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## THE LAW AS AN EXPRESSION OF COMMUNITY IDEALS AND THE LAWMAKING FUNCTIONS OF COURTS

JOHN E. YOUNG Supreme Court of New Hampshire

If we are to study law intelligently, we must not only understand what it is and its office in the social scheme, but also the forces which both immediately and mediately dominate its development. I shall assume for the purposes of this paper that each of the autonomic groups into which the human race is divided is an entity with a mind of its own which evolves ideals and makes laws to effectuate them, and creates the corporation known as the state to enforce its laws. In other words, I shall attempt to show that community ideals are emergent facts incident to the development of every community; that laws are the tools a community makes to effectuate its ideals, and the state, a corporation it creates to use these tools; or that laws and the state are the means a community employs to effectuate its ideals.

The term community has several meanings, but is sometimes used as synonymous with autonomic group; that is the sense in which I shall use it. The term state also has several meanings, but as I shall use it, it is synonymous with the governing entity of an autonomic group. In other words, as I use the term community, one of the autonomic groups into which the race is divided is intended; and as I use the term state, the governing entity of such a group is intended. By individual ideals, as I shall use that term, the opinions an individual forms as to what

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he should do or omit to promote his own welfare and that of the human race is intended; and by community ideals, the opinions a community forms as to what it should do to promote its welfare and that of the individuals of whom it is composed. In other words, by community ideals, as I use that term, are intended the concepts that go to make up public opinion.

Notwithstanding it will be necessary to consider the evolution of the human race in order to understand how ideals are evolved, and why laws are made to effectuate them, I shall not consider the force which dominates its evolution, except in so far as may be necessary to show that that force, whatever it may be, is not the one which immediately dominates the making of laws.

There is a difference of opinion as to whether laws affect persons and property, or persons only; but I shall assume that they are made, and that while they affect property, they affect it through individuals; or that all laws are commands delimiting what those subject to them must do to avoid civil or criminal liability.

The term law has no technical meaning; consequently it will be necessary to define that term before I attempt to show what law is, or its office in the social scheme.

A definition, to be of any practical value, must be broad enough to include every feature common to all the rules of all the laws and systems of law that have been, are, or ever will be in force, and narrow enough to exclude all features peculiar to particular laws and systems of law. It is common knowledge that there are innumerable laws and systems of law, and that the rules of no two are identical. In fact, every system commands acts to be done that the other systems forbid. It is also common knowledge that we have the laws of grammar, of baseball, of billiards, etc., in addition to juridical law; also, that some of the rules of all the various systems are continually breaking down, and new rules being substituted for them.

The question, therefore, that naturally arises when these things are considered, is whether there are any features common to all the rules of all these various systems—in other words, whether there are any earmarks by which a law may always be known; or whether there is anything common to a rule which makes it a felony punishable with death to teach a servant to read, and one which makes it a misdemeanor to employ a servant who cannot read.

Many definitions of law can be found in the books—nearly as many, in fact, as persons who have considered the question.

One reason for this is because the term law has no technical meaning. We speak of the laws of nature, of juridical law, and of the laws of grammar, etc. This discussion, however, is limited to a consideration of juridical law; and while that narrows its scope, it is still true that the term law has no accepted meaning. As that term is sometimes used, its makers are intended, as when we speak of the end, purpose or problem of law.

If laws are made, that is, if they are not facts in the sense in which the so-called laws of nature are facts, what must be intended when we speak of the purpose of a law is the end its makers had in view when it was enacted.¹

By law, as that term is sometimes used, the standard of justice, or the yardstick to determine right from wrong, is intended; and an attempt to define it resolves itself into an attempt to define the standard of justice.

I think that that standard is subjective, or to be found in the mind of the lawmakers; but many, perhaps the majority, think that it is objective, or to be found outside of the consciousness of the lawmaker. In other words, I think the yardstick to determine right from wrong for each of the communities into which the race is divided is to be found in its consciousness. If this view is sound, the time will come when the standard of justice will be found in the consciousness of the race; for the time is coming when all the different communities will be fused into one community, and when that time comes, community ideals will be the ideals of the human race. In short, in my view of the matter, the standard that is in fact applied to determine right from wrong is to be found in public opinion, whether the community that evolves it is a savage tribe or the race as a whole. While public opinion is the practical standard of justice, the ideal standard is the concept that those acts and those only that tend to promote the welfare of the race as distinguished from the welfare of particular communities are right, just and equitable.2 While this is my view of both the ideal and the practical yardstick to determine right from wrong, the majority believe that the standard is objective, or that it is to be found somewhere in space rather than in the consciousness of the individual, of the community or of the human race. If we are to understand what law is and its office in the social scheme, it

¹ Professor Roscoe Pound, The End of Law (1914) 27 Harv. L. Rev. 195. ² Small, General Sociology (1905) 657-683.

will be necessary to determine which of these views is sound; that is, whether the standard is objective or subjective; but in order to save repetition, I shall consider that question when I am considering whether there are any features common either to the source or to the content of all laws and systems of law.

When law is used in the sense of the standard of justice, it is said that it "is the standard of conduct which in consequence of the inner impulse that urges men toward a reasonable form of life, emanates from the whole, and is forced upon the individual", or that it is "the objective co-ordination of possible acts among men, according to an ethical principle which determines them and prevents their interference."

Some of those who believe the standard of justice is objective think that it is to be found in individual liberty, or that only those laws are just which tend to promote the liberty of the individual at the expense of the community; in other words, that law is intended to effectuate individualism. Others think law is intended to hold society together; that the end of law is to find a place for everyone and to keep him in his place, and that those laws and those only that have that effect are just. Others think the standard is to be found in equality, and that those laws and those only that tend to make everyone equal before the law are just.⁵ Others think the test to determine whether an act is just is to inquire whether it will promote the welfare of the race as distinguished from the welfare of particular individuals, or classes of individuals.6 There are those who find the standard of justice in what the Germans know as "Kultur," and they think that those laws only are just that tend "to secure and increase the progress of culture by so moulding rights and the universal cultural values which it protects that the hampering elements are removed and the improved tendencies supported and strengthened." In short, there are as many objective standards of justice as persons who believe in such a standard.

^{*}Orrin N. Carter, Introd. to Kohler, Philosophy of Law (1914)

Del Vecchio, The Formal Bases of Law (1914) 218.

^{*}Demogue, Analysis of Fundamental Notions, Modern French Legal Philosophy (1916) 371.

^{*} Small, op. cit. 680-685.

Kohler, Philosophy of Law (1914) 60.

As the term law is commonly used, the system of rules in force in a particular country delimiting what its citizens must do to avoid civil and criminal liability is intended. When used in this sense, law is said to be the "body of rules and principles in accordance with which justice is administered by the authority of the state";8 and a definition of law usually assumes the form of a definition of one of these rules. They are said to be rules for the delimitation of interests;9 of wills; and sometimes of both interests and wills; sometimes rules for the protection of interests; and when we come to the cases, they are said to be rules of civil conduct that the state will enforce; 10 or more generally, rules the state may enforce.11 To some, these rules are as unchangeable as the laws of the Medes and Persians. Others recognize that they change to keep pace with the changes in their makers' ideals. Still running through much that is to be found in the books is the idea that there is something in law, "a core" or "inner nerve," as it is sometimes called, that causes it to develop in a way to promote the well-being of the race. As will be shown more fully later, this is putting the cart before the horse, or putting the thing that is made in the place of its makers. There is a force either in or outside of humanity that dominates its evolution or causes it to develop in such a way that the number of those who share in the good things of life is constantly increasing, while law is merely one of the things communities employ to bring this about.

If all the definitions of law to be found in the books are accurate from their authors' point of view, they afford but little help in our search for earmarks common to all rules of law. There are no features common to the definitions of law when it is used in the sense of the standard of justice, and when it is used in the sense of a system of rules the state will enforce; and the only feature common to the definitions of the second class is that a rule of law is a rule of civil conduct; intending by that a rule delimiting what those subject to it must do to avoid liability.

To say that a law is a rule of civil conduct is but little more helpful to one in search for the earmarks by which a law may

Pound, loc. cit.

^{*}Korkunov, General Theory of Law (1909) 79.

¹⁶ I Blackstone, Comm. *44.

^{11 25} Cyc. 163, 18 A. & E. Ency. Law 569, 5 Words & Phrases 4014.

always be known, than to say iron is hard to one who is trying to learn how iron may be known. In other words, such a definition merely changes the question from what features are common to all rules of law, to what features are common to all rules of civil conduct. While most persons will agree that law is intended to promote justice, there is, as has already appeared, no consensus of opinion as to the test to determine when a law is just, or as to the yardstick to determine right from wrong. While I think the test is to be found in the opinion of the majority, many think it is to be found outside of human experience. I shall attempt, however, to show that this standard is subjective, or to be found in the consciousness of the lawmakers, and that those laws and those only that tend to promote the welfare of the community as distinguished from that of particular individuals are just. If this view is sound, there are as many standards and sources of justice as systems of law; for in this view of the matter, each community evolves its own ideals and makes laws to effectuate them. As each community evolves its own ideals, each must have its own standard of right and wrong; for that standard, in so far as any particular community is concerned, is equal to the sum of its ideals. If, however, the standard were objective, every community would have the same standard of right and wrong; for if it were objective it would be a fact, in the same way gravity is a fact, that could be found, and the results it would produce in a given situation could be discovered and stated in the same way the effects that heat, light or sound will produce have been discovered and stated. In short, if the standard of justice is objective, it can be discovered, and the effects it will produce in any given situation can be stated with approximate accuracy, not only by judges. but by anyone who possesses the necessary skill and will take the trouble to make the necessary investigation. All fair-minded men will, I think, agree that that cannot be done, for if it could, public ideals would not change, and each generation would think the same thoughts as all those which preceded it. And it would be true that law is intended to find a place for everyone and to keep him in it; or rather, that it is intended to hold society together in the same way gravity holds the universe together. In short, unless mind is as inert as matter, there can be no objective standard of justice. Since this is so, a definition of law cannot include any features peculiar to the content of all rules of law; for if laws are made to effectuate their makers'

ideals, they are simply a means to an end, or tools invented to effectuate their makers' ideals. Since no two communities have, or for that matter can have, the same ideals, no two can have the same standard of justice or the same yardstick to determine right from wrong; for as we have seen, such a yardstick is composed of its makers' ideals; and it necessarily follows that no two systems of law can have the same content. The question, therefore, of whether there are any features common to all rules of law, or any earmarks by which such rules may always be known, resolves itself into one of whether there are any features common to the form or to the purpose of all rules of law. If the standard of justice is subjective, it necessarily follows that laws are made. And if they are made, it requires no argument to show that they are made to effectuate their makers' purpose. This would be true if the standard of justice were objective; but in that case, the force which dominates the making of law would be the same as the one which dominates the evolution of the race, and consequently the purpose of law would be the purpose of the Creator. It is true that laws are intended to effectuate their makers' purpose, whether they are of divine origin, or made by a community or an individual; for the mind of a community is so far like the mind of an individual that the only force which can induce it to give the command necessary to put itself in motion is a desire to satisfy one of its needs; and as will appear more fully later. such a desire is the only force that can induce an individual to give the command necessary to put his muscles in motion.

In short, the standard of justice is subjective, and all laws are not only made, but are made to effectuate their makers' ideals; that is, they are simply a means to an end.¹²

As has already appeared, all laws, in the final analysis, are commands; and it is obvious that they must assume that form if they are to effectuate their makers' ideals, for the only way in which that can be done is for the lawmakers to delimit just what those subject to the law shall do in a given situation. In other words, the only way in which a community can effectuate its ideals is by limiting individual freedom of action.

There are, therefore, three features common to all laws: they are rules that are made; they are made to effectuate their

¹² Von Ihering, Law as a Means to an End (1913) liv.

makers' purpose—that is, they are the tools he invents to effectuate his purpose; and they limit individual freedom of action. As it seems to me, these features are common to all rules of law, and are the only features common to all laws and systems of law; that is, to the laws of grammar, of baseball, of billiards, etc., to say nothing of moral and of juridical law. You cannot think of a law that was not made; nor of one that is not a tool; that is, of one that was not made to effectuate its makers' ideals; nor of one that does not attempt to do that by limiting individual freedom of action, or by delimiting what those subject to it shall do in a given situation.

It is probably true that in the beginning these were all the features common to the rules of juridical law, but for countless centuries all such rules have had another common feature: that is, they have been rules the state may enforce. If laws are made either by individuals or by communities, it is obvious that they cannot effectuate their makers' purpose in and of themselves; for if they are made, they are not a force like gravity, but simply tools, and do not differ from other tools—for example, a black-smith's hammer—in so far as the capacity to effectuate their makers' purpose is concerned. The hammer, in and of itself, is an inert mass, but the smith uses it to shape iron, or to effectuate his ideals. Force, however, is necessary to effectuate them, and as there is no force in the hammer, the smith applies force to it.

In the same way, there must be force behind laws if they are to effectuate their makers' ideals. The making of laws, therefore, is but one step in the process of effectuating ideals. To do that, laws must be both made and enforced. In other words, if a community is to effectuate its ideals, it must both delimit what its members shall do or omit in a given situation, and create an entity that will punish those who fail to do or omit the things the law commands; or it must compel them to compensate one who is injured or damaged for all the loss he sustains because of their illegal acts. By this is not intended that force enters into the composition of a rule of law. What is intended is that force is one of the things necessary to effectuate ideals. Since this is so, when the entity which evolves ideals is a community, it must both make the laws and give some individual or corporation the power to enforce them, if it is to effectuate its ideals.

¹⁸ Korkunov, op. cit. 96.

All the rules of juridical law have, therefore, four common features: (1) they are made by a community; (2) to effectuate their makers' ideals; that is, they are the tools it invents to effectuate its ideals; (3) they limit individual freedom of action; that is, they delimit what those subject to them shall do in a given situation; and (4) they are rules that the state may enforce. The test, therefore, to determine whether a rule is a law in a particular community is to ask (1) if the community made it. (2) If it did, why it made it. (3) If it was made to effectuate one of the makers' ideals, how it attempts to accomplish that purpose; and (4) whether it is a rule the state may enforce, intending by that to punish those who neglect or refuse to do or omit the things it commands, or else compel them to compensate one who is injured or damaged by this failure to obey the law for all the loss he sustains because of their illegal acts.

If, however, the standard is objective, a law is a rule limiting individual freedom of action that the state may enforce. In other words, if there is such a standard, Blackstone's definition of law as a rule of civil conduct the state will enforce is both concise and accurate; for while it is true that laws are intended to effectuate their makers' purpose even if they are parts of creation, no definition of law that includes a statement of that purpose can be made that will be accepted by any considerable number of people; for while there are many who believe there is an objective standard of justice, there are no two who can agree as to just what that standard is.

This brings us to the question of the force which dominates the making of laws, and I shall attempt to show that it is the needs of a community as distinguished from the needs of the individuals who compose it. If the standard of justice is subjective; that is, if laws are made by either individuals or communities, we must begin the study of law with a study of the evolution of the human race. While it was once thought that the individual was the unit into which the race was originally divided, almost everyone now concedes that the unit was the social group. In short, it is now the orthodox view that there never has been a time when men either could or did live independently of their fellows, 14 or when each individual either could or did live by his own unaided efforts. In fact, there is something innate in every normal human being which compels him

¹⁴ Berolzheimer, The World's Legal Philosophies (1912) 216.

to become a member of some social group. The elements which make up that something consist in part, at least, of sentiment, passions, physical and psychical wants, and a desire for the society of others, as well as for help and protection. Although that something is composed of these elements, the combination of them is not the same in any two individuals; still, some one or some combination of them dominates every normal human being and compels him to become a member of a social group. This was as true when time began as it is to-day. In fact, there never was and never will be a time when social groups were not and will not be absolutely essential, not only to the mental evolution, but to the very existence of the human race.

Since such groups are composed of individuals each with a mind and purpose of his own, it is obvious that law is essential to the existence of such groups. In other words, it is self-evident that a group cannot exist without law, intending by law, limitations on individual freedom of action; for if every one were to do just as he pleased, if no one respected the rights of others, we should not have groups of men associated together for mutual help and protection, but a situation in which each man was acting for himself, or a situation in which every man was against every other man.

In other words, if it were not for law we should have "a war of all against all," or a situation in which each man was constantly trying to overreach all the others. Law, therefore, is absolutely essential to the existence of a community, and communities are equally essential to the existence of the race. Since individuals cannot exist without communities, and communities cannot exist without law, it follows that both law and the social group are as old as the race. This shows that the needs of a community are the forces which dominate the making of laws, and the needs of individuals are the forces which dominate the forming of communities. We can get a fairly accurate view of a social group in the first throes of evolving ideals and inventing laws to effectuate them by studying young children. Such a study will show that when a child is born he is helpless, and that as he develops, he looks on those who care for him in something the same way the ordinary man looks on God. Experience, however, teaches him that his protectors can and do make mistakes, and that he must decide for himself what he ought to do or leave undone in a given situation; and there comes a time in the life of all normal children when they seek the society of

others of the same mental development, and form more or less compact groups. When such a group is first formed, none of the children have the slightest idea of law; but gradually the group evolves ideals and customs to effectuate them, and the dullest child soon learns that he must comply with these customs if he wishes to remain a member of the group. This shows us both how and why laws are made, as well as who makes them. The child study is also useful when we are considering the evolution of the state and its purpose in the social scheme. A group of children always develops around a leader who dominates its activities to a greater or less extent. Although the group begins to evolve ideals and customs to effectuate them as soon as it is formed, none of the children at that time understand the purpose of customs or why they should obey them. All they know is that they must obey them if they wish to remain members of the group. In time, however, they realize that the office of customs is to effectuate group ideals, and that customs are a delusion and a snare, or that they benefit principally those who intend to disobey them, unless the group enforces them. When the group finally grasps that idea, the leader is usually able to make use of it to increase his power. In other words, the leader is able to exercise authority over the group when it is first formed because of his real or fancied superiority; but when group consciousness develops, the idea that he represents the group and should be obeyed for that reason also develops and has a tendency to put him above the law. Since the mind of a child passes through about the same phases in the course of its evolution that the human mind has passed through, it is probable that the state developed in something the same way, or that each of the groups into which the race was divided developed around a leader who exercised more or less authority over it. As group consciousness developed, the leader made use of it to increase his power, which in time became autocratic.

It is impossible, however, to say that the analogy holds; all that can be said is that we have no traditions—much less any record—of a community with laws but without a state to enforce them. It is possible, however, to form a fairly definite idea of the predicament of such a community, for we have a complete system of international law in so far as familiar situations are concerned, but no machinery to enforce its rules; so, when a state commits any serious breach of international law, the community or communities that are aggrieved fight, as they say,

to enforce the law. In other words, in such cases, that usually happens which happened long, long ago when one member of a social group was injured by another's breach of a group custom.

Although we have no record of a time when there were communities with laws but without a state to enforce them, there was a time not so very long ago when the machinery for enforcing laws was woefully inefficient in so far as the communities from which we are descended are concerned. earliest traditions relate to a time when the family was the autonomic group, and at that time, the head of the family exercised more or less authority over its members; but after tribes were evolved from the family, the tribe usually administered its affairs in an assembly composed of the whole body of free men. This is true in so far as the Germans from whom we are descended are concerned, and is probably true of the whole Aryan race. Each of these tribes had a chief who presided over its assembly and exercised more or less authority over tribal affairs. At first the office seems to have been personal; but gradually the chief was able to increase his power, and in time the office became hereditary and he became a king resting his right to rule on the will of God—not on the will of his people. When absolutism had done its work, the people tired of their kings and put them under the law; and in that way the modern constitutional state was evolved to do some of the things kings had done, and such other things as the community which made it thought would promote the community's well-being. In other words, a modern constitutional state is a corporation created by a community to administer its affairs. This is true notwithstanding most European states were evolved from the original group through the family, tribe and kingdom; for, while the community has the right to limit individual freedom of action in so far as that is necessary to effectuate its well-being, no man has or can have that right, if men are equal, except in so far as he acts for the community.

All states, therefore, no matter when or how they were formed, are corporations with such powers and such powers only as their creators gave them. To illustrate my meaning, the people who created the British monarchy vested the supreme legislative power in Parliament; but those who created the United States of America retained that power in their own hands.

If, therefore, we are to understand what a state can and cannot do, we must remember that while the community is

omnipotent, the state created by it can only make such laws as the community has authorized the state to make, and that the state cannot enact laws to effectuate a public ideal unless the community has authorized it to make them. The failure to realize this fact lies at the root of most of the honest criticism to which the courts have been subjected for holding statutes unconstitutional. It is true that in some cases these statutes were calculated to promote the well-being of the human race, and to promote it in the way the community approved; but in most cases it is also true that these statutes were in conflict with some one or more of the provisions of the constitution. In other words, while some one was to blame for the failure of some of these statutes, in most cases that some one was the community. In short, it is the community and not the state in which the power to make laws is vested. Since this is so, the common saying that if the state were destroyed, the law would perish, is in no sense true. The history of Europe since the sixth century makes this clear; for at that time the Roman Empire of the West was overthrown, but the civil law is still the common law in all or nearly all parts of Europe where those who evolved the ideals it was made to effectuate resided.

The history of the United States tends to the same conclusion, for the state perished when the thirteen colonies separated from Great Britain; but the only noticeable effect its destruction had, in so far as law was concerned, was that there was no machinery to enforce it until the colonies created new corporations for that purpose. The law and the state, therefore, are at one and the same time the tools the community makes to effectuate its ideals, and the things without which it cannot exist.

In short, as will appear more fully later, public ideals are emergent facts incident to the evolution of every community, while the law and the state are the means it employs to effectuate them. While law is made by a community and not by individuals, it is in a sense true that it is something a man carries with him wherever he goes. What he carries, however, are the ideals the law is intended to effectuate; and that explains why a colony always adopts the laws of the fatherland as its laws; for they are intended not only to effectuate the colony's ideals, but to effectuate them in the way it approves. That is all that is intended when it is said that our Anglo-Saxon ancestors brought their law with them to Britain, or that our British ancestors brought their law with them to America.

Massachusetts furnishes a good illustration of what I have in mind. The early settlers hated English law and everything that had to do with it with a hate that was both deep and cordial; but they were Englishmen with English ideals, and notwithstanding they adopted the law of Moses as their law, the form it assumed in their hands was that of the law of England, except in so far as religious matters were concerned. The reason for this is obvious: English law was, and the divine law was not, adapted to the industrial conditions that prevailed in Massachusetts. In other words, English law was adapted to their needs, and it was as natural for them to adopt it as their law as it was for them to use the English language.

Since a law is made by a community to effectuate its ideals, the problem for every community is, always has been and always will be to determine just what limitations it should impose on individual freedom of action to promote its well-being; and it may be useful to see how our Celtic-Anglo-Saxon ancestors solved that problem. History shows that they were accustomed to administer all their public affairs in local assemblies in many ways like a New England town meeting except that these assemblies exercised judicial as well as legislative and administrative functions.15 When such an assembly was exercising its judicial functions, the test it employed to determine the legality of the act complained of was to inquire whether it was customary. That, as I shall attempt to show, was but another way of inquiring whether it was reasonable, or one of which they approved; for the issue of its legality was not decided by written rules, but by a vote of a majority of the suitors-or as we should say, those qualified to vote in that precinct-present and voting.

It is common knowledge that we are apt to think of the things we approve as customary. In short, with most men, inquiring whether an act is customary is but another way of inquiring whether it meets with their approval, and that was more nearly true a thousand years ago than it is to-day.

The test, therefore, that our ancestors in fact applied to determine the legality of an act was to inquire whether it was reasonable. In other words, about the only limitation our Celtic-Anglo-Saxon ancestors imposed on individual freedom of action was that of not doing anything that would injure or

¹⁵ Thayer, Evidence (1898) 8.

damage others unreasonably; or stated positively, that of doing those things and those only of which the majority approve. The test, therefore, that our ancestors in fact applied to determine whether one who was injured by the acts of others could recover. was to inquire whether the act which injured him was reasonable or one of which they approved; and the verdict depended on how the majority answered that question. It is clear that, if laws are intended to effectuate public ideals, that is the test which should be applied to determine the legality of an act, for public ideals are the ideals of the majority. In other words, all acts the majority approve either are or should be legal, if the needs of the community are the forces that dominate the making of laws; and, that they are, is the foundation on which government by the people rests. Any act of which a majority approves is, therefore, customary, reasonable, right, just and equitable regardless of the effect it may have on individuals; and it follows that any rule the majority approves is just and reasonable regardless of the limitations it imposes on individual freedom of action. The law of every community, therefore, should consist of the general rule that it is everyone's duty to do those things, and those only, which the majority approve, and of a more or less complete body of special rules intended to apply the general rule to familiar situations.

The questions of how the needs of the community produce statutes, and how the rules of the common law are evolved, remain to be considered. I shall, however, consider them separately; for the agency the community employs to make statutes is not the same as the one which formulates the rules of the common law, and the knowledge of how statutes are made is apt to be misleading when we are studying the evolution of the common law. Since statutes are made by communities to effectuate their ideals, we must begin our study of how they are made with the study of the evolution of public ideals. That necessitates a study of the evolution of individual ideals, for the evolution of such an ideal is the first step in the evolution of all public ideals. In considering this question, it will be helpful to remember that while a community is an entity with a mind of its own,16 it is composed of entities each of whom has a mind separate and distinct from the general mind, and more or less well-developed reasoning faculties; and each of these entities

¹⁶ Small, op. cit. 133.

not only can, but is accustomed to, form opinions of his own as to the things he should do and as to how he should do them to promote his well-being and that of the community. It is as natural for men to form such opinions as it is to breathe, and all normal human beings at some time in their lives form more or less definite opinions in respect to such matters. In fact, so far as familiar situations are concerned, most men form very definite opinions as to what they should do or omit if they are to prosper. Most persons not only have their own opinions as to such matters, but also impose such limitations on themselves as they think are necessary to make their lives square with their ideals. The term ideals, as commonly used, includes a part only of the opinions a person forms as to what he should do or omit to promote his welfare and that of the community; but as I use that term, it includes all the opinions he forms as to such matters; that is, the opinions he forms as to economic and political as well as ethical questions. It follows that moral law, as I use the term, includes all the limitations an individual imposes on himself; that is, rules to determine how to vote and what to eat, as well as ethical rules. To understand how ideals are evolved, we must remember that the mind of an individual is so constituted that any want, either physical or psychical, that he may feel excites in him a desire to satisfy it; it follows that a person's desires increase as his wants increase. In other words, every normal human being possesses or is possessed by a constantly changing number of wants, some physical, others psychical; some selfish, others altruistic; each with the power to excite a desire to satisfy it. Such a desire is said to be a natural force, or a force that acts on mind in something the same way gravity acts on matter. In fact, it is said that such a desire is the only force that can produce mental activity, or the only force that can induce a man to give the command necessary to put his muscles in motion.

Since it is impossible for a man to satisfy all his wants at the same time, each of them is continually struggling to control his mind, and the opinions he forms as the net result of this struggle are what I have called individual ideals.

It is common knowledge that a person's ideals change not only with a change in his environment, but from various other causes, the trend of this change, so far as any particular ideal is concerned, depending largely on the relative strength of his desires. As no two persons have exactly the same environment,

or place exactly the same value on any given want, so no two have exactly the same ideals. By that is not intended that no two persons have any common ideals. The exact opposite is the truth, for there are no two men but have some ideals in common, and the great majority of the community entertain most of the ideals that make up public opinion. Notwithstanding everyone shares most of his ideals with a majority of the community, still every normal human being has some ideals peculiar to himself, and others that he shares with various groups each of which consists of less than a majority of the community. While individual ideals are evolved in this way, no individual evolves all his ideals for himself. In fact, the average man absorbs most of his ideals ready-made; that is, he selects such of the ideals of others as appeal to him, and adopts them as his own.

As has already appeared, all public ideals are evolved from individual ideals; but when we are studying the evolution of public ideals it is necessary to remember that the community is an entity with a mind separate and distinct from the minds of the individuals who compose it. It is impossible for me to say just what this entity is,¹⁷ but I think that whenever two or more persons associate themselves together for any purpose, their minds interpenetrate in such a way as to form a common mind or a community mind in so far as the common purpose is concerned.¹⁸

In other words, while I cannot show just what the community mind is, or for that matter, just what the human mind is, I shall assume for the purpose of this discussion that there is such an entity, or that, while the individuals who compose a community are constantly changing, the minds of the members for the time being constitute an entity in something the same way the cells—the living organisms of which the body is composed—constitute the entity we know as the body; that is, each cell is at one and the same time a separate organism and a constituent part of the organism we know as the body; in the same way, the mind of an individual is at one and the same time a distinct entity, and a constituent part of the entity that I have called the community mind.¹⁹

¹⁷ Small, op. cit. 133.

¹⁸ Korkunov, op. cit. 276.

¹⁰ Miraglia, Comparative Legal Philosophy (1912) 370, 428.

The fact that this entity cannot be apprehended by our senses has no more and no less tendency to prove that there is no such thing, than the fact that the human mind cannot be apprehended in that way has to prove that it does not exist. Everyone will, I think, agree that there is such a thing as the human mind, and that it dominates the activities of every normal individual; and I think that it is as certain that the community mind, the common mind, the general mind or public opinion—call it what you will—dominates the activities of the community and is the final arbiter of right and wrong.

It will be enough for our purpose, however, to say that every community has a mind of its own, and that it is capable of evolving ideals. Although community ideals are the ideals of a majority of its members, they do not equal the sum of the ideals of all its members; for while the community mind does not contain any ideals not to be found in the mind of a majority of its members, the mind of every normal human being contains ideals not to be found in the community mind.

In fact, the community mind is in some ways like a composite photograph of the minds of all its members, for it reflects the ideals common to a majority, and not those peculiar to a minority of its members.

It helps but little, however, to say that the ideals the community mind reflects are those common to a majority of the community, for the struggle from which public ideals emerge is more complex and more difficult to understand than the one from which individual ideals emerge. While it is true that the desire which the needs of a community excite is the force which dominates the making of law, this desire is excited in individuals in many different ways. In some it is excited by selfishness, in others by altruism; in some by prejudice, in others by knowledge; in some by hate, in others by love; in some by passion, in others by experience; in some by one thing and in others by another. In fact, no one can say, so far as a given public ideal is concerned, which of these things moved the minds of the different members of the community. All that can be said is that one of these things or some combination of them dominated the minds of the majority. As we have seen, both individual and community ideals emerge from a struggle: but in one case, the struggle is carried on in the minds of a community, and in the other, in the mind of an individual. In one case the contestants are the wants, and in the other, the

ideals of individuals. In one, the emergent facts are community, and in the other, individual ideals. As has already appeared, community ideals make up the content of the community mind, or constitute the concepts that make up public opinion; and it will help us to understand what that is to remember that the struggle from which these concepts emerge began at the time the first social group was formed; that only a few of these concepts were evolved by the community as it existed at any given time; and that while some of them are as old as humanity, others were evolved but yesterday, and still others will be evolved to-morrow.

In other words, it will help us to understand what public opinion is to remember that while an individual is mortal, a community is immortal; or that, while the opinions of an individual begin and end with him, except in so far as he is able to impose them on others, public opinion had no beginning and will have no ending.²⁰ Although the community is immortal, its ideals change; and while this change may seem slow when measured by the changes that take place in individual ideals, it never ceases.

By this is not intended that the concepts of which it is composed do not continue as public ideals for an appreciable length of time; what is intended is that there is never a time when an ideal is not breaking down and new ideals being evolved from so much of the old ideal as is vital. The direction of this change, so far as any particular ideal is concerned, depends in part on the same facts that control the change in individual ideals, and in part on the relative strength of those who entertain the conflicting ideals.

Although this accounts in a general way for the change that is continually taking place in public ideals, it will, perhaps, be useful to consider this change a little more in detail. Something either physical or psychical in a person's environment reacts on him and causes him to re-examine the foundations on which one of his ideals rests. The usual result of such a re-examination is a new ideal. If this ideal appeals to others, there may at first be as many opinions in respect to it as persons who consider it; but in the end, the view of some individual or group of individuals prevails and transmutes what had been the ideal of

²⁰ Small, op. cit. 139.

individuals into one of the concepts that go to make up public opinion.

It will be helpful to keep in mind what moral law is, and the part it plays in the development of law. As has already appeared, moral law is the law of the individual, or the means he employs to effectuate his ideals, while juridical law is the law of the community, or the means it employs to effectuate its ideals. It is necessary, in order to get an accurate idea of the similarities and the dissimilarities in the process by which the two classes of ideals are evolved, and of the forces which immediately dominate their evolution, together with the parts moral and juridical laws play in the social scheme, to keep constantly in mind the fact that a community is made up of a constantly changing number of individuals each of whom has a mind of his own and is constantly trying to satisfy his wants or to improve his condition; while an individual's mentality is made up of a constantly changing number of wants each of which is continually struggling to induce him to satisfy it. The community cannot permit one of its members to act in a given way without limiting to some extent the freedom of action of all its other members, and an individual cannot permit one of his wants to dominate his activities without limiting to some extent his capacity to satisfy his other wants. The problem for both the community and the individual is to regulate the activities of the entities of which they are composed in such a way that each shall have the greatest possible freedom of action consistent with the well-being of all the entities of which it, or he is

Both attempt to solve this problem by imposing limitations on freedom of action. The community imposes them on its members, while the individual imposes them on his wants. To determine what limitation should be imposed, the yardstick employed by both is composed of what I have called ideals.

In other words, the community attempts to solve this problem by delimiting what it thinks each of its members should do or omit in all the different situations in which they may find themselves in the pursuit of business or pleasure, while the individual attempts to solve it by delimiting what he should do or omit under all circumstances. In short, juridical law plays the same part in the life of a community that moral law plays in the life of an individual; that is, public opinion does for a community what conscience does for an individual.

With these facts in mind, there is no difficulty in understanding how statutes are made. When a particular ideal becomes a public ideal, it excites a desire on the part of the community to effectuate it, and when this desire becomes strong enough, the community elects legislators who make the necessary laws.

While this shows how and why statutes are made, it also shows that the rules of international law are not so much laws as customs; intending by that, rules the majority think everyone should obey; or perhaps it is more accurate to say of these rules that they are emergent facts incident to the evolution of the race as a whole, for the only way in which they can be enforced is for each community to enforce them for itself. These rules will never be laws, except in the sense in which the laws of grammar, of baseball, etc., are laws, until a majority of the race realize that their first duty is to the race rather than to the particular community to which they owe allegiance, as for example to England, France, Germany or Russia; but if and when they finally realize that fact, they will have no difficulty in finding a way to make the laws necessary to effectuate their ideals and to create a state to enforce them. In other words, while the rules of international law are laws in the sense in which the rules of grammar are laws, they are powerless to effectuate the purpose for which they were made except in so far as the different communities wish to obey them. In fact, they are laws in the sense in which the rules of moral law are laws, but not in the sense in which the rules of juridical law are laws; for the community which makes them has not created an entity with power to enforce them, and such an entity cannot be created until a majority of the race realize that they are men-not Chinamen, Englishmen, Frenchmen, Russians, Turks or Germans: that nothing is really for the advantage of China, etc., that is not calculated to promote the welfare of the race as a whole; and that those laws and those only are right, just and equitable which are intended to promote the welfare of humanity as distinguished from the welfare of particular communities.

While the knowledge that public ideals are emergent facts incident to the evolution of all communities, and that law is simply a means to effectuate them, enables us to understand how and why statutes are made, it is of little or no help in enabling us to understand how the rules of the common law are made. In fact, this knowledge is positively misleading when we are trying to solve that problem; for after all is said, but a part

of these rules are true laws—that is, rules intended to effectuate public ideals, and to effectuate them in the way the public approve. In some cases the ideals they are intended to effectuate never were, and in others they have ceased to be, public ideals.

It will help us to understand what the rules of the common law are and how they were evolved to keep in mind the fact that the term law has no technical meaning. As it is sometimes used, natural law, or what was commonly supposed in the eighteenth and nineteenth centuries to be natural law, is intended. That is the sense in which it is used when it is said that it is an "unwritten" law, or what the court has in mind when it says that a case "must be decided on principle," or that it "found" the rule it applied to determine the rights of the parties. As has already appeared, this theory of law depends for its validity on the proposition that the standard of justice is objective.

By the common law is sometimes intended those rules that can be deduced from cases decided in the king's courts. While this, as will appear more fully later, is the original meaning of that term, its use in that sense is unusual at the present time.

As commonly used, that term includes both of these meanings and something more; that something more comprehends all rules that can be deduced from acts of Parliament and of the provincial legislature enacted before 1776. When used in this sense, the common law includes not only all rules that can be deduced from cases decided and statutes enacted before 1776, but also the doctrine that it is the duty of the court to "find" a new rule whenever a situation arises in which no statute and no formulated rule of the common law is applicable.

While it is often said that the common law is an unwritten law, by that is not intended that its rules have not been reduced to writing; what is intended is that they were not formulated by Parliament or by the provincial legislature. In other words, to say that the common law is an unwritten law is literally true only so far as new rules are concerned.

One very real difficulty to those charged with the duty of administering it results from the fact there are more versions of it than of the civil law—as many, in fact, as there are writers engaged in elaborating it, and courts in administering it. The fact that all these courts and writers are constantly limiting some of their rules, or in some way qualifying or modifying them, or in overruling old and substituting new rules, accentuates this difficulty.

It will be necessary to show what natural law is, or rather what it was supposed to be, in order to show that whatever the rules of the common law may be, they are not rules of natural law. By that term, as it is ordinarily used, something that delimits what everyone should do or omit in all places and under all circumstances is intended.

In other words, by natural law, as that term is ordinarily used, is intended a system of rules very like the laws of nature; or rules that are not so much commands which everyone subject to them should obey, as statements of the result that should follow in a given situation from the operation of natural forces.

That must have been the theory of those who elaborated the common law; that is, they must have thought of the rules they formulated as facts, for they say they "found" them, and it is obvious that neither a judge nor anyone else can "find" a rule that does not exist.

The court, therefore, must have thought of these rules as facts; and it is certain that if they are facts, anyone, whether a judge or not, who has the necessary skill and exercises sufficient diligence can "find" them and state them with approximate accuracy.

It is also clear that if they are facts, or if they can be "found." they are not laws in the sense in which statutes are laws, but rather laws in the sense in which the laws of heat, light and sound are laws. If the rules of the common law are laws in this sense. they control the development of the race. That seems to have been the belief of our fathers, for law was looked on by them not as a means to an end, but as an end that shaped the destiny of the race in the same way gravity shapes the course of a river. In other words, in the sixteenth, seventeenth, eighteenth and nineteenth centuries most persons thought of law as a system of rules of civil conduct that would work exact justice between man and man, not only in every situation in which a person had found himself, but in every situation in which he might find himself while time endured.21 This would be true not only for your experience and for my experience, but for every possible experience. These rules were thought of not as made by manthat is, as the result of human experience—but as something that existed before time began and would exist after time ceased to be. In short, these rules were thought of as parts of creation

²¹ Korkunov, op. cit. 130.

and as something that would endure without change as long as the universe endured.²² Almost every one at that time seems to have believed in such a system, and what is more surprising, to have believed that the court and only the court could "find" those rules; and the court seems to have been of that opinion.²³

In other words, there was a time when the court seems to have thought it was inspired, or that the rules it formulated were revealed to it. At that time, therefore, the common law was not thought of as consisting of rules that were made, and that sometimes did and sometimes did not work justice; but as a system as old as creation, composed of rules that not only always had, but that always would work exact justice between man and man; that is, as a system of specific rules as applicable to the needs of the men of the twentieth as to those of the sixteenth The fact these rules were often found to work injustice does not appear to have shaken men's faith in this theory of law. They seem to have thought this trouble was rather with the court than with the theory itself. As long as this view obtained, it did not seem quite as absurd to say the court "found" the rules of the common law as it does to-day,24 when many think that the only sense in which the standard of justice can be said to be objective is that it is to be found in the consciousness of the community, or that the test to determine whether a rule is right, just and equitable is to inquire whether it will promote the welfare of humanity as distinguished from the welfare of particular individuals.

It is true that many, possibly a majority, either believe in natural law, or else believe that an abstract concept of justice can be "found" in the rules of written law by induction, and that law can be deduced from such concepts; but whatever view they entertain as to what law is, its purpose, and the force which dominates its development, all concede that the rules of the common law, in so far as they have been reduced to writing, were formulated by the court. Consequently, the study of the history of the court will show how these rules were in fact formulated, and will, as I think, demonstrate that they were made by the court in the same way statutes are made by the legislature, or that whatever they may be, they are not rules of natural law.

²² Del Vecchio, op. cit. 14-20.

²³ Preface 9 Coke xiv.

²⁴ Kohler, op. cit. 5.

At the beginning of the eleventh century there was no man or body of men either in or out of Britain that was making laws, or even pretending to make laws, for the whole kingdom. While it is true the Church was legislating, it was legislating for the world and not for Britain. At that time all of the courts in England made their own laws. Part of those courts were local assemblies of some or all of the freemen who lived in a particular hundred or shire, township or county, while the others were composed of some or all of the men who lived on a particular estate; but both classes of courts were alike in that they made their own laws. In other words, at the beginning of the eleventh century every court in England—there were hundreds of them made its own laws. Each court not only made its own laws, but made them, as has already appeared, by vote of the suitors present and voting. There were, therefore, at that time hundreds of laws in force in Britain-so many, in fact, that it is nearly true to say not only that every county, borough and township had its own laws, but that all the large estates had their own laws; and that was literally true in the twelfth century. In fact, the test all courts applied at that time to determine the legality of an act was to inquire whether it was customary, and that, as has already appeared, was but another way of inquiring whether it was one of which the suitors approved. After the kingdoms into which Britain was originally divided had been fused into a single kingdom, and land had become valuable and an object of commerce, this system of local courts was found to be ill-adapted to the needs of the people; and William the Conqueror created a court which in time was to make laws affecting the property rights of every freeholder in Britain, and, for that matter, everyone who lives under the common law.

This court, soon after it was created, aspired to universal jurisdiction; and to bring that about, it made the same use of the doctrine that all land is held of the king that Congress is making of the "commerce clause" of the federal Constitution. The public need that enabled the king's court to accomplish its purpose was that of a uniform system of land-laws, while the public need that is enabling Congress to accomplish its purpose is that of uniform laws in respect to manufacturing and transportation. It is impossible to say just what part feudal ideas played in the evolution of this court, and just what part the ideas of the Roman jurists. It is, perhaps, enough for our purpose

to say that it was feudal in so far as jurisdiction was concerned, and Roman in so far as the making of laws was concerned. In other words, it differed from all the courts in the kingdom, except the courts of the Church, in the way it made its laws. In all the other courts, as we have seen, the laws were made by the suitors of the court, or as we should say, by those qualified to vote in that precinct. In the king's court, however, the judges made laws in much the same way the Roman emperors made them, or in much the same way the popes were making them at that time. In short, while the king's courts were in some ways like the communal and feudal courts, they differed from them in the way they made laws. They were, however, like all courts of that day in that they were business institutions in the sense that while they did "right and justice," they did it for a price.

Their justice, however, was better than that of most of the local courts, and as they were stronger and better able to enforce their decrees, they naturally attracted, and in the end monopolized, the business. In fact, their business increased so fast that by the end of the twelfth century, their law began to be known as the common law, or as the law common to all freeholders in Britain, to distinguish it from the laws of all the local courts in the kingdom, as well as from the canon and the civil law.

The king's court for a century after its law began to be known as the common law was the only temporal body making laws affecting private rights in all parts of England; but in the last quarter of the thirteenth century, Parliament assumed something like its present form, and engaged in the lawmaking business. In other words, toward the end of the thirteenth century Parliament as we know if was evolved from the king's Wittan, or assembly of wise men, to do for the people of England what the king's courts were doing for the king; but it did not arrogate to itself the sole power to make laws for several centuries after it assumed its present form, as witness the fate of several famous statutes. In fact, that is true to-day; for while the court is accustomed to say that it has no power to make laws, it says in the same breath that it "finds" the rules of the common law; but it is obvious, as it seems to me, that the judges made the rules they formulated in the same way Parliament made statutes; that is, whether or not the judges realized what they were doing, they made the rules of the common law to effectuate the ideals of their royal master in the same way the members of Parliament made statutes to effectuate the will of the people.

As the power of the people waxed, the power of the king waned, and Parliament gradually took over more and more of the lawmaking business; but it had not assumed exclusive jurisdiction when Britain lost her American colonies. In other words, while the court's power to make laws had been somewhat curtailed in 1776, it had not been taken away; and at that time, the King's Bench, the Common Pleas and the Exchequer, as well as all the local courts in the kingdom, were making laws as well as enforcing them.

If anyone has any doubts on this point so far as the king's courts are concerned, he should study their history for the middle of the eighteenth century. Such a study will show that the king's courts,—or rather, that Lord Mansfield was elaborating the law of contracts as applied to the transactions of merchants at the time the American states ceased to be British colonies, and just prior to that time. When the people of America separated from Great Britain, they created states to administer their public affairs, and courts to administer their laws. They gave these courts the same powers as the English courts, in so far as their powers were not limited by the Constitution.

The English courts, as we have seen, were legislative bodies and were making laws at that time in the same way they had been making laws ever since they were created in the latter half of the eleventh century; and it would be fair to assume that those who adopted the Constitution intended for the courts they created to legislate in the same way and to the same extent the king's courts were legislating at that time, if it were not for the provisions of the Constitution; for the king's courts had been doing business for nearly seven hundred years, and no one up to that time had even suggested that they should not "find" a rule when no statute or specific rule of the common law was applicable, to determine the rights of the parties in a case they were considering. The constitution of New Hampshire—and this is substantially true of all the states-provides that the law shall consist "of all the laws which have heretofore been adopted, used, and approved in the province, colony or state,"25 together with such laws "not repugnant or contrary to this constitution"28 as the legislature may from time to time enact. All rules, therefore, that can be deduced from acts of Parliament and of the pro-

²⁵ Const., Part 2, Art. 89 (90).

[≈] *Ibid.*, Art. 5.

vincial legislature enacted before 1776, or from the reports of cases decided before that time, are in force as laws by virtue of this provision of the constitution. Such rules, however, constitute but a very small part of the rules of the common law, as that term is understood and applied by the courts. In other words, most of the rules which are applied by the courts to determine the rights of the parties cannot be deduced from this provision of the constitution or from the acts of the legislature, but have either been made by or revealed to the court.

It is idle to say that the court does not legislate, that the constitution forbids it; for even a casual reading of the reports will show that it makes rules and applies them to determine the rights of the parties in the same way, if not to the same extent, as the courts of Henry II.

In short, such an examination will show that the court does legislate, if making laws is legislation; and this in the face of its declaration that the constitution forbids it to legislate. As it seems to me, such a course is impolitic and calculated to discredit the court. If it must legislate, it should change front in so far at least as to hold that it is its duty under the constitution to legislate in the same way and to the same extent the English courts were legislating in 1776; but whatever it does, it should not attempt to look in both directions at the same time. It should either cease to legislate, or cease to declare that the constitution forbids it to legislate; for it is not true to-day, as it was when Glanvil, Bracton, Coke and Blackstone were elaborating the law, that most people think laws are parts of creation, or that the court can "find" specific rules which will work exact justice between man and man not only in the case it is considering, but in any case that may hereafter arise in which a person is injured or damaged by a similar act. It can neither find such rules in the literature of the common or the civil law, nor evolve them from its inner consciousness, if laws are intended to effectuate public ideals; for such ideals are emergent facts incident to the evolution of every community, and everyone will, I think, agree that that is not a logical process.²⁷ Although it may be true that even fifty years ago almost everyone believed that the court "found" the rules of the common law, that is not true to-day. In fact, the number of those who refuse to take the

²⁷ Cavanaugh v. Boston & M. R. R. (1911) 76 N. H. 68, 72, 79 Atl. 694, 696.

court seriously when it speaks of "deciding a case on principle," or of "finding" a rule of law, is constantly increasing. In fact, there are many who think that the rules courts formulate are the result of reactions on the minds of the judges in the same way statutes are the results of reactions on the minds of the legislators. While it is true that the court makes the rules it formulates, or that they are the result of reactions on the minds of the judges, it is not true that the force which reacts is the same as the one that reacts to produce statutes. The latter force is the needs of the community as evidenced by public opinion, while the one which reacts on the minds of the judges to produce the rules of the common law is composed of public opinion and various superstitions that have come down to them from the days of Coke and Blackstone. One of these is the theory that what the court says in a given case is not so much the reason it gives for deciding as it does in that case, as rules to be followed in all cases: another superstition that contributes is the court's belief that it is powerless to change one of its rules even when it works manifest injustice. Another is the tradition that the rules it formulates are not products of human experience, but exist separate and apart from experience and are revealed to it: or that what it does when it formulates a rule is not to make but to "find" it; in other words, the court's belief that when it formulates a new rule it is doing what Newton did when he formulated the law of gravity. However irrational this theory may be, it has contributed in the past, and to a degree continues to contribute, to the difficulty in understanding what the rules of the common law are. It may be and probably is true that this belief is gradually fading away, for the court will now permit the legislature to make any reasonable changes in the law,28 while only a few years ago it would not hesitate to override a statute²⁹ or even a provision of the constitution which conflicted with its views of what the law should be.30

The court's change of heart has not, however, proceeded far enough to remedy all the evils peculiar to judicial legislation; for at the present time when a new question arises, it is governed more in framing a rule to decide it by what Glanvil,

²⁸ Carter v. Craig (1914) 77 N. H. 200, 90 Atl. 598; State v. Prince (1915) 77 N. H. 581, 94 Atl. 966.

²⁹ Phillips Exeter Academy v. Exeter (1878) 58 N. H. 306, 42 Am. Rep. 589.

⁵⁰ State v. U. S. & Canada Express Co. (1880) 60 N. H. 219.

Bracton, Coke, or Blackstone may have said in respect to a somewhat similar matter, than by a consideration of the results it will produce; that is, by a consideration of whether these results will probably be just as the ordinary man understands justice; while it is too plain for argument that that is the test which should be applied to determine whether a law is just, if laws are intended to effectuate public ideals.³¹

Just what part public opinion plays in formulating the rules of the common law is very difficult to say. It is the final test with many judges, or what a judge has in mind when he says that a particular rule does not apply because of the results it would produce. It is obvious that it dominates the minds of all judges to a greater or less extent; for whenever the results a rule produces are usually unjust as the ordinary man understands justice, the court will find a way of distinguishing the case it is considering from the one it was considering when the rule was announced. In other words, the court will overrule the rule while professing to follow it.³²

It is, therefore, in a sense true that public opinion is the final arbiter of right and wrong in so far as the rules of the common law are concerned, as well as in the case of statutes. The practical objection to judicial legislation, therefore, is not so much the fact the constitution forbids it, as that the public opinion the judge-made rules reflect is that of yesterday rather than that of to-day.

The court's failure to realize these facts not only has excited, but must necessarily continue to excite, criticism; for public opinion is not only constantly changing, but the changes take place more quickly and at more different points with each succeeding century. In other words, the number of ideals that break down, as well as the number of new ideals that are evolved in a given time, are constantly increasing to keep pace with the changes that take place in education, industrial conditions and humanitarian ideals. The study of history is all that is necessary to realize these facts. That will show that for several centuries after our Anglo-Saxon ancestors came to Britain, their ordinary occupations were piracy, driving their neighbors' cattle and killing those who disagreed with them or had anything they wanted.

³¹ Cavanaugh v. Boston & M. R. R. (1911) 76 N. H. 68, 72, 79 Atl. 694, 696.

²² Frye v. Hubbell (1907) 74 N. H. 358, 68 Atl. 325.

If piracy was not recognized as a perfectly legitimate business, it was at least tolerated until long after the middle of the sixteenth century.

In fact, that was essentially true until after the middle of the nineteenth century, for it was 1856 when England and France, and 1898 when the United States, finally refused to recognize the right of a nation to license individuals to make war on the commerce of its enemies. Driving their neighbors' cattle and murder are still the ordinary occupation of those inhabiting a large part of Mexico, and that was true but a few years ago of the Panhandle, New Mexico, Arizona and the Indian Territory. In fact, it is nearly true to say that in the past there was a time when many, perhaps most, of the things we consider as right and just, if not looked on as wrong, were not thought of as essential, and when most of the things we think of with horror were considered as right and just-many of them, in fact, as absolutely essential to the salvation of the race. For example, civilized Rome crucified Christians for nearly two centuries. Christian Rome burned heretics for a much longer period, and our ancestors in the sixteenth, seventeenth and eighteenth centuries were accustomed to hang Catholics, Quakers, and witches. To come down to more modern times, it was a crime in at least one state as late as the middle of the nineteenth century to teach a servant to read, while now it is a crime in some states to employ one who cannot read.

Since natural law is a will-o'-the-wisp, or since there is no objective standard of justice other than public opinion, and since that is constantly changing, the question that must be decided is what the court should do when a new question arises; for history teaches, if it teaches anything, that courts are to do justice as well when there are no specific rules applicable as when there are such rules. In other words, history shows that there were judgments, not before public ideals were evolved, but long before specific rules intended to effectuate them were formulated. The question, therefore, is not whether the court shall do justice in all cases, but how it shall settle disputes when no specific rule is applicable. In short, the question is whether the court shall legislate in such cases as our Norman ancestors were accustomed to do, or whether it shall decide them as questions of fact as our Celtic-Anglo-Saxon ancestors were accustomed to do; that is, by inquiring whether the average man would have done the act complained of. As a practical proposition, it probably makes little if any difference which of these courses the court pursues, if it remembers that an act which was right and just yesterday may not be reasonable to-day, and that if it is right to-day, it may not be to-morrow; in other words, if the court remembers that it is not true that the law of yesterday was, and that the law of to-morrow will be, the same as that of to-day, except in the sense a person's body is the same to-day that it was yesterday and will be to-morrow. The cells, the organism of which the body is composed, are never twice the same. When one has served its purpose another is substituted for it, and in time nothing is left of the original body. Notwithstanding these changes, the body, in so far as it is considered as a whole, is always the same, for the new cells perform substantially the same office as those for which they were substituted. So with the law; the special rules intended to apply the general rule to specific situations are constantly changing, but notwithstanding these changes, the law as a whole always consists of the general rule and a more or less complete body of special rules intended to apply the general rule to specific situations; and in this sense, it is true that the law never has changed and never will change; but it is equally true that the law is constantly changing. The ideal of an individual gradually develops into a public ideal, and then as gradually looses its hold on the public; and when that happens, rules intended to effectuate it cease to have any office to perform even though they remain as parts of the law. Their position is like that of a dead limb. The limb remains a part of the tree until it drops to the ground or some one takes the trouble to remove it; so a dead rule remains a part of the law until the legislature repeals or the court overrules it.

The truth of the matter seems to be that the rule, it is every-one's duty to do those things and those only the majority approve, never has changed and never will change, but some of the special rules intended to apply this general rule to specific situations are continually changing. When an ideal has served its purpose, rules made to effectuate it have no office to perform. A new ideal is evolved from so much of the old ideal as is vital, and new rules are made to effectuate it. This process of decomposition and recomposition of public ideals and the making of rules to effectuate them is always going on;³³ and while the new

²² Kohler, op. cit. 345.

rules, like the old, are intended to effectuate public ideals, they always differ from them. In other words, the rules of every system of law are continually changing to keep pace with the changes in public ideals, but all that can be said of this change is that it is dominated immediately by the needs of humanity; but who can say who or what dominates the evolution of humanity?

# THE STANDARDIZING OF CONTRACTS

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## THE STATUS-TO-CONTRACT THEORY QUESTIONED

Ever since Sir Henry Maine wrote his Ancient Law (1861) it has been a commonplace among jurists—and some who are not jurists—that "the movement of progressive societies has hitherto been a movement from status to contract." The formula has generally been gratefully accepted as a very useful summary of many phenomena encountered in legal history. Usually, its original meaning is extended so as to embrace within the concept of "status" the immediate or the remote results of agreement. Now and then the formula has been modified or limited, or exceptions to it have been noted; then the universality of the doctrines began to be questioned; and finally its applicability to Anglo-American law has been categorically denied. In Dean Roscoe Pound's latest contribution to his forthcoming Sociological Jurisprudence we read:

"But Maine's generalization as it is commonly understood shows only the course of evolution of Roman law. It has no basis in Anglo-American legal history, and the whole course of English and American law to-day is belying it unless, indeed, we are progressing backward."

The issue framed by this flat contradiction is one of fact. Viewed as an event in the history of Anglo-American juristic thought, this rejection of a fundamental concept in current jurisprudence is no mere academic quibble. The position taken by Dean Pound seems an essential part of the groundwork of his sociological jurisprudence. Thus, he remarks upon the significance of

"the legislative development whereby duties and liabilities are imposed on the employer in the relation of

¹ Thus, Edward Jenks in Law and Politics in the Middle Ages (1897) speaks of "Caste and Contract." See Chapter VII.

²E. g. by William G. Miller, Lectures on the Philosophy of Law (1884) 73, quoted in 30 Harv. L. Rev. 219.

³ Sir Frederick Pollock's Note L to Chapter V of Maine's Ancient Law (1906).

⁴Roscoe Pound, The End of Law as Developed in Juristic Thought (1917) 30 HARV. L. REV. 219.

employer and employee, not because he has so willed, not because he is at fault, but because the nature of the relation is deemed to call for it."⁵

It is not only "significant"; it represents "the settled tendency of the present." For such statutes the new jurisprudence bespeaks "the sympathetic judicial development which all statutes require in order to be effective." The new school denies the soundness of the historical views of those courts that have been talking of freedom of contract in such matters.

## THE DOCTRINE APPLICABLE UNTIL MAINE'S DAY

Now what is the fact? Is there indeed "no basis in Anglo-American legal history" for the status-to-contract theory as generally understood? Its original application was to personal relations derived from or colored by the powers and privileges anciently residing in the family. Is it not true that the relation of master and servant was originally—and still is nominally—a domestic relation? And whether the nineteenth century was out of line with the common law or not, is it not a fact that it has made of this relation a contractual one? "Employer" and "employee" (words having reference to the contract) now seem more appropriate terms than the older "master" and "servant" (words having reference to status).6 What of the relation of principal and agent? Historically, the making of this relation has not depended on contract. Hence, persons incapable of making contracts are still competent to become agents. But in the living law of the last century this relation, too, has veered from status to contract. The naïve statement in many text books and judicial opinions that "agency is a contract" is evidence of the tendency, if not of the law.7 Perhaps even the marriage relation has been made somewhat subject to contract law, at least on the property side; though, of course, here we should expect

⁵ Ibid. Cf. Roscoe Pound, Liberty of Contract (1909) 18 YALE LAW JOURNAL 454.

⁶ Thus, 26 Cyc. 968: "The relation of master and servant arises only out of contract."

⁷2 C. J. 432, Agency as a Contract, quotes *Cullinan v. Garfinkle* (1906) 114 App. Div. 509, 512, 99 N. Y. S. 1119, 1121: "Agency is a contract, and like other contracts, it is essential that the minds of the parties should meet in making it." *Cf.* the outline and treatment of the subject in Evans. *Agency* (1878) Chap. II, being entitled "The Parties to the Contract."

more conservatism, and marriage must still be considered a status.8 But when we leave the family circle and turn from the original application of the formula to its possible applications "as it is commonly understood," it becomes difficult to comprehend what is meant when we are told that the generalization has no basis in Anglo-American legal history. Holmes has shown the fact, whatever the reason, that the law of bailments was originally a law of status, and that the nineteenth century has stretched contract law so as to make a contract even of a gratuitous bailment.9 Perhaps here the change is in the theory of the law rather than in the law itself; but what shall we say of the law of landlord and tenant? Beginning in status as indicated by the terms still used-though "lessor" and "lessee" are displacing them-it has progressed to the point where every letting is an agreement of lease. A lease was formerly a conveyance of property, an instrument of status.10 We can even localize the point where assumpsit was allowed alongside of debt in the collection of rents.11 Turn to the history of assumpsit.12 The early tradesman was there sued as tradesman and not as a contracting party. We may lament this progress and blame all our ills upon it,13 if we will, but the fact remains that most business relations have become contractual relations,14 and-at least until Maine's day-all business relations had shown a tendency in that direction. In the law of negotiable instruments, the peculiar rights and liabilities of the parties were connected with the status of being a trader until Lord Holt declared that the "gen-

^{*}A score or more of our states have statutes declaring marriage "a civil contract," having reference rather to the inception of the relation than to its incidents. Cf. Sheldon Amos, The Science of Law (1880) 217: "It is obvious from this investigation, as has been already indicated, that marriage has a tendency to glide into a mere contract." Even in guardianship, the element of consent now plays an important part.

O. W. Holmes, The Common Law (1881) Lecture V.

¹⁰ The current definitions of a lease shift between the ideas of a conveyance and of a contract. For a collection of them see 24 Cyc. 894.

¹¹ For the Elizabethan cases showing the transition, see 2 Gray's Cases on Property (2d ed.) 571 ff.

¹² Cf. James Barr Ames, The History of Assumpsit (1888) 2 HARV. L. REV. I, 53, reprinted in 3 Select Essays in Anglo-American Legal History (1909) 259-303.

¹⁸ Cf. Edward A. Adler, Business Jurisprudence (1914) 28 Harv. L. Rev. 135, 147 ff. See my note in 23 Journ. Pol. Econ. 553, 554.

¹⁴ Ibid. 555.

tleman" who signed a negotiable document became ad hoc a trader. The basis thereafter was agreement. But more significant, because deeper, than the changes in particular branches of the law, has been the development of the general theory of implied contract. This is illustrated in the history of possessory liens. The presence or absence of a lien has come imperceptibly to depend on the implied contract. Of course, the terms of the implied contract are to be sought in usage; but there was a time when usage merely dictated a list of bailees whose status entitled them to liens of one kind or another without the mediation of any theory of implied contract. The

Maine was, of course, no prophet. He could not foresee the twentieth century tendency of our law to go back to the Year Books, but as a shrewd observer of the tendencies about him, he was unsurpassed. At least, with reference to his status-to-contract generalization, whatever limitations we shall have to insert, whatever exceptions we shall be forced to engraft on the rule, we must—however reluctantly—dissent from the view that it was a mere Romanism with "no basis in Anglo-American legal history." Here is poetic justice, indeed. Maine, who falsely accused Bratton of foisting Roman law on his unsuspecting countrymen, is now charged with having foisted Roman juris-prudence on his still unsuspecting countrymen!

## THE PRESENT TENDENCY A REACTION

Still, if Maine's observations of the past were correct, the present tendency is clearly a reaction in the opposite direction. Dean Pound enumerates, besides the instance of the workmen's

¹⁵ Witherly v. Sarsfeild (1687) I Shower 127, sub nom. Sarsfield v. Witherly, Carthew 82.

¹⁶ As Ames explains Chapman v. Allen (1632) Cro. Car. 271, the existence of the lien depended on the absence of a contract. In 1794 Lord Kenyon said that liens were either by common law, usage, or agreement. Naylor v. Mangles, I Esp. 109. A few years later (1806) in Rushforth v. Hadfield, 7 East *224, *230, one of the judges said arguendo, "And it is admitted that the question . . . was properly left to the jury, . . . if the usage for the carriers . . . were so general as that they must conclude that these parties contracted with the knowledge and adoption of such usage." Usage is brought under the head of agreement. It is only one more step to say (as is done e. g. in 25 Cyc. 663) that liens can be created only by a contract express or implied, and to look upon the lien given to an innkeeper by a wrongdoer as an exception based on public policy.

compensation acts, those of public service companies, insurance, and surety companies. We may add many other cases, not only those in which the statute book says "any contract to the contrary notwithstanding," but also those in which it prescribes the terms of a relation only in the absence of a specific agreement to the contrary. In fact, because of the constitutional limitations which we inherit from the days of freedom of contract,17 the second class of provisions is still the more important check on the tendency that seemed to be making every contract a law unto itself. In ordinary transactions, people cannot or will not stop to make special agreements "to the contrary." Therefore, they find themselves governed by the statute with its prescribed insurance policy, its prescribed bill of lading, warehouse receipt, stock-transfer, negotiable instrument, articles of partnership, its prescribed type of sale. When the question arises whether title has passed to a buyer, they will find the answer in the mechanical

¹⁷ Some of the greatest legal battles of the day are being fought over statutory collisions with the principle of freedom of contract. The issue was clearly put by one of the more conservative judges: "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto." Yet "this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in its statutes." Peckham, J., in Allgeyer v. Louisiana (1897) 165 U. S. 578, 591, 17 Sup. Ct. 427, 432, 41 L. Ed. 832, 836. Just how far courts will go in their respect for such public policy is a question of degree, depending in the final analysis on the trend of the times towards status or contract. The recent tendency to extend the police power in defiance of the idea of liberty of contract is well illustrated in Professor Felix Frankfurter's paper on Hours of Labor and Realism in Constitutional Law (1916) 29 HARV. L. REV. 353. To the decisions there enumerated should be added, perhaps as a climax, Bunting v. Oregon (April 9, 1917) 37 Sup. Ct. 435, which he succeeded in saving from a reversal in a divided Supreme Court. Other interesting contributions to the literature of the "apologetics of the police power" in this connection are: Ernst Freund, Limitation of Hours of Labor and the Federal Supreme Court (1905) 17 GREEN BAG, 411; Constitutional Limitations and Labor Legislation (1910) 4 ILL. L. Rev. 609, 622; Learned Hand, Due Process of Law and the Eight-Hour Day (1908) 21 HARV. L. REV. 495; Roscoe Pound, Liberty of Contract (1909) 18 YALE LAW JOURNAL 454; Edward S. Corwin, Social Insurance and Constitutional Limitations (1917) 26 YALE LAW JOURNAL 431. Several interesting papers in the recent periodicals touch on the subject in connection with the Adamson law and the Supreme Court's decision upholding it.

rules of the code for the ascertainment of their "intention," a constructive intention. The effect is a making of contracts in wholesale lots, just as we now make corporations in wholesale lots. A practical check on the individuality of contracts, if not a theoretical limitation on the freedom of contract, and a standardization of legal relations, are the net results.

#### DEGREES OF STANDARDIZING OF RELATIONS

After all, the question is not so much one of status and contract as it is of a broader classification that embraces these concepts: standardized relations and individualized relations.18 In what Maine calls status, that is, the ancient family relations, or caste, the rights, privileges, powers and immunities (and the correlative duties, limitations, liabilities, and disabilities) 19 were thoroughly standardized. In ascertaining them, the peculiarities of the individual agreement of individual members of society were irrelevant. But so are many of the peculiarities of an agreement ignored in later stages of society where a formal contract of this or that type results in a more or less standardized relation. Here, we include not only the early Roman forms of sale and the old English conveyances of land, but marriage, the taking up of the feudal relation at other stages in the law, and the purchase of a standard insurance policy to-day. The point of likeness is that a relation results in which the details of legal rights and duties are determined not by reference to the particular intentions of the parties, but by reference to some standard set of rules made for them. In origin, these relations are, of course, contractual; in their workings, they recall the régime of status. Maine's original statement has reference to a classification on the basis of origins. His argument applies—and is generally applied-to a classification of relations on the basis of their workings. In this sense, the difference between status

¹⁸ This formula includes more than status and contract relations. Relations arising *ex delicto* are more or less "standardized" too. In periods of strict law, the individual fault plays a smaller part in the creation of liability than it does in periods of equity—but this is another, though a parallel, story.

is I am gratefully adopting Professor Wesley N. Hohfeld's eight fundamental legal conceptions. See Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL 16, and (1917) 26 YALE LAW JOURNAL 710. I have made but one verbal change: "limitation" instead of "no-right."

and contract is not one of kind, but one of degree; and in this sense there has clearly been a long-enduring tendency in English law from status to contract, and—in the last two generations—an equally distinct veering back to status. I now quote Dean Pound, perhaps with an unintended stressing:

"It is significant that progress in our law of public service companies has taken the form of abandonment of nineteenth century conceptions for doctrines which may be found in the Year Books."²⁰

It is, indeed, significant, not "that the nineteenth century was out of line with the common law"-for we cannot indict a century to save the reputation of a theory—but that the twentieth century is witnessing a reaction back to status. And this is not the first time that the seismograph of history has made such a record, nor the first time that it has been ignored as an exception. That medieval hardening of relations known as feudalism was also, in its beginnings, a progress from contract to status. And those whose philosophy of history is a belief in the gradual development of liberty through the principle of contract have been forced to regard feudalism as a pause in human progress, an armistice in the war between two opposite ideas, status and contract—at best, a compromise, an exceptional, disturbing element in their whole scheme.21 Perhaps if we were able to go back to what we accept as standard family relations, we should find their basis, too, in the hardening of individual practices into rules. Perhaps even back of caste there was a progress from the individual non-standardized conduct to the standardized. In other words, legal history has room not merely for one single line of progress in one direction or the other, but for a kind of pendulum movement back and forth between periods of standardization and periods of individualization.

#### THE CYCLES OF LEGAL HISTORY

I have elsewhere attempted to develop another of Maine's generalizations—that of Fictions, Equity and Legislation—by tracing not only their occurrence, but their recurrence in cycles.²²

^{20 30} Harv. L. Rev. 219.

²¹ Cf. Edward Jenks, Law and Politics in the Middle Ages, 310.

² "The Law" and the Law of Change (1917) 65 U. of Pa. L. Rev. 659, 748.

It seems that once every millennium or so the laws of a people tend to become hardened, its ways standardized. Between successive crystallizations or codifications, the instrumentalities of change enumerated by Maine are resorted to in the order named. This order is by no means the result of chance. Each instrumentality is connected with a particular point of view: fictions with word-study, the first treatment to which a code is naturally subjected; equity with the study of principles, a kind of revolt that comes with the realization that life has progressed too far since the last codification to permit us to find in the words of the code an adequate expression of the law of the times; legislation. with a desire for conscious amendment in which the pretense that the new rule is in the code, either explicitly or implicitly, is given up. When the code becomes overburdened with new material, the time is at hand for a new code, and another cycle begins. Within historic times Roman-continental law has gone through two cycles and part of a third;23 Jewish law has completed four cycles and part of a fifth;24 Anglo-American law has gone through two cycles. A brief survey of the cycles in Anglo-American history may help us determine the connection, if any, existing between the recurring of the formal instrumentalities of change and the recurring of periods of the relative emphasis of status.

#### THE CYCLES OF ANGLO-AMERICAN LEGAL HISTORY

The dividing line between the two cycles in Anglo-American legal history falls about 1290. Though no code in the modern sense is compiled, codification is in the air. Edward I, the English Justinian, has brought back from the home of his fatherin-law, Alphonso the Wise, the compiler of Las Siete Partidas, a plan which his lawyers try hard to execute. A deluge of revisions of Bratton is the result. Besides the books called Britton and Fet Assever which pretend to speak in the king's name, there are the Summae of Hengham, the Fleta, and the

²³ Ibid. 670.

²⁴ Ibid. 674.

²⁵ John Selden, Dissertatio ad Fletam, and Francis Morgan Nichols' Introduction to Britton (1865) have not yet been superseded for their accounts of this period. F. W. Maitland's Introduction to the Selden Society's edition of The Mirror of Justices (1895) and Dr. George E. Woodbine's account of Bratton MSS. throw considerable light on the activities of the period.

long-lost (apparently rediscovered) book that Gilbert of Thornton was ordered to make. There appeared even a parody on such books, *The Mirror of Justices*. But the true crystallization of English law was in the series of writs that was being closed.

