Common Law, 127. "Something of this spirit, which is the spirit of the strict law, may be recognized today in such doctrines as contributory negligence and assumption of risk and the exaggerations of contentious procedure which treats litigation as a game." Ibid, 146.

[149]Hine, Election of Remedies, a Criticism, 26 H. L. R. 707 (711).

other, notwithstanding the fact that no action has been taken by other persons in reliance on the suit first commenced, the same public policy should require a suitor who has one remedy, and who commences an action therefor, to prosecute that action to a conclusion or be forever barred; yet the law permits one to dismiss an action without prejudice and recommence a similar action.

"Furthermore the rule as to election of remedies does not apply unless the plaintiff actually has two inconsistent remedies;[150] but if we assume the principle underlying the rule to be that the time of the courts shall not be taken up with different suits against the same defendant based on the same state of facts, the plaintiff should be required in all cases to elect at his peril between inconsistent theories. It cannot be denied that a defendant suffers more by being compelled to defend successive suits prosecuted to final judgment by a plaintiff who in fact has but one available remedy, than he does by being sued twice by a plaintiff who had two available remedies but who abandoned one suit immediately after its commencement. More time of the courts, also, is wasted by the first suitor than by the second."

Conclusion. We have found that the rule of election of remedies has always been confined to two infrequent instances, and that fortunately the Minnesota supreme court is not committed by express decision to its acceptance. It is true that the court has often said, in the identical language of Coke,[151] that a person who has a choice of remedies may elect his remedy. This, however, goes no further than to allow a litigant, whose cause of action is enforceable through several remedies, whether cumulative or alternative, whether given by the common law or by statute, or by both, to adopt whichever remedy he wishes.[152] It in no way implies that after choice of one, the others are not also available Such an implication depends always on the deeper assumption that they proceed "from opposite and irreconcilable claims of right,' which we have seen applies properly only to the substantive law.

[150]Clark v. Heath, (1906) 101 Me. 530, 64 Atl. 913; Barnsdal v. Waltemeyer, (1905) 142 Fed. 415.

[151]Co. Lit. 145a, cited in 3 Comyns' Digest, Title Election.

[152]Bitzer v. Bobo, (1888) 39 Minn. 18, 38 N. W. 609. That the court cannot elect for the plaintiff against his wishes, see Cisewski v. Cisewski, (1915) 129 Minn. 284, 152 N. W. 642. Plaintiff sued to recover the trust res in its substituted form, but the trial court denied such relief and gave only a money judgment secured by lien. On appeal reversed. "It would seem fairly clear that plaintiff had the absolute right to choose his own remedy and that having elected to claim the property in its substituted form, the court was without power to deny him his relief and compel him to take a remedy that he did not elect. We know of no authority or principle that gives the court the right of election between remedies that belongs to a party especially when there has been a plain election by the party."

The court is not bound to such an assumption. The court in *Gregory v. Cale*,[123] was merely repeating the unimpeachable language of Coke. Defendant appealed from an order of execution authorizing levy for plaintiff on specified real estate, which had been exempt from bankruptcy proceedings under the state Homestead Law, but was still liable for debts contracted prior to the passage of the Homestead Law. The court said:

"The creditor has an election of remedies in situations like that here presented—that is, where property [which] is exempt from general debts, but liable for particular obligations, for instance, the purchase price, work, labor, and material furnished in its construction and repair; and he may proceed (1) in equity, setting forth in his complaint all the facts, and demand a lien upon the particular property; (2) he may proceed by attachment; or (3) by an ordinary action for the recovery of money. The same result follows either remedy, namely, the appropriation of the property charged with the payment of the debt. And it would seem in this state, where all forms and distinctions between law and equity are abolished, to be immaterial which method is pursued."

This right of choice was expressly recognized in case of conversion. In *Downs v. Finnegan*,[124] the defendant was allowed to "waive the tort" and present a claim in contract, in order to come within the counterclaim statute. Plaintiff had removed stone quarried on defendant's land, and had sold or used it beneficially. The court said:

"That in cases where property has been severed from real estate by a wrongdoer, carried from the freehold, and converted to his own use, the rightful owner may sue and recover its value as on implied contract, is thoroughly established, although it may not be in harmony with the principles of the reformed system of pleading. . . . It being established that an injured party may [so] elect between the two forms of remedial proceedings—may sue in tort for the wrong done him, or in assumpsit as upon an implied contract,—it follows that by waiving the tort the demand may be counterclaimed against the plaintiff's cause of action arising on another contract. . . ."

There is not even a dictum as to the rule of election. Of course, there are numerous dicta in other cases as to its conclusive effect. But the foregoing case is the only one in the reported decisions that even raised a genuine problem of so-called "inconsistent remedies" for the application of the rule. In fact,

[123] (1911) 115 Minn. 508, 133 N. W. 75.
[124] (1894) 58 Minn. 112, 59 N. W. 981.

by their inapplicability to the situations at hand, these dicta disclose that the most lamentable influence of the rule lies not in the failure of relief in the few genuine cases of election of remedies, but in the general confusion of the problem of substantive election. Instead of finding the solution for problems of affirmance and disaffirmance of contracts, ratification and repudiation, etc., in sound, basic principles of law, the courts have been far too ready to snatch at ill considered maxims, hallowed only by the obscurity of their origin, and spin the most profound implications out of them. Judges are few, who in ascertaining the rights of defrauded parties in transactions do not gravely begin with a sounding statement of the rule of election of remedies, and attempt to use it as the basis for judgment. The glory of destroying the rule would reside not in the fact that the infrequent suitor who pursues his cotenant for taking an excessive share of the profits might have more perfect justice, but in the fact that the law would be purged by the exorcism of the mediaeval spirit of formalism from which the rule of election of remedies springs. A clean analysis and differentiation of the types of election would allow an independent and rational decision as to the necessity and consequences of each. It would dissipate the naive assumption that "The same effect that follows the adoption of one of several remedies, to wit, exclusion from resort to the other, follows the adoption of an alternative provision in a contract, or the acceptance of a benefit under a will or other instrument of donation."[135] It would confine to its proper and just sphere the now all too ubiquitous dogma that:

"The decision made
Can never be recalled. The gods implore not,
Plead not, solicit not; they only offer
Choice and occasion, which once being passed
Return no more."[136]

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[135] 7 Encyc. Pl. & Pr. 361.

[136] Longfellow, Masque of Pandora, Tower of Prometheus on Mount Caucasus.

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MORTGAGES—MORTGAGEE IN POSSESSION—ACQUIRING TITLE BY ADVERSE POSSESSION.—A recent case in South Carolina held, under a vigorous dissent, that a mortgagor was not barred by adverse possession from redeeming his land twenty years after he had surrendered possession to the mortgagee in payment of the debt.[1] The decision is of interest in that it calls attention to the rights and liabilities of a mortgagee in possession.

A mortgagee in possession is generally defined as one who has possession under his mortgage lawfully and with the consent, express or implied, of the mortgagor.[2] Thus the mortgagee may

[1]Frady v. Ivester, (S.C. 1921) 110 S. E. 135.
[2]19 R. C. L. 327; 2 Jones, Mortgages, 7th Ed., sec. 702.

enter into possession under an agreement to collect the rents and profits to apply on the mortgage debt as an additional security for the debt.[3] And a mortgagee or purchaser entering by virtue of a defective foreclosure sale is considered a mortgagee in possession.[4] Some courts hold that the possession need not be taken with the consent of the mortgagor, if it is peaceably and legally taken.[5] A mortgagee in possession cannot be ejected until the debt is paid.[6] He is accountable for the fair rental value of the property determined on its condition at the time he entered, but he can apply the rents and profits in payment of the mortgage debt.[7] He can not make unnecessary improvements on the land except at his own risk, since he can not demand payment for them upon redemption.[8]

After a mortgagee has been in possession for a length of time sufficient to bar ordinary rights, the question arises whether the right of redemption is barred, giving the mortgagee an absolute title. Where the mortgagee enters under an agreement with the mortgagor, i. e., where the possession is permissive and in recognition of the right of redemption, the statute of limitations

[3]Longfellow v. Fisher, (1897) 69 Minn. 307, 72 N. W. 118; Catlin v. Murray, (1905) 37 Wash. 164, 79 Pac. 605.

[4]Russell v. H. C. Akeley Lumber Co., (1891) 45 Minn. 376, 48 N. W. 3; Haggart v. Wilczinski, (1906) 143 Fed. 22, 26, 74 C. C. A. 176. One who takes possession under a conveyance from a purchaser at a void foreclosure sale is a mortgagee in possession, Kaylor v. Kelsey, (1912) 91 Neb. 404, 136 N. W. 54, 40 L. R. A. (N.S.) 839 and note. New York, however, does not allow a third person who has entered as purchaser under a void foreclosure sale the rights of a mortgagee in possession, Shriver v. Shriver, (1881) 86 N. Y. 575, 581. And Michigan permits the mortgagor to eject the mortgagee who is in possession by virtue of a void foreclosure, Bowen v. Brogan, (1899) 119 Mich. 218, 77 N. W. 942, 75 A. S. R. 387.

[5]Jaggar v. Plunkett, (1910) 81 Kan. 565, 106 Pac. 280; Investment Securities Co. v. Adams, (1905) 37 Wash. 211, 216, 79 Pac. 625. Backus v. Burke, (1895) 63 Minn. 272, 277, 65 N. W. 459, holds that a purchaser entering under void foreclosure proceedings is a mortgagee in possession regardless of the consent of the mortgagor. This is squarely opposed to the view expressed in the earlier case of Rogers v. Benton, (1888) 39 Minn. 39, 44, 38 N. W. 765, 12 A. S. R. 613, to the effect that the consent of the mortgagor, express or implied, is the essence of "a mortgagee in possession."

[6]Stouffer v. Harlan, (1903) 68 Kan 135, 146, 74 Pac. 610, 64 L. R. A. 320, 104 A. S. R. 396; 2 Jones, Mortgages, 7th Ed., sec. 674; see also Becker v. McCrea, (1908) 193 N. Y. 423, 428, 86 N. E. 463, 23 L. R. A. (N.S.) 754 and note

[7]Anderson v. Minnesota Loan & Trust Co., (1897) 68 Minn. 491, 71 N. W. 665; Grannis v. Hitchcock, (1912) 118 Minn. 462, 137 N. W. 186; Bowen v. Boughner, (1920) 189 Ky. 107, 113, 224 S. W. 653; 2 Jones, Mortgages, 7th Ed., sec 1114.

[8]Bowen v. Boughner, (1920) 189 Ky. 107, 224 S. W. 653; 2 Jones, Mortgages, 7th Ed., sec. 1127.

will not begin to run until the mortgagee disavows the right of redemption by some act giving notice of his adverse claim to the mortgagor.[9] It is assumed that there can be no adverse holding so long as the mortgage relation continues,[10] but a strict application of this rule leaves the mortgagee in this disadvantageous position. He can not sell the land, since he cannot give an indefeasible title, nor make permanent improvements, rendering it profitable for the mortgagor to redeem, yet in many cases his right to foreclose is barred by the statutory period and if he declares an adverse intent he becomes a mere trespasser, liable to an action of ejectment.[11] California circumvents this difficulty by allowing the mortgagee in possession a prescriptive title in five years after his right to foreclose is barred.[12] Other jurisdictions hold that no affirmative showing of an adverse intent is necessary, that mere possession by the mortgagee for twenty years without an accounting or active admission of the mortgage relation is sufficient to cut off the right of redemption.[13] Another view is based on the theory that the rights of the mortgagor and mortgagee are reciprocal, with the result that the right to redeem is barred when the statute cuts off the right to foreclose.[14]

A different situation is presented where the mortgagee takes possession under a void foreclosure sale. Here, according to the view of the Minnesota court, the mortgagee's possession is adverse from the beginning and his entry starts the statute of limitations running in his favor.[15] Since the mortgagee is entitled to

[9]Becker v. McCrea, (1908) 193 N. Y. 423, 429, 86 N. E. 463, 23 L. R. A. (N S.) 754; Blessett v. Turcotte, (1912) 23 N. D. 417, 425, 136 N. W. 945; Frady v. Ivester, (S.C. 1921) 110 S. E. 135; West v. Banking Co. et al., (1914) 33 S. D. 465, 485, 146 N. W. 598; 2 Jones, Mortgages, 7th Ed., sec. 1152.

[10]2 Jones, Mortgages, 7th Ed., sec. 1152; Catlin v. Murray, (1905) 37 Wash. 164, 79 Pac. 605.

[11]Backus v. Burke, (1895) 63 Minn. 272, 279, 65 N. W. 459; Cory v. Santa Ynez Land, etc., Co., (1907) 151 Cal. 778, 782, 91 Pac. 647.

[12]Cory v. Santa Ynez Land, etc., Co., (1907) 151 Cal. 778, 783, 91 Pac. 647. The mortgagee can bring an action in equity to compel redemption if he desires, Jaggar v. Plunkett, (1910) 81 Kan. 565, 106 Pac. 280.

[13]Batchelder v. Bickford, (1918) 117 Me. 468, 104 Atl. 819; see also Dixon v. Hayes, (1911) 171 Ala. 498, 55 So. 164.

[14]Haskell v. Bailey, (1853) 22 Conn. 569, 573; Adams v. Holden, (1900) 111 Ia. 54, 60, 82 N. W. 468; Brown v. Berry, (1918) 89 N. J. Eq. 230, 108 Atl. 51; 2 Jones, Mortgages, 7th Ed., sec. 1146. See Bradley v. Norris, (1895) 63 Minn. 156, 165, 65 N. W. 357.

[15]Backus v. Burke, (1895) 63 Minn. 272, 279, 65 N. W. 459; Nash v. Land Co., (1906) 15 N. D. 566, 574, 108 N. W. 792. Rigney v. De Graw, (1900) 100 Fed. 213, cited in 2 Jones, Mortgages, 7th Ed., sec. 1152 as authority for the contrary view was reversed on appeal in Stout v. Rigney, (1901) 107 Fed. 545, 549, 46 C. C. A. 459.

possession, the consent of the mortgagor is unimportant and is nothing more than acquiescence in the adverse holding. It should be noted, however, that one who enters under a void foreclosure but before receiving a deed acquires the status of a mortgagee in possession only by virtue of the consent of the mortgagor. Accordingly the statute does not begin to run until the mortgagee disavows the mortgage relation by some act evidencing an adverse intent. This distinction between entry under a void foreclosure sale before and after receiving a deed is adverted to by the South Dakota court in an opinion[16] which holds that a mortgagee entering adversely under a deed at a void foreclosure is given the rights of a mortgagee in possession only through an equitable fiction created to afford equitable relief. The opinion commends the early Minnesota rule of *Rogers v. Benton* that to be a mortgagee in possession in fact the mortgagee must enter with the consent of the mortgagor.

VENDOR AND PURCHASER—CONTRACT TO SELL REAL ESTATE —RISK OF LOSS PENDING CONVEYANCE.—Suppose that in March, A contracts to sell and B contracts to buy a piece of realty, conveyance to be made in May, and suppose further that in April the buildings are destroyed. Who bears the loss?[1]

1. In England[2] and in most jurisdictions in the United States[3] the loss is placed on the vendee,[4] on the theory that by

[16]West v. Banking Co., (1914) 33 S. D. 465, 486, 487, 146 N. W. 598. See note, 23 L. R. A. (N.S.) 754, 757.

[1]It is obvious that loss caused by the negligence of either party must be borne by that party. Lynch v. Wright, (1899) 94 Fed 703, by the vendor; Styles v. Blume, (1895) 12 Misc. 421, 33 N. Y. S. 620, by the vendee; 39 Cyc. 1643.

[2]Poole v. Adams, (1864) 33 L. J. Ch. 639, 10 L. T. (N.S.) 287, 12 W. R. 683; Rayner v. Preston, (1881) 44 L. T. (N.S.) 787, 29 W. R. 547. The early English rule seems to have been that the vendor bore the risk. See dictum in Stent v. Bailis, (1724) 2 P. Wms. 217, 220. The present rule was first laid down in Paine v. Meller, (1801) 6 Ves. Jr. 349. Here the premises burned after the vendee had accepted the title, but before a deed had been executed. The court held that since the vendee was in equity the owner, he should bear the loss. It should be noted, however, that in England, contrary to the custom in the United States, the vendee prepared the deed and presented it to the vendor for execution. For this reason, if the vendee actually accepted the title, it can well be argued that loss occurring before the execution of the deed should fall upon him. The rule of Paine v. Meller, as it is broadly stated, would therefore seem unwarranted by the particular facts of the case. For a discussion of the misinterpretation of the case, see 23 Yale L. J. 266-270.

[3]Woodward v. McCollum and State Bank, (1907) 16 N. D. 42, 49, 111 N. W. 623; Bautz v. Kuhworth, (1869) 1 Mont. 133, 25 Am. Rep. 737; Sewell v. Underhill, (1910) 197 N. Y. 168, 90 N. E. 430, 27 L. R. A. (N.S.)

virtue of the equitable doctrine of specific performance he is in effect the owner.[5] It is submitted, however, that this line of reasoning is not conclusive. To say that the vendee bears the loss because he is in equity the owner merely begs the question, for it assumes the point in issue, i. e., is the vendee the owner? By well settled rules the vendee is the owner only in case the contract is enforceable against him. Thus the courts accepting the majority rule properly hold that the vendee does not bear the loss if at the time of the destruction the vendor had not good title to convey.[6] But if a condition is implied in this connection, why is there not also an implied condition that the subject matter of the contract shall be in existence when the time for performance arrives? If the vendee's liability is a consequence of the contract, his liability should attach only to the extent of the vendor's compliance therewith.[7] A promise to convey a house and lot is no more fulfilled by conveying the lot without the house than by conveying nothing at all. In either case there is a failure of consideration, and if total failure is a total defense, partial failure should be at least a partial defense. A contract to buy land, without anything further, does not, properly speaking, render the vendee the "owner" in equity. This statement is not inconsistent with a recognition of the fact that under certain conditions equity will recognize in the vendee vested rights. But these rights differ from those of an owner to the same extent and degree as the right to future ownership differs from present ownership.[8] The two are fundamentally unlike in fact and in legal effect, but the distinction generally overlooked in the argument on behalf of the

233 and note, 18 Ann. Cas. 795, 134 A. S. R. 863; Fouts v. Foudray, (1912) 31 Okla 221, 120 Pac. 960, 38 L. R. A. (N.S.) 251, 30 Ann. Cas. 301 and note; O'Brien v. Paulsen, (Ia. 1922) 186 N. W. 440; 27 R. C. L. 556; 39 Cyc 1641. Note that where the subject matter of the sale is mixed realty and personalty, the vendor must bear the loss. Clinton v. Hope Ins. Co., (1871) 45 N. Y. 454, 466.

[4]The term "vendee" is used throughout in the sense of a vendee under an executory contract for the sale of realty.

[5]For a compilation of rules illustrating a vendee's equitable ownership, see 1 Col. L. Rev. 1. For adverse comment as to the application of these rules to the question of the risk of loss, see 2 Williston, Contracts, sec. 936.

[6]2 Williston, Contracts, sec. 932.

[7]The early English cases in accord with the majority rule might be justified on the grounds that they were decided at a time when mutual promises were considered independent. If this be true, then since a party to a contract today cannot sue without alleging full performance on his part, the reason for the English rule has ceased, and the rule itself should cease. 2 Williston, Contracts, sec. 933.

[8]2 Williston, Contracts, sec. 929.

majority rule that the vendee having the benefits of ownership should also bear the burdens.[9] These so-called "benefits of ownership" exclude the right of possession,[10] and, furthermore, in the absence of recording acts, are entirely destroyed by the vendor's fradulent sale to a bona fide purchaser.[11] It would seem that ownership which gives neither present possession nor guarantees it for the future, but which all the while carries with it the risk of loss is not the kind of ownership the ordinary vendee looks forward to. It has sometimes been suggested that the majority rule is justifiable on the theory that the vendor in possession is in effect a mortgagee, holding his legal title for security purposes only. But this rule does violence to the intent of the parties, and moreover the legal rights and liabilities of a vendor in possession are essentially different from those of a mortgagee.[12]

II. A few jurisdictions hold that the vendor must bear the risk until the actual conveyance of the premises.[13] This rule is the same as that applied to sales of personalty,[14] and, while ordinarily correct, it is questionable in that it arbitrarily fixes the burden of loss, like the majority rule, without regard to the circumstances of each case.[15] It can hardly be denied that the situation might be such that before the actual conveyance of the premises the loss should properly fall on the vendee.

III. To remedy the unavoidable evils arising from the application of either of the preceding extreme rules, a third rule, ably

[9]The objection to this theory is that there are practically no chance improvements analogous to chance destruction. 2 Williston, Contracts, sec. 941, p. 1789. But even so, some jurisdictions inconsistently charge the vendee with the costs of improvements made by the vendor under compulsion of law. King v. Ruckman, (1873) 24 N. J. Eq. 556, 566.

[10]Cartin v. Hammond, (1890) 10 Mont. 1, 24 Pac. 627.

[11]27 R. C. L. 562.

[12]This is shown by the following rules: an agreement between a mortgagor and a mortgagee declaring that the mortgaged property will be forfeited in case of nonpayment will not be enforced, see Peugh v. Davis, (1877) 96 U. S 332, 24 L. Ed. 775; whereas an agreement between vendor and vendee that time is of the essence will generally be enforced, 2 Williston, Contracts, sec. 937. Furthermore, unlike a mortgagor, a vendee is not entitled to possession or to the rents and profits. Iowa Ry. Land Co. v. Boyle, (1912) 154 Ia. 249, 134 N. W. 590, 38 L. R. A. (N.S.) 420. See further, Kirby v. Harrison et al., (1853) 2 Ohio St. 327, 334, 59 Am. Dec 677; 2 Williston, Contracts, sec. 937.

[13]Wells v. Calnan, (1871) 107 Mass. 514, 9 Am. Rep. 65; Powell v. Dayton, etc., R. Co., (1885) 12 Ore. 488, 8 Pac. 544; 27 R. C. L. 557.

[14]Thompson v Gould, (1838) 20 Pick. (Mass.) 134, 139; 35 Cyc. 343.

[15]It is true that many of the cases placing the loss on the vendor are actions at law, as distinguished from suits in equity; yet in jurisdictions where equitable pleadings are allowable at law, the decisions on this point, whether made by a court of equity or law, should be the same. 2 Williston, Contracts, sec. 934.

championed by Professor Williston, chooses the middle ground and puts the loss upon the party in possession.[16] Thus, a vendee in possession bears the risk, not however because he is the "owner" in equity, but because he is in effect a mortgagor, the relation between the parties being the same as though the vendor had actually given a deed and taken a mortgage back. In this situation the objection to the mortgage theory propounded under the majority rule is removed, for, by the transfer of possession, the parties show an intent that the vendor should hold his legal title merely for security,[17] and the vendee, so long as he respects the vendor's security title, has all the so-called "benefits of ownership."

All things considered the last rule would seem the best of the three. It is therefore regrettable that in a recent case,[18] where the question arose for the first time, the court, unhampered by precedents of its own, nevertheless followed the English rule, and put the loss on the vendee not in possession.

RECENT CASES

ACTIONS—LOCAL OR TRANSITORY—COURTS—JURISDICTION—NEGLIGENCE—RIGHT TO SUE IN A FOREIGN JURISDICTION FOR INJURY TO REAL ESTATE.—The defendant through negligence caused the destruction, by fire, of valuable timber on property owned by the plaintiff. The property is in the state of Washington, but the suit for damages was instituted in Idaho. *Held*, that only courts of the jurisdiction wherein the land is situated can entertain actions for trespass to realty. *Taylor v. Sommers Bros. Match Co.*, (Idaho, 1922) 204 Pac. 472.

The instant case is in accord with the great weight of authority, which holds that an action for trespass to realty is local, not transitory, and therefore cannot be brought in a foreign jurisdiction. 2 Cooley, Torts, 3rd Ed., 901; notes, 26 L. R. A. (N.S.) 933, 44 L. R. A. (N.S.) 267, 268,

[16]Williston, The Risk of Loss, 9 Harvard L. Rev. 106; 2 Williston, Contracts, sec. 940. And see Good v. Jarrard, (1912) 93 S. C. 229, 239, 76 S. E. 698, 43 L. R. A. (N. S.) 383 and note; dissenting opinion in McGinley v. Forrest, (Neb. 1921) 186 N. W. 74.

[17]In criticism of this statement, it has been said: "It is submitted that if the court of equity is justified in treating the title as if it had passed in a case where the parties have manifested an intention that the title be retained simply as security, then the same result should be reached when that court, in the absence of any indication of the intention of the parties to the contract has, because of the rights conferred upon the vendee, treated the vendor as holding the property simply as security." Keener, The Burden of Loss, 1 Col. L. Rev. 1, 5. The fallacy of this argument lies in the fact that it assumes that the rights conferred on the vendee, possession or no possession, warrant equity's calling the vendor's title merely one of security.

[18]McGinley v. Forrest, (Neb. 1921) 186 N. W. 74.

But Rice, C. J., dissenting, is convinced of the logic and desirability of the minority view, whose almost sole exponent is the Minnesota court, per Mitchell, J., in *Little v. Chicago, etc., R. Co.,* (1896) 65 Minn. 48, 67 N. W. 846, 33 L. R. A. 423, 60 A. S. R. 421, although Lord Mansfield and Chief Justice Marshall have made utterances in favor of it. The instant case adopts the test that, if any part of the damage claimed is for injury to the land, the action is local. Lord Mansfield, on the other hand, states that the true distinction between local and transitory actions is between proceedings in rem, in which the effect of the judgment cannot be had unless the thing lies within reach of the court, and proceedings in personam, in which only damages are demanded. *Mostyn v. Fabrigas,* (1774) 1 Cowp. 161, 176, 179, 2 Smith L. C., 2th Ed., 916, 932, 936. For full discussion of the opposing arguments on this question see 5 MINNESOTA LAW REVIEW 63.

BANKS AND BANKING—FEDERAL RESERVE ACT—RIGHT OF NON-MEMBER BANK TO CHARGE FEDERAL RESERVE BANK EXCHANGE ON REMITTANCES.—The defendant Federal Reserve Bank demanded that the plaintiff, a non-member state bank, remit without charging exchange on all checks drawn on plaintiff bank which, in daily clearance, were transmitted through the mail by defendant to plaintiff for payment. The plaintiff refused to remit unless permitted to deduct for exchange. To compel remittance at par, the defendant forwarded all checks restrictively endorsed, "for collection only and remittance in full without deduction for exchange." The plaintiff bank refused to pay same under the terms imposed and returned the checks to the defendant, who advised its correspondents, in effect, that the checks were dishonored. In a suit to restrain the defendant from indulging in coercive practices injurious to the plaintiff's business, *Held,* that the Federal Reserve Bank, having no authority to compel a non-member bank to remit without charging exchange, be temporarily enjoined from attempting to coerce such bank to remit at par. *Brookings State Bank v. Federal Reserve Bank of San Francisco,* (D. C., Ore. 1921) 277 Fed. 430.

This decision is in accord with the recent case of *American Bank and Trust Co. v. Federal Reserve Bank of Atlanta,* (U. S. 1921) 41 S. C. R. 499, where the Federal Reserve Bank had adopted the practice of accumulating large amounts of checks drawn on the plaintiff banks and then demanding payment in cash over the counter for the purpose of forcing such banks to join the federal reserve system or accept the alternative of closing their doors for lack of cash to meet checks presented in such unusual amounts. Notwithstanding the right of a holder of a check to demand payment thereof in cash, the rule was here laid down that a permanent injunction will issue against the defendant where its ulterior purpose is to coerce the plaintiffs to join the federal reserve system, or failing in that, effect their destruction. While the obvious purpose of section 13 of the *Federal Reserve Act* (1913), 38 Stat. 251, as amended in 1917, 40 Stat. 232, 234, was to create a uniform system of par exchange, the clause: "No such [exchange] charges shall be made against the Federal Reserve

Banks", has been construed as not directed against the state banks. 31 Op. Atty. Gen. 245, 248-249. And that the statute does not sanction the exercising of coercive measures upon non-member banks created and operating under the laws of the states to forego exchange charges is held by the two cases cited herein. The theory under which non-member banks can justify the charging of such exchange probably rests on the notion that they are, in effect, selling a draft to the Federal Reserve Bank just as they sell any customer a draft over the counter, and have the right to charge for the expense of so doing, and that they are also performing the service of aiding the Federal Reserve Bank in consummating the final step of clearance. These reasons are superficial at best, for, in fact, it is the Federal Reserve Bank that is performing the real service in this transaction by acting as a conduit for the non-member bank. While, undoubtedly, a non-member bank has the legal right to charge this exchange, the exercising of this right appears to be nothing more than an arbitrary means of exacting revenue.

BANKS AND BANKING—FEDERAL RESERVE BANK—BILLS AND NOTES—RECEIVERSHIP—PRIMARY LIABILITY OF MEMBER BANK ON INDORSEMENT OF REDISCOUNTED PAPER.—The Federal Reserve Bank of Minneapolis brought an action against an insolvent bank on paper rediscounted and indorsed by it to the Reserve Bank. The action was brought on paper not yet matured. *Held*, that, under the Federal Reserve Act (38 Stat. 251) and the rules and regulations made pursuant thereto, the liability of a member bank on the indorsement is primary, absolute, and direct, so that the action was properly brought. *Federal Reserve Bank of Minneapolis v. First Nat. Bank of Eureka*, (1921) 277 Fed. 300.

The instant case is apparently one of first impression in construing the Federal Reserve Act on this point. 38 Stat. 251, 263; U. S. Comp. Stat. 1918, sec. 9796 (2). The court finds that the intent of the act is to protect the Reserve Bank in all respects, and for this reason construes the clause of the act which reads that the indorsement of a member bank "shall be deemed a waiver of demand, notice, and protest as to its own indorsement, exclusively," to mean that the obligation of the indorsing bank shall be primary, direct, and absolute, and not contingent upon the default of the maker at maturity. The insolvency of the member bank having matured all of its absolute obligations, the Reserve Bank could sue and obtain a vested interest in the distributable assets, without waiting for the maturity of the paper. Unless the decision of the court is based on rules and regulations of the board of directors of the Federal Reserve Bank which are not set forth in the opinion, the result seems to rest on no very substantial basis. If such rules are in force, the question still remains whether the board of directors had authority to make them under the act, 38 Stat. 255, U. S. Comp. Stat. 1918, sec. 9788 (4), which empowers them to prescribe "by-laws not inconsistent with law." Unless the decision can be sustained under the Reserve Act, it seems contrary to the formerly prevailing bankruptcy law applicable to negotiable paper. *Ex parte Howard Nat. Bank*, (1876) 12 Fed. Cas. 653, holding that an in-

dorser's liability is no basis for claim in bankruptcy until the maker is insolvent. In the cited case, however, there was no such waiver as in the instant case, which may or may not have the sweeping effect attributed to it by the court. The result is an exception in favor of Federal Reserve Banks. The decision probably accomplishes the intent of the act in this, that it makes such rediscounted paper a mutual debt capable of set-off in favor of the Reserve Bank against the insolvent member bank's credits with the Reserve Bank. See Mutual Credits and Mutual Debts, 5 Words and Phrases, 1st series, 4648-4649. The instant case, however, seems to go further. In substance, it makes the indorsing bank a co-maker, not merely subject to set-off, but in case of insolvency independently liable upon its indorsement before the maturity of the paper, in an original action by the Reserve Bank.

CARRIERS—DISCRIMINATION IN RATES—DAMAGES.—The plaintiff sought to recover actual damages incurred because of a discrimination in rates by the defendant's favoring a competitor. *Held*, that the measure of damages was the difference between the lawful rate paid by the plaintiff and the rate established by the Public Service Commission on the basis of what the favored shipper paid. *Tacoma Eastern R. Co. v. Public Serv. Comm. of Wash.*, (Wash. 1921) 202 Pac. 1.

The measure of damages recoverable for an unjust discrimination against a shipper is generally dependent upon the wording of the statute, but where there is no statute, or no provision is made for damages, a conflict arises. 10 C. J. 504. G. S. Minn. 1913, sec. 4334, forbids discrimination and provides a penalty therefor but gives no civil remedy to the shipper. This, however, does not preclude the shipper's common law remedy, and the recovery in Minnesota has been fixed as the difference between the rate paid and that accepted from the most favored shipper, even though the rate paid by the plaintiff is the established rate. *Sullivan v. Minneapolis, etc., R. Co.*, (1913) 121 Minn. 488, 142 N. W. 3, 45 L. R. A. (N. S.) 612. The United States Supreme Court has held, on the contrary, that the damages are not to be measured as a matter of law by the difference between the discriminatory rate and the regular tariff; that there can be no recovery at all in the absence of actual proof of damages; and that the mere existence of a rebate has no tendency to show that any actual damage has been suffered. *Pennsylvania R. Co. v. International Coal Min. Co.*, (1913) 230 U. S. 184, 203, 33 S. C. R. 893, 57 L. Ed. 1446. But an award of damages by the Interstate Commerce Commission corresponding exactly to the amount of the rebate has been upheld on the ground that it was adequately proved as actual damage. *Meeker v. Lehigh Valley R. Co.*, (1914) 236 U. S. 412, 35 S. C. R. 328, 59 L. Ed. 657, Ann. Cas. 1916B 691. The reason for the federal rule, as stated in the *Pennsylvania R. R. case*, is that arbitrarily to measure damages by rebates would create a legalized and endless chain of departures from the filed tariffs. The Minnesota court, however, in *Seaman v. Minneapolis, etc., R. Co.*, (1914) 127 Minn. 180, 149 N. W. 134, refused to believe that the statutory penalties imposed on carriers

for violations of the rebating statutes, so strongly relied on as a preventive in the *Pennsylvania R. case,* would prove a "panacea for rebating evils" or "a terror to evildoers" and adhered to its former view, with the modification that the Minnesota rule should apply only to actual business competitors, and that where shipments are, to an extent not precisely ascertainable, interstate commerce, the federal rule should apply. In view of the tendency to restrict the field of intrastate commerce, as indicated by the recent important decisions of the Supreme Court of the United States, *Railroad Comm. of Wis. v. Chicago, etc., R. Co.,* (1922) 42 S. C. R. 232; *State of New York v. The United States,* (1922) 42 S. C. R. 239, the scope of operation of the Minnesota rule now seems to be rather limited.

COMMERCE—POWER OF INTERSTATE COMMERCE COMMISSION OVER INTRASTATE COMMERCE—POWER TO FIX INTRASTATE RATES.—Pursuant to an amendment to the Interstate Commerce Act, 41 Stat. 484, giving the Interstate Commerce Commission greater power to deal with rate discriminations and to secure to railroads a fair return upon their investments, "in order to provide the people of the United States with adequate transportation," the Commission ordered all intrastate passenger rates in Wisconsin to be raised to the level of the interstate rates, viz., 3.6 cents a mile, without prejudice, however, to the right of the state authorities or other parties in interest to apply to the commission for a modification of any specified intrastate rate if the latter did not discriminate against interstate rates. Plaintiff railroad requested an interlocutory injunction against the state authorities to prevent them from penalizing the railroad for complying with the order of the Interstate Commerce Commission. *Held,* affirming the order of the district court granting the injunction, that under the above cited statute the power of the commission is no longer confined to rate discriminations as to persons and localities, but that it may directly prescribe intrastate rates if the rates fixed by the state commissions discriminate against interstate and foreign commerce. *Railroad Commission of Wisconsin v. Chicago, etc., R. Co.,* (1922) 42 S. C. R. 232.