Tracing these writs backward to their source, we find a generation of legislators giving them their final touch in the first part of Edward's reign. There are the two Statutes of Westminster, the Statute of Bigamy, the Statute of Gloucester, the Statute of Mortmain, the Statute of Merchants, the Statute of Winchester, the Statute of Quo Warranto and the Statute of Quia Emptores. The purpose of these statutes, to fill in the gaps of English law, is best illustrated in that section of the second Statute of Westminster, which urges the chancellor to make new writs in new cases resembling the old ones. It is quite apparent from this statute and from the fact that so little use was made of it, that the ability of English law to develop on the basis of magisterial application of general principles had been exhausted. The barons had objected to new writs in 1258, and by 1272 the last of the important writs had been made.

The period of writ-making, the beginnings of which we see in Glanvil and the highest point of which we find in Bratton, though not generally called a period of equity, bears, as Jenks has pointed out,²⁶ a greater resemblance to the praetor's edict of ancient Rome with its lists of formulae, than do the vague processes of the early days of our generally recognized equity. We can literally see law growing when we pick up a writ of the year 1205 and find in the margin "Hoc breve de cetero erit de cursu" scrawled in a contemporary hand.

What preceded the growth of law by the making of new writs? It was an era of legal fictions. The great Norman kings with all their power had to stoop to this indirect method of tampering with the people's law. The Conqueror himself pretended to be the King of England by virtue of that law. He promised the people of London the advantages of all the laws that they had enjoyed in King Edward's day. His followers in their charters likewise promised "leges Edwardi reddere"—to give back the laws of King Edward the Confessor, an unwritten but still a tough code. The fictions by which the king's court extended its jurisdiction are well known. The king's peace became all important, and on the theory that this king's peace was involved, the

^{*} English Civil Law (1916) 30 HARV. L. REV. 1, 16.

king gradually took jurisdiction, not only over the criminal law, but also over possession in civil law. It was not so easy to extend the fiction to cases involving questions of ownership as distinguished from possession. Consequently, possession has always been nine points of the law, the triumphant royal law, of England. So completely was the work of transformation done in the comparatively short cycle between William I and Edward I that the English lawyer of to-day who ventures beyond Domesday Book finds himself in a strange land indeed.

From Edward's day forward, on the other hand, we have no difficulty in discerning the continuity of English law. Beginning at our turning point, we have the Year Books, those notes of the happenings in court from term to term that gradually acquired a position of dignity and authority in the eyes of the profession. The Year Books have a crystallized law to deal with. They are, in the main, technical expositions of the words and letters of this law. We no longer hear "no wrong without a remedy"; we are more apt to find "damnum absque injuria"—harm inflicted without the violation of any technical legal rule. The only instrumentality at hand for the improvement of law is the legal fiction. It is used to give the court jurisdiction in many cases not originally contemplated in writs, especially cases involving title to property.

From the fourteenth century to the end of the eighteenth, but particularly in the middle of this period, the second of Maine's instrumentalities is at work-equity. The chancellor's office at the beginning of the period is concerned rather with petitions of grace and the bestowing of boons on loyal subjects of the king than with the improvement of the law; and at the end of the period, in the days of Hardwicke and Thurlow, it is collecting precedents and formulating doctrines. The middle of the period is the time when with "conscience" as a key-word, equity is most potent in supplementing the law. And the spirit of equity is not confined to the chancellor's chambers; for even in the courts of law, the formulation and application of general principles is going on apace, and commentators begin to work out the principles that underlie the godless jumble. Littleton-even if he did not write the most perfect book that mankind has ever produced, as Coke would have us believe-did bring order out of chaos. Coke spawned maxims, but he did it in an unconscious endeavor to make principles out of rules. Holt and Mansfield borrow from the general understandings of men to enlarge the

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law. Blackstone, the greatest of commentators, states the sum total of this law so satisfactorily that even the mighty wrath of Bentham seems impotent to awaken his countrymen to the need of further change in the law. Then comes an end to the possibility of extensive growth by the administration of general principles. Equity is entrusted to the keeping of the most deliberate of conservatives, the Earl of Eldon. To him equity is a system as rigid as the law itself.

In the 1800's, both in England and in America, the ordinary means for the improvement of law and for keeping it abreast the times has been legislation. Of course, legislation had been used sparingly throughout the equity period. But prior to the nineteenth century it was looked upon as something exceptional, called forth either by a great upheaval to sweep away accumulated evils, as under Henry VIII and in the Commonwealth, or by a desire to check evil practices discovered from time to time, as in the days of the Restoration. In the last hundred years, on the other hand, legislation has come to be a normal, continuing, part of the government's business. To-day our legislators are pouring it forth in greater quantities than ever before.

There are signs that we are reaching the end of this legislative activity. Not only do we hear persistent outcries against "too many laws," but we are already making rapid progress in the work of codification. What has been done here and in England in the law of partnership, negotiable instruments, sales, warehouse receipts, bills of lading, criminal law, pleading and various other branches suggests that we may expect more and more of the authority of the digest to be transferred to the code. Whether with the code before us we shall lose our habit of tampering with private law at every session of the legislature and turn again to literalism and to fictions as they have done in Germany remains to be seen. In one branch of law which, for political reasons, was codified a century or more before the period of general codification into which we are passing, we have already followed this very course. Constitutional law in this country has heretofore been almost exclusively word-study. It has brought with it its crop of fictions.27 We may to-day be ready for equity so far as the interpretation of the Constitution is concerned. May not the broader view of principles that Professor Frankfurter calls "realism" and Dean Pound "sociolog-

²⁷ 65 U. of Pa. L. Rev. 672.

ical jurisprudence" be the appeal from the text to common sense, from the letter to the spirit, from jus strictum to equity? "If," says Professor Frankfurter, "the point of view laid down in this case²⁸ be sedulously observed in the argument and disposition of constitutional cases, it is safe to say that no statute which has any claim to life will be stricken down by the courts."²⁹

# STATUS LAW ACCOMPANIES CODIFICATION

If, now, we glance over these periods of Anglo-American legal history with standardized and unstandardized relations in mind, three places stand out as centers of standardizing, of status, we may say. They are the period of Domesday Book, the period of King Edward's Quo Warranto inquests, 80 and, so far as we can foresee, the period we are entering upon. Our "franchises" are not being catalogued, but our land titles are being registered, our business relations defined, our contracts made for us, our right to engage in ever so many kinds of business made the subject of a state license. Our partnerships, more or less contractual, are being displaced by uniform corporations organized under general laws: and corporate powers are purely affairs of status, though there was a time when even these looked more like matters of contract between the state and the incorporators. Our rights are rapidly being converted into types of rights, just as in the day of Edward I the remedies of Englishmen were types of remedies. The remedies seemed the more important then, though we naturally speak of the situation in terms of rights. But rights and remedies are obverse and reverse of the same coin; the standardizing of relations and the crystallization of law are aspects of the same movement. There is nothing surprising, then, in the fact that the periods of the codification or

²⁸ People v. Schweindler Press (1915) 214 N. Y. 395, decided under the influence of Muller v. Oregon (1908) 208 U. S. 412.

²⁹ (1916) 29 Harv. L. Rev. 366. Cf. the conclusion of Edward S. Corwin's paper on Social Insurance and Constitutional Limitations (1917) 26 YALE LAW JOURNAL 443: "In other words, constitutional 'rigorism' is at an end."

²⁰ I have purposely avoided the convenient word "feudalism" here to cover the status law of the middle ages. It is true that its typical product, the manor, placed every man in some kind of status. But this did not spring into existence spontaneously, nor was it uniform throughout Europe when it did appear, save in this, that it represented a high degree of standardizing of relations.

crystallization of the law coincide with the extreme points reached by the pendulum in the direction of standardizing. The pendulum swings across the diameter of the cycle.

# INDIVIDUALITY OF CONTRACTS FOSTERED BY EQUITY

Conversely, the periods of greatest individual liberty in the shaping of contracts and of relations in general lie somewhere between these periods of standardizing. The nineteenth century witnessed the end of a long period of this kind. For its beginnings, we must go back at least to the 1600's, to the days when even one's relations with the government were sought to be reduced to contract rather than status; to the creation of indebitatus assumpsit; to the days when the chancellors invented specific performance to take the place of cut and dried remedies, and when they sought in the actual meeting of free minds rather than in the form of the contract the basis of their adjudications.31 This ignoring of forms is the triumph of the contract principle within the history of contracts.32 Where the few types of relations that the law can conceive of are found inadequate, equity permits of endless variety through its creature, the trust. We reach the end of the swing away from status when we find equity dealing with each case on its own merits, refusing even to recognize precedents,33 as against law dealing with cases by

¹¹ Of course, there are decrees of the chancellor that seem to prohibit certain classes of contract, just as there is legislation that tends to establish freedom of contract. Such legislation simply formulates the spirit of the pre-statutory period, as in the case of our constitutions. And the attitude of the chancellors who abhorred forfeitures and penalties as well as contracts made under undue influence is quite reconcilable with their endeavor to get at the substance and ignore the form of the contract. It must be remembered, for example, that in law, the mortgage was an instrument for the creation of a status—an estate upon condition—and that the chancellors practically resolved it into a contract.

²² We may see a parallel case in the consensual contract, developed under the Roman praetors, as contrasted with the older business with copper and scales, which it effectually supplanted—though we can no longer say with Savigny and Maine that the one grew out of the other. A corresponding development in Jewish legal history is suggested in 65 U. of PA. L. Rev. 757.

^{**}The beginning of precedents in equity is illustrated in a colloquy referred to in John William Wallace, Reporters (4th ed.) 23, 303. Vaughan, C. J., "I wonder to hear of citing precedents in matters of Equity; for if there be Equity in a case, that Equity is an universal truth, and there can be no precedent in it . . . Bridgman, Ld. Keeper, "Precedents are very necessary and useful to us."

classes. If we would seek another period of triumph for the contract principle in English law, we must go back to the days when writs were forming, to the beginning of the thirteenth century. There are found doness of land changing their status by the use of the word "assigns". At this point, the various forms of Jewish gages were being invented and freely introduced. And here, strangely enough, even in government a sort of precursor of the social contract theory was suggested in the wresting of Magna Carta from King John, and poorer charters from better kings. Thus, equity periods are connected with the impetus from status to contract, as strict law is with a movement in the other direction. Neither is a "progressing backward."

### SOCIAL ENFRANCHISEMENT THROUGH STATUS LAW

The movement toward status law clashes, of course, with the ideal of individual freedom in the negative sense of "absence of restraint" or laissez faire. Yet, freedom in the positive sense of presence of opportunity is being served by social interference with contract. There is still much to be gained by the further standardizing of the relations in which society has an interest, in order to remove them from the control of the accident of power in individual bargaining. The new school of jurisprudence has a great work before it in educating the courts. It must, indeed, dispel the fear of status as an archaic legal institution which we have outgrown. It will not be compelled, however, to unteach what little the courts have learned directly or indirectly from Sir Henry Maine, or to unmake history. It will, on the contrary, simply be moving along with the current of legal development in resorting to status as an instrument at this particular time for the further enfranchisement of those to whom freedom of contract has become a mere mockery. Freedom of contract is not synonymous with liberty, nor is status slavery. But we must remember that the knife can cut both ways. In the last period of jus strictum, say the 1300's, status law was being used to drive laborers to their work; now it is looked to to force employers to a realization of their social duties. It then practically created a maximum wage; to-day it is the messenger of a minimum wage. The law that compelled a man to work at the trade that he had learned is not so different in principle from one that would have a man learn the trade at which he proposes to work. Thus, either law may create the status of

²⁴ Pollock and Maitland, op. cit. 13, 14 n. 1, 311.

being a plumber. Something like a trader's status may be restored. Regrating, engrossing and forestalling may once more become commercial crimes of the first order, and a justum pretium may be tried in spite of all the demonstrations of the orthodox economists to the contrary. We are indeed going back to the principles of the Year Books in the law of public service, and who can say where the boundaries of public service will finally be drawn? Social legislation may not stop at supervision; the state may take over many of our private enterprises. But when juristic thought and practice are thoroughly socialized, will the great end of law be accomplished, and the sociological theory be the last word on jurisprudence? Or will a reaction set in, whereby our new statutes will be ground to powder by legal fictions and reconstructed by equity—until the law will seek to serve each man according to his need once more? 35

The causes that contribute to the predominance of one or another of the schools of jurisprudence in different times and places are the subject of a study by the present writer entitled "A Marshalling of the Schools of Jurisprudence" scheduled to appear in Harv. L. Rev., January, 1918.

## MATRIMONIAL DOMICILE

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Domicile is a term which is not easy of precise definition, but one nevertheless with a real and well-understood legal meaning. What of the term "matrimonial domicile"? Has it an equally clear meaning, or an obscure one, or is it only a convenient expression to describe the joint home of two persons joined in wedlock? Courts and text-writers talk of "matrimonial domicile" in two wholly different situations, and apparently it may mean a different thing in each, for no reference is made in one connection to its use in the other. The law of the "matrimonial domicile," it is said, determines the rights which are given the parties to a marriage in the movable property of each other. The phrase makes its second appearance when the question is raised as to the validity of a divorce granted at the domicile of one of the parties only, without personal service upon the other. The significance of "matrimonial domicile" in marital property rights will first be considered.

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Suppose the easiest case. A of Iowa marries B of Iowa, and after the marriage the spouses make their home there. There is; of course, no difficulty with any question of domicile in this situation. Both parties were domiciled in the state and remain so afterwards. By the marriage, each is given such interest in the movable property of the other as the law of Iowa, the domicile, allows. It is, of course, immaterial where the marriage took place. The question of "matrimonial" domicile as something different from "actual" domicile is not brought up.

Now, let A the husband come from Illinois and B the wife be an Iowa woman, and suppose by Illinois law the personal property of the wife becomes the husband's upon marriage. Upon marriage, B would take her husband's domicile, Illinois. She acquires that domicile upon marriage, and the domicile's law gives A the property. The result is not made any clearer by saying that the law of the "matrimonial domicile" governs the property rights. Illinois law governs because it is the husband's domicile which becomes that of the wife. "Matrimonial domicile" might be used here as a term of convenience to describe the place where the

parties both have their home, but no added significance would be given by its use.

While cases involving facts as simple as the two just put are cited in proof of the general rule as to "matrimonial domicile," the real question of the existence of such a rule in this connection is yet to be tested. The general statement of the doctrine is as follows:

"The question as to what place is to be regarded as the matrimonial domicile, the law of which will determine the effect of the marriage upon personal property owned by either party at the time, or subsequently acquired by either or both during the existence of such domicile, is in its last analysis one of the intention of the parties at the time of the marriage as to where they shall establish their residence, assuming that such intention is carried out within a reasonable time. The various rules that have been adopted on the subject are really rules for ascertaining that intention, or for supplying, by presumption, the lack of any evidence or other circumstances which will reveal it."

Now, if a "matrimonial domicile" is one to be established by the intention of the parties, it differs greatly from domicile as that term is ordinarily understood, which is established by the law. The law says that every person must have a domicile because certain rights and liabilities depend upon domicile. And while the intention of the party is important in that the intention to make a home in a place must coincide with his physical presence there, no one would question that both elements are necessary to make a legal domicile. A domicile can not ordinarily be established by an intent alone, and it seems to be granted that in the absence of evidence of intention to the contrary, the parties are presumed to take the husband's domicile as their matrimonial domicile. The general rule that intent alone is not sufficient is so firmly established, that a statement that the parties to a marriage,

¹57 L. R. A. 360, n. See, for a general statement of the rule, 5 R. C. L. 1007; 85 Am. St. Rep. 557; Story, Conflict of Laws (7th ed.) sec. 186; Wharton, Conflict of Laws (3d ed.) sec. 190. Cf. Westlake, Private International Law (5th ed. 1912) 40. That something different from ordinary domicile seems to be meant, is shown by the following note in Parmele edition of Wharton, 403: "The previous domicile of the parties seems to be entirely immaterial, except for the purpose of illustrating their intention as to the matrimonial domicile." The authorities are fully discussed below.

by mere intent, can make a "matrimonial domicile" in a place which is the domicile of neither one of them, and have the law of this place govern ownership in property, is to be regarded with suspicion unless it finds adequate support in the authorities. The prefix "matrimonial" would not, a priori, seem to have the magic effect of upsetting a reasonable and well established rule governing the acquisition of a domicile.

Assume that the newly married pair intend to make an entirely new home, as in the second case, where A of Illinois marries a young woman who has been a resident of Iowa up to the time of the marriage. The parties intend to live in Texas, where neither one has ever been up to this time. Suppose they go abroad on a trip before going to Texas. What are the rights in each other's property? Determined by the law of the "matrimonial domicile," the rule would say. But their matrimonial domicile is not in Texas yet, for the intention must be carried out within a "reasonable time." How long a trip can they take and still come within the reasonable time rule? And if they overstay the limit, what law will be found to have governed? Suppose instead of going to Texas, A finds a better position in London, and they settle there. Is this their "matrimonial domicile"? It was not the one they had in mind at the time of the marriage. If the wife had died before A got the London position, of how much of B's personal property owned by her at the time of the marriage had he become the owner so that it would not pass by descent? The answer to these questions without any doctrine of "matrimonial domicile" is simple enough. When A married B, the wife took A's Illinois domicile. His domicile remained in Illinois after they were married, because he had never established a new one, even though he had given up Illinois as his home. He got by the marriage such interest in her movable property as the law of Illinois gave. If they do go to Texas and acquire property there, or do live in London and acquire it, the law of Texas or of England will govern the marital rights in those acquisitions-nothing is left in abeyance awaiting the fulfillment of their intentions.

The test case, then, is the one where the intended domicile of the parties differs from that of the husband at the time of the marriage. Unless the authorities expressly cover such a case, is it not fair to say that the term "matrimonial domicile" is one of convenience only and means nothing more than the husband's domicile which the wife takes upon marriage? As might be expected, the courts in their general statements on the doctrine of "matrimonial domicile" have been greatly influenced by Mr. Justice Story's discussion of "the rule of the true matrimonial domicile." The learned author puts the case, "suppose a man domiciled in Massachusetts should marry a lady domiciled in Louisiana, what is to be deemed the matrimonial domicile?" "Foreign jurists," he says, "would answer that it is the domicile of the husband, if the intention of the parties is to fix their residence there; and of the wife, if the intention is to fix their residence there; and if the residence is intended to be in some other place, as in New York, then the matrimonial domicile would be in New York. . . . The same doctrine," continues Judge Story, "has been repeatedly acted on by the supreme court of Louisiana." He summarizes thus:

"Under these circumstances, when there is such a general consent of foreign jurists to the doctrine thus recognized in America, it is not perhaps too much to affirm that a contrary doctrine will scarcely hereafter be established. . . ."

The Louisiana cases cited by the author are LeBreton v. Nouchet³ and Ford's Curator v. Ford.⁴ Because they are put forth here as the only American cases on the doctrine, and because they are frequently cited in this connection, they are worth stating in some detail.

In the LeBreton case, the defendant and the daughter of the plaintiff, both evidently domiciled in New Orleans, ran away and were married in Mississippi, returning to New Orleans a few weeks thereafter and remaining there until the wife died. The mother of the deceased sued the defendant to recover property owned by the daughter prior to her marriage. By Mississippi law, all personal property of a woman went to her husband upon marriage, and the defendant claimed that his rights were governed by the law. He was allowed to retain only the marital portion given by the law of Louisiana. It is to be noted in this case that the parties were originally domiciled in New Orleans. While there was evidence that the husband had expressed an intention to make a home in Mississippi, the court thought this evidence was "insufficient to counterbalance the weight of the

² Story, op. cit. secs. 191-199.

^{* (1813} La.) 3 Martin 60, 5 Am. Dec. 736.

^{4 (1824} La.) 2 Martin N. S. 574, 14 Am. Dec. 201.

facts which disclose the real intention of the parties." LeBreton v. Nouchet presents no difficulty. Both parties started with a Louisiana domicile and kept it throughout. The husband got such rights in the wife's property upon marriage as Louisiana law gave him. There is not even talk in the case which supports argument for an intended "matrimonial," as distinct from an actual, domicile.

Ford's Curator v. Ford is just as simple. Mrs. Ford before her marriage had lived in Mississippi with her brother. The intended husband had a furnished house and a farm in Louisiana, and the day after the marriage, which took place in Mississippi, the parties left for Louisiana. The question in the case was the ownership of certain movable property owned by the wife before her marriage. If Mississippi law governed, the husband would have become the owner. The court said the question was whether the matrimonial rights of the wife were to be regulated according to the laws of the place in which the marriage was contracted, or those of the intended domicile of the spouses. It is held that Louisiana law governed, and it is clear that this is correct. It would have been equally clear even without evidence of the wife's expressed intention of going to Louisiana to live and her carrying out that intention after marriage. The wife took the husband's domicile upon marriage, and this would have been equally true even had she not gone to his home to live with him.5

The court made the following statement, which is the closest thing there is in either case to support the suggestion of Judge Story:

> "We think, however, that it may be safely laid down as a principle, that the matrimonial rights of a wife, who, as in the present case, marries with the intention of an instant removal, for residence in another state, are to be regulated by the laws of her intended domicile."

It is not denied that there are to be found in the books statements which directly or by inference recognize the rule which Judge Story predicted would become the recognized American doctrine, though they are fewer in number than the imposing array of citations in some of the authorities already quoted would lead one to expect. In most of the cases, the "matrimonial"

⁵ See authorities cited by Professor Joseph H. Beale in his article, The Domicile of a Married Woman (1917) 2 So. LAW QUART. 93, 96.

domicile was no more than that of the husband at the time of marriage. Others of the decisions do not involve any question of "matrimonial" domicile at all but merely cite the rule given by Story in the course of the discussion, or state it generally. It will be seen from the cases cited that most of the recognition of the doctrine has come from the Louisiana court. This is indeed the only place where it has been enunciated repeatedly and clearly. The civil law writers referred to by Judge Story have doubtless had influence here.

The only case directly raising the point at issue is McIntyre v. Chappell. Husband and wife, both being residents of Tennessee, were married in that state. Previous to, and at the time of, their marriage they had the intention of removing to Texas. Two weeks after the marriage the husband went to Texas with some negroes, improved the land, planted a crop, and the next year moved to Texas with his wife. The dispute in the case was over the ownership of certain slaves. They were claimed for the child of the parties, as sole owner, by right of inheritance from the father, and for the wife it was claimed they were com-

⁶ Jaffray v. McGough (1888) 83 Ala. 202, 3 So. 594; Mason v. Fuller (1869) 36 Conn. 160; Parrett v. Palmer (1893) 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; Townes v. Durbin (1861 Ky.) 3 Metc. 352, 77 Am. Dec. 176; Routh v. Routh (1844 La.) 9 Rob. 224, 41 Am. Dec. 326; Fisher v. Fisher (1847) 2 La. Ann. 774; Walker v. Duverger (1849) 4 La. Ann. 569; Hayden v. Nutt (1849) 4 La. Ann. 65; Percy v. Percy (1854) 9 La. Ann. 185; Connor v. Connor (1855) 10 La. Ann. 440; Arendell v. Arendell (1855) 10 La. Ann. 566; Mason v. Homer (1870) 105 Mass. 116; Harral v. Harral (1884) 39 N. J. Eq. 279, 51 Am. Rep. 17; Kneeland v. Ensley (1838 Tenn.) Meigs, 620, 33 Am. Dec. 168; Layne v. Pardee (1852 Tenn.) 2 Swan, 232.

⁷Long v. Hess (1895) 154 Ill. 482, 40 N. E. 335, 45 Am. St. Rep. 143; Fuss v. Fuss (1869) 24 Wis. 256, 1 Am. Rep. 180.

⁸Re Hernandez's Succession (1894) 46 La. Ann. 962, 15 So. 461, 24 L. R. A. 831.

Thus, in Arendell v. Arendell, supra, the following charge of the trial court to the jury was approved by the supreme court: "It may, as it often does, occur, that the husband has no residence, or having one, it is the intention of the parties previous, and at the time of their marriage, to fix the matrimonial domicile in some other state. Cases of this sort are governed by the well recognized principle of law, that the laws of the intended domicile of the husband are to govern the rights of the parties. In such cases, the jury should be well satisfied, that the parties at the time of the marriage, intended to fix their matrimonial domicile elsewhere, and that that intention was actually carried into effect."

¹⁰ (1849) 4 Tex. 187.

munity property in which she had a half interest. The trial court instructed (p. 93):

"That if the jury believed that the parties intended to remove to Texas at the time of their marriage, and immediately did remove to Texas, their respective rights must be determined according to the laws of Texas."

Of this instruction the supreme court said:

"The national domicile of these parties was, we think, unquestionably, in the state of Tennessee; and we are aware of no principle which, under the circumstances, would justify the conclusion that their matrimonial domicile was elsewhere . . . . We conclude that the matrimonial domicile of the parties to this marriage was in the state of Tennessee, and that previous to the acquisition of a domicile, facto et animo, by the husband in this country the laws of that state must furnish the rule of decision as to their marital rights. . . . In its application to the facts of this case, we therefore, conclude that the instruction in question was erroneous."

The ruling on this point was not essential to the determination of the case, and this the court admits.¹¹ But the question was presented by the record, was the point principally discussed in argument, and counsel concurred in expressing a desire that it be decided. It is of a wholly different kind of authority than a broad general statement where the exact point is not before the court.¹²

McIntyre v. Chappel was doubted in a later Texas decision.¹³ This case is a good one to show how the facts of many of the cases lie close to the question which will test the correctness of the quoted rule, but not quite touch it. The contest was over the ownership of a slave—by the laws of Texas, movable property—which was levied on as the property of Barrow and claimed by his wife as her separate property. Husband and wife had resided in Mississippi, but had decided to move to Texas. While visiting

¹¹ As the learned judge points out, the verdict was against the law and the evidence and a new trial should have been granted, for the community law in any event would not have applied to this property.

¹³ Says the editor of the 3d edition of Wharton, Conflict of Laws, Vol. I, 403 n.: "It is somewhat singular that, in the only case in which it appeared that the intention was to establish a matrimonial domicile at a place other than the previous domicile of either party, the applicability of the rule was denied."

¹³ State v. Barrow (1855) 15 Tex. 179, 65 Am. Dec. 109.

Mrs. Barrow's parents in Tennessee, evidently while on their way to Texas, Mrs. Barrow's father gave her the slave in controversy for her own exclusive use and benefit. The Barrows took the slave directly to Texas. If Tennessee law governed, the slave became the husband's property; if Texas law, or Mississippi law, the separate property of the wife. The court said the question was whether Tennessee or Texas law was applicable, and held that the Texas law applied, evidently because the parties having intended to become domiciled in Texas must be deemed to have intended Texas law to govern future acquisitions. The Mississippi law, however, was in evidence. Applying the general principle that the former domicile was not lost until a new one was acquired, the law of Mississippi would govern, and the result of the case would be the same—the wife would get the slave. The court recognized this.

Professor Dicey defines a "matrimonial" domicile¹⁴ as that of the husband at the time of the marriage, with a query whether the intended domicile is included under English law. As he says:

> "... On the theory .... of a tacit contract between the parties about to marry, that their mutual property rights shall be determined by the law of their matrimonial domicile, the extension of the term so as to include the country in which they intend to become, and do become, domiciled immediately after their marriage seems to be reasonable."

This tacit contract theory is discussed below. Westlake¹⁵ seems to be more sure of this point. Wharton on *Conflicts*¹⁶ believes that the "matrimonial" domicile is the intended permanent residence, but Minor¹⁷ very vigorously and, it is submitted, correctly, says:

"to hold that country where the husband intends to settle (the factum not combining with the animus) to be his domicile, whether 'matrimonial' or otherwise, is violative of one of the leading principles governing the acquisition of a domicile of choice."

Judge Story gives two grounds for his "matrimonial domicile" rule:18

¹⁴ Conflict of Laws (2d ed. 1908) 511.

¹⁵ Op. cit. sec. 40.

¹⁶ (3d ed.) sec. 190.

¹⁷ Conflict of Laws, sec. 81.

¹⁸ Op. cit. sec. 199.

"Treated as a matter to be governed by the municipal law to which the parties were or meant to be subjected by their future domicile, the doctrine seems . . . capable of solid vindication."

This seems pure assertion, for no explanation is given of the way the municipal law can affect matters before the actual domicile is fixed there; and this is the very point to be established.

The second reason suggested is that of a tacit matrimonial contract. To this the author seems to incline, for stating his belief as to what the accepted doctrine will be, he adds:

"for in England as well as in America, in the interpretation of other contracts, the law of the place where they are to be performed has been held to govern."¹⁹

Stating the argument a little more fully: A and B are to be joined in wedlock. They might have contracted expressly with reference to rights in property owned by them at the time or thereafter to be acquired;²⁰ but because they enter into no express contract, we will say that they tacitly contracted with reference to marital rights in property by accepting the provisions of the law in that respect. "The tacit contract is to be construed precisely as if the laws of the place were inserted in it."²¹ And imputing further intentions to the parties, we can say they tacitly contracted according to the provisions of the law where they were going to live. This would be allowed either on the theory that the parties intended to be governed by this law in making their contract,²² or that it was the place of performance.²³

The doctrine of tacit contract seems to have found favor with European writers, and is not without support in the authorities in common-law jurisdictions.²⁴

¹⁹ But elsewhere Judge Story does not appear to approve of the doctrine of tacit consent as regulating the rights and duties of matrimony. See Story, op. cit. sec. 190.

²⁰ Note that such an agreement is not a part of the marriage contract at all, but a wholly different one.

²¹ Castro v. Illies (1858) 22 Tex. 479, 73 Am. Dec. 277, 283.

²² "As the contract of marriage was entered into and solemnized with the intention that it should be performed and fulfilled in the state of Connecticut..." Mason v. Fuller (1869) 36 Conn. 160, 162.

²² Authority may be found for either or both of these views as to the law governing the validity of contracts. See articles discussing the subject by Professor Joseph H. Beale (1909) 23 HARV. L. REV. 79, 194, 260.

²⁴ See Story, op. cit. sec. 147 et seq.; Wharton, Conflict of Laws (3d ed.) 190; Westlake, Private International Law (5th ed.), 74 et seq. In Besse

The whole argument seems to go at the question the wrong way. Calling a marriage a contract does not solve the legal puzzle of the relationships arising therefrom. It is true that people get into the married state via the contract route. But, once in, there is a relationship created which is much more than a matter of contract, and which depends for its rights and duties not upon the consent of either of the parties, but upon the authority of the law. Would it be argued that the common-law right of a husband to discipline his wife with a stick no bigger than his thumb was a matter of tacit consent between the spouses? The right of control over the wife's person seems clearly a right given by law as an incident of the marital status, but hardly more clearly than the right of curtesy in her reality and ownership of her chattels, and the power to reduce her choses in action to possession. Any explanation of marital rights on the basis of a tacit contract flies in the face of the facts. Laymen generally know very little about the law until they get involved in a lawsuit, and two young people anxious to wed do not sit up nights reading up on the law of marital property. They probably know very little about it, and what knowledge they do have is of the most general and indefinite kind. For the common law to give the husband all the wife's personal property, and then say that the reason is because the wife tacitly contracted to give it, is adding insult to injury.

A tacit agreement, if real, ought still to apply when the parties move from their first marital home to another jurisdiction and there acquire property; but there is ample authority that in such a case, the first law no longer applies, and the law of the new domicile governs.²⁶ The tacit agreement, if there were such a

v. Pellochoux (1874) 73 Ill. 285, 292, the court says: "In all marriages, the parties may be presumed to tacitly adopt the laws of their domicile, and to agree to be governed by them, but the obligation will be limited by the extent of these laws."

²⁵ Saul v. His Creditors (1827 La.) 5 Martin N. S. 569, 2 Beale, Cas. on Conflict of Laws, 220 and cases cited; Wharton, op. cit. sec. 191; Story, op. cit. sec. 178; 57 L. R. A. 366, n. The contrary seems to have been held in an English case, De Nicols v. Curlier (1899, H. Lords) [1900] A. C. 21. The case is stated in Westlake, op. cit. 79: "The consorts, both French by nationality and domiciled, were married in France without express contract, and therefore under the system of community. They removed to England, where the husband was naturalized, and where they amassed by their industry a large fortune, of which a part was invested in English freeholds and leaseholds and a part remained in money and securities.

thing, ought to apply to land as well as to personalty; but rights in land acquired by parties upon marriage are governed by the law of the *situs* of the land.²⁶

"Matrimonial domicile" may be used as a term of convenience to designate the domicile of the husband which the wife assumes upon marriage;²⁷ but as used to describe a place where an actual domicile has not been established, the doctrine seems utterly opposed to settled common-law rules of domicile, whatever may be said for it under any other system of law. It is not established by conclusive authority. The repeated citation of the language of Judge Story seems another case where the shadow of a great name has darkened the clearness of judicial expression.

#### II

What is "matrimonial domicile" in a divorce suit? The term is a recent one in this branch of law. Writers on conflict of laws do not use it; nor do the standard writers on domestic relations; nor is it taken over in this connection from the cases involving rights in marital property, for no mention of these cases is made in this connection, nor does the suggestion of "matrimonial"

The husband having died, leaving a will by which he had disposed of the whole as though he were sole owner, the widow claimed her share as of a community, and the House of Lords decided unanimously in her favor as to the personal chattels, which alone were before it." Mr. Baty, in Polarized Law, 96, explains the case by saying that it proceeded solely on the finding that the settlement made by French law for the parties must be held equivalent to an express contract by them to adopt it. "As foreign law is a matter of fact, it may in the future fail to be shown even for France; and certainly it may fail to be shown in the case of other countries." Cf. Dicey, Conflict of Laws (2d ed.) 511-14.

²⁶ Story, op. cit. sec. 159; Minor, op. cit. sec. 80; 57 L. R. A. 353, n. In De Nicols v. Curlier [1900] 2 Ch. 410, Kekewich, J. applied the contract made for the parties by the French code to interests in land in England. The decision seems a clear error, but Westlake, op. cit. 81, approves the result believing "the doctrine of tacit contract on marriage to be well founded, and that the unity of the matrimonial system of property generally coincides best with the wishes of persons who, by not entering into an express contract, show they do not desire complicated or unusual arrangements."

"Just why the first home of the parties is any more "matrimonial" than one to which they subsequently remove is not clear, but the distinction seems to be made. See Wharton, op. cit. sec. 191; Story, op. cit. sec. 178.

domicile as an intended domicile ever appear in cases of this kind. It is not found in the digests. Only in a very recent work does the term appear,²⁸ and its use therein is evidently based on the language of the courts in late cases, without additional definition of meaning.

A "matrimonial" domicile for the purpose of divorce, as something different from the actual domicile of husband or wife, gained for a time some recognition in the Scotch cases. In Jack v. Jack²⁹ there was held to be jurisdiction to grant a divorce to a husband who had formerly lived in Scotland with his wife, even though it was admitted in his pleading that he had been for some time a minister of the gospel in the state of New York, without any present intention of returning. The theory the court went on was that the "matrimonial domicile" of the pair was still in Scotland. Lord Neaves said:³⁰

"Perhaps, individually speaking, [the husband] may be domiciled in America. But the question still arises, whether, as regards the married pair, the matrimonial domicile, as it may be called, has been transferred from Scotland to any other country. . . ."

And the meaning of "matrimonial domicile" was explained by the Lord Justice Clerk:³¹

"It would seem, then, that the place of residence of the married pair for the time is the place where jurisdiction ought to be found to give redress for conjugal infidelity, without inquiring whether the husband's domicile of succession may be in another country. . . . The place of residence has appropriately been called the domicile of the marriage."

Lord Deas, however, characterizes the use of the term "matrimonial domicile" as misleading, figurative and wanting in judicial precision:

"Domicile belongs exclusively to persons. Having ascertained the domicile of the husband, and the domicile of the wife, the inquiry into domicile is exhausted."

^{28 9} R. C. L. 510, 512.

^{29 (1862) 24} Ct. Sess. 2d Ser. 467.

⁸⁰ Ibid. p. 476.

⁸¹ Ibid. p. 483.

The conception of the "matrimonial domicile" as a temporary home of husband and wife was again brought out in *Pitt v. Pitt.*³² The Lord Justice-Clerk said:³³

"The pursuer's English domicile of origin might subsist for many purposes, and yet he might be domiciled in this country so as to give jurisdiction to a Scotch Consistorial Court."

#### And Lord Cowan stated that

"... it does not require to be shewn that the domicile to found jurisdiction is the paramount and real domicile of the parties, or, in other words, the domicile for governing succession; but that the essential matter to be investigated in each case is the matrimonial domicile—the residence of the married pair—where, as their home, they live and cohabit, or ought to live and cohabit, as man and wife."

Pitt v. Pitt was reversed in the House of Lords.³⁴ The validity of the doctrine of "matrimonial domicile" as a basis for jurisdiction was not settled, as the eminent counsel for the respondent, Sir R. Phillmore and Sir Hugh Cairns, abandoned the ground as untenable, a concession suggested by the Lord Chancellor to "be quite in accordance with the law of the case."³⁵

But in Le Mesurier v. Le Mesurier³⁶ where the question was considered by the Judicial Committee of the Privy Council, the conclusion on the point was that "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." Lord Watson said:

"... any judicial definition of matrimonial domicile which has hitherto been attempted has been singularly wanting in precision, and not in the least calculated to produce a uniform result.... The introduction of so loose a rule into the jus gentium would, in all probability, lead to an inconvenient variety of practice, and would occasion the very conflict which it is the object of international jurisprudence to prevent."

²² (1862) 1 Ct. Sess. 3d Ser. 106.

^{**} Ibid. p. 117.

⁸⁴ (1864) 4 Macqueen, App. Cas. 627.

^{*} See also, Nibovet v. Nibovet (1878 Ct. App.) L. R. 4 P. D. I.

^{86 (}Priv. Counc.) [1895] A. C. 517, 540, 538.

Yet, in the two famous cases of Atherton v. Atherton⁸⁷ and Haddock v. Haddock38 the fact that a decree of divorce was or was not given by the court of the "matrimonial" domicile was made the turning point as to whether a second state must, under the "due faith and credit" clause, recognize the validity of such a decree given in the absence of the defendant. It would be affectation of learning to go over the ground covered by these and similar cases, in the light of the voluminous discussion of the subject by capable commentators. The one point we want to find is the difference between a "matrimonial" domicile and any other kind of domicile.39 The Atherton case was said in Haddock v. Haddock to have been expressly decided on the ground that the "matrimonial" domicile of the parties was in Kentucky. This was what, in the mind of the court, made the difference; and that is all the help on the point given by the Supreme Court cases, except that in a later decision the Atherton case was followed on similar facts.40

^{87 (1901) 181} U. S. 155.

^{88 (1906) 201} U. S. 562.

³⁰ It will be remembered that in Atherton v. Atherton the parties were married in New York and immediately took up their residence in Kentucky. Here the husband, after his wife had left him, had secured a divorce in accordance with the regular Kentucky procedure on the ground of desertion. Later, Atherton was made the defendant in an action for limited divorce in New York, the state to which his wife had returned; and it was there decided that the Kentucky decree was inoperative in New York, and the wife was given the decree prayed for. The United States Supreme Court held this a violation of due faith and credit to the Kentucky divorce. Mr. Justice Gray, in delivering the opinion, cautiously limited the holding to the facts before the court, and pointed out that Kentucky was the "only matrimonial domicile of the husband and wife." In Haddock v. Haddock, the parties were married in New York; Haddock went to Connecticut and secured a divorce there on the ground of desertion. The wife remained in New York, and having brought suit for limited divorce, Haddock set up the Connecticut decree. Judgment was given for Mrs. Haddock, however, and this was held to be no violation of due faith and credit.

Thompson v. Thompson (1913) 226 U. S. 551. The parties were married and lived in Virginia, where the husband had secured a limited divorce on the ground of desertion. When the wife sued in the District of Columbia, after having made her residence there, it was held that due faith and credit required recognition of the Virginia decree. "It is clear, therefore, under the decision in the Atherton case, and the principles upon which it rests, that the state of Virginia had jurisdiction, and the proper courts of that state could proceed to adjudicate respecting it upon grounds recognized by the laws of that state," said the Court. The point was not further discussed.

It has been contended that a "matrimonial domicile" is not simply the common domicile of husband and wife, but is "that place where one spouse is rightfully domiciled and where the other ought to be to fulfill the marital obligations."41 It is believed that there would be great difficulty in making this test work. Where ought a husband to be to fulfill his marital obligations? Anywhere, surely. If he has treated his wife with such cruelty that she has been compelled to leave him, his fault is not that he is living in the wrong place, but that he did not behave properly at home. Even if the husband deserts, his wrong is not in going to a new place to live-that is proper enough; the misconduct is in abandoning his wife. In Atherton v. Atherton, the New York court found that the wife had left the husband through no fault of hers, and was therefore rightfully domiciled in New York. The same must have been found in Thompson v. Thompson; yet in each of those cases the decree secured by the husband in the state where the parties had lived together, and where the husband still was living, was conclusive. If the test suggested is what determines "matrimonial domicile," why was it not open to the New York or District of Columbia court to find, as they did, that the wife was rightfully domiciled within the jurisdiction, and why would not that finding be material?

It has also been suggested that the "matrimonial domicile" is something that stays with a party who is abandoned or who is not in fault, so long as he or she stays within the jurisdiction where the parties had their common domicile, but that such innocent party can move to another jurisdiction and the "matrimonial domicile" will go along. If the husband and wife lived in Mexico, for instance, as in the Montmorency case, and he abandoned his wife there, the matrimonial domicile stays with her, and she could transfer it to Texas by going to that state to live. But if this were so, why could not the wife in Atherton v. Atherton or in Thompson v. Thompson show that she had been wronged, and that when she took up a residence apart from her husband, the "matrimonial domicile" went with her? That is just what she could not do in either one of those cases.

From the language of the judges in the Supreme Court decisions mentioned, it would seem that a "matrimonial domicile" is

^a Robert J. Peaslee, Ex Parte Divorce (1915) 28 HARV. L. REV. 457,

<sup>469.

&</sup>quot;Montmorency v. Montmorency (1911 Tex. Ct. of Civ. App.) 139 S. W. 1168. See also Parker v. Parker (1915 C. C. A. 5 C.) 222 Fed. 186, 137 C. C. A. 626.

regarded as nothing more than the place where husband and wife have their common domiciles,⁴³ and the use of the term in several recent decisions seems to indicate that this is the sense in which it is used.⁴⁴ "Where parties are married out of the state but come to reside in the state afterwards, [they] thus establish a domicile of matrimony therein."⁴⁵ Applying this simple definition to the matter under discussion, namely, the use of the term in divorce proceedings, "matrimonial domicile" would, of course, mean the place where the parties last lived as husband and wife with the intent of making that place their home.⁴⁶ This too, is the natural meaning of the term. It seems neither necessary nor desirable to make further complications in an already tangled question by ascribing to these words a more difficult meaning.

It may well be that the introduction of this term into the law of divorce was a judicial mistake, "that what in the Atherton case . . . was referred to out of abundant caution . . . was later seized upon, in the Haddock case, . . . and . . . invested with magical qualities it did not, and does not possess." Perhaps too, it works injustice. In the years since Haddock v. Haddock was decided, it has not become any easier to "see any ground for distinguishing between the extent of jurisdiction in the matrimonial domicile and that . . . in a domicile later acquired; but such a distinction has been made by a court from which there is no appeal in this world, has been taken up by lesser tribunals, and has vitally affected the people whose rights have been decided under

[&]quot;The headnote in the *Thompson* case says: "The state in which the parties were married, and where they reside after marriage, and where the husband resided until the action for divorce was brought, is the matrimonial domicile. . . ." In *Atherton v. Atherton* the marriage took place in New York.

[&]quot;Perkins v. Perkins (1916) 225 Mass. 82, 113 N. E. 841; Callahan v. Callahan (1909) 65 Misc. Rep. 172, 121 N. Y. Supp. 39; Hall v. Hall (1910) 139 App. Div. 120, 123 N. Y. Supp. 1056; Benham v. Benham (1910) 69 Misc. Rep. 442, 125 N. Y. Supp. 923; People v. Catlin (1910) 69 Misc. Rep. 191, 126 N. Y. Supp. 350; Post v. Post (1911) 71 Misc. Rep. 44, 129 N. Y. Supp. 754; State ex rel. Aldrach v. Morse (1906) 31 Utah 213, 87 Pac. 705, 7 L. R. A. (N. S.) 1127. See also (1915) 4 Cal. L. Rev. 59, 2 Bench and Bar 37.

⁴⁵ State ex rel. Aldrach v. Morse, supra.

[&]quot;Callahan v. Callahan, supra.

[&]quot;2 BENCH AND BAR 37, 41.

⁴⁸ See (1908) 21 HARV. L. REV. 296.

Holmes, J., dissenting, in Haddock v. Haddock, supra. See also, Andrews, J., in Callahan v. Callahan, supra.

it. Civilization has not come to an end, but human happiness of individuals has been made or marred by it. Unless the doctrine is soon repudiated, it bids fair to become permanently fixed in the law. The real difficulty seems to be not in the term "matrimonial domicile," but in the erroneous rule of law which has been supported by reliance upon it.

# FAULTY ANALYSIS IN EASEMENT AND LICENSE CASES

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A recent Pennsylvania case, Penman v. Jones, involving important coal mining interests, suggests not only some brief observations on what appears to be a novel decision as to easements, but also some critical comments on that which is of far greater significance: the reasoning by which the result was reached.²

The unusual chaos of conceptions and inadequacy of reasoning in easement and license cases have not infrequently been emphasized—without, however, any suggestion either as to the cause of the difficulties involved or as to the remedy to be applied. Thus, a learned New Jersey judge, Vice-Chancellor Van Fleet, has put the matter in terms none too strong:³

"The adjudications upon this subject [easements and licenses] are numerous and discordant. Taken in their aggregate, they cannot be reconciled, and if an attempt should be made to arrange them into harmonious groups, I think some of them would be found to be so eccentric in their application of legal principles, as well as in their logical deductions, as to be impossible of classification."

The difficulties so justly lamented by the New Jersey court find striking exemplification when one ponders and compares the majority opinion and the dissenting opinion in *Penman v. Jones.*⁵ It is believed, moreover, that a close examination of this case and others may suggest both cause and remedy.

In 1873, A (Lackawanna Iron & Coal Co.), the owner of a certain large tract of land, sold and conveyed a part of it to B, excepting and reserving to the grantor, its "successors and

^{1 (1917,} Pa.) 100 Atl. 1043.

² Similarly interesting for its reasoning and for its application of fundamental legal conceptions is the comparatively recent case of *Graff Furnace Co. v. Scranton Coal Co.* (1914) 244 Pa. 592, 598.

^{*}Bast Jersey Iron Co. v. Wright (1880) 32 N. J. Eq. 248, 254. The italics in the passage quoted from this case and also in the passages to be hereafter quoted from other cases are those of the present writer.

⁴Compare Chancellor Kent's remarks on the same subject, 3 Kent, Com. *453.

^{5 (1917,} Pa.) 100 Atl. 1043.

assigns," the underlying mineral estate, in apt words creating a fee therein, together "with the sole right and privilege to mine and remove the same [coal and minerals] by any subterranean process incident to the business of mining, without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of said lot."

Eighteen years after this, that is in 1891, A, by a single instrument sold and conveyed to C (Lackawanna Iron & Steel Co.) all the coal under its lands; that is, created subjacent estates in fee, the superjacent estates being, by exception, vested in the grantor.⁶ Included in the deed of conveyance, conveying all told about sixty-two parcels, was the subjacent mineral estate below B's lot. While this deed conferred, comprehensively, the "right" to "mine and remove the said coal" from the sixty-two parcels, the right and privilege of letting down the surface were given in specific terms only as regards a single tract not directly connected with B's lot.

On the other hand, as regards all the parcels included, the instrument purported to convey "all the estate, right, title, interest, benefit, property, claim, and demand whatsoever" together with "all and singular the . . . appurtenances . . . belonging to the said . . . property or in any wise appertaining to the same."

Twenty-four years later A executed a deed to D, a trust company, for "all and every the real estate or interest of any kind or nature" in certain land including, inter alia, the lot previously sold to B and "the coal and minerals underlying the same." Subsequently D quitclaimed to E (who had derived title from B),

⁶The superjacent estate, though often spoken of as "remaining," after severance, in the grantor, is really, of course, a somewhat modified legal interest, that is an aggregate of rights, privileges, powers and immunities relating to the smaller corpus of land and having somewhat different elements or characteristics than the aggregate relating to the larger corpus originally "owned."

For this reason the usual language of the books is hardly adequate,—e. g., Tiffany, Real Property (1903) sec. 383:

[&]quot;The purpose and effect of an exception in a conveyance is to except or exclude from the operation of the conveyance some part of the thing or things covered by the general words of description therein, as when one conveys a piece of land, excepting a certain part thereof, or the houses thereon, it being always of a thing actually existent. A reservation, on the contrary, as defined by the common-law writers, is a clause by which the grantor reserves to himself some new thing 'issuing out of' the thing granted, and not in esse before."

with the express purpose of investing E of the right of surface support against the owner of the subjacent estate.

In a suit by E against F for breach of a contract to purchase the surface lot, it was held by the Supreme Court of Pennsylvania, Moschzisker and Stewart, JJ., dissenting, that the "right and privilege" of letting down the surface of B's lot did not pass from A to C by the conveyance of 1891; that such "right and privilege" did pass by the later conveyance to D; and that by the latter's quitclaim deed the "right and privilege" were released and extinguished in favor of E, so as to make E's interest perfect as regards the right of surface support.

There are thus presented three questions: (1) Under the conveyance of 1891, did the "right and privilege" of letting down the surface of B's lot pass to C as an easement appurtenant to the subjacent mineral estate? (2) Did such "right and privilege" pass, under the language of the conveyance, independently of its being an easement? (3) Was the court consistent in holding, in spite of its negative answer to the second question, that the language in the conveyance from A to D was sufficient to pass the "right and privilege" to D? Each of these points may, for the sake of clearness, be somewhat separately considered.

### (I) DID THE "RIGHT AND PRIVILEGE" PASS AS AN EASEMENT?

All legal interests concerning land or other tangible objects⁷ may, on adequate analysis, be seen to consist of more or less comprehensive aggregates of rights (or claims), privileges,

Compare also (1917) 26 YALE LAW JOURNAL, 710, 721:

⁷As regards the unfortunate tendency to blend and confuse non-legal (physical) and legal conceptions, especially in the use of the term "property" with rapid shifts to indicate both the physical object and the legal interest relating to it, see the detailed discussion in the writer's article, Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL, 16, 20 seq.

[&]quot;A man may indeed sustain close and beneficial physical relations to a given physical thing: he may physically control and use such thing, and he may physically exclude others from any similar control or enjoyment. But, obviously, such purely physical relations could as well exist quite apart from, or occasionally in spite of, the law of organized society: physical relations are wholly distinct from jural relations. The latter take significance from the law; and, since the purpose of the law is to regulate the conduct of human beings, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings. The words of able judges may be quoted as showing their realization of the practical importance of the point now being emphasized: Mr. Chief Justice Holmes, in Tyler v. Court of Registration (1900) 175 Mass. 71, 76: 'All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected.'"

powers, and immunities vested in the "owner" of the interest, other persons indiscriminately being under the respective correlative duties, no-rights, liabilities, and disabilities.8

"Suppose, for example, that A is fee-simple owner of Blackacre. His 'legal interest' or 'property' relating to the tangible object that we call land consists of a complex aggregate of rights (or claims), privileges, powers, and immunities. First: A has multital legal rights, or claims, that others, respectively, shall not enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties. Second: A has an indefinite number of legal privileges of entering on the land, using the land, harming the land, etc., that is, within limits fixed by law on grounds of social and economic policy, he has privileges of doing on or to the land what he pleases; and correlative to all such legal privileges are the respective legal no-rights of other persons. *Third*: A has the legal power to alienate his legal interest to another, i. e., to extinguish his complex aggregate of jural relations and create a new and similar aggregate in the other person; also the legal power to create a life estate in another and concurrently to create a reversion in himself; also the legal power to create a privilege of entrance in any other person by giving 'leave and license'; and so on indefinitely. Correlative to all such legal powers are the legal liabilities in other persons,—this meaning that the latter are subject, nolens volens, to the changes of jural relations involved in the exercise of A's powers. Fourth: A has an indefinite number of legal immunities, using the term immunity in the very specific sense of non-liability or non-subjection to a power on the part of another person. Thus he has the immunity that no ordinary person can alienate A's legal interest or aggregate of jural relations to another person; the immunity that no ordinary person can extinguish A's own privileges of using the land; the immunity that no ordinary person can extinguish A's right that another person X shall not enter on the land or, in other words, create in X a privilege of entering on the land. Correlative to all these immunities are the respective legal disabilities of other persons

in general.
"In short, A has vested in himself, as regards Blackacre, multital, or "In short, A has vested in himself, as regards blackarre, munital, or in rem, 'right—duty' relations, multital, or in rem, 'privilege—no-right' relations, multital, or in rem, 'power—liability' relations, and multital, or in rem, 'immunity—disability' relations. It is important in order to have an adequate analytical view of property, to see all these various elements in the aggregate. It is equally important, for many reasons, that the different classes of jural relations should not be loosely confused with one another. A's privileges, e. g., are strikingly independent of his rights or claims against any given person, and either might exist of his rights or claims against any given person, and either might exist without the other. Thus A might, for \$100 paid to him by B, agree in writing to keep off Blackacre. A would still have his rights or claims against B, that the latter should keep off, etc.; yet, as against B, A's own privileges of entering on Blackacre would be gone. On the other hand, with regard to X's land, Whiteacre, A has, as against B, the privilege of entering thereon; but, not having possession, he has no right, or claim, that B shall not enter on Whiteacre."

For a more detailed analysis, explanation, and discrimination of the fundamental jural relations, see the earlier article, Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL, 16.

As there indicated, p. 41, the best synonym for "legal privilege," in the very specific sense of "no-duty," is "legal liberty."

See Fundamental Legal Conceptions as Applied in Judicial Reasoning (1917) 26 YALE LAW JOURNAL, 710, 746:

aggregate of the easement owner differs from that of the ordinary complete owner of land only in being far more limited as regards the number and the quality of the constituent jural relations involved. For this reason it is a serious obstacle to close analysis and clear thinking that courts and writers habitually deal with the easement (as they do also with all other legal interests) as if it were a simple unity to be adequately described by a few loose and ambiguous terms such as "property," "title," "ownership," "right of ownership," "right," "privilege," "incorporeal(!) right," etc.—terms utterly insufficient to indicate the precise elements involved. In none of the books has any strict analytical method been pursued. Some typical "definitions" disclose at a glance how hopelessly inadequate they are to indicate the varieties of jural relations actually included in each of the various kinds of easements.9 The unfortunate fallacy consists in treating as if it were a solid, unanalyzable unity that which

The usual definitions and explanations of "profits" and other "incorporeal" hereditaments are similarly deficient and unsatisfactory. Compare, e. g., Tiffany, Real Property (1903) 678:

"An easement is to be distinguished from a profit à prendre, which signifies a right in a person to take a part of the soil belonging to another person, or something growing or subsisting on or in the soil."

The most significant and distinguishing elements in the entire aggregate of the "profit" owner are those which the books constantly fail to point out, viz., the *legal powers* of acquiring ownership of *severed parts* of the "servient" land by exercising the *legal privileges* of making physical severance. Of course, rights (or claims) and immunities, as well as privileges and powers, constitute elements in the profit owner's "aggregate." See *post* pp. 97 seq.

⁹ Jones, Easements (1898) sec. 1:

[&]quot;An easement is a privilege without profit which one has for the benefit of his land in the land of another."

Tiffany, Real Property (1903) 677:

[&]quot;An easement is a right, in one person, created by grant or its equivalent, to do certain acts on another's land, or to compel such other to refrain from doing certain acts thereon, the right generally existing as an accessory to the ownership of neighboring land, and for its benefit."

Mr. Justice Thompson, in Big Mountain Improvement Co.'s Appeal (1867) 54 Pa. 361, 369:

[&]quot;This was but the grant of an easement although described to be in fee, which is generally defined to be 'a liberty, privilege or advantage which one may have in the lands of another without profit:' Gale & Whately on Easements 6."

is really a complex aggregate of many distinct jural relations, actual and potential.¹⁰

Consider, for example, a right of way over Y's land Whiteacre, the "servient" tenement, X being the owner of Blackacre, the "dominant" tenement. Without attempting an exhaustive analysis of this interest, it is clear that the most significant jural relations included in X's complex aggregate are as follows: First, X has rights, or claims, against others,-Y and third parties,that they shall not interfere with his crossing of Whiteacre, as e. g., by erecting an obstruction; 11 and all such other persons are under respective correlative duties not to interfere, etc. Second, the most striking jural relations in X's complex aggregate consist of his legal privileges of crossing Whiteacre in various ways (as by walking, riding or driving); i. e., his privilege in any such case is the negation of the duty to stay off which X would be under were it not for the special easement facts distinguishing him from other individuals. Correlative to X's privileges are the no-rights of Y; i. e., Y has no rights that X should stay off. Though, unfortunately, the point is generally overlooked, and sometimes, in effect, denied,12 these "privilege—no-right" relations are as true jural relations as the "right-duty" relations already referred to.13 Moreover, it is

¹⁰ The same tendency is manifest in the usual attempts to analyze even the most complex and intricate kinds of jural interests, such as equitable trust interests, corporate ownership, etc. Compare as regards trusts, Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL, 16-19; The Relations between Equity and Law (1913) 11 Mich. L. Rev. 537, 553; The Conflict of Equity and Law (1917) 26 YALE LAW JOURNAL, 767-770; and, as regards the analysis of corporate ownership, The Nature of Stockholders' Individual Liability for Corporation Debts (1909) 9 Col. L. Rev. 285, 287 seq.; The Individual Liability of Stockholders and the Conflict of Laws (1910) 10 Col. L. Rev. 283, 296-326.

¹¹These are, of course, multital rights (so-called rights in rem), as contrasted with paucital rights (so-called rights in personam).

For an extended analysis and explanation of these conceptions and terms—so often misunderstood—see Fundamental Legal Conceptions as Applied in Judicial Reasoning (1917) 26 YALE LAW JOURNAL, 710.

For an explanation of the terms, jus in re and jus in re aliena, see Ibid., 734 seq.

²² See Pollock, Jurisprudence (2d ed., 1904) 62; and cf. Del Vecchio, Formal Bases of Law (tr. by Lisle, 1914) 166-182.

¹³ See Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL, 16, 42, n. 59, criticising, inter alia, the views expressed in Pollock, Jurisprudence (2d ed., 1904) 62.

See also ante, p. 69, n. 8.

the privilege elements in X's interest, involving an affirmative activity on Y's land, Whiteacre, that cause his easement to be classified as affirmative, in contrast to a negative easement, such as that of light. Third, X has various legal powers: e.g., the power, subject to certain limitations, to create in others, e. g., servants and guests, respective privileges of crossing Whiteacre: the power to alienate his aggregate of relations by conveying it, along with his main Blackacre interest, to M-such alienation really consisting of the extinguishment of X's own relations and the creation of new and corresponding relations in M:14 and the power to extinguish his aggregate of relations in favor of Y, leaving no-rights (or no-claims), duties, liabilities and disabilities in place of his previous interest, together with a corresponding transformation of jural relations as regards Y and all third persons. Fourth, X has various legal immunities, the term "immunity" being here used in the very definite sense of non-liability or non-subjection to legal power on the part of another person. Thus, e. g., X is free from the power of any person, under ordinary conditions, to extinguish his easement interest.

Passing from affirmative easements to those classified as negative, the typical case is the easement of light. In that case the aggregate consists of rights, or claims, powers and immunities; the significant thing being the absence of privileges to be exercised by X through affirmative acts on Y's land.¹⁵

Coming nearer to the problem of the principal case, let us consider two adjacent parcels, Brownacre, owned by J, and Greenacre, owned by K. In the absence of special facts operating in favor of J or others, K has so-called "natural rights" to lateral support; *i. e.*, such rights, or claims, exist as ordinary elements of K's aggregate of jural relations called "ownership

¹⁴ As regards the "alienation" of "legal interests," see the article already cited (1913) 23 YALE LAW JOURNAL, 16, 24, 45; also Professor Walter W. Cook, The Alienability of Choses in Action (1916) 29 HARV. L. REV. 816-837; The Alienability of Choses in Action—A Reply to Professor Williston (1917) 30 HARV. L. REV. 449-485.

¹⁵ Compare Holmes, in 3 Kent, Com. *419, note (c):

[&]quot;In general it is supposed that the duty of the servient owner is the same as that of third persons in point of law, viz., to abstain from interfering with a right in rem, although it is more onerous in point of fact, by reason of his occupation of the land. See D. 43. 19. 3, sec. 5; Saxby v. Manchester, Sheffield, &c., R. Co., L. R. 4 C. P. 198. But see Lawrence v. Jenkins, L. R. 8 Q. B. 274."

of Greenacre,"—being in no way dependent on special grant or equivalent operative facts, such as reservation or prescription. That is to say, K's right that J shall not, by removing the lateral support, cause K's land to collapse is exactly of the same general character as K's ordinary right that J, having no "right of way" easement or other basis of privilege, shall not walk across Greenacre.

Suppose, however, that K should, by instrument of grant under seal, purport to create in J, his heirs and assigns, the "right and privilege," of causing, through removal of support, the collapse of K's land. Is there any reason why the aggregate of relations so created should not be considered an "easement," and thus involve the application of the usual rules as to the alienation of easements, that is, that easements appurtenant pass ordinarily with the dominant estate even without express mention, and, a fortiori, under a clause as to "appurtenances?" How, if at all, does J's aggregate of jural relations concerning and affecting Greenacre differ from X's aggregate of jural relations called "right of way" over Whiteacre?

In the Greenacre case, as in the Whiteacre case, we can easily discover right (claim) elements, privilege elements, power elements and immunity elements. The privilege is that of causing the collapse of K's land through removal of his own soil and concomitant change in the operation of natural forces on K's land. The privilege is limited, as indicated, to causing collapse in a particular mode, viz., through change in the operation of natural forces through removal of J's own soil. The power elements and immunity elements are equally obvious. Similarly, there seem to be rights, or claims, corresponding to those involved in X's right of way over Whiteacre. That is, since by the very terms of the supposed grant to J, K has given him the "right and privilege"17 of removing lateral support, etc., the intentions of the parties are clear: J has rights against K (and, by analogy to a right of way, against third parties indiscriminately) that they shall not interfere with the "exercise" of J's privilege, that is with the physical activity bringing about a change in natural forces against K's land. Such an aggregate of jural

¹⁵ See Jones, *Easements* (1898), sec. 22, collecting the authorities at large. ¹⁷ In *Penman v. Jones* (1917, Pa.) 100 Atl. 1043, it will be remembered, the same terms, "right and privilege," were used in the deed from A to B.

relations in J would thus seem to constitute an easement; and authority is not wanting for this view.¹⁸

A precisely similar analysis is applicable to the operative facts and resulting jural relations involved in *Penman v. Jones*, ¹⁹ the Pennsylvania case chiefly in view. By revolving Greenacre and Brownacre ninety degrees on an axis, the former would become the superjacent estate of B, and the latter would become the subjacent estate of A (Lackawanna Iron & Coal Co.)

It is well settled in Pennsylvania, in accord with the authorities at large, that on the original creation of a subjacent mineral estate, either by grant or by exception, the owner of the superjacent estate acquires an ordinary, or "natural," right of surface support corresponding to the right of lateral support already considered.²⁰

Thus in one of the latest cases on the subject, Youghiogheny River Coal Co. v. Allegheny National Bank,²¹ the Supreme Court of Pennsylvania said, by Mr. Justice Mestrezat:

See also, to similar effect, Tiffany, Real Prop. (1903) 690. Cf. Jones, Easements (1898) sec. 589.

Compare also the easement of causing noises and vibrations harmful to the owner of neighboring land. Sturges v. Bridgman (1878) 11 Ch. D. 852.

19 (1917, Pa.) 100 Atl. 104.

²⁰ Jones v. Wagner (1870) 66 Pa. 429, 434; Horner v. Watson (1875) 79 Pa. 242, 251; Coleman v. Chadwick (1875) 80 Pa. 81; Williams v. Hay (1888) 120 Pa. 485, 496; Robertson v. Youghiogheny River Coal Co. (1896) 172 Pa. 566, 571.

The same principle is recognized and discussed in many of the later Pennsylvania cases cited in the footnotes following.

The leading English case for the same doctrine is Humphries v. Brogden (1850) 12 Q. B. 739. See also the careful discussion in Howley Park Coal & Cannel Co. v. London & N. W. Ry. Co. [1913] A. C. 11, 25, per Viscount Haldane, L. C.

For the similar American cases at large, see Tiffany, Real Property (1903) 672, n. 74.

¹⁸ See Ryckman v. Gillis (1874) 57 N. Y. 68, 74. In this case Johnson, C., who dissented only on other grounds, said, at p. 78:

[&]quot;But if the right to have support from adjoining land be not an easement, then what may be called the antagonistic right of removing your own soil so as to diminish the support to which the adjoining owner was entitled, is an easement affecting his land in favor of yours, and making his land the servient tenement in that regard, and subject to the easement of being deprived of its natural support. That such an easement may be acquired by grant or agreement of the parties is obvious, and has been settled by repeated adjudications between surface owners and mine owners underneath."

²¹ (1905) 211 Pa. 319, 324.

"If the owner of the whole fee conveys the coal in the land in general terms, as in this case, retaining the residue of the tract, the purchaser acquires the coal with the right to mine and remove it, provided he does so without injury to the superincumbent estate. His estate in the coal, like that of the owner of the surface, is governed by the maxim "sic utere two ut alienum non laedas." The owner of the surface is entitled to absolute support of his land, not as an easement or right depending on a supposed grant, but as a proprietary right at common law: Carlin v. Chappel, 101 Pa. 348; 2 Snyder on Mines, sec. 1020."

But it is equally well settled in Pennsylvania, as in England, that the "right and privilege" of letting down the surface can, by apt words, be created in the owner of the subjacent estate either through grant or through reservation. In the leading Pennsylvania case deciding this point, Scranton v. Phillips,²² the court said, by Mr. Justice Mercur:

"We see no reason why a person shall not be bound by his agreement to exempt another from liability for damages in working a coal mine, as well as from liability for damages resulting in the performance of any other kind of labor. No rule or policy of law forbids it. The undoubted intention of the parties to the contract was, that Fellows might mine and remove the coal without any obligation to support the surface or liability in case it fell. It was well said by Justice Blackburn, in Smith v. Darby et al., Law Rep., 7 Q. B. 716, 'the man who grants the minerals and reserves the surface is entitled to make any bargain he likes; both parties are just as much at liberty to make a bargain with reference to coals and minerals, as to make a bargain with reference to anything else.' The same rule applies when one grants the surface and retains the minerals. In each case the question is, did the parties agree there should be no obligation in regard to support?"

In a much later case, Miles v. Pennsylvania Coal Co.,²³ the same proposition was enunciated even more clearly and definitely by Mr. Justice Mestrezat:

"While, however, the owner of the surface is entitled as of natural right to its support by the owner of the subjacent mineral estate, it is equally well settled that the common owner of both estates, or the owner of the fee simple title to the tract of land, may by contract relieve the owner of the mineral estate from any duty to support the

²² (1880) 94 Pa. 15, 22.

^{23 (1907) 217} Pa. 449, 451.

surface and from liability for any injury or damage done to it by mining and removing all the mineral. Being the common owner of the whole title and, therefore, having the jus disponendi, he may make any legal disposition of the property he may desire. He may sell the coal and retain the surface, or he may sell the surface and retain the coal. In selling or leasing the coal, he may grant such rights to the vendee or lessee as either may desire or deem proper or necessary to remove the entire body of coal, as well as such rights in, through or over the surface as may be necessary for the same purpose. In other words, having the absolute dominion over the property he may grant such rights therein and thereto as may be agreed upon and are stipulated for in the contract. This naturally and logically follows from his ownership of the fee simple title to the property."

Let us next consider the change in legal relations resulting either from an alienation of the superjacent ("servient") estate or from an alienation of the subjacent ("dominant") estate.

First, suppose the superjacent estate is transferred. Does the transferee take subject to the "right and privilege" of the subjacent owner? That is, does the transferee get an aggregate of legal relations (rights, privileges, powers, and immunities) equivalent only to those that his grantor had—and no greater? Or, putting the same question in different form, does the transferee take subject to the same no-rights, duties, liabilities, and disabilities as his grantor was under? This question was, in substance, presented in Kellert v. Rochester & Pittsburgh Coal & Iron Co.²⁴ In that case the original grant of the subjacent estate ran to the grantee "his heirs and assigns." But the language creating the privilege of letting down the surface did not expressly purport to "bind" subsequent takers from the grantor:

"And the said parties of the first part, do hereby release all and every claim or claims for damages to the said land caused by operating or working of said mines in a proper manner."²⁵

^{24 (1909) 226} Pa. 27, 29.

²⁵ It seems nothing short of remarkable that in instruments involving such important interests the draftsman should employ such loose and inexact language as appears in so many of the deeds on which the Pennsylvania decisions are founded.

The words, "release all and every claim or claims for damages to the

Yet the court held, in effect, that the subsequent transferee took the superjacent estate subject to similar limitations as regards rights, privileges, powers, and immunities:

"On the trial of the cause as well as on the argument of the present motion to lift the nonsuit, it was contended that the release of damages contained in this deed bound the grantors alone, and did not extend to their grantees, the plaintiffs, since it is not in express words made to apply to the grantors, 'their heirs and assigns.' In my opinion this contention can find no support either in the law or the facts in this case. The deed from Samuel Craft and wife to Adrian Iselin in apt words conveys a fee in the coal, and the subsequent related stipulations and the release of damages to the surface that might result from the removal of the coal are germane to and an integral part of the grant. It was not necessary to repeat the words 'heirs and assigns' in connection therewith to make said stipulations and release apply to subsequent grantees of the surface land."

Second, let us assume that the subjacent estate, being already in existence along with the "right and privilege" of letting down the surface, is transferred to another. As conceded by the majority judges in Penman v. Jones, such "right and privilege" may by apt words be granted along with the existing subjacent estate.²⁰ The previous Pennsylvania decisions supporting this proposition all seem, however, to be cases in which the conveyance to the subsequent grantee purported in express and specific terms

said land," purport, so far as direct meaning is concerned, to be a present release (extinguishment) of a secondary right (or "claim") to damages arising from breach of a primary right. Yet such secondary rights (or "claims") could not arise until the future. Obviously, what is really intended, so far as the grantor's rights, privileges, etc., are concerned, is an extinguishment of primary rights, privileges, etc. In correlative terms, the purpose is to create in the grantee of the subjacent estate immediate primary privileges, rights (or claims), powers, and immunities. It is of course entirely possible to express this purpose in unmistakably clear and precise terms. No doubt instruments more intelligently and artistically drawn in cases of this character would prevent serious controversy and save enormous waste from litigation.

Compare post, p. 79, n. 30.

²² Madden v. Lehigh Valley Coal Co. (1905) 212 Pa. 63, 64 (subsequent grantee of the subjacent estate held to have privilege of letting down the surface; terms of his grant do not appear in the report); Stilley v.

to grant the "right and privilege" along with the subjacent estate proper. Under such circumstances it was held both in Stilley v. Buffalo Co.,²⁷ and in Kirwin v. Del., L. & W. R. R. Co.²⁸ that the "right and privilege" passed, so that the subsequent grantee was privileged to let down the surface. It is significant, however, that no emphasis was in either case placed on the fact that specific terms had been employed for the purpose of alienating the "right and privilege." Thus, in the first case just mentioned Mr. Justice Elkin, speaking for the court, rested the result, very justly, on a broad foundation, viz., the intentions of the original grantor and grantee of the subjacent estate:

"Our cases relating to this question may very properly be divided into three classes: I. Those relating to grants of coal without any mention of damages to the surface by mining and removing the same; 2. Those relating to grants of coal coupled with mining rights and the waiver of damages resulting by reason of the proper exercise of the mining privileges; and, 3. Those cases in which the grant of the coal together with mining rights is followed either by an express waiver of damages to the surface resulting from the removal of the coal, or by words importing such a waiver. . . . In the cases last cited it was expressly held that the rule giving to the owner of the soil the right of surface support had no application in a case in which the parties had otherwise covenanted. Like any other right, the owner of the surface may waive the right of surface support by his deed or covenant. It is therefore just as well settled that a surface owner may part with his right of surface support by a covenant to do so, as it is that the servitude of support is imposed upon the subjacent estate. The important question in cases of this character is whether the surface owner by express words or by necessary implication has waived the right of

Buffalo Co. (1912) 234 Pa. 492, 497 (deed to subsequent grantee of subjacent estate contained express and specific terms granting the right and privilege of letting down the surface); Kirwin v. Del., L. & W. R. R. Co. (1915) 249 Pa. 98, 100 (same as in preceding case).

²⁷ (1912) 234 Pa. 492, 497.

^{28 (1915) 249} Pa. 98, 101.

²⁹ It is to be remembered that, as regards the Pennsylvania cases, the "right and privilege" have generally, if not always, been granted or reserved to the holder of the subjacent estates, "his heirs and assigns"; or else equivalent language has been used.

In *Penman v. Jones*, the original owner of the subjacent estate having been a corporation, the reservation was to the grantor, "its successors and assigns."

surface support. The intention of the parties must and should govern. . . . The mining privileges granted were incident to the mining and removing of all the coal underlying the tract of land, and the covenant as to damages was in these words, 'hereby waiving all damages arising therefrom.' If this waiver referred to damages to the land arising from the removal of all the coal, the case at bar is squarely ruled by Kellert v. Coal & Iron Company, 226 Pa. 27. . . .

"In that case as in this the waiver of damages related to the land not included in the grant of the coal... The grantor conveyed all the coal and no doubt intended to release all damages occasioned by the removal of it. As we have hereinbefore pointed out the release of damages in the present case related to the injuries resulting to the land by the removal of the coal, just as the waiver in the Kellert case above cited had reference to the land there in question."

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In Graff Furnace Co. v. Scranton Coal Co.³¹ there is an important dictum tending to show that the "right and privilege" in question would ordinarily pass with the subjacent estate to a subsequent grantee. Said Mr. Justice Mestrezat, in delivering the opinion of the court:

"Equally true, however, is it that the owner in fee of the entire estate may grant the mineral estate and by apt words in the deed of conveyance may part with or release his right to surface support, and where he does so his grantee or those claiming through him may mine all the coal even though it should result in the surface falling in. The owner of the entire estate may likewise grant the surface of the land and reserve the mineral estate with

²⁰ As to the adequacy of language of "covenant," "agreement," "waiver," "release," etc., to create easements, compare Mr. Justice Holmes, in *Hogan v. Barry* (1886) 143 Mass. 538:

[&]quot;There is no doubt that an easement may be created by words sounding in covenant. Bronson v. Coffin, 108 Mass. 175, 180. If the seeming covenant is for a present enjoyment of a nature recognized by the law as capable of being conveyed and made an easement,—capable, that is to say, of being treated as a jus in rem, and as not merely the subject of a personal undertaking,—and if the deed discloses that the covenant is for the benefit of adjoining land conveyed at the same time, the covenant must be construed as a grant, and, as is said in Plowden, 308, 'the phrase of speech amounts to the effect to vest a present property in you.' An easement will be created and attached to the land conveyed, and will pass with it to assigns, whether mentioned in the grant or not."

See also cases cited in 10 Am. & Eng. Ency. of Law (2d ed., 1899) 414, n. 1.

^{\$1} (1914) 244 Pa. 592, 596.

the right to mine and remove it without liability for any injury or damage done to the surface, and in such case the grantor or those claiming through him may mine and remove all the coal without being compelled to support the surface."

The language of the last three quotations all imports that the "rights, privileges," etc., as to letting down the surface constitute an integral part of the subjacent owner's interest, just like the rights and privileges of "a right of way" appurtenant to the subjacent estate. Penman v. Jones, however, is evidently the first case to require or involve a more careful consideration of the exact nature of the subjacent owner's "right and privilege" and a classification of that form of legal interest either as an "easement" or as something other than an easement. As already intimated in dealing with a similar "right and privilege" concerning withdrawal of lateral support, it would seem that in Penman v. Jones the "right and privilege" reserved to A, its "successors and assigns" should have been treated as an easement, especially as regards the matter of alienation.

As Mr. Justice Moschzisker says in his dissenting opinion:34

"How shall the character of that right be defined? If it must be classed as an 'easement appurtenant,' then it would pass by a subsequent conveyance of the mineral estate. (Cathcart v. Bowman, 5 Pa. 317; Horn v. Miller, 136 Pa. 640, 654, 20 Atl. 706, 9 L. R. A. 810; Richmond v. Bennett, 205 Pa. 470, 472, 55 Atl. 17; Held v. McBride, 3 Pa. Super. Ct. 155, 158; Citizens' Elec. Co. v. Davis, 44 Pa. Super. Ct. 138, 142; Dority v. Dunning, 78 Me. 381, 384, 6 Atl. 6; Winston v. Johnson, 42 Minn. 396, 402, 45 N. W. 958), unless some exceptional rule applies to an easement of this particular kind. An easement 'is generally defined to be a "liberty, privilege or advantage which one may have in the lands of another without

²² Compare Mr. Justice Mestrezat in Miles v. Penn. Coal Co. (1907) 217 Pa. 449, 451.

In this case the learned judge's language is such as to lump together, as of the same nature, both a right of way and a "right and privilege" of letting down the surface:

[&]quot;In selling or leasing the coal, he may grant such rights to the vendee or lessee as either may desire or deem proper or necessary to remove the entire body of coal, as well as such rights in, through or over the surface as may be necessary for the same purpose."

³⁸ See ante, pp. 73-74.

⁸⁴ Penman v. Jones (1917) 100 Atl. 1043, 1047-1048.

profit."' Big Mountain Improvement Co.'s App., 54 Pa. 361, 369. Jones on Easements, at page 4, states their qualification thus:

'First, they are incorporeal; second, they are imposed on corporeal property; third, they confer no right to a participation in the profits arising from such property; fourth, they are imposed for the benefit of corporeal property; fifth, there must be two distinct tenements—the dominant, to which the right belongs, and the servient upon which the obligation rests. . . .'

"Thus it may be seen that the right created in the grantor by the deed from A. to B. has all the attributes of an easement appurtenant to the mineral estate vested in the former. It is an incorporeal right attached to corporeal property, and, when brought into legal existence, generally speaking, it would pass upon a conveyance of the latter under the general description of 'appurtenances.' Id., sec. 20 et seq., and cases hereinbefore cited."

Various authorities support the conclusion here suggested as sound.³⁵

^{**}Rowbotham v. Wilson (1857) 8 E. & B. 123, affd. 8 H. L. Cas. 348. Compare Aspden v. Seddon (1875) 10 Ch. App. 394, 402; Wilms v. Jess (1880) 94 Ill. 464, 468 (reasoning and dicta).

In Aspden v. Seddon, supra, Mellish, L. J., said:

[&]quot;Now, by the deed, all mines and seams of coal, ironstone, and other minerals are reserved to Stott, with full liberty, power, and authority for Stott and his lessees 'to search for, get, win, take, cart and carry away the same, and sell or convert to his or their own use the said excepted mines, veins and seams of coal, cannel, and ironstone and other mines and minerals, or any of them, or any part or parts thereof, at pleasure, and to do all things necessary for effectuating all or any of the aforesaid purposes.' . . . If the sentence had stopped there, these words would be consistent with the construction that the mineral owner may take away every part of the minerals, provided he can do so without violating the surface-owner's right to support, but not otherwise, and some further words would be necessary to prove that the intention of the parties was that the mineral owner should be at liberty to take away the whole or any part of the minerals, notwithstanding he might thereby let down the surface or any buildings thereon. Accordingly the Respondents rely on the words which immediately follow in the deed as sufficient for this purpose. Those words are, 'but without entering upon the surface of the said premises, or any part thereof, so that compensation in money be made by him or them for all damage that should be done to the erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof.'

"As by the express words of the reservation the mine-owner in working

[&]quot;As by the express words of the reservation the mine-owner in working the mines is not to enter upon the plot of land conveyed by the deed, the damage to the buildings for which compensation is to be given must be damage to the buildings caused by the removal of the minerals reserved, and therefore it follows that a right to remove all the minerals, notwith-standing the buildings above might be thereby damaged, was one of the liberties reserved by the deed. . . .

[&]quot;It was argued on the part of the Appellants, that the right to com-

The contrary opinion of the majority judges in Penman v. Jones seems to be founded on four interesting and crucial points which may be indicated and discussed as follows: (a) The court's reliance on cases involving an original "severance" of the superjacent and subjacent estates; (b) The court's confusing of the subjacent owner's legal privilege of removing surface support, etc., with the superjacent owner's right (in the sense of "legal claim") that another person shall not remove the surface support; (c) The court's reasons for refusing to treat the interest as an easement; (d) The court's explanation of the interest as an "irrevocable license." Each of these matters must here be treated with as great brevity as may be consistent with clearness:

(a) The court's reliance on cases involving an original "severance" of the superjacent and subjacent estates. The court begins its argument by quoting from a series of cases running from Jones v. Wagner³⁶ to Youghiogheny River Coal Company v. Allegheny National Bank,³⁷ the court's quotation from the latter case having already been reproduced at an earlier point in the present discussion.³⁸ All of such cases announce merely the well settled doctrine that the holder of the superjacent estate, at the moment of "severance," has, apart from grant or reservation, etc., a so-called "natural" right of surface support; or, correlatively, that the owner of the subjacent estate has immediately the duty of not causing collapse through removal of support: that is, has no privilege of causing collapse, etc. These cases, which are in entire accord with the authorities at large, would seem very difficult of application to the situation in Penman v. Jones. In that

pensation was merely an additional remedy given to the surface-owner in case his buildings were damaged, but did not give the mine-owner a right to get the minerals in such a way as to cause damage to the buildings. It seems to us, however, clear that the compensation is given for damage caused by rightful acts which the deed makes lawful, and not for damage caused by wrongful acts. The exercise of any of the excepted liberties must surely apply to rightful acts, and not to wrongful acts, because it is absurd to suppose that a liberty is reserved to do wrongful acts. If liberty is reserved to do the act complained of, that reservation, as between the parties and those claiming under them, makes the act rightful."

In Rowbotham v. Wilson, supra, the judges, both of the Exchequer Chamber and of the House of Lords deliberately and definitely characterized the interest in question as an easement. The important passages to this effect are quoted post, pp. 90-91.

^{**} Jones v. Wagner (1870) 66 Pa. 429, 434.

⁸⁷ (1905) 211 Pa. 319, 324.

⁸⁸ For the court's quotation from this case, see ante, pp. 74-75.

case the subjacent estate had already been "severed" for eighteen years; and the "right and privilege" of letting down the surface, having at the moment of "severance" been created as an integral part of the subjacent owner's aggregate of legal relations, had had a similar period of life. The transfer of the subjacent estate and its accompanying "right and privilege" was, at that moment, a matter admittedly concerning only the subjacent owner and his transferee: the superjacent owner had no power to prevent the alienation of the "right and privilege." Whatever we call the "right and privilege," its transfer along with the subjacent estate proper would be like the transfer of an existing easement, not like the creation of a new easement at the moment of severance.

Yet the majority opinion, immediately after the quotation from Youghiogheny River Coal Co. v. Allegheny National Bank, 37 continues as follows:

"In the light of the foregoing authorities, it is clear that there is nothing in the language of the deed from the Lackawanna Iron & Coal Company to the steel company, which can be regarded as indicating an intention to convey the minerals free from liability upon the part of the purchaser to support the surface in their removal. No such privilege follows from the mere conveyance of coal, machinery, fixtures, tools, etc., with the 'hereditaments and appurtenances' belonging thereto. The conveyance of 'all the estate, right, title, interest, benefit, property, claim and demand whatsoever' of the grantor, is properly referable to the subject-matter of the grant, to wit, the coal conveyed, and does not necessarily amount to a waiver of the right of the grantor to insist upon support being left for the surface."

- (b) The court's confusing of the subjacent owner's legal privilege of removing surface support, etc., with the superjacent owner's right (in the sense of legal claim) that another person shall not remove surface support, etc. Let us consider certain passages from the court's opinion in juxtaposition:
- (1) "No such privilege" [of removing surface support ("free from liability")] "follows from the mere conveyance," etc. (From above quotation.)
- (2) "The conveyance . . . is properly referable to . . . the coal conveyed and does not necessarily amount to a waiver of the right of the grantor to insist upon support being left for the surface." (From above quotation.)

- (3) "The insertion" etc. . . . "indicates an intention upon the part of the grantor not to waive the right of support as to other lots" [including superjacent lot in question]. (Later passage.)
- (4) "In the present case, whatever right" [privilege] "the coal company retained to interfere with the surface support was relinquished by it to the Scranton Trust Company" [D], etc. (Still later passage.)

This is not simply a matter of terms, as such: it is a matter of basic legal conceptions constituting the very essence of the court's reasoning. In the first and fourth passages, the court is dealing with "privilege—no-right" relations; in the second and third passages with "right—duty" relations. More specifically, in the first and fourth passages the question is whether the "privilege" of A, the Coal Company, (the correlative "no-right" being in B, the superjacent owner) has been alienated to another person—in passage "(1)" to C, the Steel Company, in passage "(4)" to D, the Trust Company. But in the second and third passages that question is treated as identical with the question whether "the grantor" of the subjacent estate has made a "waiver" of "the right" [= claim] "of support" as to B's lot. 40

As, of course, the ownership of the superjacent lot in question was in B at the time the conveyance of the subjacent estate was made, it is clear that the grantor of the subjacent lot had no "right of surface support" to waive or extinguish. It is clear that he had no such right, or claim, against himself; and it is equally clear that he had no such "naked" rights, or claims, against C (the Steel Company) or anyone else. Such grantor

²⁰ Similar serious difficulties as regards the application of fundamental legal conceptions are to be found in *Graff Furnace Co. v. Scranton Coal Company* (1914) 244 Pa. 592, 598.

⁴⁰ Elsewhere in the opinion, *Penman v. Jones* (1917) 100 Atl., at 1046, more baffling language is used:

[&]quot;The Scranton Coal Company has no direct interest in this case; but, considering that its rights might be affected by the conclusion herein reached, it presented a brief, and has been represented by counsel, who among other points raised, have contended that, if the deed from the coal company to the steel company did not pass to it the waiver of liability for failure to support the surface which had been retained by the coal company, then the deed to the trust company was also insufficient to release or reconvey that waiver to the owner of the surface. But this contention overlooks the fact that the law gives to the owner of the surface the right to subjacent support of his land in its natural condition, as a result of, and as an incident to that ownership."

had (apart from various powers and immunities not now necessary to be considered) merely the "right and privilege" of removing the surface support (and causing damage thereby), i. e., the privilege of removing support, and the rights, or claims, that all others, including B, the superjacent owner, should not interfere with his privileged acts of removing such support, etc. These rights, or claims, against interference are, of course, entirely different from any supposed right, or claim, that such surface support should not be removed. Similarly, in the "right of way" case heretofore put, with X owning the dominant tenement, Blackacre, and Y owning the servient tenement, Whiteacre, it is clear that X's privileges of crossing Whiteacre and his rights of non-interference against Y and others are entirely distinct from Y's rights, or claims, that others than X shall not trespass on Whiteacre.

Very possibly, had the learned Pennsylvania court seen that, as regards the conveyance of the subjacent estate to C (the Steel Company) it was not dealing with "the grantor's" natural "right of surface support," the decision of the case would have gone the other way. A similar suggestion may, indeed, be ventured as regards the earlier case of Graff Furnace Co. v. Scranton Coal Co., involving a somewhat different question of great importance to mining interests. In any event, it seems altogether likely that in Penman v. Jones, had there been a more careful discrimination and application of fundamental legal conceptions as above specified, the court would have realized the inapplicability of the series of cases running from Jones v. Wagner¹² to Youghiogheny River Coal Co. v. Allegheny National Bank. 13

(c) The court's reasons for refusing to treat the "right and privilege," as an easement. For the proposition that the "right and privilege" of letting down the surface was not an easement, the majority judges cite no authorities; and their own argument

⁴¹ Compare Mr. Justice Holmes, in The Path of the Law (1897) 10 HARV. L. Rev. 456, 474-475:

[&]quot;Therefore, it is well to have an accurate notion of what you mean by law, by a right, by a duty, by malice, intent, and negligence, by ownership, by possession, and so forth. I have in mind cases in which the highest courts seem to me to have floundered because they had no clear ideas on some of these themes."

^{42 (1914) 244} Pa. 592, 598.

⁴⁸ See ante, p. 74, n. 20.

is as follows, the various portions thereof being consecutively numbered and paragraphed by the present writer so as to facilitate subsequent reference:

"(1) This stipulation cannot properly be regarded as the creation of another easement appurtenant to the mineral estate, which would pass merely with its conveyance. The stipulation for the right to remove the coal without liability for injury to the surface did not have the effect of retaining in the grantor any interest outside of the coal, in the land which was being conveyed. It did not authorize the grantor to do anything upon the land of the surface owner, but its effect was merely to absolve the owner of the coal from responsibility for injurious consequences which might follow the removal of the coal. The stipulation may fairly be considered as being a license to do the desired act, that is, to let down the surface, if necessary, in order to remove the coal. It was authority to do an act affecting the land, without, however, conferring upon the licensee any estate in the land. An easement is always an estate in the land.

"(2) But 'a license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful.' Thomas v. Sorrell, Vaughan's Rep. (Eng.) 330, 351. It is distinguished in this from an easement. Jones on Easements, 64, 65. The only effect of the stipulation in this case would be to make lawful the letting down of the surface, which otherwise would be unlawful. Further

than that, it could not go.

"(3) Its force would be spent with the removal of the

coal.

"(4) The license in this case, being coupled with a grant

"the reservation of the coal, was irrevocable by the owner of the surface, and was assign-

able by the licensee.

'(5) Beyond question the coal company had power to assign to the steel company its right to remove the coal without liability for injury to the surface, but it did not see fit to do so."

In this argument the first point to emerge is that "the right and privilege" did "not authorize the grantor to do anything upon the land of the surface owner," and that it was only "authority to do an act affecting the land." The mere assembling of the two parts of this proposition would seem sufficient to show how attenuated is the objection urged. The privilege of causing the surface owner's land to collapse would seem a more substantial affirmative privilege than the privilege of walking "upon" the surface of the subjacent owner's land. For the living law affecting practical coal miners the distinction laid hold of appears, at best, purely arbitrary: it has no teleological basis in relation to the general purposes intended to be achieved by the law of easements. Still looking at the *privilege* elements alone, we may profitably compare the well-recognized easement of making disagreeable noises on one's own land so as to cause annoyance to the owner of adjacent land.⁴⁴ It is interesting, in the same

"See Sturges v. Bridgman (1879) II Ch. D. 852, 857, 858, 864. In this case the claim of easement by prescription was rejected by the court; but it is recognized in the opinions of Jessel, M. R., and Thesiger, L. J., that such an easement could be created by grant. Jessel, M. R., said, at pp. 857-858:

"There are really all sorts of difficulties in the defendant's way. In the first place the easement must be an easement 'upon, over, or from.' Now the noise in question, in my opinion, is not properly described in that way. No doubt the waves by which the sound is distributed pass over the plaintiff's land; there is no question about that. But is that an easement enjoyed 'upon, over, or from any land?' Well, I think it is not. That appears not only from the natural meaning of the words, but from authority. . . . He claims the right of setting the air or ether in motion by something or other that he does upon his own property."

Thesiger, L. J., said, at p. 864:

"The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages, or for an injunction, or both. Noise is similar to currents of air and the flow of subterranean and uncertain streams in its practical incapability of physical interruption, but it differs from them in its capability of grounding an action."

Compare also, as regards noises and odors, Elliotson v. Feetham (1835) 2 Bing. N. C. 134, 137; Bliss v. Hall (1838) 4 Bing. N. C. 183, 186; Ball v. Ray (1873) L. R. 8 Ch. App. 467, 471.

Such an easement is generally classified as an affirmative or positive one. See, e. g., Leake, Uses and Profits of Land (1888) 193:

"The transmission and diffusion of noise or noxious vapours over the servient tenement is a positive easement which cannot be effectually opposed by physical obstruction; the only mode of resisting it is by action, when it amounts to an actionable nuisance."

Compare also Salmond, Torts (4th ed., 1916) 260-261:

"A positive easement is a right to enter upon the servient land or to do some other act in relation thereto which would otherwise be illegal. A negative easement is a right that the owner of the servient land shall refrain from doing some act which he would otherwise be entitled to do—e.g., the erection of a building which would obstruct his neighbour's lights. In other words, the obligation of the owner of the servient land consists either in patiendo (i. e., in suffering the dominant owner to do an act on or in relation to the servient land) or in non faciendo (i. e., in refraining from doing some act on the servient land). In the first case the servitude is positive, and in the second negative. . . . (6) rights to do some act

"The chief recognized easements are . . . (6) rights to do some act which would otherwise amount to a nuisance to the servient land."

connection, to notice the easement (as distinguished from "natural" right) of lateral or subjacent support for a building leaning against or resting upon a structure belonging to the servient land.⁴⁵ Turning from privileges to rights (claims),

"I think it clear that any such right of support to a building, or part of a building, is an easement; and I agree with Lindley, I., and Bowen, J., that it is both scientifically and practically inaccurate to describe it as one of a merely negative kind. What is support? The force of gravity causes the superincumbent land, or building, to press downward upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, I say that, in the case alike of vertical and of lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which, by the servient tenement, is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises, not from its own pressure upon the servient tenement, but from the power of the servient tenement to resist that pressure, and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal, and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight.

the servient to sustain, the weight.

"Lord Campbell in Humphries v. Brogden referred to the servitude oneris ferendi (applied in the law of Scotland to a house divided into flats' belonging to different owners), as apt to illustrate the general law of vertical support. The servitude so denominated (ut vicinus onera vicini sustineat) in the Roman law was exclusively "urban," that is, relative to buildings, whether in town or country; and the instances of it given in the Digest refer to rights of support acquired by one proprietor for his building, or part of it, upon walls belonging to an adjoining proprietor: Inst. lib. 2, tit. 3; Dig. lib. 8, tit. 2, sects. 24, 25, 33; also tit. 5, sects. 6, 8. But, in principle, the nature of such a servitude must be the same, whether it is claimed against a building on which another structure may wholly or partly rest, or against land from which lateral or vertical support is necessary for the safety and stability of that structure.

"The breesure of the dominant tenemat in the case of expects in the safety and stability of that structure.

"The pressure of the dominant tenement, in the case of support, is upon the soil of another man's land, and I can see no material difference between this and 'something positive done or used in the soil of another man's land."

Compare to similar effect, Lord Watson, at p. 831.

The above quotation seems, for present purposes, not without significance and interest even if one must think that there is in Lord Selborne's opinion an unfortunate failure to discriminate between "right" and "privilege" elements in the various easements that he discusses. The privilege of pressure against the neighboring soil would doubtless exist as a "natural" or ordinary privilege quite independently of any easement proper.

See, to this effect, Mr. Justice Lindley and Mr. Justice Bowen, S. C., L. R. 6 App. Cas. 740, 764, 784. As Lord Bowen says, at p. 784:

"There is certainly no case which decides that this pressure gives rise to a right of action on the neighbour's part, and practical reasons of

⁴⁵ Compare Lord Chancellor Selborne, in Dalton v. Angus (1881) L. R. 6 App. Cas. 740, 793-795:

the court apparently overlooks, and certainly ignores, the fact that the subjacent owner was, at the time of severance, granted, in express terms, rights (claims) as well as privileges—the "right and privilege," etc. That is, as in the case of a right of way, the subjacent owner would have rights, or claims, that the superjacent owner and third parties should refrain from disturbance of the exercise of his privileges of doing that which might cause the collapse of the superjacent owner's land. If it were not for these "right (claim)" elements in the subjacent owner's interest, very possibly the superjacent owner might, through operations conducted partly on his own land, prevent the subjacent owner's removal of surface support. These rights, or claims, of the subjacent owner correspond, pro tanto, to the negative rights constituting the chief elements in the ordinary easement of light.

A second point urged in the Pennsylvania court's argument is that "its force" [that is the force of the stipulation for the "right and privilege" of letting down the surface] "would be spent with the removal of the coal." The suggestion seems to be that the indefinite duration of the "right and privilege" tends to show that no "estate" and hence no "easement" was created in favor of the subjacent owner. But it is clear that even an easement may exist as a freehold interest of uncertain duration, 46

convenience may be adduced against such a surmise, although it might perhaps be argued that an action ought on principle to lie against, and an injunction be obtainable to restrain, the man who is actually availing himself of his neighbour's soil and using it in a manner which in twenty years will be evidence of the acquisition of a right so to do."

"See Hewlins v. Shippam (1826) 5 B. & C. 221, 228, per Bayley, B.:

"The declaration claimed the right as a license and authority granted to the plaintiff's landlords, their heirs and assigns, to make the drain, and have the foul water pass from their scullery through the drain across the defendant's yard. One of the counts claimed it indefinitely, without fixing any limits; others restricted it either to the time the defendant should continue possessed of his yard or house, or so long as it should be requisite for the convenient occupation of the plaintiff's house; some stated, as part of the consideration that defendant's landlord should do some repairs to the defendant's premises; others did not. Now, what is the interest these counts stated? A freehold interest."

An easement may even exist merely as an interest "for years." As said by Strong, J., in *Huff v. McCauley* (1866) 53 Pa. St. 206, 210:

"All easements and profits a prendre may be held for life, in fee, or for years."

See, in accord, Alderson, B., in Wood v. Leadbitter (1845) 13 M. & W. 838, 843.

so that it is difficult to see the force of the suggested objection. As the "right and privilege" was reserved to the owner of the subjacent estate, "its successors and assigns," there was clearly an attempt to create an interest in fee; and the uncertainty of possible duration would seem immaterial.

Neither of the two points directly urged in *Penman v. Jones* to show that the "right and privilege" in question could not be an easement is supported in any case cited by the Pennsylvania court; and such authorities as have been observed by the present writer are opposed in reasoning or in decision.

The leading English case is Rowbotham v. Wilson;⁴⁷ and the following passages are instructive:

Bramwell, B.: "The first question is, Can there be a right to take the mines and remove all support from the surface? . . . I cannot see how, if there may be a grant of mines, and of the right to enter, sink shafts, and work, there may not be such a grant as that contended for here. Nor can I see how, if a grant of the right of unobstructed light and air, or of support of the soil, to an adjoining owner, would be good, a grant of such a right as claimed here would not be. . . . But another objection is taken. It is said that all easements suppose a right exercised over the servient tenement: even in the case of lights it is the passage of the rays of light and of air; and in the support of the neighbouring soil it is its continuance in its place; and that the claim of the defendant here is not to do something on the plaintiff's land, but merely not to be sued for what he does on his own. It is no answer to this objection to say that it is exceedingly subtle. It certainly would be strange if such a right could not be given with a grant of an estate in the mines, but could to a licensee; and yet to the latter the objection would not apply. And I think the true answer to it (assuming the defendant claims an easement) is, that the rules which are applicable to the owners adjoining vertically, which is the natural order, are not applicable where there is an unusual order of things, viz. a division of horizontal ownership. I think, therefore, such a right may exist. . . ."

Martin, B.: "In the present case, the Commissioners

Martin, B.: "In the present case, the Commissioners and Samuel Pears, in the same instrument by which the former executed their powers, the latter under his hand and seal, for a valuable consideration to himself, declared that the mines below the land allotted to him should belong to Henry Howlette in fee simple, and his own lands be subject to the *incident* or *quality* that the

^{47 (1857) 8} E. & B. 123; affirmed 8 H. L. Cas. 348.

owner of the *mines* should not be responsible for any injury to the surface consequent upon the working of them. In my opinion, the incident was lawfully created, and *attached* to the *estate* of Samuel Pears; and that he and *all persons claiming under him* took the estate subject to it."

Williams, J.: "But it cannot, I think, be doubted that, if an owner of land with subjacent mines were to grant away the mines together with the power of winning the minerals, without regard to any injury done thereby to the surface, such a grant would be good, and would bind the inheritance, and his estate in the surface would pass to his assigns abridged, to that extent, of the right of support from the minerals, whatever the nature of that right may be. Hence it seems to follow that it is competent for the owner of the surface of land effectually to curtail by grant in favour of the owner of the subjacent mines, the right to support therefrom."

mines, the right to support therefrom."

Lord Wensleydale: "And supposing this power is not to be considered as given by the act of the Commissioners, but only by the contract of the parties, Pears' covenant, he being seised in fee by virtue of the award, would certainly operate as a grant, by him, to Howlette (who, at the same instant, took the fee simple in the mines), of the power to get the minerals, and to disturb the surface of his own land for that purpose by winning the mines below from some adjoining land or bed of coal.

"I do not feel any doubt that this was the proper subject of a grant, as it affected the land of the grantor; it was a grant of the right to disturb the soil from below, and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a way over it; and it was admitted, at your Lordships' bar, that there is no authority to the contrary."

In Ryckman v. Gillis, 48 a New York case concerning lateral support, Johnson, C., who dissented only on points not now involved, expressed views in accord with the English cases:

"But if the right to have support from adjoining land be not an easement, then what may be called the antagonistic right of removing your own soil so as to diminish the support to which the adjoining owner was entitled, is an easement affecting his land in favor of yours, and making his land the servient tenement in that regard, and subject to the easement of being deprived of its natural support. That such an easement may be acquired by grant or agreement of the parties is obvious, and has been

^{4 (1874) 57} N. Y. 68, 78.

settled by repeated adjudications between surface owners and mine owners underneath. Rowbotham v. Wilson and Smart v. Morton are instances establishing further that the party claiming the ordinary rule not to be applicable must establish its renunciation by the other party."

(d) The court's explanation of the "right and privilege" of letting down the surface as an "irrevocable license." The limitations of space forbid here any attempt to discuss comprehensively and thoroughly the numerous and troublesome classes of cases commonly associated with the chameleon-hued term, "license." Like the terms "res gestae" and "estoppel," "license" may be said to be a word of convenient and seductive obscurity; and the task of dealing at all adequately with the intricate and confused subject would, in and of itself, require a long article. In this place, therefore, only a few suggestions may be ventured—with particular reference, of course, to paragraphs "2" and "4" of the above-quoted argument from Penman v. Jones.

In spite of such ambiguities as attach to the term "license," it would seem that the court's effort to fit that legal category to the "right and privilege" of letting down the superjacent land encounters not only the *supposed* objections to its being considered an easement,⁵⁰ but also several additional ones.

For more general consideration of these difficulties, see (1913) 23 YALE LAW JOURNAL, 16, 20, 44; and compare (1917) 26 YALE LAW JOURNAL, 710, 725, n. 34; 755, n. 90.

⁵⁰ In directly negativing the contention that the "right and privilege" constituted an easement, the court said that the "stipulation" did "not authorize the grantor to do anything *upon* the land of the surface owner," and that it was only "authority to do an act affecting the land." If any distinction of this kind is to be pressed, has the category of license any greater chance?

A typical definition is to be found in Tiffany, Real Property (1903) 678:

A so-called "license" resulting, when "executed," in the extinguishment

[&]quot;Many of the difficulties would be removed if effort were made to confine the term "license" to that group of operative facts which constitute a "mere permission" to do or cause, or not to do or cause, a given thing. Instead of this, the term is rapidly shifted about by lawyers and courts,—usually even by the more careful writers,—so as to cover not only more complex groups of operative facts, but also the jural relations flowing either from a "mere permission" or from such more complex sets of facts. See, e. g., Salmond, Torts (4th ed., 1916) sec. 76 (compare the usage in paragraphs "1" and "2").

[&]quot;A license given to a person to do something on the land of another should be carefully distinguished from an easement. A license is a mere permission to do something on another's land."

Quoting the well-known dictum of Vaughan, C. J., in Thomas v. Sorrell, the Pennsylvania court says, inter alia: "An easement is always an estate in the land. But 'a license properly passeth no interest, nor alters or transfers property in anything," etc.,—the further point being that the "right and privilege" of letting down the surface is a "license," hence not an "interest," and hence also not an easement. It is clear, however, that in the passage quoted Chief Justice Vaughan was referring exclusively to a simple case not at all like that of Penman v. Jones. This is shown impressively by the examples which the learned chief justice himself gives immediately after the words quoted by the Pennsylvania court:

"A dispensation or licence properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful which without it had been unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions, which without licence, had been unlawful.

"But a licence to hunt in a man's park, and carry away the deer kill'd to his own use; to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree; but as to the carrying away of the deer kill'd, and tree cut down, they are grants.

"So to licence a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood and warming him, they are licences; but it is consequent necessarily to those actions that my property be destroyed in the meat eaten, and in the wood burnt, so as in some cases by consequent and not directly, and as its effect, a dispensation or licence may destroy and alter the property."

of an existing easement is, of course, to be distinguished. Such a "license," for example, when given by the owner of an easement of light, extinguishes, before execution, pro tanto, and, after execution, in toto, the rights or claims of the easement owner, so far as the particular obstruction is concerned. But such extinguishment amounts simply to a new creation ("restoration") of the former "natural" privilege or privileges of the owner of the servient tenement. See Winter v. Brockwell (1807) 8 East, 308 (as explained by Bayley, B., in Hewlins v. Shippam (1826) 5 B. & C. 221, 233); Morse v. Copeland (1854, Mass.) 2 Gray, 302.

It is obvious, moreover, that such "natural" privileges, on being thus "restored," would pass, even without express mention, to any subsequent grantee of the estate of which they are constituent elements.

^{61 (1672)} Vaughan, 330, 351.

Suppose that R says to S, "I give you permission to walk across my land, Longacre." This language, in and of itself, purports merely to create in S the privilege, or, more strictly, series of privileges, of walking across R's land. ⁵² In correlative terms, R's rights that S stay off are extinguished, and no-rights substituted. The important point is that the permission constitutes a grant to S of privileges alone: S is not granted any accompanying rights (or claims) that R or other persons shall not interfere with S's entering on the land, Longacre, and walking across. If, therefore, S succeeds in entering on the land, no rights (or claims) of R are violated; but, if, on the other hand, R closes the gate in the high stone wall, or bars the one and only path midway, no rights (or claims) of S are violated; ⁵³ and so also if some third party locks the gate or bars the path half way across Longacre. ⁵⁴ Further than that, it is assumed,

In Hill v. Tupper, supra, no doubt the deed of grant was intended to create a substantial interest—an "easement in gross"; and the explanation of the actual decision lies in the fact that, so far as pure "legal" doctrine was concerned, such an interest in gross could not be created in England. See Ackroyd v. Smith (1850) 10 C. B. 164. Compare a very recent case, Sports & General Press Agency v. "Our Dogs" Publishing Co. (1916) 2 K. B. 880; affd. (1917) 61 S. J. (C. A.) 299.

In Wood v. Leadbitter, supra, the intentions of the parties were evidently similar,—that is the unsealed ticket to the race course was intended to grant both "irrevocable" privileges and "irrevocable" rights; but that purpose failed both because, even if the intended interest were permissible though not "coupled with a grant," the common law would require a deed for the creation of such an "incorporeal" interest (even "for years"), and because such an interest was not deemed a permissible one when not coupled with a grant such as that involved in a profit or such as that exemplified by Wood v. Manley (1839) II A. & E. 34 (see post, p. 97, n. 58a, and p. 100). It would seem, also, that the plaintiff's pleading was faulty, his replication of "leave and license" as of the time of the battery not being sustained by the facts.

For the later English authorities concerning an unsealed written permission given for consideration and expressed to be for a continuous period, definite or indefinite, see the important case of *Hurst v. Pictures Co.*, *Ltd.* [1915] I. K. B. I, involving a theatre ticket and depending on the "con-

²² Of course the creation of such privilege or privileges amounts, in other words, to an extinguishment of S's duty or duties to stay off R's land.

⁵³ See, for a full explanation of this matter (1913) 23 YALE LAW JOURNAL, 16, 35 seq.

⁵⁴ Compare Wood v. Leadbitter (1845) 13 M. & W. 837; Hill v. Tupper (1863) 2 H. & C. 121, also cases cited in comment entitled, Right of Ticketholder to Recover in Tort (1917) 26 YALE LAW JOURNAL, 395. But cf. Case v. Webber (1850) 2 Ind. 108.

in accordance with the actually existing law, that R, instead of exercising his physical power of closing the gate or barring the path, might exercise his legal power of extinguishing S's series of privileges: that is, R might simply say to S, "I withdraw my permission."

What shall we say of this "uncompanioned" "privilege-noright" relation (or series of such relations) thus vested in S subject to the liability of being extinguished by R's exercise of his legal power of "revocation?" Was Chief Justice Vaughan strictly correct in asserting, in effect, that a mere privilege of this kind is not an "interest" or "property" in land? Very likely, as Thomas v. Sorrell was decided in 1672, some years before the Statute of Frauds, he put it so on the assumption that, if it were recognized as an "interest" in land, a deed would be requisite to create such a privilege, just as in the usual case of "incorporeal" interests. 55 Possibly also, as is so often the case even at the present day, he failed to see that a "privilege-no-right" relation is as true a legal relation and advantage as is a "right duty" relation.58

But, whatever his reasons, it is submitted that his statement is, strictly and analytically considered, erroneous; and that it has had its full measure of influence in confusing the vast number of later judicial discussions and decisions relating to the subject. The "privilege-no-right" relation of S or, a fortiori, a series of such relations seems indeed to be an "interest" in land, although it be unaccompanied by rights (or claims) and even though S be under a liability of having his privilege or privileges divested as already indicated. If, for example, M were a judgment debtor and his land, Redacre, were about to be sold by the sheriff, M's privileges concerning Redacre would be substantial elements in his total ownership or interest, even in spite of the liability of their being divested by the exercise of the sheriff's power under the writ of execution.

If all this be so, it would seem that the more accurate and satisfactory way to meet the supposed objection as to a deed

flict" of substantive "legal" and "equitable" rules and the determining of their "net effect" under the Judicature Acts.

For explanation of the latter, see the writer's articles. The Relations between Equity and Law (1913) II MICH. L. REV. 537; and The Conflict of Equity and Law (1917) 26 YALE LAW JOURNAL, 767, 770.

^{**} See Hewlins v. Shippam (1826) 5 B. & C. 221, 229; Wood v. Leadbitter (1845) 13 M. & W. 838. See also preceding note.

⁵⁶ See ante, p. 71, notes 12 and 13.

is to recognize that the creation of a very limited interest such as R gave to S was never within the contemplation of the rule that an "incorporeal" interest in land must be created by deed. Similarly, after the Statute of Frauds, the privilege or series of privileges over Longacre, even though frankly conceded to be an "interest," might well be held not within the intention of Section 1, requiring a writing for the creation of interests in land.⁵⁷

But it is necessary to hurry along to the next step in the Pennsylvania court's reasoning. After quoting Chief Justice Vaughan's dictum⁵⁸ concerning a mere temporary and revocable privilege in order to show that the "right and privilege" of letting down the surface was not an "interest" or "estate," the learned court proceeds to assert that "the license [in Penman v. Jones], being coupled with a grant of the coal, or rather with the reservation of the coal, was irrevocable by the owner of the surface, and was assignable by the licensee." That is, the assumption is made,—erroneously, it would seem,—that Chief Justice Vaughan's language applies not only to a temporary and revocable privilege, but also to a permanent and irrevocable (inextinguishable) privilege or series of privileges as to letting

"I shall not undertake to reconcile these various cases. It is evident the subject has been understood very differently by different judges. But in this all agree, that according to the Statute of Frauds, any permanent interest in the land itself cannot be transferred, except by writing. Much of the discrepancy may have arisen from the different ideas attached to the word licence." Savage, C. J., in Mumford v. Whitney (1836) 15 Wend. 380, 392.

This passage, in spite of the tendency to use language similar to that of Vaughan, C. J., in *Thomas v. Sorrell*, shows that the real contrast is that of a *permanent* interest as opposed to a *temporary* and "revocable" one, rather than that of an interest as opposed to none at all.

Compare also Chancellor Kent, in 3 Com. 452:

⁵⁷ In support of these suggestions, the following utterance of an able New York judge may be noted:

[&]quot;A claim for an easement must be founded upon grant, by deed or writing, or upon prescription which presupposes one, for it is a permanent interest in another's land, with a right, at all times, to enter and enjoy it; but a license is an authority to do a particular act, or a series of acts upon another's land, without possessing any estate therein. It is founded in personal confidence, and is not assignable. This distinction between a privilege or easement carrying an interest in land, and requiring a writing within the statute of frauds to support it, and a licence which may be by parol, is quite subtle, and it becomes difficult, in some of the cases, to discern a substantial difference between them.

[&]quot;Such a parol license to enjoy a beneficial privilege is not an interest in land within the Statute of Frauds."

⁵⁸ See ante, p. 93.

down the surface land. Such an "irrevocable" continuing privilege (or series of privileges) would seem clearly to be an interest in land—so substantial an interest as to require a deed at common law, and a writing under Section I of the Statute of Frauds. This would seem to be true, even if the "right and privilege" in *Penman v. Jones* were conceded to consist merely of a continuing series of privileges; and, of course, it becomes increasingly difficult to deny that the "right and privilege" is an "interest" when we take into consideration the accompanying legal rights (claims) against interference either by the superjacent owner or by third parties.

Passing this point by, however, it is interesting to notice that the Pennsylvania court regards the "right and privilege" as irrevocable because "coupled with a grant [reservation] of the coal." Whatever plausibility this statement has at first glance because apparently fitting in with certain well-known classes of so-called "licenses coupled with grants," does it not lose its persuasive force when we notice that the supposed license would be coupled, in Penman v. Jones, not with the grant of a power concerning another's land as in the case of profits, or with the grant of a movable on another's land as in a case like Wood v. Manley.59 but with the grant of the whole mineral estate, as such, to the supposed holder of the "license?" That is, it would be a license "coupled exclusively with" the grant of the licensee's own estate. The court cites no case either to explain or to exemplify its conception of a "license coupled with a grant"; and such cases as have been observed are of a very different character.

The first important class of cases consists of those relating to profits à prendre. Thus, a profit consisting of the so-called "right" to dig for and carry away minerals involves a "grant" of an aggregate of jural relations including, inter alia, the legal powers of vesting ownership of the severed parts of the servient

Sea See Alderson, B., in Wood v. Leadbitter (1845) 13 M. & W., at 843, 852, 854.

^{59 (1839) 11} A. & E. 34.

[∞] Compare the somewhat analogous *legal powers* of a tenant for life without impeachment for waste.

As said in Kekewich v. Marker (1851) 3 McN. & G. 311, 333:

[&]quot;We then find that the grantor has given the ordinary profits to the tenant for life, with exemption from waste, or a license to appropriate a portion of the inheritance, subject to the prior right and discretion of the trustees for raising portions. It was further insisted that the tenant for life is the owner of the timber, but that is quite out of the question; he has nothing but a power, though when he has felled the timber under

land in the profit owner—legal powers, that is, to alter pro tanto the jural relations of the servient landowner and to create aggregates of jural relations concerning the (severed) movables in the owner of the profit.⁶¹ In such grants there are also included

the power, it would become a chattel and he would be owner of it. We are now, however, discussing the relative rights as to standing timber, and the case cannot therefore be argued, or the claim to fell the timber supported, upon any existing property in the timber as owner."

Compare also McPherson v. Temiskaming Lumber Co., Ltd. (1913) A. C. 145, 152; and (1913) 23 YALE LAW JOURNAL 16, 42, n. 60.

³¹ Doe v. Wood (1819) 2 B. & Ald. 738; Muskett v. Hill (1839) 5 Bing. N. C. 706; see Clement v. Youngman (1861) 40 Pa. 341, 344; Ryckman v. Gillis (1874) 57 N. Y. 68; and cf. Chartiers Block Coal Co. v. Mellon (1893) 152 Pa. 286, 296.

In Doe v. Wood, supra, Abbott, C. J., said:

"The purport of the granting part of this indenture, is to grant, for the term therein mentioned, a liberty, license, power, and authority, to dig, work, mine, and search for metals and minerals only, that should within that term be there found, to the use of the grantee, his partners, etc.; and it gives also further powers for the more effectual exercise of the main liberty granted . . . its words import a grant of such parts thereof only as should, upon the licence and power given to search and get, be found within the described limits, which is nothing more than the grant of a licence to search and get (irrevocable, indeed, on account of its carrying an interest) with a grant of such of the ore only as should be found and got. . . . If so, the grantee had no estate or property in the land itself, or of any particular portion thereof, or in any part of the ore, metals, or minerals, ungot therein; but he had a right of property only as to such part thereof as upon the liberties granted to him should be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it. . . These expressions . . . can . . have no further effort than to shew that the grantor supposed that the soil or minerals, and not a mere liberty or privilege, passed by his deed."

Profits involving wild game and fish differ in one particular. They involve legal powers to acquire title ("qualified" or "absolute") "by reducing the game to possession." But the exercise of these powers does not affect the landowner in precisely the same way; for the latter himself does not have ordinary ownership of the game, but merely legal powers of acquiring title by reducing the game to possession,—these powers being accompanied, of course, by various rights, privileges and immunities. Blades v. Higgs (1865) II H. L. CAS. 621.

For profits of this character, compare Wickham v. Hawker (1840) 7 M. & W. 62; Fitzgerald v. Firbank [1897] 2 Ch. 96; Bingham v. Salene (1887) 15 Or. 208, 212, 14 Pac. 523.

For a novel and interesting attempt to apply the idea of "a license coupled with a grant" to the case of a theatre ticket—a license to enter and remain coupled with the "grant" of a privilege (not power as in the case of a profit), see the dictum of Buckley, L. J., in Hurst v. Picture Theaters, Ltd. [1915] I K. B. I, 7: "Let me for a moment discuss this present case upon the footing that Wood v. Leadbitter stands as good law

the privileges of physically severing or causing to be severed the various mineral portions from the corpus of the land; various rights (or claims) against interference with or disturbance of the activities and advantages connected with the exercise of such privileges and powers-rights (or claims) against third parties as well as against the grantor of the profit;62 also various immunities similar to those that any owner of property ordinarily has.63 As regards such profits, the aggregate of jural relations is not, in any ordinary case, subject to a power of "revocation" or extinguishment by the grantor. This is true of the continuing or repetitive privileges involved as well as of the other elements. Hence the frequent loose description of the situation as involving an "irrevocable license" coupled with a grant. But the term license is really used here most unfortunately,—as that term, for the sake of clearness of thought and exactness of expression, should be reserved for the "mere permission" under consideration by Chief Justice Vaughan in Thomas v. Sorrell-that is, in the first paragraph of the quotation above given.64

at this date. I am going to say presently that to my mind it does not, but suppose it does stand as good law at this date. What is the grant in this case? . . . . That which was granted to him was the right [privilege] to enjoy looking at a spectacle, to attend a performance from its beginning to its end. That which was called the license, the right [privilege] to go upon the premises, was only something granted to him for the purpose of enabling him to have that which had been granted to him, namely, the right [privilege] to see. He could not see the performance unless he went into the building . . . So that here there was a license coupled with a grant. If so, Wood v. Leadbitter does not stand in the way at all. A license coupled with a grant is not revocable; Wood v. Leadbitter affirmed as much."

Sed qu.: was there not, in Wood v. Leadbitter an attempted grant of the privilege of seeing the races?

⁶² Fitzgerald v. Firbank [1897] 2 Ch. 96.

68 See ante, p. 69, n. 8.

^{e4} To be compared with cases of profits à prendre are those referred to in Tiffany, Real Property (1903) 683:

"So, in some states, an oral sale of growing trees is insufficient to pass them as such, and is regarded as giving the vendee merely a license or permission to cut the trees, which is revocable until the trees are cut, but, after they are cut, the sale takes effect upon them in their chattel character, and the vendee then, having an interest in the trees, has an irrevocable license to enter on the land for their removal."

See, for this doctrine, Giles v. Simonds (1860, Mass.) 15 Gray, 441; United Soc. v. Brooks (1888) 145 Mass. 410.

Tiffany's characterization of these cases seems hardly adequate, as it fails to bring out the "revocable" legal powers of acquiring title to the

A second class of authorities involving so-called "licenses coupled with a grant" consists of cases like Wood v. Manley. This leading case established the rule that the sale of a movable located on the vendor's land, coupled with permission to enter on the land for the purpose of removal, results in an "irrevocable" privilege (frequently called "license") of entering on the land and removing the object purchased. It would seem clear that in this case also there are accompanying rights (or claims) against interference. It is equally clear that the total aggregate (rights, privileges, powers, and immunities) should be recognized as an interest in land, even though not within the general common law requirement of a deed or the requirement of Section 1 of the Statute of Frauds. Similar considerations are applicable to cases involving permission to place movables upon another's land and to remove them at some subsequent time. 66

In leaving this part of the discussion, the suggestion may be ventured that an examination of the court's application of the category of license tends only to confirm the conclusion, already reached on independent grounds, that the "right and privilege" in *Penman v. Jones* should more properly have been classified as an easement appurtenant, with the necessary inference that such "right and privilege" passed with the subjacent estate, even apart from the special language about to be considered.

(2) DID THE "RIGHT AND PRIVILEGE" PASS UNDER THE LANGUAGE OF THE CONVEYANCE OF 1891, INDEPENDENTLY OF ITS BEING AN EASEMENT?

The court concedes that the interest, whatever it may be called, is freely alienable, along with the subjacent estate proper. Earlier Pennsylvania cases, already noticed in detail, leave no room for doubt as to this point. Unless, therefore, there is something peculiar about this sort of interest so as to require unusually specific terms of conveyance, it would seem that the words "all the estate, right, title, interest, benefit, property,

severed trees by exercising the "revocable" legal privileges of physically severing the trees.

The cases put by Vaughan, C. J., in the second paragraph of the quotation given in the text seem to be similar to those now under consideration. The "grant" that he refers to is, in reality, the grant of legal powers, rather than of ownership of the severed things as such.

^{65 (1839) 11} A. & E., 34.

⁰⁰ Giles v. Simonds (1860, Mass.) 15 Gray, 441; cf. the explanation given in Browne, St. Frauds (5th ed., 1895) sec. 27; also the similar explanation of Alderson, B., in Wood v. Leadbitter (1845) 13 M. & W., at 853.

claim and demand whatsoever" together with "all and singular . . . the appurtenances . . . belonging to the said property or in anywise appertaining to the same" were ample to cover the "right and privilege" of letting down the surface. Apart from absolutely specific terms, it would be difficult to find more comprehensive language. It is true that in Stilley v. Buffalo Co.⁶⁷ and in Kirwin v. Del., L. & W. R. R. Co.⁶⁸ the terms employed were quite specific; but, as will be remembered, no reference to this point was made in either of these cases, and, instead, the court's reasoning proceeded along very broad lines as to the intentions of the original parties as indicated by their instruments of conveyance and the surrounding circumstances.

It would seem unnecessary, however, to resort to these earlier cases to show the adequacy of such inclusive generic terms as have just been quoted from the conveyance of 1891; for does not the very case of *Penman v. Jones* afford all-sufficient authority?

(3) Was the court consistent in holding, in spite of its negative answer to the second question, that the language in the conveyance from A to D was sufficient to pass the "right and privilege" to D?

This question is clearly enough suggested by the facts of Penman v. Jones, although the limited purposes of this article do not demand an extended discussion thereof or, much less, any positive answer. The important words in the conveyance from A to D were, it may be recalled, "all and every the real estate or interest of any kind or nature in real estate, lands, tenements or hereditaments," etc. These words, in and of themselves, seem less comprehensive and intensive than those in the conveyance from A to C. The court's reasons for denying natural force and effect to the words of the "A-C" conveyance and attributing such force and effect to the weaker words of the "A-D" conveyance are hardly convincing. Those reasons are given chiefly in the language already quoted from the majority opinion; and, as will be remembered, they seem to turn largely, if not entirely, on an unfortunate identification of the subjacent owner's privilege of letting down the surface with a superjacent owner's right (or claim) that the surface should not be let down. 69

^{(1912) 234} Pa. 492, 497. For full consideration of this case, see ante,

p. 78.

** (1915) 249 Pa. 98, 101. For full consideration of this case, see ante, p. 78.

^{*} See ante, p. 83, and p. 84, n. 40.

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The Broadened Policy of the Journal.—One year ago the Yale Law Journal began its second quarter century. At that time it found itself in the midst of a rapidly broadening development in the School of Law. It had been the long established tradition of the school that there was a real and worthy science of jurisprudence and that law must be studied and taught historically, analytically, and comparatively. Especially since the early 'seventies, when the graduate curriculum was definitely organized by Professor Simeon E. Baldwin, the legal systems of Rome and of modern Europe had been continually studied, legal concepts had been analyzed, and the history of legal doctrines and institutions had been investigated. Increased emphasis on these lines of work has, especially in recent years, had an important influence, as regards spirit, method, and content, on the undergraduate as well as graduate courses.

Of necessity, this progress has been reflected in the pages of the JOURNAL. The appreciation received from the alumni of the school and from legal scholars and practitioners at large encourages still further improvement and development. The present volume will endeavor to foster the science of jurisprudence, to bring home to its readers something of the deeper phases of law and the factors in its growth, to take notice of such defects as may appear in our own system of law as it is actually being applied, and to draw upon other legal systems—past and present—for the means of improvement by legislation and judicial action.

The practice of the law must be recognized as social service and not as a mere means of livelihood. The public is already demanding of the legal profession more than it has been receiving. Soon it will refuse longer to endure the lawyer of no insight into social needs and of smug provincial satisfaction with things as they are. Even the most ignorant man now knows that he is a citizen of the world and not merely of a province. Now is the time for leadership possessing foresight and capacity for reorganization. He only can look far into the future who has seen far into the past. He only can reorganize wisely whose industry has mastered the organizations of others. It is even now the duty of the legal profession—even while our country is in the throes of a war whose end we cannot see but whose successful end we shall achieve—to prepare for a scientific reorganization.

No new or sudden development is contemplated; but earnest effort will be made to publish articles relating to international and comparative law, legislation foreign and domestic, and every aspect of jurisprudence. Doubtless this will mean an increase in the size of each number published; for the JOURNAL will not abate one jot in its efforts to cover the field it has covered in the past, to discuss topics in the traditional branches of our American law, to give a critical review of recent decisions in the courts. Indeed, it is hoped to increase and improve these discussions and to bring about a larger perspective, a greater power of analysis and a wiser criticism because of the broader undertakings already indicated.

The JOURNAL recognizes that legal system is not an end in itself and that jurisprudence is but a sickly plant when cultivated only by Professor Dryasdust. Our sole interest is in the law as it is applied by our courts, as it is made by our legislatures, and as it is a living force among our people. But the understanding of the law in these practical senses requires the deeper investi-

gation and the wider outlook. This fact must be brought home to every practicing lawyer and to every law student. It is believed, moreover, that this can be done most effectively, not by publishing an additional review to be devoted exclusively to the broader lines of legal thought and development, but, by sending forth a well-balanced periodical that participates in all lines of legal research, publishing the results of careful investigation in all branches of legal theory and legal practice. To this end the Journal is dedicated; and it is hoped that the present volume may have some modest degree of success in attaining it.

THE LAW SCHOOL.—The JOURNAL records with satisfaction the addition of four new professors to the Law School Faculty. One of the four, Professor Edmund M. Morgan, formerly of the University of Minnesota faculty, has not yet assumed his duties here, having been given leave of absence to perform war service. He has received a commission as Judge Advocate, with the rank of Major, in the Officers Reserve Corps and has been detailed for service in Washington. On account of Professor Morgan's absence the course in Court Practice which he was to inaugurate will not be given this year.

The three other new professors have taken up their work at Yale. Professor Ernest G. Lorenzen, also called from the University of Minnesota, is to give courses in Sales, Damages, Roman Law and Modern Developments, and the Comparative Conflict of Laws.

Professor Henry W. Dunn, formerly Dean of the University of Iowa Law School, is to give courses in Property I, Property III and Office Practice.

Professor Edwin M. Borchard, formerly Law Librarian of Congress and an Assistant Solicitor of the Department of State, is to give courses in Property II, Administrative Law and International Law. He also has charge of the Law Library.

Professor Wurts is to be away during the coming year on a sabbatical leave of absence.

The registration of students this year is almost exactly fifty per cent. of last year's enrollment.

### THE RIGHT OF ALIEN ENEMIES TO SUE IN OUR COURTS

The question of the right of "alien enemies" to sue in municipal courts, which has frequently, since the outbreak of the war, been presented to the English courts, has recently come up for decision in this country. Posselt v. D'Espard (1917, N. J. Ch.) 100 Atl. 893.* Much of the confusion in which the general question has been left by the courts in England and in this country is due to the loose way in which the term "alien enemy" has been used. The connotation of the term varies with the circumstances to which it is applied. With reference to naturalization, it signifies a person having the nationality of an enemy country.¹ With reference to suits for the recovery of property or money damages, it signifies, in the present state of Anglo-American law, a person resident in the territory of the enemy country or adhering to the enemy. This is made apparent by the purpose of the rule, inaccurately expressed, that "alien enemies cannot sue in the courts."

The rigorous disabilities imposed upon all aliens by the early English law extended to their suits in court.² The privileges conferred upon alien merchants in general ameliorated the harshness of the law, and the alien friend, as distinguished from the alien enemy (subject of an enemy state), was allowed to maintain personal actions. That this right to sue was extended as an incident to the right to trade is shown by Coke's commentary on Littleton:

"For an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personall actions; but he cannot maintaine either real or mixt actions."

When we recall that, with the development of international law, England adopted the rule that trading with the "enemy" was prohibited during war, and the further rule that "enemy" character for purposes of trade is determined not by nationality but by "trade domicil" or (in the case of individuals) by voluntary residence in the enemy country, the reason for the rule

^{*} For complete statement of the facts see page 128, infra.

¹ In re Cimonian (1915, Ont. S. C.), 23 Dom. L. R. 363.

² I Pollock & Maitland, History of English Law, 461.

^{*} Co. Litt. (1st Am. ed.), 129 b.

⁴2 Halleck, Int. Law (4th ed.), 143 et seq. Trotter, The Law of Contract during War (London, 1914), Pt. I, sec. 9; British Trading with the Enemy Act, 1914, 4 and 5 Geo. 5, ch. 87, and Proclamation No. 2, Sept. 9, 1914, and Amendment October 8, 1914. U. S. Trading with the Enemy Act of Oct. 6, 1917, sec. 3 (a). Horlock v. Beal [1916] 1 A. C. 486.

⁵ The Pizarro (1817, U. S.), 2 Wheat. 227, 246; McConnell v. Hector (1802, Eng. C. P.), 3 B. & P. 113; Janson v. Driefontein Cons. Mines [1902] A. C. 484, 505. Ingle v. Mannheim Ins. Co. [1915] 1 K. B. 227.

prohibiting "alien enemies" from suing becomes clearer. The right to sue is in aid of the right to trade, and the prohibitions are, in the main, parallel. The prohibition to trade with any person, firm or corporation resident or doing business in the enemy territory is founded on the principle of public policy "which forbids the doing of any act which will be or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money or goods or other resources available to individuals in the enemy state."

As a corollary to the above rules, it would seem that there should be no prohibition against suit where there is no prohibition to trade, or where the alien is permitted to continue to reside unmolested. And so, indeed, has the law developed. The state's power of expulsion of subjects of the enemy state has not been frequently exercised in modern times,⁷ and in England and the United States, the modern practice, confirmed by treaty,⁸ has been to permit peaceable subjects of the enemy to remain, either with express or implied license; a practice which has introduced into the law an exception to the usual procedural disability of the "alien enemy" in favor of those permitted to remain sub protectione domini regis.⁹

An examination, in the light of these principles, of the leading cases in which "alien enemies" were non-suited as plaintiffs, discloses that in many of them the alien enemy was a non-resident "alien enemy," generally resident in the enemy state. 10 These are "alien enemies," strictly speaking. In others, the

² Westlake, Int. Law, 140; 2 Oppenheim, Int. Law, sec. 88, 90; Laurent (Gt. Brit.) v. United States, Feb. 8, 1853, Moore's Arb., 2671. Japan has also adhered to this criterion of enemy character, but not the countries of continental Europe, which, with minor exceptions in Holland and Spain, adhere to the test of nationality. 3 Fiore, sec. 1432 et seq.; 4 Calvo, sec. 1932 et seq.; Bonfils, sec. 1343 et seq.

^eLord Reading in *Porter v. Freudenberg* (C. A.) [1915] 1 K. B. 857, 868. See also Dicey, *Conflict of Laws* (2d ed.) 737.

⁷ Borchard, Diplomatic Protection of Citizens Abroad, 61 et seq.

⁸E. g. Article 23 of Treaty between the United States and Prussia, July 11, 1799, renewed May 1, 1828, 2 Malloy's Treaties, 1494, giving the respective subjects of either state in case of outbreak of war nine months to remove their property, collect their debts, and settle their affairs.

⁹ I Bac. Abr. (ed. 1813) 139, where it is said that the right to sue is consequential on the right to protection.

¹⁰ Brandon v. Nesbitt (1794, K. B.) 6 T. R. 23; Le Bret v. Papillon (1804, K. B.) 4 East. 502; Daubigny v. Davallon (1795, Ex.) 2 Anstruther 462; O'Mealey v. Wilson (1808, N. P.) 1 Campb. 482 (a British subject

decision passed off on technical points of pleading.11 The most important cases involve the right of a resident subject of the enemy state to sue, and in this matter the modern rule dates from Wells v. Williams (1698),12 for in this case the first exception to the disability of the alien enemy plaintiff was introduced. Chief Justice Treby there held that an alien enemy living in England by the King's license and under his protection may sue. Subsequent English cases, while showing some differences of opinion as to the party on whom rested the burden of proof of "license" by the King18 have, nevertheless, held with practical uniformity that a resident alien, subject of an enemy state, who could show that he was present with the express or implied license of the King could sue.14 Such a license has been implied, in the cases which have arisen since the beginning of the war, in the system of alien registration created by the Orders in Council under the Aliens Restriction Act, 1914,15 and has been considered as strengthened rather than weakened by internment of the "alien enemy."16

resident in enemy territory); In re Wilson (1915) L. J. K. B., 1893; Porter v. Freudenberg (C. A.) [1915] 1 K. B. 857. Bonneau v. Dinsmore (1862, N. Y. Sup. Ct.) 23 How. Pr. 397; Sanderson v. Morgan (1868) 39 N. Y. 231; Seymour v. Bailey (1872) 66 Ill. 288; Jackson v. Decker (1814, N. Y. Sup. Ct.) 11 Johns, 418; Luczycki v. Spanish River Pulp Mills (1915, Ont. Sup. Ct.) 25 Dom. L. R. 198.

11 Derrier v. Arnaud (1695, K. B.) 4 Mod. 405; Sylvester's Case (1702, K. B.) 7 Mod. 150; Casseres v. Bell (1799, K. B.) 8 T. R. 166; Society etc. v. Wheeler (1814, U. S. C. C., N. H.) 2 Gall. 105; Hutchinson v. Brock

(1814) 11 Mass. 119; Levine v. Taylor (1815) 12 Mass. 8.

¹² 1 Ld. Raym. 282.

¹⁸ Compare Casseres v. Bell (1799, K. B.) 8 T. R. 166 with Boulton v. Dobree (1808, N. P.) 2 Camp. 163; Alciator v. Smith (1812, N. P.) 3 Camp. 245.

14 See Boulton v. Dobree, supra; Alciator v. Smith, supra; and Alcinous v. Nigreu (1854, Q. B.) 4 E. & B. 217, where there was a failure to show that the plaintiff was residing in the Kingdom with "the license, safe-conduct, or permission" of the King. See also the recent Ontario case of Bassi v. Sullivan (1914, Ont. Sup. Ct.) 18 Dom. L. R. 452.

15 Princess Thurn and Taxis v. Moffit [1915], 1 Ch. 58; Porter v. Freudenberg (C. A.) [1915] I K. B. 857. Hall, Int. Law (6th ed.) 388. Proclamations in Canada, similar to those of England, have been held to remove the procedural disability from alien enemies permitted to remain in residence. Topay v. Crow's Nest Co. (1914, B. C. Sup. Ct.) 18 Dom. L. R. 784; Viola v. MacKenzie, Mann & Co. (1915, Que. K. B.) 24 Dom. L. R. 208. Pescovitch v. Western Can. Flour Co. (1914, Man. K. B.) 18 Dom. L. R.

18 Schaffenius v. Goldberg [1916] 1 K. B. 284.

In the United States, Chief Justice, afterwards Chancellor, Kent, in the leading case of Clarke v. Morey,¹⁷ extended the doctrine of Wells v. Williams to the conclusion that an alien enemy who comes and resides here, even without a safe conduct or license, is entitled to sue until ordered away by the President; and this, too, although the party is not known by the Government to have his residence in the United States. License is implied from his being suffered to remain. This would seem to be the rule most consistent with enlightened practice.

The English "Trading with the Enemy" proclamation of September 9, 1914 (sec. 3), expressly, and the recently enacted United States "Trading with the Enemy" Act of October 6, 1917 (sec. 2), by implication, exclude from the definition "alien enemy" a person not resident or carrying on business within the territory of the enemy country.

Inasmuch as, in law, the declaration of war makes enemies of all the respective subjects of the belligerents, Vice Chancellor Lane's attempt in the principal case to translate into a legal distinction the political distinction made by the President between the German Government and the German people cannot be supported. It is submitted that the German stockholders, as alien enemies resident in the enemy state, should have been non-suited.

The question as to whether the national character of the American corporation is affected by the majority German stock ownership is discussed in the COMMENT following.

E. M. B.

## IS AN AMERICAN CORPORATION SUBSTANTIALLY OWNED BY GERMAN STOCKHOLDERS AN ALIEN ENEMY?

This complex problem was recently submitted to an American court in the case of *Fritz Schultz Ir. Co. v. Raimes & Co.* (1917, N. Y. Sup. Ct.) 166 N. Y. Supp. 567. There is thus raised, at a very early stage of our participation in the Great War, the question adjudicated in England in the celebrated *Daimler* case (infra).

There are no internationally accepted rules in existence with respect to the nationality and domicil of corporate bodies. Both concepts, nationality and domicil, can be applied to corporations

^{17 (1813,} N. Y.) 10 Johns 69.

in a metaphorical sense only.¹ The privileges and duties incidental to allegiance and the "animus" necessary to domicil cannot be ascribed to corporate bodies. Nevertheless, the determination of questions of taxation and jurisdiction with respect to corporations has necessitated adjudications upon the question of their nationality and domicil. In England it has been held that for purposes of the provisions of the income tax law the domicil (more accurately "residence") of a company is at the place where its center of administration, the controlling brain, is located.² For purposes of jurisdiction, the "domicil" has been construed to be the place where it has a registered office,³ and there may indeed be two such "domicils."⁴ In the United States, the "fiction theory" of the corporate entity has served to impute to a corporation, for jurisdictional purposes, the citizenship of the

¹ Foote, Private International Jurisprudence, (4th ed.) 143 et seq. Volumes have been written, particularly on the continent, on the debatable question of the nationality of corporations. The various theories are well summarized in the work of E. Hilton Young, Foreign Companies and other Corporations, Cambridge, 1912, 110-168. See also, Mamelok, Die juristische Person in internationalen Privatrecht, Zurich, 1900, 211 et seq. Schwandt, Die deutschen Aktiengesellschaften, Marburg, 1912, pp. 25-75; Pillet, Des Personnes Morales en Droit Int. Privé, Paris, 1914; Isay, Die Staatsangehörigkeit der juristischen Personen, Tübingen, 1907, in which the legislative systems of the various countries are outlined (pp. 214-224); Levin, M., De la nationalité des sociétés et ses effets juridiques, Paris, 1900, p. 199 et seq.; Fromageot, H., De la double nationalité des individus et des sociétés, Paris, 1892, pp. 114-121; Lyon-Caen in 12 Clunet (1885) 265-274; Lainé in 20 Clunet (1893) 273 et seq.; Arminjon in 4 Rev. de droit int. n. s. (1902) 381 et seq., translated into English by William E. Spear, Clerk, Spanish Treaty Claims Com., Washington, 1907, Document 53; Marais and Barclay in 23rd Report, International Law Assn. (1906) 360-372; Jacobi in 27th Rep. ibid., 368-380; Baumgarten in 28th Rep. ibid., 246-254. The various theories relating to the nationality of corporations are summarized in Borchard, Diplomatic Protection of Citizens Abroad, 617-618.

² Calcutta Jute Mills v. Nicholson (1876) 1 Ex. D. 428. De Beers Cons. Mines v. Howe (C. A.) [1905] 2 K. B. 612; [1906] A. C. 455. Goerz v. Bell [1904] 2 K. B. 136; Mitchell v. Egyptian Hotels, Ltd. [1915] A. C. 1022, 1037; San Paulo Ry. Co. v. Carter [1896] A. C. 31. See an excellent article by E. J. Schuster in (1917) Papers read before the Grotius Society, vol. II, p. 57.

⁸ Keynsham, etc., Co. v. Baker (1863, Ex.) 2 H. & C. 729.

^{*}Carron Iron Co. v. Maclaren (1855) 5 H. L. C. 416, 449 and analysis of that case by Prof. Wesley N. Hohfeld, The Individual Liability of Stockholders and the Conflict of Laws (1910) 10 COLUMBIA L. REV. 319.

state in which it was incorporated,⁵ although this conclusion was subsequently rested upon the further fiction that there is merely "an indisputable legal presumption that a state corporation . . . is composed of the citizens of the state which created it."

The persuasiveness and apparent simplicity of the "fiction theory" of the corporation have led the English courts to hold that the nationality of a corporation is to be deemed that of the country in which it was incorporated, regardless of its center of administration, and, most curiously, regardless of the fact that for belligerent purposes domicil, and not nationality, is the test of enemy character. Consistently with this theory they have declined to investigate the nationality of the stockholders, as a matter which could not affect the nationality of the corporation. Lord Macnaghten in the Janson case (arising out of the Boer war), in which a company incorporated in the Transvaal was largely owned by British stockholders, stated:

"If all its members had been subjects of the British Crown, the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien." 10

⁵Louisville, Cinci., etc., R. R. v. Letson (1844, U. S.) 2 How. 497, 555. This is the theory followed by Lehman J. in the principal case in deciding that the New Jersey corporation had the right to sue.

^oSt. Louis and San Francisco Ry. v. James (1896) 161 U. S. 545, 562.

⁷Attorney General v. Jewish, etc., Assn. [1900] 2 Q. B. 556; [1901] 1

^{*}Amorduct Mfg. Co. v. Defries (1915) 84 L. J. K. B. 586; Janson v. Driefontein Cons. Mines, Ltd. [1902] A. C. 484. Daimler v. Continental Tyre Co. (C. A.) [1915] I K. B. 893. (But see notes 12-14.)

^{*}Janson v. Driefontein Cons. Mines, Ltd. [1902] A. C. 484; Amorduct Mfg. Co. v. Defries, supra. The Roumanian [1915] P. 26. In the matter of ownership of British ships (under the Merchant Shipping Act)—such ships cannot be owned by aliens—the courts until recently adhered to the fiction theory of the corporate entity. Queen v. Arnaud (1846) 16 L. J. Q. B. (n. s.) 50. (Lord Denman, C. J.: "In no legal sense are the individual members [of the corporation] the owners.") Recently, however, they have in this matter refused to be bound by the mere incorporation in England as conferring British nationality upon a corporation (and thus upon a ship) substantially owned by alien (German) stockholders, where the ship was under the control of the alien owners. The Polzeath [1916] P. 117 (C. A.) 241; Dictum in The Tommi [1914] P. 251. Compare, in the United States, Hastings v. Anacortes Packing Co. (1902) 29 Wash. 224.