In this and the companion case of the *State of New York v. United States,* (1922) 42 S. C. R. 239 (which was a direct proceeding to annul the order of the Interstate Commerce Commission), the greater nationalization of the railroads under the increased power given to the Interstate Commerce Commission in the Transportation Act of 1920 is sustained. The main ground for the decision is to be found in the provision of the act directing the commission to fix such rates as will secure to all railroads a fair return upon the aggregate value of their property. If the railroads are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates will have to be; but an equitable and effective operation of the act requires that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railroad system. Therefore, although the commission has no express power under the statute to prescribe intrastate rates, it has

the power to remove "any . . . unjust discrimination against interstate and foreign commerce" and may end disparity between intrastate and interstate rates which works such unjust discrimination, by directly removing it. "Such orders as to intrastate traffic", says Chief Justice Taft, "are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. . . . Commerce is a unit and does not regard state lines."

COMMERCE—PURCHASE OF GRAIN FOR INTERSTATE SHIPMENT AS PART OF INTERSTATE COMMERCE.—A grain elevator in North Dakota purchased grain from farmers of that state and, in the regular course of business, nearly all of this grain later was shipped out of the state. *Held*, that this course of business rendered the purchase a transaction in interstate commerce, and that a statute of North Dakota providing for the grading of grain so purchased is unconstitutional as imposing a direct burden on interstate commerce. *Lemke v. Farmers' Grain Co. of Embden*, (1922) 42 S. C. R. 244, affirming *Farmers' Grain Co. of Embden v. Langer*, (1921) 273 Fed. 635.

The Supreme Court in the instant case relies chiefly upon the decision in *Dahnke-Walker Milling Co. v. Bondurant*, (1921) 42 S. C. R. 106, 66 L. Ed. 114; 6 MINNESOTA LAW REVIEW 317; a precedent established in the Supreme Court since the instant case was decided in the lower court. Previous to this decision, the Supreme Court has held that interstate commerce in an article does not begin until it is delivered to a carrier for shipment, *Coe v. Errol*, (1886) 116 U. S. 517, 6 S. C. R. 475, 29 L. Ed. 715, but that when once delivered to a carrier, the intention of the shipper as to the ultimate destination of the goods, and not the mere accident of a local or foreign bill of lading determines the interstate character of the shipment. See *Fahey et al., v. Baltimore, etc., R. So.*, (Md. 1921) 114 Atl. 905. The instant case goes further and holds that goods become a part of interstate commerce when purchased in the regular course of business with an intention to ship them out of the state. For a full discussion of intent as determining the interstate character of a shipment, see 6 MINNNESOTA LAW REVIEW 61.

CRIMINAL LAW—PRACTICE AND PROCEDURE—APPELLANT'S ESCAPE OUSTS APPELLATE COURT OF JURISDICTION.—Appellant escaped from jail while his appeal was pending in the appellate court. He was recaptured the following day. *Held*, that the appellate court was ousted of its jurisdiction. *Maugia v. State*, (Tex. Crim. App. 1922) 236 S. W. 740.

It seems to be well settled that an appeal or writ of error will not be heard when the convicted prisoner has escaped from the jurisdiction of the court. 17 C. J. 47-48; 3 Wharton, Criminal Procedure, 10th Ed., sec. 1708. The reasons usually assigned for the rule are that by defying the law the defendant has waived his rights, and that the court could not render an effective judgment. But in many jurisdictions it is within the discretion of the court whether, in case of the prisoner's escape,

the appeal or writ of error will be heard and passed upon, or the hearing postponed. *Smith v. United States*, (1876) 94 U. S. 97, 24 L. Ed. 32; *McGowan v. People*, (1882) 104 Ill. 100, 44 Am. Rep. 87; *State v. Jacobs*, (1890) 107 N. C. 772, 11 S. E. 962, 22 A. S. R. 912, where an appeal was heard while the prisoner was at large. Nor will he be entitled to appear by counsel when he has escaped. *Com. v. Andrews*, (1867) 97 Mass. 543; *People v. Genet*, (1874) 59 N. Y. 80, 17 Am. Rep. 315. In some states the appeal or writ of error is summarily dismissed upon motion of the prosecuting attorney if it appears that the appellant has escaped. *Kansas v. Scott*, (1905) 70 Kan. 692, 79 Pac. 126, 3 Ann. Cas. 511, and note; *Tyler v. State*, (1910) 3 Okl. Crim. App. 179, 104 Pac. 919, 26 L. R. A. (N.S.) 921, and note. But other courts pursue what is probably the better practice, by entering an order that the appeal will be dismissed after a specified number of days unless the fugitive surrenders and submits himself to the jurisdiction of the court within that time; by this method he is not summarily deprived of the opportunity of having the legality of his conviction tested by an appellate court. *Gentry v. State*, (1893) 91 Ga. 669, 675, 17 S. E. 956, 36 Am. Rep. 32; *Smith v. United States*, (1876) 94 U. S. 97, 24 L. Ed. 32; *People v. Redinger*, (1880) 55 Cal. 290. Dismissing an appeal or writ of error under such circumstances is not a denial of due process of law. *Allen v. Georgia*, (1896) 166 U. S. 138, 17 S. C. R. 525, 41 L. Ed. 949. When the appellant has been recaptured, the reasons for refusing to hear his appeal seem no longer to apply, and, contrary to the holding of the instant case, his appeal has been considered. *State v. Murrell*, (1890) 33 S. C. 83, 11 S. E. 682; *State v. Jacobs*, (1890) 107 N. C. 772, 11 S. E. 962, 22 A. S. R. 912. The holding of the instant case, that the escape for one day, though followed by recapture, completely ousted the court of jurisdiction, even without a motion to dismiss, is contrary to the common-law authorities and seems to be the result of a Texas statute providing that upon escape of the appellant the appellate court loses jurisdiction and becomes revested with it only by a *voluntary* return to custody. See *Lunsford v. State*, (1881) 10 Tex. Crim. App. 118; *Ex parte Wood*, (1885) 19 Tex. Crim. App. 46.

DIVORCE—PARENT AND CHILD—CRIMINAL LAW—LIABILITY OF FATHER FOR SUPPORT OF CHILD IN ABSENCE OF AMENDMENT OF ORIGINAL DIVORCE DECREE IN WHICH AMPLE PROVISION IS MADE FOR CHILD.—A divorce decree awarded the custody of the child to the mother and provided for the transfer of $11,000 by the father to the mother for the support of the mother and child. The property after transfer having apparently been dissipated by the mother, leaving the child in necessitous circumstances, the mother, without first asking that the former decree be amended to the extent of a further allowance, caused the arrest and prosecution of the father for failure to support the child. *Held*, that neither payment of the sum decreed by the court in the original proceedings nor the wife's right to have the decree amended so as to provide for the support of the child constituted a bar to a prosecution by the state for failure to support. *State v. Miller*, (Kan. 1921) 202 Pac. 602

A father remains liable for the support of his children during their minority (1) where the divorce decree makes no provision for their custody or support, *Gilley v. Gilley*, (1887) 79 Me. 292, 9 Atl. 623, 1 A. S. R. 307; (2) where the divorce decree awards the custody of the children to the mother, but makes no provision for their support, *Spencer v. Spencer*, (1906) 97 Minn. 56, 105 N. W. 483, 2 L. R. A. (N S.) 851, 114 A. S. R. 695; *Evans v. Evans*, (1911) 125 Tenn. 112, 140 S. W. 745, Ann. Cas. 1913C 294; *Alvey v. Hartwig*, (1907) 106 Md. 254, 67 Atl. 11 L. R. A. (N.S.) 678, 14 Ann. Cas. 250; (3) where the decree awards the custody to the mother, and provides for the support of the children, but the provision becomes insufficient; in such case, upon opening up the former decree, further compensation may be allowed. *Graham v. Graham*, (1906) 38 Colo. 453, 88 Pac. 852, 8 L. R. A. (N.S) 1270, 12 Ann. Cas. 137; (4) where the decree grants neither a divorce nor a separation, but, it appearing that the parents are living apart, the court awards the custody of the children to the mother. *Jacobs v. Jacobs*, (1917) 136 Minn. 190, 161 N. W. 525, L. R. A. 1917D 971. But some courts refuse to accept these views on the theory that service by the children and support by the father are reciprocal duties, and that a loss of the one operates as a release from liability for the other, *Husband v. Husband*, (1879) 67 Ind. 583, 33 Am. Rep. 107; 2 Bishop, Marriage and Divorce, 5th Ed., sec. 557, or upon the presumption that the decree passed upon all the questions involved and is conclusive as to the obligations of the father. *Rich v. Rich*, (1895) 34 N. Y. S. 854. In California, a statute imposes the burden of supporting the children upon the parent entitled to their custody. Cal. Civ. Code, 1906, sec. 196; *People v. Hartman*, (1913) 23 Cal. App. 72, 137 Pac. 611.

The argument was made in the principal case that the decree fixing the award for the support of the wife and child measured the husband's liability, and relieved him from the duty of further support except by change of the decree. As between the parties that may be the rule, but the right of the child to the care and support of his father cannot be affected by a judgment to which he was not a party. *Graham v. Graham*, (1906) 38 Colo. 453, 88 Pac. 852, 8 L. R. A. (N.S.) 1270, 12 Ann. Cas. 137; *Sipple v. Laclede Gaslight Co.*, (1907) 125 Mo. App. 81, 102 S. W. 608. Nor does it seem that a divorce decree can absolve the father from the absolute duty which he owes to the state to support his offspring. *State v. Coolidge*, (1913) 72 Wash. 42, 129 Pac. 1088 (apparently contra to the instant case in holding that resort for relief must first be had to the court rendering the original decree); see G. S. Minn. 1913, 8667, amended by Minn. Laws 1917, c. 213. It is suggested that the obviously harsh result of the principal case, i. e., that the father, having generously provided for the child according to the divorce decree, is yet held criminally liable for the support of the child, might be obviated by a provision in similar cases for the payment of the money intended for the support of the child to a disinterested trustee for the benefit of the child.

EMINENT DOMAIN—MUNICIPAL CORPORATIONS—POWER OF CITY TO LEASE TO PRIVATE PERSONS LAND TAKEN IN FEE—CONSTITUTIONALITY OF STATUTE AUTHORIZING.—Plaintiff taxpayers sought to enjoin members of the In-

dustrial Commission of the city of Cambridge from leasing or attempting to lease certain property acquired for park purposes to private persons to be used for a dock or wharf, on the ground that the statute authorizing the lease was unconstitutional. *Held*, that when property is taken in fee by a municipality for a public use, there is no right of reversion in the original owner, and that a statute authorizing such lease to private persons is valid, but the income must be devoted solely to public uses. *Wright v. Walcott*, (Mass. 1921) 131 N. E. 291.

The rule is well settled that where an absolute fee is taken by eminent domain, there is no right of reversion in the original owner in case the use for which the property was taken is later abandoned. *Brooklyn Park Comrs. v. Armstrong*, (1871) 45 N. Y. 234, 6 Am. Rep. 70; *Reichling v. Covington Lbr. Co.*, (1910) 57 Wash. 225, 106 Pac. 777, 135 A. S. R. 976. Some courts hold that where a city or a railroad company has acquired land in fee, there is nevertheless a right of reversion in the original owner; but in all of these cases the fee held was not a fee simple absolute, but a qualified or terminable fee. *Gebhardt v. Reeves*, (1874) 75 Ill. 301; *City of Logansport v. Shirk*, (1883) 88 Ind. 563. In some cases the courts have construed the statutes authorizing railroads to take land in fee as authorizing nothing more than an easement. *Kellogg v. Malin*, (1872) 50 Mo. 496, 11 Am. Rep. 426. Where the statute declared that the land taken for streets shall be vested in the city "absolutely, in fee simple," the Minnesota court held that the city acquired only a qualified terminable fee *Fairchild v. St. Paul* (1891) 46 Minn. 540, 49 N. W. 325; see also, *Chambers v. Gt. Northern Power Co.*, (1907) 100 Minn. 214, 110 N. W. 1128. Subject to constitutional limitations, the extent of the interest which may be taken lies wholly within the discretion of the legislature. 20 C. J. 1221; *Fairchild v. St. Paul*, (1891) 46 Minn. 540, 49 N. W. 325; *Scott v. St. Paul, etc., R. Co.*, (1875) 21 Minn. 322. The legislature may authorize the taking of a fee or any lesser interest. 20 C. J. 1222. Where the estate or interest taken is not specified in the statute, only such estate or interest may be taken as is necessary to answer the purpose in view. *Smith v. Minneapolis*, (1910) 112 Minn. 446, 128 N. W. 819. Where the fee has been taken, the legislature alone has power to authorize the sale of the land. *Brooklyn v. Copeland*, (1887) 106 N. Y. 496, 13 N. E. 451. In the instant case the court argued that since the legislature might lawfully have authorized a sale of the land, it might lawfully permit the conveyance of a lesser estate, viz., a leasehold. But without legislative authority, a city, which holds a park in trust for the public in its governmental capacity, cannot lease it to private persons, and is not estopped to deny that such a lease is ultra vires. *Nebraska City v. Nebraska, etc., Fair Ass'n.*, (1922) 186 N. W. 374.

EVIDENCE—CRIMINAL LAW—DIFFERENCE BETWEEN ADMISSIONS AND CONFESSIONS.—The defendant was being tried on a charge of murder. The state offered in evidence, without showing that they had been voluntarily spoken, certain statements which had been made to the police by the defendant, said statements being evasive explanations of how deceased met his death. *Held*, that such statements are admissible without having

been shown to have been voluntarily spoken, "because they were 'admissions' and confessions'." *People v. Clark,* (*Cal.* 1921) 203 Pac. 781.

The case is clearly correct in differentiating between an admission and a confession. The latter is a voluntary acknowledgment of actual guilt, while the former is merely the statement or declaration of facts criminating in their nature and tending to prove guilt. *Michaels v. People,* (1904) 208 Ill. 603, 607, 70 N. E. 747; Wigmore, Evidence, secs. 816, 821, 1050. If, however, the case holds, as it seems to, that admissions can always be introduced in evidence, without showing that they were voluntary, "because they are merely admissions and not confessions," it is not well supported by authority. There are a few cases so holding, but the weight of authority is to the effect that no incriminating admission can be introduced into evidence if not voluntarily made. *People v. Reilly,* (1918) 169 N. Y. S.,[119] affirmed in 224 N. Y. 90, 120 N. E. 113; 2 Chamberlayne, Evidence, sec. 1294; *Mill v. State,* (1908) 3 Ga. App. 414, 60 S. E. 4. It should be observed in this connection, however, that an admission which otherwise has been proved to be true can be introduced in evidence whether voluntarily made or not. Thus, where the defendant had told the police that he had hidden the watch of a murdered man in a certain place, and the watch was subsequently found there, his statement was admissible, however made. *State v. Willis,* (1898) 71 Conn. 293, 41 Atl. 820.

INSURANCE—POLICY FOR BENEFIT OF PUBLIC—RIGHT OF BENEFICIARY TO RECOVER WHERE INSURER HAS DEFENCE AGAINST INSURED.—A New Jersey statute required jitney bus owners to carry insurance "for the benefit of every person suffering . . . injury." The injured plaintiff, having recovered judgment against the jitney owner, sued the defendant insurance company on the policy. Defendant sets up the defence that one of the terms of the policy was violated by the insured. *Held,* that since the insurance was for the benefit of the traveling public, the equities and defenses of the insurer against insured will not affect the rights of the beneficiary. *Boyle v. Manufacturers Liab. Ins. Co.,* (N.J. Law, 1921) 115 Atl. 383.

The decision is based on what is deemed to be the intent of the New Jersey statute, as gathered from dicta in *Gillard v. Mfrs., etc., Ins. Co.,* (1918) 92 N. J. L. 141, 104 Atl. 707, affirmed in 93 N. J. L. 215, 107 Atl. 446, which dicta seem to be the only arguments in accord. It is settled that by statute, e. g., N. Y. St. 1892, c. 690, p. 55; N. J. St. 1916, c. 136, p. 283, or with the consent of the insurer, *Vancouver Nat. Bank v. Law, etc., Ins. Co.,* (1907) 153 Fed. 440, the rights arising from insurance may be made payable to a third party. But this beneficiary or appointee has no greater rights than the insured would have had under the policy. *Brecht v. Law, etc., Ins. Co.,* (1908) 160 Fed. 399, 87 C. C. A. 351, 18 L. R. A. (N. S.) 197; see 14 R. C. L. 1037. And thus the insurer may set up as against this beneficiary all the defences that would be available against the insured. *German Ins. Co. v. Hayden,* (1895) 21 Colo. 127, 40 Pac. 453, 52 A. S. R. 206; Richards, Insurance, 3rd Ed., p. 395. This is true in actions on life insurance policies, *Clarke v. Equitable, etc., Soc.,* (1902)

118 Fed. 374, 55 C. C. A. 200, and policies made payable to a mortgagee, *Franklin Sav. Inst. v. Central, etc., Ins. Co.*, (1876) 119 Mass. 240, unless a clause is inserted to the contrary. *Magoun v. Fireman's, etc., Ins. Co.*, (1902) 86 Minn. 486, 91 N. W. 5, 91 A. S. R. 370. As to whether there may not be a difference between the rights of a beneficiary of an insurance contract for the benefit of the public, e. g., jitney liability insurance, and the rights of a beneficiary of a private insurance contract, see *Milliron v. Dittman*, (1919) 180 Cal. 443, 181 Pac. 779. But the ground of the difference, unless it be stronger considerations of public policy, is difficult to find. If the insurer is to be held liable to the beneficiary, regardless of any defence against the insured, it would seem wiser to fix that independent liability by statute rather than by judicial decision.

LANDLORD AND TENANT—ANIMALS—OWNERSHIP OF INCREASE OF LEASED ANIMALS.—The plaintiff leased a farm and livestock thereon for a period of five years. The lease contained no provision respecting the increase of the stock. The stock included a mare known by both parties to be in foal at the time of the execution of the lease. The colt, born shortly after the lessee went into possession of the farm, was sold by the lessee to the defendant. Almost three years later, plaintiff lessor instituted this action to recover the colt. *Held*, that where the lease contains no provisions to the contrary, the lessee is the owner of the increase in animals hired for a limited period, and that therefore the defendant acquired good title. *Cama v. Mastracchio*, (Conn. 1922) 116 Atl. 235.

The general rule in cases involving the ownership of the increase of animals upon the transfer of the mother is that title to the offspring follows the title to the mother. *Dunning v. Crofutt*, (1908) 81 Conn. 101, 70 Atl. 630, 14 Ann. Cas. 337, and note; 2 Black. Comm. 390; 3 C. J. 22; 1 R. C. L. 1070; see notes, 17 L. R. A. 81; Ann. Cas. 1916A 564, 584. This general rule is subject to the exception, as illustrated by the instant case, that if a person hires animals for a limited period, the increase during the term belongs to the lessee, who is regarded as the temporary owner. 2 Kent, Comm. 361; 24 Cyc. 1066; 3 C. J. 22, n. 2; *Brandt & Co. v. Verhagen*, (1915) 161 Wis. 3, 152 N. W. 448. But this exception to the general rule does not apply where the lease contains stipulations to the contrary. *Putnam v. Wyley*, (1811) 8 Johns. (N.Y.) 432, 5 Am. Dec. 346 (dictum). Nor does it apply in favor of a gratuitous bailee. *Orser v. Storms*, (1826) 9 Cow. (N.Y.) 687, 18 Am. Dec. 543. While the instant case is technically in accord with the authorities, a different result might have been anticipated from the fact that the mare was in foal, to the knowledge of both parties at the time of the transfer.

MORTGAGES—MORTGAGEE IN POSSESSION—ACQUIRING TITLE BY ADVERSE POSSESSION.—Certain mortgagors being unable to pay the mortgage debts surrendered the land to the mortgagee who went into possession. She claimed the land as her own and paid the taxes for more than twenty years. The mortgagors have made no claim of any kind during this time. Now they sue for the recovery of the tract of land and for an accounting

of the rents and profits. *Held*, that the mortgagee in possession can not hold adversely to the rights of the mortgagor until he either surrenders possession or gives notice of an adverse possession. *Frady v. Ivester*, (S. C., 1921) 110 S. E. 135.

For a discussion of the principles involved, see NOTES, p. 510.

PARENT AND CHILD—LIABILITY OF INSANE PARENT FOR NECESSARIES FURNISHED INFANT.—An infant whose father was dead and mother insane was supplied with necessaries by the plaintiff who now seeks an allowance therefor from the mother's estate. *Held*, that without an express or implied promise to pay, the plaintiff cannot recover. *In re Ganey et al.*, (N.J. Ch. 1922) 116 Atl. 19.

The instant case follows the rigid rule of the English common law, which will not imply a promise to pay from the parents' moral obligation to support the child, *Shelton v. Springett*, (1851) 11 C. B. 452, 73 E. C. L. 452, and is supported by some decisions in this country. *Kelly v. Davis*, (1870) 49 N. H. 187, 6 Am. Rep. 499; *Holt v. Baldwin*, (1870) 46 Mo. 265, 2 Am. Rep. 515; note, 4 Ann. Cas. 1188. But the weight of American authority holds that a parent's duty to support his offspring is a legal obligation. See *Spencer v. Spencer*, (1906) 97 Minn. 56, 105 N. W. 483, 2 L. R. A. (N.S.) 851, 7 Ann. Cas. 901, 114 A. S. R. 695; 20 R. C. L. 622. In consequence, the tendency of the modern decisions is toward the rule that where parents neglect to provide a minor child with necessaries, they are liable on an implied contract to a third party who provides the same although without their consent. *Lufkin v. Harvey*, (1915) 131 Minn. 238, 154 N. W. 1097, L. R. A. 1916B 1111, Ann. Cas. 1917D 583; *Porter v. Powell*, (1890) 79 Ia. 151, 44 N. W. 295; *Van Valkinburg v. Watson*, (1816) 13 Johns. (N.Y.) 480; Schouler, Domestic Relations, 5th ed., sec. 236, ff. And in pursuance of the legal obligation theory it has been held, contrary to the instant case, that the estate of an insane mother is liable for necessities supplied to a minor child. *Ellis v. Hewitt*, (1915) 15 Ga. App. 693, 84 S. E. 184. The instant case differs from this and the cases last above cited in that it refuses to imply a promise from the mere existence of the obligation.

PERSONAL PROPERTY—FINDING LOST GOODS—FINDER OF TREASURE TROVE ENTITLED THERETO.—A workman while digging a cellar on defendant's land, found a jar full of gold pieces. *Held*, that the workman was entitled to it as the finder of treasure trove as against all but the true owner, and that the owner of soil in which treasure trove is found acquires no title thereto. *Vickery v. Hardin*, (Ind., 1922) 133 N. E. 922.

There are two rules which apply to the finding of property the owner of which is not known. First, the finder of lost property is entitled to it as against everyone but the true owner, *Durfee v. Jones*, (1877) 11 R. I. 588, 23 Am. Rep. 528. The reason for this rule is that when a thing is found, the finder is the first owner after the true owner and his title is better than that of any other than the true owner. A second rule is, that the owner of the premises is entitled to property found therein as against all but the

true owner. His title to the land gives him possession of the lost property by virtue of his intent and power to control all in, on, and above the earth. *Barker v. Bates,* (1832) 13 Pick. (Mass.) 255, 23 Am. Dec. 678. An exception to this rule is usually recognized where the property is found on public premises, it in that case going to the finder, because no presumption of the owner's intent arises. *Hamaker v. Blanchard,* (1879) 90 Pa. St. 377, 35 Am. Rep. 664. Other reasons given for the above rule are that inasmuch as the loser may return and claim his property, the owner of the locus in quo is the proper custodian of it, *Hoagland v. Foster Park Highlands Amusement Co.,* (1902) 170 Mo. 335, 70 S. W. 878, 94 A. S. R. 740; and this particularly applies to articles placed and forgotten because the owner is more likely to return. *McAvoy v. Medina,* (1866) 11 Allen (Mass.) 548, 87 Am. Dec. 733. At the common law, treasure trove was defined as being "any money or coin, gold, silver, plate, or bullion found hidden in the earth or other private place, [as distinguished from *upon* it] the owner therof being unknown." 1 Bl. Com. 295. At the earliest common law, the finder was entitled to treasure trove as against all but the true owner. 1 Bl. Com. 295. But by 1276, such treasure belonged to the Crown as against all but the true owner. 4 Edw. 1 Stat. 2 11 (2). In the United States, the rule in regard to treasure trove has been merged with the rule giving lost property to the finder, *Weeks v. Hackett,* (1908) 104 Me. 264, 71 Atl. 858, 19 L. R. A. (N.S.) 1201, 15 Ann. Cas. 1156, 129 A. S. R. 390. Most courts hold that buried chattels which are not treasure trove belong to the owner of the land rather than to the finder. Compare *Danielson v. Roberts,* (1904) 44 Ore. 108, 74 Pac. 913, 65 L. R. A. 526, 102 A. S. R. 627; *Ferguson v. Ray,* (1904) 44 Ore. 557, 77 Pac. 600, 1 L. R. A. (N.S.) 477, 102 A. S. R. 648. But inasmuch as the reason for calling certain things "treasure trove", namely, appropriation by the Crown, does not now exist, there seems no reason why the law pertaining to ordinary buried or hidden chattels should not be applied to treasure trove.

REAL PROPERTY—AFTER ACQUIRED TITLE—ESTOPPEL—COVENANT OF TITLE IN FEE TO "PREMISES."—Certain persons executed a mortgage of all their right, title, and interest in and to a piece of property, covenanting that they held "the said premises by title in fee simple." Subsequently they acquired title in fee. *Held,* that the after-acquired title to the property did not inure to the mortgagee. *Cooper v. Robinson,* (Ill. 1922) 134 N. E. 119.

Cases involving after-acquired title can be divided into four classes. (1) It is well settled that a warranty deed purporting to convey the land itself, and not merely the grantor's right, title, and interest therein, will estop him to assert a subsequently acquired title. *Rigg v. Cook,* (1847) 4 Gilm. (Ill.) 336, 46 Am. Dec. 462; *Blake v. O'Neal,* (1908) 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. (N.S.) 1147. (2) A quitclaim deed, however, conveying only the grantor's right, title, and interest and not affirming, either expressly or impliedly, the existence of any estate or interest in the grantor, will not estop him from asserting an after-acquired title or interest. *Olmstead v. Tracy,* (1906) 145 Mich. 299, 108 N. W. 649,

116 A. S. R. 299. (3) If, however, the grantor in a deed of quitclaim or of bargain and sale sets forth on the face of the instrument that he is seized or possessed of a particular estate in the premises, which estate the deed purports to convey, he is estopped later to assert an after-acquired title. *Van Rensselaer v. Kearney*, (1850) 11 How. (U.S.) 297, 324, 13 L. Ed. 703; *Bradley Estate Co. v. Bradley*, (1906) 97 Minn. 161, 106 N. W. 110; *Hagenstick v. Castor*, (1898) 53 Neb. 495, 73 N. W. 932. (4) Another class of cases is that in which the grantor by quitclaim conveys all his right, title, and interest in the land, and not the land itself, adding general covenants of warranty of the "premises" without designating the extent or nature of the estate conveyed or warranted. In such a case the warranty is confined to the interest in fact conveyed, does not enlarge the grant, and does not prevent the assertion of an after-acquired title. *Hanrick v. Patrick*, (1886) 119 U. S. 156, 175, 7 S. C. R. 147, 30 L. Ed. 396; *Blanchard v. Brooks*, (1831) 12 Pick. (Mass.) 46, 67; *Bell v. Twilight*, (1853) 26 N. H. 401; Rawle, Covenants, 5th Ed., sec. 250, pp. 370-1. The instant case at first blush seems to fall into the fourth class. But a distinction is to be noted between a general covenant of warranty ("to warrant and forever defend," Rawle, Covenants, 5th Ed., sec. 116) on which the rule of the immediately preceding cases is based, and a covenant of the quantum and extent of the estate, as in the instant case. On this distinction and on the further ground that in the instant case there was an actual recital that the interest was held "in fee simple," within the requirements of the third class above, it appears that the instant case is wrong. See *Hanrick v. Patrick*, above cited, where such a situation as in the third class above was expressly excluded. To decide, as in the instant case, that the grantor intended to say that he held a life estate, or perhaps nothing at all, "in fee simple" is to ignore his intent completely.

SPECIFIC PERFORMANCE—CONTRACTS—LANDLORD AND TENANT—ORAL LEASE WITHIN STATUTE OF FRAUDS—PART PERFORMANCE INSUFFICIENT TO TAKE LEASE OUT OF STATUTE.—The plaintiff obtained from the defendant an oral lease for five years of two storehouses. He entered into possession, paid rent, and purchased a stock of goods in reliance on the five-year lease. At the end of one year the defendant sold the buildings to the co-defendant, who demanded either possession or increased rent. Plaintiff filed a bill for specific performance of the lease. *Held*, one justice dissenting, that an oral lease for more than one year is void under the statute of frauds, and is unenforceable. *Workman v. Copeland*, (S. C. 1921) 108 S. E. 922, 110 S. E. 526.

The dissenting opinion in the instant case undoubtedly represents the weight of authority, namely, that part performance of a contract within the statute of frauds will take it out of the statute and make it enforceable in equity. *Stenson v. Elfmann*, (1910) 26 S. D. 134, 128 N. W. 588; *Brown v. Sutton*, (1888) 129 U. S. 238, 9 S. C. R. 273, 32 L. Ed. 664. This doctrine has been repudiated in but four states: Kentucky, Mississippi, North Carolina, and Tennessee. See 25 R. C. L. 258, note 8; Pomeroy, Eq. Jur., 4th Ed., sec. 2239, et seq. But as to just what constitutes sufficient part

performance, the courts are not in accord. In England it is held that taking possession by a lessee takes the contract out of the statute. *Paine v. Coombs,* (1857) 3 Sm. & G. 499, 3 Jur. N. S. 307, Fry, Spec. Perf., 4th Ed., p. 265. Very few cases have arisen on this point in the United States, but the tendency has been to hold that a mere taking of possession is insufficient, *Pulse v. Hamer,* (1880) 8 Ore. 252; but a few courts have expressly followed the English rule. *Wharton v. Stoutenburgh,* (1882) 35 N. J. Eq. 266. It is generally held, however, that a taking of possession with payment of rent is sufficient. *Wendell v. Stone,* (1886) 39 Hun (N.Y.) 382; *Grant v. Ramsey,* (1857) 7 Oh. St. 158. Taking of possession and making of permanent improvements is equally good. *Bard v. Elston,* (1884) 31 Kan. 274, 1 Pac. 565. But mere payment of rent is insufficient as part performance. *Charlton v. Columbia Real Est. Co.,* (1903) 64 N. J. Eq. 631, 54 Atl. 444. And by the better authority, acts collateral to a lease, or acts performed for third parties, although done in reliance on the contract, are not sufficient as part performance. *Dechenbach v. Rima,* (1904) 45 Ore. 500, 78 Pac. 666. The rule of part performance is based on the principle that the courts will not allow the statute of frauds to be used as an instrument of fraud. *Halligan v. Frey,* (1913) 161 Ia. 185, 141 N. W. 944, 49 L. R. A. (N.S.) 112; 25 R. C. L. 259. But the plaintiff must have placed himself in such a position in reliance upon the contract that to refuse specific performance would work material injury on him. *Wallace v. Scoggins,* (1890) 18 Ore. 502, 21 Pac. 502, 17 A. S. R. 749. G. S. Minn. 1913, sec. 7004 recognizes the doctrine of part performance, and the Minnesota court has shown a tendency to be very liberal in its interpretation in the case of short term leases. *Biddle v. Whitmore,* (1916) 134 Minn. 68, 158 N. W. 808. The majority holding of the instant case abandons the doctrine of part performance on the ground that the possession relied upon applied only for the first year, during which the lease was valid. In disregard of the equitable circumstances, this would be true, and a tenancy at will would be created. *Watkins v. Balch,* (1906) 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N.S.) 852. It is submitted, however, that possession, payment of rent under the contract, and a material alteration of the lessee's circumstances should bring the case within the well recognized rules of equity.

TENANCY IN COMMON—TAX TITLE—PURCHASE BY COTENANT OF TAX CERTIFICATE ISSUED PRIOR TO COTENANCY—SOURCE OF FIDUCIARY RELATIONSHIP IN COTENANCY.—Late in 1910 the defendant conveyed an undivided half of his interest in certain real estate to one Phillips who subsequently acquired a tax title to the whole property by virtue of his purchase of a tax certificate issued for the unpaid taxes for 1910. Phillips conveyed the whole property by warranty deed to the plaintiff, who now brings an action to quiet title. *Held,* affirming the judgment for the plaintiff, that a cotenant may acquire his fellow's interest by purchase of a tax title based on unpaid taxes due prior to the commencement of the cotenancy. *Stafford v. National Gran. Co.,* (Colo. 1922) 203 Pac. 673.

The general rule is that one cotenant may not acquire by tax title purchase the interest of his fellow. See 1 MINNESOTA LAW REVIEW 466; 5

MINNESOTA LAW REVIEW 134; 7 R. C. L. 863, et seq.; 38 Cyc. 40, et seq. But there is a conflict of authority as to whether a cotenant may acquire a tax title, in derogation of his fellow's interest, based on taxes levied before the cotenancy began. 7 R. C. L. 865. Some courts hold in accord with the instant case that under such circumstances the cotenant, not having been obligated to pay the taxes at the time they fell due, acquires good title. *Sands v. Davis,* (1879) 40 Mich. 14; note, 116 A. S. R. 367, 369. But the majority of courts reach a contrary result on the ground that a fiduciary relation exists between cotenants even in such a case. *Hoyt v. Lightbody,* (1906) 98 Minn. 189, 108 N. W. 843, 8 Ann. Cas. 984, 116 A. S. R. 358, and note; see note, 19 L. R. A. (N.S.) 591; *Tice v. Derby,* (1882) 59 Ia. 312, where the tax certificate was bought before, but the tax deed obtained after, the cotenancy began. In the instant case both the certificate for prior taxes and the tax deed were obtained after the commencement of the cotenancy. If the general rule first stated above is based on a broad fiduciary relationship between cotenants, it would seem that, regardless of when an outstanding interest arises, a cotenant buying it in cannot assert it contrary to his trust. On the other hand, if the general rule is based exclusively on the obligation of each cotenant to pay all the taxes, then it would seem that an interest purchased by a cotenant in respect of which he never had any duty to pay taxes, can be asserted by him against his cotenants. According to the former view the fiduciary obligation arises by virtue of the cotenancy itself and affects all its relations; according to the latter view the fiduciary relation arises solely out of the joint obligation to pay taxes. It is submitted that the latter is too narrow a basis for the fiduciary relationship.

TORTS—INFANTS—RIGHT OF ACTION FOR PRENATAL INJURIES.—The plaintiff while yet unborn, was injured by reason of his mother during pregnancy falling through a coal hole left unguarded through the defendant's negligence. *Held,* Cardozo, J., dissenting, that the plaintiff could not recover. *Drobner v. Peters,* (N.Y. 1921) 133 N. E. 567.

This case reverses the decision of the appellate division of the supreme court, 184 N. Y. S. 337, and brings New York into line with the practically unanimous holding that the infant cannot recover for prenatal injuries. See 5 MINNESOTA LAW REVIEW 240. The reason given in the instant case is that the child is a part of the mother and has no separate existence. "The injuries when inflicted, were injuries to the mother." As to the infant, no liability was incurred, since no duty was violated. It seems unfortunate that the innocent infant should bear "unrequited the consequences of another's fault." But to allow a recovery would, perhaps, give rise to a great deal of vexatious litigation.

VENDOR AND PURCHASER—CONTRACT TO SELL REAL ESTATE—RISK OF LOSS PENDING FINAL CONVEYANCE.—Plaintiff, in seeking specific specific performance, asked for an abatement of the purchase price to the extent of the value of a building on the premises that had been destroyed after the date of the contract. *Held,* one justice dissenting, that the

plaintiff be granted specific performance with an abatement of the purchase price to the extent, not of the value of the building, but of the insurance money collected by the vendor. *McGinley v. Forrest,* (Neb. 1921) 186 N. W. 74.

For a discussion of principles involved, see, NOTES, p. 513.

WILLS—LAPSED LEGACIES AND DEVISES—DEVOLUTION OF LAPSED AND INEFFECTUAL DEVISES UNDER RESIDUARY CLAUSE.—A testator, after creating certain legacies and devises, disposed of the rest and residue of his property, real and personal, in a residuary clause. Some of the legacies and devises were void under the rule against perpetuities. In an action to have the will construed, ***held,*** that lapsed legacies pass to the residuary legatees, but that lapsed devises of realty descend to the heirs of the testator as intestate property and do not pass under the general residuary clause. *Bridgeport Trust Co. v. Parker et al.,* (Conn. 1922) 116 Atl. 182.

At the common law a lapsed legacy passed under the residuary clause. *Galloway v. Darby,* (1912) 105 Ark. 558, 151 S. W. 1014, Ann. Cas. 1914 D. 712, and note; Thompson, Wills, sec. 308, p. 275. This is also the modern rule. Thompson, Wills, sec. 308, p. 276; 28 R. C. L. 340, 341; 40 Cyc. 1944, 1945. But at common law a lapsed or otherwise ineffectual devise of realty did not inure to the benefit of the general residuary devisee, but descended to the testator's heirs as intestate property. See notes, Ann. Cas. 1914D 719; 44 L. R. A. (N.S.) 793; also 40 Cyc. 1949. This rule was based on the common-law distinction that while a will disposing of personalty spoke of the day of the testator's death and hence included lapsed and void legacies, a will disposing of realty was deemed to speak only from the date of its execution and did not therefore include after-acquired property or pass to the residuary devisee more property than the testator intended him to have. *Galloway v. Darby,* (1912) 105 Ark. 558, 151 S. W. 1014, Ann. Cas. 1914D 712, and note; note, 44 L. R. A. (N.S.) 782. The modern prevailing rule, however, is contrary to the instant case, and holds that a lapsed or otherwise ineffectual devise of realty passes under the residuary clause unless a clear or apparent intention to the contrary is expressed in the will. 40 Cyc. 1949, 1950; 28 R. C. L. 341, 342; *Lamb v. Lamb,* (1892) 131 N. Y. 227, 30 N. E. 133; *Galloway v. Darby,* (1912) 105 Ark. 558, 151 S. W. 1014, Ann. Cas. 1914D 712, and note; *Marble v. City of Tecumseh,* (1921) 105 Neb. 594, 181 N. W. 528. This result is reached by statute or by abrogation of the common-law doctrine. 40 Cyc. 1950. But where there are several beneficiaries under a residuary clause, and a portion of the residuary gift lapses, the lapsed portion is not absorbed by the remaining residue, but passes as intestate property. *Wright v. Wright,* (1919) 225 N. Y. 329, 123 N. E. 71; Thompson, Wills, sec. 308, p. 275, 276; Page, Wills, sec. 508, p. 595; and see 4 MINNESOTA LAW REVIEW 547.

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THE OUTLOOK FROM THE PRESENT LEGAL STATUS OF EMPLOYERS AND EMPLOYEES IN INDUSTRIAL DISPUTES

By Ernest C. Carman*

THE present legal status of employers and employees in industrial disputes is most understandable through a study of the historical development of this branch of the law which, oddly enough, has always been closely associated with the law relative to monopolies and combinations in restraint of trade and commerce.

In early England monopolies were, by common law, contrary to public policy[1] and illegal unless permitted by special franchise;[2] and the creation of a monopoly was punishable whether achieved by combined action or individual effort.[3]

From the earliest times, it was unlawful and criminal in England for several persons to combine for the purpose of controlling trade or enhancing prices,[4] and all contracts or arrangements in restraint of trade *or labor* were held unenforceable because contrary to public policy.[5]

It is not surprising, therefore, that the first labor unions in England (organized about 1720 A. D.) were held to be criminal

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[1]Case of Monopolies, (1601) 11 Coke 84b; Darcy v. Allen (1601) 11 Coke 84b.

[2]London's Case, (1590) 5 Coke 126; Y. B. 11 Hen. VI, 19; Fitzwalter's Case, (1685) 3 Keb. 242; Fermor v. Brooke, (1590) Cro. Eliz. 203.

[3]4 Bacon Abr. 335a; Hawkins, P. C. c. 80; Rex v. Waddington, (1801) 1 East 143.

[4]Lombard's Case, Lib. Assiz. 276 Pl. 38; Anonymous (1700) 12 Mod. 248; Rex v. Cambridge Journeymen-Taylors, (1721) 8 Mod. 10; 5 and 6 Edw. VI. c. 14.

[5]Y. B. 2 Hen. V. f. 5, pl. 26; Jelliet v. Broad, (1621) Noy 98; Claygate v. Batchelor, (1601) Owen 143; Clerke v. Comer, (1735) Cas. t. Hardw. 53.

conspiracies,[6] not because labor had begun to organize against capital, but because "combinations of this nature, whether on the part of the workmen to increase, *or of the masters to lower,* wages were equally illegal."[7]

And so, at the outset of the contest between employers and employees both got an equal start; combinations of the one to lower or of the other to raise wages were first declared illegal, not to aid or deter the particular disputants in their quarrel, but to protect the public against monopolistic control of labor and the obstruction of trade and commerce. The rights of the public, as the innocent bystander, were recognized by the common law as paramount from the very beginning.[8]

In the combat itself, labor scored first. Statutes were enacted legalizing labor unions in England and declaring that neither employers nor employees should be punished for any agreement relating to wages or hours of labor, but expressly prohibiting endeavors by either employers or employees to affect wages or hours of labor by "force, threats, intimidation, molestation, or obstruction."[9]

During the hundred years that have passed since the enactment of the statute legalizing labor unions in England, the struggle between employer and employee has progressed there much the same as in the United States. But, with admirable consistency, the English courts have adhered to the common law (as respects both employer and employee) except when authorized or required to depart therefrom by acts of parliment.[10] Under such policy proggress in the struggle between employer and employee may have been slower in England than in the United States, but the legal rights of the combatants have been much more clearly defined in

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[6]Rex v. Cambridge Journeymen-Taylors, (1721) 8 Mod. 11; Rex v. Mawbey, (1796) 6 Durn. & East 619; 3 Columbia Law Review 447.

[7]Hilton v. Eckersley, (1856) 6 E. & B. 47, 53, 59, 2 Jur. N. S. 587, 25 L. J. Q. B. 199.

[8]Some authorities have mistakenly denied that the English common law was opposed to labor unions, and have attributed the early decisions against labor unions to very ancient English statutes for the enslavement of labor in the days of serfdom. In support of this view, see Statute of Labourers, 23 Edw. III, ch. 1, and 25 Edw. III, stat. 1; 2 & 3 Edw. VI, ch. 15; 5 Eliz. ch. 4.

[9]St. 5 Geo. IV, c. 95 (June 21, 1824) amended by 6 Geo. IV, c. 129 (July 6, 1825).

[10]Lyons v. Wilkins, (1896) 1 Ch. 811, 65 L. J. Ch. 601, 74 L. T. N. S. 358.

England—probably to the advantage of both parties as well as the public at large.[11]

Prior to the enactment of the first English statute legalizing labor unions, the American courts had approved and followed the English common law doctrine.[12] After the orderly change of the law by statute in England, the courts of the several common-

[11]The Trade Union Act of 1871 (St. 34 & 35 Vict. c. 31, as amended by St. 39 & 40 Vict. c. 22), gave labor unions a definitely lawful status within the limits therein set forth. The Conspiracy and Protection of Property Act of 1875 (38 & 39 Vict. c. 86) expressly legalized an agreement or combination by two or more persons to do or procure to be done any act in comtemplation or furtherance of a trade dispute between employers and workmen which might lawfully be done by one person acting alone; but this act also expressly made it illegal for any person, with a view to compelling another person to do or abstain from doing any lawful act, (a) to use violence or intimidate such other person or his wife or children or injure his property, or (b) persistently follow such other person from place to place, or (c) hide tools or property owned or used by such other person or deprive him or hinder him in the use thereof, or (d) watch or beset the house or other place where such other person resides or works or carries on business or happens to be, or the approach to such house or place, it being provided, however, that attending at or near the house where a person resides, or carries on business, or works, or the approach to such house or place, in order merely to obtain or communicate information, should not be deemed unlawful.

The Judicature Acts authorized the courts to issue interlocutory injunctions to prevent the destruction of a business or industry through violation of the above mentioned statutes pending settlement of trade disputes in or out of court.

Therefore when the case of Lyons v. Wilkins, [1896] 1 Ch. 811, 65 L. J. Ch. 601, 74 L. T. N. S. 358, arose, the Court of Appeal was able to decide quite clearly that striking employees of a leather goods manufacturer were within their rights in combining to strike, in assisting each other in supporting themselves for that purpose and deriving support from other trade unions, and in picketing the employer's place of business for the purpose of peacefully communicating to others (whether seeking employment or not) the information that such strike was in progress; but that such striking employees were acting unlawfully in picketing the employer's place of business for the purpose of accosting employees or persons seeking employment and handing them cards reading: "You are hereby requested to abstain from taking work from Messrs. Lyon & Sons", and in calling out on strike the employees of one Shoenthal (who had no quarrel with their employer) in order to compel Shoenthal to cease and desist from making partly finished articles, pursuant to contract, for Lyon & Sons, one of the parties to the trade dispute.

Contrast the clearness of this decision with the confusion and uncertainty of judge-made law in the United States up to the same date; and with the uncertainty of such late American statutes as the Clayton Act, construed by a divided court in the Duplex Printing Case, (1921) 254 U. S. 443, 65 L. Ed. 176, 41 S. C. R. 172. An element of uncertainty in English law, however, has been injected by the Trades Disputes Act, 6 Edw. VII. c. 47, as interpreted in Conway v. Wade, [1909] A. C. 506, and Larkin v. Long, [1915] A. C. 814 when compared with Hodges v. Webb, [1920] 2 Ch. 70.

[12]People v. Fisher, (1835) 14 Wend. (N.Y.) 9, 28 Am. Dec. 501; People v. Melvin, (1809) 2 Wheeler C. Cas (N.Y.) 262, Yates Sel. Cas. 112; 24 Cyc. 818, Note 10.

wealths in the United States undertook to achieve the same result by judicial legislation under the guise of modernizing the English common law to meet the needs of our changed conditions in this new country.[13] The result has been confusion indescribable—such, indeed, that no lawyer could safely advise as to the legal rights of employers or organized employees in any state if there had been a change in the personnel of its court of last resort since the latest decision on the subject.

Confusion in the law of the several states has increased, not alone from the divergence of opinion among judges, but also from the enactment of legislation both directly and indirectly affecting the combatants.

Much of the legislation affecting employers has been indirect and generally aimed at the correction of abuses by capital in many ways, incidentally including unfair treatment of employees;[14] but nearly all legislation affecting employees or organized labor has been passed for specific purposes directly involving the status of labor.[15]

The struggle between employers and employees in the United States has been formidable only during the past fifty years. For within that time the development of industry has incidentally produced the sweatshop with its long hours, low wages, and unfit environment as the crowning evil (from the viewpoint of labor) of the industrial system; while, to combat the sweat shop, labor

[13]Campare early decisions such as State v. Stewart, (1887) 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; State v. Glidden, (1886) 55 Conn. 46, 8 Atl. 890, 3 A. S. R. 23; State v. Donaldson, (1867) 32 N. J. L. 151, 155, 90 Am. Dec. 649; Carew v. Rutherford, (1870) 106 Mass. 1, 8 Am. Rep. 287. with later decisions such as National Protective Association v. Cumming, (1902) 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 A. S. R. 648; Gray v. Building Trades Council, (1903) 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 A. S. R. 477.

[14]The Sherman Act of July 2, 1890, ch. 647, 26 Stat. L. 209, and the anti-trust acts of many states have been variously interpreted, not only as generally prohibiting trusts, monopolies and agreements in restraint of trade by either employers or employees, but also as prohibiting blacklists of employers (Lawlor v. Loewe, (1915) 235 U. S. 522, 59 L. Ed. 341, 35 S. C. 170) and, presumably, of employees. Other legislation indirectly affecting the rights of employer and employee includes the maintenance of fire escapes, guards for machinery, sanitary equipment, methods of work, and a multitude of other matters having to do with the social and economic side of industry in its relation to the community rather than the direct relations between employers and employees.

[15]The various Trade Union Acts (e. g. 24 Stat. L. 86), anti-injunction acts (e. g. 38 Stat. L. 738; Session Laws Minnesota 1917, ch. 493), anti-blacklisting acts (e. g. G. S. Minn. 1913, sec. 8890), minimum wage acts, acts limiting hours of employment, and many others, bear the unmistakable label of legislation enacted by procurement of organized labor.

unions within the same period have become thoroughly and efficiently organized, and with their constantly increasing and often unreasonably extreme demands have become (from the viewpoint of capital) the greatest menace to industrial development.

Except within the last decade, employers have operated behind closed doors, silently and secretly exerting their power in a multitude of ways to combat legislation or evade laws directed against monopoly, unfair trade competition, undue profits and other evils detrimental to the public at large, with the labor problem merely incidental to the much more general combat between the few who fain would control everything on the one side and all the rest of the people fighting for a livable distribution of wealth on the other.

But organized labor, in the very nature of things, always has been compelled to operate in the open—in fact to advertise itself noisily to gain strength and support; and, while at times this has put employees at a disadvantage, it has in a general way worked for their benefit because public opinion has been thereby enlisted in their support whenever their cause was just.

The weapons of the employers have been the same from time out of mind—the replacement of dissatisfied labor with other workmen content with (or forced by circumstances to accept) the employers' terms and conditions of employment or, in the alternative, the suppression of the business or industry involved in the dispute. In the use of these weapons, employers have been aided by their organizations for production in widely separated areas supplemented (until recently, at least) by an efficient transportation system whereby the economic demand for their products could be satisfied despite local disturbances; and also by the thousand and one other advantages, legitimate and illegitimate, incident to the possession of great wealth and the private control of large properties.

The first weapon used by employees was the simple strike, or combined refusal to work, which has been generally held to be legal in the United States from an early date; the decisions resting upon the absolute constitutional right of the individual to work or not to work at his pleasure and without assigning any reason therefor, supplemented by the American common-law right of such individuals to combine and do together what each may lawfully do separately.[16]

The simple strike, however, was often ineffective; and that explains why the whole history of organized labor in the last fifty years might be written merely by tracing its development and use of other weapons added to the simple strike to fight its battles with the employers.

One of the first additions to the strike for direct redress of grievances was the further refusal of union labor to work in the same place of employment with non-union labor. There followed a wide difference of judicial opinion as to the legality of such concerted action by employees, but finally the view prevailed that since an individual has an absolute right to refuse to work in a particular place because another employee is objectionable to him, a number of individuals may collectively refuse to work in such place for the same reason;[16] hence labor unions may require their

[16]Commonwealth v. Hunt, (1842) 4 Metc. (Mass.) 111, 38 Am. Dec. 346; Randall v. Hazleton, (1866) 12 Allen (Mass.) 412, 414; Vegelahn v. Guntner, (1896) 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 A. S. R. 443, where Justice Holmes, in his dissenting opinion, said: "But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But, in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle. . . . One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way."

The legality of strikes was also declared by Justice Holmes to be based upon the doctrine that free competition is worth more to society than it costs, and that "the policy is not limited to struggles between persons of the same class, competing for the same end. It applies to all conflicts of temporal interests."

This doctrine, however, cuts both ways when considered with reference to the present-day attempts of union labor to destroy the free competition of non-union labor (or "outlaw" labor organizations) with them in the labor market. And this, notwithstanding the declaration of some late statutes that "labor is not a commodity;" for competition in the struggle for life is not confined to an interchange of commodities.

Moreover, the right to act in concert has been frequently declared dependent upon an absence of malice and the presence of justifiable self-interest. In National Protective Ass'n v. Cumming, (1902) 170 N. Y. 315 63 N. E. 369, 58 L. R. A. 135, 88 A. S. R. 648, Chief Justice Parker said: "Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike (that is, to cease working in a body by prearrangement until a grievance is redressed), *provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves.*"

[17]Gray v. Building Trades Council, (1903) 91 Minn. 171, 97 N. W. 663. 63 L. R. A. 753, 103 A. S. R. 477; National Protective Association v.

members not to work where non-union labor is employed. The courts were very reluctant to establish this doctrine; it was rigidly confined, and its legality was made to depend upon the *motives* of the union or combination rather than upon the effect produced. If the object was to force an employer to unionize his business,[18] or coerce workmen to join the union,[19] or induce employees to break an existing contract,[20] or intimidate persons seeking employment,[21] or deprive a non-union man of his opportunity to work,[22] or maliciously injure anyone, then the agreement in combination to quit work for such purposes was an unlawful conspiracy. These limitations upon the right of employees to combine to quit work were of little practical use either to non-union workmen or employers, since proof of the *motives* actuating union labor in any particular contest was very difficult, if not impossible.

The employers, therefore, retaliated by forming organizations among themselves and agreeing not to employ laborers who had gone on strike or left the employment of any member employer, and agreeing further to discharge union employees and to prevent

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Cummings (1902) 170 N. Y. 315 63 N. E. 369, 58 L. R. A. 135, 88 A. S. R. 648 where Justice Parker stated the prevailing view in these words:

"Stated in other words, the propositions quoted recognize the right of one man to refuse to work for another on any ground that he may regard as sufficient, and the employer has no right to demand a reason for it. But there is, I take it, no legal objection to the employee's giving a reason, if he has one, and the fact that the reason given is that he refuses to work with another who is not a member of his organization, whether stated to his employer or not, does not affect his right to stop work; nor does it give a cause of action to the workman to whom he objects because the employer sees fit to discharge the man objected to, rather than lose the services of the objector. *The same rule applies to a body of men who, having organized for purposes deemed beneficial to themselves, refuse to work. . . . The reason may no more be demanded, as of right, of the organization than of an individual.*"

[18]O'Brien v. People (1905) 216 Ill. 354, 75 N. E. 108, 108 A. S. R. 216.

[19]Plant v. Woods, (1899) 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 A. S. R. 330; Berry v. Donovan, (1905) 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N.S.) 899, 108 A. S. R. 499; Erdman v. Mitchell, (1903) 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 A. S. R. 783; Curran v. Galen, (1897) 152 N. Y. 33, 46 N. E. 297; Old Dominion Steamship Co., v. McKenna (1887) 38 Fed. 48, 50, 18 Abb. N. C. (N.Y.) 262, where it was said: "All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members, . . . are pro tanto illegal."

[20]Jersey City Printing Co. v. Cassidy, (1902) 63 N. J. Eq. 759, 53 Atl. 230.

[21]Franklin Union v. People, (1906) 220 Ill. 355, 77 N. E. 176; Everett Waddey Co. v. Richmond Typographical Union, (1906) 105 Va. 188, 53 S. E. 273; United States v. Kane, (1885) 23 Fed. 748.

[22]Lucke v. Clothing Cutters Ass'n, (1893) 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408.

non-union employees from joining any labor union under penalty of discharge. As a means of accomplishing these purposes, the employers circulated "blacklists" of former employees under the ban for striking or joining labor unions.[22]

Employees sought to prevent employers from using such weapon, but the courts held that inasmuch as an employer has an absolute right to employ or to refuse to employ or to discharge from employment any person, for any reason or for no reason at all, it follows that any number of employers may lawfully organize for the same purpose, and may by mutual agreement discharge any employee or refuse to employ any person belonging to a labor union; and as a condition of employment may require any workman to sign a contract agreeing not to leave work because of the employment of non-union workmen in the same industry or place of work; and, further, that such organized employers may keep and circulate (among members of the organization, at least) a list containing the names of former employees who have quit work or have been discharged for any of the reasons above enumerated.[24]

Organized labor then procured the enactment of statutes in many states prohibiting and penalizing the refusal to employ men or the discharge of employees because of their membership in labor unions, and prohibiting the circulation of "blacklists" of discharged workmen;[25] but these statutes have been declared unconstitutional in their main provisions,[26] although some of the provi-

[22]Worthington v. Waring, (1892) 157 Mass. 421, 32 N. E. 744, 20 L. R. A. 342, is one of the leading cases involving employers blacklists of employees, and denying employees the use of the injunction to prevent same.

[24]Boyer v. Western Union Telegraph Co., (1903) 124 Fed. 246; Worthington v. Waring, (1892) 157 Mass. 421, 32 N. E. 744, 20 L. R. A. 342; State v. Employers of Labor, (1918) 102 Neb. 768, 169 N. W. 717, where the court, after discussing the right of employees to combine and cease work in a body, said: "On the other hand, employers may legally agree with each other that they will not adopt the 'closed shop' principle or may counsel or advise with each other for that purpose. They have as much legal right to refuse to employ members of labor unions as such members have to refuse to work in an 'open shop', and the same legal right to adopt a course of conduct in concert. Hitchman Coal & Coke Co. v. Mitchell, (1917) 245 U. S. 229, 62 L. Ed. 260, 38 S. C. R. 65. . . . Martin, Modern Law of Labor Unions, Sec. 270."

[25]Act of June 1, 1898, 30 Stat. L. 424, ch. 370 and G. S. Minn. 1913, Sec. 8890 are typical.

[26]Coppage v. Kansas, (1914) 236 U. S. 1, 59 L. Ed. 441, 35 S. C. A. 240; Adair v. United States, (1908) 208 U. S. 161, 52 L. Ed. 436, 28 S. C. R. 277; State v. Daniels, (1912) 118 Minn. 155, 136 N. W. 584; State v. Julow, (1895) 129 Mo. 163, 31 S. W. 781; People v. Marcus, (1906) 185 N. Y. 257, 77 N. E. 1073; Gillespie v. People, (1900) 188 Ill. 176, 58 N. E. 1007; State v. Krentzberg, (1902) 114 Wis. 530, 90 N. W. 1098.

sions against blacklisting discharged workmen may still be in force.[27] Organized labor has a corresponding right to keep and circulate (among its own members, at least) lists of employers who have discharged union laborers or are otherwise hostile to them.[28] But this limited right of employers and employees to blacklist each other must not be confused with *boycotting,* which is quite another thing.[29]

Organized labor had now established the right in concerted action to quit work together (i. e. strike) not only for the *direct* purpose of forcing an increase in wages or an improvement in working conditions *for the members of the union,* but also for the *indirect* purpose of excluding non-union workmen from participat-

[27]State v. Justus, (1902) 85 Minn. 279, 88 N. W. 759; Dick v. Northern Pacific Ry. Co., (1907) 86 Wash. 211, 150 Pac. 8; Joyce v. Great Northern Ry. Co., (1907) 100 Minn. 225, 110 N. W. 975; Heffernan v. Whittlesey et al., (1914) 126 Minn. 163, 148 N. W. 63, where it was said: "If the evidence sustained the charge of a conspiracy between the company and Whittlesey to make false charges against plaintiff's integrity in order to procure his discharge, resulting in his being 'blacklisted', it is probable that there would be a liability." In State v. Moilen, (1918) 140 Minn. 112, 167 N. W. 345, Chief Justice Brown said in reference to earlier legislation affecting employers and employees: "The so-called blacklisting of employees by employers was prohibited, and the statute was sustained in State v. Justus, (1902) 85 Minn. 279, 88 N. W. 759. . . . A statute prohibiting the malicious interference by combination of employers to prevent a discharged employee from obtaining employment elsewhere, was upheld in Joyce v. Great Northern Ry. Co., (1907) 100 Minn. 225, 110 N. W. 975." See also authorities cited and discussed in Notes 62 L. R. A. 714, 19 L. R. A. (N.S.) 561, 27 L. R. A. (N.S.)966, 48 L. R; A; (N.S.) 893.

These decisions indicate that the right to blacklist will be closely confined to the original combatants, and not extended beyond the reasoning of the cases of State v. Employers of Labor, (1918) 102 Neb. 768, 169 N. W. 717, and Hitchman Co. v. Mitchell, (1917) 245 U. S. 229, 63 L. Ed. 260, 38 S. C. R. 65. Indeed, in these decisions the courts seem to have avoided the term "blacklist", although recognizing the validity of acts amounting to the same thing.

[28]Rogers v. Evarts, (1891) 17 N. Y. S. 264; Sinsheimer v. United Garment Workers, (1894) 77 Hun (N. Y.) 215, 28 N. Y. S. 321, 59 N. Y. St. Rep. 503; Note to Hey v. Wilson, 16 L. R. A. (N.S.) 85, where there is a discussion of many decisions which apparently assumed the right of a labor union to post or list an employer not only as unfit for union laborers to work for, but also as not meriting the patronage of members of the union in the sale of his products—the only doubt expressed having to do with the right to circulate "Unfair Lists," etc. among *third persons,* thereby instituting a boycott. See also Note to Wilcutt v. Driscoll, 23 L. R. A. (N. S.) 1237, and Montgomery Ward v. S. D. Merch. Ass'n, (1907) 150 Fed. 413.

[29]Lawlor v. Loewe, (1915) 235 U. S. 522, 59 L. Ed. 341, 35 S. C. R. 170, shows that the circulation by organized labor of a list of "unfair dealers" among propective customers of such dealers is prohibited by the Sherman Anti-trust Act (26 Stat. L. 209), if it is intended to and does restrain commerce among the states.

ing in the benefits so procured, through being employed in the same place of work with union labor—for such was the undoubted cause of the refusal of union labor to work alongside non-union workmen.

Thus far all was well. Employers might, as they saw fit, either fill their place entirely with union laborers bound together by common ideals and standards, or with non-union workmen entirely unorganized; and employees might elect to work in the one kind of place or the other.

The next step, however, in the progress of union labor was an attempt to prevent employers from hiring non-union workmen to work in places from which union labor, for its own reasons, had withdrawn; and the weapon first adopted by union labor to accomplish such object was picketing the place of employment.

With the advent of picketing another confusing difference of judicial opinion arose. At first the tendency of the courts was to declare all picketing illegal;[30] but this attitude was gradually dissipated and supplanted by the present prevailing view that there is no illegality, at common law, in the act of several persons stationing themselves near a particular place (i. e. the place of former employment of striking workmen) for the purpose of observing and obtaining information or communicating facts concerning such place to persons willing to receive the same, or "peacefully persuading" persons to desist from working therein if such persons are willing to listen to the argument against it.[31] The common law, as so judicially declared, upon the right of picketing was not satisfactory either to employers or to organized labor. The employers denied the legality of the right even in limited form;

[30]Chicago Typothetae v. Franklin Union, (not reported, but affirmed in 220 Ill. 355,) where Judge Smith said: "It is idle to talk of picketing for lawful purposes. Men do not form picket lines for the purpose of conversation and lawful persuasion. . . . In imagination and in theory a peaceable picket line may be possible, but in fact a picket line is never peaceable. It is always a formation of actual warfare and quite inconsistent with everything not related to force and violence. Its use is a form of unlawful coercion."

In Atchison, etc., Ry. Co. v. Gee, (1905) 139 Fed. 582, Judge McPherson said: "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching."

[31]24 Cyc. 835, Notes 76 and 77 and numerous cases there cited. See also Empire Theatre Co. v. Cloke, (1917) 53 Mont. 183, 163 Pac. 107; White Mountain Freezer Co. v. Murphy, (1917) 78 N. H. 398, 101 Atl. 357. Many late decisions in favor of picketing are based upon anti-injunction statutes. See, for example, Truax v. Bisbee Local, (1918) 19 Ariz. 370, 171 Pac. 121.

while organized labor not only contended for the right itself but denied the legality of any limitations whatever upon the exercise of the right. Both sought to establish their contentions by legislation,[32] direct and indirect. Neither succeeded.[33]

Long before the right of picketing had become judicially determined, organized labor had adopted still another weapon some-

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[32]"An Act defining picketing, prohibiting the same, and providing a penalty for the violation thereof"—enacted by the Legislature of the state of Washington and published as Chapter 181 Session Laws of Washington, 1915, may be taken as illustrative of the direct efforts of employers to establish by statute the illegality of picketing.

Organized labor sought indirectly to establish an unlimited right of picketing through statutes such as the Clayton Act of Oct. 15, 1914, (38 Stat. at L. ch. 323; 9 Fed. St. Ann. 2nd Ed. p. 730) prohibiting the issuance of injunctions to prevent any person or persons from "attending at any place where such persons may lawfully be . . . for the purpose of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising or persuading others by peaceful and lawful means so to do;" etc. etc. Similar statutes were enacted in many of the states, typical among which are Chapter 493, Session Laws of Minnesota, 1917, and Paragraph 1464 of the Revised Statutes of Arizona of 1913 (Civil Code).

[33]The Washington Act prohibiting picketing (Laws 1915. Ch. 181) was defeated on referendum in 1916.

The Clayton Act prohibiting injunctions against picketing (38 Stat. at L. 738, ch. 323, sec. 20) was shorn of its supposed favoritism to organized labor by the Supreme Court of the United States in American Steel Foundries v. Tri-City Central Trades Council et. al., (1921) 42 S. C. R. 72, sustaining the right of federal equity courts to issue injunctions against picketing in any way indicating a militant purpose inconsistent with bare peaceable persuasion, or interfering with free ingress to and egress from the employer's premises; and in that particular case prohibiting the employees from maintaining more than one single picket at each point of ingress and egress in the plant there involved—establishing the doctrine that "the purpose should be to prevent the inevitable intimidation of [i. e. caused by] the presence of groups of pickets, but to allow missionaries."

The Arizona statute prohibiting injunctions against picketing (Revised Statutes Arizona 1913, Par. 1464), after being interpreted as absolute in its terms by the supreme court of Arizona (20 Ariz. 70, 176 Pac. 570) was declared unconstitutional by the Supreme Court of the United States in Truax v. Corrigan, (1921) 42 S. C. R. 124, although there was a strong and very able dissenting opinion by Justice Brandeis in which Justices Holmes, Clarke and Pitney concurred. This decision appears to have sounded the death knell of state statutes designed to favor employees as a class immune from general provisions of law applicable to all others under similar circumstances.

The Minnesota statute (Ch. 493 Session Laws of Minnesota (1917) met with the same fate as the Clayton Act in the Wonderland Theatre Case (Campbell v. Motion Picture Machine Operators Union, (Minn. 1922) 186 N. W. 781, 787).

It may safely be said, therefore, that the combatants (employers and employees) are now practically back where they started in their fight to legalize or outlaw picketing by legislation.

what related to picketing—the boycott.[34] The terms "boycott" and "conspiracy" have been loosely used interchangeably in relation to attempts by organized labor to force its will upon employers by concerted but usually indirect action tending to injure or destroy the trade or business of such employers unless the demands made of them should be complied with. There can be no doubt that boycotting was originally illegal at common law;[35] but after early decisions to that effect a wail of protest from organized labor, and a plethora of new statutes in the several states (some for and some against boycotting), soon brought about a change in judicial sentiment and interpretation in most jurisdictions whereby the boycott (as used by labor unions) was legalized within strict limitations,[36] dependent upon the object to be accomplished and the means of attainment. This test of the legality of boycotting (equally unsatisfactory to both combatants) gave rise to a somewhat artificial classification of boycotts as primary and secondary. A boycott is primary where an organized union of employees by concerted action cease dealing, either socially or in a business way, with a former employer; and it is secondary where such employees

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[34]The term "boycott" was probably used first in State v. Glidden, (1866) 55 Conn. 46, 8 Atl. 890, 3 A. S. R. 23, which was a criminal prosecution for violation by members of a labor union of a statute (Session Laws of Connecticut, 1878, ch. 92) unquestionably enacted at the behest of employers (see decision, p. 69) and providing that "every person who shall threaten or use any means to intimidate any person, to compel such person, against his will, to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure or threaten to injure his property, with intent to intimidate him, shall upon conviction be liable to a fine not exceeding one hundred dollars, or imprisonment in the county jail six months."

[35]Doremus v. Hennessy, (1898) 176 Ill. 608, 52 N. E. 924; Beck v. Railway Teamsters Union, (1898) 118 Mich. 497, 77 N. W. 13; Gray v. Building Trades Council, (1903) 91 Minn. 171, 97 N. W. 663, 1118; Hopkins v. Oxley Stave Co., (1897) 83 Fed. 912; Martin v. McFall, (1903) 65 N. J. Eq. 91, 55 Atl. 465; Purvis v. Carpenters Local, (1906) 214 Pa. 348, 63 Atl. 585; Jensen v. Cooks Union, (1905) 39 Wash. 531, 81 Pac. 1069.

In the Oxley Stave Company case, supra, Judge Thayer said: "While the courts have invariably upheld the rights of individuals to form labor organizations for the protection of the interests of the laboring classes, . . . yet they have generally condemned those combinations usually termed 'boycotts,' which are formed for the purpose of interfering, otherwise than by lawful competition, with the business affairs of others, and depriving them by means of threats and intimidation, of the right to conduct the business in which they happen to be engaged, according to the dictates of their own judgments."

[36]In Gill Engraving Company v. Doerr, (1914) 214 Fed. Rep. 111, Justice Hough, after denying an injunction to enforce an employers statute against boycotting (Consol. Laws, c. 40, New York), said: "Nor does it advance matters to call the affair a boycott, for 'it cannot be said

induce or compel others (not parties to the controversy) to withdraw their social intercourse or business patronage from a former employer by threatening or doing injury to such other persons.

A great contrariety of judicial opinion arose as to what constitutes a legal or illegal boycott; some courts adhering to the original rule that all boycotts are illegal,[37] some adopting the view that primary boycotts are legal and secondary boycotts illegal,[38] and others adopting the doctrine that boycotts (whether primary or secondary) are legal if free of malevolence or violence and used in support of a bona fide industrial conflict, but otherwise illegal.[39] Some of these conflicting decisions rested upon various anti-trust and anti-conspiracy acts—the former having been judicially stretched to cover combinations of labor as well as capital, and the latter having been enacted (probably through the influence

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that to boycott is to offend the law.' Mills v. U. S. Printing Company, (1904) 99 App. Div. 611, 91 N. Y. S. 185, affirmed (1910) in 199 N. Y. 76, 92 N. E. 214. This is not thought to mean that every form of boycotting is lawful, but that the word does not necessarily import illegality. I do not perceive any distinction upon which a legal difference of treatment should be based between a lockout, a strike, and a boycott. They often look very unlike, but this litigation illustrates their basic identity. All are voluntary abstentions from acts which normal persons usually perform for mutual benefit; in all the reason for such abstention is a determination to conquer and attain desire by proving that the endurance of the attack will outlast the resistance of the defense; and for all the law of New York provides the same test, viz., to inquire into the legality (1) of the object in view, and (2) of the means of attainment. When courts generally (with some legislative assistance from behind) abandoned the doctrine that any concerted arrangement which hindered the following of a trade or constituted an attempt to change trade conditions (especially wages) amounted to an actionable conspiracy, this judicial position was quite sure to follow, unless it was admitted that the passing of the old doctrine had left the matter political rather than judicial. This has not yet been done."