¹⁰ Janson v. Driefontein Cons. Mines, Ltd. [1902] A. C. 484, 497.

The principle was carried to its logical, if somewhat startling, conclusion by the Court of Appeal in the Daimler case,11 in which Lord Reading held that a company incorporated in England, only one of whose 25,000 shares was owned by a British subject, the balance being owned in Germany, was a British company and entitled to sue in a British court.12 This decision was reversed in the House of Lords13 on another ground, so that the opinions of the law lords on the question of the nationality of the plaintiff company are dicta only. Nevertheless, they will carry great weight by reason of the authority of the judges delivering them. Of the eight judges, two (Lord Shaw and Lord Parmoor) followed Lord Reading's decision in the Court of Appeal, although Lord Parmoor would, on evidence that the business of the company was carried on in an enemy country, have held otherwise. The Earl of Halsbury took the view that the company had an enemy character if the whole or a large part of its capital were owned by persons residing or doing business in Germany. He was the only one of the fourteen judges who sat in the two appellate courts who, it is submitted, consciously declined to be misled by the fiction theory, but concluded that a corporation was merely a form of association, analogous to a partnership, to enable human beings to do business and enjoy their property.14

¹¹ Daimler v. Continental Tyre Co. (C. A.) [1915] I K. B. 893. (Four of the justices concurred, Buckley, L. J., now Lord Wrenbury, alone dissenting on what would seem intuitive rather than legal grounds.)

² The decision was substantially aided by the Trading with the Enemy Proclamation of Sept. 9, 1914, which provides (§3) that "In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." A less restrictive but similar provision is included in the United States Trading with the Enemy Act of October 6, 1917 (§2a). Although the British Proclamation substitutes nationality for domicil in determining enemy character, it is proper to recall that in Anglo-American law the nationality and domicil of corporations are usually considered identical. Subsequent British Orders in Council and the Trading with the Enemy Amendment Act, 1916 (5 and 6 Geo. V, c. 105) have extended the prohibition of trading with the enemy very widely to include those having "enemy association" (which has been construed by the political department of the Government to include firms even in neutral countries having German sympathies, connections or trade relations) and give the Board of Trade wide powers to wind up British concerns with such association. See Frank Evans: Trading with the Enemy Amendment Act, 1916 (1916) 32 LAW QUAR. REV., 249.

^{18 [1916] 2} A. C. 307.

¹⁴ An able analysis of the fiction theory of the "corporate entity" showing its true relations to legal realities is to be found in an article by

The opinions of the other judges, as expressed by Lord Parker, while purporting to uphold the legal entity theory, in fact laid particular emphasis upon the actual control and directing center of management as the determining factor in reaching a conclusion as to enemy character; and on this point, while the nationality of the shareholders could not affect the nationality of the company, they considered the character of the stockholders material to the question whether the control of the company's business was in fact vested in persons adhering to or under the control of enemies.¹⁵

While unwilling to modify in any way the corporate entity theory, Lehman, J., in the principal case, nevertheless adopted so much of Lord Parker's dictum as touched upon the question of "control" of the corporation by persons resident in an enemy country or adhering to the enemy, concluding that inasmuch as three of the four directors, including the manager, were residents of this country, the company was not under the "control" of alien enemies. Thus, by the organization of subsidiary companies, with local directors in ostensible control, it would seem possible for large corporations doing an international business, to minimize the effects of an eventual taint of enemy character—a result created by the courts through their hesitation in piercing the corporate veil.

In conclusion, it may be observed that International Claims Commissions have almost uniformly adopted the rule, for purposes of jurisdiction, that the nationality of corporations is that of their country of incorporation, although the Department of

Professor Wesley N. Hohfeld: Nature of Stockholders' Individual Liability for Corporation Debts (1909) 9 Columbia L. Rev. 285, 288 et seq. For cases in which the "fiction theory" (under statutory construction) has been discarded see the Australian cases of Osborne v. The Commonwealth (1911) 12 Commonw. L. R. 321, 365; and Morgan v. Deputy Federal Comm. (1912) 15 Commonw. L. R. 661. A leading extreme case supporting the corporate entity theory is that of Salomon v. Salomon & Co. [1897] A. C. 22.

¹⁵ [1916] 2 A. C. 307, 344. Story, J., in the case of Society etc. v. Wheeler (1814, U. S. C. C., N. H.) 2 Gall. 105, a case much misunderstood, really decided that the courts could determine the character of the British corporation from the character, enemy or friendly, of its members.

¹⁶ It should be observed that in England, one-third stock ownership in an English company by subjects of the enemy suffices to give the Board of Trade supervision of its affairs, and some similar rule will undoubtedly be adopted by the Alien Property Custodian in the United States. A recent newspaper report mentioned 52% stock membership in Germany as the minimum.

State, acting administratively, always seeks, before extending protection to American corporations abroad, to establish the fact that the substantial beneficial ownership of the company is vested in American stockholders.¹⁷

CONFLICT OF LAWS IN WORKMEN'S COMPENSATION LEGISLATION.

A recent Connecticut case involves problems in the conflict of laws that are at once of compelling theoretical interest and of great practical importance. An employee under a Massachusetts contract was injured in Connecticut while at work within the scope of his employment. Under the decision of the Supreme Judicial Court of Massachusetts in Gould's Case¹, in accordance with the court's conclusion as to legislative intent, the Workmen's Compensation Act of Massachusetts has no application to an injury occurring outside of that jurisdiction. In an action brought in Connecticut recovery was allowed under the statute of the latter state. Douthwright v. Champlin (1917) 91 Conn. 524; 100 Atl. 97.

Such a result would have been reached without difficulty under the authority of Gould's Case, supra. This case, mainly on considerations applicable to the law of torts generally, while deciding that the Massachusetts act did not apply to extraterritorial injuries, expressly stated that it did apply to all intraterritorial injuries irrespective of the place of the contract. The court gave full effect to the presumption that a legislative act designed partially to supersede a particular branch of the law of torts is coextensive in application with the law thus superseded.² The fact that this dominant purpose was effected by reading certain unexpressed terms into certain contracts of employment was deemed not to affect this presumption. The rule of conflict of laws applicable to torts generally,³ and not that applicable to contracts, was therefore consistently applied.

¹⁷ Borchard, op. cit., pp. 620-626.

¹ (1913) 215 Mass. 480, 102 N. E. 693. Accord, Tomalin v. Pearson [1909] 2 K. B. 61; Schwartz v. India Rubber, etc. Co. [1912] 2 K. B. 299. Applying the principle of Gould's Case to the question of waiver of common law rights are Johnson v. Nelson (1915) 128 Minn. 158, 150 N. W. 620; Piatt v. Smith (1915) 188 Mo. App. 584, 176 S. W. 434; Pendar v. H. & B. Mach. Co. (1913) 35 R. I. 321, 87 Atl. 1.

² Gould's Case, supra, 487.

^{*}See cases cited in Gould's Case, 487; and compare the very important case of Brown v. Western Union Tel. Co. (1914) 234 U. S. 542, 547, 34 Sup. Ct. 955, 956.

Such, however, was not the reasoning of the principal case. It had previously been decided⁴ that the Compensation Act of Connecticut was in effect an amendment of contract law, in its dominant characteristic a rule of construction applicable to a special class of contracts, whereby certain so-called "implied" terms were added. Accordingly the act was held to apply to all injuries wherever occurring, if arising under Connecticut contracts of employment, with the further intimation⁵ that a similar application would be accorded to foreign acts in case of injuries occurring within Connecticut under foreign contracts. This, now probably the prevailing view among the states,⁶ while recognized as law by the principal case, was refused application on the ground that the jurisdiction of the contract had, under Gould's Case, no applicable compensation act.⁷

We are not now concerned as between the two opposing theories of the workmen's compensation acts. The issue between them is merely one of degree. All rules of contract law, properly speaking, are ultimately concerned with the modification of certain conditions non-contractual in character. Conversely many rules of law, plainly within the domain of tort or quasicontract law, obtain their compulsory fulfillment through the prohibition of certain terms in certain contracts. In no case is the mere regulation of the contractual relationship as such the sole and ultimate purpose of legislation.8 In any case a regulation partaking of the nature of tort law may involve the incidental modification of the construction of certain contracts.9 decisive question should be, therefore: what is the dominant purpose of the statute,—to abolish certain unspecified evils arising from a certain way of contracting, the latter being the direct object of legislative attack, or to remedy certain factual conditions directly selected as the object of remedial legislation, with only an incidental effect upon contract law?

⁴Kennerson v. Thames Towboat Co. (1915) 89 Conn. 367, 94 Atl. 372.

⁶ Ibid., 89 Conn. 381, 94 Atl. 378.

^{*}Post v. Burger (1916) 216 N. Y. 544, 111 N. E. 351; Schweitzer v. Hamburg-Amerikanische, etc. Co. (1912, N. Y. Sup. Ct.) 78 Misc. (N. Y.) 448, 138 N. Y. Supp. 944; Grinnell v. Wilkinson (1916, R. I.) 98 Atl. 103; Gooding v. Ott (1916, W. Va.) 87 S. E. 862. See also Bradbury, Workingmen's Compensation (2d ed.) 56.

⁷ See principal case, 91 Conn. 528-529, 100 Atl. 98.

⁸ E. g., statutes of frauds, and regulations of life insurance contracts.

[°]E. g., regulations of hours of labor.

A graver practical question, however, is here involved. Can a court, consistently with the principles of conflict of laws. presume that an act combines both these characteristics simultaneously? Can it extend its own act to extraterritorial injuries occurring under contracts made within its own jurisdiction, and incorporate by reference foreign acts,10 if applicable, as a part of the law of the contract in cases of intraterritorial injuries under foreign contracts, on the one hand, and, on the other hand, apply its own act to intraterritorial injuries under foreign contracts when the lex contractus has no applicable statute providing compensation, and also give effect to the law of the place of injury irrespective of the law of the contract in the matter of statutory waiver of common law rights of action? No conclusive theoretical objection to such a position exists, as the legislative intention may be deemed to have embraced both objects in equal degree. Such, indeed, has become the settled doctrine of at least one state.11

But the principles of conflict of laws are designed to provide a method of selection of specific rules universally applicable to specific groups of facts, without variation dependent upon the place where the remedy is sought.¹² The rule under present consideration must stand or fall according as it, if consistently followed, subserves this end; for, whatever the legislatures might have done by express enactment, they should not be presumed to have acted in contravention of the objects for which rules of conflict of laws exist.¹³ We may assume any of the following

¹⁰ For the logical and legal bases of the conflict of laws, more particularly as regards "incorporation by reference," see Professor Wesley N. Hohfeld, The Individual Liability of Stockholders and the Conflict of Laws (1909) 9 Col. L. Rev. 496, 520, 522, note, and 10 Col. L. Rev. 526; see also Comment entitled Moratorium Decrees and the Conflict of Laws (1917) 26 Yale Law Journal, 771, 772.

¹¹ Except that the tort or quasi-contract aspect of the statute has been carried so far as to embrace intra-territorial injuries, even though the foreign lex contractus was an applicable statute. Am. Radiator Co. v. Rogge (1914) 86 N. J. L. 436, 92 Atl. 85, 93 Atl. 1083, 94 Atl. 85; Rounsaville v. Central R. Co. (1915, Sup. Ct.) 87 N. J. L. 371, 374; Atl. 392, 393 (applying the contract theory). Also compare Pendar v. H. & B. Mach. Co., supra, with Grinnell v. Wilkinson, supra.

¹² See Pillet, Essai d'un système général de solution des conflicts des lois (1894) 21 Clunet 417, 711; also Comment, Moratorium Decrees and the Conflict of Laws (1917) 26 YALE LAW JOURNAL, 771, 773.

¹² In re Wood (1902) 137 Cal. 129, 69 Pac. 900; N. Y. Mut. Life Ins. Co. v. Prewitt (1907) 127 Ky. 399, 105 S. W. 463.

alternative hypotheses, with respect to states X and Y. First, an injury occurs in state X under a Y contract of employment, the injury being of such a nature as to come within the terms of the X statute and not within the terms of the Y statute. Second, the injury comes within the terms of both statutes but with different scales of compensation. Third, state Y has no applicable workmen's compensation act. Fourth, under the law of state Y there has been no waiver of common law rights of action, while under the law of state X there has been such a waiver. Upon the fundamental assumption that the X statute is a branch of the contract law of state X, it necessarily follows that the failure to enact a similar statute in state Y is equally a characteristic of the contract law of the latter state. The absence of an applicable statute, therefore, and the provision of a different scale of compensation, and the rule resulting in no waiver of common law rights are as decisive features of the law of the contract as any positive applicable provision would be. To refuse to give effect to them, by swinging over to the tort theory of the local act, is in direct violation of the principles of international reciprocity applicable to contract law.

If it should be urged that such a policy is in accord with the well-settled rule14 that the lex contractus will not be incorporated by reference when contrary to the declared public policy of the forum, two answers may be made. First, it has been decided,15 and the result seems incontestable on principle, that contracts made under common law rules of industrial accident liability do not fall within such a classification. Second, the assumption of the existence of such a rule of policy established by the local statute is precisely the position which we contend to be incompatible with the simultaneous assumption that the legislation falls within the category of contract law. It is immaterial that a similar practical result is reached when, as sometimes unavoidably happens, different rules of conflict of laws obtain acceptance in different jurisdictions, or when different notions of public morals require a forum to repudiate a contract valid under the law of the contract. Our suggestions are directed to the fact that the court has in the present instance raised a gratuitous presumption of legislative intention intrinsically leading to this exceptional result.

¹⁴ Greenwood v. Curtis (1810) 6 Mass. 358.

¹⁸ Reynolds v. Day (1914) 79 Wash. 499, 140 Pac. 681.

We have seen that a consistent application of the doctrine of the principal case has already produced an actual overlapping of the positive provisions of two compensation statutes.¹⁶ Such a result has not yet been reached under the law of the principal case.¹⁷ It would, however, logically follow from a refusal to recognize the negative features of the law of the contract on a point assumed to be one of contract law.

We submit, therefore, that the decision in the principal case should be reached under the reasoning of Gould's Case, *supra*, or not at all, and that the courts should decisively elect between the theory of that case and the contract theory of the workmen's compensation acts. If the latter prevails, the place of injury should in all cases be immaterial, whether or not the jurisdiction of the contract happens to possess an applicable statute.

C. R. W.

## EXTRATERRITORIAL RECOGNITION OF A DECREE OF JUDICIAL SEPARATION

For the first time, apparently, a court has passed upon the extraterritorial effect, in a subsequent action for full divorce, of an ex parte judicial separation. Pettis v. Pettis (1917) 91 Conn. 608, 101 Atl. 13. Immediately after marriage in New York the parties had separated; the wife remained resident there and obtained the decree in question. When the husband, who was domiciled throughout in Connecticut, began suit for divorce on grounds of desertion she pleaded the decree, which was based on cruelty, to justify her living apart. The court held that a decree of judicial separation, as opposed to full divorce, did not affect the marriage status, was personal in its nature, and to be in any way effective in another State, called for personal jurisdiction over the defendant.

If such a decree from bed and board is indeed personal merely, it cannot of course be enforced abroad against a non-appearing, non-resident party; nor can it be res judicata as to the grounds

¹⁶ See note II, supra.

¹⁷ See principal case, 91 Conn. 528, 100 Atl. 98.

¹Where both parties have been before the court, the decree will bar subsequent suit by the original defendant for divorce on grounds of desertion; and is conclusive as to the issues of fact on which it is based. Harding v. Harding (1905) 198 U. S. 317, 25 Sup. Ct. R. 679.

on which it was based.2 Doubt may well be entertained, however, whether such a decree does not sufficiently affect the marriage status to be considered, in the same way as that of divorce proper, a decree in rem. This marriage status cannot be literally a res, a thing physical; it is rather the condition of the parties in society, the sum of their jural relations with each other and with people at large: their rights, powers, disabilities,3 etc. Now with judicial separation, as with divorce, the wife loses what disabilities marriage imposed upon her4: she may now acquire and hold personal property in her own right5; she may convey realty, sue, be sued.6 The decree may fix her property rights and those of her husband.7 His control over her and his right of cohabitation he has lost.8 Has he not then likewise lost his rights against all men that they do not alienate his wife's affections which are no longer his; or interfere with the consortium he no longer enjoys? With the right of cohabitation he has at least lost the duty to support his wife;10 with this

² Pennoyer v. Neff (1877) 95 U. S. 714.

^{*}When married women's property acts cut away perhaps the major portion of these relations, the *in rem* character of proceedings directed "against" the status grew considerably more shadowy than it was when established in *Ditson v. Ditson* (1856) 4 R. I. 87.

⁴To this an exception ought perhaps to be made as to the power of either party to dispose of real estate acquired before the decree. Castlebury v. Maynard (1886) 95 N. C. 281. But see Marshall v. Baynes (1892) 88 Va. 1040, 14 S. E. 978.

⁵ Meehan v. Meehan (1848 N. Y.) 2 Barb. 377.

^oDelafield v. Brady (1888) 108 N. Y. 524, 15 N. E. 428; Barber v. Barber (1858 U. S.) 21 How. 582.

⁷ See Davis v. Davis (1878) 75 N. Y. 221. In Thompson v. Thompson (1913) 226 U. S. 551, 33 Sup. Ct. R. 129, a Maryland decree from bed and board was held to blot out the wife's claim to maintenance and her rights in her husband's property.

^{*}People v. Cullen (1897) 153 N. Y. 629, 635, 636, 47 N. E. 894; and see American Legion v. Smith (1889) 45 N. J. Eq. 466, 17 Atl. 770. That cohabitation in the broad sense involves a right as well as a privilege is shown by the remedy granted in case of desertion.

^{*}Barrere v. Barrere (1819, N. Y.) 4 Johns. Ch. 187, 196, squints in passing toward the persistence of this set of rights. The problem all through here is whether the possibility of reconciliation would be sufficient to found an action; ordinarily such reconciliation would appear not only contingent, but improbable. In any case, the right to compensation for loss of consortium is fading. Feneff v. R. R. Co. (1909) 203 Mass. 278; 89 N. E. 436.

¹⁰ Unless it is expressly imposed upon him. *People v. Cullen, supra. Contra, State v. Ellis* (1898) 50 La. Ann. 559; 23 So. R. 445; but the court in the principal case was considering a New York decree.

latter it would seem as if her power to pledge his credit for necessaries must also fall.¹¹ Further, if no alimony has been decreed, it is not easy to see how the husband's death by the wrongful act of another can any longer found an action by his wife.¹² Even the power to reëstablish the old status must be exercised through a decree of the court;¹³ it is hardly to be distinguished from divorcees' powers to remarry each other. The New York judicial separation, in fact, seems to leave very little of the marriage status save a duty in each party not to commit adultery¹⁴ and the incapacity of either to contract a valid marriage with another person;¹⁵ while even this last is matched in the case of the guilty party by like incapacity after full divorce.¹⁶

Still, though in pure theory we concede to the decree from bed and board an effect "quasi" in rem, there are considerations of public policy to be urged against its being so regarded in practice. In the case of divorce a vinculo, though constitutional compulsion extends only to decrees obtained in the matrimonial domicile, 17 public policy requires an ex parte proceeding at the

¹¹ Such power in the wife is decidedly founded on the husband's duty of support; will it stand without its foundation? *Erkenbach v. Erkenbach* (1884) 96 N. Y. 456, 465, suggests that it may still continue.

¹² Statutes confer this right for the purpose of making up to mentioned relatives the entire pecuniary loss resulting from the deceased's death. *Murphy v. N. Y. C. R. R.* (1882) 88 N. Y. 445, basing on the N. Y. Code sec. 1902 ff. But unless the wife be entitled to support, what pecuniary loss does she sustain? It is held, *Countryman v. Fonda etc. R. R. Co.* (1901) 166 N. Y. 201, 208 f., 59 N. E. 822, that the jury may consider prospective damages beyond what they might at common law; would the wife's damage in the supposed case be even prospective?

¹⁸ Bliss' Ann. N. Y. Code sec. 1767.

¹⁴ As shown by the fact that breach of the duty by either would ground a bill by the other for a complete divorce. *Vischer v. Vischer* (1851, N. Y.) 12 Barb. 640.

¹⁵ To these should be added a joint power, legal as well as physical, to produce legitimate children. *Barrere v. Barrere, supra,* indicates a presumption, *prima facie* only, against the legitimacy of children born under such circumstances.

¹⁶ It is worth thought in this connection that this last, this species of "marital celibacy," although decreed by a court having jurisdiction of the person, against one of 'its own citizens, and although surely intended to affect status, will be given no recognition extraterritorially. *Van Voorhis v. Brintnall* (1881) 86 N. Y. 18; *In re Crane* (1912) 170 Mich. 651, 136 N. W. 587. But cf. Hall v. Industrial Commission (1917, Wis.) 162 N. W. 312, discussed p. 131 infra.

¹¹ Haddock v. Haddock (1906) 201 U. S. 562, 26 Sup. Ct. R. 525, as interpreted in Thompson v. Thompson, supra.

domicile of either spouse to be treated as in rem. There is need for certainty in the matters of legitimacy, bigamy, adultery. People are best everywhere married, or everywhere not. There seems to be no such urgent call to recognize in like manner decrees manufacturing states of part- or almost-marriage, distinct each one according to the law of the jurisdiction where its particular decree of limited divorce happened to be granted. Thus in the principal case the court assimilated the parties' status to that nearest like it known to the law of Connecticut: marriage. On the other hand, this use of the judicial separation decree as purely personal leads to difficulty to which the court is sensible: because it did not affect status, recognition is denied to a decree which the New York court could not have rendered ex parte, had they not held it in some sort in rem, precisely because it did affect status. On the did affect status.

But though we admit it to be so to speak in rem, it still does not follow that the decree of judicial separation would have served the purpose for which it was introduced. It was not pleaded in bar; it seems to have been intended to establish against the husband the cruelty on which it was based.²⁰ But ex parte divorce decrees seem to be anomalous—if they are in rem in truth—in that they swim free and have effect, though the necessary grounds on which they base sink away; in that they need not even bar further divorce proceedings by the original defendant. So an ex parte divorce judgment has been held not to estop the wife from showing that her husband had committed acts entitling her to alimony and divorce, and that she committed

¹⁸ New York and a few other States do not admit this. See *Haddock v. Haddock, supra,* dissenting opinion of Brown, J. And elsewhere limitations are imposed: as, not recognizing jurisdiction in the divorcing court unless the defendant receive actual notice. Felt v. Felt (1899) 59 N. J. Eq. 606, 45 Atl. 105; and cf. Perkins v. Perkins (1916) 225 Mass. 82, 113 N. E. 841.

¹⁰ To answer that the status concerned is not the same in the two cases; i. e., that a wife's marital status may be affected materially without changing that of her husband, leads into a metaphysical labyrinth. But cf. the language in Haddock v. Haddock, supra; in Perkins v. Perkins, supra; and in the principal case.

²⁰ Though not included in the pleadings either to the husband's action for desertion or in the wife's cross-action for cruelty, the record was admitted in evidence without objection. The wife's task was to justify leaving her husband on the very day of the wedding; the decree could help in that only so far as it concluded him on the point of cruelty.

none to either bar alimony or ground divorce.²¹ And, throwing theory to all the winds of heaven in the interests of justice, courts have, without wishing to "impugn" the prior decree, granted new divorce to an already divorced wife, because without it the ancillary decree of alimony could not be rendered.²²

Whether, therefore, the *ex parte* decree of judicial separation be, as here held, *in personam* merely,²³—because it does not in fact affect status, or because it seems more advantageous to act as if it did not; or whether, as fully as divorce *a vinculo*, it finally achieve extraterritorial recognition—in either case the finding of fact on which it is based seems destined, unlike the prophet, to honor only in its own country.

K. N. L.

AN EXPANSION OF THE DUE PROCESS CLAUSE: FEDERAL SUPREME COURT REVIEW OF ERRORS IN THE APPLICATION OF STATE LAWS

Since our Federal Supreme Court, in its interpretation of the due process clause of the fourteenth amendment, is committed to the policy of waiting for cases rather than that of binding itself in advance with a definite rule, each new decision on this subject from that learned body is likely to contain points and reasoning of more than ordinary moment. Three cases recently decided are here to be considered together in so far as their differences will permit.

Mississippi Railroad Commission v. Mobile & Ohio Railroad (1917) 37 Sup. Ct. 602, is a case of attempted railroad regulation which was defeated by the decision of the United States courts. The state commission is an elected branch of the executive department.³ It held the legally required hearings in this matter, considered the evidence presented by the railroad and others and

²¹ Thurston v. Thurston (1894) 58 Minn. 279, quoted at length and approved, Toncray v. Toncray (1910) 123 Tenn 476, 131 S. W. 977. It is, however, difficult to make out just which marriage relations those are, which the court there holds to have been "seized" by the foreign ex parte divorce.

²² For proceedings in rem and in personam cf. (1917) 26 YALE LAW JOURNAL 710, 759-764.

²² Turner v. Turner (1870) 44 Ala. 437; Stilphen v. Stilphen (1870) 58 Me. 508.

^{1 &}quot;Nor shall any State deprive any person of life, liberty, or property, without due process of law."

² "The process of judicial inclusion and exclusion," Davidson v. New Orleans (1877) 96 U. S. 97, 104.

^a Miss. Code 1906, sec. 4826.

thereafter ordered the reinstatement of numerous local passenger trains recently taken off between Meridian and certain less important points. When the railroad filed a bill to enjoin the enforcement of this order it appeared that under capable management the road was operating at a considerable deficit at that time and further, that some, although not remarkably convenient, service was still offered between the towns. The Supreme Court declared that a fair rate of return must be allowed, otherwise a commission's ruling would be altogether unreasonable and its enforcement a violation of due process. And so it was here.

A second case, Saunders v. Shaw (1917) 37 Sup. Ct. 638, probably involves a more novel state of facts. Here a landowner in his suit to enjoin collection of a special drainage assessment levied against him in Louisiana, offered evidence to show that he received no benefit from the improvement. The trial court ruled out this evidence as incompetent but permitted it, as well as some evidence of the defendant drainage board, to be spread upon the record for use by the Supreme Court on appeal. The trial judge did not permit cross-examination, however; and, in view of its ruling which rejected the landowner's evidence, an intervenor, who held bonds payable from this tax, offered no evidence in rebuttal. There was judgment below against the landowner, which was first affirmed by the Supreme Court of Louisiana but on rehearing, on account of a subsequent decision of the United States Supreme Court,4 was reversed without remanding,5—the Louisiana Court probably feeling satisfied of the facts on inspecting those which were before it in the record and only changing position on the point of law, namely, as to whether benefit to the land assessed was material. On the appeal to the United States Supreme Court, the intervenor contended that he had been given no opportunity to present his evidence (since it would have been an idle procedure to attempt to answer that of the landowner which had been rejected by the trial court). In this contention he was upheld; he had not been given due process of law.

A third case also presenting a novel point is *Chicago Life Insurance Company v. Cherry* (1917) 37 Sup. Ct. 492. Two insurance companies being sued in Tennessee but not served there,

⁴ Myles Salt Co. v. Iberia & St. M. Drainage Dist. (1915) 239 U. S. 478; 36 Sup. Ct. 204.

⁵ Shaw v. Board of Commrs. (1916) 138 La. 917, 70 So. 910.

nevertheless contested the jurisdiction of the trial court by a plea in abatement and lost in both the lower and the supreme court of that state, judgment being given for the plaintiff. Suit on the judgment was later brought in Illinois where, in the Superior Court of Cook County, the plaintiff once more had judgment. On appeal the Illinois Appellate Court refused to look further into the question of jurisdiction in Tennessee than to note that the issue had been raised, argued and considered in the courts of that state before judgment was given there. Two lines of reasoning are followed by the United States Supreme Court in affirming the Illinois Appellate Court in this decision.

The first considers the question of jurisdiction in Tennessee as if the case had come up from there without a trip to Illinois. If the Tennessee court did not have personal jurisdiction of the insurance companies it clearly could not issue a valid judgment against them.⁷ On the other hand if there had been personal service on the defendants in Tennessee, jurisdiction would of course have been established. There seems to be no well settled rule as to the exact point between these two extreme states of fact at which the line is drawn. The United States Court recognizes that a difference of opinion on the subject is possible and reasonable as well and regards as not lacking in due process a rule that the mere filing of a plea in abatement gives the court jurisdiction.⁸

The second line of reasoning to uphold the Illinois court amounts briefly to this: A decision rendered in good faith by a state court although predicated on a mistake of fact will ordinarily give the defeated party no ground of appeal under the fourteenth amendment of the Federal Constitution. To Illinois courts Tennessee law is a matter of fact and hence the rule applies in this case.

It should be recalled in considering these cases that the meaning of the phrase, "due process of law" has in the United States

^{*} Cherry v. Chicago Life Ins. Co. (1914) 190 Ill. App. 70.

⁷Pennoyer v. Neff (1877) 95 U. S. 714; Scott v. McNeal (1893) 154 U. S. 34, 46; 14 Sup. Ct. 1108, 1112 (administration upon the estate of a supposed decedent).

Equally unobjectionable whether provided by statute or by a court.

^{*}Similarly held where a state court is in error on a point of conflict of laws. Kryger v. Wilson (1916) 242 U. S. 171, 37 Sup. Ct. 34; see Comment, Due Process and Full Faith and Credit clauses as applied to the Conflict of Laws (1917) 26 YALE LAW JOURNAL 405.

been expanded so as to include not only process in the everyday meaning, process-proper, but the result or outcome of that process, the decision or judgment handed down.¹⁰ It should also be recalled that the application of the limitation has been extended to embrace the legislative¹¹ and judicial departments of our government, including the inferior bodies and officers of each.¹²

The railroad commission in Mississippi was one of these inferior bodies. The case may be classified as one containing a mistake of law and a resulting unreasonable regulation.¹³ It may then serve as a background for the others.

The two remaining cases are judicial appeals. Where the act of a court is in question it has been stated upon high authority¹⁴ that an erroneous decision, simply, is not a violation of the due process clause in the fourteenth amendment. That the rule is not applicable to the quasi judicial acts of executive bodies is evidenced by the railroad case just considered, there having been no charge of bad faith on the part of the commission. The principal importance of the Louisiana and Illinois cases would seem to consist in showing that the rule is not always and absolutely applicable to judicial decisions either. In other words, they recognize that certain kinds of errors, even by a court relative to its own law, may be denials of due process. One of the cases does this by suggestion; the other seems to decide just that.

For a number of years dicta, and to some extent decisions, have been approaching this point from various angles. The progress

¹⁰ Whether anything turns on the distinction between "process-proper" and result it is difficult to say. A close case may some day bring the distinction into prominence but at present no statement can be made with assurance. See Harlan, J., in *Chicago*, B. & Q. R. R. v. Chicago (1897) 166 U. S. 226, 234-235, 17 Sup. Ct. 581, 584, col. I.

¹¹ On the total lack of meaning of the phrase when applied to the legislature without the expanded interpretation, see Cooley, *Constitutional Limitations*, p. 503.

¹² Ex parte Virginia (1879) 100 U. S. 339, 346. That the amendment is intended even to cover cases where the state agents act in excess of, or in violation of state law, see, Yick Wo v. Hopkins (1886) 118 U. S. 356, 6 Sup. Ct. 1064.

¹⁸ Mistake of law because it appears that the Commission computed railroad service expense on the actual "out of pocket" cost, this rule of computation being held to be wrong.

¹⁴Chief Justice Waite in Arrowsmith v. Harmoning (1886) 118 U. S. 194, 195; 6 Sup. Ct. 1023, 1024. See also, Patterson v. Colorado (1907) 205 U. S. 454, 460, 27 Sup. Ct. 556, 557. Cooley, Constitutional Limitations, p. 587.

may be set forth as a series of steps. Numerous dicta may be found to the effect that fraudulent decisions or those rendered in bad faith are wanting in due process and may be carried to the United States Supreme Court for that reason.¹⁵ Likewise it has been stated that due process of law requires a competent and impartial tribunal.16 In one case whose facts were widely aired in the press¹⁷ the dissenting opinion¹⁸ declared that a criminal trial before a mob-controlled tribunal is not due process of law, which general rule seems to have been recognized as well by the majority. A very definite step in this general direction was taken in the case of Scott v. McNeal,10 in which the United States Supreme Court reversed the State Supreme Court of Washington on the question of jurisdiction in a lower court of that state. At that time it is hardly likely that the state court would have been reversed on a question of procedure in the lower court, once the jurisdiction of the latter was established.20 And yet that is the point to which the decision in Saunders v. Shaw now carries us.

This result has been foreshadowed, not only by analogy as outlined above, but directly in the language of the Justices. It has been intimated that extraordinary cases might arise in which a state would deprive a person of due process of law solely by the decision of its courts.²¹ Just such an intimation is found in the *Life Insurance* case now before us, but neither therein nor in the previous cases was the required grossly erroneous decision thought to be present. It did arrive when a court rendered a decision which concluded a case without any evidence by one of the parties.

¹⁵ Fallbrook Irrig. Dist. v. Bradley (1896) 164 U. S. 112, 17 Sup. Ct. 56. Chicago, M. & St. P. Ry. v. Minnesota (1890) 134 U. S. 418, 466, 10 Sup. Ct. 462.

¹⁶ Jordan v. Mass. (1912) 225 U. S. 167, 176, 32 Sup. Ct. 651.

¹⁷ Frank v. Mangum (1915) 237 U. S. 309, 35 Sup. Ct. 582.

¹⁸ That of Holmes, J.; Hughes, J., concurred in the dissent.

^{19 (1893) 154} U. S. 34, 14 Sup. Ct. 1108.

²⁰ But it has been urged very forcibly on the ground of this decision and some others, as well as on independent reasoning, that the United States Supreme Court should review all cases in which the state courts are in error concerning their own law. See Professor Henry Schofield, The Supreme Court of the United States and the Enforcement of State Law by State Courts (1908) 3 Ill. L. Rev. 195.

ⁿ Dissenting opinion of Holmes, J., in Raymond v. Chicago, Un. Tr. Co. (1997) 207 U. S. 20, 28 Sup. Ct. 7, 14.

We have no new rule from these three cases but we do have in one of them a square decision on a disputed question and one from which, in looking forward, we may well inquire how far the Federal Supreme Court will go in future cases involving state court interpretation of state law.

M. S. B.

# REVIVING BARRED DEBT AS A FRAUDULENT "INCUMBRANCE" UNDER THE BANKRUPTCY ACT

A recent federal decision holds that the revival by an insolvent debtor just before bankruptcy of a debt barred by the statute of limitations may be treated as an "incumbrance" of the debtor's property, and void as such under section 67e of the Bankruptcy Act. In re Salmon (1916, S. D. N. Y.) 239 Fed. 413.1 In its ordinary meaning, "incumbrance of property" denotes some charge or lien attaching to specific property. To refer to a simple unsecured debt as an incumbrance of property causes considerable linguistic strain. Moreover, under the familiar ejusdem generis rule of construction, the term "incumbrances," in conjunction with its accompanying words in section 67e-"all conveyances, transfers, assignments, or incumbrances of his property"-would naturally be confined to the narrower and more usual meaning above suggested. Furthermore, the purpose of section 67e is to invalidate only such transfers as would have been fraudulent at common law or would constitute an act of bankruptcy under section 3 of the Act.² The learned judge says that the destruction by the bankrupt of a valid defense against the claimant's debt is analogous to a voluntary conveyance in fraud of creditors. But at common law a transfer of property was not fraudulent as to creditors when the debtor was under a moral obligation to the transferee, though the obligation was legally unenforceable because of some statutory provision.⁸ The payment of a barred debt was not deemed a badge of fradu-

¹ For more complete statement of facts, see page 129, infra.

² Coder v. Arts (1908) 213 U. S. 223, 242; 29 Sup. Ct. 436, 444.

^{*}Bump, Fraudulent Conv. (3d ed.) 223; Del Valle v. Hyland (1894, N. Y. Sup. Ct.) 76 Hun. 493 (outlawed debt); Livermore v. Northrop (1870) 44 N. Y. 107 (debt within Statute of Frauds); Wilson v. Russell (1858) 13 Md. 494 (debt discharged under insolvent laws); Gardner v. Rowe (1825, Eng. V. C.) 2 Sim. & St. 346 (transfer to cestui of land held on oral trust).

lent intent but a satisfaction of the debtor's moral obligation to pay a creditor, for the statute of limitations is usually considered as merely suspending the creditor's remedy, not as destroying the debtor's obligation.4 When the statute is waived, the old obligation again becomes effective.⁵ The running of the statute creates in the debtor the power of defeating the claim, if he cares to exercise it. This power passes to the trustee in bankruptcy, and cannot, after bankruptcy proceedings have been instituted, be exercised by the debtor.6 But apart from bankruptcy, the privilege of exercising the power by pleading the statute is personal to the debtor and he is under no duty to exercise it for the benefit of other creditors.7 Consequently it would seem to follow that creditors cannot object to his releasing or destroying the power by a new promise, actual or implied from part payment. If sound policy forbids the revival of barred debts within four months of bankruptcy, it is believed that further legislation is necessary. The part payment of a barred debt might (as well as reviving the debt) constitute a preference, voidable under section 60b, if the debtor were charged with notice;8 but it is difficult to see how such a revival can be avoided as a fraudulent incumbrance under sec. 67e. The only other cases found on the point are opposed to the principal case, and would seem to represent the sounder view.9

M. B.

Johnson v. Albany & S. R. R. Co. (1873) 54 N. Y. 416.

⁵ Ilsley v. Jewett (1841, Mass.) 3 Met. 439.

^e In re Zorn & Co. (1912, E. D. Pa.) 193 Fed. 299.

⁷ Elliot v. Trahern (1891) 35 W. Va. 634, 643, 14 S. E. 223, 226; see also Cahill v. Bigelow (1836, Mass.) 18 Pick. 369, 372 (Statute of Frauds).

^e See In re Banks (1913, N. D. N. Y.) 207 Fed. 662.

In re Banks, supra; In re Blankenship (1915, S. D. Cal.) 220 Fed. 395.

# RECENT CASE NOTES

ALIEN ENEMIES—NATURALIZATION—"APPLICATION."—U. S. Rev. St. sec. 2171 (Comp. St. 1916, sec. 4362), first enacted in 1802 (Act April 14, 1802, ch. 28, 2 Stat. 153) declares that no alien who is a native citizen or subject or a denizen of any country with which the United States is at war "at the time of his application" shall then be admitted to citizenship in the United States. By the Act of June 29, 1906, c. 3592, 34 Stat. 596 (Comp. St. 1916, sec. 4362) the naturalization law was changed and aliens were for the first time required to file a petition for citizenship, and ninety days' notice of such petition had to be given before final hearing thereon in open court. The applicant was a German citizen. War was declared between the filing of his petition and the date set for final hearing. Held, that the final appearance of the applicant in open court and not the filing of the petition should be regarded as the "application" referred to in the act of 1802, and the applicant must be denied admission. In re Naturalization of Subjects of Germany (1917, E. D. Wis.) 242 Fed. 971.

See, in accord, Ex parte Borchardt (1917, E. D. S. C.) 242 Fed. 1006; In re Haas (1917, N. D. Tex.) 242 Fed. 739; In re Jonasson (1917, D. C. Md.) 241 Fed. 723. But see, contra, United States v. Meyer (1917, C. C. A. 2d) 241 Fed. 305, Hough, J., dissenting; In re Nannanga (1917, S. D. Ga.) 242 Fed. 737; In re Kreuter (1917, S. D. Cal.) 241 Fed. 985. The principal case would seem to represent the better view. The apparent purpose of the statute being to protect the United States against the admission of persons whose loyalty might be doubtful, it should be strictly construed in favor of the Government.

ALIEN ENEMIES—RIGHT TO SUE.—The resident manager (erroneously assumed by the court to be a German) of a domestic corporation, practically all of whose stock was owned by a German corporation, brought suit on behalf of himself and with power of attorney to represent the German majority stockholders for an injunction against the two American directors, charging them with deliberately seeking to wreck the corporation. A motion was made to stay the prosecution of the suit on ground that plaintiffs were alien enemies. Held, that the suit might be maintained, since the tolerance implied in the President's proclamation assuring German residents that they would be undisturbed in the peaceful pursuit of their occupations, and his statement that the sins of the German Government "ought not to be visited on" the German people, were a declaration of public policy, by which policy the courts were bound. Posselt v. D'Espard (1917, N. J. Ch.) 100 Atl. 893. See Comments, p. 104.

ALIEN ENEMIES—RIGHT TO SUE—DOMESTIC CORPORATION WITH GERMAN STOCKHOLDERS.—The plaintiff was a New Jersey corporation. Of its capital stock of 50 shares, 45 were owned by a German corporation, 2 by a German subject, 2 by American citizens, and 1 by an Austrian subject who

resided in the United States and acted as manager of the plaintiff corporation. The four individual stockholders constituted the board of directors. A motion was made to stay the further prosecution of the suit on the ground that the plaintiff was an alien enemy. Held, that the suit might be maintained because the corporation should be regarded as an entity separate and apart from its stockholders and because the control of the company was vested in a board of directors, of whom the majority (including the manager) were residents of the United States. Fritz Schultz, Jr., Co., v. Raimes & Co. (1917, N. Y. Sup. Ct.), 166 N. Y. Supp. 567. See Comments, p. 108.

Bankruptcy—Reviving Barred Debt as Fraudulent "Incumbrance."—The day before a petition in bankruptcy was filed against him, a debtor made a payment upon a statute-barred debt, intending to revive it. The debtor was aware of his insolvent condition, the creditor was not. The creditor, offering to restore the payment, filed his claim on the revived debt. Held, that the claim should be disallowed, its revival being an "incumbrance" of the bankrupt's property and void under section 67e of the Bankruptcy Act. In re Salmon (1916, S. D. N. Y.) 239 Fed. 413. See Comments, p. 126.

BILLS AND NOTES—HOLDER IN DUE COURSE—CORPORATION'S CHECK USED IN INTEREST OF FISCAL OFFICER.—W. was treasurer of the plaintiff corporation and also of the B. company. The defendant bank held for collection a note of the B. company which W. had indorsed. To pay this note W. wrongfully drew the plaintiff company's check, signed by himself as treasurer, to the order of the defendant. This check, after being certified, was received by the defendant from a representative of the B. company in payment of the note on its date of maturity. Held, that there was nothing in the transaction to put the defendant bank on notice that W. was misappropriating the funds of the plaintiff to pay his own debt. Colonial Fur Ranching Co. v. First Nat. Bank (1917, Mass.) 116 N. E. 731.

The fact that the corporate obligation is drawn by the official payable to himself and used to pay his own debt is not of itself constructive notice of lack of authority. Fillebrown v. Hayward (1906) 190 Mass. 472, 77 N. E. 45; contra, Rochester Turnpike Road Co. v. Paviour (1900) 164 N. Y. 281, 58 N. E. 114. But even in Massachusetts, where the instrument is made payable to a creditor of the officer, the creditor takes at his peril. Johnson v. Longley Co. (1910) 207 Mass. 52, 56, 92 N. E. 1035. The question before the court in the principal case was whether or not it would carry this doctrine farther and apply it where the officer was not absolutely liable to the payee, as a debtor, but only contingently as an indorser. The liability of a bankrupt indorser has been called a provable "debt." In re Philip Semmer Glass Co. (1905 C. C. A., 2d) 135 Fed. 77. But the purpose of the Bankruptcy Act was to relieve insolvents from their pecuniary liabilities. Moch v. Market

St. Nat. Bank (1901, C. C. A., 3d) 107 Fed. 897, 898. So that while the Bankruptcy Act seems to treat an indorser as an actual debtor, it does not do so in reality, for "debt" as used there may mean only "claim" or "liability." Moch v. Market St. Nat. Bank, supra. In the instant case, the court said that the debt was primarily that of the B. company, the officer being only contingently liable. Refusal to extend the doctrine of notice to such a case is believed to be sound.

G. L. K.

CARRIERS—CARMACK AMENDMENT—BILL OF LADING ISSUED BY CONNECTING CARRIER.—The plaintiff as shipper of live stock received a bill of lading from the initial carrier. The connecting carrier issued a second bill changing the liability by requiring 30 days' notice of claim in order to hold the carrier liable. *Held*, that the second bill was invalid for lack of consideration and because the enforcement of its terms would defeat the policy of the Carmack Amendment. *Missouri K. & T. Ry. Co. v. Ward* (1917) 37 Sup. Ct. 617.

This holding is a natural corollary to the rule already established under the Carmack Amendment that the bill of lading issued by the initial carrier applies to the entire transportation and fixes the rights and duties of all participating carriers. See Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co. (1915) 241 U. S. 190, 196, 36 Sup. Ct. 541, 544, and cases there cited.

CARRIERS—CARMACK AMENDMENT—PRESUMPTION AGAINST TERMINAL CARRIER.—In an action against the terminal carrier to recover damages for injury to goods, the plaintiff introduced evidence to show that the goods were delivered in good condition to the initial carrier and were received from the defendant in a damaged condition. The defendant contended that since the passage of the Carmack Amendment this did not make a prima facie case. Held, that the common law presumption against the terminal carrier was not superseded by the Carmack Amendment, which did not establish any presumption, but merely gave an optional remedy against the first carrier for the entire transportation. Salinger, J., dissenting. Erisman v. Chicago B. & Q. R. Co. (1917, Ia.) 163 N. W. 627.

The point decided is not new, even in Iowa (see cases cited on p. 631 of the opinion), but the case is worthy of note for its detailed reexamination of the whole subject, with full discussion of both sides of the question and an apparently exhaustive collection of authorities.

Carriers — Non-Delivery — Restraint of Princes.—The defendants agreed with the plaintiffs to provide a steamer to proceed to Marionpol, and there load a cargo and carry it to Japan. On September 1, the defendants refused to name a steamer on the untrue assertion that the British government had prohibited steamers going to the Black Sea to load. The Turkish government closed the Dardanelles on September 26. The defendants pleaded "restraint of princes" as a justification of their breach of the charter-party. The ship would not have had time to reach the

Dardanelles before the closing. *Held*, that a reasonable apprehension of the impending closing of the Dardanelles, though justified by the event, did not constitute a restraint of princes, and the defendant was not excused. *Watts & Co. Ltd. v. Mitsui & Co. Ltd.* [1917] A. C. 227.

The question decided was similar to that involved in the case of the Kronprinzessin Cecilie, discussed in (1917) 26 YALE LAW JOURNAL, 247, 791, in which the decision of the United States Circuit Court of Appeals that the owners of the ship were not excused by reasonable apprehension of war, was reversed by the Supreme Court. The opinion in the Supreme Court cites as authority a dictum in the English case in the Court of Appeal, which appears to be contradicted by the above decision of the House of Lords.

CONFLICT OF LAWS—Ex PARTE DECREE OF JUDICIAL SEPARATION—FOREIGN RECOGNITION.—A husband and wife from the time of their marriage in New York never lived together. The wife, "domiciled" in New York, procured an ex parte divorce from bed and board, on grounds of cruelty. When her husband, domiciled throughout in Connecticut, began suit there for divorce a vinculo for desertion, she introduced the New York decree to justify her living apart. Held, that such a decree, as opposed to full divorce, did not affect the marriage status, was personal in its nature, and was not in any way effective in another state unless entered by a court having jurisdiction over the defendant. Pettis v. Pettis (1917) 91 Conn. 608, 101 Atl. 13. See COMMENTS, p. 117.

CONFLICT OF LAWS—FOREIGN MARRIAGE—REMARRIAGE PROHIBITED FOR LIMITED TIME AFTER DIVORCE.—Two residents of Illinois were married in Indiana within a year after the woman had obtained a divorce in Illinois. By statute in Illinois, and by the terms of the divorce decree, such a marriage was prohibited, and would not have been recognized in Illinois. Subsequently the parties removed to Wisconsin where a similar statute was in force. Upon the death of the "husband," the woman filed a claim under the Wisconsin Workmen's Compensation Act. Held, that the marriage was void and that the claimant was not entitled to compensation as the wife of the deceased. Hall v. Industrial Commission (1917, Wis.) 162 N. W. 312.

It is the general American rule, based on the policy of giving legal sanction wherever possible to what may be called a marriage in fact, that the lex loci celebrationis determines the validity of a marriage. Wharton, Conflict of Laws (3d ed.) sec. 127 et seq. Accordingly, statutes prohibiting marriage for a specified period after divorce have frequently been construed as applying only to marriages in the same state, and a marriage elsewhere may be held valid even in the prohibiting state. Estate of Wood (1902) 137 Cal. 129, 69 Pac. 900; Dudley v. Dudley (1911) 151 Ia. 142, 130 N. W. 785; contra, Lanham v. Lanham (1908) 136 Wis. 360, 117 N. W. 787; Wilson v. Cook (1912) 256 Ill. 460, 100 N. E. 222. Outside the prohibiting state, it is not believed that such a marriage, if valid where

celebrated, has ever before been denied recognition, and this is conceded in the principal case. The decision seems to proceed in part on the theory originally followed by the civil law, which finds some support in the English cases, that capacity to marry is a matter of personal status, to be determined by the law of the domicile. Cf. Sottomayor v. De Barros (1877) 3 P. D. I; Brook v. Brook (1861) 9 H. L. Cas. 192. But the question is confused by the emphasis placed on the public policy of the forum, as evidenced by the Wisconsin statutes, and its similarity to the policy of Illinois. If the law of the domicile is the proper criterion, its application can hardly be conditioned on such similarity. And since it was not the public policy of Wisconsin, but the similar policy of Illinois, which the court professedly enforced, the decision cannot be explained on the analogy, which would be strained at best, of cases holding that the distinctive public policy of the forum may deny recognition to certain classes of foreign marriages. State v. Bell (1872, Tenn.) 7 Baxt. 9 (miscegenation); United States v. Rodgers (1901, D. C. E. D. Pa.) 109 Fed. 886 (consanguinity). The decision might possibly be supported by regarding the situation as similar to that existing before a decree nisi has become absolute, and considering the divorce incomplete until the year has expired. This ground also is suggested in the opinion, but no other decided case has been found to support it. See, however, dissenting opinion in Estate of Wood, supra; and cf. McLennan v. McLennan (1897) 31 Oreg. 480, 50 Pac. 802.

L. F.

CONFLICT OF LAWS—WORKMEN'S COMPENSATION ACT—FOREIGN CONTRACT OF EMPLOYMENT.—The plaintiff, employed under a contract made in Massachusetts, was injured in Connecticut while working within the scope of his employment. Suit was brought in Connecticut under the Connecticut Workmen's Compensation Act. Held, that the plaintiff might recover. Donthwright v. Champlin (1917) 91 Conn. 524, 100 Atl. 97. See COMMENTS, p. 113.

Constitutional Law—Admiralty—State Workmen's Compensation Act not Applicable to Injuries within Admiralty Jurisdiction.—An employee of a company operating a coastwise steamship line was accidentally killed while engaged in the work of unloading a cargo at a pier in New York. In proceedings under the New York Workmen's Compensation Act, his widow and children received an award which was approved by the New York Court of Appeals. The case was taken by writ of error to the United State Supreme Court. Held, that the state compensation act, as applied to matters within admiralty jurisdiction, was in conflict with the grant of exclusive admiralty jurisdiction to the federal courts by the Constitution, and was to that extent invalid, and the award must be set aside. Southern Pacific Co. v. Jensen (1917) 37 Sup. Ct. 524. See Comments, next month.

CONSTITUTIONAL LAW—CONSTITUTIONAL CONVENTIONS—LEGISLATURE'S POWER TO CALL.—The plaintiff brought suit for himself and all other

tax-payers of the state, to enjoin the enforcement of an act of the legislature providing for the calling of a constitutional convention without first submitting the question to the people. The state constitution contained no provision for the calling of such conventions. On a submission of the question three years before, the electorate had declined to authorize a convention. Held, that the act in question was beyond the powers of the legislature and the injunction should issue. Lairy, J., dissenting. Bennett v. Jackson (1917, Ind.) 116 N. E. 921.

In the absence of judicial authority the weight of opinion among textwriters seems to be against the instant case. Jameson, Const. Conv. (6th ed.) 211; Dodd, The Revision and Amendment of State Constitutions, 44; 6 Am. & Eng. Enc. of Law, 896; Cooley, Const. Lim. (6th ed.) 42. But there are strong arguments in favor of the decision. Legislative power may be divided into two classes, ordinary and fundamental. Jameson, Const. Conv. 84-86. The grant of legislative authority to the General Assembly confers only the power to pass ordinary legislation. McCullough v. Brown (1893) 41 S. C. 220, 248, 19 S. E. 458, 473. The power to pass fundamental legislation is still retained by the people. In drawing the line between the two, extra-legal factors, such as custom, political tendency, expediency, public policy, must necessarily have influence. It is an almost universal custom in the states, in the absence of constitutional provision, first to submit the question of calling a convention to the people. 6 R. C. L. 27. In the few contrary instances cited by the dissenting judge the power of the legislature had not been challenged. Granting that where the people have no machinery to institute legislation there must be an implied power in the legislature to take the first step, this may well be limited to what is absolutely necessary to enable the people to exercise their reserved powers. Nor can it be said to be immaterial whether the people act before or after the convention, in view of the large expenditure of public money which the calling and holding of such conventions necessarily involve. In view of these considerations, the decision in the instant case may well be accepted as sound.

CONSTITUTIONAL LAW-CONSTITUTIONALITY OF SELECTIVE DRAFT ACT.-The defendants were indicted for conspiring to procure persons to violate certain penal provisions of the "selective draft act" of May 18, 1917. On a motion to quash the indictment they attacked the constitutionality of the act, objecting, among other grounds indicated below, that it deprived the courts of the United States of the power to pass on the exemptions provided by the act, and that it called out the militia for a purpose not authorized by the Constitution. Held, in sustaining the indictment, that the act was within the power "to raise and support armies" conferred by Art. I, sec. 8, subdivision 12 of the Constitution; that it did not call out the militia as such, but, in the exercise of the general power to draft all citizens, drafted into the national army the members of the militia organizations; that compulsory military service is not "involuntary servitude" within the prohibition of the Thirteenth Amendment; that the exemption boards, if courts at all, were military courts established under the power given by Art. I, sec. 8 of the Constitution "to make rules for

the government and regulation of the land and naval forces" and their decisions, like those of other military tribunals, need not be reviewable by the civil courts; and that the act involved no unconstitutional delegation of legislative or judicial powers. *United States v. Sugar* (1917, E. D. Mich.) 243 Fed. 423.

The constitutionality of the same act was upheld against certain of the same objections in an eloquent opinion by Judge Speer in Story v. Perkins (1917, S. D. Ga.) 243 Fed. 997, and the claim of "involuntary servitude" was disposed of in a single sentence in Claudius v. Davie (1917, Cal.) 165 Pac. 689. In the Story case the further objection was made and overruled that Congress had no power to compel service outside the United States. The decisions are interesting as current history, but the questions raised presented little novelty and less difficulty. Several cases upholding the draft act of Civil War times are cited in the principal case.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—DECISION OF STATE COURT.—In a suit to collect special assessments the defendant landowner offered evidence that he was not benefited. The evidence was refused. Consequently an intervenor (the owner of bonds payable from the tax) offered no evidence to rebut that which had been rejected. When judgment favorable to the intervenor was reversed by the state Supreme Court without remanding, the intervenor claimed a violation of his constitutional rights. Held, that since the decision of the state court on appeal amounted to excluding the intervenor's evidence at trial, it denied him due process of law. Saunders v. Shaw (1917) 37 Sup. Ct. 638.

Two insurance companies being sued in Tennessee but not served, filed pleas in abatement in the Tennessee court, which, on the strength of these pleas, assumed jurisdiction over the parties and rendered judgment for the plaintiff. Suit being brought in Illinois on this judgment, the Illinois court refused to question the jurisdiction of the Tennessee courts. Held, that such a refusal did not amount to a denial of due process of law to the insurance companies. Chicago Life Ins. Co. v. Cherry (1917) 37 Sup. Ct. 492. See COMMENTS, p. 121.

CONSTITUTIONAL LAW—DUE PROCESS—EMPLOYMENT AGENCIES FORBIDDEN TO TAKE FEES FROM WORKERS.—The plaintiffs, proprietors of private employment agencies, sought to enjoin the enforcement of the Washington Employment Agency Law which forbade the collection of fees from workers for furnishing them with employment. *Held*, that the statute was an infringement of the Fourteenth Amendment. Brandeis, McKenna, Holmes, and Clarke, JJ., dissenting. Adams v. Tanner (1917) 37 Sup. Ct. 662.

Under the police power the states have the right to regulate any business, vocation, or occupation. Schmidinger v. City of Chicago (1913) 226 U. S. 578, 33 Sup. Ct. 182. They may go even farther and prohibit absolutely the maintenance of any business, where the public welfare requires its discontinuance. Cosmopolitan Club v. Virginia (1908) 208 U. S. 378, 28

Sup. Ct. 394. Private employment agencies are regulated by statute in at least thirteen states and such statutes have been upheld, the purpose of preventing fraud being a sufficient justification for the exercise of the police power. Brazee v. Michigan (1916) 241 U. S. 340, 36 Sup. Ct. 561. The Washington statute purports to regulate private employment agencies but it was alleged that its actual operation would practically prohibit them, as such agencies could scarcely exist without the privilege of collecting fees from those seeking employment. Yet, have such agencies any constitutional right to exist? There seems to have been ample evidence of such evils as would render them fit subjects for the police power; and it was primarily for the state legislature to determine how drastic a remedy was necessary. The statute is not arbitrary according to the test laid down in Lindsley v. Natural Carbonic Co. (1911) 220 U. S. 61, 31 Sup. Ct. 337. It is submitted that the dissenting opinion of Mr. Justice Brandeis, remarkable for its modern method of approach and comprehensive marshalling of social data, presents the better view and is more in line with the recent progressive policy of the Supreme Court, which has affirmed with but rare exception state statutes intended to advance "social justice."

S. J. T.

Constitutional Law—Due Process of Law—Order of Railroad Commission.—The plaintiff railroad having cut down its local passenger service as a war economy measure, was, after a hearing by the State Railroad Commission, ordered to operate additional trains. It appeared that the traffic would not pay a reasonable profit over cost of operation. Held, that such a regulation was a violation of the due process clause of the Fourteenth Amendment to the Federal Constitution. Mississippi R. R. Com. v. Mobile & Ohio R. R. (1917) 37 Sup. Ct. 602. See Comments, p. 121.

Constitutional Law—Interstate Commerce—Federal Employers' Liability Act Excluding State Legislation.—The plaintiff, while in the employ of a railroad company engaged in interstate commerce, suffered personal injuries without negligence on the part of the company. The Federal Employers' Liability Act (Comp. Stat. 1916, §§8657-8665) regulated the liability of such railroad companies to their employees in cases involving negligence, but did not impose any liability in the absence of negligence. The New York Workmen's Compensation Act (N. Y. Laws 1913, ch. 816; Laws 1914, ch. 41 and 316) provided that employees might recover for injuries received in the course of their employment, without regard to the negligence of the employer. Held, that the plaintiff could not have the benefit of the New York act since the Federal act was exclusive. Brandeis and Clarke, JJ., dissenting. New York Cent. R. R. Co. v. Winfield (1917) 37 Sup. Ct. 546.

This decision reverses the holding of the New York Court of Appeals in Winfield v. New York Cent. R. Co. (1915) 216 N. Y. 284, 110 N. E. 614, which was adversely criticised in (1916) 25 Yale Law Journal, 497. For a discussion of a recent Supreme Court decision still further narrowing the field of state legislation of this character, see Comments, next month.

CONSTITUTIONAL LAW-WORKMEN'S COMPENSATION ACT-COMPULSORY COMPENSATION .- The plaintiff sued in a common law action to recover for injuries received in the course of employment through the negligence of the defendant company. The Maryland Employer's Liability Act (Laws 1914, ch. 800) required employers to provide compensation and limited the amount that might be recovered, giving the employer an option to secure the compensation through state insurance, insurance with an authorized insurance corporation, or by a deposit of securities with the state commission. If he failed to secure it in any of these ways, the employee could proceed either for compensation under the act or by common law action in which the employer was denied the benefit of certain common law defences. The defendant pleaded that it had complied with the provisions of the act and was not liable to a common law action. The plaintiff demurred, on the ground that the act contravened the Fourteenth Amendment. Held, that the act was constitutional. Solvuca v. Reilly & Ryan Co. (1917, Md.) 101 Atl. 710.

The act here in question was similar to the New York act upheld in New York Cent. R. Co. v. White (1917) 37 Sup. Ct. 247. For a discussion of the constitutionality of the Washington act, which is even more rigid in character, in that it requires employers of certain hazardous occupations to make enforced contributions and denies even the alternative of self-insurance, see (1917) 26 YALE LAW JOURNAL, 618.

CONTRACTS—ASSIGNABILITY—ASSIGNMENT BY PURCHASER ON CREDIT.—The defendant undertook to transport sand and gravel for the plaintiff's assignor, and was to be paid each month for the previous month's deliveries. On being notified of the assignment to the plaintiff, the defendant refused to perform on the ground that the contract was non-assignable. Held, that the contract was assignable. C. H. Little Co. v. Cadwell Transit Co. (1917, Mich.) 163 N. W. 952.

The assignment in this case involved the substitution of a new party both in respect of the right to have sand and gravel transported by the defendant and in respect of the duty to pay the price. The power of the possessor of a contract right to effect such a substitution has long since been fully recognized by the common law, by equity, and by statute. See Walter Wheeler Cook, The Alienability of Choses in Action (1916) 29 HARV. L. REV. 816. It has been thought, however, that an assignment is invalid if it involves the substitution of a new party to perform a duty of the assignor as well as to enforce his right. Arkansas V. S. Co. v. Belden Mining Co. (1888) 127 U. S. 379; Boston Ice Co. v. Potter (1877) 123 Mass. 28. This depends on whether or not the duty is one requiring performance by the assignor in person, a question to be determined in the same way as are other questions involving the doctrines of conditions precedent. The tendency is now clearly in the direction of holding that performance in person is not a condition precedent. British Waggon Co. v. Lea (1880) 5 Q. B. D. 149; Northwestern L. Co. v. Byers (1903) 113 Mich. 534, 95 N. W. 529; Rochester Lantern Co. v. Stiles P. Co. (1892) 135 N. Y. 209; cf. the earlier case of Robson v. Drummond (1831, K. B.) 2 B. & Ad. 303. The fact that financial credit has been given to the

assignor does not make the duty to pay the price a purely personal duty; for the assignment does not affect the assignor's liability in case of non-payment, and the assignment deprives the other party of no part of his security. The English courts seem to have carried this to the extreme of holding the assignment good, even though the duty of making payment in the future has been turned over to the assignee and the assignor has disabled himself from performing (as where the assignor is a corporation and has been dissolved). Tolhurst's Case [1903] A. C. 414. The principal case goes to no such extreme and is easily sustainable.

C. I.

CRIMINAL LAW—CONSPIRACY TO DEFRAUD UNITED STATES—FRAUDS IN CONGRESSIONAL ELECTIONS.—The defendants demurred to indictments under section 37 of the federal Criminal Code (Comp. St. 1913, sec. 10,201) which makes it an offense to "conspire . . . . to defraud the United States in any manner or for any purpose." The indictments were based on alleged conspiracies to bribe voters or cause illegal voting at congressional elections. Held, that the conspiracies described were not within the statute. United States v. Gradwell (1916) 37 Sup. Ct. 407.

The question has several times arisen under this statute whether the word "defraud" should be interpreted in an exact technical sense as meaning to deprive, by fraudulent means, of money or property, or whether it should be extended to cover any deceit or imposition practiced on the government or its agents in connection with the government service. Some decisions and dicta in early cases tend to support the narrower construction. United States v. Thompson (1886, C. C. D. Oreg.) 29 Fed. 86; United States v. Milner (1888, C. C. N. D. Ala.) 36 Fed. 890. Cf. Cross v. North Carolina (1889) 132 U. S. 131, 138-139, 10 Sup. Ct. 47, 49. And the general rule is of course well recognized that penal statutes should be strictly construed. Baldwin v. Franks (1887) 120 U. S. 678, 691, 7 Sup. Ct. 656, 662; France v. United States (1897) 164 U. S. 676, 682, 17 Sup. Ct. 219, 222. Nevertheless the later cases have rejected any limitation to property frauds and have held that the statute is broad enough to cover "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government." Haas v. Henkel (1910) 216 U. S. 462, 479; 30 Sup. Ct. 249, 254 (conspiracy to obtain advance information of government cotton reports). See also Curley v. United States (1904, C. C. A. 1st) 130 Fed. I (conspiracy to impersonate another in civil service examination); United States v. Stone (1905, D. C. D. N. J.) 135 Fed. 392 (conspiracy to deceive government inspectors of life preservers). Whether the principal case marks a tendency to return to stricter construction may well be doubted. The opinion proceeds chiefly on the special ground that Congress, having constitutional power to regulate congressional elections, and having at one time exercised that power by a comprehensive system of legislation, subsequently repealed this legislation and thus elected to leave the matter to state regulation. Perhaps the case is most noteworthy as an exception to the current tendency to extend the scope of the federal laws and leave less and less to the states.

CRIMINAL LAW—FALSE PRETENSES—PROFESSIONAL SERVICES AS "VALU-ABLE THING."—The defendant by false representations obtained medical services from a physician. Section 1166 of the Mississippi Code of 1906 made it an offense for any person, with intent to cheat or defraud another, designedly to "obtain from any person any money, personal property, or valuable thing." *Held*, that professional services were a valuable thing, within the meaning of this section. *State v. Ball* (1917, Miss.) 75 So. 373.

This decision seems rather at variance with the "noscitur a sociis" rule of construction. Professional services were held not to be "property" under the Oklahoma false pretenses statute. Ex parte Wheeler (1912) 7 Okla. Cr. 562, 124 Pac. 764. (See Okla. Rev. L., 1910, sec. 2694.) But see United States v. Ballard (1902, D. C. W. D. Mo.) 118 Fed. 757 (a month's lodging held a "valuable thing"). Cf. State v. Black (1890) 75 Wis. 490, 44 N. W. 635 (board and lodging not "property").

CRIMINAL LAW—THREAT TO KILL THE PRESIDENT.—A statute, enacted by Congress February 14, 1917, provided that anyone who knowingly or wilfully threatened the life of the President should upon conviction be liable to \$1,000 fine or five years' imprisonment, or both. The accused declared, "President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself." Held, that a demurrer, based on the ground that the language employed by the accused did not amount to a threat, was properly overruled. United States v. Stickrath (1917, S. D. Oh.) 242 Fed. 151.

The statute, rather than the application of it, is noteworthy as illustrating the unexampled stringency of our present war legislation.

FRAUDULENT CONVEYANCES—SALES IN BULK ACT—OMISSION OF CREDITOR FROM VENDOR'S LIST.—A "sales in bulk" statute provided that the transfer of a stock of merchandise should be void against the transferor's creditors "unless the transferee demands and receives from the transferor a written list . . of the creditors of the transferor" certified by him as complete, and unless the transferee "shall . . notify . . every creditor whose name and address is stated in said list . " A vendor omitted the name of one creditor from the list furnished under this statute. The vendee had no knowledge of the omission and the creditor was not notified. In all other respects the statute was complied with. Held, that the vendee's title was good as against an attachment by the omitted creditor. Glantz v. Gardiner (1917, R. I.) 100 Atl. 913.

This case lines up another jurisdiction in favor of the proposition that the fraud or mistake of the vendor in omitting a creditor's name is not attributed to the bona fide vendee, so as to invalidate the sale as to him. See, in accord, Coach v. Gage (1914) 70 Oreg. 182, 138 Pac. 847; International Silver Co. v. Hull (1913) 140 Ga. 10, 78 S. E. 609. In the principal case the court decided that as the statute made the validity of the sale dependent on the action of the vendee, not that of the vendor, and as it did not require of the vendee that he obtain a complete list, but merely a list certified by the vendor as complete, the omission by the vendee could

not invalidate the sale. There is a dictum apparently contra in a Massachusetts case where the seller, through misunderstanding of the statute, included only merchandise creditors in the list, but the facts are not fully stated and it is not clear whether or not the purchaser knew of the omission. If he did, of course, mistake of law would not excuse him. See Rabalsky v. Levenson (1915) 221 Mass. 289, 108 N. E. 1050. The objection to the decision in the principal case, that it does not protect the creditor, for whose benefit the statute was passed, is met by the observation of the court that this defect, if any, is for the legislature to remedy; and with regard to the possibility of collusion the court points out that the creditor still has all his previous remedies, and may show fraud in fact, if it exists, and so avoid the sale, even if the vendee has fulfilled all the statutory requirements. The decision seems justified as a matter of construction, but discloses a weakness in the statute, since the vendor is under no effective compulsion to furnish a complete list.

L. F

Monopolies—Sherman Act—"Rule of Reason."—In a suit for triple damages under the Sherman Act it appeared that the defendants, owners of steamship lines operating between New York and South African ports, in pursuance of an effective combination to restrict competition, established by concerted action, if not by formal agreement, uniform freight rates, including a "primage charge" which was subsequently refunded to those shippers who shipped exclusively by the vessels of the combining companies. Held, that the acts of the defendants amounted to a combination in restraint of trade in violation of the Sherman Act. Thomsen v. Cayser (1917) 37 Sup. Ct. 353.

There has been much popular misapprehension of the meaning of the "rule of reason" announced by the Supreme Court in its construction of the Sherman Act in Standard Oil Co. v. United States (1911) 221 U. S. I, 31 Sup. Ct. 502, and United States v. American Tobacco Co. (1911) 221 U. S. 106, 31 Sup. Ct. 632. The Circuit Court of Appeals seems to have shared this misapprehension when it reversed its former opinion in the principal case and held that the combination was not shown to be in violation of the statute because not in "unreasonable" restraint of trade. Union Castle Mail S. S. Co. v. Thomsen (1911, C. C. A. 2d) 190 Fed. 536. In reversing this decision the Supreme Court reasserted what should have been clear from its former rulings, that the "rule of reason" is to be applied, not to determine whether the motives of the defendants were good or bad, or whether the power of the combination was used benevolently or oppressively, or whether the results were in the Court's opinion beneficial or injurious, but whether the underlying policy of the statute,-to preserve competitive conditions,-was in fact violated. Under some of the decisions before the Standard Oil Co. case, there was at least ground for the inference that the combination of two out of fifty competing concerns must necessarily be held unlawful, merely because it theoretically destroyed the actual or potential competition between the two. See Northern Securities Co. v. United States (1904) 193 U. S. 197, 331; 24 Sup. Ct. 436, 454; United States v. American Tobacco Co. (1908, C. C. S. D. N. Y.) 164 Fed. 700, 701-702. This conclusion no longer follows,

if the "rule of reason" shows that the general condition of competition in the trade is not substantially impaired. But if, in a given case, the purpose or result of the combination appears to be to establish, in any substantial sense, non-competitive conditions in the trade as a whole, the policy of the law is violated, and no room is left for the court to apply its own theories of policy, economics or morals. Standard Sanitary Mfg. Co. v. United States (1912) 226 U. S. 20, 49; 33 Sup. Ct. 9, 15; Cf. International Harvester Co. v. Missouri (1914) 234 U. S. 199, 209; 34 Sup. Ct. 859, 862. Judged by this test the combination in the principal case was clearly illegal.

H. W. D.

SALES—SERVING OF GAME AS "SALE" WITHIN GAME LAW.—Two guests at the defendant's hotel were served native partridge. The New York Conservation Law provides that the dead bodies of birds native to the state, and protected by law shall not be "sold, offered for sale, or possessed for sale for food purposes within this state, . . ." Held, that the serving of partridges as part of the guests' table d'hôte meal constituted a sale in violation of the statute. People v. Clair (1917, N. Y.) 116 N. E. 868.