See also Pierce v. Stablemen's Union, (1909) 156 Cal. 70, 103 Pac. 324; Lindsay v. Montana Federation, (1908) 37 Mont. 264, 96 Pac. 127.

[37]Wilson v. Hey, (1908) 232 Ill. 389, 83 N. E. 928; Beck v. Railway Teamsters' Union, (1898) 118 Mich. 497, 77 N. W. 13; Gray v. Building Trades Council, (1903) 91 Minn. 171, 97 N. W. 663, 1118; Booth v. Burgess, (1900) 72 N. J. Eq. 181, 65 Atl. 226; Purvis v. Carpenters' Local, (1906) 214 Pa. 348, 63 Atl. 585; Patch v. Protection Lodge, (1904) 77 Vt. 294, 60 Atl. 74; Crump v. Commonwealth, (1888) 84 Va. 927, 6 S. E. 620, 10 A. S. R. 895; Burnham v. Dowd, (1914) 217 Mass., 351, 104 N. E. 841; My Maryland Lodge No. 186 of Machinists v. Adt, (1905) 100 Md. 238, 59 Atl. 721.

[38]Foster v. Retail Clerks Ass'n, (1902) 78 N. Y. 860, 39 Misc. Rep. 48; Butterick Co. v. Typographical Union, (1906) 100 N. Y. S. 292, 50 Misc. Rep. 1; Gill Co. v. Doerr, (1914) 214 Fed. 111; Empire Theatre Co. v. Cloke, (1917) 53 Mont. 183, 163 Pac. 107; Ex parte Sweitzer, (1917) 13 Okla. Cr. 154, 162 Pac. 1134.

[39]Bossert v. Dhuy, (1917) 221 N. Y. 342, 117 N. E. 582; Stoner v. Robert, (1915) 43 Wash. L. Rep. 437; Parkinson v. Building Trades Council, (1908) 154 Cal. 581, 98 Pac. 1027.

of employers) to restrict the use of the boycott in industrial disputes although never expressly so declaring.

But organized labor very soon exerted political pressure to procure enactment of statutes declaring that labor is not a commodity or article of commerce (and, consequently, not within the purview of anti-trust or anti-monopoly statutes or decisions), and expressly providing—as organized labor believed—that injunctions should never be issued to prevent picketing or boycotting in combats between employers and employees, nor to prohibit any other development in such struggles unless necessary to prevent irreparable injury.[9] It was the confident belief of organized labor that these statutes effectually removed all practical restrictions upon their use of the boycott and its adjunct—picketing. This delusion was short-lived; and any prospect of final achievement of such results now seems to have been completely shattered by the Supreme Court of the United States in very recent decisions.

In the *Duplex Printing Case*[10] it was held that the secondary boycott when so applied as adversely to affect interstate commerce violates the Sherman Anti-Trust Act; that the Clayton Act gives private parties so injured the right to relief by injunction in the federal courts; and that the anti-injunction sections of the Clayton Act cover only direct disputes between employers and employees —hence apply only to *primary* boycotts lawfully conducted. In the *American Steel Foundries Case*,[11] a similar interpretation of the Clayton Act was adopted with reference to picketing; and even the common law right of picketing was declared to be very limited indeed, it being said that the aim should be "to prevent the inevitable intimidation of the presence of groups of pickets, *but to allow missionaries.*" And finally, in the *Truax Case*[12] it was held that the anti-injunction statute of Arizona, when interpreted by the highest court of that state as prohibiting the granting of an injunction against acts by striking employees which would be enjoined if committed by persons other than employees, is unconstitutional in that it violates the fourteenth amendment to the con-

[9]The Clayton Act, 38 Stat. at L. 738, identical with Session Laws Minnesota 1917, ch. 493, and similar to Civil Code Arizona 1913, Par. 1464 and California Statutes 1903, page 289 (Penal Code, Deering Ed. 1909, p. 762). Similar acts were passed in nearly all the states.

[10]Duplex Printing Press Co. v. Deering et al., (1921) 254 U. S. 443.

[11]American Steel Foundries Co. v. Tri-City Centray Trades Council, (1921) 42 S. C. R. 72.

[12]Truax v. Corriman, (1921) 42 S. C. R. 124.

stitution of the United States guaranteeing to all the equal protection of the laws.

These sweeping federal decisions were followed by the supreme court of Minnesota in the *Wonderland Theatre Case*[44] interpreting a Minnesota statute identical with the Clayton Act.[45] That most of the other states will follow with like decisions is almost certain, not only because of the desirability of uniformity stressed in the Minnesota decision but also because any other interpretation would probably conflict with the constitution of the United States as interpreted in the *Truax Case*.

As soon as it had been established through the development of American law governing the conduct of employers and employees in trade and labor disputes that employees could lawfully organize and act in concert, the radical elements of organized labor began to chafe under the restrictions and limitations which the law placed upon such concerted action. The decision in the *Danbury Hatter's Case*[46] declaring a combination of labor organizations subject to the inhibitions of the Sherman Anti-Trust Act and its members liable in threefold damages for violation thereof, and the alacrity with which equity courts adopted the use of the injunction to prevent abuses where prospective actions at law for damages gave no promise of adequate relief, together aroused such bitterness that the more important rights of the parties were for a time overshadowed by this phase of the contest.[47] The result was a split in the ranks of union labor and the growth of hybrid offshoots[48]—the bastard progeny of a hapless forbear—which afforded a fertile field for the evil work of anarchists and criminal propagandists masquerading as friends of labor. The success of these advocates of "direct action" and the crimes committed by them in the name of union labor (but without its approval) led to

[44] Campbell v. Motion Picture Operators Union, (Minn. 1922) 186 N. W. 781.

[45] Session Laws of Minnesota for 1917, ch. 493.

[46] Loewe v. Lawlor, (1907) 208 U. S. 274, 52 L. Ed. 488, 28 S. C. R. 30; Lawlor v. Loewe, (1915) 235 U. S. 522, 59 L. Ed. 341, 35 S. C. R. 170.

[47] In a dissenting opinion in Truax v. Corrigan, (1921) 42 S. C. R. 124, 138, Justice Brandeis said: "In America the injunction did not secure recognition as a possible remedy until 1888. When a few years later its use became extensive and conspicuous, the controversy over the remedy overshadowed in bitterness the question of the relative substantive rights of the parties." This bitterness, however, was caused quite as much by the decision in the Danbury Hatters' Case as by the too ready use of the injunction.

[48] Such, for instance, as the so-called Industrial Workers of the World and other insincere exponents of "The One Big Union" idea.

the enactment of statutes in various states creating, defining, and providing for drastic punishment of the new offense of criminal syndicalism.[49]

And here rests the development of the relative legal rights of employers and employees in trade and labor disputes.

The combatants face each other in legalized battle array. Fighting is the order of the day. Peace and quiet prevail only between the rounds. The legalized weapons of employers are suppression of industry and derangement of commerce, lockouts, blacklists, discrimination agreements, and starvation of employees. The legalized weapons of employees are suppression of industry and derangement of commerce, blacklists, discrimination agreements, strikes and boycotts. There are forty-eight different sets of rules for intrastate battles but only one set for interstate conflicts. The legislatures are the rule-makers; the courts are the referees; and the "big stick" is the injunction. But it is not a contest of sportsmanship, but a dirty fight to the death where each gladiator strikes the other below the belt whenever he can conceal the foul blow, and at pleasure tramples under foot the spectators who are paying nearly all the costs of the fight and eventually will contribute the purse for the winner and the consolation prize for the loser. There is no arena and there are no sidelines for the safety of the onlookers who, perforce, are interested in the outcome. All of this broad land—the land of the free and the

[49]Session Laws of Minnesota, 1917, ch. 215, the first section of which is as follows:

"Criminal syndicalism is hereby defined as the doctrine which advocates crime, sabotage (*this word as used in this bill meaning malicious damage or injury to the property of an employer by an employe*), violence or other unlawful methods of terrorism as a means of accomplishing industrial or political ends. The advocacy of such doctrine, whether by word of mouth or writing, is a felony punishable as in this act otherwise provided."

This Act was held constitutional in State v. Moilen, (1918) 140 Minn. 112, 167, N. W. 345, where Chief Justice Brown said:

"The contention that the statute violates rights granted and secured by the federal constitution is without merit. The design and purpose of the legislature in the enactment of the statute was the suppression of what was deemed by the lawmakers a growing menace to law and order in the state, arising from the practice of sabotage and other unlawful methods of terrorism employed by certain laborers in furtherance of industrial ends and in adjustment of alleged grievances against employers. . . . That they are unlawful and within the restrictive power of the legislature is clear."

Similar statutes have been passed in many other states. In the state of Washington, criminal syndicalism is given a more restricted definition, but sabotage is made a separate crime. See Session Laws of Washington, 1919, ch. 173 and 174.

home of the brave—is the battle ground of the combatants. There is no place of retreat for noncombatants—for women and children. Many are forced into the conflict against their will to die with the vanquished or survive with the victors; others are deprived of the necessities of life; and all remaining are left to sink or swim in the maelstrom of business depression, curtailed production, artificially enhanced prices, and disordered channels of trade and commerce that inevitably result from the very nature of the conflict.

That such conditions will remain static is unthinkable. For it must soon be more clearly realized that the existing status is the natural result of unscientific legislation and economically unsound judicial opinion. The public detriment resulting from physical combat between individuals has been recognized and made unlawful ever since "trial by battle" disappeared from Anglo-Saxon jurisprudence; and yet the same primitive fallacy has been deliberately adopted by legislatures[50] and courts[51] as the means whereby employers and employees shall determine their disputes in economic conflicts that indirectly but no less surely accomplish the destruction or disability of the combatants themselves, and occasion vastly greater and infinitely more far-reaching public detriment.

An outbreak of mob violence or other physical combat between contending forces in Pennsylvania would scarcely affect the citizens of Minnesota, but as this article is written (April, 1922) a strike of coal miners in Pennsylvania gives direful promise of leaving the poor in Minnesota and the Dakotas as well as in Pennsylvania to freeze during the next succeeding winter; and, even if they be spared that calamity, at least a further shrinkage in their already too thin purses will assuredly follow the enhanced prices for fuel that inexorably results from curtailment of normal pro-

[50] In the Report of the Congressional Committee on Industrial Relations, 1915, p. 136, appears the following:

"There are apparently only two lines of action possible: First, to restrict the rights and powers of employers to correspond in substance to the powers and rights now allowed to trade unions, and, second, to remove all restrictions which now prevent the freedom of action of both parties to industrial disputes, retaining only the ordinary civil and criminal restraints for the preservation of life, property, and the public peace. The first method has been tried and failed absolutely. . . . The only method, therefore, seems to be the removal of all restrictions upon both parties, thus legalizing the strike, the lockout, the boycott, the blacklist, the bringing in of strike breakers, and peaceful picketing."

[51] Bossert v. Dhuy, (1917) 221 N. Y. 342, 117 N. E. 582, shows the extent to which permissible combat may now be carried.

duction. But that is not all; for unlawful physical violence will also surely occur in the vicinity of the mines if such strike long endures. The history of strikes in general admits of no other conclusion.

The reason for lawlessness in all long continued strikes is not far to seek. The weapons of legally permissible use are woefullly inadequate for the achievement of complete victory by either of the combatants;[52] hence, in the heat of conflict, both find the use of illegal means preferable to a stalemate or a failure. Human passions are not easily controlled—especially when set in motion with legal sanction. "Gentlemen's agreements" will be made behind closed doors and "sab cats" will prowl in the dark just as long as strikes are allowed and the means of winning them are prohibited by law.

But there is no disposition by either legislatures or courts to add to the list of permissible weapons of the combatants nor to extend their use. The tendency of recent legislation and decisions has been quite to the contrary.

And this tendency will continue, because it is due to a realization by law-makers and courts of the intolerable consequences of their mistaken policy of the past if it be continued to its logical end in the future. It was too much for the supreme court of Minnesota in the *Wonderland Theatre Case* when it came face to face with the logical result of its previous decisions[53] and was forced either to modify and restrict them or to announce that the erstwhile employer in the *Wonderland Case* might be boycotted and picketed indefinitely because he chose personally to do a certain job for himself rather than hire two union men to do it.[54] A statute cor-

[52]The decision in the American Steel Foundaries Case, (1921) S. C. R. 72, upholding in theory the right of peaceful picketing but limiting the use of pickets to one for "each point of ingress and egress' in the plant there involved, may be considered by organized labor as a grim paraphrase of that old doggerel jest:

"Mother, may I go out to swim?
Yes, yes, my darling daughter;
Hang your clothes on a hickory limb,
But don't go near the water."

[53]Gray v. Building Trades Council, (1903) 91 Minn. 171, 97 N. W. 663, 1118; Grant Co. v. St. Paul Trades Council, (1917) 136 Minn. 167, 161 N. W. 520; Steffes v. Motion Picture Union, (1917) 136 Minn. 200, 161 N. W. 524.

[54]In the statement of facts by the court in the Wonderland Case, Campbell v. Motion Picture Machine Operators Union, (Minn. 1922) 186 N. W. 781, appears the following:

"Until February 24, 1917, plaintiff employed none but members of Local 219 to operate the projecting machines in this theatre. On Feb-

responding to the Clayton Act afforded a convenient and quite sufficient excuse for following the Supreme Court of the United States in its interpretation of that Act. But these decisions, state and federal, are not to be deplored. On the contrary, they represent a healthy effort to limit the effects of a mistaken policy previously adopted in good faith, and are the best that the courts can do under present circumstances.

For it is now apparent to all careful observers that trade and labor disputes between employers and employees cannot be settled satisfactorily, as a rule, by combats between the disputants armed with economic weapons the use of which must be so closely restricted in the public interest that neither combatant can effectually subdue the other . And, paradoxical as it may seem, the ultimate public good forbids that either be allowed to subdue the other; for the result would be either a workers' soviet on the one side or a return to the sweatshop on the other. Either is intolerable.[55] This being so, why continue the fight? Why allow ten million combatants to keep the home of a hundred million people in constant turmoil, to destroy their property, to imperil their safety, to obstruct their sources of supply of the necessities of life, to interfere with their happiness and convenience in a thousand other ways—all for the purpose of allowing the combatants the special privilege[56] of *injuring* but never of completely destroying or *subduing* each other?

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ruary 10, 1917, having decided to reduce his expenses, he gave to his operators the notice called for by his contract with them for termination of employment, and gave similar notice to the Local. He informed them that, to reduce expenses, he was going to operate his machine himself for the whole or a greater portion of the time, but was willing to employ a member of the Local, at the wage scale fixed by it, to relieve him a portion of the time each day. The officers of the Local refused to enter into the proposed arrangement. Plaintiff then offered to join the Local, but was not taken in because the rules did not allow an owner or proprietor of a theatre to become a member. On February 24, 1917, the employment of plaintiff's machine operators was terminated in accordance with the notice, and from and after that date until June 18, 1917, plaintiff operated his machines himself, with part time aid from one Dillon, who was not a member of Local 219." It was upon such facts that plaintiff was boycotted and picketed.

[55]The radical laborer's dream of life in a palace is hardly less attainable than the aim of radical employers to "smash the labor unions". (See any one of Judge Gary's after dinner speeches). Labor unions have come to stay. Their legitimate uses are numerous and varied, not the least of which is their inestimable service to the general public in curbing and exposing malefactors of great wealth whose lawless greed would otherwise add much to the burdens of life. A coal company declaring one thousand per cent. dividends is quite as reprehensible as a misguided labor union striving to deprive a man of the privilege of doing his own work.

[56]The legalization of economic fights between employers and employees

The best friends of organized labor on the bench are apparently anxious for a change—for the substitution of some other method of adjusting disputes between employers and employees.[57]

Others high in authority have suggested a continuance of the present struggle with experimentation in changing the rules of combat as a possible solution of the problem.[58] It may be conceded that experimentation is the key to progress in the development of the law to fit the constantly changing conditions in modern society; but fifty years of experimentation in armed economic conflict between employers and employees has been of doubtful benefit to either of them, and has resulted in repeatedly dragging the public

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despite the resultant injury to the general public constitutes in itself a vicious special privilege. Other classes are generally required to submit their disputes, of whatever nature, to some orderly tribunal or commission for determination and settlement—particularly where the public interests would otherwise suffer.

A blacklist in the hands of others than employers or employees meets with severe condemnation of the courts (Eastern States Retail Lumber Dealers Association v. United States, (1913) 234 U. S. 600, 58 L. Ed. 490, 34 S. C. R. 951) and is held criminal even when limited in circulation to the members of an association.

A boycott maintained by any except employees or employers is unlawful (Davis v. Starrett, (1903) 97 Me. 568, 55 Atl. 516).

Recognizing this evil in interpreting Section 20 of the Clayton Act, the United States Supreme Court in the Duplex Printing Case said: "Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States, and upon the general operation of the Anti-trust Laws,—*a restriction in the nature of a special privilege or immunty to a particular class, with corresponding detriment to the general public;* and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it."

[57]Justice Brandeis, the most profound student of industrial disputes and the most pronounced friend of organized labor on the bench, closed his dissenting opinion in favor of the unions involved in the Duplex Printing Case with these words:

"Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands. This is the function of the legislature, which, while limiting individual and group rights of aggression and defense, *may substitute processes of justice for the more primitive method of trial by combat.*"

[58]In closing his dissenting opinion in the Truax Case, Justice Holmes

with the combatants to the brink of an abyss where disaster was averted only by resort to subterfuges—among which the Adamson Act was the most conspicuous. A policy fraught with such danger in indefensible. Experimentation, to be helpful, must be made along sound lines; but this has not been done. The apologists for experimentation in the continuance of the economic war between employers and employees attempt to justify their views with the argument that it is all for the public good.[59] The argument proves too much; for a fight to the finish would assuredly destroy the public as well as the combatants,[60]—and a lesser fight

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said: "There is nothing that I more deprecate than the use of the fourteenth amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

In his dissenting opinion in the same case, Justice Brandeis said: "The rules governing the contest necessarily change from time to time. For conditions change, and futrhermore, the rules evolved, being merely experiments in government, must be discarded when they prove to be failures."

[59]In his dissenting opinion in the Truax Case, Justice Brandeis said: "The history of the rules governing contests between employer and employed in the several English-speaking countries illustrates both the susceptibility of such rules to change and the variety of contemporary opinion as to what rules will best serve the public interest. The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable *merely because we are convinced that it is fraught with danger to the public weal* and thus to close the door to experiment within the law. . . . *In England improvement of the condition of workingmen and their emancipation appear to have been deemed recently the paramount public need.*"

[60]It needs no argument to demonstrate that the removal of all restrictions upon employers allowing them to form a nation-wide combine could, and in a great contest with organized labor would, result in the complete cessation of all industry throughout the country. On the other hand, the removal of all restrictions upon employees, allowing them an unlimited and nation-wide use of secondary boycotts and sympathetic strikes, would achieve exactly the same result. And so the public would either perish with the combatants, or become the prey of the victor—either the serf of the malefactors of great wealth or the slave of soviet tyrants. The United States Supreme Court foresaw one side of this proposition in the Duplex Printing Case, where Justice Pitney in the majority opinion reversing the lower court and restricting the anti-injunction section of the Clayton Act to primary boycotts, said:

"The extreme and harmful consequences of the construction adopted in the court below are not to be ignored. The present case furnishes an apt and convincing example. An ordinary controversy in a manufacturing establishment, said to concern the terms or conditions of employment there, has been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them, carried out by inciting sympathetic strikes and a secondary boycott against complainant's customers, to the great and incalcuable damage of many innocent people far remote from any connection with or control over the original and

injures the public only in a lesser degree. In general, the conduct of a just and free government must be predicated upon the principle of the greatest good to the largest number; and a departure from this principle whereby a few of the people are allowed to inflict economic injury upon all the rest, for whatever purpose, is surely of doubtful public benefit. If disarmament and the settlement of differences by discussion and arbitration is a good policy in the politics of the nations, the principle would seem to be equally advantageous in the settlement of industrial disputes between employers and employees. Common sense leads to the same conclusion; for the justice of a disputed wage scale can better be determined by disinterested arbiters than by an endurance contest between the disputants—unless the public prefers the doctrine that might makes right. A vague comprehension of the foregoing principles has already set the trend of the best thought of the times toward industrial disarmament and arbitration, even though it meets temporarily with the disapproval of organized labor.[61]

It became evident that Congress and the several state legislatures had come vaguely to realize the futility of armed economic combat as a means of settling disputes between employers and employees when various acts were passed creating labor boards and commissions with power to inquire into the facts in such disputes and offer their services as mediators.[62] But as these bodies were not endowed with power to do more than offer their services and suggest terms of adjustment to the disputants, the results achieved were correspondingly meagre and unsatisfactory. Enlargement of their powers in determining disputes between public service corporations and their employees has doubtless resulted in some benefit, but has left much still remaining in the realm of uncertainty.[63]

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actual dispute,—people constituting, indeed, the general public upon whom the cost must ultimately fall, and whose vital interest in unobstructed commerce constituted the prime and paramount concern of Congress in enacting the Anti-trust Laws, of which the section under consideration forms, after all, a part."

[61]The fear of organized labor that it may be bargained out of its rights in legislatures or courts of arbitration has little foundation. On the contrary their political influence seems to be more powerful than that of the employers. See the Adamson Act, 39 Stat. L. 721. upheld in Wilson v. New, (1917) 243 U. S. 332, 61 L. Ed. 755, 37 S. C. R. 298.

[62]The Minnesota State Board of Arbitration created in 1895 by chapter 170 Session Laws of Minnesota, 1895 (R. L. 1905, sec. 1828 to 1834; G. S. Minn. 1913, sec. 3940 to 3946), and the Board of Mediation and Conciliation created by Act of Congress of July 15, 1913 (ch. 6, 38 Stat. at L. 103) are typical.

[63]In sections 300 to 316 of the federal Transportation Act of February 28, 1920 (41 Stat. L. 456 and 946) Congress created the Railroad Labor

The boldest attempt yet made in the United States to substitute peaceful arbitration for industrial combat is to be found in the Kansas Industrial Court Act.[4] The Kansas Act is the first clear-cut modern recognition of the existence and rights of the *third* and most important party to industrial disputes—the public. It is an application of the fundamentally sound doctrine that all individual rights are relative and not absolute—a doctrine long advanced in favor of employers and employees and offered as an excuse for the incidental harm done to the general public in trade and labor disputes, but now turned "t'other end to" and applied *in favor* of the general public and *against* employers and employees in Kansas. The Act impresses with a public interest the production and distribution of food, clothing and fuel; provides that controversies between employers and employees engaged in such production or distribution shall be adjudicated by the court of industrial relations therein created, saving certain constitutional rights to the disputants; prohibits strikes and other acts lessening normal production and distribution thereof; and adequately provides for enforcement of this new law. The Act is predicated upon the paramount interest of *all* the people as opposed to the oppression of contesting groups in strategic economic positions, whether such oppression be direct or indirect. It is not a law against or in favor of employers or employees, but a law enacted wholly for the benefit of the non-combatants—the general public. Indeed, in its broader sphere of operation the powers and duties of the Kansas Industrial Court are roughly analogous to those of the Interstate Commerce Commission in the domain of national transportation. The Kansas Industrial Court Act is, therefore, a pioneer in Ameri-

Board with power to hear and render decision upon certain disputes between interstate carriers and their employees; but the enforcement of such decisions appears to be still a matter of conjecture.

[4]Laws of Kansas, Special Session 1920, chapter 29, held constitutional in its main provisions in State v. Howat, (1920) 107 Kans. 423, 191 Pac. 585; and again in State v. Howat, (1921) 109 Kans. 376, 198 Pac. 686; and again in Court of Industrial Relations v. Wolff Packing Company, (1921) 109 Kans. 629, 201 Pac. 418; and again in State v. Howat, (1921) 109 Kans. 779, 202 Pac. 72. In Howat et al. v. Kansas, (1922) 42 S. C. R. 277, decided March 13, 1922, on appeal from the decisions in 107 Kan. 423 and 109 Kan. 376, the Supreme Court of the United States expressly refused to pass upon the constitutionality of the Kansas Industrial Court Act, but sustained the convictions of appellants on other grounds. In the opinion Chief Justice Taft said:

"We are of opinion that in neither case is the Kansas Industrial Relations Act presented in such way as to permit us to pass upon those features which are attacked by the plaintiffs in error as violative of the constitution of the United States."

can law, and it represents a local legislative opinion in favor of a complete reversal of policy—the *suppression* of industrial combats in the *public interest* instead of their *enlargement* in the interest of the *combatants*. Naturally enough it has met with the opposition of both employers and employees, but the tendency of this new idea to spread is already indicated by bills for similar laws since brought before the legislatures of Massachusetts and New York and now contemplated in other states—anti-industrial-court planks in political platforms as bait for votes to the contrary notwithstanding.

The Kansas idea was probably derived from legislation in the British Dominions. As early as 1907 the right of employers or employees engaged in industrial disputes in Canada to cause a cessation of industry by lockouts or strikes was temporarily withdrawn until after official investigation and report upon such controversy should have been made.[66]

In Australia a confederation of states exists under a constitution modeled on the constitution of the United States of America but expressly conferring on the Federal Parliament power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state." There, as here, all residuary powers of legislation remained in the states. The Federal Parliament by statute created a "Court of Arbitration and Conciliation" for the settlement of disputes between employers and employees extending beyond the limits of one state,[67] while the several states enacted similar legislation for like intrastate disputes.[68] In general these statutes forbade boycotting, picketing, the strike and the lockout; use of the injunction to enforce compliance with the acts was expressly sanctioned, and violation thereof was also made punishable by criminal proceedings. Along with these prohibitions, industrial arbitration through courts or administrative tribunals created by the same acts was made compulsory, the "absolute" rights of

[66]Statutes of Canada, 6-7 Edward VII, chap. 20, entitled: "An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities." See also 9-10 Edward VII c. 29; 8-9 George V, c. 27; 10-11 George V, c. 29; Rex. v. McGuire, (1908) 16 Ontario Law Reports 522.

[67]The Commonwealth Conciliation and Arbitration Act, 1904-1915 printed as Appendix A to Commonwealth Acts, 1914-1915.

[68]New South Wales: Industrial Arbitration Act, 1912-1918, and Industrial Disputes Act of 1908. Queensland: Industrial Arbitration Act, 1916. New Zealand: Industrial Conciliation and Arbitration Act, 1908.

both employers and employees being subordinated to the public interests. Fifteen years of operation under these laws in Australia seems to have demonstrated not only that such system is vastly superior to legalized industrial combat, but also that the abridgment of personal liberty necessary to make the new system effective has been quite harmless.[68]

In America, the induction of any system for compulsory settlement of disputes between employers and employees may meet with serious obstructions in the nature of constitutional limitations. The provisions against deprivation of liberty or property "without due process of law," and against "involuntary servitude," and in favor of "equal protection of the laws," may be urged with much force against the compulsory operation of industries by employers and employees or even the submission of their economic disputes to legal tribunals. But rising beside these constitutional restrictions is the indefinable "police power" reserved to the states to support just such legislation as will necessarily be involved in compulsory settlement of industrial disputes; while the power to regulate commerce between the states and with foreign nations still inheres, by express constitutional provision, in the federal government. Ultimately the two powers together may be found sufficient to sustain both state and federal action to compel submission of disputes between employers and employees to duly constituted tribunals for adjudication without the cessation of industry or

[68] In the third of a series of articles in the Harvard Law Review by Henry B. Higgins, President of the Australian Court of Conciliation and Arbitration, it is said (34 Harvard Law Review, 126):

"From our Australian point of view, the objections so fiercely urged in America and in Great Britain to compulsory arbitration appear to be fanciful and irrelevant. Compulsion may be applied at either of two points: compulsion to submit to arbitration before strike, and compulsion to obey the award. . . . Under the Australian act, both kinds of compulsion are applicable; and no voices, so far as I know, are now raised against either. Regulation by tribunals of some sort is accepted; it is welcomed especially by the unions—the great majority of the unions. . . . The ideal of the Court is to get such a regulation as the parties ought to put in a collective agreement; and compulsion means merely that as to claims on which the parties cannot agree, or as to which some of the parties will not agree, the Court can make an award. Very often the mere fact that the Court has a power of compulsion in reserve impels the parties to find a line of agreement; and reasonable employers are more willing to make concessions when they feel that their competitors are to be bound by the same terms. . . . Moreover, . . . the dread expressed by certain theorists that compulsion would end in 'a servile state'—a state in which the workers would be compelled to work in return for certain guarantees as to conditions—is unfounded, so far as our experience goes. It has been established here that a worker is not compelled to take work, any more than an employer is compelled to give work."

other economic disorders. The decisions upon the Kansas Industrial Court Act have already partially established the existence of the necessary power; and the general trend of judicial opinion is in the same direction.[*]

The right of the sovereign to enforce the operation of public and quasi-public service utilities privately owned is already too well established to admit of controversy; and the line of demarcation between public service and private enterprise is hazy as well as flexible. All industry, all general trade and commerce between human beings is necessarily impressed with a public interest of greater or less degree; and well it may be that the courts of last resort, under pressure of an enlightened public opinion, will finally declare it to be exclusively for the legislatures to determine whether any given industry so far affects the public weal as to justify enforced operation thereof and compulsory settlement of labor disputes arising therein. Under such ruling of the courts, the incidental loss (if any) to the owner resulting from enforced operation in the public interest would be damnum absque injuria.

As to the employee, however, it is admittedly impossible constitutionally to enact any law specifically requiring him to work against his will; but there is no constitutional limitation upon that economic law which compels him to work or starve. That he has no *vested* right in the special privilege of engaging in great industrial combats grossly inimical to the public welfare is clear; and if deprived of such right by positive law and shorn of all privilege down to his bare constitutional right of working or not working,

[*]In Wilson v. New, (1917) 243 U. S. 332, 61 L. Ed. 755, 37 S. C. R. 298, which sustained the Adamson Law, Justice McReynolds in his dissenting opinion said:

"But considering the doctrine now affirmed by a majority of the court as established, it follows as of course that Congress has power to fix a maximum as well as a minimum wage for trainmen; *to require compulsory arbitration of labor disputes which may seriously and directly jeopardize the movement of interstate traffic;* and to take measures effectively to protect the free flow of such commerce against any combination, whether of operatives, owners or strangers."

In American Coal Mining Co. v. Special Coal and Food Commission of Indiana, (1920) 268 Fed. 563, it is said in the syllabus:

"The regulation of the coal mining business is within the police power of a state, and in such regulation the *state can fix prices,* which is a well recognized mode of police regulation. The test to determine whether a state law passed under its police power violates const. U. S. amend. 14 *is whether there is no basis of fact on which to support the Legislature's finding of public welfare, or when the remedy presented has no possible connection with the evil to be cured.*"

The decision adverts to the New York and Wisconsin statutes regulating rentals, recently upheld as a valid exercise of the police power.

the economic law would soon deprive him of his absolute right of idling and bring him to a better realization of his economic duty to the community which gives at least as much to any individual as it takes from him. Analogous expedients to force a waiver of ultra-absolute constitutional rights of both employers and employees have been used effectively in the various Workmen's Compensation Acts."[70]

And finally, if it be found absolutely necessary, constitutional amendment to permit compulsory arbitration of disputes between employers and employees is not impossible."[71]

From the foregoing study it appears that specially legalized economic combat as a means of settling disputes between employers and employees has been weighed in the balance and found wanting; that it is a mistaken policy based upon doctrines economically unsound and legally indefensible; and that it must be discarded in the public interest and other methods invented and substituted in its place. The signs of the times indicate a growing public comprehension that the proper settlement of industrial disputes lies neither with a soviet of workers nor an oligarchy of employers, but in a complete reversal of policy—in the substitution of reason for force, of the modern processes of justice for the more primitive method of trial by battle, and of the might of the state to enforce peace between industrial combatants for the paramount public good.

And so mote it be.

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[70]See the so-called elective provisions of the various Workmen's Compensation Acts whereby either an employer or an employee may stay without or come within the operation of the law; but he is presumed to have elected to come within the operation of the law unless he indicates the contrary, and if he does so indicate, he is deprived of practically all his non-vested rights relating to personal injuries unless the other also expressly elects to stay without the law—in which case the status of both remains as though no compensation act existed.

[71]Various economists, including Professor Alvin Hansen of the University of Minnesota, have estimated that employers and employees together in all lines of human endeavor constitute about one-half the total population. See Quarterly Publications of American Statistical Society, December, 1920. Governor Allen of Kansas estimates that in any particular controversy the proportions are: the public, ninety per cent.; employers and employees combined, ten per cent. Constitutional amendment, under such circumstances, is by no means an impossibility. Twenty years ago many public men predicted that no further federal constitutional amendments would ever be accomplished. Since then the federal constitution has been amended four times—to provide for election of senators by direct vote, the levy of an income tax, prohibition, and woman suffrage. None of these amendments are more important than the matter of industrial peace.

THE RATIONALE OF THE RULE AGAINST PERPETUITIES[1]

By Everett Fraser*

THERE have been two schools of thought as to the nature of the common law rule against perpetuities. One school has argued that the object of the rule is to prevent too long postponement of the power of alienation of property by the creation of future interests therein; that the rule is satisfied by the existence of persons who can jointly convey an absolute fee in the property; and that the law has no objection to unvested interests as such, but only in so far as they postpone this power of alienation; that this was particularly the nature of the rule originally even if it may have taken a new bent in its later development.[2]

The other school has maintained that the rule is aimed at too long postponement of vesting, that remotely unvested interests are per se obnoxious to the law, that although a power of alienation by the joint action of persons having interests is often promoted by the vesting of these interests, that is not the main object of the rule but only an incidental result, and that the law requires a not

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[1]The Minnesota rule against perpetuities is: "Every future estate is void in its creation, which suspends the absolute power of alienation for a longer period than is prescribed in this chapter; such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed." General Statutes 1913, sec. 6664. This rule was taken from the Revised Statutes of New York which were enacted in 1828. Part 2, chapter 1, sec. 14. It has been since debated whether the New York revisers intended to adopt the common law rule or to make a new rule, and, indeed, it has been a matter of dispute what the common law rule was. See, for example, Fowler's Real Property Law in New York, 3d Ed., p. 261 et seq.; Chaplin, Suspension of the Power of Alienation, 2d Ed., p. 177 et seq.; Reeves, Real Property, p. 1261 et seq. The late decisions in New York seem to establish a rule against remoteness in vesting, at least in certain cases, in addition to the rule stated here. See Matter of Wilcox, (1909) 194 N. Y. 288, 87 N. E. 497; Walker v. Marcellus & Otisco Lake Ry. Co., (1919) 226 N. Y. 347, 123 N. E. 736. This brief study of the common law rule is here presented as preliminary to a further consideration of the Minnesota statutory rule and its operation.

[2]Fowler's Real Property Law, 3d Ed., 261; Reeves, Real Property, 1261; Fox, The Criticism of Cases, 6 Harv. L. Rev. 195.

too remote vesting even when such vesting is unnecessary to, or does not promote, this power of alienation of the property.[3]

Each side has apparently been able to find support in the cases and dicta of the courts, and has dubbed the authorities of the other side "misfits," wrongly decided.[4] The first formulation of the rule leaves more misfits than the second. But there are authorities which do not conform to the second formula.[5] The language of the cases has pretty consistently been that the rule is against suspension of the power of alienation.[6]

There is another possible view of the nature of the rule. The rule is aimed at the practical suspension of the power of alienation which results from postponing ownership of the property. It requires that there be a tenant (or co-tenants) with power to alien the property by reason of his ownership. It is not satisfied with a power of alienation by joint action of all parties with interests, yet it does not require vesting where vesting does not at all promote this power of alienation.[7]

The policy and history of the law, the decisions and language of the courts point to this as the true purpose of the rule. This view has the merit of leaving fewer decisions among the "misfits" than either of the others.

In so abstruse a matter, it will be well first to restate the rule in terms of these several purposes and to examine the practical result of the application of these several forms of the rule to the various classes of cases into which the problems fall. The rule affects only contingent or executory limitations.

I The rule makes void such executory limitations as might suspend the absolute power of alienation beyond what the law has fixed as a reasonable period. The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee can be conveyed. It is not suspended when there are persons in being who can jointly convey an absolute fee in possession. Such limitations as create the former situation are void;

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[3]Lewis, Perpetuities, supp., 16-19; Marsden, Perpetuities, Chapter III; Gray, Perpetuities, Chapter VII; Chaplin, Suspension of Power of Alienation, 2nd Ed., 177 et seq.; Tiffany, Real Property, 2d Ed., 591.

[4]Gray, Remoteness of Charitable Gifts, 7 Harv. L. Rev. 406.

[5]See post page 575.

[6]See post notes 27, 49, 58, 61.

[7]See Lisle, Remoteness of Charitable Gifts, 8 Harv. L. Rev. 211, and a valuable article by Professor Rundell, The Suspension of the Absolute Power of Alienation, 19 Mich. L. Rev. 235.

such limitations as create the latter situation are not affected by the rule.

II The rule makes void such executory limitations as might remain unvested beyond what the law has fixed as a reasonable period. Such limitations are void whether the power of alienation is postponed by them or not.

III The rule makes void such executory limitations as suspend the absolute power of alienation of the fee, beyond what the law has fixed as a reasonable period, by postponing the absolute ownership of the fee. The absolute power of alienation of the fee is suspended when there is no present tenant (or co-tenants) by whom an absolute fee can be conveyed. It is not suspended when there is a tenant (or co-tenants) in being who can convey an absolute fee. Nor is it suspended by such executory limitation when an absolute fee could not be conveyed if the executory limitation did not exist.

Subject to an exception noted later, executory interests which are indestructible by the present tenant and which cannot be released, necessarily suspend the power of alienation of an absolute fee. Executory interests that can be released do not suspend the power of alienation by joint action, but do suspend the power of the present tenants to make an absolute fee. In this respect executory interests may be divided into four classes.

(1) The limitation may be to a person not in being and who may not be in being within the period allowed. Such a limitation is void under any form of the rule. A devise to the first born grandchild of A (a bachelor when the limitation is made) might remain *executory and inalienable* during the life of A and the lives of all A's children. The possibility that it *might* remain *executory* avoids the limitation under forms II and III. The possibility that it *might* remain *inalienable* avoids it under form I. Each form treats the possibility of the situation objectionable to it as cause for rendering the limitation void in its creation.

(2) The limitation may be to a person to be ascertained out of an unlimited group who may remain unascertained beyond the period allowed. This also is void under any form. A devise to the person who will be elected president of the United States in 1960 must remain both *executory and inalienable* until he is ascertained.*

(3) The limitation may be to a person to be ascertained out of a limited group, all of whom are now in being, or will be in being within the period allowed, but who might not be individually ascertained within that period. This is void under forms II and III,[8] but valid under form I.[9] A devise to the survivor of the children of A (a bachelor when the limitation is made) might remain contingent during the life of A and the lives of several children. But the group power of alienation is suspended only during the life of A. The group of whom the survivor must be one will all be in being at the death of A, and each can release his possibility, so that jointly they can release the interest, and in conjunction with those having present interests in the property, convey an absolute fee.

(4) The limitation may be to a person in being and ascertained, but on a condition precedent which may remain eventual beyond the period allowed. This too is void under forms II and III[11] but valid under form I[12] A devise to the A corporation on condition precedent that it pay to the B corporation a sum of money, without limit as to the time of payment, might, if it were allowed, remain contingent forever, but the interest of the A corporation can be released at any time.

(5) So far there is no difference in effect between forms II and III. But they part company when we consider the exception already referred to. Suppose a devise to corporation A on trust to use the income for certain charitable purposes, with a devise over to corporation B also for a charitable purpose if A ever neglects to carry out the purpose in testator's will.[13] From the nature of the charitable trust the property would be inalienable by A even if there were no gift over. There would be a suspension of the power of alienation by the nature of the *present* interest. The executory gift consequently does not make it any more inalienable.

[8] In re Lord Stratheden, L. R. [1894] 3 Ch. 265, 63 L. J. Ch. 872, 71 L. T. 225, 42 W. R. 647.

[9] Avern v. Lloyd, (1868) L. R. 5 Eq. 383, 18 L. T. 282, 37 L. J. Ch. 489.

[10] In re Hargreaves, Midgeley v. Tatley, (1890) L. R. 43 Ch. D. 401, 59 L. J. Ch. 384, 62 L. T. 473, 38 W. R. 470.

[11] London & South Western Ry. Co. v. Gomm, (1882) L. R. 20 Ch. Div. 562, 51 L. J. Ch. 530, 46 L. T. 449, 30 W. R. 620.

[12] Mineral Land Investment Co. v. Bishop Iron Co., (1916) 134 Minn. 412, 159 N. W. 966.

[13] Christ's Hospital v. Grainger, (1849) 1 MacN. & G. 460, 1 Hall & Tw. 533, 19 L. J. Ch. 33, 14 Jur. 339.

The executory gift might remain contingent forever, but it does not suspend the power of alienation either by group action, or by postponing the absolute ownership of the fee. Even if it were required to vest in B corporation within the period usually allowed, it would still be inalienable by B. Assuming the validity of present gifts on such trusts for charitable purposes, the executory limitation would be good under forms I and III and void under form II."

The problem presented by the last three classes of cases may be put in the form of two questions.

1. Does the rule against perpetuities require only a power of alienation of the fee by joint action of the parties with successive interests, or does it require vesting?

2. Does it require vesting when vesting does not promote any power of alienation?

The history of the law of real property is full of efforts of alienors to control the future succession to the property transferred. The common law has persistently defeated these efforts. The fee simple conditional was an early example. If A gave an estate to B and the heirs of his body, the manifest intent was that the land remain to B's issue and when the issue failed that it should return to the donor.[15] But the courts held that B could alien the land in fee simple so soon as issue was born, and the intent was defeated. The statute De Donis Conditionalibus, 1285, provided that the will of the donor should be observed and took away B's power of alienation on birth of issue. The statute assured the succession of the land to B's issue against all the efforts of B or his creditors. Thus was created the estate tail which was an unblushing perpetuity in its time. Efforts to repeal the statute failed,[16] but the courts after two centuries allowed the tenant to

[14]See Gray, Remoteness of Charitable Gifts, 7 Harv. L. Rev. 412.

[15]See the preamble to the Statute De Donis, 1285. "In all the cases after issue begotten and borne between them to whom the lands were given under such condition, heretofore such feoffees had power to aliene the land so given and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift."

[16]In Sir Anthony Mildmay's Case, (1605) 6 Co. 40a, the reporter states: "And in this case some points on great consideration were resolved. . . . : 1. That all these perpetuities were against the reason and policy of the common law; for at common law all inheritances were fee-simple. . . . But the true policy and rule of the common law in this point was in effect overthrown by the statute de donis conditionalibus . . . which established a general perpetuity by act of Parliament for all who had or would make it, by force whereof all the possessions of England in effect were entailed accordingly, which was the occasion and cause of the said

dock the entail by a common recovery, and to alien the land in fee simple.[17]

Donors attempted to prevent recourse to this means of docking the entails by attaching clauses restraining alienation to the estates created. The courts called these estates attempted perpetuities and held the estates good and the restraining clauses void.[18] The term perpetuity is here applied to a present estate made inalienable.

Restraints on the alienation of the fee simple were held void from an early date.[19] Even restraints on the alienation of life estates or estates for years were held void,[20] although provision could be made for their forfeiture out of regard for the interest of the landlord.

Defeated at law donors resorted to equity. But equity was no more regardful of donors' wishes. Alienation could no more be prevented by putting the property in trust for the donee than by a restraint on the legal title.[21] These rules against restraining the alienation of presently vested estates are everywhere in force and are known as the rules against restraints on alienation.

Unable to control the succession to their gifts by restraining the alienation of present interests, donors attempted to control it, by so formulating their gifts that their donees would not have the ownership to alien, in other words by the creation of future interests therein.[22]

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and divers other mischiefs. And the same was attempted and endeavored to be remedied at divers Parliaments and divers bills were exhibited accordingly (which I have seen), but they were always on one pretense or another rejected. But the truth was, that the Lords and Commons, knowing that their estates-tail were not to be forfeited by felony or treason as their estates of inheritance were before the said act, and finding that they were not answerable for the debts and incumbrances of their ancestors, nor did the sales, alienations, or leases of their ancestors bind them for the lands which were entailed to their ancestors, they always rejected such bills."

[17]Taltarum's case, (1472) Y. B. 12 Edw. IV. 19.

[18]Corbet's Case, (1599) 1 Co. 83b; Sir Anthony Mildmay's Case, (1605) 6 Co. 40a; Mary Portington's Case, (1613) 10 Co. 35b. Gray, Perpetuities, sec. 140 et seq.

[19]Gray, Restraints on Alienation, sec. 19.

[20]Gray, Restraints on Alienation, sec. 134 et seq.

[21]Gray, Restraints on Alienation, secs. 144, 168, 256, 269. Two exceptions were allowed in equity. There could be restraint on alienation of a married woman's estate during coverture, Gray, Restraint on Alienation, secs., 125-131k., and in many of the United States there may be spendthrift trusts which are inalienable, Gray, Restraints on Alienation sec. 177a et seq.

[22]"But the term *perpetuity* and the general principle of law forbidding

The law had come to allow several forms of future interests. Vested remainders were first allowed, then contingent remainders, and after the Statute of Uses, 1535, and Wills, 1540, contingent remainders by way of use, springing and shifting uses and executory devises.[23]

The law has never objected to vested remainders. The remaindermen are in being and can alien their interests and there never has been any objection to the postponement of possession provided that the remainder was vested in interest, that is provided there was ownership of an estate and not a mere possibility.[24]

Contingent remainders might have been troublesome. They could be limited to persons not in esse. They might be given to each person in succession to whom it was desired to secure the property. For example, to A for life, and after to the use of every person who should be his heir, one after another, for the term of the life of every such heir only.[25]

Alienation of the fee would be impossible because the fee was not given to anyone, but only life estates. But contingent remainders were kept within bounds by a rule much older than the rule against perpetuities. This rule was that after a life estate to a person not in being, a remainder limited to that person's issue was void.[26] Whatever the reason for this rule its effect was, by

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the creation of a perpetuity are first met with, after it had become well settled that an estate tail might be barred by a common recovery, amongst the reasons given for deciding that any contrivance to restrain a tenant in tail from suffering a recovery shall be of no effect. When the law came to recognize as valid the limitation of estates in remainder to unborn children, and further to admit the creation of future estates by way of shifting use and executory devise, it was seen that such devices, unless restrained within due bounds, might pave the way to perpetual settlement of land; and the same principle of policy was again invoked." Williams, Real Property, 23d Ed. 439.

[23]For the history of the development of the various classes of future interests see Fraser, Future Interests in Property, 4 MINNESOTA LAW REVIEW 307.

[24]Gray, Perpetuities, sec. 205.

[25]See cases discussed in Chudleigh's Case, (1595) 1 Co. 120a, 138, Perrot's Case, (1594) Moore 368, 372; Manning & Andrew's Case, (1576) 1 Leon, 256, 258, Gray, Perpetuities, sec. 937 note 2; Williams, Real Property, 23d Ed., 445 note.

[26]In England after a life estate in real property to an unborn person there cannot be a remainder to that person's issue even if the remainder is so limited as not to offend the rule against perpetuities. Whitby v. Mitchell, (1890) 44 Ch. D. 85, 59 L. J. Ch. 485, 62 L. T. Rep. N. S. 771, 38 Wkly. Rep. 337; In Re Nash, [1910] 1 Ch. 1, 79 L. J. Ch. 1, 101 L. T. 837, 54 S. J. 48, 26 T. L. R. 57; In Re Parks Settlement, [1914] 1 Ch. 595, 83 L. J. Ch. 528, 110 L. T. 813, 58 S. J. 362. This rule is older than the rule against perpetuities. Williams, Real Property, 23d Ed. 445; Fletcher,

restricting the number of contingent remainders, to ensure an earlier vesting of the fee in one who would have power to alien it.

The wings of contingent remainders were further clipped by the requirements of seisin. The remainders failed unless they were vested before, or at the moment when the prior estate of freehold ended. And as the present tenant for life could put an end to his estate by a tortious alienation or by merger, it was within his power to destroy the contingent remainders at any time.[27]

After the Statute of Uses, alienors attempted to accomplish the same object by limiting remainders by way of use. It was argued that the seisin for the use was in the feoffee to the use and the contingent interest limited was therefore not dependent upon the seisin of the present tenant and consequently he could not destroy the contingent interest by destruction of his own estate. The argument was logically sound, but it did not prevail. Contingent remainders by way of use were held equally destructible with those of the common law.[28] Neither could be used to control the devolution of the property into the remote future, or to prevent the alienation of the fee by the present tenant.

Contingent and Executory Interest In Land 89. Although its earlier existence has been doubted. In Re Ashforth, [1905] 1 Ch. 535, 74 L. J. Ch. 361, 92 L. T. 534, 21 T. L. R. 329, 53 Wkly. Rep. 328; Gray, Perpetuities, 3d Ed. sec. 298h.

[27]"As is stated in Mr. Butler's note to Coke on Littleton, 342 b. i., although the suspense or abeyance of the inheritance (as distinguished from the freehold) was allowed by the common law, it was discountenanced and discouraged as much as possible and modern law has added her discouragement of every contrivance which tends to render property inalienable beyond the limits settled for its suspense, because it is clear that no restraint on alienation would be more effectual than a suspense of the inheritance. He adds: 'The same principles have, in some degree, given rise to the well-known rule of law, that a preceding estate of freehold is indispensably necessary for the support of a contingent remainder; and they influence, in some degree, the doctrines respecting the destruction of contingent remainders.'" Per Farwell, J. in In Re Ashforth, L. R. [1905] 1 Ch. 535, 74 L. J. Ch. 361, 92 L. T. 534, 21 T. L. R. 329, 53 W. R. 328.

[28]"The 'sacred rule' enunciated in Purefoy v. Rogers, (1669) 2 Wms. Saund. 768, 681, n. 9, that no limitation shall be construed as an executory or shifting use which can by possibility take effect by way of remainder . . . probably owes its origin to the chance of destruction by the failure of the particular estate incident to the one and not to the other." . . . In Chudleigh's Case, (1589-95) 1 Rep. 120a (the case of perpetuities), the court defeated an attempt to make the Statute of Uses serve as a means of protecting contingent remainders from destruction, lest lands should remain too long in settlement." Per Farwell, J. in In Re Ashforth, L. R. [1905] 1 Ch. 535, 544, 74 L. J. Ch. 361, 92 L. T. 534, 21 T. L. R. 329, 53 W. R. 328.

The arguments that failed to save contingent remainders created by way of use, prevailed with respect to the new future interests that could not be classified as contingent remainders—springing and shifting uses and executory devises. They were held indestructible by any act of the present tenant.[29] They too could be limited to persons not in esse. A slight change in the wording of the limitations would prevent the interests being classified as contingent remainders, and would require that they be classified as executory uses or devises.

Reverting to the example previously given it was only necessary in a will to say, to A for life, and *one day after his death* to the use of every other person who should be his heir, one after another, each person to take *one day after the death of his predecessor,* for the term of the life of every such heir only. These life interests could not be classified as remainders, since they were not limited to begin immediately on the termination of the preceding estates. They were executory devises and indestructible. In this way it would have been possible for alienors to control the succession to the property and to render the fee inalienable, into the remote future, had not some check been put on the creation of these interests. To such interests, indestructible by the present tenant, as might continue farther into the future than the policy of the law could allow, the term perpetuity was applied, and the rule against perpetuities was developed to keep them within bounds.

The old rules against restraints on the power of alienation had been concerned with restraints on the present interests. These restraints were express and collateral to the interests given and the law could accomplish its object by holding the restraint void and the interests good. But when the device of future interests was used, the suspension of the power of alienation by a present tenant arose out of the very existence of the future interests. The only way to remove the suspension and to restore the power was to hold the future interests themselves void. And this the rule against perpetuities does.

Another important difference developed between the rules against restraints on the power of alienation and the new rule against perpetuities. Since the express restraints on present interests could be destroyed without affecting the interests no period of grace was allowed them. A restraint on the alienation of a

[29]Pells v. Brown, (1620) Cro. Jac. 590; Gray, Perpetuities, secs. 142 et seq.

present absolute fee for a life in being or for five years is void.[30] The restraint is at once and altogether bad. But when the suspension is by force of a future interest the interest itself must be destroyed to end the suspension. Now future interests have their legitimate uses. It is not the use but the abuse of the scheme of future interests that calls for condemnation. Suspension of the power of alienation should be endured long enough to enable the scheme of future interests to be used for beneficent purposes but not so long as to make them the recourse of the whimsical and capricious. It is a balancing of interests, the public interest in having property alienable against the public and private interest in allowing testators to make reasonable dispositions of their property and provision for dependents. As the period of suspension is extended the former interest grows weightier and the latter lighter. The period permissible was finally fixed at twenty-one years after the termination of lives in being at the creation of the interests.[31] There can consequently be a suspension of the power of alienation of the absolute fee by a present tenant for this period because of the limitation of future interests thereon, although there cannot be any restraint at all on alienation of a present absolute fee.

The rule against perpetuities was a special rule developed to take care of suspensions caused by future interests and has no application to other restraints, express or implied, on present interests.

The above historical retrospect shows that in some cases the object and in all cases the result of the rules allowing docking of entails, against restraints on alienation, and maintaining the destructibility of contingent remainders, was to secure a power of alienation of the fee to a present tenant. It was an infraction of

[30]Morse v. Blood, (1897) 68 Minn. 442, 71 N. W. 682; Hause v. O'Leary, (1917) 136 Minn. 126, 161 N. W. 392.

[31]By the device of trustees to support contingent remainders property could be made practically inalienable at common law for lives in being and twenty-one years. It was on analogy to this that the period of the rule against perpetuities was fixed. "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the courts have said that the estate shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail, and until the person to whom the last remainder is limited is of age the estate is unalienable. In conformity to that rule the courts have said so far we will allow executory devises to be good." Per Lord Kenyon, C. J., in Long v. Blackall, (1797) 7 Durn. & E. 100.

this policy to hold that the new springing and shifting uses and executory devises were indestructible by the present tenant.[32] But having held them indestructible the courts set about to limit the mischief such interests might cause. So long as indestructible interests remained executory there could not be a present tenant with power to convey an absolute fee. The courts restricted the period for which they could be created to continue executory and held all that might continue executory beyond that period void. The period finally adopted was lives in being at the creation of the interest and twenty-one years thereafter. By allowing interests to remain executory during this period the ownership of the absolute fee could be postponed, and there would not be, during this period, a present tenant with power to alien an absolute fee. But on the other hand by restricting the period for which they could be limited to remain executory it was insured that there would again be, when the period had expired, a tenant entitled to an absolute fee with power to alien the same. So the rule against perpetuities took *the form* of a rule against remoteness in vesting, but its object was to prevent an unreasonable postponement of the power of alienation by a present tenant entitled to the fee. And where that object is not served the rule should not apply.

In most of the cases in which the rule against perpetuities was developed the future interests were both contingent and unreleasable and so were void under any form of the rule. But there were early some cases in which contingent interests could be released which, nevertheless, were held void without referring to this fact.

In the first great case on the rule, the *Duke of Norfolk's case*[33] a term for 200 years was limited to H, but if T die without issue in the lifetime of H, then it should go to C. The validity of the limitation to C was questioned. H and C were both lives in being at the time the limitations were made. C could have released his interest at any time.[34] The term was consequently alienable by

[32] "The notion that an executory devise was not barred by a recovery 'went down with the judges like chopped hay.' Per Powell, J., Scattergood v. Edge, (1699) 12 Mod. 278, 281. 'These executory devises had not been long countenanced when the judges repented them; and if it were to be done again, it would never prevail.' Per Treby, C. J., Id 287." Gray, Perpetuities, sec. 159 n. 3.

[33] (1682) 3 Ch. Cas. 1.

[34] 2 Preston, Abstracts, 283; Lampet's Case, (1613) 10 Co. 46b; Tiffany, Real Property, 2d Ed. 589.

H and C joining. The case was in equity before Lord Chancellor Nottingham. He was assisted by Chief Justice Pemberton, Chief Justice North, and Chief Baron Montague. The three justices delivered opinions agreeing that the limitation to C was void. North and Montague said it was void because it would create a perpetuity. Pemberton was more definite. He said it was void because H could not alien the property.[25] There is not a suggestion in the opinions that the power of release of the executory interest of C would save the limitation. The Lord Chancellor held that the limitation to C was good. He said:[26]

"If it tends to a perpetuity, there needs no more to be said, for the law has so long labored against perpetuities, that it is an undeniable reason against any settlement, if it can be found to tend to a perpetuity.

"A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, *as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment,* but such remainders must continue as perpetual clogs upon the estate; such do fight against God, for they pretend to such a stability in human affairs, as the nature of them admits not of, and they are against the reason and policy of the law and therefore not to be endured.

"But on the other side, future interests, springing trusts, or trusts executory, remainders that are to emerge and arise upon contingencies, are quite out of the rules and reasons of perpetuities, nay, out of the reason upon which the policy of the law is founded in those cases, especially, *if they be not of remote or long consideration; but such as by a natural and easy interpretation will speedily wear out, and so things come to their right channel again.*"

The decision was rested on the ground that where it is within the compass of one life that a contingency is to happen, there is no danger of a perpetuity. Such limitations "produce no inconvenience. They wear out in a little time." The Lord Chancellor added:

"They will perhaps say, where will you stop . . . ?

"Where? Why everywhere, where there is not any inconvenience, any danger of a perpetuity; and whenever you stop at the limitation of a fee upon a fee, there we will stop in the limitation of a term of years. No man ever yet said, a devise to a man and his heirs, and if he die without issue, living B. then to B. is a naughty remainder, that is Pell's and Brown's Case.

"Now the ultimum quod sit, or the utmost limitation of a fee upon a fee, is not yet plainly determined, but it will be soon found

[25] (1682) 3 Ch. Cas. 1, 17, 20, 24.
[26] Not italicized in the original.

out, if men shall set their wits on work to contrive by contingencies, to do that which the law has so long labored against, the thing will make itself evident, where it is inconvenient, and God forbid, but that mischief should be obviated and prevented."

There was another limitation over to E, a person in being, on the event that the issue of C ever failed. That too would be releasable. But the Lord Chancellor and judges agreed that this limitation was void.[37]

Child v. Baylie[38] and *Grey v. Montague*[39] were similar cases in which the future interests were held void without adverting to the fact that they were to persons in being who could release them, and that the property was consequently alienable by the joint action of the parties with interests.

The first cases in which the courts referred to the effect of a power of release on the validity of a future interest were *Gilbertson v. Richards*,[40] *Birmingham Canal Co. v. Cartwright*,[41] and *Avern v. Lloyd*.[42] In all three cases it was held that remoteness in vesting was unobjectionable provided that the power of alienation by joint action was not unduly suspended. "It seems obvious," said the court in *Avern v. Lloyd*, "that such a case is not within the principle on which the law against perpetuity rests and that the limitation in question of the absolute interest does not fail as being too remote."

But these decisions did not prevail. *Gilbert v. Richardson* was put on other grounds by the Court of Exchequer Chamber.[43] *Birmingham Canal Co. v. Cartwright* was overruled in *London & S. W. R. Co. v. Gomm*[44] and *Avern v. Lloyd* was overruled in *In Re Hargreaves*.[45] It is now firmly established that the common law rule is not satisfied by a power of alienation by joint action of the parties with successive interests in the property. And in its present form it is true to its original purpose.[46]

The effect of the rule in operation fortifies authority. The

[37](1682) 3 Ch. Cas. 1, 48.
[38](1618) Cro. Jac. 458, 459.
[39](1764) Eden 205, 3 Brown P. C. 314.
[40](1859) 4 H. & N. 277, 28 L. J. Ex. 158.
[41](1879) L. R. 11 Ch. D. 421, 48 L. J. Ch. 552, 40 L. T. 784, 27 W. R. 597.
[42](1868) L. R. 5 Eq. 383, 37 L. J. Ch. 489, 18 L. T. 282, 16 W. R. 669.
[43](1860) 5 H. & N. 453, 29 L. J. Ex. 213, 6 Jur. N. S. 672.
[44](1882) L. R. 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. 449, 30 W. R. 620.
[45](1890) 43 Ch. D. 401, 59 L. J. Ch. 384, 62 L. T. 473, 38 W. R. 470.
[46]Gray, Perpetuities, Ch. VII.

difference in the effect of the two forms is well illustrated by options to buy land. These options are specifically enforceable in equity. Consequently they are in effect executory equitable limitations of the property.[47] A devise to A and his heirs but if B or his heirs ever pay a sum of money to A or his heirs, then the property to go over to B and his heirs would have the same effect. The executory limitation is void. But as it could be released, it would be good if the rule required only a power of alienation by joint action of A and B.[48]

If land be limited to A and his heirs and if A's issue ever fails to B and his heirs, the limitation to B is void. It would be good if the rule were only against a suspension of the power of alienation by joint action of A and B. This power of alienation is not suspended even for a day. Estates tail have been generally abolished, but some of their objectionable features reappear in a limitation of this kind.

The rule against perpetuities is a practical rule.[49] It does not look so much at the theoretical possibility of a joint conveyance as at the practical improbability of it. It would be difficult to agree on the value of the executory interest. The dif-

[47]"Now is there any substantial distinction between a contract for purchase, or an option for purchase, and a conditional limitation? Is there any difference in substance between the case of a limitation to A. in fee, with a proviso that whenever a notice in writing is sent and £100 paid by B. or his heirs to A. or his heirs, the estate shall vest in B. and his heirs, and a contract that whenever such notice is given and such paymant made by B. or his heirs to A. or his heirs, A. shall convey to B. and his heirs? It seems to me that in a court of equity it is impossible to suggest that there is any real distinction between these two cases. There is in each case the same fetter on the estate and on the owners of the estate for all time, and it seems to me to be plain that the rules as to remoteness apply to one case as much as to the other." Per Jessel, M. R., in London & S. W. Ry. Co. v. Gomm, (1882) L. A. 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. 449, 30 W. R. 620.

[48]Such options are valid under the Minnesota statutory rule. Mineral Land Investment Co. v. Bishop Iron Co., (1916) 134 Minn. 412, 159 N. W. 966.

[49]"If the owner in fee of an estate, or the absolute owner of any property could be fettered from disposing of it by a springing use or executory devise or future contingent interest which might not arise till after the period allowed by the rule, it would be easy to tie up property for a very long time indeed. The present interest under the executory limitations might be vested in an infant, a lunatic, or in a person who would refuse to release it, and thus the estate would be practically inalienable for a period long beyond the prescribed limit. That is clearly not the law." Per Kay, J., in London & S. W. Ry. Co. v Gomm, (1882) L. R. 20 Ch. D. 562, 51 L. J. Ch. 530, 46 L. T. 449, 30 W. R. 620. And see Gray, Perpetuities, secs. 268 et seq.: Rundell, The Suspension of The Absolute Power of Alienation, 19 Mich. L. R. 242.

ficulty of getting life tenants and remaindermen to unite in a conveyance is well known. There is greater difficulty here. The contingencies on which executory limitations may be made operative are without number. There is nothing to correspond to actuarial tables of mortality as in the case of life interests. The executory devisee can use his comparatively valueless interest as a club over the present tenant. True the fee may be aliened without a release but it would continue subject in the hands of the alienee to the executory interest. This interest is indestructible by any act on A's part. Purchasers cannot be found for such defective titles.

Professor Reeves, who has made the best argument for the other form of the rule,[50] answers this objection as follows:

"The Anglo-Saxon policy as to *values* has generally been to let them regulate and care for themselves. Otherwise, there would doubtless have been numerous rules for compelling alienation by co-tenants, for example, in many cases of which the price of the interests of some of the owners may be as injuriously affected by the refusal of the others to sell or release, as if the latter were contingent remaindermen."[51]

Co-tenancy serves a useful purpose. One tenant's right to say whether the property should be sold or held is as good as his co-tenant's. There is no difficulty in determining the value of concurrent interests. And co-tenants can generally have partition. But remote future interests are not of such use that the inconveniences arising from them should be endured.

How the law looks at the practical results is well shown by *In Re Rosher*,[52] a case of express restraint on the alienation of a present interest. A devised real estate to his son and his heirs with the proviso that if he should desire to sell the property, in the lifetime of devisor's widow, she should have the option to purchase the same for £3000. The value was £15000. Theoretically the land was not inalienable. But the condition was held void as a restraint on alienation. The court said that "to compel him, if he does sell, to sell at one-fifth of the value, and to throw away four-fifths of the value of the estate is equivalent to a restraint upon selling at all."[53]

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[50]Gray, Perpetuities, sec. 278a.

[51]Reeves, Real Property 1265.

[52](1884) L. R. 26 Ch. D. 801, 53 L. J. Ch. 722, 51 L. T. 785, 32 W. R. 825.

[53]For similar reasoning see Morse v. Blood, (1897) 68 Minn. 442, 71 N. W. 682.

Turning more particularly to the second question, does the rule require vesting when vesting does not promote any power of alienation?

It has already been shown how the courts have historically defeated restraints on the alienation of present interests, and how donors resorted to the device of giving only limited present interests and future interests thus postponing ownership of the fee in order to control the devolution of the property into the future. Certain classes of these interests were finally held indestructible by the present tenant and the courts were compelled to set a bound to them in order to carry out the ancient policy of the law. That bound was the rule against perpetuities. It took the form of a rule against remoteness in vesting, but its object was to insure that there will again be when the period has run, a tenant with power to alien.

There are two classes of cases in which this object would not be promoted by holding the future interest void. 1. When the future interest is destructible by the present tenant. 2. When the present interest would be inalienable even if the future interest limited thereon were held void.

Future interests upon an estate tail or after an estate tail are destructible by the tenant in tail. If they are so limited that they cannot persist after the estate tail has come to an end, they are not affected by the rule against perpetuities. If they are so limited that they might persist after the estate tail has terminated they are subject to the rule.[64] To give this statement another form: If there will always be a tenant with power to alien the fee the future interests are not void no matter how remotely they might vest; if there might come to be a tenant without power to alien the fee because of the future interests, they are void if too remote.

Present charitable trusts are inalienable from their nature.[65] They may be created to last forever. The law favors them and sanctions a perpetuity where it is for a charitable purpose.

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[64]Gray, Perpetuities, Ch. XIV.

[65]It is often said that trusts for charity are unalienable because there are no definite cestuis que trust and there is consequently no one to alien them. "No one has any alienable rights because no one has any rights." Gray, Perpetuities sec. 590. But is this the true reason? The trustee has the legal title and if no one else has any rights, he must also have the equitable title. Why can the trustee not alien? Are they not inalienable because the law recognizes the interest of the indefinite group and makes

Suppose the gift is to A corporation on a charitable trust with an executory gift on a remote contingency over to B corporation also on a charitable trust. This was the case in *Christ's Hospital v. Grainger.*[56] The gift over was held good. The court said:

"It was then argued that it was void as contrary to the rules against perpetuities. These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of property from one charity to another? If the corporation of Reading might hold the property for certain charities in Reading, why may not the corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account."

Of this case Gray says:[57]

"But here, with submission to so great an authority, is the common confusion between perpetuity in the sense of inalienability and perpetuity in the sense of remoteness. Property dedicated to a charity is inalienable necessarily; but to allow a gift to charity to commence in a remote future is not necessary; and the object of the rule against perpetuities is to restrain the creation of future conditional interests.

"If a remote gift to a charity after a gift to another charity is good, because it is by nature inalienable, then a gift to a charity after a gift to an individual should be good; the individual can alienate the whole of his present interest, and the remote interest is no more and no less inalienable than when limited after a gift to another charity. Yet after a gift to an individual a gift to a charity may be unquestionably bad for remoteness. So a remote gift to a charity without any preceding gift at all is too remote."

This case and Gray's comment raises the question whether Gray's insistence that the rule is against remoteness in vesting is quite justifiable. The language of the cases is that it is a rule against suspension of the power of alienation.[58] Gray fought valiantly and rightly against the idea that alienability by joint convey-

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it the duty of the trustee to hold the property and devote it to charitable purpose?

[56](1847) 16 Sim. 83, 1 McN. & G. 460, 1 H. & Tw. 533.

[57]Perpetuities, secs. 600, 601. See also Remoteness of Charitable Gifts, 7 Harv. Law Rev. 412.

[58]In extending the period of the rule to include an infancy after a life in being, the judges of the King's Bench gave as a reason that "the power of alienation will not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity." Stevens v. Stevens, (1736) Cas. Temp. Talb. 228.

"The question always is, whether there is a rule of law, fixing a period, during which property may be unalienable. The language of all these cases is, that property may be so limited as to make it unalienable dur-

ance satisfied the rule. But did he not lean too far to the other side? In the second and third editions of his Rule Against Perpetuities he expressed some doubt of the "entire correctness" of his criticism quoted above. He states the doctrine to be that "future interests must arise within a certain time," but that when the law allows property to be taken out of commerce as in the case of charities there seems to be no occasion to apply the rule. But does not the rule itself need restatement to accord with the language of the cases and with *Christ's Hospital v. Grainger* and the cases that follow it?[88]

If property is given to an individual and then on a remote contingency over to a charity, the reason for holding the gift over void is obvious. The present tenant would have a power to alien but for the charitable gift, and the charitable gift is illusory.[89] The public policy that overlooks inalienability in present charities would be going far to sanction inalienability in individuals for the remote possibility to the charity. And the same reasoning applies to a remote gift to a charity without any preceding gift at all. Some one has the right to the property subject to the executory gift to the charity and cannot alien it because of that gift.

The common law rule against perpetuities is a logical development from the policy of the law to keep property alienable. The law has generally insisted on a power of alienation by an individual tenant. Indestructible executory interests necessarily suspend that power pro tanto. The only way to end the suspension is to get rid of the executory interest. It may be got out of the way

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ing a number of lives not exceeding that, to which testimony can be applied, to determine, when the survivor of them drops." Per Eldon, Lord Chancellor, in Thellusson v. Woodford, (1805) 11 Ves. 112.

"Upon the introduction of executory devises and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted." Per Baron Bayley, in Cadell v. Palmer, (1833) 1 Clark & F. 372.

"The rule against perpetuities is that you shall not make property absolutely unalienable beyond a certain period. It is only a rule in favor of alienation." Per Jessel, M. R., In Re Ridley, (1879) L. R. 11 Ch. Div. 645.