Both at common law and under the Sales Act, general property as distinguished from special property must pass in order to effect a sale. Jenkyns v. Brown (1849) 14 Q. B. 496. Uniform Sales Act, Sec. 1, §76. But a guest at a hotel or restaurant does not get general property, i. e., all the incidents of ownership, in the food that he orders. He is privileged to eat as much as he desires, but, having eaten, his control over the remaining food is at an end. What he buys is not a specified quantity of food, but service and the privilege of eating. The transaction of serving and receiving pay for a meal has, therefore, been held not to constitute a sale under the Sales Act. Merrill v. Hodson (1914) 88 Conn. 314, 91 Atl. 533; Beale, Innkeepers §169. On the other hand it has been held in cases relating to statutes regulating the sale of liquor, impure milk, and oleomargarine that serving and receiving pay therefor does constitute a sale. State v. Lotti (1900) 72 Vt. 115, 47 Atl. 392; Commonwealth v. Warren (1894) 160 Mass. 533, 36 N. E. 308; Commonwealth v. Miller (1890) 131 Pa. St. 118, 18 Atl. 938. Since a technical interpretation of the term "sale" in the case of game laws and similar prohibitory statutes would open the way to evasion of the law, it is submitted that the more liberal construction adopted in the principal case, and in the great majority of similar cases, is both reasonable and desirable.

C. S. B.

TAXATION—INHERITANCE AND TRANSFER TAXES—EXEMPTION OF INSTI-TUTIONS RECEIVING "STATE AID."—The Connecticut Inheritance Tax statute exempted "all property passing to or in trust for the benefit of any corporation or institution located in this state which receives state aid." (Pub. Acts of 1915, ch. 332, sec. 3.) The will of Justus S. Hotchkiss, a Connecticut testator, left bequests to five institutions, including Yale University, all of which enjoyed under general or special laws more or less complete exemption from ordinary taxation. Held, that such tax exemptions constituted "state aid" within the meaning of the inheritance tax law, and the institutions receiving them were also exempt from the inheritance tax. Corbin v. Baldwin (1917, Conn.) 101 Atl. 834.

Several instances of the use of the term "state aid" in various senses in Connecticut statutes and decisions are referred to in the opinion. The decision seems justified from the standpoint of statutory construction and is in line with the previous policy of the state, both legislative and judicial, in treating educational, religious and charitable institutions as in a sense agencies of the state, established and encouraged for the public benefit.

Taxation—Inheritance and Transfer Taxes—Survivorship of Joint Tenant.—A husband and wife owned jointly certain bonds, which they delivered to a trust company as trustee to pay them the income in equal shares and, if the agreement was in force at the death of either, to deliver the bonds to the survivor. An amendment to the Transfer Tax Act, subsequently passed, provided that where property was held jointly and payable to the survivor, the survivor's right should be deemed a taxable transfer. The husband died and a transfer tax was assessed on his interest in the bonds. Held, that the husband and wife were joint tenants and not tenants by the entirety, and that his interest passing to his wife by survivorship was taxable. In re McKelway's Estate (1917, N. Y.) 116 N. E. 348.

Apart from any question of constitutionality, inheritance and transfer tax statutes are commonly construed as applying to such transfers and devolutions only, as take place after the passage of the act imposing the tax. Ross, Inheritance Taxation, sec. 36. Matter of Seaman (1895) 147 N. Y. 69, 41 N. E. 401. And it was held in New York, in a case involving a vested remainder not yet come into possession, that a statute attempting to tax past transfers was unconstitutional. Matter of Pell (1902) 171 N. Y. 48, 63 N. E. 789. It has also been held, both in New York and elsewhere, that contingent remainders created before the passage of the tax law are not subject to tax though the contingency occurs subsequently. Matter of Seaman, supra; Lacey v. State Treasurer (1911) 152 Iowa 477, 132 N. W. 843. The principal case recognizes the rule against retroactive operation, but argues that since the husband had power to defeat the wife's right of survivorship by conveying his interest in his life-time, her right was not vested until his death, and therefore at his death there was a taxable transfer. This seems to be attaching undue weight to mere inaction on the husband's part. The wife's right in the principal case would seem to be closely analogous to a remainder subject to be defeated by the exercise of a power of appointment. The New York court has expressly held that in such a case, while the exercise of the power would be a taxable transfer, its non-exercise is not, and when the instrument creating the power was prior to the statute, property passing in default of appoinment cannot constitutionally be taxed. Matter of Langdon (1897) 153 N. Y. 6, 46 N. E. 1034; Matter of Lansing (1905) 182 N. Y. 238, 247, 74 N. E. 882. In Massachusetts, however, a statute expressly imposing such taxation has been upheld. Minot v. Treasurer (1911) 207 Mass. 588, 93 N. E. 973. The decision in the principal case thus finds support in a case from another jurisdiction but is difficult to reconcile with the previous New York decisions.

Taxation—Inheritance and Transfer Taxes—Trustee's Commissions—Approximating Expenses of Administration.—A New Jersey testator left the residue of his estate to his executors to hold as trustees during the life of his wife, with remainders after her death. By the New Jersey statutes, commissions of trustees are to be fixed by the courts with reference to the "actual pains, trouble and risk" involved. Under the Transfer of Property Tax Act of 1909 (N. J. Comp. St. 1910, p. 5301) a tax was assessed on the residue without allowance for trustees' commissions, and the executors and trustees appealed. Held, that trustees' commissions should be deducted in determining the net taxable value of the residue passing to the beneficiaries, but that the comptroller's office could not lawfully estimate in advance the amount of such commissions, and must await the final allowance of the commissions by the proper court. In re Christie's Estate (1917, N. J. Prerog. Ct.) 101 Atl. 64.

On the first point the court follows the New York decisions, on the ground that the New Jersey Transfer of Property Tax Act was copied from the New York act, from which it would be presumed that the legislature intended to adopt the established construction in New York. The New Jersey act applies to all stocks in New Jersey corporations held by foreign decedents, and its administration is therefore of practical interest to lawyers everywhere. The practice of the comptroller's office has been to approximate and allow in the assessment the estimated expenses of administration, without waiting for the estate to be finally settled. This practice is disapproved by the court as "not warranted in law." It is to be hoped that the decision on this point may be qualified or overruled or the act amended to permit a continuance of the former practice, at least in the case of foreign decedents. Otherwise the settlement in other states of estates containing New Jersey corporation securities will be subjected to great practical inconvenience and delay.

Wills—Olographic Will—Use of Typewriter.—The California Civil Code, sec. 1277, required that an olographic will should be entirely "written, dated and signed by the hand of the testator himself." A testator wrote his will on the typewriter himself and signed it with his own hand. Held, that in view of the reason for dispensing with witnesses to wills, namely the protection against forgery furnished by identification of handwriting, the word "written" in section 1277 should not be construed to include typewriting, and that the will was not entitled to probate as an olographic will. In re Dreyfus' Estate (1917, Cal.) 165 Pac. 941.

The California statutes, like those of other states, require every will, except a nuncupative will, to be "in writing." Cal. Civil Code, sec. 1276. Yet it is hardly to be doubted that typewritten wills, when fully attested by witnesses, are constantly admitted to probate in California, as elsewhere. Nevertheless, the reasoning of the court would seem to justify giving a narrower meaning to the word "written" in section 1277, though the only case found on the same point is contra. In re Aird (1905) 28 Quebec Super. Ct. 235.

Workmen's Compensation Act—Injury Arising out of the Employment—"Horseplay."—An employee sustained fatal injuries when another employee, as an act of sport, turned an air-compressor upon him. The employer had known of the employees' habit of using the air-compressor in sport, but had made no objection. The employee was working when injured. *Held*, that the injury arose out of the employment within the meaning of the Workmen's Compensation Act. *In re Loper* (1917, Ind.) 116 N. E. 324.

It is generally held that the employer is exempt from liability for compensation where the injury to the employee is caused by the wilfully tortious act of either fellow employees or outsiders. Armitage v. Lancashire & Y. R. R. Co. [1902] 2 K. B. 178; Union Sanitary Mfg. Co. v. Davis (1917, Ind.) 115 N. E. 676. Such injuries are said not to arise "out of the employment." On similar principles compensation is generally denied where the injury is the result of "horseplay." Wilson v. Laing (1909) 46 Sc. L. Rep. 843; Fishering v. Pillsbury (1916) 172 Cal. 690. The principal case appears to be the first to recognize an exception where the habit of horseplay is knowingly allowed by the master to continue-thus, in the court's view, making the habit an element of the conditions under which the employee is required to work. The decision seems sound, and an analogy to support it may be found in such cases as Rowland v. Wright [1909] 1 K. B. 963 (the "stable-cat case"), and Nisbet v. Rayne, etc. [1910] 2 K. B. 689. By failing to control his recklessly playful employees the master subjects their fellow employees to a special hazard. A further analogy is found in the common-law doctrine that the master is not only under a duty to a servant to make proper rules for the use of safe methods of work by fellow servants, but may also be liable if, having made such rules, he permits their habitual violation. See Ohio & Miss. R. R. Co. v. Collarn (1881) 73 Ind. 261, 273; cf. Hogle v. Franklin Mfg. Co. (1910) 199 N. Y. 388, 92 N. E. 794.

F. C. H.

WORKMEN'S COMPENSATION ACT—INJURY "ARISING OUT OF" EMPLOY-MENT—PERIL ATTACHED TO WORKMAN'S PARTICULAR LOCATION.—The falling of a wall on the adjoining premises of a neighbor carried down the roof of the defendant's shed, in which the plaintiff was at work as a herring packer, and injured the plaintiff. *Held*, that the injury was caused by an "accident arising out of the employment." *Thom v. Sinclair* [1917] A. C. 127, 116 L. T. 609.

The compensation acts of many of the states are identical with the English Act in limiting compensation to employees injured by accident "arising out of" and "in the course of" the employment. Drawing a distinction between the two conditions of liability indicated by the above-quoted phrases, it has generally been held that "arising out of" includes only risks incidental to the nature or character of the employment. Craske v. Wigan (C. A.) [1909] 2 K. B. 635; Hoenig v. Industrial Com. (1915) 159 Wis. 646, 150 N. W. 996. The accident need not be one that could have been foreseen or expected. Larke v. Hancock Life Ins. Co. (1915) 90 Conn. 303, 97 Atl. 320. Nor need it be one peculiar to the employment, if the employment accentuates a common hazard. Andrew v. Failsworth Ind. Soc. (C. A.) [1904] 2 K. B. 32; State v. District Court (1915) 129 Minn. 502, 153 N. W. 119. But the weight of judicial opinion has been opposed to the

proposition that an injury is shown to be compensable merely by showing that the presence of the person injured in the place where the accident befell him was due to his employment. Klawinski v. L. & M. S. Ry. Co. (1915) 185 Mich. 643, 152 N. W. 213. It would seem that the principal case marks a departure in the character of causation required to satisfy the Act. The court refuses to go beyond the "proxima causa," i. e., the falling of the roof, and declares that the remote cause which brings down the roof—whether it be a neighbor's wall or a bolt of lightning—is immaterial. Such a view seems to render indistinguishable the two conditions of liability imposed by the Act. It makes the employer an insurer against accidents whether or not they are related to the nature of the employment. Cf. Trim School Bd. v. Kelly [1914] A. C. 667. One American case has been found in accord. Kimbol v. Industrial Acc. Com. (1916) 173 Cal. 351, 160 Pac. 150. It is submitted, however, that the dissenting opinion in that case contains the more cogent reasoning.

WORKMEN'S COMPENSATION ACT—RECOVERY FOR DISEASE CONTRACTED IN THE COURSE OF THE EMPLOYMENT.—The plaintiff, after working for twenty-five years rolling cigars, was disabled by "neurosis" resulting from his working posture, which caused a certain amount of pressure on the brachial plexus. Held, that this was not a personal injury within the meaning of the statute. In re Maggelet (1917, Mass.) 116 N. E. 972.

Under Workmen's Compensation Acts limiting recovery to "personal injury by accident," unless, as in England, special provision to the contrary is made, no recovery can be had for diseases not resulting from a definite injury constituting the "accident." Adams v. Acme White Lead Works (1914) 182 Mich. 157, 148 N. W. 485. In several states, however, the act omits the qualifying words, "by accident." Yet the majority of the courts do not put a broader interpretation on such statutes than on those of the former class. Industrial Commission v. Brown (1915) 92 Oh. St. 304, 110 N. E. 744. Miller v. American Steel & Wire Co. (1916) 90 Conn. 349, 97 Atl. 345. Massachusetts, however, had already construed its statute very liberally in permitting recovery for disease. In re Hurle (1914) 217 Mass. 223, 104 N. E. 336 (optic neuritis); In re Johnson (1014) 217 Mass. 388, 104 N. E. 735 (lead poisoning). The test, as explained in the principal case, seems to be whether the diseased condition results from the cumulative effect of what might be regarded as a succession of physical injuries, though each "injury" in itself may be too slight to be perceptible; with the further requirement that these "injuries" must be the result of some exposure, strain, or other cause "peculiar to the employment." The final test is, therefore, one of causation, and the plaintiff failed in the principal case because it did not appear that his posture was a necessary incident of his employment. The case is interesting chiefly for its further exposition of the exceptional Massachusetts doctrine. H.S.

# **BOOK REVIEWS**

Some Legal Phases of Corporate Financing, Reorganization and Regulation. By Francis Lynde Stetson, James Byrne, Paul D. Cravath, George W. Wickersham, Gilbert H. Montague, George S. Coleman and William D. Guthrie. Published by The Macmillan Co., New York. 1917. pp. ix, 389.

The contents of this book consist of lectures delivered before the Association of the Bar of the City of New York in 1916. They embody the best thought and the wide experience of some of the leading members of the New York bar whose activities have been particularly addressed to the solution of the complicated present-day problems of corporate financing, organization and operation.

Mr. Stetson deals with corporate bonds and mortgages; Mr. Byrne, with the foreclosure of railroad mortgages; Mr. Cravath, with the reorganization of corporations. Many of the great reorganizations and mergers of recent years have been carried out under the direction of these lawyers, and the bar is in their debt for the publication of some of their accumulated experience. Mr. Wickersham presents in short space a history of the Sherman Anti-Trust Law with many weighty observations thereon. Mr. Coleman discusses the Public Service Commission Law of New York with which he has had a great deal to do. Mr. Guthrie's suggestion that in many instances a Public Service Commission necessarily becomes "that judicial monster, a judge in his own cause," and that such commission should partake of the character of a body of experts and less of that of a judicial body, will be favored by many. Mr. Montague foresees a wider field of usefulness for the Federal Trade Commission in the handling of anti-trust questions and troublesome questions of commerce. This series of lectures will well repay careful study by the profession.

A. E. HOWARD, JR.

HARTFORD BAR.

Business Law for Engineers. By Frank C. Allen. Published by the McGraw-Hill Book Co., New York. 1917.

- Carnegie Endowment for International Peace, Year Book for 1917. Washington. 1917. pp. xvii, 213.
- German Legislation for the Occupied Territories of Belgium. Official Texts. Edited by Charles Henry Huberich and Alexander Nicol-Speyer. 8th, 9th and 10th Series, and Index to Vols. 1-5. Published by Martinus Nijhoff, The Hague. 1917.
- International Law Topics—Neutrality Proclamations and Regulations, with Notes. By the Naval War College, Washington. 1917. Obtainable from the Superintendent of Documents, Government Printing Office, Washington. pp. 153.
- Jurisdiction and Practice of Federal Courts—A Handbook for Practitioners and Students. By Charles P. Williams. Published by The F. H. Thomas Law Book Co., St. Louis. 1917. pp. xix, 586.
- Leading Cases on International Law. By Lawrence B. Evans. Published by Callaghan & Co., Chicago. 1917. pp. xix, 477.
- Legal Reasoning and Briefing. By Jesse Franklin Brumbaugh. Published by The Bobbs-Merrill Co., Indianapolis. 1917. pp. xvi, 775.
- Modern Business Corporations. By William Allen Wood. 2d edition. Published by The Bobbs-Merrill Co., Indianapolis. 1917. pp. xviii, 600.
- Science and Learning in France, with a Survey of Opportunities for American Students in French Universities. An appreciation by American scholars, John H. Wigmore, Editor and Chairman of the Authors' Committee. Published by The Society for American Fellowships in French Universities. 1917. pp. xxxviii, 453.
- Science of Legal Method. Select Essays by Various Authors.

  Modern Legal Philosophy Series, Vol. IX. Published by The
  Boston Book Co., Boston. 1917. pp. lxxxvi, 593.
- The National Budget System. By Charles Wallace Collins. Published by The Macmillan Co., New York. 1917. pp. vi, 151.
- United States Statutes Annotated. Editor-in-Chief, Bruce Barnett. (To be complete in 12 volumes. Five volumes received to date.) Published by T. H. Flood & Co., Chicago. Beginning 1916.

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# SURVIVING FICTIONS

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It is sometimes asserted that the use of fiction in law is now practically obsolete; a thing of the past. Thus, Mr. Odgers says: "Legal fictions have well-nigh disappeared." But this strong statement is erroneous. Instances of old fictions which are still in common use will be given in a later part of this paper.

Moreover, the law is not only encumbered by old fictions, but is in danger of having new ones foisted upon it. Mr. Bentham, who died in 1832, did not believe that the crime of inventing a new fiction was likely ever again to be committed.² But he was mistaken. Twenty-five years after his death the English courts invented and applied what Sir Frederick Pollock calls "one of the most brilliant and successful fictions of the common law," viz., "the implied warranty of authority which is attached to the acts of a professed agent." And Sir Frederick Pollock, in calling attention to this instance, expresses his dissent from Maine's view that there is now "left no room for fictions."

In the past there have been two principal reasons for employment of fictions in law.

First. To cure deficiencies in the law of procedure.

Second. To conceal the fact that judges, by their decisions, are making or changing the substantive law.

As to the first reason. Under the old law, in its literal and rigid form, there was, in many just cases, no remedy whatever.⁵ The law of procedure needed amendment. But legislation was "exceptional"

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¹ W. B. Odgers, in A. D. 1900: "A Century of Law Reform," 40.

² See I Bentham, Works (ed. 1843) 268-269.

^{*}Collen v. Wright (1857) 8 El. & Bl. 647; since affirmed in the House of Lords, Starkey v. Bank of England, L. R. [1903] App. Cas. 114.

Pollock, The Expansion of the Common Law (1904) 135-136.

⁵ See 30 Harv. L. Rev. 244-245.

and occasional," and the desirable amendments had to be made by the judges, or not at all. The judges, however, did not openly and directly assert their right to invent or change law as to procedure. Instead, they resorted to the aid of fiction to bring about practical changes. While not professedly altering the old forms of action, or adding new forms, the old forms "were adapted to new cases by means of fictions." Fictions as to procedure

"often proved, in the hands of Judges, instruments for accomplishing useful reforms, long before direct sanction could be obtained for such reforms from the Legislature." 10

"But while the legal fiction may, for the time being, have served a useful function, we agree with Professor Hepburn that 'the price paid for it was very high.'" 11

The first reason for employment of fiction has no longer great influence. In very recent times the defects in the law of procedure have been largely remedied by legislation. There is now, in most jurisdictions, a comparatively simplified system, either regulated in its details by express legislative enactment, or regulated by rules of court framed by judges under the express authority of the legislature. There is now comparatively little need for judges to employ fiction as to that subject. But the fiction phrases and fiction reasons formerly employed are not entirely banished from the law books. ¹³

As to the second reason for the use of fiction, viz., to conceal the

See the opinions of Doe, C. J. in Metcalf v. Gilmore (1879) 59 N. H. 417, 431-435; Walker v. Walker (1885) 63 N. H. 321, 326; Owen v. Weston (1885) 63 N. H. 599, 600-604; Boody v. Watson (1886) 64 N. H. 162, 171-172. See also Memoir of Judge Doe by Professor Hening in 8 Great American Lawyers, 247-257, and 317.

⁶ Pollock, op. cit. 49.

⁷2 Austin, Jurisp. (3d ed.) 632.

^{*}A broader ground as to judicial power and duty has, in late years, been taken by one court at least. It is asserted that there is a "judicial duty of subordinating legal machinery to legal rights"; that it is the duty of the court to invent and use convenient procedure for ascertaining and establishing rights and obtaining remedies; that "parties are entitled to the most just and convenient procedure that can be invented"; and that courts should distinctly recognize "the judicial duty of allowing a convenient procedure, as a necessary incident of the administration of the law of rights."

^o See Hepburn, Historical Development of Code Pleading (1897) ss. 24, 25.

¹⁰ W. D. Lewis, 1 Jurid. Soc. Papers, 374.

¹¹ See Hepburn, op. cit. ss. 24, 25, 27. As to the evils accompanying the use of fiction, see post in the present paper.

¹² See Prof. Roscoe Pound, Regulation of Judicial Procedure by Rules of Court (1916) 10 ILL. L. Rev. 163.

^{18 &}quot;The simplification of pleading in modern times has tended to diminish the

fact that the judges, by their decisions, are making or changing the substantive law.14

"There are, at least, three different theories as to judicial law-making." ¹⁵

1. That judges cannot "make" law; that they merely discover and apply law which has always existed. 16

2. That judges can and do make new law on subjects not covered by previous decisions, but that judges cannot unmake old law—cannot even change an existing rule of judge-made law.¹⁷

3. That judges can and do make new law; and also can and do unmake old law, i. e. the law previously laid down by themselves or by their judicial predecessors. 18

We adopt the third view. But for present purposes, it is not absolutely essential to consider whether the third view is to be preferred to the second, for those who adopt the second view generally concede that a large part of the law now administered by the courts consists of additions made—and rightly made—by judges in the way of supplementing and enlarging the law as originally stated.¹⁹ And

operation of fiction strictly so called, although the effect of its former prevalence is probably ineradicable." Broom, Legal Maxims (8th ed.) 107.

"The forms of action we have buried, but they still rule us from their graves." Prof. Maitland, Equity and Forms of Action, 296.

"Forms of action are dead, but their ghosts still haunt the precincts of the law." Prof. John W. Salmond, Observations on Trover and Conversion (1905) 21 LAW QUART. Rev. 43.

"Upon the question whether judges "make" law, some important conflicting authorities are collected in Prof. E. Wambaugh, Study of Cases (2d ed.) s. 78, n. 2.

For a recent and very interesting discussion of the subject, see the article by Judge John E. Young on The Law as an Expression of Community Ideals and the Lawmaking Functions of Courts (November, 1917) 27 YALE LAW JOURNAL, I, 22-31.

This summary is taken from a paper by the present writer in 27 HARV. L. REV. 365-366. And see the present writer's paper, Jones v. Hulton: Three Conflicting Judicial Views as to a Question of Defamation (1912) 60 U. OF PA. L. REV. 461, 467.

¹⁸ See the posthumously published work of Mr. James C. Carter, one of the greatest lawyers of his day, on Law, Its Origin, Growth and Function (1908).

¹⁷ See Prof. A. V. Dicey in *The Relation between Law and Public Opinion in England*, Chap. XI: and more fully in the Appendix, 481-493.

"The courts cannot contradict what has already been settled as law, but the power of taking up fresh material is still alive. . ." Pollock, Expansion of the Common Law, 15.

"Judges may supplement and enlarge the law as they find it. . . . but they must not reverse what has been settled." Pollock, *ibid*, 49. Cf. Salmond, Jurisp. (ed. 1902) 108, 170, 171.

¹⁵ See Prof. John C. Gray, The Nature and Sources of the Law (1909) ss. 215-231, 465-512, 545-550, 628-636.

¹⁹ Thus, Prof. Dicey, a prominent advocate of the second view, says that a large part of the law under which we live

"consists of rules to be collected from the judgments of the court. This portion of the law has not been created by Act of Parliament, and is not recorded in

candid advocates of the second view must concede that judges, in general, do not frankly admit that the law is thus being changed by their decision, but that, on the contrary, judges frequently use fiction phrases to conceal the fact of such changes, making the fictitious assumption that no change has been made, by addition or in any other manner, in the law as formerly laid down.

The authorities cited below distinctly admit that fiction is frequently resorted to in the attempt to conceal the fact that the law is undergoing alteration at the hands of the judges.

"A legal fiction is a device which attempts to conceal the fact that a judicial decision is not in harmony with the existing law. The only use and purpose, upon the last analysis, of any legal fiction is to nominally conceal this fact that the law has undergone a change at the hands of the judges."²⁰

"But I now employ the expression 'Legal Fiction' to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its

operation being modified."

(Then, after referring to the English case-law, and the Roman responsa prudentum as resting on fictions):

"The fact is in both cases that the law has been wholly changed; the

fiction is that it remains what it always was."21

"For though it is . . . a duty imposed upon English judges, within certain limits, to make new laws, it is against the tradition of their office ever to avow it. By saying, therefore, that there is malice in law, or fraud in law, they pretend that there is malice, or fraud, or whatever else they think unnecessary, when there is really none at all."

Fictions include

"any assumption which conceals a change of law by retaining the old formula after the change has been made."23

The result

"is the expansion of law, whilst leaving it formally intact."²⁴
"The expedient of fictions . . . occasionally employed to introduce by stealth real innovations, . . ."²⁵

the statute book. It is the work of the courts; it is recorded in the Reports; it is, in short, the fruit of judicial legislation. . . . Nine-tenths, at least, or the law of contract, and the whole, or nearly the whole, of the law of torts are not to be discovered in any volume of the statutes." Dicey, The Relation between Law and Public Opinion in England, 359, 360. And see also pp. 484, 490, 492.

²⁰ Mr. O. R. Mitchell, The Fictions of the Law: Have They Proved Useful or Detrimental to its Growth? (1893) 7 Harv. L. Rev. 249, 262.

²¹ Maine, Ancient Law (1st ed.) 26.

²² Markby, Elements of Law (3d ed.) s. 688. And compare 2 Chamberlayne, Mod. Law of Evid. s. 1164, n. 4.

^{28 10} Ency. Brit. (11th ed.) 319.

²⁴ Pulszky, Theory of Law and Civil Liberty, 431.

^{*} Phelps, Judicial Equity Abridged, s. 149.

"It is true that at many times the Courts have been over-anxious to avoid the appearance of novelty; and the shifts to which they resorted to avoid it have encumbered the Common Law with several of the fictions which Maine denounces (p. 28) as almost hopeless obstacles to an orderly distribution of its contents."²⁶

As to why a judge, in innovating on existing law, has so often sought to accomplish his object through the medium of fiction, Austin suggests as one reason:

"A wish to conciliate (as far as possible) the friends or lovers of the law which [he] really annulled . . . By covering the innovation with a decent lie, he treated the abrogated law with all seemly respect, whilst he knocked it on the head."²⁷

The assertion that law is *not* changed by decisions of judges, is now the most effective and the most frequently applied of all legal fictions, and much harm results from its use.

Some eminent jurists are very far from advocating the abolition of all existing fictions. On the contrary, they use language implying that the use of fiction is not necessarily and invariably objectionable, and giving the impression that, if the introduction of fictions in law were now urged for the first time, it might sometimes be expedient to employ them. The language of such high authorities as Bishop, Pollock, and Gray can be so understood.²⁸

These great lawyers grew up under a system where the use of fiction was frequent. They were habituated to its employment. They saw that its use at an earlier day had in some respect been beneficial, and, indeed, was often said to have been indispensable. They did not always realize the accompanying disadvantages: that "the price paid was very high," involving confusion of thought, and a long period

Sir F. Pollock, Notes on Maine's 'Ancient Law' (1905) 21 LAW QUART. Rev. 165, 172.

²⁷ 2 Austin, Jurisp. (3d ed.) 630.

²⁸ "One of the most interesting features of our law is its fictions. Not quite all of them are useful and wise, but most are, and some of them are so essential that they could be dispensed with only at great inconvenience." Bishop, Contracts (2d ed.) s. 182.

As to Pollock's views, see Expansion of the Common Law, 135-136, and op. cit. 21 Law Quart. Rev. 165, 173.

Professor Gray, following Ihering, divides fictions into two classes, "historic fictions" and "dogmatic fictions." He regards the former class as objectionable, but the latter as sometimes laudable. But it is, however, interesting to observe that Professor Gray, after saying that the dogmatic fictions

[&]quot;are to be praised when skilfully and wisely used," adds—"Yet though handy, they are dangerous tools. They should never be used, as the historic fictions were used, to change the Law, but only for the purpose of classifying established rules, and one should always be ready to recognize that the fictions are fictions, and be able to state the real doctrine for which they stand." Gray, Nature and Sources of the Law (1909) s. 89.

²⁸ See Prof. Hepburn quoted in the article by the present writer, Tort and Absolute Liability—Suggested Changes in Classification (1917) 30 HARV. L. Rev. 241, 245.

subsequently required for clearing the air. If the introduction of fiction in law were now urged for the first time, it is difficult to conceive how much eminent jurists would answer some of Mr. Bentham's anti-fiction arguments. It is not easy to escape from some of his dilemmas.

If the fiction is not founded on truth, its use is unjustifiable. If it is founded on truth its use is foolish:

"What you are thus doing with the lie in your mouth—had you power to do it without the lie?—your lie is a foolish one. Have you no such power?—it is a flagitious one."30

"What you have been doing by the fiction—could you, or could you not, have done it without the fiction? If not, your fiction is a wicked in the real of facility and "

lie. If yes, a foolish one."

"Such is the dilemma. Lawyer! escape from it if you can.81

If a fiction does not, in any degree or to any extent, represent a legal truth, it would seem that its continued use can result only in evil. If, on the other hand, it does represent some clumsily conceded legal truth, then it belongs to a class of fictions which Mr. Bentham had in mind when he said:

"Not a fiction but is capable of being translated, and occasionally is translated, into the language of truth. Burn the original, . . . and employ the translation in its stead. Fiction is no more necessary to justice, than poison is to sustenance."

We may remark, in passing, that Mr. Bentham's vigorous attack on fictions, like his onslaught on other abuses,³⁸ is marred by "unnecessary violence of diction," and by the imputation of improper motives in his opponents.³⁴

But it may be asked: Why banish from the law all old fictions? Why not retain two classes? First. Those which are merely exaggerated forms of statement, which would never be understood or applied in their full literal sense. Second. Where the result reached by the use of fictions is substantially correct, although the method of reaching it is objectionable, involving erroneous reasoning or confusing statements.

As to the first class. There are undoubtedly some so-called fictions, which are practically harmless. They are a kind of "legal short-hand"; intentional overstatements for the purpose of attracting atten-

²⁰ 2 Bentham, Works (ed. 1843) 466, n.

²¹ 7 Bentham, Works (ed. 1843) 283.

^{33 6} Bentham, Works (ed. 1843) 582.

^{**} See Atkinson, Life of Bentham, 225.

¹⁴ For example, he calls "legal fiction" "the most pernicious and the basest sort of lying," 6 Bentham, *Works* (ed. 1843) 582. And he further says:

[&]quot;It affords presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed." 9 Bentham, Works (ed. 1843) 77.

tion;³⁵ obvious exaggerations not likely to mislead; "a figure of speech designed to set a rule of law in a striking light." Sometimes they are merely the "condensed expression of a rule of law,"³⁶ and it has been asserted that fiction "too barefaced to deceive any one may fairly be called innocent."³⁷ But a large proportion of existing fictions cannot be explained, or their use justified, on these grounds.

As to the second class. Professor Williston has said that

"the result reached by means of fictitious statement must not be discarded with the fiction when, as has commonly been the case with fictions in the law, the result reached is desirable though the mode of statement is confusing."88

But it does not follow that the fiction phraseology and fiction reasons should be retained.39

Two prominent disadvantages result from the use of fictions. They "are the greatest of obstacles to symmetrical classification." They tend to prevent investigation as to the fundamental principle underlying a rule of law, and to retard the framing of a statement of the rule in strictly accurate terms. By giving an erroneous reason for the rule, they make it difficult thoroughly to understand and apply the rule. Indeed, the adoption of an erroneous reason for a doctrine inevitably leads to misapplication of the doctrine. **1

"Fiction was simply the avoiding of difficulties instead of the solution of them . . ." It becomes "its purpose merely to save the trouble of elucidating legal principles . . . Further it has the

^{*}See as to maxims the present writer's article on The Use of Maxims in Jurisprudence (1895) 9 HARV. L. REV. 13, 22-23.

^{* 10} Ency. Brit. (11th ed.) 319.

[&]quot; Pollock, Expansion of the Law, 51.

Liability for Honest Misrepresentation (1911) 24 HARV. L. REV. 414, 434. Compare Lord Blackburn in Dalton v. Angus (1881) L. R. 6 App. Cas. 740, 812. And see Holmes, Common Law (1881) 375.

^{*}One does not wish to see re-introduced "an ingenious but highly artificial method of arriving at just results . . . now buried in the foundations of more simple and direct ones." Pollock, Law of Fraud in British India, 41.

Maine, Ancient Law (1st ed.) 27-28.

[&]quot;To speak of constructive presence is to use the language of fiction, and so to hinder precise analysis." Holmes, J., in Hyde v. United States (1912) 225 U. S. 347, 386.

Undoubtedly, the giving of an incorrect reason for a correct doctrine is very common. Indeed, John Stuart Mill goes so far as to say: "Nine-tenths of all the true opinions which are held by mankind are held for wrong reasons." 2 Letters of J. S. Mill, Appendix, 372. And Judge Holmes has said that judges know which way to decide a good deal sooner than they know how to give the reason why. But a clear perception of the underlying reason is essential to the beneficial working of a correct doctrine, and experienced judges have taken pains to expose "the negation of error upon erroneous grounds."

baneful effect of paralyzing and crippling legal reasoning from sheer considerations of comfort . . ."42

The use of fiction tends not only to impair, in a general way, reverence for truth; but also to diminish the respect which would otherwise be felt for the courts and for the law itself. These objections, in substance, have been urged, not by mere theorists, but by experienced lawyers and judges.

"The expedient of fictions . . . occasionally employed to introduce by stealth real innovations, proves only that courts were more willing to sacrifice truth than form . . . although said to be invented to 'promote justice,' they were conspicuous object-lessons in high places of the utility of falsehood and craft. Their influence was sinister. Their example was contrary to public policy because hostile to the cultivation of good faith among men."

In opposing the continuing use of fictions, we have not been "slaying the slain." The question of the expediency of employing fictions is still a living issue in important branches of the law; and is defended by authorities entitled to respect.

It is now proposed to give some examples of old fictions which are still in use. The list is not complete. Nor do we claim the merit of originality in pointing out the fictions or in stating the objections to their use. Indeed, the criticisms here given are largely in the form of quotations. In some instances, the use of the fiction has obstinately persisted. In others, it is gradually diminishing; and, for these last cases, "decadent fictions" might be a better term than "surviving fictions." Within the limits of this paper we can do little more than briefly call attention to the fallacies and mistakes involved in the use of fiction in the various instances. We cannot now enter upon a thorough discussion of any particular doctrine or of the ground of We believe that, at the present day, the use of fiction in law should be entirely abandoned. As was intimated earlier, if a fiction does not, in any degree or to any extent, represent a legal truth, then its continued use can result only in evil. If, on the other hand, it represents—in part at least—some clumsily concealed legal truth, then it is capable of being translated into the language of truth, and we should adopt Mr. Bentham's remedy-"Burn the original, and employ the translation in its stead."44 In short, we would entirely discard the use of fiction phrases and fiction reasons.

If it be granted that fictions were, "at a certain stage of human development," useful aids in the formation of law, it does not follow that they should not now be discarded. At most, "they are merely

⁴² Pulszky, Theory of Law and Civil Liberty, 435, 436.

⁴ Phelps, Judicial Equity Abridged, ss. 149, 150.

[&]quot;6 Bentham, Works (ed. 1843) 582.

the scaffolding behind which the house was built, and now that the house is convenient, and proximately complete, the scaffold may be taken down."⁴⁵ The scaffolding, even if useful in construction, yet, after the building is erected, serves only "to obscure it."⁴⁶

#### EXAMPLES OF SURVIVING FICTION

Example One: As to Conclusive Presumption.

The expression "conclusive presumption" might be taken to be a term used solely in the statement of a rule (a statement of a principle) in the law of evidence, and not concerned with rules of substantive law. Even if, however, its application is thus limited, its use would be open to criticism. But the expression "conclusive presumption" is used to-day as a clumsy and roundabout method of stating a rule of substantive law; or rather, as giving a fiction reason for a rule of substantive law.

"All conclusive presumptions pertain in form to procedure, but in effect to substantive law." ¹⁸

"Such rules, though in form connected with the law of Proof, are in truth rules of substantive law disguised in the language of mere adjective rules." 49

A conclusive presumption is

"a rule of substantive law masquerading as a rule of evidence." ⁵¹
"Conclusive evidence is not evidence at all; it is something which takes the place of evidence and of the thing to be proved as well." ⁵²

To say that a certain element is implied or presumed

"is only helping out a false theory by a fiction . . . Whenever it is said that a certain thing is essential to liability, but that it is con-

[&]quot;J. F. Stephen, Dig. of Crim. Law (Am. ed. of 1878) 404, n. xvi, Chap. XXXII.

[&]quot;Gray, Nature and Sources of the Law (1909). s. 85.

[&]quot;In strictness, there cannot be such a thing as a 'conclusive presumption.'"
4 Wigmore, Evid. s. 2492.

Conclusive presumptions are

[&]quot;almost necessarily more or less false, for it is seldom possible in the subject-matter of judicial procedure to lay down with truth a general principle that any one thing is conclusive proof of the existence of any other." Salmond, Jurisp. (ed. 1902) 589.

"For, all that is meant by a conclusive proof, is a proof which the law has made so. Independently of predetermination that it shall be conclusive, no information of processing the protection of the probable. Although in

[&]quot;For, all that is meant by a conclusive proof, is a proof which the law has made so. Independently of predetermination that it shall be conclusive, no inference from one fact to another can be more than probable: Although, in loose language, we style the proof conclusive, wherever the probability appears to be great." I Austin, Jurisp. (3d ed.) 508-509.

⁴⁸ Salmond, *Jurisp*. (ed. 1902) 580.

[&]quot;Kenny, Outlines of Crim. Law (5th ed.) 325.

^{50 2} Chamberlayne, Mod. Law of Evid. s. 1160.

⁵¹ Prof. Williston, op. cit., 24 HARV. L. Rev. 414, 425.

⁵² Gray, The Nature and Sources of the Law, s. 228, p. 99.

clusively presumed from something else, there is always ground for suspicion that the essential element is to be found in that something

else, and not in what is said to be presumed from it."58

"In strictness there cannot be such a thing as a 'conclusive presumption.' Wherever from one fact another is conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule really provides that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence. The term has no place in the principles of evidence, (although the history of a 'conclusive presumption' often includes a genuine presumption as its earlier stage), and should be discarded."

The foregoing views are well illustrated by the prevailing fiction respecting "malice" in the law of defamation, where malice is often enumerated among the requisites to a *prima facie* action; but it is said that malice need not be proved, because its existence is conclusively presumed. This, of course, means that malice is *not* a requisite.⁵⁶

Judges often fail to admit frankly that the substantive law is being changed by their decisions, and they sometimes use "fiction phrases" to conceal the fact of such change. In the instances just discussed, there is a "tendency to veil the reality under the fiction that they are merely laying down a rule of evidence."

Example Two: As to the alleged legal presumption that every man intends the natural and probable consequences of his acts.

It is sometimes said that a person is presumed in law to intend the natural and probable consequences of his acts. For such a universal presumption there is no foundation save in fiction.

Professor George L. Clark says of this "unfortunate maxim":

Holmes, The Common Law (1881) 134.

Willard, J., in State v. Platt (1870) 2 S. C. 150, 154.

[&]quot;Where several independent acts are required to be performed in order to accomplish a given result, to say that proof of the performance of one of them shall be submitted as conclusive proof of the performance of the other, is to say in effect that one alone is really requisite."

^{*4} Wigmore, Evid. s. 2492.

As to the old law of defamation regarding malice, the changes in the law, and the use of fiction phrases to conceal the changes, see citations and comments in article by the present writer (cited in note 15, supra) in 60 U. of Pa. L. Rev. 365, 370-372, and 461-466. See also 2 Chamberlayne, Mod. Law of Evid. 1452-1456. See, especially, N. St. John Green, 6 Am. Law Rev. 597, 609-610; I Street, Foundations of Legal Liability, 317; Gaynor, J., in Prince v. Brooklyn Daily Eagle (1896) 16 N. Y. Misc. 186, 188.

The See the present writer (in article cited in note 15, supra) 60 U. of Pa. L. Rev. 461, 465-466.

"If this were taken literally, it is obvious that it would wipe out the sound and well-settled distinction between intentional and negligent torts." 58

"It is not sufficient to indicate an intentional injury that the party causing it had reasonable ground to expect that such a result was within reasonable probabilities, otherwise a violation of the duty to exercise ordinary care would, of itself, be sufficient to indicate such injury." ⁵⁹

The so-called presumption "that every man intends the probable consequences of his acts" is not a rule of law "further or otherwise than as it is a rule of common-sense."60

"In fact there is no such legal presumption. It is merely a presumption of fact which the law sometimes sanctions, or approves, or allows a jury to act upon. And the admission that it is an inference of fact and not of law proves that its application depends on varying circumstances."

"It is not universally true that a man intends the probable consequences of his act . . . Probable consequences may result from acts as to which the law, by pronouncing them to be negligent, expressly negatives intent."

In many cases, undoubtedly, the facts are such as to justify a jury in finding intent. And, if the facts are so strong that no other finding could reasonably be made, the judge may be justified in assuming the existence of intent without submitting that issue to the jury. But whenever intent is thus inferred, "the process is one of inference from fact, not of pre-determination by law." Or, in other words, "the process is induction from fact, not deduction from arbitrary law." ⁶²

"It is sometimes said that a person is presumed in law to intend the natural and probable results of his acts. See R. v. Harvey (1823) 2 B. & C. p. 264. Such a form of statement, however, is useless and misleading. So far as it is true at all, it is simply an improper way of saying that a person is responsible for the natural and probable consequences of his acts, whether he intended them or not. Commonly, it makes no difference whether a consequence was intended or not, provided that it was natural and probable; for the same liability exists in each case. But there are exceptional instances (many of them in criminal law, and some also in the law of torts) in which the distinction becomes important—a defendant being liable for intended consequences but not for others. In such cases the alleged presumption does not exist, 68 and in all other cases it is unnecessary."

^{58 17} U. of Mo. Bul. No. 13, p. 30, n. 73; Law Series 12.

¹⁰ Marshall, J., in Bolin v. Chicago, St. P. etc. Ry. (1900) 108 Wis. 333, 352.

² Stephen, Hist. of Crim. Law of Eng. (1883) 111.

^{en} Peters, C. J., in State v. Hersom (1897) 90 Me. 273, 275.

See 2 Wharton, Evid. (3d ed.) ss, 1258, 1261, 1262. Also article by the present writer (cited in note 15, supra) 60 U. Pa. L. Rev. 365, 384-385.

See I Bishop, New Crim. Procedure, s. 97.

"The only constructive intent really known to the law is in those branches of the criminal law in which conscious negligence amounting to reckless disregard of consequences is imputed to the defendant as an intention to produce these consequences; as in the case of murder, and malicious injury to person or property. See p. 16, n. 4 above. In other cases the probability of a consequence may be evidence that it was intended, but there is no legal presumption to that effect, either rebuttable or conclusive."

"The 'presumption' now under consideration is apparently a paraphrase of the statement of a very ordinary rule of substantive law to the effect that one who does an act prohibited by law takes the risk of all the natural consequences of his act, and cannot, except where intent is an element of the liability charged, escape responsibility for the consequences of his conduct by saying that they were not embraced within the scope of his intention. So understood, the maxim is undoubtedly correct. . . . It suffers, however, from the infirmity that it has no possible connection with the law of evidence in general or the subject of presumptions in particular."

"Often these maxims and ground principles get expressed in this form of a presumption perversely and inaccurately, as . . . when the doctrine that every one is chargeable with the natural consequences of his conduct, is expressed in the form that every one is presumed to

Example Three: The fiction of constructive intent; considered especially with reference to the defense of plaintiff's contributory negligence.

The use of this fiction serves the purpose of concealing the fact that the judges are now departing from the earlier decisions as to contributory negligence, and are changing the law on that subject.

Formerly, two points seemed tolerably well settled. I. If defendant intentionally caused damage to plaintiff, he could not set up the defense that plaintiff's negligence was a contributing cause. 2. But if defendant negligently caused (was a part of the cause of) damage to plaintiff, defendant was not liable in case plaintiff's own negligence was also a part of the cause. As to the second point, the courts were at first inclined to make a rigid application of the rule in its literal terms. A plaintiff whose own negligence constituted only a small part of the compound legal cause of the damage was held barred from recovering any part of the damage, although the defendant's negligence constituted a much larger part of the damage and was of a more objectionable quality. Negligence of the plaintiff, however small a part of the compound cause, would always bar his action irrespective of the quantum or the quality of the defendant's negligence.

This rigid doctrine proved unpopular. The courts gradually came to hold that a negligent defendant might be barred from setting up

⁴ Salmond, Torts (1st ed.) 104, n. 3.

² Chamberlayne, Mod. Law of Evid. s. 1166.

e Professor J. B. Thayer, Prel. Treatise on Evid. 335.

the defense of plaintiff's contributory negligence in certain cases where defendant's own negligence was of a peculiarly objectionable character, e. g. in certain cases where defendant, though not desiring to cause damage, acted with knowledge of the danger and in conscious disregard of it.⁶⁷

But the judges did not like to admit frankly that they were thus—partially, at least,—overruling the law as previously laid down. Hence, some courts said that the defendant in such cases must be regarded, not as having negligently caused this damage, but as having intentionally caused it. And to sustain this distinction, they resorted to the fiction of constructive intent. Constructive intention to do harm was sometimes imputed to a defendant in the admitted absence of actual intent.⁶⁸

At the present time, American courts generally hold that a defendant whose fault is part of the cause of the damage cannot set up the defense of plaintiff's contributory negligence, if the following propositions are established (made out):

- 1. Defendant was conscious of (was aware of) plaintiff's perilous position.
- 2. Defendant realized the substantial danger of harm to plaintiff, in case defendant should fail to use care.
- 3. Defendant, although not desiring to cause damage, consciously failed to use care.

[&]quot;If a better phrase is desired, the idea might, perhaps, be expressed by the words—"If defendant is consciously negligent." But it may be a question whether this expression is sufficiently full or accurate.

[&]quot;Gross negligence" would not be a satisfactory term. It might be understood as meaning negligence somewhat greater in degree than plaintiff's negligence, but not materially differing from it in kind. This has been held an insufficient description of culpable conduct on the part of a defendant which will bar him from setting up the defense of plaintiff's contributory negligence. See Knowlton, C. J., in Banks v. Braman (1905) 188 Mass. 367, 370.

⁶⁸ Aiken v. Holyoke St. R. Co. (1903) 184 Mass. 269, 271, presents a strong instance.

The idea intended to be conveyed by the term "constructive intent" is sometimes attempted to be expressed by describing defendant's conduct as "wilful," or "wanton," or "reckless." But the use of these terms provokes controversy as to the proper definition of each. "Wilful" is an ambiguous term, liable to be used in two very opposite senses. (As to different meanings of "wilful" compare Start, C. J., in Anderson v. Minn. St. P. etc. Ry. (1908) 103 Minn. 224, 228; Jaggard, J., in same case, 230; Black's Law Dictionary, 1242; Klenk v. Oregon S. L. R. R. (1904) 27 Utah, 428; Southern Ry. v. McNeeley (1909) 44 Ind. App. 126; Barrett v. Cleveland, etc. Ry. (1911) 48 Ind. App. 668; Tinsley v. Western Union Tel. Co. (1905) 72 S. C. 350.) "Wanton" and "reckless" are vague, indefinite expressions. It is better to disregard these terms, and, instead, describe the specific conduct on the part of the defendant which will debar him from setting up the defense of plaintiff's contributory negligence, e. g. by enumerating the four propositions given immediately hereafter in the text.

4. (A requisite which would be included by some courts, though not, perhaps, by all)—Defendant, though not desiring to cause damage, was indifferent as to whether harm would result from his failure to use care.

We find no fault with the result now generally reached in cases including the above four elements. But we do question the reasoning and phraseology sometimes used to sustain this result. The phrase "constructive intent," as used in reference to such a case, is a fiction. Upon the best definitions of "intent" and "negligence," the damage in the above case was not intentionally caused but negligently caused.

It is not admissible to manufacture a "hybrid" tort, composed (theoretically as it were) of both intent and negligence.

The view that the presence of these elements furnishes the ratio decidendo is not always distinctly taken in the opinions. But a careful analysis of the cases decided adversely to the defendant will generally disclose the presence of at least three of these elements—viz., propositions 1, 2, and 3.

There is some conflict of authority as to both definitions.

As to intent: Markby, Salmond and Terry hold that desire to procure a consequence is an essential element of "intent" to produce it. See Markby, Elements of Law (5th ed.) ss. 222, 220; Salmond, Jurisp. (ed. 1902) 415; Salmond, Torts (4th ed.) 20, 21, 22; Terry, Leading Principles of Anglo-American Law, 195.

On the other hand, Austin maintains that desire is not an essential element of intent, but that expectation is sufficient. He virtually says that if a person thinks that there is any chance, or any appreciable chance, of a certain consequence following his act or omission, then he "intends" that consequence. See summary of Austin's view in Terry, op. cit. s. 220, founded on I Austin, Jurisp. (3d ed.) 442, and see 433, 437. Compare Stroud, Mens Rea, 3-6.

We believe the better view is that adopted by Markby, Salmond and Terry.

As to negligence: Wharton, Negligence (1st ed.) s. 3 holds that inadvertence is an essential element of negligence. The contrary view is taken by Salmond and by Shearman and Redfield. They hold, in effect, that a man may be conscious that he is failing to use proper care, and conscious that this failure involves a substantial risk of harm to others, and yet that resulting harm, if it is not desired, is to be regarded as negligently caused rather than intentionally caused. See I Shearman and Redfield, Negligence (6th ed.) ss. 3, 5, 6; Salmond, Jurisp. (ed. 1902) 432, 434, 430, 435; Salmond, Torts (1st ed.) 19, and see p. 33, par. 3. Compare I Beven, Negligence (2d ed.) 5.

We think that the latter view is preferable.

In a case including the four propositions ante, it is conceded that the decision would now be in favor of the plaintiff; the controversy is as to the reason for this result. How do the above stated conflicting definitions of intent and negligence bear on this question? Suppose that a judge adopts Markby's definition of intent and Salmond's definition of negligence. Then, if the judge gives constructive intent as the basis for his decision, he is consciously resorting to sheer fiction. Suppose that a judge adopts Austin's definition of intent and Wharton's definition of negligence. Then, if these definitions are correct, he has no need to rely upon the fiction of constructive intent, inasmuch as, under these definitions, there would in this case be actual intent (damage intentionally caused). But the difficulty is that, according to our view, these alleged fundamental definitions are erroneous.

"He who causes a result intentionally cannot also have caused it negligently, and vice versa. . . . Negligence and wrongful intent

are inconsistent and mutually exclusive states of mind."11

"As between the two conceptions, conduct must ordinarily be one or the other. In the very nature of things the same conduct cannot be both. And the difficulty cannot be evaded by resorting to the fiction of constructive intent."⁷²

It can be urged that negligence, if of a peculiarly objectionable quality, may be "as bad as intent, in point of moral deserts," or that "reckless indifference to probable consequences" may be "morally as bad as an intention to produce those consequences." But it does not follow that the two things are of the same legal nature, or that they ought to be called by the same name.

The same fiction reason of constructive intent is sometimes relied upon in another class of cases where its use is even less defensible than in the preceding case of the four propositions. Suppose that a defendant was not aware of plaintiff's perilous position, but would have discovered it if he had used reasonable care and foresight. Some courts hold that, even though defendant did not know, yet if he ought to have known, he is barred from defending on the ground of plaintiff's contributory negligence.⁷⁶

To sustain this result, courts sometimes resort to the fiction reason of constructive intent. But, even if this reason should be held properly applicable in the previous case of "conscious negligence," it does not

follow that it is applicable here.

The argument for plaintiff is, in substance, that defendant, who had in fact no expectation of a harmful result, ought to have expected or foreseen the probability of such a result, and that hence the law should treat him as if he actually had foreseen it; and that then it follows that he should be treated as having intended the result.

This argument involves not merely fiction, but double fiction—fiction twice applied. "Constructive knowledge" is brought in as a basis for "constructive intent"; there is an inference from another inference, a presumption resting on the basis of another presumption.⁷⁶

The fallacy of this argument becomes apparent when it is analyzed

and reduced to its lowest terms, as follows:

⁷¹ Salmond, Torts (1st ed.) 18-19.

¹² See article by the present writer (cited in note 15, supra) 60 U. of Pa. L. Rev. 365, 386.

⁷⁸ Salmond, Jurisp. (ed. 1902) 448.

¹⁴2 Stephen, Hist. of Crim. Law of Eng. 360. And compare Bishop, New Crim. Law, s. 313.

⁷⁸ Upon this point there is a conflict of authority. See cases cited in 21 L. R. A. (N. S.) 427-442, n. It is not proposed here to discuss the main question of liability; but only to consider the soundness of one reason sometimes given to sustain a decision against the defendant.

See 2 Chamberlayne, Mod. Law of Evid. s. 1029.

- 1. Because defendant ought to have foreseen what he did not foresee, the law should hold that he "constructively" foresaw.
- 2. Because he "constructively" foresaw, he must be regarded as having "constructively" desired what he "constructively" foresaw.

Or in this form:

- 1. Presume that defendant foresaw what it is admitted he did not foresee; and then,
- 2. Because he is thus presumed to have foreseen what he did not foresee, he must further be presumed to have desired what he neither foresaw nor desired.⁷⁷

Example Four: As to the doctrine of implied malice in criminal law.

Its use in criminal law has been mainly confined to one department, homicide, and there it has been productive of confusion, and sometimes of unjust results.

At a very early day the presence or absence of "malice afore-thought" was taken as a test to distinguish between murder and man-slaughter; "but experience soon showed that the test was a rough one, and failed in many cases." ⁷⁸

"In order to meet such cases without sacrificing the established definition, the doctrine of implied malice was invented." "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. To say that he was presumed to have intended them, is merely to adopt another fiction, and to

[&]quot;". . . . it cannot be conceived, in the nature of things, how a purpose to accomplish a given result can be imputed to mental conditions, the very essence of which is the absence of all thought on the particular subject. . . . to imply a purpose to do a thing from inadvertence in respect of it, is a contradiction in terms." McClellan, J., in Georgia Pacific Ry. v. Lee (1890) 92 Ala. 262, 270.

[&]quot;To say that negligence or heedlessness may run into intention, is to say that a thought may be absent from the mind, and yet (after a fashion) present to the mind." I Austin, Jurisp. (3d ed.) 442.

⁷⁸ "What is malice aforethought? Is there any malice that is after thought?" I Edward Livingston, Works on Crim. Jurisp. 309.

[&]quot;The word 'aforethought' in the definition of murder, has been held to mean almost, if not quite, nothing." 2 Bishop, New Crim. Law, s. 677.

[&]quot;. . . the word 'aforethought' is practically unmeaning." 2 Stephen, Hist. of Crim. Law of Eng. 119.

[&]quot;. . . the words 'aforethought,' 'prepense,' 'deliberate,' in the established definition have no real meaning, inasmuch as the state of mind which causes the act must of necessity precede it." 3 Stephen, op. cit. 70.

[&]quot;. . . the word aforethought is unfortunate, . . . The word aforethought countenances the popular error that a deliberate premeditated design to kill is required in order to constitute the guilt of murder, whereas it is only one out of several states of mind which have that effect. It is, moreover, an unmeaning word, for the thought, the state of mind, whatever it is, must precede the act; and it precedes it equally, whether the interval is a second, or twenty years." Stephen, General View of Crim. Law of Eng. (1st ed.) 118, 119.

^{*} Stephen, General View of Crim. Law of Eng. (1st ed.) 43, 44.

disguise the truth."⁸⁰ Some of the results reached in this way (by the application of this fiction) were intrinsically just; but this was not so as to all the results. In one or more classes of cases the result is now disapproved;⁸¹ and in other cases the prisoner could well have been held guilty, "apart altogether from the artificial doctrine in question," and according to ordinary principles without the aid of fiction.⁸²

"The modern tendency is to restrict, if not to disregard" the doctrine of implied malice. It does not furnish a basis from which to reason by analogy. A recent writer goes so far as to express the opinion that it may be regarded as now "discredited and obsolete."88

There is a growing tendency to discard the terms "malice," "malice aforethought," and "implied malice." This tendency is apparent in the *Draft of an English Criminal Code*, printed in 1879. (The proposed code was never enacted, but deserves great consideration from the eminence of the codifiers, who were appointed by a Royal Commission.) In that draft the expression "malice aforethought" is not used. The commissioners who prepared the draft substituted

"a definite enumeration of the states of mind intended to be taken as constituent elements of murder for a phrase which is never used except to mislead or to be explained away."84

The use of the word "malice" is avoided throughout the English Draft Code, as it is in the Indian Penal Code. In their Report the English Commissioners say:

"It seems to us that the law upon this subject ought to be freed from the element of fiction introduced into it by the expression 'malice aforethought,' . . ."

The word "malice" is not used in the definition of murder in the Penal Code drafted by Edward Livingston for the state of Louisiana (never enacted).⁸⁶

^{*} Holmes, J., Com. v. Pierce (1884) 138 Mass. 165, 178.

Eng. 71, 75; Stroud, Mens Rea, 176; Stephen, General View of Crim. Law of Eng. (1st ed.) 119; 2 Chamberlayne, Mod. Law of Evid. ss. 1138-1142, 1145-1149; Prof. Joel Parker, 72 NORTH AM. Rev. 187, 188, 192, 198-202.

See Stroud, Mens Rea, 182 et seq., 185.

^{**} See Stroud, Mens Rea, 172, 181-182.

⁴³ Stephen, Hist. of Crim. Law of Eng. 83.

[&]quot;It is much better, in defining murder, to state directly what acts or states of mind are forbidden than to call them malicious and then have to go on and explain that 'malice' does not really mean malice but something quite different." Terry, Leading Principles of Anglo-American Law, s. 220.

See Report of Commissioners, 15, 23, 24.

See 2 Complete Works of Edward Livingston on Criminal Jurisp. 147, art. 537. As to the learned codifier's reasons for the omission, see Vol. 1, p. 307-310. As to the objections to the use of the term "implied malice" in the law of defamation, see quotations cited in the paper by the present writer in 60 U. of PA. L. Rev. 461-463.

Example Five: As to the fiction of conclusive presumption of intent, stated as affording the reason for the doctrine of trespass ab initio.

That doctrine is, in substance, as follows:

He who under authority of law enters upon another's land,⁸⁷ and is subsequently guilty of an abuse of that authority by committing a wrong of misfeasance⁸⁸ against the owner, is deemed to have entered originally without authority, and is therefore liable as a trespasser ab initio for the original entry itself, as well as for all damaging acts subsequently done by him thereunder. By the subsequent abuse, he forfeits the protection which the law would otherwise give to the original entry. The abuse of the authority not only terminates it, but revokes it retrospectively, so that it is deemed never to have existed.⁸⁹

But if one enters under an authority in fact, given by the owner, his subsequent abuse of that authority does not make him liable as a trespasser for the original entry. He is liable only for abuse or misconduct occurring after entry.

It has been said that the rule of trespass ab initio was "primarily one of procedure," authorizing the maintenance of an action of trespass quare clausum fregit for the entire damage including the original entry, instead of an action on the case for the subsequent abuse only. In view of modern procedural changes, the question as to the form of action under the old system is not now of practical importance. But the rule did not merely affect the form of action under the old procedure. It created a substantive liability which would not otherwise exist. And

"its secondary effect upon the substantive law still remains, viz., that it enables the plaintiff to recover damages for the entire transaction, and not merely for the wrongful portion of it" (the abuse subsequent to the entry). 90

For this doctrine of trespass ab initio two prominent reasons or explanations are given.

- 1. The subsequent abuse of the right conferred by law gives rise to a conclusive presumption that an intent to abuse the authority existed at the time of the original entry.
  - 2. A ground of public policy to be briefly referred to later.

Here we are concerned only with the correctness or sufficiency of the first reason, i. e. the presumption as to the original intent.

⁴⁷ The doctrine does not apply merely to entry upon land.

^{* &}quot;A positive wrongful act, as opposed to a mere omission or non-feasance."

⁶⁰ See definitions in text-books; especially Salmond, Torts (1st ed.) 167; Cooley, Torts (2d ed.) 371-372.

⁸⁰ See I Salmond, Torts (1st ed.) 168; Bigelow, Torts (7th ed.). But compare Street, Foundations of Legal Liability, 244.

An early statement of this reason is found in the leading case of The Six Carpenters:91

. . in the case of a general authority or licence of law, the law adjudges by the subsequent act, quo animo, or to what intent, he entered: for acta exteriora indicant interiora secreta.'

This view has been restated in various forms:

"The presumption of law is, that he who thus abuses such an authority assumed the exercise of it in the first place for the purpose of abusing it."92

". . . it is presumed, from the misbehavior of the licensee, that he entered originally with the intent to do the wrong he has actually

committed, and not in good faith under his license."93

"He is said to be a trespasser ab initio, on the assumption that his subsequent misconduct evidences an intention from the first to commit unlawful acts under the colour of a lawful authority."94

". . . the original intent was presumed conclusively from the

subsequent conduct."95

This presumption has practically been regarded as a conclusive presumption, although the word "conclusive" may not have been used in stating it. It is treated as irrebuttable.

There is no ground for a conclusive presumption in cases of this nature generally. In some instances a jury might be justified in finding the fact of the existence of such an intent, e. g. where the abuse followed closely upon the original entry and was of an extreme nature. Subsequent misconduct may, in particular cases, be held to afford some evidence of original intent. But that is a very different thing from holding that it gives rise in all cases to a conclusive legal presumption of original intent.

Modern writers who have given attention to the question practically agree in calling the "presumption" a fiction, "an artificial assumption,"

"This artificial assumption in many cases does not accord with the real justice of the case."88

". . . by a fiction of law to make him a trespasser ab initio." of sor a legal fiction due to the misplaced ingenuity of some

abuse was evidence of a wrongful intent from the beginning, . . . . "" "An artificial difficulty was thus overcome by artificial means." 100

^{4 (1610) 8} Coke, 146a, 146b.

² I Water, Trespass, s. 493.

²⁶ Cooley, Torts (2d ed.) 371.

[&]quot;Clerk & Lindsell, Torts (2d ed.) 165.

^{*} Holmes, J., Com. v. Rubin (1896) 165 Mass. 453, 455.

[&]quot;Clerk & Lindsell, Torts (2d ed.) 165.

[&]quot;Bigelow, Torts (7th ed.) s. 490.

Salmond, Torts (1st ed.) 168.

^{*}I Street, Foundations of Legal Liability, 47.

¹⁰⁰ Id. 47.

The theory that the law will invariably infer the original wrongful intent from the subsequent act of abuse, was stated in the Six Carpenters' Case¹⁰¹ as a ground for distinguishing the case of authority given by law from that given in fact, and for applying the rule of trespass ab initio to the former case but not to the latter. This ground of distinction¹⁰² has been strongly criticised. It is said that this reason "applies equally to both cases," and that it is not easy to see why intent from the beginning to abuse authority may not be as readily inferred in the one case as in the other. ¹⁰³ In Hammond, Nisi Prius (Eng. ed. of 1816) it is forcibly said:

". . . if the *nature* of a subsequent act of trespass was indicative of a previous evil intent, it must be so not only in the instance where it has been perpetrated in executing an authority in law, but likewise when it has been committed in fulfilling an authority in fact."

Does the rejection of this fiction reason (conclusive presumption of original intent) necessitate the abandonment (the elimination from the law, the legal annihilation) of the doctrine of trespass ab initio?

If it does have that effect, the result will not be regretted by some leading jurists. Prof. Salmond¹⁰⁴ and Judge Holmes¹⁰⁵ have indicated their willingness to get rid of the doctrine.

But it would not necessarily have that effect. Another reason has been given for the doctrine, and, whether entirely satisfactory or not, it is certainly a better reason than the fiction of presumed intent. It is founded upon general considerations of policy, and has been stated in substantially the following form:

"When the law gives one man an authority to enter upon or take possession of another's property against the owner's will, it must provide ample safeguards against the abuse of the authority, since it disarms the owner of the power of protecting himself. But where the owner himself gives the authority, the means of protection are in his own hands." 108

## Where

"an authority in law is delegated to another, the privilege is conferred upon this *implied condition*, that he does not convert it into an instrument of oppression."

(To be continued)

¹⁰¹ (1610) 8 Coke 146a.

^{102 &}quot;a curious and rather subtle distinction." Pollock, Torts (6th ed.) 379.

¹⁰⁸ See note in 14 Am. Dec. 365.

¹⁰⁴ Torts (1st ed.) 168.

¹⁰⁸ The Path of the Law (1897) 10 HARV. L. Rev. 457, 469.

^{108 14} Am. Dec. ed. n. p. 365. Compare 6 Bac. Abr. (6th ed.) 561, Title "Trespass B"; Hammond, Nisi Prius (Eng. ed. of 1816) 54, 55.

# ALIEN ENEMY PERSONS, FIRMS AND CORPORA-TIONS IN ENGLISH LAW

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Soon after the outbreak of the present war, the English courts found themselves confronted with problems for the solution of which they were compelled to look back to decisions reached at the time of the Napoleonic Wars. For, although similar questions were ventilated before the courts during the Crimean War, and were, so far as the law of prize is concerned, treated with learning and distinction by Lushington, it was yet inevitable, both by reason of the comparative brevity of the Crimean War and of the conspicuous and overmastering ability of Stowell, whose reign in the Admiralty Court lasted for twenty-nine years (1798-1827), that the wide range of topics which he treated, covering as they did every kind of mercantile transaction, should become the classic authority for subsequent decisions. nothing is the greatness of Stowell more conspicuous than in his grasp of principle; and the result is that to this day, notwithstanding the greater variety, complexity and interdependence of commercial dealings, notwithstanding the rapidity of communications and the rise of the limited liability company, the principles which he evolved are still true and applicable to the conditions of this war.

#### I. ALIEN ENEMY PERSONS

The status in judicio of alien enemies becomes an acute question the moment the capacity of a plaintiff to bring his action is challenged. How has English law defined an alien enemy, and under what conditions may such a person sue in the courts? In the Anglo-American system of law the test is now well settled; it is a test not of nationality but of residence or commercial domicile, not what a man is but where his business is. It may be well at this point to mention briefly some of the older authorities to which the courts were able to turn when they were first called upon, in the early days of the war, to form an opinion on the question. In Bacon's Abridgement¹ the doctrine is laid down that an alien enemy can sue in the king's courts only if he is in the realm by license of the Crown. The same principle is followed in Wells v. Williams.² This is strictly interpreted in a later case (of the Crimean War period); for it was held by Campbell, C. J.,

^{1 (7}th ed.) Vol. I, p. 183.

^{* (1607)} I d Raum off of also Roulton v. Dobree (1808) 2 Campb. 163.

in Alcinous v. Nigreu³ that an alien born in Russia, resident in Great Britain, though without the license of the Crown, could not maintain an action for work and labour done. Lord Stowell laid down the principle broadly in The Hoop⁴ that an alien enemy could not sue in British courts unless under particular circumstances, such as his coming under a flag of truce or some other act of public authority, which pro hac vice would relieve him of his enemy character. The same view is to be found in a case arising out of the South African war.⁵

This being, briefly, the trend of the earlier authorities, it is now to be seen how they have been applied and developed by the courts in the present war. It is clear that the meaning to be attached to license and residence requires close attention and definition. License, for example, may be either express or implied. 'In most cases which arise under modern conditions the license to reside is to be inferred from a number of circumstances, such as the length of time for which the alien enemy has resided or carried on business in this country. The application of these principles to the conditions of the present war was made in two important judgments. In Princess Thurn and Taxis v. Moffitt's a writ had been issued by the wife of an alien enemy who had been compulsorily registered under the Aliens Restrictions Act, 1914, and the Orders made thereunder. It was argued for the defense that no action could lie at the suit of an alien enemy registered as such. Sargant, J., took the opposite view, and, indeed, based his judgment for the plaintiff upon this very fact of registration.

"There can be no doubt," he said, "that the effect of such registration is to amount to at least a license to the person to remain in this country. Inasmuch as the plaintiff is coming to insist on a right which is individual to herself, she has in my opinion, by virtue of her registration and by virtue of the permission thereby granted her to reside in this country, a clear right to enforce that right in the courts of this country notwithstanding the existence of a state of war."

In Schaffenius v. Goldberg⁷ there is an important development of this principle. An alien enemy had been interned under the Defense of the Realm Regulations. He then entered into a contract with a British subject that was in no way prohibited by any restriction relating to trading with the enemy. It was held by Younger, J., that the interned alien could bring his action; and the arguments in opposition to this view and the reasons for which the court rejected them are of such interest and and importance that they deserve a closer inspection. The contention of the defense was that the plaintiff could

^{* (1854) 4} Ei. & Bl. 217.

⁽¹⁷⁹⁹⁾ I C. Rob. 196.

⁵ Janson v. Driefontein Consolidated Mines, Ltd. [1902] A. C. 484.

^{*[1915] 1} Ch. 58.

¹ (Ex parte Liebmann) [1916] 1 K. B. 284, 290, 293, 294.

not bring his action, as the fact of his internment amounted to a revocation by the Crown of his license to reside. This argument was supported by a reference to a recent case, Rex v. Superintendent of Vine Street Police Station;⁸ but all that this decided, as the court pointed out, was the short point that an alien enemy interned in this country is a prisoner of war, and for that reason cannot be granted a rule of habeas corpus.

"Internment," said Younger, J., "has not made the plaintiff an enemy. Enemy character in a trading sense has never attached to him"; and a little later in his judgment: "There has been a gradual and progressive modification in the rules of the old law in their restraint and discouragement of aliens. It is, as I have already indicated, not the nationality, but the residence and business domicil of the plaintiff that are now all-important. . . . I can find no real warrant for the contention that internment is equivalent to a revocation of the licence to remain which is implied in registration."

The Court of Appeal upheld this view.

In the case discussed above the contract was entered into after the outbreak of war. Where a contract was entered into between two parties before the outbreak of war, and one of them became subsequently an alien enemy and was interned as such, his right of action would a fortiori be unaffected; as was in fact decided in the unreported case of Mayer v. Fink-Sibler, in which the writer was engaged.

I have discussed these cases at this stage because they provide a good illustration of the way in which the license to an alien enemy to remain is interpreted under modern conditions. We may take from them the propositions that an alien enemy, that is, a person who is a subject or citizen of a state at war with Great Britain, puts off his enemy character for the time being and may appear as a plaintiff in the English courts if there is clear evidence that he has the license of the Crown to reside, such evidence being very strong in cases where the Crown has contemplated and made provision for the continued residence of alien enemies by making enactments for their registration and internment, and where, in consequence, the alien enemy has in fact been registered or interned. The case would be even stronger where an alien enemy has, in pursuance of the prescribed procedure, made application to the regular committee of the British Home Office10 for an exemption from internment and has been granted such exemption upon the condition that he produces sufficient sureties for his loyalty and good behaviour.

⁶ [1916] 1 K. B. 265.

^{*}Tried before Darling, J., in November, 1915.

¹⁰ This is strictly an Advisory Committee to the Secretary of State for Home Affairs. It is a quasi-judicial body, and includes in its membership two High Court Judges. It was set up in 1915.