[88] Storrs Agricultural School v. Whitney, (1887) 54 Conn. 342, 8 Atl. 141; MacKenzie v. Trustees, (1905) 67 N. J. Eq. 652, 61 Atl. 1027; Gray, Perpetuities, sec. 597.

[89] "Although the interest of the charity is created by the contract, it does not become effective until the happening of a future event, and it is the very postponement of its effectiveness which renders it obnoxious to the rule against perpetuities." Per Warrington, J., in Worthing Corporation v. Heather, [1906] 2 Ch. 532, 75 L. J. Ch. 761.

by vesting or by avoidance. If it vests there will be a new tenant with power to alien; if it is avoided the old tenant will have the power. In either case there will be a tenant with power to alien the fee. Some suspension must be endured out of respect to the legitimate uses of executory interests. The period allowed is fixed by the rule. If the interests are such that they cannot remain executory longer they are good, alienability will be restored by vesting. If the interests might remain executory longer, and thereby the power of alienation is suspended longer, they are void, and the power of alienation of the prior tenant is unrestrained.[81] But if avoiding the executory interest would not promote the power of alienation the rule has no application.

The rule against perpetuities might be stated thus: An executory limitation of property which causes suspension of power in the persons having the property subject to it to convey an absolute fee and which might remain executory for more than twenty-one years after the termination of lives in being at its creation is void.

[81] "The mere fact that a contingent interest may be released by persons in being, and that a good title may thus be made, is not enough to take the case out of the rule, if the estate cannot be alienated by those having vested interests in it, because a possible future interest is created which may not vest within the time fixed by law." Windsor v. Mills, (1892) 157 Mass. 362, 365, 366, 32 N. E. 352. See also quotation from Kay, J., in note 49.

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BAILMENTS—INVOLUNTARY BAILEES—ABSOLUTE LIABILITY IN CONVERSION FOR MISDELIVERY.—A person who through no act or fault of his own has been put in the actual or constructive possession of a chattel is termed by some cases an involuntary bailee.[1] He has various rights and liabilities. He is entitled to collect storage charges, but is not entitled to a lien on the goods,[2] except apparently where the owner upon notification fails to re-

[1]Heugh v. London & N. W. R. Co., (1870) L. R. 5 Ex. 51, 57, 39 L. J. Ex. 48, 21 L .T. 676; Preston v. Neale, (1858) 12 Gray (Mass.) 222, 223; Cowen v. Pressprich, (1922) 192 N. Y. S. 242, 244. Walker v. Norfolk & W. R. Co., (1910) 67 W. Va. 273, 277, 67 S. E. 722, would apparently limit the use of the expression to situations wherein goods are thrown on another's land by inevitable casualty, winds, storms, etc.

[2]Preston v. Neale, (1858) 12 Gray (Mass.) 222.

move them.[3] He can be charged with a duty towards the goods only when it appears that he knows they are in his possession, actual or constructive.[4] And even where he has this knowledge, it was stated in a recent case[5] that he has not the slightest duty to care for them as long as his lack of volition towards them continues. It is submitted that this latter qualification deprives the subject of involuntary bailments of all novelty, and renders the so-called involuntary bailee liable for misdelivery according to the law of conversion.[6]

A person upon discovering that he is possessed of another's property may pursue one of three courses: first, he may leave the goods alone, in which event no liability can be imposed on him for his non-feasance;[7] secondly, he may rid himself of the possession;[8] or, thirdly, he may voluntarily assume to care for the chattel by the exercise of dominion not inconsistent with the rights of the owner, and having done so, he is bound to use a slight degree of care.[9] The policy of the law is against imposing upon a stranger the duty to care for another's property, but on the other hand, the law seeks to protect by the doctrine of conversion the owner's interest in such property. The law of conversion creates an absolute liability where by a positive act, one who has no authority so to act deprives an owner, or the person entitled to possession, of title or possession. The controlling element is the owner's loss, and not the motive of the actor. The only intent necessary is the intent which the law implies from the act.[10] The soundness of this unqualified doctrine was put to a severe test in the recent case of *Cow-*

[3]Schneider v. Dayton, (1897) 111 Mich. 396, 69 N. W. 829.

[4]Cosentino v. Dominion Exp. Co., (1906) 16 Manitoba L. R. 563; see also, Copelin v. Berlin Dye, etc., Co., (1914) 168 Cal. 715, 144 Pac. 961, L. R. A. 1915C 712, 12 N. C. C. A. 362, and Cohen v. Koster, (1909) 118 N. Y. S. 142.

[5]Cowen v. Pressprich, (1922) 192 N. Y. S. 242.

[6]The courts usually treat liability for misdelivery as a liability peculiar to the law of bailments; whereas in fact it is but an application of the law of conversion. Furthermore, the term "involuntary bailee" is misleading in that the word "bailee" presupposes a duty of some kind, which is contrary to the actual facts. If the term "depositary" were used instead of that of "involuntary bailee," there would be less probability of the error of fixing liability for misdelivery according to the law of bailments.

[7]20 R. C. L. 8; Beal, Bailments, Canad. Ed., 66-68; but see Schouler, Bailments and Carriers, 3rd Ed., 5-6. As to the right of the owner to retake his property from another's premises, see 22 Col. L. Rev. 354.

[8]26 R. C. L. 950.

[9]3 R. C. L. 83.

[10]Bowers, Conversion, 2-4; 1 Street, Foundations of Legal Liability, 234.

en v. Pressprich.[11] In this case the plaintiff had agreed to sell and deliver a negotiable bond to the defendant. To effect a delivery, the plaintiff's private messenger entered a small anteroom used by such messengers, and thrust the bond with the sales memorandum attached through a slot used for that purpose, the bond falling on a clerk's desk. It was immediately noticed that the wrong bond had been delivered; so it was redelivered almost instantly to a person in the anteroom who answered when the plaintiff's name was called. It turned out that this person was an impostor; whereupon the plaintiff brought suit for the value of the bond. The court held that the defendant upon receiving the wrong bond became an involuntary bailee thereof; and that having exercised dominion over it by the attempted redelivery, he incurred absolute liability for misdelivery. The decision is apparently correct. It is submitted, however, that the foundation of the defendant's liability for his misdelivery[12] is based on the law of conversion, and not on any rule peculiar to the bailor-bailee relationship. This liability being a well defined one, the problem is to find if possible an escape from it.

Neither the decisions nor the texts suggest a theory of escape from liability for conversion, except that Bowers says that good intention will excuse where there is but a slight interference with the owner's interest,[13] as where in the owner's presence horses are put off a ferry and left on the bank with but the intent to eject them from the ferry.[14] This theoretical suggestion is obviously of no assistance where the act is one which deprives the owner of a substantial interest such as possession or title. Schouler's statement that misdelivery cunningly induced does not subject one to liability in conversion is not sustained by the authorities he cites.[15]

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[11](1922) 192 N. Y. S. 242. At page 252 the dissenting justice confuses intent with motive.

[12]The difficulty felt in 22 Col. L. Rev. 354, 357, in finding a basis for liability for misdelivery, is not apparent.

[13]Bowers, Conversion, 4. Another writer classifies the same cases cited by Bowers as cases wherein the defendant's act did not of itself sufficiently designate the intent essential to conversion, and that therefore resort to the actual intent of the individual was justified. 1 Street, Foundations of Legal Liability, 235.

[14]Fouldes v. Willoughby, (1841) 8 Mees. & W. 540, 1 Dowl. (N.S.) 86, 10 L. J. Ex. 364, 5 Jur. 534.

[15]Schouler, Bailments and Carriers, 3rd Ed., 72, citing Metzger v. Franklin Bank, (1889) 119 Ind. 359, 21 N. E. 973, wherein the court only found that the complaint did not state a cause of action based on fraud, negligence, or breach of contract, and Brant v. McMahon, (1885) 56

In *Hough v. London & N. W. R. Co.*,[16] and *Krumsky v. Loeser*,[17] the doctrine of conversion is evaded, for the courts in both of the cases treated the subject of misdelivery as a doctrine peculiar to bailments and foreign to the ordinary rules of conversion.[18]

It may be doubted that a court would hold that in a situation such as that presented by the *Cowen* case, the defendant would have an absolute right to rid himself of possession of the negotiable bond, or even further that he would have the right to leave it entirely alone and take no steps for its protection. Undoubtedly the court would take advantage of any element of invitation or custom between the parties, and it might possibly go further and recognize that "common courtesy and prudence, if not the law"[19] demand that the depositary take steps to enable the owner to recover the property. As a practical matter it would seem inconsistent that a depositary should have the right to rid himself of the possession of the property and yet be deprived of the right to do so by delivery to a person whom he reasonably believes to be the owner. It is submitted, however, that the rights of a depositary are ample to prevent the encumbrance of his premises with the goods of another and to prevent the imposition of any duties upon him with respect thereto, and that in the interest of the owner the doctrine of conversion should remain unimpaired.

STAGE OF PROCEDURE AT WHICH CONSTITUTIONAL RIGHTS MUST BE ASSERTED.—The frequency with which constitutional issues are for the first time raised on appeal or in the late stages of a trial indicates a wide-spread belief that a constitutional right is so fundamental that it may be asserted at any time. But an individual may waive a constitutional provision for his benefit when no

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Mich. 489, where the court, though considering the case as one of misdelivery, misconceived the effect of a prior transaction in which by the law of sales the plaintiff did not acquire title or the right of possession as against the defendant.

[16](1870) L. R. 5 Ex. 51, 39 L. J. Ex. 48, 21 L. T. 676.

[17](1902) 75 N. Y. S. 1012.

[18]The court in the Heugh case, at page 57, finds authority for its holding in that Duff v. Budd, (1822) 3 Brod. & B. 177, 6 Moore 469, and Stephenson v. Hart, (1828) 4 Bing. 476, 1 Moore & P. 357, did not find a common carrier liable in conversion for misdelivery. The cases mentioned were however actions on the case for negligence; so it is difficult to understand their weight in a question of conversion not in issue under such a form of action.

[19]See Cowen v. Pressprich, (1922) 192 N. Y. S. 242, 252; 3 R. C. L. 83.

question of public policy or morals is involved,[1] and a failure to make an objection questioning the validity of a statute may be deemed a waiver.[2] The general rule in civil cases, as stated in *Lohmeyer v. St. Louis Cordage Co.*,[3] is that a constitutional question should be lodged in the case at the earliest moment that good pleading and orderly procedure will permit under the circumstances of the case, otherwise it is waived. Accordingly the issue should be raised in the pleadings if due to be found there,[4] but where the opportunity to invoke a particular constitutional clause does not arise until the trial is under way, as in objections to the introduction of evidence or instructions to the jury, the point is timely though not presented in the pleadings.[5] Even where the whole right of action or defense, in a civil case, is based upon a statute alleged to be unconstitutional, the general rule is that its invalidity must be asserted at the earliest opportunity.[6] In Louisiana, however, a contrary result is reached under the code,[7] a result which Kentucky has reached without special code provision.[8] In a New York case,[9] the court said:

"It is the duty of courts to exercise some discretion in determining the time when and the manner in which questions affecting the constitutional validity of an act of the legislature should be presented."

In criminal cases, greater protection is afforded the constitutional rights of a defendant. Where the objection raised is that the act under which the defendant was indicted is unconstitutional,

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[1]Musco v. United Surety Co., (1909) 196 N. Y. 459, 464, 90 N. E. 171, 134 A. S. R. 851.

[2]People v. Vaughan, (1918) 282 Ill. 163, 118 N. E. 479.

[3](1908) 214 Mo. 685, 690, 113 S. W. 1108. The object of the rule is said to be "that the trial court may be treated fairly and the question get into the case under correct safeguards and ear-marked as of substance and not mere color." Hartzler v. Metropolitan St. Ry. Co., (1909) 218 Mo. 562, 564, 117 S. W. 1124.

[4]Miller v. Connor, (1913) 250 Mo. 677, 684, 157 S. W. 81.

[5]Wabash R. Co. v. Flannigan, (1909) 218 Mo. 566, 570, 117 S. W. 722.

[6]Lohmeyer v. St. Louis Cordage Co., (1908) 214 Mo. 685, 690, 113 S. W. 1108.

[7]State v. Winehill & Rosenthal, (1920) 147 La. 781, 86 So. 181.

[8]McCabe's Adm'x. v. Maysville, etc., R. Co., (1910) 136 Ky. 674, 679, 124 S. W. 892. The court said, "When a cause of action or defense is based on a statute, it is not necessary that the validity of the statute should be attacked in a pleading setting forth specifically its invalidity. If the attention of the court is directed to the fact that the validity of the statute is drawn in question, and the determination of its validity is necessary to a correct decision of the case, it will take judicial notice of the legal question presented."

[9]In re Woolsey, (1884) 95 N. Y. 135, 144.

the tendency is to hold that the question is jurisdictional and may be raised for the first time on appeal.[10] Even after final conviction on appeal, it has been held that the defendant may attack the constitutionality of the statute under which he was convicted, in habeas corpus proceedings for his release from confinement,[11] and one convicted of a crime under an unconstitutional statute, may attack the statute, after judgment imposing a fine, by motion to quash the execution issued to collect the fine.[12] In a recent Georgia case,[13] this doctrine was extended to a quasi-criminal case where a physician's license had been revoked, and it was held, after conviction in the court of appeals, that the defendant could bring an action in equity to prevent the enforcement of the penalties imposed, on the ground that the statute under which he was convicted was unconstitutional. Where, however, the constitutional question in a criminal case affects only a matter of evidence and not the jurisdiction of the court, the question must be seasonably raised in the trial court or it is waived.[14]

A constitutional question cannot be raised for the first time in the Supreme Court of the United States, on an appeal from a state court. The jurisdiction of the Supreme Court is limited to points raised and passed upon in the state court.[15]

MINNESOTA'S WRONGFUL DEATH STATUTES—ADVISABILITY OF REMOVING DISPARITIES—LIMITATION OF ACTION FOR WRONGFUL DEATH.—Minnesota has two wrongful death statutes. The first is section 8175 of the General Statutes of 1913, which section has been in force for many years and up to 1915 at least has afforded the sole remedy for the death of all classes of individuals.[1]

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[10]State v. Diamond, (N. M. 1921) 202 Pac. 988, 993; State v. Gibson, (Ia. 1919) 174 N. W. 34; Schwartz v. People, (1909) 46 Colo. 239, 244, 104 Pac. 92; and Commonwealth v. Hana, (1907) 195 Mass. 262, 81 N. E. 149, 11 L. R. A. (N.S.) 799, 11 Ann. Cas. 514, 122 A. S. R. 251. See contra, People v. Raport, (1920) 183 N. Y. S. 589, 592, two judges dissenting.

[11]Ex parte Smith, (1896) 135 Mo. 223, 229, 36 S. W. 628, 33 L. R. A. 606, 58 A. S. R. 576.

[12]State v. Finley, (1915) 187 Mo. App. 72, 172 S. W. 1162.

[13]State Board of Medical Examiners v. Lewis, (1920) 149 Ga. 716, 102 S. E. 24.

[14]State v. Hennessy, (1921) 114 Wash. 351, 195 Pac. 211; State v. Chavez, (1914) 19 N. M. 325, 142 Pac. 922.

[15]Spies v. Illinois, (1887) 123 U. S. 131, 181, 8 S. C. R. 22, 31 L. Ed. 80.

[1]Even death claims paid under the Workmen's Compensation Act and passing to the employer by subrogation must be brought under section 8175. Fidelity and Casualty Co. v. St. Paul Gas Light Co., (Minn. May 19, 1922). See RECENT CASES, post, p. 593. It seems, however, that the

The second, enacted in 1915[2] and modeled essentially after the Federal Employer's Liability Act,[3] provides a remedy for the wrongful death of employees on steam railroads,[4] and was apparently enacted for the purpose of placing railroad employees in intrastate traffic on the same footing as employees in interstate traffic.

Attention is directed to the lack of harmony existing between the provisions of the two statutes and the advisability of bringing about greater uniformity where possible. The more important differences are here set forth in parallel columns:

Section 8175	Laws of 1915, Chap. 187
1 Provides a new cause of action.	1 A survival statute.
2 Maximum recovery, $7500.	2 Unlimited recovery.
3 Damages for pecuniary loss only.	3 Damages for the pain and suffering of the deceased, as well as for pecuniary loss.
4 Action by personal representative.	4 Action by surviving spouse or next of kin.

In the first place, since the law has been long settled in Minnesota that section 8175 creates a new cause of action[5] and is not a survival statute, it seems an unnecessary complication to introduce a survival statute calling for new decisions on cases whose fundamental facts are no different from those in cases under section 8175. The conflict of opinion as to the effect of instantaneous death under a survival statute is one example of the problems that

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right of the employee's dependents to recover compensation from the employer is a new and distinct right of action created by the death. *State ex rel. Carlson v. District Court*, (1915) 131 Minn. 96, 154 N. W. 661.

[2]Minn. Laws 1915, Chap. 187.

[3]See Seamer v. G. N. Ry. Co., (1919) 142 Minn. 376, 380, 172 N. W. 765.

[4]Of course it is to the advantage of the beneficiaries of a deceased railroad employee to sue under the 1915 act because the defenses of assumption of risk, contributory negligence and the fellow-servant rule are therein abolished. The Minnesota supreme court has not yet decided whether this act furnishes the exclusive remedy for the wrongful death of railroad employees, i. e., whether section 8175 is abolished in such cases. There is no express language in the new statute compelling such a conclusion, although such an inference may perhaps be drawn from its later enactment. Whether or not the new statute is exclusive becomes important only when an action has been inadvertently brought under section 8175. In Weireter v. G. N. Ry. Co., (1920) 146 Minn. 350, 178 N. W. 887, the action seems to have been brought under section 8175.

[5]Anderson v. Fielding, (1904) 92 Minn. 42, 50, 99 N. W. 357; Clay v. Chicago, etc., Ry. Co., (1908) 104 Minn. 1, 14, 115 N. W. 949. In Fidelity and Casualty Co. v. St. Paul Gas Light Co., (Minn. May 19, 1922) section 8175 is referred to as a "survival statute," but in view of the decisions cited this seems an inadvertence.

would be presented.[6] In the second place, since section 8175 fixes the maximum recovery at $7500, there seems no reason why the beneficiaries of deceased railroad employees should be allowed greater redress, especially in view of the fact that prior to the 1915 act, $7500 was also the maximum recovery for railroad employees. Thirdly, as to the items of damage recoverable, under section 8175 the damages are for pecuniary loss alone and do not include the pain and suffering of the deceased.[7] What damages are recoverable under the 1915 act does not seem to have been determined, but under the Federal Employer's Liability Act, upon which the new statute is based, a recovery is permitted under the survival feature for the pain and suffering of the deceased.[8] The law on the subject of damages might well be harmonized in both death actions.[9] A final disparity exists in the provisions as to the proper party to sue, section 8175 confining the action to the personal representative while the 1915 act provides for suit by the surviving spouse and next of kin.[10]

A question affecting section 8175, and also the 1915 statute if uniformity is desired, is the limitation period within which the action may be brought. Under section 8175 " The action may be commenced within two years after the act or omission." Consequently if the injured person does not die until two years after the injury, the action for wrongful death does not lie: in other words, the action of the personal representative may be barred before it ever accrues. Such a result appears illogical and, where proximate causation can be shown, unjust. It would seem that the statute of limitations should run only from the time when the action for death arises, i. e., the time of death, and not from the time of the

[6]Capital Trust Co. v. G. N. Ry. Co., (1914) 127 Minn. 144, 148, 149 N. W. 14.

[7]Guhl v. Warroad, etc., Co., (1920) 147 Minn. 44, 179 N. W. 564.

[8]St. Louis, etc., Ry. Co. v. Craft, (1915) 237 U. S. 648, 658, 35 S. C. R. 704, 59 L. Ed. 1160.

[9]This can be accomplished by eliminating the survival feature and substituting for it the new-cause-of-action theory of section 8175. Before the survival feature was introduced in the federal act, the Supreme Court of the United States confined recovery to pecuniary loss alone. St. Louis, etc., Ry. Co. v. Craft, (1915) 237 U. S. 648, 657, 35 S. C. R. 704, 59 L. Ed. 1160.

[10]In Molstad v. Minneapolis, etc., R. Co., (1919) 143 Minn. 260, 173 N. W. 563, and Brown v. Duluth, etc., Ry. Co., (1920) 147 Minn. 167, 179 N. W. 1003, the action seems to have been brought under the 1915 act by the administrator. It should be noted that the federal act forming the model for the 1915 act allows suit to be brought by the personal representative. U. S. Comp. Stat. 1918, sec. 8657.

injury.[11] [12]If the limitation in section 8175 is changed so as to run from the time of death, a similar provision should be inserted in the 1915 statute.[12]

The statutes under discussion can be harmonized by legislation. The 1915 statute can be amended by incorporating in it the cardinal provisions of section 8175, at the same time expressly excluding from section 8175 actions against railroad companies for the death of railroad employees. Or section 8175 can be made the exclusive remedy for the wrongful death of any individual, amending the 1915 act by striking out the inconsistent parts and preserving only the advantages derived from the abolition of the common-law defenses. Which method to adopt is a matter of legislative policy.

RECENT CASES

ATTORNEY AND CLIENT—ETHICS—WITNESSES—ATTORNEY TESTIFYING IN CLIENT'S CAUSE.—An attorney, in the active conduct of the trial, offered to testify generally as a witness in his client's behalf. The trial court refused to permit him so to testify unless he withdrew from the case as counsel. The attorney declined to accept this alternative and conducted the case to its conclusion. *Held,* that the decision of the trial court did not constitute reversible error in the absence of a showing that an offer of proof had been made. *Cox v. Kee,* (Neb. 1922) 186 N. W. 974.

At the early common law an attorney undoubtedly was disqualified as a witness for his client under the rule which rendered all parties primarily interested in the outcome of the action incompetent to testify, a rule of evidence which has been entirely eradicated except in so far as statutory provisions disqualified interested parties. Jones, Evidence, 2nd Ed., sec. 712; 28 R. C. L. 469. Under statutory provisions of that nature it is generally held that the client's attorney is not disqualified merely because of the fact that he receives a fee from the client. *Quarles v. Waldron,* (1852) 20 Ala. 217; note, 49 L. R. A. (N.S.) 426. But where

[11]The proviso of section 8175 for the substitution of the personal representative in an action brought by the injured person but not prosecuted to judgment before his death, provides a remedy in all cases where the deceased started suit in his lifetime. But a personal injury action may be brought in Minnesota within six years, G. S. Minn. 1913, sec. 7701, yet where the deceased defers his right to sue and then dies more than two years after the injury, the action is barred under the present statute. This limitation period was apparently taken from a survival statute in which, from the very nature of the action, the limitation began to run from the date of the injury. A further reason may be the desire of the legislature to avoid speculation concerning the proximate cause of death.

[12]A discrepancy also exists between the limitation period under the 1915 act and G. S. Minn. 1913, section 7701. Under the later statute a railroad employee has but two years to sue for personal injuries, whereas under section 7701 a personal injury action may be brought within six years.

there is a contract for a contingent fee there is authority to the effect that the client's counsel is disqualified as an interested party, from testifying to conversation with a deceased person. *Tretheway v. Carey*, (1895) 60 Minn. 457, 62 N. W. 815. Though no longer disqualified as an interested party, on ethical grounds the English and Canadian courts hold the client's counsel incompetent as a witness unless he first withdraws as *counsel. Stones v. Byron*, (1846) 4 Dowl. & L. 393; 2 Halsbury's Laws of England 396; *Benedict v. Boulton*, (1847) 4 U. C. Q. B. 96; *Cameron v. Forsyth*, (1847) 4 U. C. Q. B. 189; contra, *The Bank of British North America v. McElroy*, (1875) 15 N. B. 462. With one exception the rule is settled in American jurisdictions that an attorney is competent to testify in behalf of his client no matter how gross the violation of professional ethics. *French v. Hall*, (1886) 119 U. S. 152, 30 L. Ed. 375; notes, 49 L. R. A. (N.S.) 422, 13 Ann. Cas. 31. The notable exception to this rule is the state of Georgia where a statute provides that no attorney shall be competent to testify in any court on any matter, knowledge of which he acquired in his professional capacity from his client. 1911 Ga. Code, Sec. 5860.

Bench and bar, however, are practically unanimous in denouncing the practice of an attorney testifying for his client in other than formal matters. A. B. A. Canon, No. 19; The Annual Practice, (Eng.) (1917) 2428. A proper regard for the ethics of the profession demand that, where an his connection with the litigation before taking the witness stand. *Wilkin-*attorney's testimony is indispensable to his client's cause, he should sever *son v. People*, (1907) 226 Ill. 135, 149, 80 N. E. 699. The ethical reasons underlying the objection to an attorney serving in this dual capacity are obvious. It is manifestly repugnant to a sense of fair play to permit a counsel, in argument to the jury, to comment on the credibility of witnesses in the very case where he himself has testified. There is also the very apparent danger that the jury will fail to differentiate between what the attorney testified to under oath and what he stated in argument.

ATTORNEY AND CLIENT—LIENS—RIGHT OF CLIENT TO INSPECT PAPERS HELD UNDER LIEN OF ATTORNEY WRONGFULLY DISCHARGED BY HIM.—Libelant discharged his attorney without just cause and secured an order from the court substituting another attorney and giving him access to all the papers under the control of the former attorney. On appeal from the order it was *held*, that the client cannot inspect the papers held under the lien of the wrongfully discharged attorney, since to permit such inspection would in effect defeat the lien. *The Flush*, (C. C. A. 1921) 277 Fed. 25.

It is generally held that an attorney has a lien for compensation on his client's papers which have come into his possession in the course of his professional employment, unless he has been discharged for just cause. 2 R. C. L. 962; *Matter of Hollins*, (1910) 197 N. Y. 361, 90 N. E. 997. How far the control of a wrongfully discharged attorney reaches, however, the courts seem rarely to have been called upon to decide. In England the law appears to be clear where an attorney is dismissed without cause, he is under no obligation to produce the papers, or to allow the

client to inspect them. *Kemp v. King*, (1842) 2 Moody & R. 437; and see 1 Jones, Liens, sec. 122a. The few cases that have arisen in America on this question are in accord with the instant case. 6 C. J. 786; *Penn. Finance Co. v. Charleston, etc., Ry. Co.*, (1891) 48 Fed. 45; *Davis v. Davis*, (1898) 90 Fed. 791, in which the court refused to compel an attorney having a lien on papers of a former client in his possession for unpaid fees, to produce such papers under a subpoena duces tecum issued on behalf of the client. In the instant case the court is clear and emphatic that the right of inspection should be denied to the former client because to allow him this privilege would be to destroy the value of the attorney's lien right. As stated by the court:

"The leverage which the possession of the papers affords depends upon how embarrassing to the client the possession of them by the attorney is. If the client is given the right to inspect the papers or to compel their production while the lien continues, it certainly impairs the value of the lien, as it diminishes the embarrassment caused by the attorney's retention of them, and might make them valueless to the attorney, and the lien nugatory."

In Minnesota an attorney has a lien upon the papers of his client coming into his possession in the course of his employment. G. S. Minn. 1917 Supp., sec. 4955. And, in a proper case, he would doubtless be protected as in the instant decision.

BAILMENTS—CARRIERS—NOTICE NECESSARY TO RESTRICT LIABILITY OF PARCEL ROOM.—The plaintiff checked a parcel at a railroad parcel room, paying the sum of ten cents therefor and receiving a check or card with which to reclaim. This card contained conditions in fine print limiting the liability of the parcel room to $25.00 a parcel. The plaintiff seeks full recovery for negligent loss claiming that he had not read or agreed to the notice. *Held*, that the party checking goods was under no duty to read the card, and that in the absence of being informed by the railroad of a limited liability, a recovery could be had in full. *Lebkeucher v. Pennsylvania* R. Co., (N. J. Law, 1922) 116 Atl. 323.

A bailee is liable for failure to exercise ordinary care where the bailment is for mutual benefit, in the absence of a special agreement to the contrary. 6 C. J. 1121; *St. Paul, etc., Ry. v. Minneapolis, etc., Ry.*, (1879) 26 Minn. 243, 2 N. W. 700. It is then necessary to determine whether there is an express or implied contract to vary this rule, for that the bailee may impose terms as a condition to accepting the bailment and may, short of protection in case of his own fraud or negligence, limit his liability seems undisputed. 6 C. J. 1112. The authorities are divided as to what constitutes acquiescence by the depositor. The settled English and Canadian law under the same facts as the instant case holds that the depositor having the means of ascertaining the conditions must be taken to have consented to be bound by them. *Van Toll v. Railway Co.*, (1862) 12 C. B. (N.S.) 76, 31 L. J. C. P. 241; *Dorion v. Grand Trunk Ry. Co.*, (1917) 53 C. S. (Quebec) 106. This view has been accepted in the United States. *Terry v. Southern Ry.*, (1908) 81 S. C. 279, 62 S. E. 249, 18 L. R. A. (N.S.) 295. The weight of American authority, however, is in accord

with the instant case in holding that the depositor is under no duty to read the card, which he is considered to have accepted merely as a means of identification, and that he must be affirmatively shown to have been aware of and to have consented to the contract of limitation. *Dodge v. Nashville, etc., Ry. Co.*, (1919) 142 Tenn. 20, 215 S. W. 274, 7 A. L. R. 1229, and note; *Healy v. New York, etc. Ry.*, (1912) 138 N. Y. S. 287, aff'd, 210 N. Y. 646, 105 N. E. 1086; *Lancaster v. Sanford*, (Tex. Civ. App. 1920) 225 S. W. 808; *Van Noy Interstate Co. v. Tucker*, (1921) 125 Miss. 260, 87 So. 643.

The general rule of contracts is that the acceptance of a paper which purports to be a contract sufficiently indicates an assent to its terms whatever they may be and it is immaterial that they are, in fact, unknown. 1 Williston, Contracts, sec. 90[a]. However, it is reasonable to contend that the card purports merely to be a means of identification to enable the depositor to reclaim his baggage; and the cases supporting the instant case only hold that the duty is on the bailee to bring notice to the bailor that the check is more than a means of identification, viz., that it contains a contract. Once informed that the check contains a contract, of course the bailor on acceptance would be bound by it, whether he reads it or not, under the general rule just stated.

BAILMENTS—INVOLUNTARY BAILEE—ABSOLUTE LIABILITY IN CONVERSION FOR MISDELIVERY.—The plaintiff agreed to sell and deliver a negotiable bond to the defendant. To effect delivery, the plaintiff's private messenger entered a small anteroom used by such messengers, and thrust the bond through a slot used for that purpose, the bond falling on the defendant's desk. It was immediately noticed that the wrong bond had been delivered; so the defendant redelivered it almost instantly to a person in the anteroom who answered when the plaintiff's name was called. It turned out that this person was an imposter. Thereupon the plaintiff brought this action for the value of the bond. *Held*, one justice dissenting, that the defendant upon receiving the bond became an involuntary bailee thereof, and that, having exercised dominion over it by the attempted redelivery, he became absolutely liable for misdelivery. *Cowen v. Pressprich*, (N. Y. 1922) 192 N. Y. S. 242.

For a discussion of the principles involved, see NOTES, p. 579.

BANKS AND BANKING—SPECIAL DEPOSIT—DEPOSIT FOR A SPECIFIC PURPOSE.—A bought mortgage bonds of the B corporation on condition that the purchase price be deposited in a separate fund to be drawn on only for the construction and equipment of a mill. The defendant bank guaranteed the performance of the contract and agreed to hold the deposit for the purposes named. After the contract had been in part performed, the defendant applied the balance of this fund on a note given by the corporation for other than the purposes mentioned. Four years later, the corporation having been adjudged bankrupt, the trustee sued to recover the sum so applied by the defendant, as a part of the general assets of the corporation. *Held*, that this was a special deposit, and that neither

the defendant bank nor the trustee of the corporation was entitled to the residue of the fund. *Turkington v. First National Bank*, (Conn. 1922) 116 Atl. 241.

The court seems to base its decision on the erroneous premise that this case involves a *special deposit*. The deposit was in the form of a certified check; it was not to be returned in specie, but was to be drawn on for a specified purpose. It was therefore a deposit for a specific purpose. Morse, Banks and Banking, 5th ed., secs. 183, 185. The rights of the parties can all be determined on the basis of the contract existing between A, the B corporation, and the defendant. Neither could claim against the terms of the contract. The same result could be attained by treating the B corporation as a trustee of the fund for the benefit of A. The distinction insisted upon is not important in the instant case; but it would be of importance had the defendant bank become insolvent. If the deposit were a *special deposit* the depositor or anyone claiming in her right would have been entitled to a preference over the general creditors of the bank. *Anderson v. Pacific Bank*, (1896) 112 Cal. 598, 44 Pac. 1063, 32 L. R. A. 479, 53 A. S. R. 228. If it were a deposit for a *specific purpose*, this would not be so clear. For a discussion of the distinction between these classes of deposits, see 6 MINNESOTA LAW REVIEW 306.

CARRIERS—NEGLIGENCE—TORTS—DUTY TO EXERCISE DUE CARE TOWARD ONE EXCHANGING GREETINGS WITH A PASSENGER.—The plaintiff boarded the defendant's boat for the purpose of exchanging farewells with friends who were taking passage on the boat. The plaintiff was not related to the passengers mentioned, nor did she stand in the position of a hostess, She did not accompany her friends to the boat nor did she in any manner render them assistance. The defendant permitted the use of its boat for such purposes and warned visitors ashore just before leaving the pier. While on the boat the plaintiff was injured by tripping over baggage negligently left in the passage by the defendant. *Held*, that the plaintiff was an invitee and entitled to the exercise of ordinary care on the part of the defendant. *Powell v. Great Lakes Transit Corporation*, (Minn. May 5, 1922).

It is well settled that a carrier owes the duty of ordinary care to one who, with notice to the carrier's servants of his presence not as a prospective passenger, enters a train for the purpose of assisting a passenger about to depart. *Cannon v. Atchison, etc., Ry. Co.*, (1917) 101 Kan. 363, 167 Pac. 1050, L. R. A. 1918A 559; *Leon v. Chicago, etc., Ry. Co.*, (1918) 102 Neb. 537, 167 N. W. 787, L. R. A. 1918F 313, and note; note, 10 Ann. Cas. 161. In *Louisville, etc., R. Co. v. Crunk*, (1889) 119 Ind. 542, 21 N. E. 31, 12 A. S. R. 443 it was held that one assisting an invalid whom the carrier has accepted as a passenger is entitled to the care due a passenger. It is essential, however, that the carrier knew or should have known from the circumstances that the person boarding the train did so not intending to take passage on the train. *Southern Ry. Co. v. Patterson*, (1906) 148 Ala. 77, 41 So. 964, 121 A. S. R. 30; *Wickert v. Wisconsin Central Ry. Co.*, (1910) 142 Wis. 375, 125 N. W. 943; see *Street v. Chicago, etc., Ry. Co.*,

(1914) 124 Minn. 517, 145 N. W. 746, 8 N. C. C. A. 630. The weight of authority is to the effect that the carrier owes ordinary care to one on his premises merely for the purpose of exchanging farewells. *Banderob v. Wisconsin, etc., Ry. Co.*, (1907) 133 Wis. 249, 113 N. W. 738, *Jackson v. Hines*, (Md. 1921) 113 Atl. 129; *City of Seattle v. Jenkins*, (1906) 150 Fed. 537, 80 C. C. A. 279, 10 L. R. A. (N. S.) 969, 10 Ann. Cas. 159. A minority view, however, holds that the carrier is bound only to refrain from wanton injury. *Galveston, etc., Ry. Co. v. Matzdorf*, (1908) 102 Tex. 42, 107 S. W. 882, 112 S. W. 1036, 20 L. R. A. (N. S.) 833, and note. Where the object of the meeting is to promote business relations it is held that the carrier owes the visitor the duty to exercise due care. *Atchison, etc., Ry. Co. v. Cogswell*, (1909) 23 Okla. 181, 99 Pac. 923, 20 L. R. A. (N. S.) 837, and note; *Klugherz v. Chicago, etc., Ry. Co.*, (1903) 90 Minn. 17, 95 N. W. 586, 101 A. S. R. 384. But where the sole object was to pay a debt it was held that the individual was a trespasser. *McElvane v. Central of Georgia Ry. Co.*, (1911) 170 Ala. 525, 54 So. 489, 34 L. R. A. (N. S.) 715, and note, 3 N. C. C. A. 340. Likewise, one present for the purpose of satisfying his curiosity is a trespasser. *Arkansas, etc., Ry. Co. v. Sain*, (1909) 90 Ark. 278, 119 S. W. 659, 22 L. R. A. (N.S.) 910; *Gillis v. Pennsylvania Ry. Co.*, (1868) 59 Pa. 129, 98 Am. Dec. 317.

The duty owed by the carrier to the visitor is, however, not owing to that individual in his own right but in the right of the passenger. 1 Wyman Public Service Corporations 319-321. The situation is analogous to that of a person visiting a guest at an inn, in which case it has recently been held that in the right of the guest the innkeeper owes the visitor the care of an invitee, i. e., ordinary care. *Goldstein v. Healy*, (Cal. 1921) 201 Pac. 462.

CHARITIES—CORPORATIONS—LIABILITY TO INJURED SERVANT UNLAWFULLY EMPLOYED.—The defendant hospital, a charitable corporation, employed the plaintiff, who was under sixteen years of age, to operate an elevator. There was a statute in effect making it unlawful to employ anyone under sixteen years of age in such a capacity. The plaintiff sued for damages for injuries sustained by him in the course of his employment. *Held*, that the defendant was not liable. *Emery v. Jewish Hospital Ass'n*, (Ky. 1921) 236 S. W. 577.

It has been held that a charitable corporation is liable for injuries received by a lawfully employed servant when such injuries are caused by its negligence. *Hewett v. Woman's Hospital, etc., Ass'n*, (1906) 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N.S.) 496. For a discussion of the liability of a charitable corporation to persons other than patients who are injured by the negligence of such corporation, see 1 MINNESOTA LAW REVIEW 178; note 7 L. R. A. (N.S.) 481. In the instant case the court argues that the rule of respondeat superior does not apply to a charitable corporation itself, because the servants of such an institution are servants of the public, and further, that while no rule governing the administration of trusts prevents the diversion of a sum recovered for damages from the trust res, it is against public policy to make such diversion. The Minnesota

court under practically the same conditions has allowed a recovery on the theory that the statute under consideration imposed a non-delegable duty upon the master fixing him with liability in the absence of statutory exemption. *McInerny v. St. Luke's Hospital Ass'n*, (1913) 122 Minn. 10, 141 N. W. 837, 46 L. R. A. (N.S.) 548. *Maki v. St. Luke's Hospital Ass'n*, (1913) 122 Minn. 444, 142 N. W. 705. For a discussion of the liability of a charitable corporation for its negligence and the negligence of its servants, see 1 MINNESOTA LAW REVIEW 178, 2 MINNESOTA LAW REVIEW 539, and 4 MINNESOTA LAW REVIEW 533. For exhaustive collection of authorities, see 14 A. L. R. 572, 581.

CONTRACTS—IMPOSSIBILITY—SCHOOLS AND SCHOOL DISTRICTS—RECOVERY BY TEACHER WHERE SCHOOL CLOSED ON ACCOUNT OF AN EPIDEMIC.—The school in which plaintiff taught was closed for two months by order of the state board of health on account of an influenza epidemic. There was no provision in the contract covering such a contingency. Plaintiff was at all times ready and willing to perform her contract. *Held*, that plaintiff was entitled to recover her full salary for the two months, the court being unwilling to imply a condition which the parties have omitted from their own contract. *Phelps v. School Dist.*, (Ill. 1922) 134 N. E. 312.

In the instant case the court denied the force of the contention which was successfully urged in *Gregg School Tp. v. Hinshaw*, (Ind. App. 1921) 132 N. E. 586. In that decision it was held that where the school was closed by the health authorities acting under the authority of the state law, and not by the school board, there could be no recovery of compensation for the interval of the epidemic, performance by the school board having been made impossible by act of law. See criticism in 6 MINNESOTA LAW REVIEW 318. The result of the instant case is reached under the general doctrine that, when a party contracts to do a thing without qualification, performance is not excused because by inevitable accident or other contingency not forseen it becomes impossible for him to do that which he agreed to do. The reasoning is that while such a contingency as in the instant case was unforeseen, it was not unforeseeable and might well have been expressly guarded against in the contract. It would seem that this is the better rule.

DEATH—WORKMEN'S COMPENSATION—MASTER AND SERVANT—SUBROGATION—PLEADING—RIGHT OF EMPLOYER WHO HAS PAID DEATH CLAIM TO SUE FOR WRONGFUL DEATH.—Plaintiff insurer, claiming to have become subrogated to the employer's rights by paying a claim for the death of an employee under the Workmen's Compensation Act, brought an action for death against the defendant tortfeasor to reimburse itself, more than two years after the injury occurred. Plaintiff contended that the Compensation Act (G. S. Minn. 1913, sec. 8229, repealed and re-enacted, Minn. Laws 1921, chap. 82, sec. 31) also gives an action for wrongful death subject to the statute of limitations contained in G. S. Minn. 1913 sec. 7701, viz., six years. *Held*, that the Compensation Act gives no new right of action for death, and that the present action could be brought only under the general

wrongful death statute, G. S. Minn. 1913, sec. 8175, under which it was already barred. *Fidelity and Casualty Co. v. St. Paul Gas Light Company*, (Minn. May 19, 1922).

This decision settles an important question concerning the Compensation Act as it stood in 1919 and seems in no way affected by the new Compensation Act of 1921 (Minn. Laws 1921, Chap. 82), which merely reenacts the here litigated section. G. S. Minn. 1913, sec. 8229. Without considering the arguments in favor of holding that the Compensation Act creates a new independent remedy for wrongful death, such as the divergencies between it and section 8175 as to parties plaintiff and the amount of recovery, it seems that the case might have been disposed of, regardless of whether a new death action was created or not, on the ground that in any event an insurance company could never bring a death action under that statute. At common law there seems but little doubt that a life insurance company cannot be subrogated to an action for wrongful death. 14 R. C. L. 1408; *Mobile Life Ins. Co. v. Brame*, (1877) 95 U. S. 754, 24 L. Ed. 580; and see *Gatzweiler v. Milwaukee Elec. Co.*, (1908) 136 Wis. 34, 116 N. W. 633, 128 A. S. R. 1057, 16 Ann. Cas. 633, 18 L. R. A. (N.S.) 211, and notes. The reason lies in the inherent difference between an insurance contract for an injury to property and an injury to the person, the former being an indemnity contract, the latter not. Vance, Insurance 102. But in addition to this argument, a reason against such subrogation seems to arise from the very statute itself because it reads that a third party tortfeasor shall not be liable to any person other than the employee or his dependents or, by way of subrogation, to his employer. The right of subrogation to a death action not existing at common law in favor of an insurer and not being expressly given, in fact, being expressly negatived, by statute, it would seem that in no event can the insurance company bring an action, unless the statute is amended. In one case, however, it has been held, on facts similar to those of the instant case, that an insurance company which had paid a claim under a state workment's compensation act, could sue the third party tortfeasor for damage caused to it by the wrongful death, not by way of the technical death action, but by way of an ordinary tort action for negligence which caused the plaintiff to sustain a loss. *Trav. Ins. Co. v. Great Lakes Eng. Co.*, (1911) 184 Fed. 426, 107 C. C. A. 20, 36 L. R. A. (N.S.) 60. It is to be noted, moreover, that the right of the dependants of a deceased employee to recover compensation from the employer has been held to be a distinct right of action created by death. State ex rel. Carlson v. District Court, (1915) 131 Minn. 96, 154 N. W. 661. In so far as the instant case suggests the possibility of an action by an insurance company under the wrongful death statute, it seems open to question; but aside from that, the decision seems commendable in keeping down the number of statutory death actions; and its effect is merely to inject a few new parties plaintiff into section 8175, as a matter of pleading.

In the instant case G. S. Minn. 1913, sec. 8175 is designated as a "survival statute," whereas the court has previously held that it is technically not a "survival statute," but that it gives a new cause of action. *Anderson v. Fielding*, (1904) 92 Minn. 42, 51, 99 N. W. 357; *Magean v. G. N. Ry.*

Co., (1908) 103 Minn. 290, 115 N. W. 651; *Clay v. Chicago, etc., R. Co.*, (1908) 104 Minn. 1, 115 N. W. 949. The distinction between the two types of statutes being important, the language of the court in the instant case seems inadvertent. For a discussion of wrongful death statutes in Minnesota, see NOTES, p. 584.

EXTRADITION—INTERSTATE AND INTERNATIONAL—INDICTMENT FOR DIFFERENT OFFENSE.—The defendant was extradited from New Mexico to California on a charge of embezzlement. While held on this charge, an amended information was filed, charging him with bigamy. *Held*, that he could be held and tried for bigamy. *People v. Martin*, (Cal. 1922) 205 Pac. 121.

This decision is supported by the great weight of authority. *Las celles v. Georgia*, (1893) 148 U. S. 537, 13 S. C. R. 687, 37 L. Ed. 549; *People v. Thaw*, (1915) 154 N. Y. S. 949, aff'd, 152 N. Y. S. 771; notes, 14 L. R. A. 128, 19 L. R. A. 206, 47 L. R. A. (N.S.) 811. Prior to the decision in the *Lascelles case* there were two lines of authority, a minority view based on the authority of *United States v. Rauscher*, (1886) 119 U. S. 407, 7 S. C. R. 234, 30 L. Ed. 425, which held that a prisoner surrendered under a treaty with a foreign country could be tried only for the offense for which he was surrendered until given a reasonable time to depart. *State v. Hall*, (1888) 40 Kan. 338, 19 Pac. 918; *In re Fitton*, (1891) 45 Fed. 471; *In re Hope*, (1889) 10 N. Y. S. 28. But, as clearly pointed out in the *Lascelles case*, the question of international extradition depends entirely on treaty contract or stipulation, there being no rule of comity preventing a nation from granting fugitives within its jurisdiction the right of asylum. Interstate extradition, however, is not a mere matter of contract but is governed by the supreme law of the land, U. S. Const., Art 4, sec. 2, which places no restrictions on the rights of the extraditing state and grants the prisoner no immunity.

As to immunity of an extradited person from civil process, see 6 MINNESOTA LAW REVIEW 410; note, 14 A. L. R. 771.

GIFTS CAUSA MORTIS—SYMBOLICAL DELIVERY—SUFFICIENCY OF DEED OF GIFT TO PASS TITLE.—The donor owned some Liberty Bonds, which were held for her by the Tonopah Banking Corporation. Three days prior to her death, while in imminent expectation of death, she wrote, signed, and delivered an instrument in which she declared it to be her wish that the donee have the bonds. *Held*, that the written declaration was a symbolical delivery of the bonds and constituted a valid gift mortis causa. *Goldsworthy v. Johnson*, (Nev. 1922) 204 Pac. 505.

A gift mortis causa passes title conditional upon the death of the donor; but delivery, actual, constructive, or symbolical, is necessary. *Devol v. Dye*, (1890) 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; Darlington, Personal Property, 59, 317. Originally, to constitute a valid gift inter vivos or causa mortis, actual delivery of the chattel was necessary, not to prevent fraud, but because a transfer of seisin or possession was necessary to the transfer of title. See *Cochrane v. Moore*, (1890) L. R. 25 Q. B.

D. 57. But it is now well settled that a deed of gift inter vivos passes title without actual delivery of the chattel, because it clearly evidences the donor's intention. *Newman v. James and Newman,* (1847) 12 Ala. 29; *Gordon v. Wilson,* (1856) 4 Jones (N.C.) 64. And the rule today is the same with regard to gifts mortis causa. *Meach v. Meach,* (1852) 24 Vt. 591; *Ellis v. Secor,* (1875) 31 Mich. 184, 18 Am. Rep. 178; *In Re Reh's Estate,* (1917) 196 Mich. 210, 162 N. W. 978. But there is some contrary authority because of the peculiar susceptibility of such a mode of transfer to fraud. 2 Schouler, Personal Property, 3rd Ed., sec. 179; *Smith v. Downey,* (1844) 38 N. C. 268, where, however, the donor could have made actual delivery. While a deed under seal clearly will pass title, it is not so certain whether a mere unsealed writing will operate as a good gift causa mortis. It was intimated in *Tate v. Hilbert,* (1793) 2 Ves. Jr. 111, 120, that a valid delivery might be made either by deed or by writing. On the other hand, an unsealed writing has been termed insufficient. 1 Roper and White, Legacies, 4th Ed. 13. In Minnesota, by G. S. Minn. 1913, sec. 5704, seals are abolished, and an informal writing would therefore seem to be sufficient for a gift mortis causa. In the instant case, the only thing which could operate to pass the title, according to the donor's intent, was the informal writing, but the court does not rely on the writing expressly and seems to regard the fact that, under the circumstances, no other delivery was possible as an important consideration. Though the court termed it a symbolical delivery, it might better have said that the gift was valid because the donor's intention was evidenced and title passed by a deed without seal. See opinion of Handy, J., *McVillie v. Van Vacter,* (1858) 35 Miss. 428, 451, 72 Am. Dec. 127. For a discussion of symbolical delivery in gifts inter vivos, see 4 MINNESOTA LAW REVIEW 70.

INSURANCE—LIABILITY OF INSURANCE COMPANY IN TORT FOR AGENT'S DELAY IN FORWARDING APPLICATION.—The agent of the appellant insurance company negligently failed to forward to the home office the respondents' application for fire insurance on a threshing rig. Fifteen days from the date of application the property burned. *Held,* that the respondents may recover in tort the amount stated in their application. *Security Insurance Co. v. Cameron et al.,* (Okla. 1922) 205 Pac. 151.

The holding of the instant case, which is one of first impression in Oklahoma, marks another step in the establishment of the struggling doctrine which holds an insurance company liable in tort for negligent failure to pass upon an application for insurance. In the late case of *Bradley v. Federal L. Ins. Co.,* (1920) 295 Ill. 381, 129 N. E. 171, 15 A. L. R. 1021, and note, the doctrine was discussed, but not passed upon, though the intimation was against adoption of the rule. See 5 MINNESOTA LAW REVIEW 479. The decisions in accord with the instant case allow the plaintiff to recover on the ground apparently that the insurance business is affected with a public interest, and that therefore the duty is imposed by law to act with reasonable promptitude. See 3 MINNESOTA LAW REVIEW 53; and see 5 MINNESOTA LAW REVIEW 224, for comment on *Wanberg v. National U. F. Ins.,* (N. D. 1920) 179 N. W. 666, holding

valid a North Dakota law which provides that an application for hail insurance shall be effective as a policy at the end of twenty-four hours after application is made to the local agent, unless upon receipt of the application the company shall forthwith by telegram notify the applicant of its rejection of his risk. The court in the instant case declares, as did the court in the leading case in accord, *Duffie v. Bankers' L. Ass'n*, (1913) 160 Ia. 19, 27, 139 N. W. 1087, 46 L. R. A. (N.S.) 25, that the rule adopted does not preclude the insurance company from pleading as a defense that the application would in any event have been rejected by it, and hence that no damage was caused by the delay. It is submitted that this limitation is not correct. The true basis of the plaintiff's cause of action is the company's failure to pass upon his application, and not its failure to issue him a policy. If the company's delay prevents the applicant from going elsewhere for insurance, then, regardless of whether the company would have accepted or rejected the application, damage has been suffered and tort liability should attach.

INSURANCE—WAIVER AND ESTOPPEL—MUTUAL BENEFIT SOCIETY.—In an action to recover on a mutual benefit certificate, the trial court instructed the jury that if it found that a soliciting agent of the defendant in order to induce the insured to take insurance, stated, that the war clause had not been enforced and that in his opinion it would not be enforced, and that the insured was influenced thereby to take the insurance, then the defendant was estopped from setting up the nonpayment of the war premium, and plaintiff could recover on the certificate. *Held*, that the defendant was estopped. *Sovereign Camp, W. O. W. v. Richardson*, (Ark. 1922) 236 S. W. 278.

The prevailing opinion expressly rejects waiver as the ground for the decision. It is rested on estoppel only. If there is any estoppel, it must be a promissory estoppel. 2 Williston, Contracts, secs. 679, 691, 692. It is submitted with deference that there is no valid basis for such an estoppel in the instant case. The rule is that the fundamental basis for promissory estoppel is the justifiableness of the conduct of the party claiming the estoppel. Here the representations of the agent were made before the certificate issued to the insured. The terms of the contract which included the constitution and by-laws of the society showed clearly that there was a war clause, and also that the agent had no power to waive the terms of the contract. But waiver is not relied on. As to estoppel, on the other hand, it is an elementary rule of law that there can be no estoppel where the means of knowledge are equal. The rule that a contract is conclusively presumed to merge all prior transactions and negotiations is equally well established law. *Insurance Company v. Mowry*, (1877) 96 U. S. 544, 547, 24 L. Ed. 674; 2 Bacon, Benefit Societies and Life Insurance, 3rd Ed., secs. 425, 429; 5 MINNESOTA LAW REVIEW 136. That the agent in the instant case had no authority to waive any terms was apparent from the contract. It is a well settled rule that a principal may limit the powers of his agent, and when he does so, the agent cannot waive rights beyond his powers in dealing with those who know the extent of his powers. The

holding in the instant case is directly contrary to the established authorities. *Modern Woodmen of America v. Tevis,* (1902) 117 Fed. 369, 54 C. C. A. 293; *Graves v. Modern Woodmen of America,* (1902) 85 Minn. 369, 89 N. W. 6. 2 Bacon, Benefit Societies and Life Insurance, 3rd Ed., sec. 426; 1 Id., sec. 158. It should be noted that the courts are less willing to find that there is a waiver or estoppel in the case of mutual benefit societies than of stock insurance companies. 1 Bacon, Benefit Societies and Life Insurance, 3rd Ed., sec. 145, et seq.; 2 Id., sec. 426; contra, *Kausal v. Ins. Co.,* (1883) 31 Minn. 17, 22, 16 N. W. 430, 47 Am. Rep. 776.

LIENS—ATTACHMENTS—AGISTER'S LIEN LOST BY ATTACHMENT OF THE PROPERTY SUBJECT TO LIEN.—The plaintiff left certain mortgaged horses with the defendant for pasturing. The defendant later surrendered them to the mortgagee without making any attempt to preserve his lien. Subsequently, the defendant sued out a writ of attachment against the mortgagee and levied on the horses, but the attachment proceedings were void. In an action of replevin instituted by the plaintiff the defendant set up his lien for agistment. *Held,* that the defendant lost his lien by surrendering possession, and if not then, that he lost it by instituting the attachment proceedings. *Hill v. Rhule,* (Colo. 1922) 204 Pac. 894.

In the absence of statute, the weight of authority seems to favor the doctrine that the possession under a lien and therefore the lien itself is waived by the levy of an attachment or execution at the suit of the lienor, the lienor, by authorizing the levy, being deemed to have abandoned the possession by virtue of his lien. *Jacobs v. Latour and Messer,* (1828) 5 Bing. 130, 2 M. & P. 201, 6 L. J. C. P. (O. S.) 243; *Crimson v. Barse Live Stock Comm. Co.,* (1906) 17 Okla. 117, 87 Pac. 876; *Fein v. Wyoming Loan & Trust Co.,* (1890) 3 Wyo. 332, 22 Pac. 1150; 17 R. C. L. 606; common-carrier's lien, *Wingard v. Banning,* (1870) 39 Cal. 543; a lien for services, *Legg v. Willard,* (1835) 17 Pick. (Mass.) 140, 28 Am. Dec. 282. The reason given for the rule is that the private lien and the lien of attachment are inconsistent and cannot coexist in favor of the same person. *Crimson v. Barse Live Stock Comm. Co.,* (1906) 17 Okla. 117, 87 Pac. 876. Massachusetts, while following the general rule in some cases, seems to hold, however, that where the lien is expressly reserved it is not waived by permitting an attachment. *Townsend v. Newell,* (1833) 14 Pick. (Mass.) 332; see Story, Bailments, sec. 366, for a discussion of the Massachusetts cases. And a minority doctrine is vigorously laid down in *Lambert v. Nicklass,* (1898) 45 W. Va. 527, 31 S. E. 951, 44 L. R. A. 561, 72 A. S. R. 828 where the attachment levied was in a suit on the debt secured by the lien. The court held that if the lien is lost it must be by intentional waiver or loss of possession and if by the former, one will not be held to waive a lien unless the intent be express or very plain and clear, the presumption being against waiver. And further as to possession, the lienholder, having no common-law remedy on the lien, is merely enforcing his lien, and the officer is the agent of the lienholder for that purpose. See to the same effect in the case of a mechanic's lien *Brennan v. Swasey,* (1860) 16 Cal. 141, 76 Am. Dec. 507; and even in the case of a pledgee's lien where the

pledgee has other remedies, *Arendale v. Morgan & Co.*, (1857) 5 Sneed (Tenn.) 703. On principle, it would seem that the majority rule is the correct one, because on attachment the lienor's possession is relinquished, and the property passes into the possession of an officer of the law, who cannot properly be said to be an agent of the lienor. The property having been permitted to pass into the custody of the law, a lien based on possession would seem necessarily to be lost. Nevertheless the instant case, in holding that a *void* attachment waives the lien, seems to go unwarrantably far. In Minnesota a statutory remedy is provided for the enforcement of an agister's lien. G. S. Minn. 1913, sec. 7050.

LOTTERIES—ILLEGAL CONTRACT—PRINCIPAL AND AGENT—ASSUMPSIT—QUASI-CONTRACT—LIABILITY OF AN AGENT TO ACCOUNT FOR PROCEEDS OF AN ILLEGAL CONTRACT.—Plaintiff shipped an assortment of collar buttons and prize articles to defendant to be sold on commission by means of a punchboard. Defendant returned the unsold buttons but failed to remit the money collected. Sales by the defendant were illegal under section 7079, General Laws of Vermont, which precluded recovery on the contract. *Held*, that the plaintiff can recover on the common counts for money had and received to the use of the plaintiff. *Canfield Mfg. Co. v. Paddock*, (Vt. 1922) 116 Atl. 115.

Although the thing to be done by the agent is contrary to law, the receipt of the money by the agent acting in a fiduciary capacity is not illegal and the law implies a promise to pay over to the principal money had and received to the use of the principal. *Tenant v. Elliott*, (1797) 1 Bos. & P. 3; *Willson v. Owen*, (1874) 30 Mich. 473; *Hertzer v. Geigley*, (1900) 196 Pa. 419, 16 Atl. 366; 79 A. S. R. 724; *Yale Jewelry Co. v. Joyner*, (1912) 159 N. C. 644, 75 S. E. 993. These decisions, supporting the instant case and in accord with the weight of authority, not only unduly emphasize the duty of the agent faithfully to account to his principal, but they also secure for the principal substantially what he bargained for and thus indirectly affirm the illegal contract—a class of contracts that courts of law have persistently sought to discourage. As the courts do not enforce rights under illegal contracts and the interests of the parties must yield to considerations of public welfare, Page, Contracts, 2nd. Ed., sec. 1022, the minority view, as represented by *Lemon v. Grosskopf*, (1868) 22 Wis. 427, 99 Am. Dec. 58, seems preferable. In that case the court held that the receipt of the money and accounting to the principal was as much a part of the agency as the selling of the lottery tickets, that there was no divisibility into legal and illegal parts of an entire contract, that an action to recover the money from the agent would be in affirmance of the illegal contract, and a recovery was denied. Minnesota supreme court favors the minority view, consistently adhering to the rule that there can be no recovery of the proceeds of a contract entered into in direct violation of law. *Thomas Mfg. Co. v. Knapp*, (1907) 101 Minn. 432, 112 N. W. 989.

MARRIAGE—EVIDENCE—PRESUMPTION OF DIVORCE.—The plaintiff lived for a time with one Kinney as his common law wife, but left him in 1892,

and was formally married to one Johnson, with whom she continues to live. In 1904 Kinney took out a benefit certificate in a fraternal society, payable to his wife. The plaintiff endeavored to recover under this certificate, but her rights were contested by Kinney's heir. *Held*, that it would be presumed that plaintiff's existing marriage was legal, and that her previous marriage to Kinney had been dissolved by divorce, so that plaintiff's recovery was barred. *Kinney v. Woodmen of the World*, (Kan. 1922) 203 Pac. 723.

The instant case is in accord with the weight of authority. The rule is that in civil cases where a second marriage in fact is shown, the law raises a strong presumption in favor of its legality, which will not be regarded as overcome by mere proof of a former marriage. *Coal Run Coal Co. v. Jones*, (1889) 127 Ill. 379, 8 N. E. 865, 20 N. E. 89; *Pittinger v. Pittinger*, (1901) 28 Colo. 308, 64 Pac. 195, 89 A. S. R. 193, and note; notes, 17 Ann. Cas. 68a, L. R. A. 1915E 186. As is often said, the law presumes morality, not immorality; marriage, not concubinage; legitimacy, not bastardy, *Hynes v. McDermott*, (1883) 91 N. Y. 451, 43 Am. Rep. 677; and this presumption is one of the strongest known to the law. See *Shepard v. Carpenter*, (1911) 86 Kan. 125, 119 Pac. 533, 38 L. R. A. (N.S.) 568. Where there is no evidence to the contrary, death is presumed in favor of the second marriage, *Hunter v. Hunter*, (1896) 111 Cal. 261, 43 Pac. 756, 52 A. S. R. 180, and this presumption is indulged in regardless of logic. Where there is evidence that the former spouse is yet alive, it is presumed that the first marriage has been dissolved by divorce, and he who would attack the second marriage must show conclusively that the first marriage has not been dissolved. *Alabama, etc., Ry. v. Beardsley*, (1901) 79 Miss. 417, 30 So. 660, 89 A. S. R. 660. This rule, however, is not applicable in a prosecution for bigamy. *Bennet v. State*, (1911) 100 Miss. 684, 56 So. 777; *Fletcher v. State*, (1907) 169 Ind. 77, 81 N. E. 1083, 124 A. S. R. 219; see *State v. Worthingham*, (1877) 23 Minn. 528, 534. The indulgence of the rule applied in civil cases cannot but be fraught with dangerous consequences, 1 Jones, Evidence, Horwitz's Ed., p. 106, and the more logical solution seems to be that such presumptions of fact are but inferences derived from other facts and circumstances in the case, and should be made entirely on principles of induction. *O'Gara v. Eisenlohr*, (1868) 38 N. Y. 296; and see 35 Harv. L. Rev. 790. So where there is evidence that no divorce has been granted and none that there has been a divorce, the presumption should not arise. *Barnes v. Barnes*, (1894) 90 Ia. 282, 57 N. W. 851. As a deduction from the language used in *State v. Plym*, (1890) 43 Minn. 385, 45 N. W. 848, a prosecution for bigamy, it seems that the Minnesota court would regard the logical view with favor.

PHYSICIANS AND SURGEONS—ASSAULT AND BATTERY—TORTS—LIABILITY OF PHYSICIAN FOR UNAUTHORIZED OPERATION.—Plaintiff consulted defendant physician as to the cause of her barrenness. Defendant determined upon and mentioned a specific cause and was thereupon authorized by the plaintiff to remove her trouble by operation. After giving of an anaesthetic and during the course of the operation, defendant discovered a differ-

ent infection, wholly unanticipated and so serious as to menace plaintiff's life, and surgically removed it. *Held*, that although the operation was performed without plaintiff's express consent, no action lies against the defendant for removing the diseased condition, where, if not removed, it would endanger the life of the plaintiff. *King v. Carney*, (Okla. 1922) 204 Pac. 270.

It is generally held, in accord with the instant case, that a surgeon can without express authorization take whatever steps he may deem necessary for the preservation of the life of his patient where for some reason it is impossible or impracticable for him to consult with the patient or his immediate relatives concerning his wishes in the matter. *Luka v. Lowrie*, (1912) 171 Mich. 122, 136 N. W. 1106, 41 L. R. A. (N.S.) 290; *Barfield v. Highlands Infirmary*, (1915) 191 Ala. 553, 68 So. 30, Ann. Cas. 1916C 1097, and note. The consent of the patient is implied from the circumstances in such a case. But, conversely, where a surgeon performs an operation to which the patient has not expressly or impliedly consented, and which is not necessary to the preservation of life, there is no implied authority to operate even though the operation is beneficial to the patient; and in such a case a surgeon is liable in an action for assault and battery. *Mohr v. Williams*, (1905) 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N.S.) 439, 111 A. S. R. 462, 5 Ann. Cas. 303, where the left ear was operated upon after consent had been given to operate upon the right ear; *Pratt v. Davis*, (1906) 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N.S.) 609, 8 Ann. Cas. 197. It would seem that in the instant case it was not necessary to rely on authority implied from the emergency, but that the authority could actually be implied from the broad language of the plaintiff to the effect that she wished to be relieved of her trouble. In any event, while the law does not extend to a surgeon free license respecting operations, it does, as said in the Minnesota case just cited, allow him reasonable latitude, and does not unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictates for the welfare of the patient in a case of emergency.

REAL PROPERTY—WILLS—FUTURE INTERESTS—TIME AT WHICH NEXT OF KIN ARE TO BE ASCERTAINED—HOLDER OF INTERVENING LIFE ESTATE EXCLUDED FROM GIFT OVER TO NEXT OF KIN.—The testator devised in trust for the benefit of two daughters for life with remainders to their respective issue, and on failure of issue over to the testator's next of kin. One daughter died without issue, and the question arose whether her estate was entitled to a portion of the gift over to the next of kin. *Held*, that the next of kin are to be determined as of the date of the testator's death, but that the life tenant is impliedly excluded from the gift over. *Close v. Benham*, (Conn. 1921) 115 Atl. 626.

The instant case follows the almost uniform current of authority in determining the next of kin as of the death of the testator. *Bullock v. Downes*, (1860) 9 H. L. Cas. 1; *Mortimer v. Mortimer*, (1879) 4 A. C. 448, 48 L. J. Ch. 470; *Himmel v. Himmel*, (1920) 294 Ill. 557, 128 N. E. 641, 13 A. L. R. 608, and note; *Tatham's Estate*, (1915) 250 Pa. 269, 95

Atl. 520, Ann. Cas. 1917A 855, and note; Hawkins, Wills, 2nd. Ed., p. 131, et seq.; 2 Jarman, Wills, 6th Ed., pp. 1641, 1644. Furthermore, by the great weight of authority, both English and American, the life tenant is not excluded from taking as one of the next of kin under the gift over, merely because of the fact that he was the holder of the intervening life estate. See citations above. In order to exclude the life tenant from the class of next of kin, such an intention of the testator must clearly appear from the context of the will and the surrounding circumstances. *Oleson v. Somogyi*, (1919) 90 N. J. Eq. 342, 344, 107 Atl. 748; *Carr v. New England etc., Soc.*, (1919) 234 Mass. 217, 125 N. E. 159; *Lee v. Lee*, (1860) 1 Drew & S. 85, 29 L. J. Ch. N. S. 788; Hawkins, Wills, 2nd. Ed., p. 133, et seq.; 2 Williams, Executors, 9 Ed., pp. 986-988. Nor is the life tenant excluded merely because he happens to be the sole heir or sole next of kin, early English authorities to the contrary having been disregarded. Hawkins, Wills, 2nd. Ed., p. 132; 2 Williams, Executors, 9th Ed., p. 988; *Himmel v. Himmel*, (1920) 294 Ill. 557, 128 N. E. 641, 13 A. L. R. 608, and note; and see *In re Busby's Estate*, (N. J. Prerog, 1922) 115 Atl. 909 for a concise statement of the rule. Those courts which exclude the life tenant on the ground that such intent appears from the will and the surrounding circumstances, reach the result by construing the will as indicating an intention on the part of the testator that the class should not be determined until the death of the life tenant. *McKee's Estate*, (1901) 198 Pa. 255, 47 Atl. 903; *Grantham v. Junnette*, (1919) 177 N. C. 229, 233, 98 S. E. 724; *Welch v. Howard*, (1917) 227 Mass. 242, 116 N. E. 492; Hawkins, Wills, 2nd Ed., p. 133; 2 Jarman, Wills, 6th Ed., 1645. The holding of the instant case reverses the ordinary rule of construction in that it excludes the life tenant from participation in the gift over unless an intent to include the life tenant clearly appears. In this respect the case finds little, if any, support in authority. See note, 13 A. L. R. 608.

SEARCHES AND SEIZURES—CONSTITUTIONAL LAW—SEARCH WARRANTS—SUFFICIENCY OF AFFIDAVIT FOR ISSUANCE OF.—A search warrant was issued based solely on an affidavit that affiant "has good reason to believe and does verily believe" that evidence of a crime against the United States was stored in certain buildings. The affidavit contained no statement of facts. On motion to quash, *held*, that the warrant was illegally issued in violation of the fourth amendment of the federal constitution and was void. *United States v. Kelly*, (Dist. Ct., 1921) 277 Fed. 485.

The fourth amendment to the federal constitution provides, among other things, that "no warrants shall issue, but upon *probable cause*, supported by oath or affirmation." The federal courts uniformly have interpreted this section to require that a statement of facts, supported by oath, must be given to the magistrate who issues the warrant, for the reason that the existence of probable cause is wholly a judicial question which can only be determined by a judicial officer. *United States v. Borkowski*, (1920) 268 Fed. 408; note, 13 A. L. R. 1318. With almost the identical provisions in their state constitutions, most states have held in accord with the federal courts, that a statement of facts is necessary

to the issuance of a search warrant and that mere belief is not sufficient. *State v. Magahey*, (1904) 12 N. D. 535, 97 N. W. 865, 14 Am. Crim. Rep. 283, 1 Ann. Cas. 650, and note. Consequently, any statute which attempts to permit the issuance of a search warrant, based solely upon information and belief is unconstitutional. *State v. Peterson*, (1920) 27 Wyo. 185, 194 Pac. 342, 13 A. L. R. 1284, and note; *Lippman v. People*, (1898) 175 Ill. 101, 51 N. E. 872, 11 Am. Crim. Rep. 356. But some courts maintain that such a statute does not violate the constitutional provision that "no search warrant shall issue, but upon probable cause," on the ground that the constitution does not say who shall determine the existence of probable cause and that therefore the legislature can designate the complainant as such a person. *Lowrey v. Gridley*, (1862) 30 Conn. 450; *Rose v. State*, (1909) 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228, and note; note, 3 A. L. R. 1517. In view of Minn. const. art. 1, sec. 10, which is a reproduction of the federal provision verbatim, and G. S. Minn. 1913, sec. 9033, Minnesota would probably hold in accordance with the majority rule.