We are now in a position to consider the extent of the expression "alien enemy" as used in the present war. Before it had become necessary for the High Court to give its attention to the definition of the term, a Proclamation was issued on September 9th, 1914, which, although purporting to do no more than declare the common law (for this is the utmost force that a Proclamation can possess), yet admirably sets out the gist of the true doctrine. By sec. 3 the expression "enemy" is defined as meaning "any person or body of persons of whatever nationality resident or carrying on business in the enemy country," but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country.11 Sec. 6 provides that "where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy."

There can be no doubt that the sections just quoted correctly express the conclusion to which a review of the common-law authorities would lead. It was completely borne out by the judgment of the full Court of Appeal¹² in *Porter v. Freudenberg*, ¹³ a decision of peculiar fullness and authority. The court took occasion to travel outside the actual question before it, and reviewed in an exhaustive and powerful judgment the whole of the law relating to alien enemies. Their conclusions are the same as those expressed in the Proclamation.

"It is clear law," said Lord Reading, C. J., in delivering the judgment of the court, "that the test for this purpose is not nationality but the place of carrying on the business."

#### And again:

"For the purpose of determining civil rights a British subject, or the subject of a neutral State, who is voluntarily resident or carrying on business in hostile territory, is to be regarded and treated as an alien enemy. . . ."

By a further Royal Proclamation dated January 7th, 1915, territory in the occupation of the enemy is treated as enemy country, and enemy territory in the occupation of His Majesty's Forces or those of his Allies is treated as friendly country. This is a rule of common sense and requires no justification.

It may be taken, then, that Porter v. Freudenberg has finally decided the question, Who is an alien enemy. It is clear from this case that

¹¹ The words in italics have a special significance, in view of a subsequent decision of the House of Lords which I shall discuss at a later stage.

¹² Consisting of the Lord Chief Justice of England and six Lords Justices.

¹⁴ [1915] 1 K. B. 857, 868, 869.

no person can properly be called an alien enemy (for the purpose of suing and being sued) if he resides in this country by license, express or implied, or if he carries on business here. On the other hand, all persons are alien enemies, even though their nationality may be British, who voluntarily reside in enemy country or in territory which is in effective military occupation. For this purpose, and in this limited sense, there is only one test, the test of residence and business. There is no other. It may, therefore, be truly said that the expression "alien enemy" as used in and defined by the English courts for commercial purposes is a highly technical expression, and bears an esoteric meaning which to the layman may well prove misleading.

At this point, it will be well to consider the important question discussed by the court in *Porter v. Freudenberg* of the effect, if any, upon English law of certain parts of the Hague Convention which have been claimed as directly bearing upon the status of alien enemies in civil courts in time of war. The Fourth Hague Convention of 1907¹⁴ deals with the laws and customs of land warfare. It has been signed and ratified by Great Britain. Section 2 of that convention is headed "Of Hostilities." Art. 23 of that section sets forth a number of acts of warfare which are prohibited to signatories of the convention, e. g., to employ poisoned weapons, to declare that no quarter will be given, to employ arms, projectiles or material calculated to cause unnecessary suffering. Subsection (12) of this article lays down that it is forbidden

"to declare abolished, suspended or inadmissible the right of the subjects of the hostile party to institute legal proceedings."

The opposing views may be very briefly put. It is the German contention that this subsection constitutes a general prohibition against any legislative measures which in time of war would place the subject of an enemy state in the position of inability to enforce the execution of a contract by recourse to the tribunals of the state in regard to which he is an alien enemy. The English view (and it is believed that this is widely shared in the United States) is that the subsection bears a strictly limited application to occupied territory, and does no more than prohibit the military authorities in command of such territory from preventing access to the civil courts on the part of residents of that territory. It is to be conceded that the German delegates at the Hague Conference, who were in fact responsible for the introduction of the subsection, plainly stated the intention and meaning which their Government would attach to such a provision; and on the eve of the outbreak of war, the German Ambassador in London made a personal enquiry of the British Foreign Office regarding the legal status of alien

¹⁴ Pulling's Emergency Legislation, Supp. 3, p. 547.

enemies in the event of war. The Court of Appeal took the view (though a decision on the point was scarcely necessary for the determination of the question before it) that the English view of the subsection, according to which the interpretation it bears is the limited one relating only to the rights of the inhabitants of occupied territory, was correct; both on the general ground that the subsection was so placed in the general scheme of the convention in which it is found that it must have a strictly military application, and, more particularly, because a prohibition against declaring suspended, etc., the rights of action of alien enemies could have no relevance or meaning in regard to a country such as England whose law operated automatically, on the outbreak of war, to suspend the rights of action of subjects of hostile states. The German Government made strenuous efforts, even up to the last moment before the severance of relations, to press their view upon the British Government, but unsuccessfully. But it is doubtful whether the application of the English rule operates as unfavourably against the subjects of a foreign state as the German Government seems to have supposed. It is the peculiarity of the English law of alien enemies that it makes the test not nationality but domicile. The Continental systems throw the stress on nationality. It follows from this that not all German subjects, for example, are, according to English law, alien enemies as such. This consideration is worth bearing in mind; for it at once considerably restricts the area over which alien enemy prohibitions operate. In short, the English rule does little more than affect, either by renewal or suspension, the rights of action of alien enemies (and in this must be included even British subjects) resident in an enemy country at the outbreak of and during war.

We may now pass on to examine some of the decisions in which the status of "alien enemies" has been reviewed. The fundamental principle is that the alien enemy cannot be the actor; he cannot initiate or set in motion proceedings in the courts. Lord Reading, C. J., has thus stated the rule:¹⁵

"When once hostilities have commenced, he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the Courts in motion. If he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace."

That is to say, that in any action in which he had been plaintiff, he cannot begin appeal proceedings while an alien enemy; but if he is not the actor, that is, when he has been brought before the court as defendant, he may, even though an alien enemy, commence an appeal.

The right of alien enemies to defend an action appears never to have been expressly considered and decided upon until the present

¹³ Porter v. Freudenberg [1915] 1 K. B. 857, 884.

war. On general principles, and in view of language used in regard to the status of alien enemies by judges and text-writers which would seem to justify the conclusion that an alien enemy is totally ex lex, and that he is simply nonexistent in the eye of the law, it might have been not unreasonable to suggest that an alien enemy could neither sue nor be sued. But it is clear that a disability to be sued may lead to results repugnant to common sense and expediency. It was upon this ground that Bailhache, J., based his decision in Robinson & Co. v. Continental Insurance Co. of Mannheim.16 The point was taken for the defendants that they could not be sued. The court took an adverse view, Bailhache, J., stating the law as follows:

"But to hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief."

This admirably clear statement seems to commend itself to law and to good sense.

The same result appears to have been reached in American law.17

It follows from the principles just stated that an alien enemy may not counterclaim.¹⁸ For a counterclaim is in essence no more nor less than a new and separate action which for purposes of convenience and for the saving of expense is tried together with the main action; the defendant who counterclaims is pro tanto the actor.

By the same reasoning, it has been held19 that an alien enemy may be sued where the cause of action arose after the outbreak of war as well as before, but may not initiate a new proceeding by a third party notice for indemnification; for this is distinct from, and not incidental to, his right of defense.

Before passing altogether from the consideration of the status of alien enemy persons, notice might be taken of London & Northern Estates Co. v. Schlesinger,20 in which it was held by Ridley, J., that an Order made under the Aliens Restriction Act, 1914, preventing the lessee of a flat from residing in a certain place does not relieve him from the obligation of paying rent to the lessor of a flat in that place, taken before the war.

# II. THE STATUS OF FIRMS AND CORPORATIONS

The rights in the English courts of alien enemy firms did not pass without attention in previous wars. The matter generally arose out

^{18 [1915] 1} K. B. 155, 159.

¹⁷ McVeigh v. U. S. (1871) 11 Wall. 259.

²⁸ Cf. Porter v. Freudenberg and Robinson v. Mannheim Insurance Co., vide

¹⁹ By Ridley, J., in Halsey v. Lowenfeld [1916] 1 K. B. 143.

**[»]** [1916] 1 K. B. 20.

of the question whether a cargo of goods was seizable as prize or not. A mercantile house might have one branch in enemy territory and one in neutral or friendly territory; and the result would be that the goods involved in the trade with the hostile branch would be confiscable, while those involved in that with the neutral or friendly branch would not. This question is, of course, quite distinct from that which is the subject of this article, namely, the capacity of alien enemy persons, firms and corporations for suing and being sued. It is mentioned only to show that the problem of the commercial house with wide ramifications is not new, and that principles were already to hand which could be applied to the facts of the present war.

The result of the common-law authorities was expressed in the Royal Proclamation of September 9th, 1914, which, *inter alia*, drew attention to the illegality of trading with enemy firms and went on to provide that

"where an enemy has a branch locally situated in British, allied or neutral territory not being neutral territory in Europe, transactions by or with such branch shall be transactions by or with an enemy."

It is true that this provision and the authorities which will be cited are in strictness relevant only to the question of trading with the enemy, with which this article is not concerned. But they are of value in so far as they yield by inference the proposition that branch houses not domiciled in enemy territory or in neutral territory in Europe can maintain an action in the English courts, even though other branches of the same business possess an enemy domicile. This principle was carried to some length in W. L. Ingle, Ltd. v. Mannheim Insurance Co.21 in which it was held by Bailhache, J., that where an insurance company had a head office in Germany and a branch office in London, transactions with the branch in London would not be transactions involving trading with the enemy. The significance of this decision lies in the fact that the friendly domicile prevails, even though the domicile of the head office is in enemy territory. But on the other hand, the case of Leader v. Direction der Disconto Gesellschaft22 may be compared, for it was there held that where the London branch of a bank of which the head office was in Berlin was permitted to carry on business according to the terms of a license given by the Treasury under an Order made under the Aliens Restriction Act which prescribed the way in which the assets were to be applied, an English firm which had obtained a judgment could not issue execution against the assets of the London branch. There is no conflict, however, between this case and that previously referred to, for the Leader case may be regarded as a decision on the circumstances, and

^{21 [1915] 1} K. B. 227.

²² [1915] 3 K. B. 154.

on the interpretation of the specific license under which the London branch of the bank carried on business.

It can be said of these contemporary decisions on questions relating to branch houses that they involve little or no departure from the main principles enunciated by Stowell. It is a striking tribute to the genius of that illustrious man that the foundations which he laid were so firm and comprehensive that on them has easily been reared the intricate superstructure of modern commercial relations. The limited liability company, however, is a recent growth; the conditions and circumstances under which it carries on business are new; and when there is added to this the complexity of international operations, we are confronted with a legal problem of quite exceptional difficulty which must be solved without any very great assistance from the past.

Little more will be done in this article than to endeavour to summarize the law as it has been left by the now famous decision of the House of Lords in Daimler Co. Ltd. v. Continental Tyre & Rubber Co. Ltd.²³ The whole question has been discussed by Dr. Ernest Schuster in a paper read by him before the Grotius Society of England and printed in the second volume of Proceedings at page 57, a paper to which the writer is deeply indebted, and which is rich in learning, acute in reasoning, and profound in thought.

How is the commercial domicile of a corporation to be determined? The question would become acute in a case where a limited liability company was registered in Great Britain but was, in point of control, entirely an enemy concern. English law has always very strongly insisted upon the complete distinction between the corporation and the persons (e. g., shareholders) who compose it. But a point might be reached when the directors and shareholders resident in enemy territories might exercise such a real control over the activity of the company that the courts might be driven to examine the whole basis of the idea of incorporation and to declare that a body substantially of enemy character should not defeat the legal incapacity of alien enemies to sue by the technicality of English registration. I shall endeavour to trace the stages by which the present doctrine was reached.

The Proclamation of September 9th, 1914, expresses negatively the doctrine that the place of incorporation is the test of a company's domicile, for it provides that

"in case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country."

At the end of 1914, the case of the Continental Tyre & Rubber Co. Ltd. v. Daimler Co. Ltd. was before the full Court of Appeal,24 the

^{* [1916] 2} A. C. 307.

^{4 [1915] 1} K. B. 893.

same court which decided Porter v. Freudenberg. The Continental Tyre Company was registered in England; out of 25,000 £1 shares one was held by the secretary, a naturalized British subject, resident in Great Britain; the directors and all the other shareholders were all German subjects resident in Germany. This company issued a writ after the outbreak of war and obtained a judgment against the Daimler Co. This was, therefore, an ideal test case. The Court of Appeal (Buckley, L. J., dissenting) held that it could not look behind the fact of the English incorporation in order to consider the nationality of directors or shareholders. The company was, therefore, not an alien enemy, and was entitled to bring its action.

The next case to be noticed is Rex v. London County Council,²⁵ an authority not directly in point, but yet of some significance. The council, as the statutory authority for the grant and renewal of cinematograph licenses, refused to renew the license of a cinematograph company registered in England on the ground that the large majority of the shares were held by alien enemies. Lord Reading, C. J., held that the council were entitled in the exercise of their discretion to refuse the renewal. The court put its decision upon the following rather special ground:

"If the Council are of opinion that the exhibition of cinematograph films accompanied by music should not be entrusted to a company so largely composed of persons whose interest or whose desire at the present time is or may be to inflict injury upon this country, can it be held as a matter of law that the Council have travelled beyond the limits allowed to them? I think not."

Before the House of Lords gave its famous decision when the Daimler case came to them from the Court of Appeal, Bargrave Deane, J., in the Admiralty Court, considered the point in the case of The Polzeath.²⁶ He held, in determining the question where a company's principal place of business is situate within the meaning of sec. I of the Merchant Shipping Act, 1894, that

"to decide the true character and entity of a business or company you must ascertain where the motive or directing force of the business or company comes from; in other words, where the real life is, and not where the limbs move to give effect to that living power."²⁷

²⁸ [1915] 2 K. B. 466, 475. Cf. also Robson v. Premier Oil & Pipe Line Co. Ltd. [1915] 2 Ch. 124, in which it was held that during war an alien enemy may not vote in respect of shares in an English company, the right being suspended.

^{* [1916]} P. D. 117 (affirmed by the Court of Appeal).

⁷⁶ Cf. The Tommi [1914] P. D. 251 and The Poona (1915) 31 TIMES L. R. 411, 1 Br. & Col. P. C. 275, in which the President of the Admiralty Division expressed a doubt as to right of companies composed of aliens to sue even though incorporated in Great Britain.

It will be noticed that in both the authorities just quoted there is a current of opinion moving away from the strict doctrine of the Court of Appeal in the *Daimler* case, that the determining factor in deciding the domicile of a corporation is the place of its registration. Attention is beginning to be paid to the quality of the persons who compose the corporation in order to ascertain the real seat of its activity.

Dr. Schuster's Grotius Society paper was read on May 30th, 1916, nearly two months before the judgment of the House of Lords in the Daimler case. The learned writer, after a full consideration of the treatment of corporations in foreign law, inclines to a view different from that of the Court of Appeal, being of opinion that

"a corporate body should be deemed to be domiciled in the place of its administrative centre, being the place at which the persons directing the policy of the corporation habitually meet."

This is, in effect, the doctrine of "control" which was adopted and expounded in Lord Parker's judgment in the House of Lords.

When the Daimler case²⁸ came before the Lords in July, 1916, they reversed the Court of Appeal, holding that the mere fact of registration in Great Britain does not of itself determine the domicile of a limited company as English. But the appeal was allowed by some of the Lords on a different ground, namely, that the secretary had no authority to issue a writ in the action. As this was all that was relevant for the decision of the appeal, any excursion into the larger question of the status of the company became, strictly, unnecessary. But fortunately, a matter of such gravity and importance was not passed over without comment. Lord Parker, in a judgment delivered on his own behalf, and on that of Lords Mersey, Sumner and Kinnear, discussed the main question, and laid down principles for determining the domicile of corporations.

"It would seem, therefore, logically to follow," said Lord Parker,²⁹ "that, in transferring the application of the rule against trading with the enemy from natural to artificial persons, something more than the mere place or country of registration or incorporation must be looked at. My Lords, I think that the analogy is to be found in control, an idea which, if not very familiar in law, is of capital importance and is very well understood in commerce and finance. The acts of a company's organs, its directors, managers, secretary, and so forth, functioning within the scope of their authority, are the company's acts and may invest it definitively with enemy character."

This judgment of the House of Lords may be taken to have established that the status of corporations for purposes of suing is to be

^{28 [1916] 2} A. C. 307.

^{* [1916] 2} A. C. 339.

tested by the notion of control and no longer by sole reference to the place of incorporation.³⁰ But the difficulties which arise when the doctrine is applied in practice are considerable. At which point is it to be said that the acts of a company are under enemy control? The answer to this must vary with the particular circumstances of each case. Again, is this a question of law for a judge or a question of fact for a jury? The answer to neither of these questions is entirely clear. It seems safest to say that an enemy status can be pronounced for only after the most careful examination of the constitution and composition of the company in every case, regard being had to all the circumstances before the court. Beyond this, it is not wise to go.

It is hoped that the cases which have been discussed above will illustrate the manner in which the English courts have applied themselves to some of the commercial problems created by the war. The law in regard to the rights of action of alien enemy persons and corporations may now be regarded as settled. The principles have by now been fixed, and only their application remains. The indubitable community between the English and American systems of law justifies the writer in hoping that this article may prove not without interest to American students and practitioners, who doubtless will be confronted with similar situations to those which the English courts have not unsuccessfully overcome. He cannot doubt that their treatment in the courts of the United States will furnish a rich and lasting contribution to the literature of this branch of that law which the two countries have so largely in common.

Followed in In re Hilerces, 33 Times L. R. 28.

# ADVANCING FREIGHT RATES TO INCREASE REVENUES

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The right of the railroad carriers to advance freight rates for the purpose of increasing revenues has been considered frequently by the Interstate Commerce Commission during the past seven years; the carriers have complained that their net operating revenues are inadequate, and have, with much consistency, repeated with growing elaboration and varying statement the reasons why this condition exists. Generally, they have come asking for increased rates after a year of remarkable business, and though the commission each time has reviewed conditions over a period of years, the preceding highly productive year has had much influence on the decision.

The latest of these cases was decided only in June, 1917, and it furnished a climax to the series in that the railways of practically the entire United States were concerned in the request. All these circumstances make it worth while to take a synoptic view of this group of cases.¹

#### AN EARLY CASE

The earlier case of *Proposed Advances in Freight Rates* decided in April, 1903, relates to official classification territory, and is the forerunner of the group of cases mentioned. It developed in a very thorough manner the considerations and principles applicable. Commissioner Prouty, speaking for a unanimous commission, regarded a rate from two standpoints, namely, with respect to cost and value of the service and in its relations to other rates, and absolutely, or in the guise of a tax levied on the industry of the country by a quasi-

¹ The cases especially considered herein are:

Proposed Advances in Freight Rates (Apr. 1, 1903) 9 I. C. C. 382;

In Re Investigation of Advances in Rates by Carriers in Official Classification Territory (Eastern Rate Advance Case) (Feb. 22, 1911) 20 I. C. C. 243;

In Re Investigation of Advances in Rates by Carriers in Western Trunk Line, Trans-Missouri & Illinois Freight Committee Territories (Western Rate Advance Case) (Feb. 22, 1911) 20 I. C. C. 307;

Five Per Cent Case (July 29, 1914) 31 I. C. C. 351; Five Per Cent Case, Supplemental Hearing (Dec. 16, 1914) 32 I. C. C. 325;

¹⁹¹⁵ Western Rate Advance Case (July 30, 1915) 35 I. C. C. 497;

Fifteen Per Cent Case (June 27, 1917) 45 I. C. C. 303.

I have intentionally not used technical language to state how these various cases came before the commission; procedure here is not important. Cf. 45 I. C. C. 311.

public institution—the carrier; it is the latter phase that he proceeded to discuss.² He argues that the highest rate a carrier should be permitted to earn is not what the federal Government would probably pay for money if it were the railroad owner, nor is it correct to determine the rate on the basis of the cost of reproducing the railway property, or the actual money investment, or the capitalization; in the case of a particular system, it might be found that some one of these bases might alone be sufficient, but he denies that a general rule as to one, or as to the combination of them, exists. He then lays down the "precise question before the Commission" thus:

"We find a rate fixed by competition, sufficiently remunerative, and properly adjusted to other rates. Is there anything in the financial operations of these carriers which justifies an advance in that rate? Should the property invested in these railroads be allowed to lay a larger tax upon the general public when and largely because competitive conditions have been so far restrained that it can?"

In a review of the kind here contemplated the detailed reasoning of the commission cannot be followed, but the purpose is to develop the commission's view of the nature of the factors involved and their appropriate influence.

It is denied in this case that a rate is a commodity whose value is determined by supply and demand, and therefore the era of advancing prices for commodities does not necessarily produce a corresponding advance in freight rates. Assent is given to the broader proposition that the railways should share in the general prosperity; the "law of increasing returns" in railroad operation is discussed and illustrated, and the result of its application in particular cases is seen only by continuous observation, and accordingly the commission considers several important factors in this connection, namely, the number of ton-miles, the gross receipts, the net receipts, and the railroad mileage, from 1897 to 1902, for the whole United States, and for the territory embraced in this inquiry, and concludes that the figures show a prosperous condition.

Rising costs in materials and supplies and increased wages are also factors in the situation; and as these greatly augment operating expenses, the commission proceeds to examine the financial showing of the leading carriers in this territory "for the purpose of determining whether the claim of the carriers that they ought to advance rates for the sake of increasing their gross revenues is well founded." The elements of the financial showing then considered are the mileage, the funded debt per mile, capital stock per mile, the net income for the last fiscal year, interest on funded debt, rentals and taxes, appropriation out of income for permanent improvements, dividend paid, and

²9 I. C. C. 401, 404.

balance remaining; the increase in wages far exceeds this balance, and the commission does some constructive figuring to find the sources of revenue to take care of the large wage increase made and to be made; refunding soon to take place will save so much from the interest account; strict adherence to the published rates and ending the pernicious practice of rebating will realize another very large amount, overbalancing the wage advance. As to the surplus, of course the carrier is entitled to enough income to create that also; but recent improvements in the property of the carrier will tend to increase revenues and effect economies, and it cannot be permitted that these improvements shall be made out of current earnings and that the enhanced value of the property thus produced shall also be the basis upon which to determine an increase of rates. In other words, the carrier should not increase rates to improve the property and then increase them again to maintain a proper percentage of return on the property!

The clear exposition of this principle did not convince the carriers, for in the 1911 Eastern and Western Cases, Commissioners Prouty and Lane vigorously reiterate and amplify the argument and fix the principle unquestionably. To determine whether the carrier is sharing in the general prosperity which marked that period, the capital stock quotations are shown to have risen in 1902 to about 100 per cent of the quotations in 1896. The conclusions may be expressed in the language of the commission:⁸

"We have now examined upon this proposition the main lines of the Vanderbilt and the Pennsylvania systems. It appears that for the last three years in all instances gross earnings have steadily increased; that in most instances where permanent improvements have not been charged against operating expenses, net earnings have increased in even greater proportion; that the stocks of these companies have advanced from 50 to 100 per cent. in market value; that net earnings per mile are in every case large and must yield an abundant return upon a fair valuation of the properties. There is probably no case in which the rate of dividend paid in 1902 cannot be maintained without any advance in rates, beyond those sanctioned in this report, notwithstanding the material increase in wages. While we are not prepared to hold that these returns are excessive, nor that rates ought to be reduced for that reason, we are clearly of the opinion that they in no respect indicate that rates should be advanced."

Several respects in which rates may be advanced are indicated; for instance: restoration of rates which had been lowered to meet depressed commercial conditions in iron articles; withdrawal of low export rates, and maintaining the published rates.

In the 1911 Eastern and Western Cases the carriers were specifically asked by what standard the reasonableness of the proposed advances

² 20 I. C. C. 424.

should be measured, and they answered solely and unanimously that "increased operating expenses required additional gross revenue"; the application of this test produced the results above stated.

In these cases the carriers made the contention—which had been made before and has often been made since—that the test of reasonableness is what the traffic will bear; that only traffic and commercial conditions need be estimated to ascertain a rate; and that so long as traffic moves, the rate is conclusively reasonable. But the commission answers this contention with reference to the question whether a carrier has a right to advance its tariff for the sole purpose of increasing its revenues, by citing especially the elements named in the case of Smyth v. Ames and found that not one of the rate fixers of the carriers had any such criteria in mind when he formulated the rates here in question.

The mild judicial tone of the commission in this early opinion is remarkable and suggestive; at that time, some of the greatest excesses of railroad management and stock manipulations were not so completely understood as they were later when the supervision over railroad accounts was more thoroughly established; in fact, many of the most highly culpable transactions had not then occurred. This opinion, like all succeeding ones, carefully recognizes the vastly important part played by the carriers in the welfare of the country and their right to fair treatment; some of the subsequent opinions, in their occasional sharp and rebuking references to railroad mismanagement, also clearly reflect the popular mind. Such utterances may be regarded as somewhat by way of retort to the argument that the carriers' alleged troubles are due to governmental regulation!

## JURISDICTION OF THE COMMISSION⁶

No question is made in this early case (Proposed Advances in Freight Rates) of the jurisdiction of the commission to consider the subject under its accorded authority to pass on the reasonableness of rates; indeed, the power seems to be expressly claimed; but in the Eastern Rate Advance Case, where the same territory and a very similar advance of rates are involved, Commissioner Prouty, in rendering the opinion of the commission, suggested lack of jurisdiction although the statutory power of the commission to consider reasonableness of rates had in the meantime in that respect not been narrowed in any way. There is an absence of authorization specifically to increase or establish or approve a rate to produce greater revenue,

⁴²⁰ I. C. C. 256.

⁶ (1898) 169 U. S. 466.

^{*}For jurisdiction to consider rates, see I. C. Act, s. 1, ¶ 3; s. 12, ¶ 1 (jurisdiction to enforce the act); s. 13, ¶ 1; s. 15, ¶ 1, 2 (suspension).

79 I. C. C. 382, 438.

and all the great changes in the Act to Regulate Commerce had been incorporated in the Elkins Law of 1903, the Hepburn Amendment of 1906, and the Mann-Elkins Amendment of 1910; and all of the changes-excepting, possibly, the proposed establishment of the Commerce Court-were in the direction of broadening the powers of the commission. Thus, at the time the Eastern Advance Case comes on, the act had in all essential matters reached its present form. Therefore, if jurisdiction in the matter here raised was questionable, the question might still be pertinent, or in any case the conclusions reached would be applicable to the same statutory language we now have in the act.

Let us look at this question in some detail. Early in his opinion in the Eastern Rate Advance Case, Commissioner Prouty says:8

". . . the question presented to us is, Are these defendants justified in laying this additional transportation burden upon the public for the

purpose of obtaining greater net revenue?

"Strictly speaking, this Commission has no jurisdiction to hear and determine that question. We have no authority, as such, to say what amount these carriers shall earn, nor to establish a schedule of rates which will permit them to earn that amount. Our authority is limited to inquiring into the reasonableness of a particular rate or rates and establishing that rate or practice which is found lawful, in place of the one condemned as unlawful. . . . This Commission is called upon to deal with rates as they exist, and in so doing we ordinarily consider them, not from the revenue standpoint, but rather from the commercial and traffic standpoint. At the same time it is now the settled law that there is a limit below which the revenue of railways cannot be reduced by public authority, and if there were no such constitutional limitation it would nevertheless behoove every regulating body to permit the existence of such rates, when possible, as will yield just earnings to the railways. The question of revenue is therefore fundamental and ever-present in all the considerations as to the reasonableness of railroad rates, although it may not be and seldom is when single rates are presented, the controlling question."

He then goes on to say that the consideration of the commission is not confined to single rates, and when the entire rate fabric of a territory is affected by advances and the propriety of these advances is involved, and the question is whether the advance is justified by lack of adequate revenue upon the existing rate basis, "this Commission must determine the fundamental question." Although jurisdiction is denied at first, after this short argument it is concluded that the commission must settle the question which it has no authority to settle. Must it usurp authority? Clearly he does not mean that; evidently his conclusion is that the commission has jurisdiction as shown by this course of reasoning based on the statutory functions

^e 20 I. C. C. 243, 247-248.

of the commission. Still the matter haunts him, and he says further:

"We must take the history of these properties [i. e., the railways here involved] and, from a consideration of all the facts before us, arrive at some rough notion of their value for railroad purposes. As a part of that same inquiry we must form some idea of the rate

of return to which the property of these carriers is entitled.

"Here, again, it should be observed that this Commission has no jurisdiction to deal with that question as such. We have no authority to say that a railroad ought to earn, either as a matter of right or as a matter of public policy, any given per cent upon its value; but in discharging our duty, to say whether these particular rates which the carriers propose to establish are just and reasonable, we must determine in a general way what a fair return would be, and that matter will be next considered."

In the end, therefore, the commission concludes that it may determine whether a particular rate is reasonable, or whether a group of rates is reasonable, and indirectly it thus fixes the income of the carrier; the body of rates is unreasonable unless they produce a fair return. So the jurisdiction over this subject matter is proven.

In the companion case—Western Rate Advance Case 10—decided on the same day, the matter is naturally not adverted to.

In dissenting in the Five Per Cent Case,11 where the same official classification territory was involved, general advances were asked, and allowances were awarded only partially and in detail, Commissioner Daniels for some unexplained reason argues and cites precedents¹² to establish the authority of the commission to deal with the question, although the majority of opinion does not refer to the question and a footnote13 states that the expression of Commissioner Daniels' views does not imply that they are opposed to the views of the majority. Presumably, that had been under discussion in commission conferences, and he thought to spread an argument on the record which might furnish some light in the future. However that may be, he finds no difficulty in showing to his own satisfaction the jurisdiction of the commission. He shows that when the statute authorizes the commission to consider the reasonableness of a proposed rate it does not mean a single rate—that meaning would load the commission with a physical impossibility; and so to accomplish the statutory purpose, the consideration of rates in group or en bloc may be construed to be a consideration of the component individual rates; evidence as to inadequate returns on a carrier's property is rate evidence, and such evidence applies to specific rates. In further support of his position

^{° 20} I. C. C. 261-262.

^{10 20} I. C. C. 307.

^{11 31} I. C. C. 351.

¹² 31 I. C. C. 448-450.

^{18 31} I. C. C. 448.

he cites Arlington Heights Fruit Exchange v. Southern Pac. Co.,14 where a uniform blanket rate was placed on lemons from Colorado to the Atlantic seaboard covering a multitude of different hauls of varying lengths; Intermountain Rate Cases15 (City of Spokane v. Northern Pac. Ry.), 16 Railroad Commission of Texas v. Atchison, T. & S. F. Ry. Co. 17 Commissioner Daniels concludes:

"The obvious conclusion, both from reason and from precedent, is that the Commission may legally deal with rate schedules as a whole, and also that insufficiency of revenue is a proper ground upon which, nothing substantial to the contrary appearing, to accord advances which will result in just and reasonable rates."

We may surmise that Commissioner Daniels was arguing for the benefit of Commissioner Clements, for upon the supplemental hearing18 of the Five Per Cent Case, the latter enters a vigorous dissent to the award of increases on the ground that the carriers need more revenue to enable them to furnish

"adequate service to the public, to meet their financial obligations, and maintain dividends in such manner as to encourage further investments in railways and their securities. If these considerations constitute a sufficient basis for wholesale approval of a body of increased rates agreed upon by all carriers in a given territory, competing or connecting, weak or strong, the same must be equally true if every road in the country, as well as every rate, were included in a proceeding before us."19

His view is that the power here claimed is legislative, inasmuch as it is the power to inaugurate and shape public policy, which is clearly a legislative function.

In the 1915 Western Rate Advance Case,20 the commission says:

"The effort has been made to constitute the present investigation essentially one of the propriety of increased rates which the carriers seek to impose on a relatively small number of articles";

but no finding is made on the subject of "increased revenues." This failure to "meet the issue" is criticized by Commissioner Daniels in his dissenting opinion, but there is no intimation anywhere in the majority opinion or in the two dissents of lack of jurisdiction.

^{14 (1910) 19} I. C. C. 148, affirmed per curiam (1913) 231 U. S. 736.

^{15 (1914) 234} U. S. 476.

^{16 (1911) 21} I. C. C. 400.

^{17 20} I. C. C. 463.

^{18 (1914) 32} I. C. C. 325, 337.

¹⁹ This was actually the case in the Fifteen Per Cent Case (infra); there the commission did not stick at the matter of jurisdiction.

³⁵ I. C. C. 497, 502.

We come now to the most recent case considered, the Fifteen Per Cent Case,21 where the question is one of a horizontal increase in rates in the three classification territories, involving practically all the rates and railroads in the United States. Here, the subject of increasing rates for revenue is presented in the most extensive and complicated manner possible, and it includes the plan of a horizontal increase. No individual rates could receive consideration and no one line of railroad could receive especial attention except for purposes of comparison; the very condition prophesied three years before by Commissioner Clements as the most extreme which could be suggested under the ruling he was then criticising, had now come to pass, yet no whisper of lack of jurisdiction is heard; the commission bravely attacked the problem presented and squarely decided it. And it may be noted that in Commissioner Harlan's concurring dissent, and in the dissent of Commissioner McChord, a readiness is expressed to grant rates brought before the commission in this wholesale manner. It does not seem probable that the question of jurisdiction will ever be raised again in the commission, and in view of the opinion in the Intermountain Rate Cases,22 it is thought that the objection would meet short shrift if carried to the Supreme Court of the United States.

### ESSENTIAL FACTORS

No attempt will be made to enumerate in detail the matters considered or mentioned by the commission in deciding these cases, but the factors which were deemed of great importance will be selected from the cases with the intention of showing how far they agree, what factors have uniform consideration, what the chief railroad contentions are, how far they influence the commission, and finally, to determine whether the view of the commission has been an enlarging one. Keep in mind that the system of accounting by railroads, under the supervision and orders of the commission, was constantly growing more complete, harmonious and truthful about financial operations, and therefore railroad information bearing on rate questions became increasingly available. Likewise, the interaction and interrelation of groups of statistics are more clearly discerned and become capable of more varied expression and significance. These are gratifying matters apparent on the face of the reports.

Attention may here be directed to the changes in 1910 in the Act to Regulate Commerce which authorized the commission to suspend proposed rate schedules during investigation, and laid the burden of proof regarding these schedules on the carriers; but it is not seen that the factors considered by the commission, or the weight attached

²¹ (June 27, 1917) 45 I. C. C. 303.

^{22 (1914) 234} U. S. 476.

to them, are altered in any manner by these statutory changes. All the cases to be considered now came on after the enactment of 1910 and were alike subject to its provisions; therefore, it is not a peculiar element needing specific attention, and we dismiss it with this statement.

In the Eastern Rate Advance Case²³ many carriers in official classification territory made a general advance on all class rates and about half of the commodity rates, and contended in support of this action that on account of wage increases their net operating income was insufficient, and they therefore needed additional revenue. In determining whether to grant this alleged need, the commission considered only typical lines in this territory and staked the fortunes of the remainder upon the outcome of an inquiry into the Baltimore & Ohio, the Pennsylvania, and the New York Central systems over the period from 1901 to 1910, comparing the figures for the earlier year with those for the latter.

Taking the Baltimore & Ohio first:

- a. The single-track and the all-track mileage show increases respectively of 36 per cent and 50 per cent, indicating a great improvement by the addition of main-line tracks and switch tracks.
- b. The cost of construction (which must be taken from the books of the company, although it is open to much question) had increased about 50 per cent for the system; for single-track mileage the increase in book cost was about 23 per cent and in all-track mileage about 15 per cent.
- c. Total capitalization had grown about 85 per cent, which, applied to the mileage, would be an increase as to single-track mileage of about 37 per cent, and as to all-track mileage of about 23 per cent.

The funded debt included here had increased about 75 per cent, while the stock capital had more than doubled; but in 1901 the funded debt was about 67 per cent of the total, and in 1910 was about 63 per cent.

- d. Total operating revenues had almost doubled for the period, and per mile all-track mileage had grown by 20 per cent.
- e. Operating income went up 60 per cent or, in all-track mileage, about 5 per cent per mile, and the total operating expenses had more than doubled.
- f. Corporate income more than doubled, although its percentage of the outstanding capital stock had advanced only from 7.48 to 7.66.
- g. Preferred stock dividend of 4 per cent had been regularly paid, and the stock had averaged about \$90 per share.
- h. Common stock had varied in market value from about \$85 to \$114 per share and was then selling at \$107.

^{* (1911) 20} I. C. C. 243.

- i. Net earnings: Out of these the interest on the funded debt and the preferred stock dividend had been paid; the dividends paid on common stock had gone from 2 per cent in 1901 to 6 per cent in 1907 and the year following, and \$34,000,000 had been put into property improvements.
- j. To maintain the *credit* of the company the commission thought it should have earnings sufficient to devote from 7 per cent to 8 per cent to dividends on the common stock and to surplus. On this basis for the fiscal year ending June 30, 1910, assuming the wage increase to have been then effective, a dividend of 5 per cent on the common stock could have been declared and a surplus of over 4 millions of dollars would have remained.
- k. The cost of maintenance of equipment and of way and structures was shown to be greater for the last year than for the average year—and, indeed, for almost any single year,—so an increase therein in the near future was not deemed probable.
- 1. Ratio of operating expenses to operating revenues had steadily increased since 1901, but no reason appeared for further increase in the immediate future over 1910 except wage increases, since the ratio for the 10-year period was 66.84, for the first five years 64.54, for the last five years 68.56, and for 1910 was 70.09.

One other matter was urged, namely, that notes recently issued would add a large item to the interest charge; it was answered that the improvements in the property thus made should lead to greater business and greater economies, and what cannot thus be made out of the business for a few years may be very properly carried out of the large surplus accumulated during the period; and anyway, if the new interest had been borne by the net revenues in the last year, and the wage increase had also been paid therefrom there would still have been 5 per cent for the common stock and a surplus of  $2\frac{1}{2}$  millions which was regarded as ample.

This analysis, in view of the principles generally applicable to rate making as discussed and illustrated over the preceding thirty pages of the report of this case, did not show a condition of affairs which would justify an increase in rates over the Baltimore & Ohio system. Practically all of these elements are employed in the analysis of the other systems mentioned with more or less detail, since naturally the facts are variable; the conclusion is that in the case of the Baltimore & Ohio and the Pennsylvania systems no increase is justifiable, and therefore none can be permitted on the New York Central system,—although analysis does not show it so prosperous,—since the rates on these three systems must be the same.

Parenthetically, let it be stated that the commission found about 57 millions of stock of the New York Central for which nothing had ever been paid, and about 120 millions of dividends paid thereon which if otherwise used would have produced a startling difference in its financial condition, and the commission "can not entirely close our eyes to bits of history" of that sort! Attention was also given to the huge expense being incurred in the building of the Grand Central passenger station in New York City.

Although individual roads in this territory might show a condition of need, yet the carriers as a group were before the commission and the decision was a group decision based especially upon the statistics relating to the three great systems operating in the territory.

In the Western Rate Advance Case,²⁴ more than 200 carriers operating in Wisconsin and the two tiers of states between the Mississippi River and the Rockies proposed increases in the rates on some 300 commodities. The commission selected for investigation six systems, viz., the Chicago, Burlington & Quincy, the Atchison, Topeka, & Santa Fe, the Chicago & North Western, the Chicago, Milwaukee & St. Paul, the Chicago, Rock Island & Pacific, and the Chicago & Alton, covering the years 1901-1910.

The chief contentions of the carriers were the same as in the Eastern Case, and in addition to many general considerations applicable to rate regulation, Commissioner Lane, announcing the opinion of the commission, submits these six carriers to the test of the application of the factors set forth in the Eastern Case, and the additional factor of unit cost of operation, approximate figures on which were available for several roads.

A somewhat greater variety of presentation is given to these factors, but the course of the argument, allowing for these necessary individual variations of fact relating to the carriers, is quite the same.

To individualize this case the factors as set forth in a tabular fashion are here enumerated, namely:

- a. For the six systems. Total capital, funded debt, common stock, preferred stock (also calculated per mile of single-track mileage), rate of interest on funded debt, dividends on preferred stock, and ratio of balance of corporate income (after deducting dividends on preferred stock) to common stock.
- b. For the individual systems. Average mileage operated, gross operating earnings, operating expenses, operating ratio, net earnings, miscellaneous income, net income, taxes, fixed charges, and net profits. This list on the whole will be recognized, mutatis mutandis, as the list in the Eastern Case (supra) decided the same day.

The Five Per Cent Case²⁵ again involved the carriers in official classification territory, which was involved in the case of Proposed

^{24 (1911) 20} I. C. C. 307.

^{* (1914) 31} I. C. C. 351.

Advances in Freight Rates²⁶ and the Western Case.²⁷ The questions considered were:²⁸

"I. Do the present rates of transportation yield to common carriers by railroads operating in official classification territory adequate revenues?

"2. If not, what general course may carriers pursue to meet the situation?"

Here the question of an increase for greater revenues is not only raised, but the increase is to be applied horizontally. To make their case the carriers contended:29

"(a) That the rate of return in net operating income upon the

property investment is declining.

"(b) That the principal cause of this decline is a steady and constant increase in operating expenses, due to matters of a continuing character, such as wage increases, legislative requirements, and the necessity of maintaining a higher standard of track, equipment, and facilities generally.

"(c) That the return upon money invested in railway facilities since 1903 has been utterly inadequate, and that no return at all has been

received upon the money so invested since 1910.

"(d) That the effect of these things is so to impair the credit of the railway companies as seriously to check the normal construction and development of railway facilities which are required to meet the public demands."

In 1903 and 1911 the commission had used the three leading systems in this territory—the New York Central, the Pennsylvania, and the Baltimore & Ohio systems—as the standards for the territory, but in this proceeding the thirty-five systems involved are treated as a single group for most purposes, although for certain purposes the interested carriers are arranged in four groups.

Net corporate income is regarded an untrustworthy factor, and net operating income is held before the mind as the crucial factor in such inquiry.

The investigation in the Five Per Cent Case is extended over the period 1900-1913, and utilizes not only the usual tabular analysis of the carriers' activities, but introduces a chart in graphic form to illuminate these same activities. The factors considered, with some variation of expression and tabulation, are essentially those enumerated in the Western Case, 30 but a more intimate study is made of the causes of increased operating expenses, in an analysis of expenditures for,

^{* (1903) 9} I. C. C. 382.

²⁷ (1911) 20 I. C. C. 307.

^{**31} I. C. C. 355.

**³¹** I. C. C. 360.

^{**} Supra (1911) 20 I. C. C. 307.

and ratios to revenues of, (a) maintenance of way and structures and (b) of equipment; (c) transportation and traffic; (d) general and outside operations (conducted by carriers, e. g., boat and ferry lines, sleeping, dining-car and special-car services, stockyards) and depreciation and renewal charges; the subject of taxes is also given detailed attention, taxes having greatly increased.

The commission considered the business of the last fiscal year, compared it with the preceding year, and found a falling off in operating revenues, an increase of expenses, and a heavy decrease in net revenue; but the greater reliance for conclusions is placed on the tendency of the showing for the period of fourteen years.

The commission considers these roads in three divisions, central traffic association territory, grand trunk line territory and the New England roads,³¹ and concludes that the tendency toward a diminishing net operating income in the whole territory is more marked in central freight association territory, which is singled out for relief.

The Five Per Cent Case came to a supplemental hearing³² two months later, on a showing concerning (a) completed returns for the fiscal year ending June 30, 1914, and returns for the July, August and September following; (b) war in Europe; (c) results of original order; and the commission says:³³ "Collectively they present a new situation."

The figures presented for July, August and September showed a continuation of the unprosperous conditions, but the commission seems to have drawn its conclusions from the last fiscal year, with all of which—except the last month—it was familiar on the early hearing, and had expressly declined to be persuaded thereby to change its conclusions based on the period 1901-1913, in which it found relief due to only one section of the country.

To base a finding for relief on the history of one month or two months, or to give any particular weight thereto, would be such a radical departure from the long-established and conservative modus operandi of the commission as to lead to the belief that it did not in fact accord relief for that reason. There was really nothing in the records of the operations of the carriers which the commission had not estimated and valued on the original hearing.⁸⁴

Further, there were no perceptible results of the order of July 29 in the matter of economies or improved regulations and practices, so such results admittedly could not have aided in presenting the "new situation."

The European war is the remaining factor, and logically the only factor, which changed the old situation; it is entirely improbable that

²¹ This is a departure from the method pursued in 1903 and in 1911.

^{** (}Dec. 16, 1914) 32 I. C. C. 325.

^{* 32} I. C. C. 327.

⁴ See 31 I. C. C. 423.

there would have been a supplemental hearing before the carriers had acted on some of the constructive suggestions of the original opinion if the war in Europe had not broken out. The commission emphasizes³⁵ the provocative influence of the war and recites a sufficient reason for the aid now extended to the carriers. If the commission had based its finding therein solely on the war, in view of matters carefully considered by it and its general conclusion at the original hearing, its opinion would have rested upon reasons which, to say the least, could be more readily comprehended.

But to Commissioner Harlan, fresh from the composition of the very noteworthy opinion in the original hearing, neither the recent reports of the carriers nor the war furnished a legal or economic reason for the horizontal relief now extended to trunk line carriers, while to Commissioner Clements the action in this case seemed³⁶

"out of harmony with the spirit and purpose of the law, and as taking a step that leads away from the sound principles necessary to conserve the ends of justice."

Hence, it seems fair to say that a horizontal advance in rates is here permitted really on the conclusions based on the factors considered in the original case, plus the determining factor—the war in Europe.

In the 1915 Western Rate Advance Case, 37 the carriers in western trunk line and southwestern tariff committee territory asked for an increase in the rates on a few commodities totaling an increase in revenues of almost 8 millions, and placed the increase on the ground of inadequate revenues. The increase is not horizontal, but laid on particular commodities, and is an ideal case for the determination of the question involved in all these cases. The important factors discussed in the earlier cases are here, in varied form of arrangement, again presented and considered; the data used by the railroad witness Powell, the protestants' witness Wetling, and the data abstracted from the commission records and tabulated by the commission, are comparatively studied and the tendencies shown in each are noted. The data are also applied to the roads concerned by groups, the graphic charts are also introduced, and generally the analysis follows the versatile and most thorough plan and manipulation of data characterizing the original Five Per Cent Case.38

Extensive data to show whether the carriers' credit has been impaired are considered, and at the end of the general consideration of all these factors the commission says:39

^{25 32} I. C. C. 330, "While we differ," et seq.

^{* 32} I. C. C. 336.

⁸⁷ 35 I. C. C. 497.

[&]quot; (1914) 31 I. C. C. 351.

³⁵ I. C. C. 565. The italics are those of the present writer.

"Up to this point we have discussed evidence of a general character, chiefly financial. As the views of individual Commissioners might vary with respect to particular features and different degrees of importance to be attached to the same fact, our comments have been primarily narrative; they have been interpretative only incidentally and within the range of financial facts of record. No attempt has been made on the record nor in our discussion of it to review the entire financial history of these carriers, nor to bring into relief other facts which have an important bearing upon their present financial condition. In other words, this preliminary discussion leaves uninterpreted many consequential facts. However, in our view a wider examination in this respect is not necessary for a proper disposition of the issues involved regarding proposed increased rates. We proceed to the consideration of the particular tariff schedules in which it is proposed to increase the rates."

The whole case is decided upon the conclusions as to the individual commodity later proposed; and in finding that a certain rate should or should not be increased, the decision is based on the "whole record," although the exact pertinency of the preceding portion is not stated, and apparently sufficient reasoning is developed in connection with the consideration of each commodity to indicate and support the finding thereon. In the first 66 pages of the opinion, the discussion is almost an ideal one on the question whether revenues are inadequate, or in the language of the opinion:

"As the carriers first presented testimony relating to the inadequacy of their present revenues, that question may properly be considered prior to any consideration of the reasonableness of the proposed rates."

To the student of these questions and to the lawyer the failure to find any holding thereon is disconcerting; while it may be admitted that its decision is not necessary to the determination of the individual rate problems, still these problems are solved on the "whole record"; it may also be admitted that a tribunal may use its own discretion as to the compass and language of its opinions, but nevertheless the question why upon so elaborate a discussion no holding is predicated will not retire.

What are the "other facts" above alluded to? There may be a multitude in any of the cases of this kind, yet in the preceding cases enough were drawn into the record to support findings on this general question, and they were of the nature of those adduced here. It would be surmised, if Commissioner Daniels had not mentioned it in his dissent, that recent cases of railroad maladministration were in the commission's mind, such as the Alton, the Rock Island, the 'Frisco, and from earlier cases it may be inferred that these and possibly other wrongdoers were to be permitted to suffer the effects of their own

^{4 35} I. C. C. 502.

willful and self-inflicted troubles. This feeling is mentioned in both the Eastern and the Western Rate Advance Cases,⁴¹ and is gently hinted in the original Five Per Cent Case.⁴²

It is to be noted that in both the Five Per Cent Case and the supplemental hearing of the same case⁴⁸ the commission was badly divided and a state of entirely unusual disagreement is shown by the vigorous dissents in both cases, and those in the instant case. Apparently, the commission was irrevocably divided upon the questions of the legality and the propriety of the general relief sought; also, the members of the commission were finding themselves consistently unable to agree on the conclusions which their statistical analyses would require. Possibly all these elements contribute to the failure to pass on the large question here.

#### THE FIFTEEN PER CENT CASE

We come now to the last of these cases, the Fifteen Per Cent Case, in which practically all the carriers and all the rates in the United States are involved. The carriers are asking for a horizontal increase, and present the very situation which Commissioner Clements visualized as the worst possible under the ruling made in the supplemental hearing of the Five Per Cent Case. Clearly, the general proposition we set out to investigate is here presented in its most comprehensive setting, and the factors considered should be attentively regarded.

The commission says:46

"The consideration of a general increased rate case is necessarily a study of tendencies. The trend of the curves shown in the different diagrams for the respective periods of time is unmistakably in a certain direction. It will be observed that there have been numerous ups and downs, but the general tendency has been favorable, including, for the country as a whole, the first four months of 1917. These figures and diagrams do not suggest a country-wide emergency. Emergencies of greater or less intensity may have existed with respect to individual carriers during various limited periods, but the direction of the curves shows recovery in each instance before the lapse of extended periods of time. The general trend has been distinctly favorable."

### And further:47

"From the proceedings of 1910 and 1911 to the present time all such cases have involved the consideration and weighing one against the other of certain fundamental factors. The essential character of

a (1911) 20 I. C. C. 243, and 20 I. C. C. 307.

^{4 (1914) 31} I. C. C. 351.

^{4 (1914) 32} I. C. C. 325.

[&]quot; (June 27, 1917) 45 I. C. C. 303.

^{4 (1914) 32} I. C. C. 325.

⁴⁵ I. C. C. 314.

⁴⁵ I. C. C. 317.

these primary factors was the same in all the cases, but the attendant circumstances, the relation of the factors to one another, and certain significant secondary factors were not the same in all. This lack of identity in the relationship and surroundings of the individual factors accounts for the different conclusions arrived at in different proceedings.

"In this connection we refer especially to Tables 13 to 21 in the appendix, which reflect operating results through the entire period embracing all the important increased rate proceedings. They are the tables used in our reports of July and December, 1914, [Five Per Cent

Case and supplemental hearing | brought down to date.

These tables include and show the effect of the following factors in graphic form:

Ratio of operating expenses to operating revenues.

- Comparison of increase in property investment and traffic.
- Ratio of net operating income to property investment. Ratio of total operating revenue to property investment.
- Ratio of certain groups of operating expenses to operating revenues.
  - a. Maintenance of way and structures.
  - b. Maintenance of equipment. c. Transportation and traffic.
  - d. General and miscellaneous operations.
  - Passenger traffic and revenue per unit.
  - Ratio of taxes to operating revenues.
  - Ratio of taxes to property investment.

All these charts cover the period 1900 to 1917.

Certain other tabular views considered show over a varying number of years, month by month (and especially the first four months of each year) the factors: (a) Average operating revenues per mile; (b) Average operating income per mile, both for the whole United States, and separately for the three districts here involved, namely, eastern, western, southern, working out also (c) Average investment per mile of road, and (d) Ratio of operating income to average investment.

Finally, the commission considers, per mile of road operated for the whole United States and the three districts separately, these factors, for each month from July to December, 1916, and from January to April, 1917, namely: (a) Railway operating revenues; (b) Railway operating expenses; (c) Net revenue from railway operations; and (d) Railway operating income, and from the consideration of all the foregoing well-known factors, the commission reaches its conclusions.

Some relief was granted, but note that it was not granted horizontally; it is said48 that on the hearing it was generally admitted that a percentage increase would destroy existing rate relations, which are of dominant importance; and it is concluded49 that percentage

⁴⁴⁵ I. C. C. 316.

⁴⁵ I. C. C. 324-325.

increases are very undesirable because of the serious effects on commercial conditions and established relationships.

The record of dissents is further enlarged in this case; although Commissioner Harlan voted with the majority to secure some affirmative action, yet his views as to why he concurs have all the essentials of a dissenting opinion. He really favored granting the relief requested throughout the country instead of confining it to the eastern district, whereas Commissioners Meyer and McChord viewed the record as not showing a case for any relief. Verily, the inherent difficulty of the problem is emphasized when these three able commissioners are found disagreeing among themselves and from the remainder of the commission. It should also be noted that the statistical analysis indulged in led two commissioners to the view that financial conditions were satisfactory and needed no aid in any parts of the United States; led one of the commissioners to the conclusion that they were unsatisfactory and needed aid in every part of the United States; and led three of the commissioners to the conclusion that they were unsatisfactory and needed aid on the merits in only one of the three districts of the United States!

To summarize and leave something concrete on this subject of factors, it is probable that, on the whole, the selection, arrangement, and manipulation of them, as well as the treatment given to them, in the original *Five Per Cent Case*, 50 make that case typical. The general discussion there was centered about the tendencies—all over a period of time named—manifested by:

(a) Property investment. (b) Total operating revenue. (c) Ratio a to b. (d) Total operating expenses. (e) Ratio d to b. (f) Net operating revenue. (g) Taxes. (h) Hire of equipment, joint facilities, etc. (net). (i) Net operating income. (j) Ratio i to a. (By the year and the average.) (k) Comparison of property investment with traffic units and operating revenue. (l) Details showing operating expenses grouped. (m) Depreciation and renewal charges. (n) Tax ratios to operating revenue and property investment. (o) Analysis comparatively of property investment and operation and capitalization.

In a given case, incidental factors are likely to appear, and more or less manipulation of the steady factors may be desirable to develop a variety of phases; and so we have found it.

### RAILWAY CREDIT

In the hearings since 1910 the railway representatives have introduced evidence and arguments to show that railway credit is rapidly ebbing, and this is reflected in the rapid decline annually in new mileage. Railway expansion reached its zenith about 1910, and since

^{50 31} I. C. C. 351.

that time the capital needed to make extensions, enlargements, and developments to care of the traffic has not been available. The stock market reflects this situation because dividends are small, as a rule; hence, issuing stock can no longer be resorted to as formerly to raise money. Further, bonds and short-time notes come more and more into use, so that the funded debt is growing in much larger volume than the capital stock, and mortgages the property to an extent that renders new money from that source a fading possibility; the railroad security must compete with others of a more attractive sort, and it is failing in the race because the railway under state and federal regulation can control neither its income nor its expenditures; the day of railway speculation and stock bonuses is gone, and the railway must now appeal for new money to the conservative investor. The railway representatives admit the cases of the Erie, the New York Central, the Rock Island, the Alton, the New Haven, the 'Frisco, the Cincinnati, Hamilton & Dayton, the Pere Marquette, and other instances of flagrant railway manipulation resulting in a depressing effect upon stocks; but they say further that these are exceptional cases, they do not characterize the railway management of the country and are now so recognized; that all such methods of financing are obsolete. Accordingly, they ask a constructive policy, and to that end lay before the commission a program of development based on increased rates to produce a greater and an adequate revenue. They have also argued that large improvements could be made from such net revenue, and further development on a large and necessary scale could be made with new capital attracted by the liberal rates; and that it is possible that the proposed new policy would enable the payment of such dividends as to make new stock issues readily marketable.

Not only have the railroads in a constructive way repeatedly made this argument to the commission, but they have made it over and over to congressional committees as a reason for new legislation of a constructive kind; until to-day this course of reasoning is fundamental in the railroads' statement of their conditions and needs. An accompanying reason has always been that the costs of everything a railroad uses are rapidly rising, and that the interest rate also advances.

How has the commission in the cases before us received these arguments?

In the 1911 Eastern Case⁵¹ the commission viewed these arguments with sympathetic interest, recognizing that rates should be sufficient to enable railroads to maintain a high state of efficiency, and the treatment of the railroads by the public should be such as to inspire confidence in the investing public and make the long-time railroad bond a favorite investment. But on the evidence the commission found

^{11 20} I. C. C. 243.

the railway bond to be more stable over the last ten-year period than the municipal bond, and, comparatively, had gained favor, although the low-rate bond did not sell for as much as it did in 1900. The evident course pointed out is to pay more interest. The commission charged the railway interests with having subsidized the press to proclaim threatened disaster because of government regulation,52 and places the blame for much of the foreign suspicion of American railway securities upon the practices of the railways before governmental supervision was extended. Some concern is expressed for holders of railway securities, and a public duty is declared to exist to make good, so far as possible, the legitimate expectations of investors, inasmuch as the government, by failing to establish rates and by inviting railway construction by private capital, has in a way opened the gate for such stock and bond transactions as have occurred. The whole question, therefore, is whether higher rates are now needed to yield to this railroad capital as large a return as it could have obtained from "other investment of the same grade." Then the commission paints an alluring picture of the railroad security as an investment, directly contrary to the complaints of the railway operators!

In the 1911 Western Case⁵⁸ Commissioner Lane, on the commission's conception of the facts, produces arguments that sweep away all foundation for the railroads' claims on the proposition of decadent credit, although earnestly recognizing the public duty toward railroads and expressing the heartiest interest in railroad prosperity and the intention of the commission at all times to foster it.

He charges the railroads with insincerity in their instant complaints and representations⁵⁴ and quotes the brief of the Atchison, Topeka & Sante Fe Railway Co. to the effect that rates have always been inadequate, and therefore development has halted and can now go forward only on higher rates which will produce the needed cash and credit; he then observes:

"We must not regard too seriously, however, the effort of railroad counsel to establish this Commission in loco parentis toward the railroads. We must be conscious in our consideration of these rate questions of their effect upon the policy of the railroads and, ultimately, upon the welfare of the state. This country can not afford to have poor railroads, insufficiently equipped, unsubstantially built, carelessly operated. We need the best of service. Our railroad management should be the most progressive. It should have wide latitude for experiment. It should have such encouragement as would attract the imagination of both the engineer and the investor. Nevertheless, it is likewise to be remembered that the government has not

²⁵ The Mann-Elkins Act was passed in 1910 after a tremendous legislative conflict with the railway interests.

²⁰ I. C. C. 307.

⁴²⁰ I. C. C. 316, 317.

undertaken to become the directing mind in railroad management. We are not the managers of the railroads. And no matter what the revenue they may receive there can be no control placed by us upon its expenditure, no improvements directed, no economies enforced."

He thinks the unfavorable public attitude toward railway securities is the result of financial manipulations, not regulation. He finds that from 1899 to 1909 the railroads of the United States floated bonds to the amount of more than 4½ billions of dollars; the mortgage indebtedness was thus increased 77 per cent while the mileage increased 36 per cent, and the rate of interest paid was actually less in 1909. He proceeds to show that there is no evidence to support a fear that new capital may not be had, and shows also that the bond holder is not aided by increased rates, his rate of income is fixed, and he merely desires stability in the security. As to stocks, he finds in some cases an utter recklessness in their issue which affects their value and also the inclination of the public to invest in them or others; clearly, increased rates will not revive confidence in stocks already issued! He then inquires,

What is the connection between rates and capitalization? In the railroad rate maker's mind, nothing! In the instant case President Ripley of the Sante Fe stated his view to be that the making of freight rates has no relation to the capitalization of the railroads; and in testifying before the Joint Congressional Committee on Interstate Commerce in March, 1917, Judge Lovett, Chairman of the Executive Board of the Union Pacific, stated⁵⁵ that he had never heard of a case where a traffic manager or rate-making authority of a railroad company paid any attention to the amount of securities in making rates, and he appeared, of course, as a railroad witness, and one of the foremost authorities on railroad matters! So the railroad point of view has not changed since 1910.

In the original Five Per Cent Case⁵⁶ net corporate income is considered as a factor in indicating railroad prosperity, and it is found that some systems with large property investment have comparatively small capital stock, and vice versa, and the relatively inefficient Erie Railroad is seen to have capital obligations about 57 per cent greater per mile than the average for the three great systems in official classification territory, that is, the New York Central, the Pennsylvania, and the Baltimore & Ohio. Further, net corporate income of the Central of New Jersey for the preceding year was almost 25 per cent, while this account for the Cincinnati, Hamilton & Dayton showed a deficit of almost 14 per cent; this great difference can be accounted for largely by difference in management of the property

⁵⁵ Testimony, 751.

^{54 (1914) 31} I. C. C. 351.

as an earning concern, and also as a basis for stock speculation (and worse); at the same time, the average in this territory was over 8 per cent.

But net corporate income is a factor which includes within its scope a multitude of corrupt transactions as well as the bona fide transactions in many properties managed in a fine public-spirited manner, and it is therefore not regarded in that case as a reliable measure of the adequacy of rates.

As stated in the 1911 Eastern and Western Cases, 57 the great increase in capitalization over the ten-year period since 1900 showed that stocks and bonds had found, comparatively, a ready market, while in the instant case the data for the period 1900-1913 show a +45 per cent increase in capital stock and a +80 per cent increase in the funded debt, and a +64 per cent increase in the total; also, it appeared that the ratio of stock to funded debt had decreased from +45 per cent to +40 per cent, which indicated again that stock was less attractive to railway investors than bonds and notes which were based on the property as security and carried their rate of income on their face, and, further, did not involve the holder in any of the duties and tribulations of an owner of stock. The interest rate was also seen to be close to 4 per cent over a period of six years. But when the thirty-five systems of carriers were distributed into groups and the analysis applied, a somewhat less favorable result appeared. A group of ten (almost all in trunk line territory) showed, for the year 1913, fine results in an average of 8.55 per cent net operating income on a total capital obligation of over 811 millions, and 16.92 per cent net corporate income on the capital stock; the three great systems showed less favorably with 5.16 per cent net operating income on total capital obligations of over 3 billions and a net corporate income of 9.05 per cent on capital stock; at the same time, the five New England lines with a total capital of over 654 millions showed a net operating income of 5.56 per cent and a net corporate income of 3.98 on capital stock; and the remaining seventeen systems scattered through trunk line and central freight association territory, with over 1807 millions total capital, showed 2.15 per cent for net operating income and 12 per cent net corporate income on capital stock, with eight of them showing an actual deficit in this item. Although since the opening of the calendar year 1914 it was shown that over 500 millions of bonds and notes had been marketed and 35 million of Baltimore & Ohio notes went quickly at par, yet in view of the above analytical review, the decreasing net corporate income, and the recent upward swing in the interest rate, these carriers were, generally speaking, found to be in need of more money. Some other facts coupled with the analysis tended to show a declining credit. These

^{57 20} I. C. C. 243 and 307.

facts are: great competition for money with government, public service and industrial securities which generally were proferred at the same interest rate; flagrant railroad mismanagement in some instances had shocked the public; decline in securities on the market; railroad receiverships; intimate relationship between badly-managed railroads and banking institutions of great reputations for conservativeness; interlocking relations and directorates among strong and weak (or mismanaged) lines, e. g., Baltimore & Ohio and Cincinnati, Hamilton & Dayton; unwise extensions of the lines of large systems; acquiring property not forming a part of the system or being non-railroad property; and lastly in this indictment, the great campaign of publicity carried on by the railroads during the pendency of this case to induce the commission to grant the requests of the railroads.⁵⁸ The commission thereupon expresses the view that a restoration of credit will soon follow a conservation of revenues.

This subject is merely mentioned in the supplemental hearing⁵⁰ of the *Five Per Cent Case*, to indicate that the fears of the carriers in the 1911 cases have fortunately not been realized; that they have borrowed vast sums of money in the intervening time; but that the great war undoubtedly will render acute the financial needs of the carriers; the increasing interest rate is an important factor in the situation.

In the 1915 Western Rate Advance Case the credit of railroads as measured by the rate of interest was compared exhaustively with the credit of municipalities, manufacturing and industrial enterprises, and public utilities, in all of which a gradually rising interest rate is found running over the preceding 14-year period, while railroad credit had not been depressed relatively. After a careful study of the financial experiences of these western roads, the commission concludes that they have not suffered as a whole any impairment of credit not common to comparable industrial enterprises; that such relatively equal depression of credit is not evidence either of the adequacy or inadequacy of rates; that investors are showing a decided preference for bonds and notes over stock; that, as the underlying mortgage security is progressively covered by these loans, the prospect narrows for new capital from the same sources; and further, that these roads are not relatively so prosperous as they were in 1901. All of these conclusions seem to point to higher rates as the most reasonable source

The extent and insidious character of this campaign are clearly shown in the letters, articles, editorials and telegrams published at the request of Senator La Follette, in the Congressional Record for May 12, 1914, covering 360 pages. Commissioner Harlan devotes three pages of the opinion to a deprecatory notice of this campaign.

³⁸ (1914) 32 I. C. C. 325.

^{** 35} I. C. C. 492.

of additional money. Thereupon, on a consideration of the commodities individually, certain increases were awarded.

Coming to the Fifteen Per Cent Case, 61 the matter of railway credit is not introduced into the opinion of the commission, but it receives the attention of the witnesses for the carriers. President Rea of the Pennsylvania Lines says that railroads are suffering from increased costs and taxes, and an inadequate property investment; hence, the facilities are inadequate and the credit is insufficient. President Smith of the New York Central says, with more detail, that stock is not now an inviting investment, for the dividend rate is not high enough, and the conditions do not provide sufficient assurance of the railroad situation; earnings must be at a level which will attract investors in securities—that is, they must show a proper surplus above charges to create credit. President Elliott of the New Haven spoke in detail of the needs of his system, and of the necessity for income sufficient to assure dividends in order to bolster the credit of the system. But on account of revelations of New Haven practices in recent years under the Mellen régime, anything tending to show a bad credit condition there would be explained by local conditions and could shed no light on railroad needs in general. President Harrison of the Southern Railway referred to the need of increased credit. Mr. Kruttschnitt, chairman of the executive board of the Southern Pacific, detailed the low status of railroad credit as shown partially by the virtual impossibility for some years past of getting new capital by stock issues, by the great increase in the bonded indebtedness, and by increased rates of interest. He quotes Commissioner Daniels in the Five Per Cent Case on "rising prices" and their influence in railroad matters. Other witnesses also refer to this subject of diminishing railroad credit, and all incline to harmony in the opinion that an increase in the rates is the only solution.

In this matter of credit, therefore, the findings of the commission running back to 1910 have quite uniformly been that the railroads are not suffering from diminishing credit, except possibly in some instances where their own conduct is responsible for an unfavorable public opinion; at the same time, the railroad evidence for the same period is insistent that credit is at an ebb and increased rates are needed to revive it, and the railroads have also insisted that the many honestly managed systems should not be forced to suffer for the misdeeds of a relatively small number. They also urge that they may be permitted to have such revenues as will enable them to project improvements of such magnitude and character as to accommodate for the near future a transportation business which has grown out of all proportion to railroad facilities. And the best railroad operators in the country have been in entire agreement in advocating this program

^{41 (1917) 45} I. C. C. 303.

before the commission; they have deprecated the necessity for reappearing before the commission at short intervals, and although they agree that regulation is one of the best things that ever befell the American railroads, yet, since the effects of the close regulation under the amendments of 1906 and 1910 have more and more become evident, the railroads of one or more sections of the country have now been before the commission for the sixth time in seven years—each time with practically the same arguments and representations as to conditions! Usually, when relief has been accorded, it has been because of an emergency of very recent origin. The commission has been conservative, and has acted as the law requires it, namely, it has required the railroad to assume the burden, and has in no case found that the railroads have entirely supported that burden. Generally, the commission has been guided by the statistics and has uniformly acted on what it has deduced as the "tendencies" shown thereby; the carriers have never been satisfied with these deductions and have uniformly proposed a constructive program which necessarily has a future aspect which they base on experience.

Commissioner Meyer adheres to the statistical formulae entirely and finds in the Fifteen Per Cent Case that the carriers, on that basis, have failed to show a case for relief; Commissioner McChord agrees, but expresses a willingness, if the conditions become more acute, to sanction a large horizontal increase universally; Commissioner Harlan in the Five Per Cent Case⁶² shows signs of leaning toward the carriers' views, but disagrees with them as to the means of securing increased revenues, and proposes a program of reform which the commission thought the carriers ought to try. In the Fifteen Per Cent Case he is very close to the carriers' point of view when he says:⁶⁵

"This month-to-month and purely statistical view of the matter seems to me to be wholly inadequate. Nor do I regard that course as altogether safe. We are facing a much larger problem, and it must be approached in a much broader way if we are to reach a sound solution."

Railroad evidence has growingly made reference to the public side of the transportation question and has come more into accord with the necessary view of the commission, and Commissioner Harlan says further:⁵⁴

"The record in my judgment demonstrates a proposition that has long been clear to me, namely, that a rate is a public question and that the existing rates, aside from any interest that the owners of our

ez (1914) 31 I. C. C. 351.

⁴⁵ I. C. C. 327.

[&]quot;45 I. C. C. 329.

railroads may have in the matter, could well be advanced in the public interest, in order that assurance may thus be given for the early

enlargement of our transportation facilities.

"I express the thought in that way because it is clear that so long as we look to private interests to furnish a transportation service for the country we must see to it that the rewards are sufficient to attract capital for its further development. Under present conditions this appears not to be the case. Executives of great insurance companies and of great saving institutions testified during the hearings that the volume of their holdings in railroad securities has been steadily diminishing and that they and other large investors are looking with decreasing favor on railroad securities. . . . We must not overlook the fact that at this time, and apparently for the next few years, new capital must be sought by the carriers in competition with the demands of many governments for war loans and in competition with the very large returns of industrial companies."

This doctrine is not new, but it has seldom been advocated by a commissioner with such clearness and directness; a like note is clearly struck by Commissioner Daniels in his dissent in the Five Per Cent Case⁶⁵ although he does not there express his individual views. But no majority opinion yet indicates that the commission has acceded to this viewpoint.

## THE ATTITUDE OF THE COMMISSION

It is almost a superfluity to comment on this point, because the attitude has always been what would be expected of a responsible body entrusted with issues of such vast importance; but since the commission itself has in nearly all of these cases adverted to its attitude toward the problems involved and to the carriers, a brief statement is appropriate and reassuring. Freed from the formalities and technicalities marking the procedure of the common-law courts, it has always addressed itself in the simplest and most direct fashion to the crux of the situation; parties almost without end have appeared in these great rate advance cases, and multitudes of witnesses have testified on the manifold phases of the questions involved. The commission has not held aloof like an arbitrator or forum called upon to decide a dispute, but has been a patient and sympathetic body positively standing for the great mass of the public otherwise unrepresented which is uncomplaining, because the incidence of most rates in the item of increased costs has long since been shown to be practically negligible so far as a particular individual is concerned. Generally speaking, counsel for railways and protestants may be relied upon to develop the case, but the commission has usually supplemented such testimony by information elicited upon its own investigations, frequently conclusive in its nature. At the same time, the commission

^{4 31} I. C. C. 351, 434.

has been keenly impressed with the needs of railroads as well as their practices, and has had a uniformly broad outlook upon the railroad situation. Let the cases speak for themselves.

In the early case of Proposed Advances in Freight Rates it is said:65

"To the broader proposition, that railways should share in the general prosperity, we assent. Railway stocks and railway properties ought not to fluctuate in value like industrial stocks or industrial enterprises, and it is hardly probable that they will do so. The causes which have contributed to this in the past will not operate to the same extent in time to come. The great systems have taken permanent form. The tendency is to operate railways as business enterprises; not for the stock market. Consolidations in ownership, whatever their other effects, contribute to the maintenance of rates and will prevent in case of future dearth of traffic the suicidal competition which might otherwise be induced. Still, whatever may be true in the future, they have certainly suffered severely in the past and should be allowed to recuperate in this era of good times."

In the Eastern Rate Advance Case it is said:67

"Now, the ordinary considerations of justice require that the money so invested by invitation of the Government should be allowed a fair return. . . .

"Our railroads must be maintained in a state of high efficiency. This the public interest demands. Commerce and industry can not afford to wait on transportation facilities. Our rates should be such as to render possible a high class, not an extravagant, service.

"If, therefore, we are to rely in the future, as we have in the past, upon private enterprise and private capital for our railway transportation, the return must be such as will induce the investment. It is therefore not only a matter of justice, but in the truest public interest that an adequate return should be allowed upon railway capital."

In the Western Rate Advance Case the commission says:68

"The Constitution of the United States guarantees the carriers against the confiscation of their property or the taking of the same without due process of law. Without this constitutional guaranty, which is distinctively American—for here property rights are more sacredly safeguarded than in other lands of more mobile law—the railroads of our country are protected from injury of any lasting character by the popular consciousness that they are essential to the industrial life of the people. To harm these roads is to injure ourselves. Our laws do not seek to establish dominion over private capital for any other purpose than to make sure against injustice being done the public, and thereby make such capital itself more secure. We are dealing here with a difficult problem, involving mul-

^{• (1903) 9} I. C. C. 382, 406.

⁴⁷ (1911) 20 I. C. C. 243, 262-263.

^{* (1911) 20} I. C. C. 307, 378.

titudinous facts and an infinite variety of modifying conditions, which make the establishment of principles and the framing of policies a matter of slow evolution. Congress has laid down a few rules. These rules we are attempting to apply."

In the original hearing of the Five Per Cent Case, 69 the same sentiment is differently expressed, and it is further said: 70

"We may justly feel proud of the development of our transportation system. Despite occasional discreditable chapters the history of our railroads has been marked by great achievements. There is among the carriers a growing spirit of co-operation with the Commission in its efforts to enforce the law. With the application of correct and helpful accounting, the establishment of sound business methods, and a better understanding by both carriers and the public of their mutual obligations, to which we believe this investigation has contributed, the future is full of promise. We see no reason why our American railroads should not enjoy a large measure of prosperity consistently with just and reasonable rates."

Further to manifest the sympathetic spirit of helpfulness, the commission suggested to the carriers ten items relating to their practices and regulations adapted to improve the service and add to the revenues—a real constructive program in economies and practices based upon the results of an independent investigation prosecuted by the commission.

The outcome of the supplemental hearing⁷¹ of the Five Per Cent Case in itself expressed the helpful attitude of the commission.

In the 1915 Western Rate Advance Case¹² the same attitude is shown as in the preceding cases regarding a liberal policy towards the carriers.

In the Fifteen Per Cent Case⁷⁸ the expressions on this point are cordial; and inasmuch as the opinion is vastly shorter than in any of the other cases except the supplemental hearing of the Five Per Cent Case, and deals briefly with the large volume of evidence submitted, no excursion for this purpose should be expected, and certainly, in view of the oft-expressed attitude of the commission, none is needed.

### SUMMARY

The commission in the case of 1903 and the cases of 1910-1911 came to the unanimous agreement that it could lawfully consider the question of advancing rates to secure greater and adequate revenues; and, in a manner astonishing for its patience, thoroughness, and desire to work out the best interests of railroads and public alike,

^{∞ (1914) 31} I. C. C. 351, 359.

^{то} 31 І. С. С. 427.

⁷¹ (1914) 32 I. C. C. 325.

¹² 35 I. C. C. 497, 520.

[&]quot; (1917) 45 I. C. C. 303.

unanimously concluded (except as to some fragmentary details in one case) that the case made by the carriers was not convincing.

In the Five Per Cent Case⁷⁴ the matter of a horizontal increase in rates is first raised, and the relief accorded by the commission is in the main a horizontal one, yet it arouses no protest on that ground, and is approved as to class rates and certain commodities. But a most vigorous and well-reasoned dissent is voiced in this case, and the commission does not act unanimously in any of the subsequent cases. On the supplemental hearing,⁷⁵ under the stress of the cataclysmic struggle in Europe, the percentage increase, with exceptions, is extended to other territory, but again most vigorous dissent arises.

Commissioner Harlan deplores the percentage plan of increasing rates and thereby crystallizing in the law rate structures teeming with irregularities and discriminations, and he predicts disaster from the course there pursued; Commissioner Clements makes an argument against the whole ground of the opinion and the jurisdiction of the commission.

In the 1915 Western Case Commissioner Daniels again vigorously dissents and concludes:76

"In the matter of rate regulation and fixation we have reached a point where one of two courses ought deliberately to be chosen and clearly announced. If, despite increased costs not offset by increased revenue, increases in rates are to be denied, except where in individual instances gross injustice would be occasioned by their denial, the carriers ought to be apprised of this policy, so that they may set their house in order, if they can, against such a situation. If, on the other hand, we are to acknowledge in general, what we are perforce compelled to admit in detail, just and reasonable increased rates should be permitted not grudgingly but with such fair measure of allowance as will indicate that the transportation industry is entitled in the interest of the public to earnings sufficient to supply a service commensurate with public needs."

Commissioner Harlan also dissents, approving the manner in which the carriers have requested the increases and finding them justified substantially as made; he further suggests several items of a constructive nature.

Again in the Fifteen Per Cent Case⁷⁷ the dissents and explanations are vigorous. Commissioner Harlan expresses what is practically the view of the transportation question so laboriously and insistently presented by the railroad authorities in season and out of season for the last seven years. Commissioner Meyer occupies the antipodes, and insists that the well-known factors considered hitherto in such cases

[&]quot;31 I. C. C. 351.

^т 32 І. С. С. 325.

⁷⁴ 35 I. C. C. 497, 680.

^{17 45} I. C. C. 303.

are sufficient, and a proper construction and rating for them would lead to the conclusion that no increases should be allowed; he wants the evidence to show the "most conclusive proof" of the need for the advance. His view is that the application of reasoning and methods similar to those applied in the former cases would lead to the conclusion that no increases are proper.

Commissioner McChord agrees with Commissioner Meyer as to the weight of the well-known factors, but is willing, as a war measure, to raise all rates everywhere. He expresses the view that the questions involved are largely of governmental policy as to prices.

This review shows that the commission is now badly split on this question; to pursue the matter further or to predict future action would be useless. The commission is not tied to precedent like a court, but it clearly believes that action should be piecemeal and the results thereof observed and made the basis for future action; it is plainly unwilling to follow the program of the carriers, and it remains unconvinced of their failure of credit and their inability to effect further economies and reforms. The statute places the burden upon the carrier, and a "show me" frame of mind is legally justifiable; yet there is nothing in the statute which forbids the commission from being a helpful and constructive influence, or from taking a broad view of the problems and parties involved in these proceedings. The word "reasonable" applied to rates is capable of almost unlimited interpretation and application in view of the public interest involved, and there are potent signs that the commission is taking a somewhat larger view of the whole rate structure and the legitimate needs of the carriers, the vast majority of which are managed in good faith, and many, with rare ability.

But it would be a mistake to conclude that the commission has ever taken a "narrow" view of these great questions; it should be characterized as a "developing" view based on a most intensive and extensive study supplemented by the observations of many years; in fact, its course seems the only one logically possible; it has advanced as the great remedial enactments of 1906 and 1910 have been applied and have produced a progressively improving condition in the practices, accounting, and sense of responsibility of the carriers. It must not be forgotten that only recently has valuation of the carriers' property by the commission been provided for; authentic information as to one of the chief essentials of rate determination has never been available, and skepticism as to carriers' figures was well founded. It is also to be remembered that the commission has never been given any control over the issue of securities, and therefore a potent factor in the question of credit is still without regulation and its presumed beneficent results.

Although Mr. Acworth, the English writer on Railway Economics, holds the view that American railway rates are now too low, and have been so for years, and that a 20 per cent increase would in time produce the needed railway prosperity, and although a considerable number of writers in the United States take the same view, yet the commission has aimed to secure sufficient benefits for the carriers, and to protect the interests of the shippers and the consuming public; and its course has been based on an exhaustive study of facts and tendencies as illustrated in a wealth of statistics. Its course has kept the carriers reminded of economies and reforms which they might achieve, and has tended to put the carriers on their mettle; further results in this direction are being insisted upon. One who will carefully study these great cases cannot escape the conviction that the commission has been painstaking, progressive, and-in view of the numerous great and discordant interests always involved-eminently reasonable in its findings.

One will gain the impression that the railroads are far beyond the point where they render mere lip-service to the idea of public regulation for the public interest; that their cases are framed with that idea prominent, and that the era of recrimination is permanently past. Although it is to be expected that their own individual interests will continue to be strongly advanced by them, yet they meet the commission on ground progressively common, and the relation to-day is fast approaching mutual recognition of bona fide and cordial co-operation.

# GENERAL ASSIGNMENTS AND THE BANKRUPTCY LAW

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#### I. INTRODUCTION

Under the English Bankrupt Acts and our own Acts of 1841 and 1867, a general assignment made by a debtor for the benefit of creditors was held almost uniformly to be an act of bankruptcy and a constructive fraud upon the bankruptcy law. This was true whether the assignment was made with or without preference, for the benefit of all or of only some of the creditors, and without regard to the debtor's actual intent in making it. It was considered an attempt on his part to defeat the operation of the bankruptcy statute by selecting his own administrator and the forum in which his estate was to be administered, with the preconceived purpose of securing to himself greater lenity and advantage through such administration, and the avoidance of the more stringent regulations of the bankruptcy courts: and thus it was deemed an attempt to hinder and delay his creditors.1 It was even held by the late eminent jurist, William J. Wallace, when district judge in the Northern District of New York, that under the Act of 1867, such an assignment was an act of bankruptcy which would defeat a discharge, irrespective of the time when it was made. and although made without preference.2 The assignee for the benefit of creditors, as a participant in such attempted fraud upon our earlier Acts, was held to strict accountability in respect to his disposition of the debtor's estate and his own expenditures, and was often refused compensation because of his connection with the common-law assignment.

Our present bankruptcy law provides in express words, among the enumeration of the acts of bankruptcy, that one of such acts shall consist in the debtor's having made a general assignment for the benefit of his creditors.³ To constitute such an act of bankruptcy, there

¹Jones v. Sleeper (1843) Fed. Cas. No. 7,496 (Act of 1841); MacDonald v. Moore (1876) Fed. Cas. No. 8,763 (Act of 1867); Globe Ins. Co. v. Cleveland Ins. Co. (1876) 14 Nat. Bankr. Reg. 311, decision by Judge Blatchford (N. Y.), reversed on other grounds by Circuit Court of Appeals; Platt v. Preston (1879) Fed. Cas. No. 11,219. See Mayer v. Hellman (1875) 91 U. S. 496, 502; In re. Biesenthal (1877) Fed. Cas. No. 1,236.

² In re Kasson (1878) 18 Nat. Bankr. Reg. 379.

^{*}Bankruptcy Act, July 1, 1898, c. 541, s. 3 (4).

need be no formal deed of assignment,⁴ nor need the assignment necessarily be valid under the state law; and the assignment may be joined with an application for voluntary dissolution of a corporation in the state court. The term "general assignment" may be construed in a generic sense.⁵ It has also been held that after a general assignment is made, the act of bankruptcy is complete, and insolvency is not a defense to a bankruptcy petition, nor need it be alleged or proved.⁶ Although the making of a general assignment is no longer a ground for denying the bankrupt a discharge, the general principles and decisions affecting such general assignments under our former statutes in their relations to subsequent bankruptcy are as applicable under the present act as before.⁷

#### II. PARAMOUNT JURISDICTION OF THE FEDERAL COURT

The Constitution of the United States expressly confers upon Congress power to make uniform bankruptcy laws throughout the states.⁸

"The plenary and paramount power of congress to establish uniform laws on the subject of bankruptcies throughout the United States, is given in express terms by the constitution of the United States. It is therefore very clear that when congress has exercised the power thus conferred their action must necessarily control or limit the exercise of the power of the states over the same subject matter; and that whenever any state legislation, or any action of the state courts, comes practically into actual conflict with the proper execution of the laws of congress, constitutionally passed under such grant of power, state legislation and the jurisdiction and action of the state courts must yield to the paramount authority of the national government. This being so it is unnecessary in this case to decide that the insolvent laws are superseded *ipso facto* by the bankrupt act."

This jurisdiction, though paramount, controlling and exclusive when properly invoked within the limited time, does not have the effect of repealing the state insolvency laws, but merely suspends

^{&#}x27;In re C. H. Bennett Shoe Co. (1905) 140 Fed. 687; Courtenay Mercantile Co. v. Finch (1912) 27 Am. Bankr. Rep. 688; Griffin v. Dutton (1908) 165 Fed. 626.

In re Thomlinson Co. (1907) 154 Fed. 834, 835.

^{*}Gill v. Farmers' & Manufacturers' Bank (1915) 35 Am. Bankr. Rep. 91; In re Farthing (1913) 202 Fed. 557.

⁷This was declared in the noteworthy and exhaustive opinion of Judge Addison Brown of the Southern District of New York. In re Gutwillig (1898) I Am. Bankr. Rep. 78, aff'd id. 388. It was Judge Brown's privilege to determine many important and far-reaching questions arising in the first years of the operation of the present Bankruptcy Act; his opinions still stand illuminative of the subject and are often quoted and reiterated by the higher courts.

⁸ In re Safe Deposit & Savings Institution (1872) 7 Nat. Bankr. Reg. 393, 398.

them pro tanto. Provisions of state statutes remain unaffected and controlling where bankruptcy does not intervene, and in some cases, even after such bankruptcy, as, for example, in respect to matters not comprised within the scope of the act.⁹

On the other hand,

"the rights of creditors, inchoate from the making of the assignment, ripen into maturity when the adjudication is made. If it were otherwise the bankruptcy law could be evaded with the utmost facility." 10

This being so, in such cases the assignee is not to be regarded, concerning matters occurring or transpiring after the filing of the petition, as an adverse claimant with any claim of right in himself or as an assignee for value, but as the agent for the debtor in the distribution of the estate.¹¹

Upon an adjudication and the appointment and qualification of a trustee in bankruptcy, the title of the trustee to property in the hands of the assignee reverts to the date of the filing of the petition; all the trustee's rights and remedies are fixed as of that date, and the bankruptcy court has jurisdiction summarily to order such property delivered to the trustee, and to set aside a sale previously made by the assignee under certain circumstances and within the four months period.12 Payments made by the assignee in apparent good faith may be recovered for the estate, and even a purchaser from an assignee may acquire no title as against the trustee in bankruptcy.18 Immediately after the filing of a bankruptcy petition, the federal court has power to enjoin the assignee from proceeding further with the subject of his assignment, or to appoint a receiver in bankruptcy; or in its discretion it may permit the assigned property to remain in the hands of the assignee pending the appointment of a trustee or other disposition of the estate.

# III. HISTORY OF ASSIGNMENTS SINCE THE BANKRUPTCY LAW OF 1898 WENT INTO EFFECT

Have our courts acted consistently in recognizing such paramount power of the federal courts? It would appear not if one closely

⁹ In re Watts & Sachs (1903) 190 U. S. 1; In re Gray (1900) 3 Am. Bankr. Rep. 647.

¹⁵ In re Knight (1903) 125 Fed. 35, 40. See Johnson v. Crawford & Yothers (1907) 154 Fed. 761, aff'd id. 769; Geo. M. West Co. v. Lea Bros. (1899) 174 U. S. 500.

¹¹ Bryan v. Bernheimer (1901) 181 U. S. 188; Whittlesey v. Becker & Co. (1911) 25 Am. Bankr. Rep. 672.

¹² In re Knight (1903) 125 Fed. 35; In re Karp (1915) 36 Am. Bankr. Rep. 414. ¹³ Stearns v. Flick (1900) 103 Fed. 919; In re Knight, supra; In re Carver & Co. (1902) 7 Am. Bankr. Rep. 539.

observe the judicial attitude over a course of years. In the early years of administration under the Act of 1898, the making of general assignments by debtors was so generally frowned upon by the federal courts, following the trend of decisions under former acts, that it fell into general disuse. The assignment bureaus of the state courts became to a large extent deserted. Insolvency laws remained in most states upon the statute books, but few thought seriously of making a general assignment except as an easy step into a bankruptcy considered inevitable. In assignment cases the federal courts in most jurisdictions appointed bankruptcy receivers ex parte, with systematic regularity and without much scrutiny of the applications presented. It was enough that an assignment had been made and that an assignee was administering the estate, which, by every established principle of the Bankruptcy Act, Congress had intended to be administered under the exclusive authority of the federal courts. No thought was given to the personality or qualifications of the assignee, be he ever so eminently fitted to administer the estate, except that in rare cases he was named as receiver in the bankruptcy proceedings. Such was the modus operandi of the federal courts down to the end of the year 1909 or the beginning of 1910, and throughout these years voluntary bankruptcy was not allowed to corporations.14 Meanwhile the expenses of bankruptcy receiverships multiplied and grew to abnormal amounts. Many complaints began to be heard as to the extreme cost of administering insolvent estates under this system and some reforms were projected, particularly in the Southern District of New York. In December, 1909, the Circuit Court of Appeals for the Second Circuit handed down a decision in the matter of the Oakland Lumber Co.,15 which was taken-mistakenly, it now appears—as establishing a new rule relating to assignments, and as restoring them once more to respectability. In the Oakland Co. case the court said:

"The question broadly stated, is this—should the court have vacated

the ex parte order appointing the receiver?

"At the time this motion was made the questions presented by the creditors' petition and the bankrupt's answer were undetermined, and, so far as this record discloses, there was nothing to indicate that the assignee under the state law was not an honest, capable and responsible man, in whose hands the property was entirely safe.

"The power to take from a man his property, without giving him an opportunity to be heard, is both arbitrary and drastic and should not be exercised except in the clearest cases. Congress recognized the necessity for caution by limiting the appointment of receivers to cases

[&]quot;By the amendment of 1910 corporations were permitted to become voluntary bankrupts, except municipal, railroad, insurance and banking corporations.

¹⁶ In re Oakland Lumber Co. (1909) 174 Fed. 634, referring therein to an earlier decision of the same court, In re Spalding (1905, C. C. A. 2d) 139 Fed. 244.

where it is 'absolutely necessary' for the preservation of the estate. In other words, the reason for such an interference with the rights of property must be clear, positive and certain. Of course cases frequently arise where this remedy may be necessary—cases where there is reason to believe that the property may be stolen, or secreted or turned over to favored creditors. But fraud cannot be presumed, neither can danger to the property be predicated of acts which are honest and lawful. It cannot be presumed that an assignee under a state law intends to plunder the fund he is appointed to administer. Unless something be shown to the contrary the presumption is persuasive that during the interval between the filing of the petition and the appointment of a trustee, the property will be entirely safe in the hands of the assignee, especially if he be enjoined from disposing of it pendente lite."

While upon examination of this case we find that it does but reiterate general and well-established principles of law which should govern the drastic remedy of receiverships, nevertheless the effect of the decision was almost revolutionary. The decision was apparently taken as establishing a general rule in favor of the retention of assignees and receivers appointed in the state court. It was thought to mean, generally speaking, that in no case should they thereafter, on the filing of a petition in bankruptcy, be removed or superseded by a receiver appointed in such bankruptcy proceedings without actual proof of fraud, misconduct or incompetency. Motions for the appointment of receivers in the district courts upon estates in the hands of assignees were denied with such frequency and uniformity that soon such motions almost ceased to be made. Many other restrictive rules were made as to the employment of the attorney for the petitioning creditors, as to the amount of compensation, etc., all tending to discourage attorneys seeking to invoke the aid of the federal courts in administering the estates of insolvents. These rulings soon drove the Bar and the commercial community to the opposite extreme. Only infrequent efforts were made to prevent assignees from administering estates in the state courts untrammelled, without fear of interference, and in the face of the bankruptcy law whose only utility under the circumstances might be to afford the debtor a discharge from his debts without the concomitant administration and investigation prior to the appointment of the trustee. In consequence of this attitude and of the interpretation of the Oakland Lumber Co. decision, the assignment business of the state courts increased enormously.

As stated recently in the public press of New York City, summing up statistics of assignments, in the year 1910 in New York County there were seventy-seven general assignments; in 1911 one hundred and nine; in 1912 one hundred and ninety-eight; in 1913 two hundred and forty-nine; in 1914 nine hundred and twenty-four, and in 1915 more than eleven hundred; while the number of assignments made in the county when the decision above referred to was written was

trifling. In 1916 the number of corporations alone making assignments was two hundred and sixty-two. 16

Abuses and evils arising from this double administration of the same subject-matter by state and federal courts became prevalent: assignees in some instances administered and distributed estates without even filing the bond required by state statute, sold property after the entry of the order of adjudication and without appraisal, made exorbitant payments to their attorneys, and succeeded, in some instances, in having their accounts passed and allowances fixed in the state courts even over the trustee's objection. Recently the federal courts, taking full cognizance of this unsavory state of affairs and the resulting loss to creditors, have been endeavoring to rectify and curb such evils. In 1916, in the matter of the Federal Mail & Express Co., 17 in the Southern District of New York, the court discussed these matters very explicitly in its opinion and stated as its conclusion that the decision of the Circuit Court of Appeals in the Oakland Lumber Co. case was not meant to interpose a jurisdictional objection to

¹⁸ As to the methods employed in some of these assignment cases, considerable light is thrown by the record of a proceeding which the writer recently had occasion to examine in one of our district courts which may be taken, perhaps, as somewhat typical of many of the cases. In this particular case the attorney for the insolvent appeared with his client at the office of another atforney, a business acquaintance, and stated that his client desired to make a general assignment for the benefit of creditors to the latter attorney; and upon consent of this attorney, the assignment was made to him about four o'clock in the afternoon. Another attorney on a different floor in the same building was called up on the telephone by the assignee and told of the general assignment. This attorney with great expedition called at the office of the assignee, looked over the list of creditors, and was enabled by ten o'clock the following morning to file a petition in bankruptcy against the debtor upon three claims, all assigned to clerks in his own office. Immediately thereafter the assignee retained the lawyer acting as attorney for the petitioning creditors as his attorney also. While the assignee was on the stand in the bankruptcy proceeding, the following interesting colloquy took place:

[&]quot;I anticipated that if any of Mr. ———'s clients were interested in this assigned business. that a petition would be filed. Q. Was anything said about that between you and Mr. ———? A. The only thing that was said was, when I told him that I am assignee, he asked me, 'whether any of his clients were interested in the assignment.' I said 'look them over; I don't know.' I simply anticipated that he asked that question for the purpose of filing petition in bankruptcy; because he usually does. Q. What do you mean? A. What do I mean? That if any attorney who represents creditors sees that an assignment for the benefit of creditors is made, it is his duty to creditors to file a petition in bankruptcy. Q. Yes, but as I understand it, Mr. ———represents you as assignee? A. Yes, I told you I asked him to represent me in this as assignee, of course. . . . Q. When was the first assignment for benefit of creditors made to you? Do you remember? A. A week after the custom was established. Q. When was that? A. Oh, I don't know, about two or three weeks after Judge ———— would not permit the receiver to retain counsel. Q. How many assignments have been made to you since that time, approximately? A. May I ask my clerk? Of course I cannot tell, but there are fifty, perhaps one hundred. I think it is nearer one hundred, I don't want to be bound by this answer. . . ."

^{17 (1916) 37} Am. Bankr. Rep. 240.

the general appointment of receivers when assignees were in charge, but was intended for that particular case. The district judge concluded by observing that he would be inclined to grant stays against assignees in case of future assignments, unless the creditors should as a body desire otherwise. This was followed by Judge Mayer in In re D. & E. Dress Co., Inc., who remarked very pertinently: 18

"An exceedingly annoying practice has developed by which, after the making of the general assignment, this court [Bankruptcy Court] is nevertheless appealed to either by the assignee or by creditors to assist in the speedy administration of the estate, which often is both necessary and important in connection with summary proceedings, by landlords, sales of perishable property, examinations and the like. . . .

"I may also add that there may, of course, be cases where the selection of an assignee at a meeting of reliable creditors may be had under circumstances practically equivalent to the election of a trustee, but, reserving the discretion which may be necessary for exercise in any given case, I announce the general policy of removing assignees and appointing receivers in their stead, quite irrespective of the good faith and standing of the assignee. This I think is the only means whereby the Bankruptcy Act can be carried out in accordance with its intent and spirit."

Through the concerted efforts of credit men of large commercial houses and attorneys practicing in bankruptcy, an attempt was recently made by Congress to have enacted certain amendments to the Bankruptcy Act whereby it should be obligatory upon the federal courts to take jurisdiction of the administration of assigned estates immediately upon the filing of the bankruptcy petition. In the press of more important matters, the amendment failed of passage, but it is to be hoped it will be taken up and considered at the next session of Congress.

## IV. IN WHAT COURT ASSIGNEE SHOULD ACCOUNT

Owing to the early decisions of the Supreme Court in Louisville Trust Co v. Comingor¹⁹ and Mueller v. Nugent²⁰ the impression has prevailed that it was a matter of discretion on the part of the assignee whether he should account in the federal court or in the court which appointed him, and many of the cases in the books turn upon the point whether an assignee, having consented to come within the federal jurisdiction for the purpose of having his accounts passed, is bound by the summary order of such court in the matter of turning over assets, of recovering payments previously made by the assignee and disallowed, and in the surcharge of the assignee generally, by reason

^{18 (}July 5th, 1916) N. Y. LAW J.

^{19 (1902) 184} U. S. 18.

²⁰ (1902) 184 U. S. 1. See also Bryan v. Bernheimer (1901) 181 U. S. 188.

of his misconduct in administering the assigned estate. For example, in the case of the Banzai Mfg. Co.,²¹ the Circuit Court of Appeals for the Second Circuit considered an order made by the court below, that the assignee summarily turn over to the trustee several thousand dollars, much of which had been improvidently expended by the assignee and with which, for that reason, he had been surcharged. The court said:

"By reason of his [the assignee's] improvident conduct in so doing it has been found that he ought to make good to the estate the whole or the greater part of these disbursements, and he is a debtor to the estate for that amount, but it does not necessarily follow that his indebtedness is of such a sort that he may be imprisoned for non-payment. The situation differs from that which has frequently come before the courts where a person—the bankrupt or some one else—has had property of the estate in his possession and testifies that he had paid it out or distributed it in some way, but the referee and the district judge have disbelieved his testimony and have ordered him to return the property or be imprisoned for disobedience to such order. It is not understood that in the case at bar the trustee disputes the statement of [the assignee] that he actually did pay out the money, or substantially all of it. More would be required than appears in this record to warrant an order punishing [the assignee] for failure to pay \$6,053.27 which he owes the estate as a result of his transactions while assignee."

This entire matter of jurisdiction to settle an assignee's accounts has recently come before the courts in the matter of Louis Neuburger, Inc.,22 wherein an assignee filed his report and accounts in the Bronx County Court, New York, and an order was entered passing and approving such accounts over the trustee's objection. The assignee thereupon served upon the trustee in bankruptcy a copy of the order passing his accounts, and paid over a check for the monies payable to the trustee, pursuant to the order. Subsequently the referee in bankruptcy, upon the application of the trustee, directed the assignee to file his report and accounts as assignee in the United States District Court on or before a certain date. The assignee refused to comply with this order; his application for a review of the order was heard and denied, the district judge overruling the contention of the assignee that he had a right to account only in the state court, whence he derived his authority. The court held that the trustee had the power to compel an accounting in the federal court, and that the state court having been ousted in its jurisdiction, the accounting order of the state court was not binding upon the trustee as res adjudicata. The Circuit Court of Appeals, Second Circuit, with opinion by Judge Rogers,

²¹ (1910) 25 Am. Bankr. Rep. 497, 501.

^{22 (1916) 37} Am. Bankr. Rep. 248, aff'd (1917) 39 Am. Bankr. Rep. 139.

affirmed the court below and held that it was the plain duty of the assignee to account in the bankruptcy court for the estate which came into his hands as assignee.

# V. COMPENSATION OF ASSIGNEE AND HIS ATTORNEY IN THE BANKRUPTCY COURT

It was formerly held in many jurisdictions23 that an assignee's claim for compensation for his services must, when bankruptcy has intervened, be disallowed, upon the theory that the assignee by his acceptance of the assignment voluntarily makes himself a party to an arrangement contrary to the policy of Congress in enacting a uniform bankruptcy law, and that assignees should go unrewarded even when they have acted honestly and intelligently and in all probability the estate has benefited by their experience and efforts. This harsh rule was soon modified, however, and it is now quite generally held that an assignee should be treated, upon the settlement of his account, as a quasi-receiver and be compensated, together with his attorney, for whatever services are shown to have been of actual benefit in preserving the estate while in his possession. To be denied compensation he must have been guilty of actual fraud, waste or negligent conduct. His claim, however, is not entitled to be paid as a first lien or claim in the bankruptcy courts out of the estate in the hands of trustee; nor can there be any deduction for services rendered by the assignee prior to the assignment or for expenses made in attempting to resist an adjudication in bankruptcy.24 As' to disbursements made prior to the four months preceding bankruptcy, the Supreme Court has held that in such cases the assignee is an adverse claimant and such disbursements cannot be recovered in summary proceedings.25

# VI. DUTIES AND LIABILITIES OF ASSIGNEES IN RELATION TO INSOLVENT'S ESTATE

While Congress has not, by enacting a uniform bankruptcy system, succeeded, it seems, in outlawing the state insolvency laws, nevertheless it has made it incumbent on a state court assignee to act with the utmost good faith and sound business judgment in administering his trust, if he is to avoid liability. He will be held to have acted on notice and at his peril in carrying on the bankrupt's business, in selling

¹¹ In re Pauly (1899) 2 Am. Bankr. Rep. 333; In re Kingman (1899) 5 Am. Bankr. Rep. 251; In re Peter Paul Book Co. (1900) 5 Am. Bankr. Rep. 105; In re Harson Co. (1904) 11 Am. Bankr. Rep. 514; Wilbur v. Watson (1901) 7 Am. Bankr. Rep. 54.

²⁴ In re Hays (1910) 24 Am. Bankr. Rep. 601.

²⁸ Louisville Trust Co. v. Comingor (1902) 184 U. S. 18; Randolph v. Scruggs (1903) 10 Am. Bankr. Rep. 1; In re Zier & Co. (1905) 15 Am. Bankr. Rep. 646.

it out, or in making expenditures. He may be surcharged for resulting losses or for doing anything beyond what was necessary to preserve the property which was in his hands when the petition was filed. Under ordinary circumstances it is his duty to turn this over intact to the trustee in bankruptcy.²⁶

In re Karp (1915) 36 Am. Bankr. Rep. 414; In re Sobol (1915) 35 Am. Bankr. Rep. 804; In re Resnek (1917) 38 Am. Bankr. Rep. 759; In re Hays (1910) 181 Fed. 674.

## THE DEVELOPMENT OF PRINCIPLE IN TRESPASS

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The principles upon which redress is based in the action of trespass are, like all common-law principles for the greater part, the product of historical development. This is more universally true of trespass than of any other form of action because of its wider significance, and because it occupies probably two-thirds of the attention of the modern court. It needs no proof to demonstrate that economic and social change are the controlling factors in the evolution of trespass, and not judicial or philosophical fiat. For example, some years ago a person riding upon the front platform of a street car was not considered to be the agent of his own injury if hurt by mis-But suddenly the eyes of the community are adventure. awakened to the possibilities of electricity as a motive power. and all street cars are now operated by means of electricity. Straightway the law of trespass responds, and to jurisprudence is added a new principle, namely, that one who stands on the platform of an electric car, when he could have gone inside, has assumed a certain risk, and, if injured, must shoulder the responsibility himself.1 As this process of adding principle to principle through some fourteen centuries has resulted in that enormous mass of decisions which, added together, constitute the law of trespass, what, if any, theory has been the law of its development? From the year 1285 A. D. onward, the history of trespass is an open book in this sense, that the decisions are there available to anyone who chooses to read. From that date the judges administer relief in trespass and in all its allied actions very much as if they had inherited from their forbears certain views or principles of which the relief granted was a necessary corollary. There is, however, no suggestion of any underlying theory unless the general maxim of the common law that no wrong shall be without a remedy can be called a theory. It must be observed in parenthesis that acceptance of the historical method of inquiry precludes a belief in any theory, if anything static be involved in the word theory; for a case decided upon one theory to-day may be decided upon another in the course of a few years or even a few months.

¹ Thane v. Scranton Traction Co. (1899) 191 Pa. 249.

The law of trespass chronologically, like that of contractlike that of the entire common law-falls into three distinct periods. The period of no reports, from 566 A. D. to 1194 A. D.; the period of the records, to 1285 A. D.; and the period of the common-law reports from that time to the present. There may be common-law reports prior to 1285 A. D., for there are many unpublished Year Book manuscripts of the reign of Edward I, but the date 1285 A. D. is chosen arbitrarily as marking the beginning of that peculiar development of trespass which is based upon indirect injury. Although but few reported cases exist as late as the year 1387 A. D., the law of negligence had in that short time progressed so far that in an action of damages for failure to repair a hedge, there is laid a duty, a breach of the duty, and resulting damage.2 Thus early, therefore, the basis of redress in trespass on the case, the fundamental principle of universal recognition from that to the present, was established. As the Statute of Westminster II, as interpreted, led inevitably to this decision, and as that statute was introduced to supply a recognized defect in the common law at the time of its passage, the date chosen is not without significance. It is obvious that a remedy already existed for all tangible injuries or trespasses, or rather, for such injuries as were produced by direct causes, and had not to be followed through a chain of causation. It is the purpose of this essay to trace the development of the action of trespass prior to the Statute of Westminster II, and to discover the principles upon which redress was based.

The action of trespass from its origin has been intended to provide a remedy for an injury to property or to the person. In modern terminology it is an action for damages. Was it always so? The damages constitute the remedy. But the trespass in the early law was very frequently the taking of property. Toward what end was the action directed when the injury was an assault?

It will appear in the course of this discussion that the action of trespass existed for the purpose of affording a remedy, and that if damages were sought, or even were involved, they were usually granted. It will appear also, that the action was not criminal in nature, except for the fiction by which the king justified his interference, that the defendant had been guilty of a breach of the king's peace.

In the Saxon period it is hopeless to seek for a distinct law of trespass. And, considered as a judicial system, the Saxon

² Y. B. H. 11 R. II, Fitzherbert, Accion sur le case, 36, (1912) 25 HARV. L. Rev. 341.

Dooms present a colorless picture indeed. Some pretense might be made to evolve from those general miscellaneous provisions a law as to sales, as to warranties, or even as to the collection of debts, but no form of action can be discovered to which the name trespass could be applied.

But if it should be assumed that the Saxon laws afford no evidence that bears upon the subsequent history of trespass, nothing could be wider from the mark. The defect to be observed in those laws is not lack of instances in which trespasses, typical of the tortious wrongs of our own day, may be redressed, but of any legal conception or form of action capable of assimilating a large number of instances, by means of which uniform legal development might have been possible. It is probable that the want of a jury had much to do with the incoherence of the Saxon law. Each provision of the Dooms contained a fixed penalty for an individual act. Classes of acts had no existence; classes of wrongs had no existence. For example, the laws of Aethelbirht exacted the sum of fifty scaetts from the man who pulled his neighbor's hair.8 And if a man passed over a fence, he was obliged to pay four shillings.4 There is no need of multiplying instances of this sort, for the Dooms are filled with them. The moral is plain. There being nobody charged with finding facts and assessing damages, the law of necessity fixed the damages beforehand, with a few exceptions. There were occasions, however, on which the lawgiver must have felt the need in certain cases of leaving some portion of the damages or compensation to be determined by unprejudiced third persons. And a few provisions of the Saxon Dooms justify this conclusion. The law had no difficulty in fixing the amount to be paid if a defendant broke the plaintiff's thigh. With its customary directness the Saxon law said, if a thigh be broken, let bôt be made with twelve shillings. But it was obliged to consider also that a broken thigh might leave the plaintiff lame. In that case, said the law, the friends must arbitrate.⁵ So, too, in the case of injuries the extent of which must be left to the imagination, the amount of compensation was necessarily left indefinite, because it could not be ascertained beforehand.

^{*}B. Thorpe, Editor, Ancient Laws and Institutes of England, etc. (1840) 13. I Felix Liebermann, Gesetze der Angelsachsen (1903) 5. A scaett is 1/250 of a pound of silver, I Rogers Ruding, Annals of Coinage (1840) 296.

⁴ Thorpe, op. cit. 11.

Thorpe, op. cit. 19. Liebermann, op. cit. 7.

"If anyone injure another man's vineyard, or his fields or aught of his lands, let him make bôt as it may be valued."

There is nothing to indicate how the inquiry is to be conducted, but the instances quoted leave no doubt that there was some method of fixing damages other than the foresight of the legislator.⁷

The assessment of damages plays a great part in the development of the action of trespass. And as the jury later became the machinery by which this task was performed, we may ascribe no little influence in the history of the forms of action to this source. The Saxon Dooms would not have contained separate provisions for a broken thigh, for pulling hair, and many like offences, had it been possible to leave the extent of the damage and the amount to be paid, to the jury. Without the jury, there might have been no common law, and we might be drinking our legal lore from Roman goblets. This is pure assumption, however, for it can never be known how much common law passed over at the time of the Conquest and by tradition gradually worked its way into legal principle. This is all that can be said of damages in the Saxon law. Of the punishment of offences that might be considered trespasses there is no lack, and they include wrongs of almost every type of trespass known. Let it be understood that they are miscellaneous provisions aimed not at a class of cases but at the particular event. The law was not aimed at wrongs of force in general but at the breaking of an arm by the defendant or the breaking of a fence by cattle.

The reign of Henry II may be regarded as a cauldron into which was poured an unassorted mass of litigation to be fused and alloyed and refined, and by various processes molded into a coherent form. The molds as we know were furnished by Henry II—the jury—the writs—the invitation to suitors, rich and poor alike, to seek justice in the king's court. And in 1194 A. D. begin the records, and with them, the principle of stare decisis.8

It remains to discover what was contained in that body of law upon which the processes of the common law were to work. Of such trespasses as result from the direct application of forces, little need be said. The Saxon Dooms are built upon force. More than one-half of the law consists of

Thorpe, op. cit. 54. Liebermann, op. cit. 37.

See 2 Pollock and Maitland, Hist. Eng. Law, 523.

^{*} See Jenks, Short Hist. Eng. Law, 24.

an enumeration of deeds of violence for which compensation must be made, or for which the king imposes a penalty. At times, as in the case of the broken thigh, the remedy is farreaching and extends to injuries that may develop later. So too, the  $b\hat{o}t$  is twelve shillings if an ear be cut off, twenty-five shillings if, as a consequence, the other ear becomes deaf.

Although trespass is termed a noxal action, involving something in the nature of a crime, the inception of the action, or rather the first attempts to give compensation for harm due to wrongful acts, suggest nothing that is criminal. The inevitable result of the litigation is the payment of money. It is not until the time of King Alfred that the resounding phrases of the book of Exodus fill the laws with retribution and physical penalties.¹¹

The Saxon law was not indifferent to the intention with which an act was done, nor to the element of malice, if present. One who furnishes weapons to those in strife must pay six shillings though no one be injured.¹² Again, if the owner of an ox know of any viciousness in his beast and neglect to confine it, he must give another ox if his own gore that of his neighbor, whereas if he be ignorant of any evil traits in the animal, the penalty is less.¹³

There are many provisions in the Saxon laws of a similar nature that suggest tests of liability, and some that border on negligence. And if a modern terminology may be applied to a legal system that had no distinctive forms of action, contributory negligence was at times an answer to a claim for compensation.

A churl's close ought to be fenced, winter and summer; if it be unfenced, and his neighbor's cattle stray in through his own gap, he shall have nothing from the cattle—let him drive it out and bear the damage.¹⁴ If, however, there be a beast that breaks hedges and goes in everywhere and he who owns it cannot or will not restrain it, he forfeits all of the animal except the skin.¹⁵ And if a man find swine among his mast, he is entitled to six shillings. But if they have been there only once the owner need only pay a shilling if he can prove that they came not there oftener.¹⁶ Yet why the distinction between straying cattle and straying swine? The penalty for carelessness

^{*}Thorpe, op. cit. 15, par. 39. Liebermann, op. cit. 5, par. 40.

¹⁰ Thorpe, op. cit. 15, par. 40. Liebermann, op. cit. 5, par. 39.

[&]quot;Thorpe, op. cit.; Liebermann, op. cit., Laws of Alfred.

¹² Thorpe, op. cit. 7. Liebermann, op. cit. 4.

¹³ Thorpe, op. cit. 35. Liebermann, op. cit. 35.

¹⁶ Thorpe, op. cit. 127.

¹⁵ Thorpe, op. cit. 129.

¹⁸ Thorpe, op. cit. 133.

in carrying a spear might contain a suggestion of negligence, if there were any indication of uniformity in the application of the law. The tests of liability appear sporadically and not as part of any coherent legal consciousness.17 Yet tests must have been applied. In the case of the spear the test appears in the law; if the butt is higher than the point, the penalty is so much; if the butt and the point are on the same level, there is no fault. Furthermore, some test must be applied to determine whether or not a man knows of vice in his beasts. But when this is said, all is said. The law progressed, no doubt, for the first reported cases disclose an almost inconceivable advance over this haphazard way of settling litigation. Yet it is clear that the Saxon Dooms show little attempt if any to develop the form of action that later became trespass. This, briefly, is what Henry II put into his cauldron, and into his molds. Perhaps we should add also a suggestion of disseisin—the Saxon real lac,18 and the suggestion of slander in the penalty for calling a man perjurer in the dwelling of another.19 What came of the process?

The first cases reported reveal three civil actions of tort of which one, trespass, in time absorbed the other two. They were the assize of novel disseisin, the assize of nuisance, and the action of trespass, or transgressio. All three in form contained words suggestive of violence, and all three were done contra pacem—against the king's peace. The words "with force and arms" had little significance, nor had the words injuste detinet any greater meaning, for a defendant sometimes denies the force and arms in debt upon an obligation. In disseisin the defendant injuste disseisavit, or injuste et sine judicio disseisavit, in the assize of nuisance the defendants injuste et sine judicio levaverunt quendam murum, in debt, the defendant injuste detinet.

Thus, in the reign of Henry II, the action of trespass, the whole common law, has become dynamic, for the reports of the following reign reveal three different forms of action, all of which might properly be designated trespasses; and if we regard the volume of cases in the plea rolls, there is no dearth of litigants. One characteristic of Saxon relief has remained, however, and is destined to remain in the common law for some centuries. That is the penalty that accompanies litigation. In the Saxon Dooms, the defendant paid six shillings to the plaintiff and twelve shillings to the king. In the common law, the

¹⁷ Thorpe, op. cit. 85. Liebermann, op. cit. 69.

¹⁸ Thorpe, op. cit. 109.

¹⁹ Thorpe, op. cit. 54. Liebermann, op. cit. 35.

amercement is the almost inevitable result of a lawsuit. Whatever the relief administered, there is always some point in the case where one party or the other is prepared for an amercement or penalty. It is administered with fine impartiality and with no reference to the form of action. The plaintiff is amerced pro falso clamore in disseisin, open pro injusta deforc in assisa ultime presentac' (unjust deforcement in darrein presentment) and pro injusta detentione in a plea of debt. No action is more or less penal, more or less noxal, because of the amercement. It is to be regarded more as a perquisite or profit of litigation than as an index of the degree to which the action was penal in its nature. Judged by this standard, debt and darrein presentment are as highly penal as trespass.

Thus, if we have no preliminary fundamental distinctions for the earliest forms of trespass, we have at least one characteristic common to all. It is not to be supposed that any one form of action had a power of assimilation that made it superior to the others. Distinctions were early formulated by which one action was made the vehicle for certain kinds of relief; for example, the matter of the right to real estate must be tried in the assize of novel disseisin; but the connotations of the three forms of trespass were not so clearly cut, that an authority as to the same kind of wrong might not be found in both the assize of nuisance and in trespass.

The notion that has somehow become inseparably connected with trespass is that it provided relief against deeds of violence. and therefore was accompanied by a suggestion of something unusually drastic in its administration of relief. This is founded upon a conception fundamentally wrong. The first litigation involving injuries due to violence was not pursued as a substitute for criminal processes. In the Saxon law, in the earliest times at least, there is very little suggestion of violence in the penalties. Even homicide is a thing to be paid for. It is not until the reign of King Alfred that the doctrine of an eve for an eye and a tooth for a tooth becomes a part of the law. The result of all litigation, as we have seen, was a money penalty. What, then, differentiated trespass from debt or contract? Was it that the courts afforded a civil remedy for a crime which could be enforced by imprisonment if necessary? This is absurd, because as we know, imprisonment for debt has only been abolished within a century. The theories that are spun about the action of trespass are children of a later growth

²⁰ Tempore Johannis, Placitorum Abbreviatio, 81.

²¹ M. 25 Hen. III, Placitorum Abbreviatio, 110.

²² M. 25 Hen. III, Placitorum Abbreviatio, 110.

and represent usually the jurist's attempt to satisfy his mind as to the reason upon which his decision is based. His real reason for the decision is to be found in history, and he decides in accordance with history even when he overrules a precedent.

The trespasses for which the first common-law writs were issued consisted of two that were aimed at specific offences generally connected with real estate. The third, trespass, was given from the first a connotation wide enough to have embraced both of the others, had there been any speculation as to legal remedies to open the eyes of judges and lawyers to that fact.

The action of novel disseisin was aimed at the forcible dispossession of a man from his freehold. It was a complete and thorough remedy; it restored the property of the owner, and awarded him damages for the detention, and the defendant paid a fine as well.²³

The assize early became the containing vessel for a fairly wide group of wrongs, and as litigation in the assize was frequent, it early developed principles and displayed a remarkable power of assimilation and sturdy growth that resisted until within the last few centuries the encroachment of trespass. Originally aimed at dispossession, it soon became a medium for trying title, and usurped to that extent the office of the writ of right. If we read Lilly's reports and his learned introduction we might possibly share his regret at the disuse of an action that admitted of so few delays, that afforded such prompt justice, and so efficient a remedy. So far as the decisions prior to the reign of Edward I are concerned, they disclose comparatively small variation in principle, but if the content of novel disseisin is known, we can more easily understand why the courts refused a remedy in trespass and referred it to novel disseisin. The application of the remedy was regulated in accordance with certain well-defined rules of inclusion and exclusion. It was a defense for the defendant to say that the plaintiff is his villein,24 and apparently it is an equally good defense that the plaintiff is a bastard.25 The writ did not lie between brother and sister.28 Nor did it apply to lands held in ancient demesne.27 The names of both parties are to be set forth in the writ.28 And the land and the quantity of land must

²² P. 7 and 8, John, Placitorum Abbreviatio, 50; Tempore Johannis, Ibid., 76; M. 25 Hen. III, Ibid., 115.

²⁴ Tempore Regis Ricardi Primi, Placitorum Abbreviatio, 11.

²⁸ Hen. III, Placitorum Abbreviatio.

^{*} H. 4 John, Placitorum Abbreviatio, 38.

²⁷ 25 Hen. III, Placitorum Abbreviatio, 117.

^{*}M. 34 Edward I, Placitorum Abbreviatio, 259.

be made certain before the assize is taken.²⁰ It is not at all characteristic of the action of novel disseisin, that the action must be brought in the county in which the land is, for that objection apparently could be made in almost any common-law action.³⁰ The assize includes actions for a variety of wrongs which, however, are uniform in principle. For example, the assize might be maintained for common of wood,³¹ for a common of piscary,³² for common of pasture.³³ Finally, as a matter of practice, let us note that the plaintiff is liable to be fined if he claims a freehold when he has only a right of common.³⁴

Evidently the basic principle of the relief in novel disseisin is that no one shall unjustly and without the judgment of a court deprive another of his property, but within the sphere of the action the remedy was complete and effective. It was understood that merely restoring his property to the plaintiff was not a complete remedy. He was injured by violence, perhaps; he was deprived of his property during a certain period, and the property was usually injured. There was something appealing in the extent to which self-help was permitted, in the extent to which the plaintiff within five days might gather his friends and forcibly eject the intruder, a feature apparently peculiar to this assize. As has been observed, this action resisted for centuries the encroachments of trespass in which respect it fared better than the assize of nuisance.

The assize of nuisance from its inception dealt with a class of wrongs that inevitably must have been recognized later as trespasses, and there seems little reason for one absorbing the other beyond the infinitely vaster connotation of trespass. Its justice was no speedier, in fact it was not so speedy as the relief afforded by the assize of novel disseisin. Many of the wrongs against which the assize of nuisance was directed were offences to which the cant phrase of equity, "irreparable injury," was aptly applied, so that such of its jurisdiction as was not absorbed by trespass fell into the capacious maw of equity.

From the beginning, the assize of nuisance follows a fairly consistent line of development, and the cases disclose a certain uniformity of relief. The court orders the restoration of the status quo, and such further relief as the situation calls for.

²⁹ P. 30, Edward I, Placitorum Abbreviatio, 245.

D. 18, Edward I, Placitorum Abbreviatio, 282.

Tempore Johannis, Placitorum Abbreviatio, 70.

^{**} Tempore Johannis, Placitorum Abbreviatio, 51.

^{**} P. 7 and 8 John, *Placitorum Abbreviatio*, 51; M. 8 John, *Ibid.*, 53; *Ibid.*, 68, 77, 81. 44 Hen. III, *Ibid.*, 146.

⁴ T. 14 John, Placitorum Abbreviatio, 87.

Thus, an assize of nuisance is brought against eight defendants because they unjustly and without legal right erected a certain wall in the free and common pasture of Foxcote, to the plaintiff's injury, etc. The jury say that the defendants erected the wall as alleged. Judgment that the wall be taken down, and all those who erected it, be in mercy.³⁵

The remedy is complete, as judgment may be given not only for the removal of a wrongful structure but for damages as well.³⁸ If the assize is brought for the wrongful diversion of a water course, the judgment of the court is that the water be restored to its former course.³⁷ The instances of the action are uniform in nature, for example, conducting a fair wrongfully,³⁸ erecting a fence,³⁹ obstructing a road,⁴⁰ breaking a ditch.⁴¹

In all of these cases the issue is presented to the jury—"Did the defendant unjustly, etc., obstruct the road," and if the jury answer "Quod abbas obstruxit viam illam" the court orders the abbot to open the road. Both of the assizes began with the same formula. The writ was either "Si... injuste disseisavit" or "Si... injuste obstruxit." But the uniformity of litigation under the assize of nuisance is much more striking than in the case of novel disseisin. The connotation of nuisance was more limited even than that of novel disseisin.

The proceedings were the same in both assizes. The contrast between the two is instructive. The assize of novel disseisin is a remedy against the wrongful dispossession of the owner from his freehold. The assize of nuisance gives to trespass its basic principle of widest application, viz., sic two utere ut alienum non laedas, for the wrong to be redressed was the improper use of one's own property, the building of a house to the nuisance of a neighbor's freehold and the like.

For almost a century, between 1194 A. D. and 1285 A. D., these assizes held the field almost undisturbed against the action of trespass. It was not a very popular remedy until the reign of Henry III, and the cases are not numerous until much later. The words of the complaint generally follow the same formula, that the defendants "contra pacem domini Regis vi et armis intruserunt," etc., and the relief awarded is usually damages.⁴²

^{*}Tempore Regis Ricardi Primi, Placitorum Abbreviatio, 10.

²⁶ Assize 25 Hen. III, Placitorum Abbreviatio, 115.

²⁵ Hen. III, Placitorum Abbreviatio, 120, 121; H. 12 E. I, Ibid., 205.

T. 14 John, Placitorum Abbreviatio, 85.

^{39 10} Hen. III, Placitorum Abbreviatio, 103.

^{*8} Hen. III, Placitorum Abbreviatio, 101.

a 3 John, Placitorum Abbreviatio, 33.

Easter, 4 Hen. III, Bracton's N. B. pl. 85.

The action of trespass naturally could not follow a consistent line of development by contrast with another form of action based upon a wrong diametrically opposite in principle. The clearer definition of trespass began when the principles of contract came to be understood. But that is a matter that had not yet been settled as late as 1388 A. D. in the reign of Richard II, if we may believe a dictum of Thirning, J., for he says that the issue of contract or not contract must be tried by the bishop.⁴³

Trespass, therefore, was defined at first only by contrast with other forms of tort or trespass, and possibly with debt. Words of force appear in the action of debt until a comparatively late period. For example, in an action of debt, the complaint is "injuste detinet" and the defendant in reply denies the tort and the force.44

It is clear that no distinction can be made between trespass and any other form of action on the ground that trespass is more noxal or more highly penal than any other. The action is a civil action, and it is enforced precisely as are all of the other civil actions.

Trespass is not exclusively an action for damages as yet. In fact, it is doubtful if there was any action for damages as such until recourse to the action on the case became frequent. But the cases in which damages are not awarded are comparatively few. If a man bring an action for the killing of his horse, or because of an assault, obviously in a civil action, he is seeking damages.

Trespass offers a much more coherent picture than any of the allied actions prior to the Statute of Westminster II. As in all other actions the law requires the plaintiff to be named in the writ.⁴⁵

The necessity of limiting an action having so broad a significance as trespass became apparent from the first. It was settled early that a matter of title or of right to possession could not be determined in an action of trespass. For example, the defendants were attached for entering the plaintiff's turbary, cutting turf, and illtreating his servants. The defendants replied that the turbary belonged to them and not to the plaintiff. It was held that since both parties claimed the seisin of the same tenements and this cannot be determined by the writ of trespass, but a writ of novel disseisin lies well in such a case, and like-

⁴⁸ M. 12 R. II, Fitzherbert, Garde, 106. (This case is not very fully reported by Fitzherbert.)

<sup>M. 12 R. II, Fitzherbert, Jurisdiction, 18.
P. Edward I, Placitorum Abbreviatio, 272.</sup> 

wise both damages and the tenements can be recovered in novel disseisin, the writ in this case does not lie.46

A similar conclusion is reached in an action for cutting trees in which the defendant alleged that the trees were growing on his own land and not on the land of the plaintiff. The defendant says, "supra feodum et liberum tenementum suum" whence the conclusion of the court "liberum tenementum non potest per hoc breve de transgressione terminari." 47

Thus early was it determined that trespass did not lie to try the right to a freehold, nor to inquire concerning the title to a freehold. In both of these cases the court advises the plaintiff that he may, if he wish, purchase a writ of novel disseisin.

There are some few cases that bring us close to the action on the case. In 18 Henry III, the defendant is summoned to answer "quare vi et injuste" he uses a certain road and holds it beyond his land of Waleton, which he ought not to have, as it is said, and whence the complaint is that by this use, a plaintiff is injured and claims forty shillings damages. This question is left to the jury, as well as the question of title to the road.⁴⁸

Evidently the law had no objection to trying the title to a road in trespass, although it refused to try the title to a freehold. Undoubtedly there is some confusion in the conception of the legal basis of redress. In an action for taking fishing nets and boats, it is alleged that the plaintiff was thus hindered from exercising his right of piscary. The judgment is that the nets must be returned, but there is no mention of damages.⁴⁹

The invasion of the plaintiff's liberty at Shornes, the breaking of his prison, and the removal and hanging of one of his prisoners by guards of the hundred of Shamel is the basis of an action as late as 17 Henry III. And the defense is that the hundred of Shamel has the right of *infangenthef* (taking of thieves) and *utfangenthef* (execution of thieves).⁵⁰

The remaining cases of the period under discussion add little to the general principles derived from the cases thus far considered. The mere fact that trespass is brought for the taking of cattle is of little significance, nor is it instructive to know that the defendant pleads that the plaintiff is his villein.⁵¹

[&]quot;H. 38 Hen. III, Placitorum, 142.

[&]quot; M. I. Edward I, Placitorum Abbreviatio, 262.

^{*18} Hen. III, Bracton's N. B. pl. 843.

⁴⁰ T. 15 Hen. III, Bracton's N. B. pl. 616.

M. 17 Hen. III, Bracton's N. B. pl. 821.

²¹ 44 Hen. III, Placitorum Abbreviatio, 147.

The actions follow a more or less uniform type, for example, trespass for false imprisonment; ⁵² for breaking a ditch; ⁵³ for removing fishing poles; ⁵⁴ for removing grass; ⁵⁵ for taking wreckage; ⁵⁶ for entering a liberty and burying a man without view; ⁵⁷ invasion of a warren; ⁵⁸ for assault; ⁵⁹ for assault and beating; ⁶⁰ for killing a horse. ⁶¹

It would be an anomaly to find damages awarded in novel disseisin and nuisance and not in trespass. Damages were necessarily the basis of complaint in certain instances and where the wrong is the taking or killing of beasts; trespass is chosen as a remedy in order to obtain the value of the property taken or destroyed.

Thus, in 3 Edward I, Thomas Hegham sues Thomas de Leyburne and two others for taking and carrying away his cattle to the value of forty marks. The jury fixed the damages at nineteen marks. Afterward the court, being of opinion that the inquisition had not been carefully taken, issued a precept to the sheriff to summon the jury to inquire if the cattle of the plaintiff had been taken by precept of the said Thomas de Leyburne, and whether the plaintiff could have replevied them if he had desired. It was said that he could; the court held that the plaintiff had lost the cattle through his own negligence (quod ipse Thomas Hegham amisit averia sua negligencia sua propria) and that he should return the damages that had been paid to him. 62 In 9 Edward I, the abbot of Cern recovers ten pounds damages against the defendant for taking wreckage within his manor. 68

Recalling now that trespass as a popular action is but in its infancy even in the reign of Edward I, let us observe that the action served two purposes. It served as a highly effective method of compelling restitution of property taken by force and it served equally well for the recovery of damages, where

^{22 15} Hen. III, Bracton's N. B. case 465. H. 9 Hen. III, Bracton's N. B. case 1041.

^{58 15} Hen. III, Bracton's N. B. case 567.

⁵⁴ H. 18 Hen. III, Bracton's N. B. case 835.

^{68 19} Hen. III, Bracton's N. B. case 1121; 10 Hen. III, Ibid., case 1735.

⁵⁶ M. 9 Edward I, Abbreviatio Placitorum, 201.

⁵⁷ Tempore Johannis, Abbreviatio Placitorum, 70.

⁸⁸ H. 38 Hen. III, Abbreviatio Placitorum, 141; T. 4 Edw. I, Ibid., 190; M. 4 Edward I, Ibid., 191; M. 9 Edward I, Ibid., 201; H. 10 Edw. I, Ibid., 202.

⁵⁹ M. 38 Hen. III, Ibid., 134.

[∞] T. 10 Edward I, Ibid., 274.

^{et} T. 10 Edward I, Ibid., 274.

⁶² Placitorum Abbreviatio, 265.

⁶⁵ Placitorum Abbreviatio, 201.

the object taken could not be restored. It is equally certain that where the goods were taken under color of right and the appropriate remedy was replevin that trespass could not succeed. The writ did not always contain words indicating violence. In many cases the plaintiff merely complains and sets forth his damages. In others the formulæ, now second nature to the lawyer in a suit for trespass, are employed.

In almost all of the cases, some one, plaintiff or defendant, is amerced (in misericordia) but this is a matter entirely different from the damages (damna). The amercement is the king's indirect way of adding to his revenue. Surely it is a harsh decision in the cases of trespass considered above, that the plaintiff has sued in trespass, has miscontrued his wir, may sue in novei disseisin, but must make fine to the king, "pro falso clamore." The amercement, the penalty to the king, is the inevitable tax on litigation from which no one escapes, whether he sue in trespass, or even for breach of covenant. This may be verified by glancing at random through the cases in the Placitorum Abbreviatio. The penalty to the king had no relation to trespass, nor can any conclusion as to the penal nature of trespass be drawn from the fact that the penalty is imposed. It is imposed on any unsuccessful plaintiff "pro falso clamore,"-for having failed to make good his complaint.64

There is very little of a criminal nature in this action of trespass. The action is maintained without words of violence and with them, and amercement was likely to take place in an action brought by a simple complaint for taking wreckage, and to be omitted in a case filled with the rumblings of vi et armis, armed men, and destruction of manors. Trespass is administered as a civil remedy, and the vi et armis sometimes had significance and sometimes had not, much as is the case to-day.

The same assertion may be made as to damages. Trespass was sometimes brought for a specific sum stated in the complaint; sometimes to compel restitution of property, but it was not confined to either. Later, we shall find the courts refusing to give both property and damages, but that is another matter. As we have seen, the courts exercised a considerable power of controlling verdicts and this, too, grows to incredible bounds, the judges not only reducing verdicts but increasing them because they believe them insufficient.⁶⁵

Again, outlawry has been suggested as one feature of trespass that made it unusually drastic in its operation, and therefore

[&]quot;Bracton's N. B. pl. 208, 242.

[&]quot;See note 63, supra.

a more popular remedy. But outlawry was a part of the entire common law. If a defendant persistently remained away from court after repeated summons, even in the action of debt, judgment was given against him by default, he was outlawed and his goods forfeited. His remedy then was to purchase a charter of pardon, and sue a scire facias against the plaintiff, in order to do what he should have done in the first place, viz., defend the action.

Apparently, then, the only virtue of the action of trespass was its extremely general or miscellaneous nature or its wider connotation. Why then its later popularity, and abnormal development?

The answer to this, apparently, is obvious, if the common law be considered from beginning to end. As has been observed, the earlier remedies were invented for instances, not for series of event. The actions of ael, bisael and cosinage are familiar examples. If you claimed of the seisin of your grandfather, you brought a writ of ael; if of the seisin of your great-grandfather, a writ of bisael; and if of some other relative, a writ of cosinage. Why should not all real actions to recover possession of land, or to vindicate the title to land, have been comprehended in an action of ejectment, or any of its synonyms? Simply because the law had not yet realized the similarity or identity of principle common to each. This, we believe, is the key to the development of the forms of action. From some hundred of different actions, existing at the time of Edward I, the common law has gradually selected two, contract and tort, which represent voluntary and involuntary action; consequences voluntarily assumed, and consequences thrust upon one. This is the only plausible reason for development of the action of trespass, the sole reason why trespass comprises so large a proportion of all modern litigation. It was the only action capable of holding all wrongs, of whatever description, just as assumpsit is the only action capable of embracing every manner of undertaking.

Nothing in the earlier cases of deceit could have warranted the supposition that they were trespasses; trespass was understood then. They are actions brought for false recoveries against plaintiffs, either by omitting to summon them, or by presenting fictitious affidavits, through fraud in the inquisition and the like.⁶⁶

In the action brought to enforce the warranty in a fine, however, there is a reasonable approach to the modern action of

T. 2 Henry III, Br. N. B. pl. 105. See also, *Ibid.*, pl. 107; pl. 168; pl. 208; pl. 296; pl. 500; pl. 645; pl. 1173; pl. 1184; pl. 1629; pl. 1747;

deceit. It is unnecessary to observe, perhaps, that the fine is equivalent to a modern conveyance of record, with this difference, that the officers witnessing the transaction, instead of being notaries public, or some other official authorized to take acknowledgments, are judges of the court. In 1225 A. D., 9 Henry III, Br. N. B. Pl. 1690, one Thomas, son of Ganfridus, was attached to reply to the widow Geve (Genevieve?) because of his failure to comply with a fine made at Westminster before the justices between Ganfridus, father of Thomas, whose heir he is, and Geve, for six shillings of rent, which Thomas refused to pay, because, says the plaintiff, her husband, Swanus, sold to Thomas her part of the chirograph (the deed or fine of the conveyance is tripartite—there are three originals written on one sheet of parchment, and when they are separated the cutting is made along a jagged line, the original or foot remaining with the court, and the other two copies going one to each party). The court having examined the foot of the fine, found that Ganfridus, father of the defendant and his heirs, held one messuage with the appurtenances in Coventry of Geva during her life, at a rental of six shillings. It was held that Geva should recover her seisin and that Thomas be in the mercy, he having defended the fine and the chirograph, and having falsely called a third person to the warranty.67

In this brief survey of the progress of trespass during six or seven hundred years, one fact surely is patent. There is no elemental fact or series of facts upon which redress is based. Possibly there is a theoretical breach of the king's peace in all trespasses, but that is merely a formality. Probably one who takes his neighbor's cattle knows what he is doing, and to that extent his trespass is an intentional wrong. But the cases discuss wrongs, and not whether they are intentional or not. In one instance they say the plaintiff has lost his cattle through his own negligence, indirectly acquitting the defendant of culpability. And since there are few or no indirect trespasses, it is fair to assume that trespass was aimed at intentional wrong, but this is no more a theory of trespass than of novel disseisin or of nuisance. It is true that these were really torts, but the law had not yet mentally connected them. As the cases show, the court will not grant relief in trespass that should have been sought in novel disseisin.

There is no suggestion in any of the cases as yet, of any approach to a legal standard of conduct. That is a product

pl. 1924. See also, 5 Henry III, Br. N. B. pl. 1946. (This is really a civil action for conspiracy, hardly a deceit.)

⁶⁷ Note the use of seisin. It is a right, not possession. The plaintiff really vindicates her right to collect six shillings of rent—her seisin.

of a later day. The standard is purely objective. The law is made cognizant that a wrong has been committed—or since this is a prejudicial statement—becomes aware of an injury—it seeks the actor—the person actively contributing to the injury—it compels him to pay the sum ascertained as damages.

In scope, in range of actionable wrongs, trespass is wide enough. If your ownership of the thing injured is not denied, trespass affords a remedy. But it is not as yet an action for damages as such. The development of the action for damages and the rise of the action on the case belong to the succeeding period.

## THE LEGAL POSITION OF THE BRITISH ARMY IN FRANCE

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An expeditionary force invading an enemy territory brings with it an entire organization, and judiciary methods which are in accordance with the law of its own country. It imposes its will upon the inhabitants and deals with property in conformity with its needs. The situation is quite different when an expeditionary force is in the territory of an allied country; it then becomes necessary for such a force to obey its own military law and at the same time respect the *lex loci* and the public opinion of the country from which it receives hospitality.

Such a situation is a delicate one on account of the necessary intercourse between the allies and the inhabitants, and the mutual dealings between individuals. The military force establishes important bases in the vicinity of the firing line; hires land for the erection of camps, pastures for remounts and veterinary hospitals, buildings for headquarters, billets and offices, and workshops for the repair of mechanical transports, lorries, wagons, locomotives, etc. It makes contracts with local builders for the erection of huts, arranges for the purchase of local supplies, and obtains native professional assistance to settle questions of damage to property and the like.

When there are numerous civil and commercial transactions between an expeditionary force and the inhabitants, a proportional number of contentions arise through injuries, thefts, assaults, and acts committed by the soldiers to the prejudice of civilians and *vice versa*—in a word, every offence which comes within the scope of criminal law.

If the British Army in France could be considered as a foreigner, it would be treated legally as a person. It should act legitimately as an alien. But such is not the case. The British Army is an integral part of the British Government. It would be incorrect to allege that the said army has a legal personality. An army is the executive power of a nation. It remains under the supervision of its national authority and depends upon the Cabinet and Parliament. The British Army, when it makes a contract in France, does so in the name of the British Government.

An army such as this, numbering millions of men defending a large front, necessarily interferes with the economic life of the allied nation; the establishment of British police, censorship, courts-martial, etc., is inconsistent with the principle of the sovereignty of the state. Abnormal conditions are created and established rules overthrown.¹

In peace times, no kind of interference by a foreign nation with the internal life and policy of another nation would be tolerated for a moment. Any decision rendered by a foreign court would have no legal value in France, and any such matter would have to be submitted to the control of French judges for revision. Hence, any criminal offence committed by foreign subjects in France are referred to French tribunals.

We may find the application of the principle of sovereignty in old customs which form the basis of modern private international law—viz., locus regit actum, lex loci rei sitae. During many years, for instance, locus regit actum was considered by French authorities as imperative, and foreigners in France were bound to make their wills pursuant to the legal French form. Similarly, and in conformity with the lex loci rei sitae, any contention in connection with real property in France must be submitted to a French court, even if such property is of foreign ownership. In all such cases is seen the care each country exhibits to maintain its own customs, laws and practices in its possessions, and to exclude any encroachment upon its national rights.

It is obvious that the existence in France of an important expeditionary force tends to interfere with these rights. However, it cannot be said that the principle of sovereignty in France is in any way abandoned by permitting the British Army to enter its territory; as a matter of fact, France has authorized Great Britain to send its army, and this decision was taken without any kind of compulsion. Therefore, the sovereignty of the French State has been respected and in no sense impugned.

The matter is more complicated when its practical side is considered together with the legal relationship between this foreign army and the French civil population. Disputes will certainly arise, and failing an amicable settlement, it will be necessary to submit them to a superior authority for final decision. What shall be this authority? Let us take an example: Twenty acres of pasture are let to the British Army, a camp is installed, roads, drainage and water pipes are laid all over the ground. After, say, six months the site is vacated and given up to the freeholder. It is necessary to value the damage and to pay a fair indemnity. If the freeholder accepts the

¹This article does not deal with the legal position of the British Army in France from a criminal point of view.

indemnity proposed by the lessor, the question is settled without difficulty. Should he refuse it, the point is to know whether French courts are competent to deal with the case, to appoint experts, and to give judgment accordingly, if necessary, against the British Army. In other words, is the freeholder in a position to summon the British Army before a French judge? Strictly speaking, the claimant cannot sue the British Army, the latter not being "a legal person" in itself, but acting in the name of a foreign state. The French courts have no right to discuss the matter, and the proper way to claim redress is through the diplomatic channel. Therefore, as the British Army is to be considered as the British State, it becomes impossible to abide by the lex rei situe, according to which the French courts ought to be competent to judge in the case, say, of a building occupied by British troops being burnt down by their own gross negligence. The courts, however, would be unable to give a decision, as a foreign state is a party in the case.

French courts having no jurisdiction over a foreign state, may a French plaintiff bring his action in England? Such a proceeding, even when practicable, would give rise to endless difficulties. The dispute arising in France, British judges would not be in a position to know all the details of the case. It would be difficult to obtain evidence, to appoint experts, to make enquiries on the spot. The procedure would be lengthy and expensive; during war, communication between the two countries is abnormal and costly. Nor would the claimant be very desirous of calling upon a jurisdiction quite unknown to him. As a general rule, he would rather accept a disadvantageous amicable settlement than run the risk of a foreign law suit. It should also be borne in mind that British courts would, in many instances, refuse to deal with any such action brought before them. They would also be bound to respect the lex rei sitae, and would be incompetent to decide upon questions concerning real property in France on these grounds.

French plaintiffs being unable to obtain redress by instituting proceedings against the British Army in France, is it not possible for them to sue the French Government direct? It might be argued that the French Government must be held responsible for all kinds of offences committed by a foreign expeditionary force which has been permitted to land on its territory. A diplomatic convention between France and Great Britain was signed about the end of 1915 based upon the above hypothesis, thus settling the question open for nearly one and a half years. It must be recognized that the British Army has made every possible attempt during this period to meet the French claimant. Special services have been either instituted

or increased for the careful examination of all claims, and it may truly be said that the great majority of claims have been settled either directly or through arbitration. Some special cases have, of course, been submitted to law courts, but they are very few. The branches of the British service which have to deal with claims are: first, the commanding Royal Engineer of each base, for all hiring of houses, buildings or lands for which contracts have been made; second, the Central Requisition Office, for personal and real property for which a requisition order has been issued; third, the Claims Commission, for all claims where there is no written document.