SPECIFIC PERFORMANCE—JURISDICTION—PROCESS—VENDOR AND PURCHASER—SERVICE BY PUBLICATION IN SUIT TO ENFORCE A LAND CONTRACT.—The plaintiff brought an action for specific performance of a contract for the sale of land situated within the state against a non-resident defendant, securing service by publication. *Held*, that the statute authorized constructive service so as to enable the court to enter a decree compelling a conveyance. *Light v. Doolittle*, (Ind. App. 1921) 133 N. E. 413.

The general rule of equity is that a suit to compel specific performance of a contract to convey real estate is a suit in personam and can only affect and operate upon the parties duly served with process. 25 R. C. L. 322, 323; *Silver Camp Mining Co. v. Dickert*, (1904) 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940, 3 Ann. Cas. 1000, and note. But it is within the power of the state to provide by statute for the maintenance of such a suit for conveyance of real estate within its borders, and for the service of process in such proceedings upon non-resident defendants by publication. *Hollander v. Central Metal Co.*, (1908) 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N.S.) 1135, and note. In that event the judgment rendered is not in personam but in rem. *Clem v. Given's Executor*, (1906) 106 Va. 145, 55 S. E. 567. Although the decree cannot require the non-resident to execute the conveyance, the result can be effected by appointing a trustee to convey the title. *Hollander v. Central Metal Co.*, (1908) 109 Md. 131, 71 Atl. 442, 23 L. R. A. (N.S.) 1135, and note. And probably the title can be passed by the decree itself, without the intervention of a trustee. See *Smith v. Smith*, (1913) 123 Minn. 431, 144 N. W. 138.

In Minnesota this precise point does not seem to have been raised, but it would seem that G. S. Minn. 1913, sec. 7738 (5) would permit a decree of specific performance of a land contract upon constructive service, under the clause which allows such service where the relief demanded consists wholly or partly in excluding the defendant from any interest he may claim in the land. The Minnesota court has already held that under this section such service is sufficient in an action to reform a deed or

to set aside a fraudulent conveyance. *Corson v. Shoemaker*, (1893) 55 Minn. 386, 57 N. W. 134; *Lane v. Innes*, (1890) 43 Minn. 137, 45 N. W. 4; and see *Smith v. Smith*, (1913) 123 Minn. 431, 144 N. W. 138, in which it was said:

"Under proper legislative authority almost any kind of action may be instituted and maintained against non-residents to the extent of any interest in property they may have within the state, and the court may make any form of decree known to the law, which can be enforced through the court's control of property within its territorial jurisdiction."

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—POSSESSION AND IMPROVEMENTS INSUFFICIENT TO TAKE A PAROL GIFT OF LAND OUT OF THE STATUTE.—The decedent took possession of certain real estate under a parol gift from his father. In pursuance of the gift, understanding the land to be his own, he built a house and made other substantial improvements on the property. He died intestate and the plaintiffs, his sole heirs at law, bring this bill against the decedent's father to quiet title. *Held*, that equity will not grant specific execution of the gift, but will authorize an award of compensation to the donee or representative for the value of the improvements less a reasonable rent charge. *Griffin v. Griffin*, (Ala. 1921) 90 So. 907.

But few jurisdictions support the doctrine expressed by this court. *Rucker v. Abell*, (1848) 8 Mon. (Ky.) 566, 48 Am. Dec. 406; *Adamson v. Lamb*, (1834) 3 Black. (Ind.) 446. By statute Virginia precludes all possibility of enforcing a parol gift of land. *Nicholas v. Nicholas*, (1902) 100 Va. 660, 42 S. E. 669, 866. The overwhelming weight of authority is to the effect that the parol gift of land is taken out of the statute of frauds when the donee has acquired possession and made permanent improvements on the land in reliance upon the gift. *Freeman v. Freeman*, (1870) 43 N. Y. 34, 3 Am. Rep. 657; *Schmitt v. Schmitt*, (1905) 94 Minn. 414, 103 N. W. 214. A stronger case for the application of the rule is presented where the improvements are made at the donor's request. *Neale v. Neales*, (1869) 9 Wall. (U.S.) 1, 10, 19 L. Ed. 590. In any event it is essential that the improvements be of such character that it would be unjust and inequitable to deprive the donee of the land, *Burris v. Landers*, (1896) 114 Cal. 310, 46 Pac. 162, and the fact of a gift must be established by clear, definite, and unequivocal proof, *Bevington v. Bevington*, (1907) 133 Ia. 351, 110 N. W. 840, 9 L. R. A. (N.S.) 508, 12 Ann. Cas. 490, and notes; *Sturgis v. McElroy*, (1920) 113 Wash. 192, 193 Pac. 719, or specific execution will not be granted. The reason for enforcing the gift is similiar to the reason for enforcing a parol lease or sale, viz., because failure to do so would perpetrate a fraud on the lessee or vendee. See 6 MINNESOTA LAW REVIEW 529.

The nature of the title which the donee acquires and the time at which he acquires it are of material importance. Words of gift, though accompanied by a delivery of possession, vest no equitable interest in the donee. *Stewart v. Stewart*, (1834) 3 Watts (Pa.) 253. It is submitted that equitable title and with it the right to acquire the legal title by an action for specific performance, vests when the donee has made such im-

provements as are essential to warrant an execution of the gift by a court of equity. This conclusion would seem essential to support decisions recognizing such matter as a proper equitable counterclaim for specific performance, *Hubbard v. Hubbard*, (1897) 140 Mo. 300, 41 S. W. 749, or under a simplified method of procedure, as an equitable defense to the action of ejectment. *Hayes v. Hayes*, (1914) 126 Minn. 389, 148 N. W. 125. See 26 Yale L. J. 592. The practical effect of the Minnesota holding is to give the donee legal title upon the consummation of the gift.

Prof. Williston would explain the enforcement of a parol gift of land as an application of the doctrine of "promissory estoppel" i. e., where relying on a gratuitous promise, the promissee has suffered a detriment. 1 Williston, Contracts, sec. 139. The decisions, however, state that the expenditures constitute in equity a valuable consideration for the donor's promise. *Freeman v. Freeman*, (1870) 43 N. Y. 34, 3 Am. Rep. 657; *West v. Bundy*, (1883) 78 Mo. 407.

States—Process—Immunity of Members of Legislature From Service of Process.—The defendant, a member of the legislature, was served with a summons in a transitory civil action while he was attending a session of the legislature away from his home county. He appeared specially, filing a motion to quash the service. By statute it was provided that members of the legislature should be immune from arrest and that suits against them should be stayed, but that nothing in that act should exempt them from service of summons. *Held*, that he was not exempt them from service of summons. *Doyle-Kidd Dry Goods Co. v. Munn*, (Ark. 1922) 238 S. W. 40.

In view of the statutory provision the above decision is undoubtedly correct. There is a difference of opinion as to the extent of the common law exemption. Compare *Berlet v. Weary*, (1903) 67 Neb. 75, 93 N. W. 238, 60 L. R. A. 609, 2 Ann. Cas. 610, 108 A. S. R. 616, with *Bolton v. Martin*, (1788) 1 Dall. (U.S.) 296, 1 L. Ed. 144. The usual constitutional privilege of exemption of a legislator from arrest does not, by the better view, extend to an exemption from service of summons in a civil suit. *Rhodes v. Walsh*, (1893) 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632, and note; *Worth v. Norton*, (1899) 56 S. C. 56, 33 S. E. 792, 45 L. R. A. 563, 76 A. S. R. 524, and note (member of Congress). *Catlett v. Morton*, (1823) 14 Ky. (4 Litt. 122) 92; *Gentry v. Griffith*, (1864) 27 Tex. 461; contra, *Anderson v. Rountree*, (1841) 1 Pin. (Wis.) 115. Under the constitutional or statutory provisions prohibiting merely arrest and suit the courts are given an opportunity of determining the requirements of public policy, and the decisions assert, either that public policy demands that the legislator be free from mental harassment and the possibility of being deterred from his duty, or that the inconvenience to the individual is slight, more fanciful than real, justifying no restriction of the rights of citizens to bring suit. Thus, on the one hand, a statute exempting members of the legislature from service of process has been held unconstitutional as class legislation. *Phillips v. Browne*, (1915) 270 Ill. 450, 110 N. E. 601, Ann. Cas. 1917B 637, and note; criticised in 16 Col. L. Rev. 249,

250, and 82 Cent. L. J. 45. On the other hand, the exemption has been extended to include not only legislators but other persons engaged in the performance of public service, e. g., the president of a national bank, on the same grounds of public policy. *Filler v. McCormick,* (1919) 260 Fed. 309.

TAXATION—FEDERAL CHILD LABOR TAX LAW—TENTH AMENDMENT.—The federal child labor tax law (40 Stat. 1057, 1138) imposed an annual excise tax of ten per cent on the net profits of certain industries in which, contrary to specified conditions, children were employed. Plaintiff employed a boy in violation of such conditions and, having paid under protest the tax assessed for so doing, sues to recover the tax. *Held,* for plaintiff, the tax law being repugnant to the tenth amendment. *Bailey v. Drexel Furniture Co.*, U. S. Sup. Ct., October Term, 1921, No. 657, decided May 15, 1922.

An earlier act of Congress under the commerce clause, designed to prohibit child labor in the same industries mentioned above by excluding the products of such industries from interstate commerce, had been held invalid as a violation of the tenth amendment. *Hammer v. Dagenhart,* (1918) 247 U. S. 251, 38 S. C. R. 529, 62 L. Ed. 1101; see 3 MINNESOTA LAW REVIEW 89. Soon after that decision and in reliance on such cases as *Veazie Bank v. Fenno,* (1869) 8 Wall. (U.S.) 533, 19 L. Ed. 482, and *McCray v. United States,* (1904) 195 U. S. 27, 24 S. C. R., 49 L. Ed. 78, 769 Congress re-enacted the substantial provisions of the child labor act, resting the new enactment not on the commerce power but on the taxing power. Notwithstanding the difference in the power sought to be exerted, however, the Supreme Court now rules that the tax case can not be distinguished from *Hammer v. Dagenhart* and that the act involved is invalid for the same reason. Both child labor laws passed by Congress thus come to failure. The court does not deem it necessary to inquire into the motive of Congress in passing the tax law, because the "prohibitory and regulatory effect and purpose are palpable," and may be "found on the very face" of the statute. This furnishes the basis for the not altogether satisfactory distinction drawn by the court between the child labor case and the *Veazie* and *McCray cases,* for in neither of the two latter "did the law objected to show on its face" the regulatory features. Besides, in the *Veazie* case the end aimed at was itself within the power of congress. "There comes a time in the extension of the penalizing features of the so-called tax," declares the court, "when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment." Such the child labor tax is held to be. What the court really has done is to define the federal power of taxation as excluding mere regulation unless Congress has, aside from the taxing power, control over the subject matter. The movement for centralizing power at Washington, under the development of the taxing clause and in derogation of state police control, has been definitely checked. For a full discussion of the National Police Power under the Taxing Clause, see an article by Mr. R. E. Cushman, 4 MINNESOTA LAW REVIEW 247.

TAXATION—FUTURE TRADING ACT—TENTH AMENDMENT.—The Act of Congress known as the Future Trading Act (42 Stat. 187) imposes a tax of twenty cents a bushel on all contracts for the sale of grain for future delivery, except sales in so-called "contract markets." Contract markets are those which comply with the requirements of the act and which are so designated by the secretary of agriculture. In an action to enjoin the enforcement of the Act, *held*, that, in respect of the tax features above mentioned and other parts of the act interwoven therewith, the act violates the tenth amendment and the injunction will issue. *Hill, Jr. et al. v. Wallace*, U. S. Sup. Ct., October Term 1921, No. 616, decided May 15, 1922.

The act in question here was characterized by the Supreme Court as "in essence and on its face a complete regulation of boards of trade, with a penalty of twenty cents a bushel on all 'futures' to coerce boards of trade and their members into compliance." So characterized, the act falls into the class of cases where Congress, through the exercise of its taxing power, seeks to regulate intrastate matters, and is governed by the decision in *Bailey v. Drexel Furniture Co.*, decided the same day and cited by the court as conclusive. For a discussion of this case, see this issue page 606.

While Congress fails to effectuate its control under the taxing power here, it is interesting to note the practical suggestion by the court that perhaps the desired end can be reached under the commerce clause by showing that such contracts are in the "current of commerce" as illustrated in *Stafford v. Wallace*, U. S. Adv. Ops. 1921-22, p. 469.

VENDOR AND PURCHASER—FIRE INSURANCE—RIGHT OF VENDEE TO PROCEEDS OF POLICY TAKEN OUT BY VENDOR.—Certain buildings on the land held under a contract for deed were destroyed by fire. No mention of the insurance policy was made in the contract of sale. The vendor having collected under the policy, the purchaser in this suit for specific performance claims the insurance money in partial satisfaction of the purchase price. *Held*, that the purchaser is entitled to the proceeds of the insurance policy. *Russell v. Elliott*, (S.D. 1922) 186 N. W. 824.

In England it is the general rule that the vendee, though he must bear the loss, has no right whatever to the proceeds of the insurance unless there is an express stipulation to that effect in the contract of sale, because the contract of insurance is purely a personal contract of indemnity with the insured, collateral to the contract of sale, and therefore does not run with the land. *Poole v. Adams*, (1864) 10 L. T. R. (N.S.) 287, 4 New Rep. 9, 12 Wkly. Rep. 683; *Rayner v. Preston*, (1881) 18 Ch. D. 1, 45 J. P. 829, 50 L. J. Ch. 472, 44 L. T. R. (N.S.) 787, 29 Wkly. Rep. 546. As a result of this rule, which permits the insured to have double satisfaction, it has been held that the insurer, having paid the insurance to the vendor, may either be subrogated to the vendor's rights against the vendee for the purchase money, or at least can get back the amount of the insurance money from the vendor after he has collected the purchase money from the vendee. 2 Williston, Contr., sec. 942; *Castellain v. Preston*, (1883) 11 Q. B. D. 380, reversing 8 Q. B. D. 613. The English rule has some support inAmerica. *King v. Preston*, (1856) 11 La. Ann 95;

Aetna F. Ins. Co. v. Tyler, (1836) 16 Wend. (N.Y.) 385, 30 Am. Dec. 90; *Wilson v. Hill,* (1841) 3 Metc. (Mass.) 66. But so obnoxious are its results that the majority of American courts have held that in equity, as between the vendor and the vendee, the one who must bear the risk of loss is entitled to the proceeds, of the insurance, the insurance money being treated as a substitute for the destroyed property. This is clear where the risk of loss is on the vendor. *Phinizy v. Guernsey,* (1900) 111 Ga. 346, 36 S. E. 196, 50 L. R. A. 680, 78 A. S. R. 207. And where the vendee bears the loss, equity treats the vendor as holding the proceeds of the insurance policy in trust for the vendee. *Williams v. Lilley,* (1895) 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150, and note; *Skinner, etc., Co. v. Houghton,* (1900) 92 Md. 68, 48 Atl. 85, 84 A. S. R. 485; 5 Joyce, Insurance, secs. 3488c, 3525; and see 2 Williston, Contr., sec. 928; *McGinley v. Forrest,* (Neb. 1921) 186 N. W. 74. Under this doctrine the one suffering the loss receives the indemnity, and the insurer is not entitled to the benefits of the purchase money by subrogation. *Washington F. Ins. Co. v. Kelly,* (1870) 32 Md. Md. 421, 3 Am. Rep. 149; *Insurance Co. v. Updegraff,* (1853) 2 Pa. 513; 5 Joyce, Insurance, sec. 3569. The whole difficulty results from the questionable doctrine of placing the risk of loss on the vendee. But such being the law, any method of relieving the situation would seem acceptable. For a discussion of the risk of loss under a contract of sale, see 6 MINNESOTA LAW REVIEW p. 513.

WILLS—PRESUMPTION OF ACCEPTANCE OF LEGACY—FRAUDULENT CONVEYANCES—RENUNCIATION UNDER A WILL NOT A "CONVEYANCE" BY DEBTOR TO DEFEAT CREDITORS.—A trust estate for the benefit of the defendant was created under a will. The plaintiff instituted an action in equity to subject the income from the trust estate to the payment of a judgment which she held against the defendant. The defendant had neither accepted benefits nor in any manner assented to the bequest. After execution was levied on his interest and after the present action was brought to establish a lien on the interest, he renounced it before he was required to plead. *Held,* that the renunciation was not equivalent to a conveyance for the purpose of defeating creditors, and that after renunciation the beneficiary had no interest to which the levy could attach. *Schoonover v. Osborne,* (Ia. 1922) 187 N. W. 20.

This decision is in accord with the only previous case on the exact question, *Bradford v. Calhoun,* (1907) 120 Tenn. 53, 60, 109 S. W. 502, 19 L. R. A. (N.S.) 595, the opinion of which states that "the renunciation is not a voluntary conveyance, void as against creditors, because, when he has properly renounced, the renunciation relates back to the date of the gift, and, as he has never accepted the gift, he has had nothing that could be made the subject of a voluntary conveyance." The statement in the instant case that there is a presumption of acceptance of benefits by a devisee or legatee under a will, but that renunciation rebuts that presumption and relates back to the testator's death so that title never vested in the beneficiary for lack of acceptance, is clearly in accord with the weight of authority. *Townson v. Tickell,* (1819) 3 Barn. & Ald. 31; *Burritt v.*

Silliman, (1855) 13 N. Y. 93, 64 Am. Dec. 532; *Bradford v. Leake*, (1910) 124 Tenn. 312, 328, 137 S. W. 96, Ann. Cas. 1912D 1140; *Albany Hospital v. Albany Guardian Soc. etc.*, (1915) 214 N. Y. 435, 440, 108 N. E. 812, Ann. Cas. 1916D 1195, and note. Although all of the cases cited deal with renunciation of a bequest conferring legal title, there seems to be no reason why the renunciation of an equitable interest should not operate in the same manner, and the instant case so holds.

BOOK REVIEWS

HANDBOOK OF THE LAW OF TRUSTS. By George Gleason Bogert, Professor of Law in the Cornell University College of Law. The Hornbook Series. West Publishing Company. 1921. Pp. xiii, 675.

Generous commendation is due Dean Bogert for the able manner in which he has executed his purpose of giving "to practitioners and students a compact summary of the American law relating to trusteeships." He has produced the most usable book upon the subject yet written from that viewpoint.

A bare recital of the chapter topics suffices to show that his arrangement is not only original and logical but especially emphasizes the more important practical problems. He opens with a short but adequate historical sketch. Then, probably suggested by the analysis in Ames' casebook, he devotes a chapter to distinguishing a trust from other relations. The creation of express, resulting and constructive trusts and the purposes for which private and charitable trusts may be created are treated in the next five chapters. Chapter VIII deals with the settlor; Chapter IX with the subject matter; and Chapters X to XII with the qualifications, appointment, removal, powers and duties of the trustee. The nature and incidents of the interest of the cestui que trust and his remedies are discussed in Chapters XIII and XIV. The last chapter is on the methods of extinguishing a trust.

One decidedly good feature, unusual in trust books, is a discussion of the property rules against remoteness in vesting, restraints upon alienation and against accumulations with respect both to private and charitable trusts. Also his attention to statutory changes and modifications in various jurisdictions is very valuable and evidences careful workmanship. The limits of space necessarily restrict theoretical discussion to a minimum but this is partially compensated for by reference in the footnotes to articles upon trust questions which have appeared in the leading law periodicals. The citation of cases is quite full and apparently brought well down to date. Practicing lawyers should find it a valuable starting point in their search for authorities.

In view of the unusual merit of the book as a whole it may appear captious to call attention to what seem to be some of the minor defects. That is peculiarly so where the error or omission is the result of the necessity for compression. However, there is no such excuse for stating as though it were prevailing law Ames' theory that the bona fide purchaser of trust property, equitable in its nature, would be protected against

the cestui que trust. The statement is particularly noticeable in view of the prominence given to the problem in casebooks upon trusts and in articles upon the effect of a bona fide purchase. Further, although he gives a rather full discussion of savings bank trusts, he does not suggest the question whether they ought not to be considered testamentary and so within the statutes of wills, or, at least, under the inheritance tax laws. In this same connection, he does not comment upon the questionable leniency of the law in allowing these unusual trust accounts when they are such an obvious evasion of the laws limiting the amount which a depositor may have in his personal account. In considering the distinction between a trust and an assignment of a chose in action, (pp. 29-30) he fails to point out the important difference in the party to whom the obligor should pay. Also, without noting any possible distinction between the creation of a trust inter vivos and by will, he states it as a flat rule that a trust will not fail for want of a trustee even though the trustee be dead or incapable of taking at the time of its establishment. (p. 262). He is, perhaps, orthodox in saying that "whether the payee of money is a debtor or trustee ought to depend in each case upon the presence or absence of intent to keep the money paid separate and to apply the particular bills and coins received to the use agreed upon." (p. 24). But could not the trustee of a bushel of wheat be authorized to mingle it with other bushels of wheat and so convert the trust res into a tenancy in common in a mass of wheat? If so, why cannot the trustee of money similarly be authorized to mingle money? Again, in spite of an announced effort to cite all discussions in leading law periodicals there is a rather remarkable omission of at least two notable articles by authors of unusual distinction, i. e., Ames, The Failure of the Tilden Trust, 5 Harv. L. Rev. 389 and Gray, Gifts for a Non-charitable Purpose, 15 Harv. L. Rev. 509.

It would be demanding too much to expect the author to be thoroughly familiar with the idiosyncracies of the Minnesota law of trusts. But, in view of *Re Charlemagne Tower's Estate*, (1892) 49 Minn. 371, (not cited by him) attention must be called to the questionable accuracy of his statement (p. 175) that, in Minnesota, there is an automatic suspension of the power of alienation in trusts to receive and apply the rents and profits of realty even though a power is given to the trustee to sell the particular property in his hands at the commencement of the trust.

Having indulged, perhaps unduly, what appears to be a generic propensity in reviewers to seek out minor flaws, it should be reiterated that the book as a whole deserves exceptionally high praise.

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A HISTORY OF MINNESOTA. By William Watts Folwell. Volume I. Minnesota Historical Society. St. Paul, 1921.

Not so long ago state supported historical societies were half-heartedly granted appropriations to propitiate a few old gentlemen with antiquarian instincts and political influence as well as to satisfy an inchoate state patriotism. At the social gatherings, called annual meetings, papers

were read by pioneers possessing fair memories, strong imaginations and spectacles with rosy lenses. Glorified was the past but a knowledge of it not increased. These papers were published in the proceedings, the elderly gentlemen were extraordinarily puffed up, the public unenlightened, but the public money wasted.

Such a condition still exists in a number of capitals, but in many states there has taken place uring the last fifteen years a transformation. State supported historical societies are being manned by experts and are esteemed as products of well equipped historical laboratories. Among the leading institution of this ned era is the Minnesota Historical Society, an institution of which ll citibens should be proud; and in particular should members of the legfal profession become associated with it and learn about the work in the state history which is there being done.

This volume of Doctor Folwell is a fine example of what the best historical societies of the Mississippi Valley are attempting to accomplish; scientific and learned without being pedantic. It is the result of a happy union of the research of the student in his laboratory and the personal knowledge of events possessed by a man of affairs. This is a rare combination, and Doctor Folwell has taken full advantage of it. He has corrected by study those personal prejudices which naturally arise in the course of a public career. His literary style is simple and direct and is a fine expression of the man and his subject. Very few states can boast of a survey of their past comparable to this which Doctor Folwell and the Minnesota Historical Society are presenting to the state.

The first volume tells the story of this territory until the formation of the state government. For the first time an adequate treatment of the territorial history of Minnesota has been given the public. Two chapters are devoted to the French explorations, one to the few years when the British held dominion, and the remaining thirteen chapters to the American regime. For those who find pleasure in the history of beginnings, when the territory first became known, Doctor Folwell's narrative of the early explorations of Minnesota will provide a treat, for he has taken great pains to be both accurate and interesting. His search has led him far and there are few documents or monographs pertaining to his field of research that have escaped him.

The story of the contact of the white men and the Indians forms naturally an important part of the narrative. The description of the Indian tribes is well done and is accompanied by an excellent map which was prepared by Doctor Upham. This contact of the two races was in the first place the result of the white man's desire for profits. The fur trade enticed them into this region in the early years, and later they came in the pursuit of profits in land speculation and the lumber industry. The readers will find particularly interesting the account of methods, not always honest, of these pioneers of business. The appendices on the "Faribault Claim" and the "Repurchase of Fort Snelling" are peculiarly illuminating; the same may be said of the story of the Indian treaties, in which the speculative interest of the whites was always conspicuous.

Another interest which brought men into the region was the wish to

do good to the natives. Doctor Folwell has given adequate treatment to the subject of the early men with religious fervor. One whole chapter is devoted to the story of the activities of Ayer, Boutwell, Ely and their fellow enthusiasts.

The narrative naturally becames fuller as it approaches the modern period. The peopling of the territory is adequate and well done. The balance between antiquarian lore which concerns itself with origins and the broader historical viewpoint which requires a treatment of forces is well maintained. As soon as a few thousand people were settled here, politics began; and Doctor Folwell has been able to present a lively story of the beginnings of party strife which broke out at the time the issue of statehood arose.

The book is provided with most excellent and full notes; all the paraphernalia of the scientific historian are here found. In fact these short studies of the literature of the subject, for such is the character of Doctor Folwell's footnotes, form a most valuable contribution. The Minnesota Historical Society has performed its work of publishing remarkably well. The book is clothed in a dignified manner and the proof reading has been conscientiously performed. Well may the state of Minnesota be proud of this output from its state laboratory of history.

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INTERNATIONAL LAW, chiefly as interpreted and applied by the United States. By Charles Cheney Hyde. Little, Brown and Co., Boston, 1922. In Two Volumes, 832 and 925 pages.

"Custom and reason," wrote Westlake, "are the two sources of international law." Anglo-American writers on international law have been inclined to respect the latter source more in theory than in practice. Afraid of falling into the morass of "natural rights" which engulfed so many eighteenth century jurists in a wild confusion of "what ought to be" with "what is", they have kept safely to the dry land of custom and precedent, eschewing all exploration in the sometimes turbulent waters of reason. Hyde does not harbor this fear.

"There has been," he confides in his preface, "constant endeavor to emphasize the unreasonableness of any rule which, however widely accepted, and although acquiesced in by American statesmen, has appeared through its operation to violate the requirements of international justice. Under such circumstances the author has not hesitated to suggest the nature of the modification which those requirements seemed to demand. He has not refrained from the attempt to point out, in the light of reason and practice, the next step which his own country might well advocate." (p.VIII).

The body of the work amply fulfills this promise. Every rule and principle discussed is brought to the bar of reason. Nor is it any abstract theory of international morality or natural law by which Professor Hyde adjudges the adequacy of existing custom and practice. He appreciates that the dominating interests of states and the practical conditions of international intercourse, have always been the most important elements in forming the law and he subjects its present crystallization to

the test of such considerations. Nothing but quotation can give an adequate idea of his method. To indicate the care with which he distinguishes law as it is from law as it ought to be, the penetration with which he isolates the real reason of the rule, and the caution with which he refuses to neglect pertinent qualifications for the sake of a neat but useless generalization, the quotation must be somewhat extended. We have selected for illustration his conclusions on the much mooted subject of the immunity of public vessels and may add that in the text the quotation given is further illumined by four footnotes occupying half a page.

"On principle, however, it would seem that not the ownership or exclusive possession of a ship by a foreign sovereign gives rise to the claim of immunity, but rather the appropriation and devotion of the vessel to the public service under governmental authority. This idea has found some judicial approval in the United States. When a ship has been requisitioned for a definite public service, such as an admiralty transport, is engaged in the carriage of governmental supplies, and the officers acknowledge the duty to obey the governmental assertion of control and act accordingly, the circumstances that the vessel is neither owned nor actually possessed by the requisitioning State would appear to be immaterial. In such a case the dedication of the ship to the public service would seem to render the constructive possession by the sovereign as efficacious for purposes of exemption as actual possession manifested by the assertion of control through the medium of its own officers.

"Should the nationalization of merchant vessels, by requisition or any other process, serve to create a large volume of tonnage engaged under governmental control in commercial enterprise, and notably in foreign trade, there would be reason to withhold exemptions not accorded private ships, unless there was definite understanding that the state of the flag should assure full responsibility for the conduct of its vessels, and also place within the reach of the individual claimant a simple and direct means of obtaining justice. Obviously the matter is one demanding general international agreement to establish a reasonable substitute for the broad yielding of jurisdiction by the territorial sovereign." (vol. I pp. 444-445).

Though the reviewer doubts whether the immunities of public vessels can be safely accorded to vessels not under the direct control of public officers, he believes that Professor Hyde's reasoning should convince the careful reader that the traditional rule which accords immunity to all vessels *owned* by the government and to such vessels alone is obsolete.

This continuous illumination of law by reason is to the reviewer's mind, the outstanding feature of these volumes, but their other merits should not be ignored. In no other book will be found so exhaustive a citation of American precedents, particularly those of recent date. No diplomatic, arbitral or judicial pronouncement of importance has been omitted and the book and periodical literature of international law has been put to good use. Many of the citations are accompanied by carefully selected quotations, a feature of great value to the busy student. Over a third of each page, on the average, is devoted to footnotes.

The work is exhaustive. It covers the whole field of international law, giving attention to many matters such as the constitutional organization for conducting foreign relations, often omitted from treatises on international law. Yet in discussing such subjects, where international law and municipal law come into close contact, the author has not failed

to note the difference between the obligations of these two laws. He has not fallen into the error, too frequent among American publicists and politicians, of assuming that restrictions upon constitutional powers of performance can limit or eliminate obligations under international law. Thus of the obligation to execute treaties he says:

"A serious problem arises where the treaty imposes a legal obligation upon the nation to take steps, through Congressional action, which the nation has rarely taken save under gravest necessity. An agreement binding the United States to become, under certain circumstances, a belligerent is of such a character. It is not, however, the validity of the undertaking which is necessarily open to question. It is rather the danger lest popular opinion demand that the congress refrain from exercising the war-making power, and so subject the nation to the charge of violating its agreement, which operates as a deterrent. The distinction between the practical effect upon Congress of a burdensome duty of performance, and the validity of an engagement under the constitution, needs constantly to be observed. It is frequently, however, obscured from view by utterances which appear to confuse constitutional requirements as to modes of performance with constitutional limitations as to the power to contract." (Vol. 2, pp. 23-24.)

It would be a pleasure to discuss many sections of these volumes, which have given to the reviewer both a stimulus to thought and material to think about. Space, however, permits only the briefest mention of a few such sections. Professor Hyde believes that any evidence shedding light on the intention of the parties should be admissible in interpreting treaties and should be considered of prime importance. (2: 63). He believes that diplomatic appeal over the heads of the regular authority controlling foreign relations will be rare. (1: 712). On the League of Nations, though describing its organization and purpose, he is non-committal. (2:163). He thinks, however, that the United States is not prepared to admit "that the states constituting the League may by virtue of their organization alter the principles of international law" (1: 133) and that, though articles X and XXI of the Covenant may recognize the Monroe Doctrine, yet "The United States will not adhere to the League of Nations save on terms definitely recognizing the propriety of the invocation of the Monroe Doctrine, to the full extent to which it has been applied, embracing the use of it to thwart the transfers of territory to non-American States." (1: 160) He is enthusiastic about the Permanent Court of International Justice with compulsory jurisdiction as originally suggested by the Committee of Jurists, but regrets the elimination of the compulsory jurisdiction section in the statute as finally adopted. (2: 150-152.)

The reviewer's admiration for this book increased with continued examination. It will unquestionably assume a position as the leading American text on international law. Nowhere else can the student and lawyer so easily find succinct statements of the American position on questions of international law, the rules and principles of international law generally accepted today, a critical examination of these rules and principles, and references to further material for study. The profession is to be congratulated on having so excellent a book for its instruction and use.

University of Minnesota. QUINCY WRIGHT.

MINNESOTA STATE BAR ASSOCIATION

SHALL THE GRAND JURY IN ORDINARY CRIMINAL CASES BE DISPENSED WITH IN MINNESOTA?

By Paul J. Thompson*

England, which got along without grand juries during the War, is now debating the advisability of dispensing with them permanently. This proposition is also the subject of discussion among Minnesota lawyers with reference to Minnesota grand juries. It is proposed to substitute the Wisconsin system providing for trials on information by the prosecuting attorney and allowing the defendant a preliminary hearing before a magistrate if he so desires. On this hearing the prisoner is either discharged or bound over for trial at the next term of court as the evidence may determine.

The object of this article is to present briefly the arguments on both sides and then to set out certain views of the writer on the question.

The arguments in favor of the grand jury can be summarized as follows: It is an ancient institution designed for the protection of the accused; by bringing an indictment it leaves the county attorney merely as the prosecutor and not the originator of the prosecution; it disposes of frivolous and technical cases with a no bill; it furnishes a means to get evidence which could not otherwise be brought out; where the prosecution is not preceded by a complaint it protects the complaining witness against a "come back" in the form of an action for malicious prosecution in the event there is nothing to the state's case; it provides a means for bringing dishonest public officials to trial; it spurs on the lazy or laggard county attorney; it unearths and lays bare vicious and corrupt conditions in both city and country, especially the former.

Against the arguments we find the following:

The system is antiquated, cumbersome and expensive; in most cases the grand jury acts as the "rubber stamp" of the county attorney; instead of being independent, grand juries are sometimes subject to outside influence; the county attorney uses the grand jury to "pass the buck to." grand juries often "leak" information; in order to get necessary testimony to indict it is sometimes necessary to give immunity where it need not have been given could the county attorney prosecute by information; the accused is not protected from unjust indictment by the grand jury but many unjust indictments are found owing to the fact that ordinarily only the state's side of the case is heard; by presenting a case direct to the grand jury in many instances defendants are deprived of their right to preliminary hearings. Grand juries are prone to hear incompetent and hearsay evidence; the grand jury under our laws is an ungoverned and ungovernable body, responsible to no one, working in secret and blasting

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by an indictment the reputation of many a person whom it finally develops there is no evidence to convict.

Very few of these arguments on either side need elaboration. Every lawyer on reading them can balance advantages and disadvantages and make up his own mind on the subject. The recent action of a Hennepin County grand jury in its final report to the Court recommending the disuse of the body in the ordinary case shows that the subject is a live one at this time. The State Bar Association has a special committee studying the subject.

In the opinion of the writer, the arguments against the use of the grand jury weigh more strongly. The grand jury should be dispensed with except in unusual cases where public necessity requires; such as cases where charges are made against public officials or certain conditions exist in a community that call for a clearing of the moral atmosphere.

No grand jury can hear twenty to thirty cases a day as is often done in Hennepin County and have the action taken in these cases be anything more than perfunctory.

Section 9117 of the 1913 Statutes providing for the calling of witnesses for the defense before the grand jury has practically fallen into disuse. It was put in the law for a purpose—to head off frivolous prosecutions or those brought solely for revenge.

Grand juries in counties where certain laws are unpopular fail to indict even though the evidence be clear and who can call a grand jury to account in such a case and by what means? A county attorney, if he failed to prosecute under similar circumstances, could be removed by the governor for non-feasance.

The expense item is large. Hennepin County spent during the year 1921 for fees of grand jurors, $4,244.70 and for witnesses before the grand jury $2721.90, a total of $6,966.60. The expense of the time spent on grand jury activity by the county attorney and his assistants, the sheriff and his deputies in serving subpoenas and the time of the district court in dealing with the grand jury should be added to this total.

The public would be amply protected if a special grand jury could be called when necessary by the presiding judge, the board of county commissioners or by a designated number of tax payers.

SUBJECT INDEX