What is the policy of the diplomatic convention between France and Great Britain? When the British authorities have tried by every means to settle a claim amicably and failed, all the documents are forwarded to the French Minister of War. As soon as they are in the possession of the French authorities, the French Government in its own name institutes proceedings before the competent tribunals. The British services, however, keep in touch with the case; they must be consulted when an appeal is possible, and they may give their opinion as to the desirability of accepting the decision of the court. They may appoint representatives to follow the procedure and to see that British interests are carefully guarded. As regards the indemnities to the plaintiff, if any, they are paid by the British to the French Government, which takes the necessary steps to have the sums handed over in the usual way. Therefore, the British authorities do not appear in court. The French Government acts, and wins or loses the case. This diplomatic convention was not only useful to meet a situation which obviously could not be allowed to continue, but it became a legal necessity. Had no convention been arranged, French courts might allege their incompetence on the ground that the French Minister of War acts as agent for the British Government. Diplomacy overcame this difficulty. A nation which agrees to accept decisions in the courts of a foreign country relinquishes its privileges of sovereignty.

The system adopted may work satisfactorily during the war, chiefly because claimants rarely resort to legal proceedings. This is due to the patriotic and equitable spirit animating British authorities and French citizens. But it is doubtful whether such a procedure will work smoothly after the cessation of hostilities, when camps, lands and buildings will be speedily vacated and the proportion of claims naturally increased. Note also, that the allied armies are mostly centralized in certain regions, and that the courts concerned would be inundated with actions. In Rouen alone, where thousands of acres have been leased

and hundreds of houses rented, the existing courts would have to deal with all the British cases as well as execute their local civil functions. Similar disability would occur at Havre, Boulogne, Calais and all the other bases.

It therefore appears desirable to organize a new scheme capable of meeting whatever conditions are created by the declaration of peace. Needless to say, any such scheme must present guaranties for both sides. Each region of France where the allied forces have important establishments might be provided with a local tribunal which should deal with all matters in which allied interests are concerned. This local tribunal should be composed of French judges assisted by British and American lawyers especially appointed by their respective governments. Two or three appeal courts should be created on similar lines, and the general jurisdiction should be legally assimilated with that of the established French tribunals.

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#### LIABILITY OF BANK AFTER PAYING CHECK FRAUDULENTLY RAISED BY FILLING SPACES LEFT IN DRAWING

The drawer issues a check in which are spaces before and after the words and figures indicating the amount. The spaces are filled by another without authority from the drawer, and the amount is thus raised without giving the check an appearance to excite suspicion. Can the drawee bank, which in good faith pays the raised check, charge the entire amount against the drawer?

Ninety years ago Young v. Grote¹ answered this question in the affirmative. A case recently decided by the English Court of Appeal reaches the opposite conclusion, affirming the judgment of the lower court which found that the drawer was not guilty of any negligence which misled the bank, and if he was guilty of negligence, the

¹ (1827 Eng. C. P.) 4 Bing. 253. Accord, Timbel v. Garfield Nat'l Bank (1907, N. Y.) 121 App. Div. 870; 106 N. Y. Supp. 497. See also 8 C. J. 734 for conflict as to application of Young v. Grote to actions by innocent purchasers against acceptors, makers and endorsers.

negligence did not cause the loss. Macmillan v. London Joint Stock Bank (C. A.) [1917] 2 K. B. 433.

The bank and the drawer stand in the relation of debtor and creditor. The bank by the contract acquires the power of discharging its debt by paying genuine orders, and is also under a duty to honor genuine orders or answer in damages. The depositor has entirely within his control the creation of an existing state of facts which will compel the performance of the bank's duty to him and enable the bank to exercise its power of discharging its debt to him. In the instant case the bank has attempted to exercise its power in reliance on an appearance of the existence of those facts, which appearance has resulted from a third party's criminally taking advantage of the drawer's failure to observe the ordinary business methods intended to prevent such crimes. It is legally possible to place the responsibility for the resulting loss on the depositor in several ways. We may say the bank under the circumstances acquired no power so to discharge its debt, but can hold the depositor in tort for damages for the difference between the genuine and raised check; or, to avoid circuity of action, allow the bank to use its right of action as a set-off in the action by the depositor against it. But the most direct way of placing responsibility on the drawer is to say that the bank under the circumstances has the power to discharge its debt by honoring the raised order. If we adopt this conclusion we in effect say that a change in the legal relations of bank and depositor has resulted from the wrongful act of the holder in filling in the spaces. It is clear that the holder had no right to collect the check when raised for the drawer was not under any duty to him after the check had been altered; nor had he the privilege of collecting, for he was under a duty to the drawer not to collect more than the amount of the original check. Then responsibility for the results must be placed on the depositor because, in view of his acts, a power is given the holder by law to subject the depositor to the liability of being divested of his legal rights under his contract with the bank. Professor Hohfeld has thus described legal powers: "A change in a given legal relation may result from . . . some superadded fact or group of facts which are under the control of one or more human beings," in which case, "the person whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem."2 Again, "legal powers and correlative liabilities involving the divesting of legal and equitable rights in rem (and other jural relations belonging to the particular aggregates involved) have existed from the earliest times. Such powers are created by the law on various grounds

² Prof. Wesley N. Hohfeld, Fundamental Legal Conceptions (1913) 23 YALE LAW JOURNAL 16, 44.

of policy and convenience." The problem then is simply one of the naked legal *power* of the wrongdoer and the correlative *liability* of the drawer.

An examination of the powers thus described shows, first, that the exercise of the power divests legal rights and does not merely give rise to liability ex delicto. P through A as agent loans money to T and leaves T's note and mortgage in A's possession but gives A no authority to collect. Payments made by T on account discharge the debt pro tanto.4 Again the maker of a bearer note who pays it at maturity in good faith to the thief in possession has discharged his debt to the true owner.5 Second, the law does not create the power because of negligence on the part of the person whose legal relations are changed by its exercise. The power of the thief to give an indefeasible right to the purchaser in good faith of negotiable bonds payable to bearer stolen from the owner's safe is not created by law because of the owner's negligence in the manner in which he kept the bonds, but simply in view of the fact that he failed to retain them in his possession.6 The liability of a partner on new contracts made by his associates after dissolution is not because of his negligence in failing to give notice, for it is immaterial that sufficient time has not elapsed in which to give notice,7 or that reasonable efforts have been made to give notice.8 There is of course no agency in fact, but a power given by the law on grounds of business policy. Third, the act or omission of the person against whom the power is exercised need not be the "proximate cause." It is sufficient if it is in the chain of causation and the circumstances are such that sound policy and business convenience require that the power be given.

In each of the above illustrations there is the intervention of the independent wrongful acts of the one exercising the power, and in some instances the acts are criminal. To say that the drawer is not responsible because he is not guilty of negligence, and that even if he is negligent, the crime, not the negligence, is the "proximate cause," is to leave unanswered the question, whether the law should not, in situations like the one under consideration, as a matter of business convenience and in the interest of fair dealing, give the holder the power, by certain acts, to confer upon the bank the power of discharging its debt to the drawer by honoring the raised instrument.

^{*}Fundamental Legal Conceptions (1917) 26 YALE LAW JOURNAL 710, 756. See also Prof. Walter W. Cook, Powers of Court of Equity (1915) 15 COLUMBIA L. REV. 228, 251.

^{*}Crane v. Gruenewald (1890) 120 N. Y. 274, 24 N. E. 456.

⁵ Greve v. Schweitzer (1875) 36 Wis. 554. N. I. L. secs. 88, 119.

^e Professor Underhill Moore, Theft of Incomplete Negotiable Instrument and Negotiation to a Holder in Due Course (1917) 17 Columbia L. Rev. 617.

⁷ Bristol v. Sprague (1832, N. Y. Sup. Ct.) 8 Wend. 423.

⁸ Austin v. Holland (1877) 69 N. Y. 571.

The problem being one of business convenience and policy, its solution must depend largely on the actual method by which the bank of necessity conducts its checking business, the business world's conduct and understanding in the premises, and the economic policy of both law and business of encouraging as far as possible the use of this species of credit as a substitute for money in the transaction of business.

The bank is not in the position of the ordinary debtor. The latter may refuse to pay an agent at all or postpone payment until direct inquiry has been made of his principal as to the agent's authority. In either event he has not increased his legal liability, and, as the transaction is more or less isolated, the business world does not suffer. On the other hand the bank must act immediately and act only on the appearance of the check itself. The bank cannot refuse to honor genuine checks if there are funds of the depositor's on hand, without subjecting itself to an action for damages for injury to his credit. It cannot inquire of each of its thousands of depositors as to the validity of each check. Not only would this be impracticable, but the delay would be intolerable to the business world and would end the usefulness of checks as a quick means of transferring credits.

That the business world appreciates the bank's situation and the necessity of guarding against check raising is clear from the almost universal practice of drawing lines in spaces, if any, before and after the words and figures fixing the amount the check calls for, and from the now common use of cutting and stamping devices to indicate the amount. Business men know that erasures by chemicals or other means leave tell-tale marks in the check and that when a check is so drawn that it can be raised without making erasures, by merely filling spaces, the bank is deprived by the carelessness of the drawer of its most important means of detecting an alteration. It is probably true that these precautions are due mostly to an understanding among business men that the responsibility for losses resulting from loosely drawn checks falls on the drawer, an understanding which accords with the opinions of most of the leading text writers. To place the responsibility on the drawer would seem to mean simply bringing the law into accord with the business world's conduct and understanding of what the situation demands.10 J. W. E.

^{*}Glennon v. Rochester Trust, etc., Co. (1913) 209 N. Y. 12, 102 N. E. 537, holding that the administrator of a depositor could not recover from the bank the amount of a check drawn by the intestate but paid after his death, of which the bank was ignorant. In effect, the court, on grounds of business policy, gives the holder of the check a power which will divest the legal rights of the administrator. Leighton v. Bank (1917, Mass.) 116 N. E. 414 (insane drawer); Riley v. Albany Savings Bank (1885, N. Y. Sup. Ct.) 36 Hun 513.

¹⁰ Commercial Bank v. Arden (1917, Ky.) 197 S. W. 951, reported since the above was written, holds that the drawer, under facts like those of the principal

### WHAT LAW GOVERNS THE QUESTION OF PURCHASE FOR VALUE OF NEGOTIABLE INSTRUMENTS

A case recently decided by the Supreme Court of Wisconsin raises the question whether the law of the state governing the contract of the maker of negotiable paper, or the law of the state where such paper is acquired, determines what constitutes a purchaser for value. Suit was brought in Wisconsin to foreclose mortgage bonds issued by a Wisconsin corporation in that state. The bonds were void in the hands of the original holders for fraud and want of consideration, but were valid in the hands of bona fide holders in due course. A accepted some of the bonds in New Mexico from B as collateral security for an antecedent debt. Under the law of Wisconsin such a transfer would not constitute a transfer for value. A offered evidence to show that he was a holder for value under the law of New Mexico, but the evidence was excluded, the court holding that Wisconsin law governed. Badger Machinery Co. v. Columbia, etc., Lt. & Power Co. (1917, Wis.) 163 N. W. 188.

Several views have been expressed with regard to the above question. According to one view, the matter being one of general commercial law, the law of the forum should govern.² In the federal courts it is the settled rule that in matters of general commercial law, or of general instead of local law, the federal doctrine will be applied and not the rule obtaining in any particular state.³ This doctrine was established by the Supreme Court of the United States, no doubt, for the purpose of creating, so far as it lay within its power, a uniform body of law relating to commercial transactions. Some of the state courts have assumed to exercise the same prerogative of following their own law in the above class of cases, although they are not in a position to allege a similar justification or excuse.⁴ If the law of a

case, is not responsible, as Sec. 124, N. I. L., avoids an altered instrument except as against a party who has made, authorized or assented to the alteration. While this provision may fix the liability of the depositor as a party to a negotiable instrument to subsequent purchasers of the instrument, it is submitted that the section does not determine his liability arising out of the special relation of bank and depositor.

- ¹ Wis. Stat. 1898 Supp. sec. 1675-51.
- ² Professor Ames would apply the law of the forum because, in his opinion, the question is one of commercial law and not one of jurisdiction. 2 Ames, Cases on Bills and Notes, 806.
- *Swift v. Tyson (1842, U. S.) 16 Pet. 1, 10 L. Ed. 865; Baltimore & Ohio R. Co. v. Baugh (1893) 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772.
- ⁴Franklin v. Twogood (1868) 25 Iowa, 520; St. Nicholas Bank v. State Nat. Bank (1891) 128 N. Y. 26, 27 N. E. 849; Roads v. Webb (1898) 91 Me. 406, 40 Atl. 128; Alabama Mid. Ry. Co. v. Guilford (1903) 119 Ga. 523, 46 S. E. 655. The great majority of states hold to the contrary. See, for example: Sykes v. Citizens National Bank (1908) 78 Kans. 688, 98 Pac. 206; Forepaugh v. Delaware, L. & W. R. Co. (1889) 128 Pa. St. 217; 18 Atl. 503; Limerick Nat. Bank v. Howard (1901) 71 N. H. 13, 51 Atl. 641.

particular state is applicable under the rules of the Conflict of Laws of the forum, there is no good reason why these rules should be set aside when the matter in question is one of common law or of general commercial law. The rules of the Conflict of Laws are based upon considerations of justice, and if in consequence of such considerations the law of a foreign state is to control, it goes without saying that the nature of the subject matter involved, whether it be of statutory origin, or one of common law, or of general commercial law, should be of no consequence.

Another view is to the effect that the law of the state where a negotiable instrument is acquired by the holder should control the question of "value." This law governs, of course, the rights of the holder against the party transferring or negotiating the instrument to him. But why should it control as regards remote parties, be they indorsers, acceptors, or makers of promissory notes or negotiable bonds? Should not the nature of their contracts and the extent of the obligations assumed by them remain fixed, unaffected by the fact that the instrument may circulate in states or countries where a different law may prevail?

The third view answers the question just stated in the affirmative. This view is clearly correct, both on theory and from the standpoint of expediency. The principle of certainty which underlies the whole subject of bills and notes demands that the liability of each party be fixed by one law. Whether the contract of the maker of a promissory note or negotiable bond should be subject, on correct theory, to the law of the place where such instrument is issued, that is, delivered, or to the law of the place where it is payable, or even to the law of the place where the signature was affixed or where the company had its seat, need not be determined, as in the instant case all of these places coincided. Where the law of the place of payment differs from that of the place of issue the Supreme Court of Wisconsin applies the former law and in so doing it follows the great weight of authority in this country.

The tenor of the maker's contract must naturally be ascertained by reference to the law governing his contract and cannot vary with respect to the different holders of the instrument. This law will

^{*}Brook v. Vannest (1895, Ct. App.) 58 N. J. L. 162, 33 Atl 382.

Woodruff v. Hill (1874) 116 Mass. 310; Houston v. Keith (1911) 100 Miss. 83, 56 So. 336.

⁷For a discussion of this problem, see Lorenzen, The Rules of the Conflict of Laws Applicable to Bills and Notes, I MINN. L. REV. 239-256.

^{*}Brown v. Gates (1904) 120 Wis. 349, 97 N. W. 221, 98 N. W. 205; International Harvester Company v. McAdam (1910) 142 Wis. 114, 124 N. W. 1042.

^{*}Brabston v. Gibson (1850 U. S.) 9 How. 263, 13 L. Ed. 131; Mason v. Dousay (1864) 35 Ill. 424; Hunt v. Standart (1860) 15 Ind. 33; Berger v. Farnham (1902) 130 Mich. 487, 90 N. W. 281.

determine the nature of the instrument that is executed and the defenses that may be available to him. ¹⁰ If the controlling law allows the maker to set up a personal defense even against a holder in due course, such law should be followed in every other jurisdiction, although the municipal law of the forum and of the place where the plaintiff acquired the instrument may be to the contrary. ¹¹ The question of what constitutes a holder for value concerns the extent of the defendant's obligation. Has the defendant agreed that he will not avail himself of any personal defense as against a party who may acquire the instrument as collateral security for an antecedent debt? In accordance with the above point of view the law governing his contract in general should furnish the answer to this question, and this is the rule which is supported by the weight of authority in this country. It appears to be also the view followed by the principal case.

The case of *Embiricos v. The Anglo-Austrian Bank*¹² is not inconsistent with the above conclusion. That case in its broadest interpretation holds only that a title acquired in a mode recognized by the law of the place of transfer is binding upon the maker, though such transfer does not conform to the municipal law of bills and notes of the state governing the maker's contract. It is a qualification of the ordinary principles of the Conflict of Laws applicable to bills and notes which is based upon the analogy of the law governing chattels.

E. G. L.

## INDIVIDUAL LIABILITY OF THE OFFICERS OF A NON-COMPLYING FOREIGN CORPORATION

It is not good to be a non-complying foreign corporation; to be a part of one is worse. There are statutory fines for the corporation doing business without obtaining authority in the prescribed fashion. Many courts hold contracts with such a corporation enforceable against it, but not in its favor.¹ Officers and directors are sometimes made sureties for corporate debts.² And a few states, with which Illinois

¹⁰ Brabston v. Gibson, supra.

¹¹ Ory v. Winter (1826, La.) 4 Mart. N. S. 277.

¹² (C. A.) [1905] 1 K. B. 677, 74 L. J. K. B. 326.

¹United Lead Co. v. Reedy Elevator Mfg. Co. (1906) 222 Ill. 199, 78 N. E. 567; Parke, Davis and Co. v. Mullett (1912) 245 Mo. 168, 149 S. W. 461, approved in the principal case as exemplifying "one of the ordinary principles of law"; 25 L. R. A. 569, and cases cited. But see as to estoppel of one who deals with such a corporation, Second Natl. Bk. v. Hall (1878) 35 Oh. St. 158, 166; and note 14a infra.

² Slater v. Taylor (1909) 241 Ill. 102, 89 N. E. 271. And the agent as well as the corporation may be subject to a statutory fine. Wis. Stat. 1911, chap. 85, sec. 1770b II.

has now aligned itself by the decision in Joseph T. Ryerson & Son v. Shaw (1917) 277 Ill. 524, 115 N. E. 650,³ add officers' and directors' direct individual liability for claims arising out of business done in the state in the corporate name. Nor is this all. There is more than an intimation of the final step in the development: that the court is ready under such circumstances to hold stockholders, too, as partners.⁴

Individual liability has been imposed upon stockholders of a foreign corporation by statute in Colorado, California, and elsewhere;⁵ when so imposed, it has been recognized by the Federal Supreme Court, though the state of incorporation expressly provided against individual liability, and though the stockholder was sued in a third state.⁶ But Illinois has no such statute; the court reasoned on common law principles.

Now partnership liability in the stockholders has not been without recognition at common law. Sometimes it is imposed because the court, finding fraud in the act of incorporation, refuses to recognize the latter as valid at all; sometimes because corporate action before compliance is held beyond the corporators power, so that they are treated as partners, like any body of individuals doing business without authority to act as a corporation; or the stockholders liability, though impliedly admitted, may be limited to business of a sort prohibited from

³S. c. below (1916) 201 Ill. App. 445. A collection of authorities on this point can be found in L. R. A. 1917 B, 574.

⁴The holding is made to follow from Hill v. Beach (1858) 12 N. J. Eq. 31; Taylor v. Branham (1895) 35 Fla. 297, 17 So. 552, is expressly approved.

^{*}Mill's Ann. Stat. Col. 1912, §501; N. D. Rev. Codes 1905 §4698, applied in Chesley v. Soo Lignite Co. (1909) 19 N. D. 18, 121 N. W. 73; Cal. Const. art. xii, §3; Civ. Code §322, applied in a series of cases ending with Provident Gold Mining Co. v. Haynes (1916) 173 Cal. 44, 159 Pac. 155. It is to be noted that the liability imposed by California is for a share of the corporate debt proportional to the share of the stock held by the defendant. For a discussion of this line of cases, see COMMENTS (1916) 26 YALE LAW JOURNAL, 143.

^{*}Thomas v. Matthiessen (1914) 232 U. S. 221, 34 Sup. Ct. R. 312: the corporation had been organized in Arizona to do business in California and elsewhere; a charter provision exempting stockholders from individual liability was held nullified pro tanto by another charter provision authorizing business to be done outside Arizona, hence necessarily in accordance with the laws of the place of any outside transaction; the stockholder was successfully sued in the Federal courts in New York. Cf. Leyner Engineering Works v. Kempner (1908, C. C. S. D. Tex.) 163 Fed. 605, which refused to apply the Colorado statute to a Texas corporation, because the stockholders had nowhere assented to be individually liable.

⁷ Montgomery v. Forbes (1889) 148 Mass. 249, 19 N. E. 342; Davidson v. Hobson (1894) 59 Mo. App. 130; Journal Co. v. Nelson (1908) 133 Mo. App. 482; 113 S. W. 690.

⁸ Cunnyngham v. Shelby (1916) 136 Tenn. 176, 188 S. W. 1147, developing from Morton v. Hart Bros. (1890) 88 Tenn. 427, 12 S. W. 1026, where the foreign corporation's agent was held.

transaction without a permit; or to business which cannot in the state concerned be done by any corporation. In many of the cases which hold the stockholders the motive underlying the decision appears to be the desire to frustrate a palpable attempt by the defendants to slip by the law. And in the lack of some such special circumstance the cases lean—and properly—toward denying direct recovery against stockholders, treating the non-complying foreign corporation in this respect as if it were de facto. The true principle would seem to be that the law and the creations of the law of any state should be held good unreservedly in every other state, where they do no violence to rule or policy of the forum, or of the state of the transaction which are in these cases almost always the same.

Such is not the reasoning of the principal case:¹³ there the basic proposition is extraterritorial non-existence of a corporation. It is not clear how, on such a base of theory, the court can also build the non-complying corporation's liability to be sued on within-state transactions. Against a being which "exists only in contemplation of law," and that only inside the state of its creation, suits are to be brought—and are in fact brought—in a court where the being "does not exist at all!"

This liability of the corporation to be sued as a corporation, however, fits joint for joint with the true common law principle outlined above. Disability, where imposed, to sue on a contract made without

^{*}Lescher & Sons Co. v. Moser (1913 Tex. Civ. App.) 159 S. W. 1018, 1026.

10 Empire Mills v. Alston Grocery Co. (1891, Tex. Civ. App.) 4 Willson 346,
15 S. W. 505; and see Mandeville v. Courtright (1905, C. C. A. 3d) 142 Fed. 97.

It is to be noted in the above cases that the distinction between agents' liability and that of stockholders was not always before the court's mind, as the defendants were often related to the corporation in both capacities. The language of the decisions therefore demands careful reading before conclusions are drawn. It is dubious, e. g., whether Mandeville v. Courtright can fairly be cited at all on the liability of stockholders as such.

¹¹ Merrick v. Van Santvoord (1866) 34 N. Y. 208; Second Natl. Bk. v. Hall (1878) 35 O. St. 158; Boyington v. Van Etten (1896) 62 Ark. 63, 35 S. W. 622; and see Natl. Bk. v. Spot Cash Coal Co. (1911) 98 Ark. 597, 605, 136 S. W. 953, 956; and Tribble v. Halbert (1910) 143 Mo. App. 524, 127 S. W. 618.

See Bateman v. Service (1881) L. R. 6 App. Cas. 386, 389, cited Comments (1917) 26 YALE LAW JOURNAL, 481, 484, where the problem is discussed from the standpoint of conflict of laws; Merrick v. Van Santvoord (1866) 34 N. Y. 208, 215.

Nor, indeed, of most cases, unfortunately. For an excellent theoretical treatment of the disconcerting fact that corporations do not break out over the map in blotches, like measles, see *Merrick v. Van Santvoord, supra*. After all, a corporation is at bottom only an association of persons having a particular mode of doing business, decked about with fictions; on this see articles on the individual liability of stockholders by Professor Wesley N. Hohfeld, 9 Col. L. Rev. 285; 9 ibid. 492; 10 ibid. 283; 10 ibid. 520.

complying, should be deemed a penalty—like statutory fines¹⁴—laid by the policy of the state on attempting corporate business without authority.¹⁴² Or, where policy forbids business without compliance, the agent who knowingly breaks over the law may properly be held by those who relied on his misrepresentation:¹⁵ that the corporation would be available, should suit be necessary. That seems the crux of the agent's fault; only in that can damage consist from misrepresentation of "authority," whether indemnity be sought in an action for deceit or in one for breach of warranty. But it is clear that no such theory of agency would suffice to hold the officers and directors where the corporation itself is in fact subject to suit; ¹⁶ and the principal case states that it is so subject.

The court avoids the difficulty by treating officers and directors as partners, as some states treat the stockholders: a body doing business without authority to be a corporation. Between agents actively managing the concern, to whose direct fault non-compliance can be traced, and stockholders relying on such agents there is a difference, one none can help but feel. A distinction in individual liability based on that difference is sound.¹⁷ Whether any court take the final step is a matter of pure policy. But it is to be regretted that in going this far Illinois thought it good to base its decision on cases embodying the dubious theory of an agent's "common law liability as principal" where he contracts without authority, and on that ghost of a ghost, a corporation's extraterritorial non-existence.

K. N. L.

¹⁴ Oliver Co. v. Louisville Realty Co. (1913) 156 Ky. 628, 161 S. W. 570.

¹⁴a Citizens' Natl. Bk. v. Bucheit (1916 Ala.) 71 So. 82. The de facto corporation analogy is sometimes applied to estop a defendant who has dealt with the corporation to deny its authority; Second Natl. Bk. v. Hall, supra. There is, however, a valid distinction in that the non-complying foreign company having taken no bona fide step to bring itself within the law, lacks the buttressing of public policy. Power to incur only duties or liabilities without corresponding advantages is rare in our law, but is here and there to be found. That is the nature of a non-complying corporation's power, under the disabling mentioned in the text. Somewhat akin is the power of a discharged bankrupt to come under a duty, by a mere promise, to pay any debt from which his bankruptcy discharged him; or, indeed, the power of a person, by a gratuitous sealed instrument, to impose a legal duty upon himself.

¹⁵ Cf. Mechem, Agency, 2d ed. § 1395.

¹⁶ See (1917) 12 ILL. L. REV. 207. Of course this argument fails as to agents of insurance companies, where the qualification rules are directed to the company's solvency; which, consequently, the agent is held to guarantee. *Morton v. Hart Bros., supra*; and see *Vertrees v. Head* (1910) 138 Ky. 83, 91, 127 S. W. 523, 526. But cf. Jones v. Horn (1904) 104 Mo. App. 705, 78 S. W. 638.

²¹ See Mandeville v. Courtright, supra, 100; Second Natl. Bk. v. Hall, supra, 166.

²⁶ Lasher v. Stimson (1892) 145 Pa. St. 30, 23 Atl. 552, quoted and affirmed Raff v. Isman (1912) 235 Pa. St. 347, 84 Atl. 352.

## JURISDICTION TO DETERMINE THE VALIDITY OF CLAIMS OF NON-RESIDENT DEFENDANTS

People whose business interests extend to several states,—and there are daily more of these as society increases in complexity,—need to know how far the law will protect their interests in their absence and how great is the liability that their interests may be destroyed or injured in judicial proceedings unknown to them. It seems therefore, that something of certainty and uniformity is as much to be desired in this field of law as in any other.¹ That there is, however, nothing even approaching uniformity and certainty will appear as the cases are discussed.

The following are the facts or the case of National Council of Knights and Ladies of Security v. Scheiber (1917) 163 N. W. 781, recently decided in Minnesota. The plaintiff, a fraternal insurance society, brought an action in equity to cancel an insurance policy which it had issued on the life of Mrs. Anna Scheiber, the original defendant. Before the trial Mrs. Scheiber died and, upon motion of the plaintiff, the court substituted as defendants the two beneficiaries² one of whom was a resident of California and had been served in that state only. The latter entered his appearance to contest the jurisdiction of the court.³ Upon a ruling against him, he appealed to the Supreme Court, which decided that jurisdiction had not been acquired and reversed the order below.

Though, as a preliminary in this case, it be conceded that the statute which authorized the substitution of new parties intended to cover the case of non-residents, there remains the question whether a judgment against the non-residents is due process of law.³ As to a purely personal action the rule of *Pennoyer v. Neff*⁴ settles that it is not. The Supreme Court of Minnesota, adopting the view that this action was purely personal, decided likewise.

As opposed to this view, however, in an action in Tennessee by one beneficiary against the insurance company and another beneficiary (a non-resident not served in Tennessee) to extinguish the alleged

¹The very general knowledge by the laity of the fairly uniform rule that real estate may be sold for taxes without any personal service on the owner has probably been of considerable advantage to tax collectors and property owners alike.

² The court acted under a statute which provided for the substitution of the successor in interest of a deceased party when the cause of action was one which survived. Minn. Gen. St. 1913 Sec. 7685. The opinion laid it down without discussion that this statute was intended to cover the case of a non-resident successor in interest. This interpretation may be questioned.

The mere filing of a plea in abatement to contest the jurisdiction may, without violation of due process to the pleader, be seized upon by a state court as ground for assuming jurisdiction of the case to try the merits. Chicago Life Ins. Co. v. Cherry (1917) 244 U. S. 25, 37 Sup. Ct. 492.

^{4 (1877) 95} U. S. 714.

wrongful claims of the latter in the policy of insurance, it was held by a divided court that sufficient jurisdiction had been obtained to adjudicate the rights of the parties. The majority considered the action as quasi in rem⁶ and hence not within the rule of Pennoyer v. Neff. By way of comparison, it is to be noted that the facts of the Minnesota case went a step farther but involved much the same principles. The suit there was that of the debtor insurance company itself, instead of that of a creditor, to extinguish the rights of a non-resident third party. And to this particular type of case, there may be an instinctive objection, since it would permit a debtor to get rid of his debt without personal jurisdiction of his creditor.

The close resemblance of the facts in the Minnesota and Tennessee cases to those concerned in attachment and garnishment invites a comparison, even though as to the latter the states are in hopeless conflict and it is consequently doubtful if many generally accepted principles can be fished from the whirlpool of confusing decisions.

Taking the simplest case first, let us assume that A of California owes B of Minnesota \$1,000 and B finds in Minnesota tangible property, land or chattels, which belong to A. This property may be attached, and the Minnesota court has jurisdiction to extinguish A's rights in the particular physical objects or acres of land which are in Minnesota, even though A has not been personally served and actually knows nothing of the suit. It does not violate the rule of Pennoyer v. Neff because it is a proceeding quasi in rem and no personal judgment against A is attempted. The situation would not be different if A had gold coin or bills in a safety deposit box within the jurisdiction, for money is attachable; but it would be different if A had "money on deposit" in the First National Bank of St. Paul, for in such a case there would be no specific physical thing to be attached. Under the usual arrangement between bank and depositor, the bank is a debtor, not a custodian, bailee or trustee of a particular fund.

⁶ Perry v. Young (1916) 133 Tenn. 522, 182 S. W. 577.

This view seems to have been founded principally on the fact that the policy itself, a physical thing, was within the jurisdiction of the court. Attachment cases form an analogy to support the decision from this angle. The reasoning in this comment, however, seeks rather to pursue the analogy of garnishment cases, jurisdiction over the debtor being the essential feature.

⁷ The two dissenting judges regarded this as a personal action and consequently reached the same result as that in our Minnesota case.

^{*}Despite a curious technical rule in early English cases, that money could not be sold, hence could not be attached. Cf. Knight v. Criddle (1807 K. B.) 9 East 48 with Turner v. Fendall (1801 U. S.) 1 Cranch 117, 133.

^{*}This difference is clearly brought out in a case which involved both attachment and garnishment proceedings to reach "money on deposit." National Bk. of the Republic v. Young (1905) 125 Ill. App. 139. For general consideration of proceedings in rem and in personam see Professor Cook, 15 Col. L. R. 106-141; also 26 Yale Law Journal, 760-766.

For such cases a broader kind of attachment has been provided by statute, namely, garnishment proceedings. Whereas in the attachment case above assumed, the result of the suit would be to extinguish the rights of A in or concerning a particular physical tangible mass or object, for example, a parcel of land or a carload of wheat, in the garnishment case, the result is to extinguish the rights of A against a particular person, the debtor Bank. And, dismissing temporarily the individual idiosyncrasies of the several states, to that is what has been held: A cannot collect of the bank the amount garnished by B.11

It is not much of a step from these facts to those of the Tennessee case previously mentioned. Whereas a garnishment is a proceeding in a court having jurisdiction of a debtor to extinguish his absent creditor's rights, the suit in Tennessee was a proceeding in a court having jurisdiction of a contingent debtor, the insurance company, to extinguish the rights of an absent contingent creditor, the beneficiary. Although there would seem to be no difference in principle, there is this actual distinction between the cases—the garnishment case is expressly provided for by statute; the other is not. But in an appeal before the United States Supreme Court, which involved at once the two kinds of suits here considered, the decision attempted a distinction in principle, not altogether clear, and did not rely upon a garnishment statute. It held that California need not recognize the decision of a Pennsylvania

io Many of the differences arise out of the theory that garnishment reaches a thing, the debt, and that this debt must therefore have a situs. The situs is then fixed at one of several places: (1) the domicile of the debtor, in which case it follows that he may not be garnished on a trip to another state; (2) the domicile of the creditor, in which case as pointed out by the court in Lancashire Ins. Co. v. Corbetts (1897) 165 Ill. 592, 597-598, 46 N. E. 631, 632, there could be no such thing as a foreign garnishment; (3) the designated place for payment of the debt if it be also the jurisdiction in which the creditor resides. See Louisville & N. R. R. v. Nash (1898) 118 Ala. 477, 23 So. 825; Bragg v. Gaynor (1893) 85 Wis. 468, 55 N. W. 919; American Cent. Ins. Co. v. Hettler (1893) 37 Neb. 849, 56 N. W. 711; Wyeth Hdw. & Mfg. Co. v. Lang & Co. (1895) 127 Mo. 242, 29 S. W. 1010. In Harris v. Balk (1905) 198 U. S. 215, 25 Sup. Ct. 625, Mr. Justice Peckham holds that the question of situs is immaterial; the obligation of the garnishee exists wherever he may be found. See also National Fire Ins. Co. v. Chambers (1896, Ch.) 53 N. J. Eq. 468, 477, 32 Atl. 663, 667-678.

[&]quot;Harris v. Balk, supra, requiring North Carolina to recognize a garnishment in Maryland which extinguished the rights of a North Carolina creditor who was not under the jurisdiction of the Maryland Court. Stelizer v. Chicago, etc. (1912) 156 Ia. 1, 134 N. W. 573, recognizing a garnishment in Illinois which extingushed the rights of an Iowa party served by mail only. One practical objection to the extension of the old attachment rule to debtors by way of garnishment is that while a person is fairly likely to keep track of his property through agents, he is neither likely nor able to keep track of his debtors. The objection is partly, perhaps altogether, met by the rule in Harris v. Balk that the garnishee must immediately notify his creditor of the suit on pain of having to pay twice.

court extinguishing the rights of a resident of California in an insurance policy, although the debtor company was before the Pennsylvania court. If this case be followed, the rule of Harris v. Balk will not be extended by the United States Supreme Court to other than garnishment cases. (But see the very recent case of Hartford Life Insurance Co. v. Barber, which requires the Supreme Court of Missouri to recognize a Connecticut decree extinguishing the rights of a Missouri beneficiary who was not before the Connecticut court. Aside, however, from the statutory differentiation, which, it should be noted, has not been urged by the cases, is there any reason why such an extension would fail to be due process of law? Is there any valid ground, when the analogy of garnishment cases is considered, for holding the decree in Perry v. Young and that of the lower court in Minnesota so utterly unreasonable as to be not due process? It is somewhat difficult to see that there is.

M. S. B.

#### ADMIRALTY JURISDICTION AND STATE COMPENSATION ACTS

The Supreme Court of the United States, by that five to four division, unfortunately so usual in the determination of important constitutional questions, has ruled that state workmen's compensation acts cannot apply to any cases coming within the jurisdiction of admiralty. Southern Pacific Co. v. Jensen (1917) 37 Sup. Ct. 524. This decision was given upon the same day that another important limitation upon the extent of state compensation acts was announced

[&]quot;New York Life Ins. Co. v. Dunlevy (1916) 241 U. S. 518, 36 Sup. Ct. 613. Cf. Kelly v. Norwich Un. Fire Ins. Soc. (1891) 82 Ia. 137, 47 N. W. 986, refusing to admit as evidence the record of a suit in a lower court of New York against the insurance society to extinguish Kelly's rights, he, a resident of Iowa, not having been served in New York. The New York Court of Appeals adopted the Iowa view and later reversed the Supreme Court Order which had been disregarded in Iowa. Mahr v. Norwich Un. Fire Ins. Soc. (1891) 127 N. Y. 452, 28 N. E. 391. Cf. Stevenson v. Anderson (1814, Ch.) 2 Ves. & B. 407, 411, in which Lord Eldon held he would protect the plaintiff against the claims of non-residents who had been personally served outside the jurisdiction and who refused to appear.

¹² (1917 U. S. Sup. Ct.) Nov. 19th, October term, No. 252. It appears that in this case the insurance company was not a debtor but a trustee of a particular fund. Barber v. Hartford Life Ins. Co. (1916) 269 Mo. 21, 27, 187 S. W. 867. See (1916) 25 Yale Law Journal, 324 and Comment to follow in Yale Law Journal for January, 1918.

Reversing (1915) 215 N. Y. 514, L. R. A. 1916 A, 403, 109 N. E. 600, Ann. Cas. 1916 B, 276, 9 N. C. C. A. 286. On the same day and upon the same principles the Supreme Court decided Chyde S. S. Co. v. Walker (1917) 37 Sup. Ct. 545 (four justices dissenting) reversing (1915) 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916 B, 87, but refused to take similar action in an Ohio case on the ground that the point was not raised in the trial court. Valley S. S. Co. v. Wattawa (1917) 37 Sup. Ct. 523.

in a decision² elsewhere commented upon.³ The decision in the Jensen case is of great interest not only in its bearing upon compensation law, but also because of its importance upon the entire question of maritime law as well as the intrinsic interest of the opinions rendered. Mr. Justice McReynolds spoke for the majority of the court. Mr. Justice Holmes wrote a dissenting opinion containing an unusual number of the epigrammatic statements for which he is renowned,⁴ while Mr. Justice Pitney, concurring substantially with Mr. Justice Holmes, gave a dissenting opinion so full, so complete and so persuasive as seemingly to exhaust the subject. Mr. Justice Brandeis and Mr. Justice Clarke concurred in the dissent.

The New York Workmen's Compensation Commission had made an award, sustained by the state courts,⁵ to the widow and children of one Jensen, who had been killed while in the employ of the Southern Pacific Company, a common carrier by railroad also owning and operating a steamship line between New York and Galveston, Texas. Jensen operated an electric truck from the steamship across a gangway to a pier in North River, New York City, and while thus assisting in unloading the cargo of lumber, sustained the accidental injury causing his death. The majority of the Supreme Court hold that, the matter being maritime and within the jurisdiction of admiralty, the state compensation act conflicts with the grant of admiralty jurisdiction to the federal courts by the United States Constitution and is to that extent invalid.⁶

Article 3, Section 2, of the federal Constitution extends the judicial power of the United States "to all cases of admiralty

²N. Y. Central R. R. Co. v. Winfield (1917) 37 Sup. Ct. 546 (Justices Brandeis and Clarke dissenting), holding that Congress, by enacting the Federal Employers' Liability Act had excluded state action concerning injuries sustained during employment by employees of interstate railway carriers. As the Court in the Winfield case held that Congress had by this Act covered the field of such injuries, while in the Jensen case it held that the Act did not apply to injuries sustained upon an ocean going steamship not a mere adjunct of an interstate railway, the two cases present the distinction that in the one Congress had acted, while in the other it had not.

^{*} See 27 YALE LAW JOURNAL 135.

^{&#}x27;Thus he says "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified." In another place he remarks "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.

See note 1, above.

⁶ The general constitutionality of the New York compensation statute was upheld in New York Central R. Co. v. White (1917) 243 U. S. 188, 37 Sup. Ct. 247.

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and maritime jurisdiction." In 1789 Congress enacted that the district courts of the United States should have "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." This grant has been continued.8 The majority opinion holds that the saving clause does not here apply, as the remedy which the Compensation Act attempts to give was unknown to the common law. The court recognizes that certain state laws affecting maritime matters are upheld but attempts to formulate a test that no such legislation is valid "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." A state statute exceeding these limitations is invalid even though Congress has not legislated upon the point covered by the state statute, just as in certain cases connected with interstate commerce, silence of Congress is equivalent to a declaration that Conflicting state compensation acts commerce shall be free. applicable to maritime matters would destroy that uniformity which the constitutional provision was designed to secure. And finally, this form of remedy is not in harmony with the policy of Congress to encourage investments in ships, manifested in the acts limiting the liability of ship owners to the amount of their investment.9

It would seem that the case might have been decided otherwise under the authority of the saving clause of the Act of 1789, the constitutionality of which seems never to have been doubted. The framers of that act by their reference to the common law

⁷ Section 9, Judiciary Act of 1789 (1 Stat. at L. 76, 77, ch. 20, sec. 9).

⁸ Judicial Code, sections 24, 256 (36 Stat. at L. 1091, 1160, ch. 213; Comp. Stat., 1916, sections 991 (1), 1233).

^{*}Comp. Stat., 1916, sections 8021-8023, 8028. In State v. Daggett (1915) 87 Wash. 253, 151 Pac. 648, L. R. A. 1916 A 446, the Washington Supreme Court had decided that the Compensation Act of that state could not apply to maritime injuries, as Congress, having legislated upon the matter in the limited liability statutes, had excluded state action. Most of the state decisions, however, were contrary to the ruling of the Jensen case. See the well considered cases of Kennerson v. Thames Towboat Co. (1915) 89 Conn. 367, 373, L. R. A. 1916 A 436, 94 Atl. 372; Lindstrom v. Mutual S. S. Co. (1916) 132 Minn. 328, L. R. A. 1916 D 935, 156 N. W. 669; North Pacific S. S. Co. v. Industrial Acc. Com'n. (1917, Cal.) 163 Pac. 199; also the New York decisions, antennet 1; also Keithley v. North Pacific S. S. Co. (1916, D. Oreg.) 232 Fed. 255, 259; Stoll v. Pacific Coast S. S. Co. (1913, W. D. Wash.) 205 Fed. 169. Schuede v. Zenith S. S. Co. (1914, N. D. Oh.) 216 Fed. 566 was in accord with the Jensen case.

apparently meant simply the system of law enforced in the ordinary courts as distinguished from the admiralty courts, and did not mean that restricted, though uncertainly limited, body of law which excludes both equity and statutory law. Moreover, the Supreme Court seems so to have decided cases which, though not overruled by this case, are difficult of reconciliation with it, notably those cases which have applied state statutes creating a remedy for death by wrongful act—a remedy unknown to the common law—to maritime cases, both those brought in the state courts¹¹ and those brought in the admiralty courts. ¹²

But broader grounds than the mere wording of the Act made it desirable that the state statute should have been sustained. Mr. Justice Pitney seems clearly right in pointing out that the framers of the Constitution in the provision concerning admiralty matters intended merely to establish jurisdiction and not to prescribe particular codes or systems of law; to enumerate rather than define the powers granted.¹⁸ This jurisdiction was not in terms made exclusive and, as the decisions of the Supreme Court show, it was not exclusive under the rules of admiralty law with two exceptions. These exceptions were prize cases and civil cases brought under the peculiar "in rem" proceedings of admiralty where a judgment against all parties in interest is obtained by process against the thing itself to enforce a maritime lien, which, unlike a common law lien, does not rest upon possession of the property. In all other cases the common law is competent to give a remedy and its jurisdiction is concurrent. Hence state statutes attempting to give maritime liens enforced by in rem proceedings are invalid,14 but other state statutes bear-

¹⁰ Speaking of the saving clause of this statute, Mr. Justice Holmes, in The Hamilton (Old Dominion S. S. Co. v. Gilmore) (1907) 207 U. S. 398, 404, 52 L. Ed. 264, 28 Sup. Ct. 133, said: "And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the legislature." See also American S. B. Co. v. Chase (1872) 16 Wall. 522, 21 L. Ed. 369.

¹¹ Sherlock v. Alling (1876) 93 U. S. 99, 23 L. Ed. 819; American S. B. Co. v. Chase (1872) 16 Wall. 522, 21 L. Ed. 369.

¹² The Hamilton (Old Dominion S. S. Co. v. Gilmore) (1907) 207 U. S. 398, 52 L. Ed. 264, 28 Sup. Ct. 133; La Bourgogne (Deslions v. La Companie Générale Transatlantique) (1907) 210 U. S. 95, 52 L. Ed. 973, 28 Sup. Ct. 664.

¹³ Gibbons v. Ogden (1824) 9 Wheat. 1, 189, 194, 6 L. Ed. 23, 68, 69; M'Culloch v. Maryland (1819) 4 Wheat. 316, 407, 4 L. Ed. 579, 601.

¹⁴ The Moses Taylor (1866) 4 Wall. 411, 18 L. Ed. 397; The Hine v. Trevor (1866) 4 Wall. 555, 18 L. Ed. 451; The Glide (1896) 167 U. S. 606, 42 L. Ed. 296, 17 Sup. Ct. 930. A state statute creating a lien for materials used in repairing a foreign ship is invalid. The Roanoke (1902) 189 U. S. 185, 47 L. Ed. 770, 23 Sup. Ct. 491. But not for repairs of a

ing upon maritime matters, including statutes aiding proceedings in personam by allowing attachments of the interest of owners in vessels, are upheld.¹⁵ Admiralty courts have enforced state legislation in the absence of similar legislation upon the part of Congress.¹⁶ All the more then should the state act be enforced in the state court when the suitor has chosen the state tribunal rather than the admiralty court for the determination of his rights.¹⁷

Moreover, there is no body of law forming a complete admiralty code. Mr. Justice Holmes, by an ingenious and pertinent argument, demonstrates that the wholly incomplete maritime law is supplemented by common law principles.¹⁸ If maritime law does thus include common law, and common law with its statutory changes such as the remedy for death by wrongful act, it is difficult to see how this common law is excluded from admiralty by the mere conferring of admiralty jurisdiction by the federal Constitution upon the federal courts.

The lack of uniformity which the majority feared would result from an enforcement of state compensation acts in maritime matters would be at least a difficulty no greater than the like lack of uniformity in the application of laws to interstate commerce before Congress partly covered the situation by the passage of the federal Employers' Liability Act. At most the matter is one for the legislative department to deal with, and it seems not to be doubted that Congress might act in this case and that state laws would then be superseded. Yet it is doubtful if an act in the nature of an admiralty compensation act is desirable. The state machinery of compensation commissions (which is

vessel in her home port. The Lottawanna (Rodd v. Heartt) (1874) 21 Wall. 558, 22 L. Ed. 654; The J. E. Rumbell (1892) 148 U. S. 1, 37 L. Ed. 345, 13 Sup. Ct. 498. See also Workman v. New York (1900) 179 U. S. 552, 45 L. Ed. 314, 21 Sup. Ct. Rep. 212.

¹⁵ Rounds v. Cloverport Foundry & Mach. Co. (1914) 237 U. S. 303, 59 L. Ed. 966, 35 Sup. Ct. 596; Knapp S. & Co. v. McCaffrey (1899) 177 U. S. 638, 44 L. Ed. 921, 20 Sup. Ct. 824, citing cases.

¹⁸ See notes 12 and 14, supra.

It is clear that different rules may apply accordingly as a case is brought in the state or in the admiralty court. Compare The Max Morris (1890) 137 U. S. 1, 34 L. Ed. 586, 11 Sup. Ct. and Atlee v. Northwestern Union Packet Co. (1874) 21 Wall. 389, 395, 396, 22 L. Ed. 619, as to the effect of contributory negligence in admiralty.

¹⁸ The argument in brief is that as the Supreme Court has permitted a recovery for a maritime tort upon common law principles, as in *Atlantic Transport Co. v. Imbrovek* (1913) 234 U. S. 52, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. 733, and as the judges without legislation could not engraft the common upon the maritime law, therefore the maritime law actually includes in part the common law.

necessary in view of the many purely local contracts of employment) ought not to be duplicated by federal machinery occupying much the same field. Moreover, as the risk resulting from the liability imposed by various state compensation acts may be transferred without difficulty to an insurance company, the practical hindrance to commerce would be small. Then, while a uniform act is desirable in some fields of law, such as bankruptcy, it is questionable whether compensation to dependents of injured employees—the real object of compensation acts—ought to be uniform in all parts of the country, no matter how the cost of living may vary. Local legislatures and tribunals are perhaps better fitted to determine the amount of the compensation.¹⁹

The limited liability acts furnish no obstacle. They are, of course, paramount in both state and federal courts and would operate to place a maximum upon the amount allowable in certain cases, though only the worst forms of marine disaster ordinarily make an appeal to the benefits of the statutes of any aid to the ship owner. But this limitation of liability has been applied to claims for death damages based upon state statutes,²⁰ and may just as easily be applied to claims for compensation.

The practical results of the decision are unfortunate. The earlier cases are apparently not to be considered as overruled, but even if they were the situation would hardly be cleared. In either event it would be impossible to tell just what was included in the maritime law. The only test would be the nebulous one set forth by the majority in this case. How certain a test that is may be imagined when we consider that here five justices thought the limitations were exceeded, while four justices thought the objections not well taken. The test hitherto applied certainly was more explicit. Then, too, it may be doubted whether freedom of commerce will be aided by the lack of a compensation act in admiralty, since modern experience tends to show the value and the necessity of compensation acts. To induce labor to turn to the sea, Congress will probably have to create some compensation remedy applicable to admiralty and thus perhaps uselessly duplicate state compensation organizations, thereby obtaining in maritime matters a uniformity of remedy which does not take into consideration the variations of local conditions. Hence, a policy which refuses state assistance in control of maritime affairs before Congress has shown that

¹⁹ See dissenting opinion of Mr. Justice Brandeis, in New York Central R. Co. v. Winfield (1917) 37 Sup. Ct. 546.

²⁰ See cases in note 12, above.

assistance undesirable may not be the most desirable policy under all circumstances.²¹ C. E. C.

THE DOCTRINE OF MUTUALITY IN SPECIFIC PERFORMANCE CASES

To Lord Fry, specific performance without "mutuality" was inconceivable.1 The supposed principle proves, however, on careful analysis to have so many exceptions as to be valueless as a generalization.2 Indeed when all the exceptions to Lord Fry's broad statement are considered, the true doctrine of want of mutuality as a defense to specific performance narrows down to this: Equity will not grant the plaintiff specific performance of a bilateral contract if, after the defendant's forced performance, the plaintiff's own obligation will remain unperformed and is of such a nature that, at the time for its fulfillment, equity would, on grounds independent of mutuality, refuse specific performance of it,—the one possible limitation to this rule being that equity might give the plaintiff specific performance if the defendant's assumed common law remedy for damages would be fully adequate.8 But some jurisdictions, following the lead of the federal Supreme Court, have carried the supposed broad doctrine of mutuality to the extreme extent of applying it to cases where there is no want of mutuality of remedy as such, but only a want of mutuality in the substantive rights and powers of the parties.4 Thus it has been held that covenants in leases

²¹ Since the above was written, it has been brought to the writer's attention that Congress, by an act approved October 6, 1917, has amended the Act of 1789, cited in notes 7 and 8 supra, by adding to the saving clause the words: "and to claimants the rights and remedies under the workmen's compensation law of any state." See 244 Fed. 420 (General and Permanent Acts of Congress). Does not this amendment lead to an interesting dilemma? If the Act of 1789 is constitutional-and it has always been so considered, and was so considered by the majority in the Jensen case—it would seem beyond question that the amendment is also constitutional. Yet the majority in the Jensen case hold that state compensation acts interfere with the grant of admiralty jurisdiction contained in the United States Constitution. Hence the amendment must be unconstitutional. Cf. Comment by Professor Wright, 6 Cal. L. Rev. 72, n. 18. The writer of this interesting comment states that the holding of the majority in the Jensen case that the saving clause of the act did not apply was merely a dictum. It is difficult to see how the majority in reaching their conclusion could have avoided a direct decision either that the statute was unconstitutional or that it did not apply.

¹ Fry, Spec. Perf. (3d ed.) 225.

² See 36 Cyc. 621.

^{*}Wakeham v. Barker (1887) 82 Cal. 46, 22 Pac. 1131 (exemplifying the true rule); cf. Jones v. Newhall (1874) 115 Mass. 244 (inferentially supporting the suggested limitation).

⁴ Rutland Marble Co. v. Ripley (1869, U. S.) 10 Wall. 339.

of oil or mineral lands would not be specifically enforced against the lessor when the lessee had the power to terminate his tenancy without notice or on short notice.⁵ A recent decision in Indiana is to this effect. Advance Oil Co. v. Hunt (1917, Ind.) 116 N. E. 340. Such an application of the doctrine of mutuality is unfortunate. The lessor enters into the lease because he expects certain advantages from making it and is willing that the lessee should protect himself against possible losses by the option to terminate. It is not unfair to the lessor to hold him to his bargain. The refusal to do so is not only unjust to the lessee but also, in some jurisdictions, injurious to the development of the mineral wealth of the community. Such refusal in one cases resulted in the immediate enactment of a statute to remedy the evil.7 Other states have, without the aid of a statute, repudiated this application of the doctrine of mutuality.8 The federal Supreme Court itself has, in the reasoning of a late case, virtually repudiated its earlier doctrine.9 The remedy sought in that case, as in the principal case, was an injunction against interference with the plaintiff's possession by parties claiming under a subsequent lease. The court distinguishes such a suit from a bill for the specific performance of an executory contract, and considers the desired injunctive relief as simply the giving of adequate protection to the plaintiff's vested leasehold interest. In this view, the inapplicability of the supposed doctrine of mutuality is even more apparent. It is unfortunate that in the principal case the Indiana court followed the authority of its own earlier cases and the Rutland Marble Co. case,10 entirely overlooking the later case of Guffey v. Smith, 11 A study of that case would perhaps have led to a reëxamination of the soundness of the doctrine of mutuality and to a more mature consideration of the justness of the plaintiff's claim. It is interesting to note that as the law now stands in Indiana, Illinois and such other states as still cling to the old formula of mutuality, a plaintiff lessee under a lease which gives an option to terminate, will be denied equitable relief in the state courts, but may secure it if he can bring his suit in the federal courts.

C. I.

^{*}Rust v. Conrad (1881) 47 Mich. 449, 11 N. W. 265; Watford Oil & Gas Co. v. Shipman (1908) 233 Ill. 9, 84 N. E. 53.

Rust v. Conrad, supra.

⁷ See Grummett v. Gingrass (1889) 77 Mich. 369, 43 N. W. 999.

^aPhiladelphia Ball Club v. Lajoie (1902) 202 Pa. St. 210, 51 Atl. 973; Gregory Co. v. Shapiro (1914) 125 Minn. 81, 145 N. W. 791; Thurber v. Meves (1897) 119 Cal. 35, 50 Pac. 1063.

^{*} See Guffey v. Smith (1914) 237 U. S. 101, 35 Sup. Ct. 526.

¹⁰ Supra, note 4.

¹¹ Supra, note 9.

TORT LIABILITY FOR DEPRIVING THE PLAINTIFF, THROUGH FALSE REPRESENTATIONS, OF AN EXPECTED INHERITANCE.

A case recently decided by the Supreme Court of Connecticut suggests an interesting question on which there is little direct authority. In an action for damages, the complaint alleged in substance that the defendants, with intent to deprive the plaintiff of any share in his father's estate, made false representations to the father, since deceased, in regard to the plaintiff's sanity, and thereby obtained from the father transfers of certain property in which the plaintiff would otherwise have shared by inheritance. A demurrer was sustained on the ground that the plaintiff had no legal interest in the property transferred and so suffered no legal wrong. Hall v. Hall (1917) 91 Conn. 514. The only authorities cited by the court in support of the decision were cases holding that the law of fraudulent conveyances protects only creditors and those to whom the grantor owed a duty.1 But neither the plaintiff's lack of legal interest in the property nor the authority of the cases cited would seem to be conclusive. There are cases, of course, where liability results from a clear infraction of the plaintiff's legal right, regardless of the moral innocence of the defendant, as in trespass to real estate; and there would seem to be cases also where the defendant's conduct is so completely privileged that no degree of improper motive or moral guilt on his part can impose a civil liability;2 but the law is coming more and more to recognize an intermediate class in which both right and privilege are purely relative, and liability may depend either on the motives of the defendant's action, or on the character of the means employed. Thus liability has been imposed where the defendant established a rival shop or business solely for the purpose of ruining the plaintiff's business;3 where false but not defamatory statements or implications were employed with intent to injure the plaintiff; and even where truth was spoken with intent to injure.⁵ In the ordinary case of fraudulent conveyance, the wrong, if any, which vitiates the

¹ Ullrich v. Ullrich (1897) 68 Conn. 580, 37 Atl. 393; Harris v. Spencer (1898) 71 Conn. 233, 41 Atl. 773. See, in accord, Tyler v. Tyler (1888) 126 Ill. 525, 21 N. E. 616; 12 R. C. L. 490.

² See James Barr Ames, How far an Act may be a Tort because of the Wrongful Motive of the Actor (1905) 18 HARV. L. REV. 411. See also Oliver Wendell Holmes, Privilege, Malice and Intent (1894) 8 HARV. L. REV. I.

^{*}Dunshee v. Standard Oil Co. (1911) 152 Ia. 618, 132 N. W. 371; Tuttle v. Buck (1909) 107 Minn. 145, 119 N. W. 946.

^{*}Morasse v. Brochu (1890) 151 Mass. 567, 25 N. E. 74; Davis v. New England Ry. Pub. Co. (1909) 203 Mass. 470, 89 N. E. 565; Ratcliffe v. Evans [1892] 2 Q. B. 524.

^{*}Huskie v. Griffin (1909) 75 N. H. 345, 74 Atl. 595.

transfer, is committed by the grantor, and in the absence of debt, contract or similar obligation, the transfer by a grantor of his own property may well be regarded as a case of absolute privilege; but it by no means follows that third persons, having no similar privilege, can lawfully interfere to the prejudice of another. Improper motives or fraudulent means might well make such conduct actionable.

To the objection that no legal right of the plaintiff was violated, which was apparently regarded as decisive in the principal case, and in a similar case in New York, it might be answered that a mere expectation of benefit has often been protected against wilful and unjustifiable interference. Perhaps the most familiar example is found in strike cases where no contract of employment is violated. The Connecticut court very recently made liability in such a case depend on motive. Thus the analogies of the law would seem to support the view that an action might lie for depriving the plaintiff, either fraudulently, or wilfully and without justification, of an expected inheritance; and there is a dictum in a well-considered Massachusetts case presenting similar facts which strongly supports this view. 10

But if damages are to be allowed for the loss of an expected benefit, it should at least appear as reasonably certain that the expected benefit would have been received if the defendant had not interfered, and this is where the real difficulty in such cases is found.¹¹ Accordingly in the Massachusetts case above referred to,¹² where the defendant was charged with fraudulently pre-

Hutchins v. Hutchins (1845, N. Y. Sup. Ct.) 7 Hill 104.

^{*}See cases above cited and Keble v. Hickeringill (1809) 11 East, 574; Kiernan v. Metropolitan Const. Co. (1898) 170 Mass. 378, 49 N. E. 648; Hutton v. Watters' (1915) 132 Tenn. 527, 179 S. W. 134, L. R. A. 1916 B, 1228

^{*}Booth v. Burgess (1906) 72 N. J. Eq. 181, 65 Atl. 226; Wilson v. Hey (1908) 232 Ill. 389, 83 N. E. 928.

^{*}Cohn & Roth Electric Co. v. Bricklayers', etc., Union (1917, Conn.) 101 Atl. 659.

¹⁰Lewis v. Corbin (1907) 195 Mass. 520, 81 N. E. 248. See also dictum in Murphy v. Mitchell (1917, N. D. N. Y.) 245 Fed. 219. Cf. Dulin v. Bailey (1916) 172 N. C. 608, 90 S. E. 689, where action was allowed for mutilating a will containing a legacy to the plaintiff, and so preventing probate of the will.

[&]quot;The opinion in the principal case looks momentarily in this direction, by emphasizing the fact that the grantor is not alleged to have been mentally incapable of an intelligent disposition of his property at the time of the transfers in question; but this is made a reason for the conclusion that he had a legal right to convey, rather than for the inference that even without the defendant's interference he might not in fact have left the property to descend to the plaintiff.

¹² Lewis v. Corbin, supra.

venting the proper execution by a third person of a codicil in the plaintiff's favor, a demurrer was sustained because it was not clearly stated that the testator's intention of benefiting the plaintiff, as manifested in the invalid codicil, continued unchanged until the death of the testator. The principal case might well have been decided on a similar ground. It appeared that the plaintiff's father, subsequent to the transfers complained of, had executed a will of his remaining property in favor of the defendants, and the will had been probated; and though there were also charges of fraud in inducing the execution of this will, and of lack of testamentary capacity, the court properly held, on that aspect of the case, that the probate decree was not subject to collateral attack, and so long as it stood, was conclusive on the issue of testamentary capacity, and all other issues involved in the validity of the will. It would seem to follow that, until the plaintiff could set aside the will, he could not show that he had lost anything by the previous transfers. It is to be regretted, however, that the court disposed of the case so readily on what seems a very imperfect analogy to the ordinary cases of fraudulent conveyances, and thus missed the opportunity to throw new and much needed light on the still unsettled question of the basis and limits of tort liability, as well as on the specific problem on which authority is so very meagre.13

M. B.

ENCROACHMENTS BELOW GROUND OR WELL ABOVE THE SURFACE: IS EJECTMENT AN ADEQUATE LEGAL REMEDY?

In a recent case it was held that ejectment would lie where the bay window and eaves of a house projected over an adjoining owner's land. The court based its decision, rendered over the defendant's objection that the plaintiff should have sought her remedy in equity, partly on the ground that the defendant had refused to make any compromise with the plaintiff outside of court, and partly on the fact that the projections could be cut off without materially affecting the rest of the building. *McDivitt v. Bronson* (1917, Neb.) 163 N. W. 761.

Whether or not ejectment will lie in cases similar to that just stated is a question to which the courts have given contradictory

¹² It would seem that the case might naturally have been considered as a suit for defamation with allegation of special damage, but this view of it was not discussed by the court, and even if it were so considered, since damage in such a case is the gist of the action, the question would still remain whether the damage complained of was of such a character and so related to the alleged wrongful conduct that the law would allow it to be recovered.

Those jurisdictions which allow the action to be brought for overhanging projections do so on the theory that the owner of land may be ousted from his possession by structures built above or below the surface, as well as by those built upon the surface. Opposed to this view are those authorities which regard the encroachment as only the invasion of a right, and not an ouster.2 As to what constitutes ouster as contrasted with mere trespass, in the kind of encroachments under discussion, the conflicting decisions do not allow the formulation of a rule. Seemingly the one essential on which all are agreed, is a permanency, or probable permanency, in the encroaching structure. That the owner should be interfered with in the actual, in distinction from the theoretical, enjoyment of his land is apparently not always necessary.3 In regard to foundation walls which encroach below the ground, no part of the superstructure extending over the dividing line, the courts are no more agreed than in the case of encroaching eaves and cornices.4

From the standpoint of practical application to actual conditions, the disadvantage of ejectment as a remedy in cases of encroachment lies not so much in the difficulty of determining what constitutes ouster, as in the obstacles which may confront the sheriff in the execution of the judgment. The order to remove encroaching overhead wires may be carried out easily enough when the wires in question are merely telephone wires; but the sheriff well might hesitate to remove wires carrying a powerful current of electricity. The removal of encroaching

¹ Ejectment was allowed in the following cases: Murphy v. Bolger Bros. (1888) 70 Vt. 723, 15 Atl. 365; Johnson v. Minnesota Tribune Co. (1904) 91 Minn. 476, 98 N. W. 321. Ejectment was not allowed in Vrooman v. Jackson (1876, N. Y. Sup. Ct.) 6 Hun 326; Huber v. Stark (1905) 124 Wis. 359. 102 N. W. 12.

² See Norwalk Heating & Lighting Co. v. Verman (1903) 75 Conn. 662, 58 Atl. 168. If the encroachment continues long enough, the owner of the projecting structure acquires an easement. Grace M. E. Church v. Dobbins (1893) 153 Pa. St. 294, 25 Atl. 1120. But he gets no claim to the land below the projection, and can not prevent the owner from building thereon. Keats v. Hugo (1874) 115 Mass. 216.

^{*}But under certain circumstances the fact that the plaintiff is not prevented from taking possession of the surface of the land may be an additional reason for refusing ejectment. Harrington v. Port Huron (1891) 86 Mich. 46, 48 N. W. 641.

^{*}Ejectment will lie: McCourt v. Eckstein (1867) 22 Wis. 153; Wachstein v. Christopher (1907) 128 Ga. 229, 57 S. E. 511. It will not lie: Rahn v. Milwaukee R. R. Co. (1899) 103 Wis. 467, 79 N. W. 747; especially where the plaintiff has later erected a building up to the true line and has used as a foundation the projecting portion of the defendant's wall. Zander v. Brewing Co. (1897) 95 Wis. 162, 70 N. W. 164.

⁵ Butler v. Telephone Co. (1906) 186 N. Y. 486, 79 N. E. 716.

underground waterpipes would probably be a task of no considerable magnitude provided the pipes were empty; but if water under pressure were being forced through them, the difficulties of the sheriff who should attempt to remove them would be almost insurmountable. Nor should the sheriff be expected to carry out an order of removal when by so doing he would be forced to enter upon the defendant's land or injure his building, and thus render himself liable to an action of trespass. It has been recognized that even in such a seemingly simple operation as cutting off projecting cornices, the sheriff ought to be protected against the danger of taking more than his "pound of flesh." And on what basis shall the sheriff execute a writ commanding the removal of two feet of an encroaching foundation wall, when it is found that the remaining portion of the wall would not be sufficient to support the building?

This inability of the sheriff to remove the encroachment doubtless has led many of the courts to grant mandatory injunctions in this class of cases; it is not only more equitable, but easier, oftentimes, to put the burden of removing the encroachment directly upon him who caused it to be erected. Consequently mandatory injunctions have been granted ordering the defendant to remove the encroaching eaves or foundation wall. Or in the alternative he has been allowed to accept a compromise which has been offered by the plaintiff and found equitable by the court. One jurisdiction at least has enforced the injunction

⁶ In the case of sewer pipes a mandatory injunction has been refused on the ground that the remedy by ejectment is adequate. Kiernan v. Mayor of Jersey City (1909) 76 N. J. Eq. 114, 74 Atl. 139. But see Harrington v. Port Huron, supra.

⁷ "It cannot be removed by execution, because of the damage to the remainder of defendant's property. By taking down the wall it would impose a risk of damage upon the sheriff which he is not bound to incur in an execution." Blake v. McCarthy (1909, Trial T.) 115 N. Y. Supp. 1014.

^{*}Norton v. Elwert (1895) 29 Oreg. 583, 41 Pac. 926.

^{*}Curtiss Mfg. Co. v. Spencer Wire Co. (1909) 203 Mass. 488, 89 N. E.

<sup>534.

19</sup> Baron v. Korn (1891) 127 N. Y. 224, 27 N. E. 804.

[&]quot;Injunction to remove projecting eaves or cornice. Wilmarth v. Woodcock (1885) 58 Mich. 482, 25 N. W. 475; Pentony v. Penn. R. R. (1911) 231 Pa. St. 464, 80 Atl. 1052; Norwalk Heating and Lighting Co. v. Vernam, supra. Injunction to remove encroaching foundation wall. Mulrein v. Weishecker (1899 N. Y.) 37 App. Div. 545, 56 N. Y. Supp. 240; Curtiss Mfg. Co. v. Spencer Co. supra. In one case an injunction was granted as to the eaves of a building, the defendant having deliberately extended them over the line; but it was refused as to the foundation, where the encroachment was unintentional and very slight. Harrington v. McCarthy (1897) 169 Mass. 492, 48 N. E. 278.

¹² Blake v. McCarthy, supra.

strictly even in a case of innocent mistake on the defendant's part, and where the uncompromising attitude of the plaintiff has made the work of removal unnecessarily hard.¹³

It has been a question whether, if ejectment will lie, and the plaintiff elects that remedy, he is later entitled to equitable relief if he has been successful in his action at law. Since equity will not interfere where the plaintiff has an adequate legal remedy, will the remedy afforded by an action of ejectment be regarded as adequate?14 Must the successful plaintiff rest content in the knowledge that the sheriff is under a duty to remove an encroachment which he is practically powerless to remove? On principle, equitable relief should be granted when it turns out that what, in theory, is an adequate legal remedy, is, in fact, no remedy at all. But hitherto it has not been possible to support this thesis with authority, so far as ejectment cases are concerned. On the contrary it has been held that one who has recovered in ejectment might not later come into equity to compel the defendant to remove the encroachment.15 A recent New Jersey decision takes the opposite and more just view. In this case, after the plaintiff in an action of ejectment had procured a judgment and had had execution issued thereon, the sheriff refused to remove the encroaching wall, built wholly below the surface of the ground, because the large size of the foundation stones made such removal impossible without trespassing on the defendant's land and injuring his building, which did not extend over the line above the surface. A mandatory injunction was issued to compel the defendant to remove the obstruction. Hirschberg v. Flusser (1917, N. J.) 101 Atl. 191. This seems the correct solution of the problem.

G. E. W.

¹³ Pile v. Pedrick (1895) 167 Pa. St. 296, 31 Atl. 646, 647. This seems too severe on the defendant; but it has not been overruled. See Baugh v. Bergdoll (1910) 227 Pa. St. 420, 76 Atl. 207.

¹⁴ Even where a portion of the building, as well as the foundation wall, overlapped the line, it has been held that the proper remedy was at law in an action of ejectment, and not in equity. Beck v. Ashland Cigar Co. (1911) 146 Wis. 324, 130 N. W. 464. And see Cromwell v. Hughes (1906) 144 Mich. 3, 107 N. W. 323.

¹⁵ This was under a code which provided that the action should not be split. Hahl v. Sugo (1901) 169 N. Y. 109, 62 N. E. 135. To the same effect is Gilbert v. Boak Fish Co. (1902) 86 Minn. 365, 90 N. W. 767.

### RECENT CASE NOTES

BILLS AND NOTES—ALTERATION OF CHECK FACILITATED BY SPACE LEFT IN DRAWING—LIABILITY OF BANK TO DRAWER.—The plaintiff signed a check handed to him by his clerk who kept the petty cash and who stated that two pounds was wanted for petty cash. The body of the check was in the handwriting of the clerk. The line intended for inserting words indicating the amount was entirely blank, but there were the figures 2.0.0. in the line intended for figures. There were spaces before and after the figure "2" sufficiently large so that additional figures could be inserted. The clerk, after obtaining the plaintiff's signature, wrote in the blank line the words "one hundred and twenty pounds" and added the figures "1" and "0" on either side of the figure "2". He then cashed the check and absconded. Held, that the drawer could recover from the bank the amount paid, less two pounds. Macmillan v. London Joint Stock Bank (C. A.) [1917] 2 K. B. 439. See Comments, p. 242.

BILLS AND NOTES—GRATUITOUS ASSIGNMENT BY SEPARATE INSTRUMENT.— The payee of promissory notes assigned them to the plaintiff by a separate instrument acknowledged before a notary and delivered to plaintiff without consideration, but did not deliver the notes themselves. The defendant holds both notes, one as indorsee for collection, and one as administrator of the payee's estate. Held, that there was a valid gift of the notes. Burkett v. Doty (1917, Cal.) 167 Pac. 518.

As the notes were not delivered, it is clear that no title passed under the law merchant or the uniform Negotiable Instruments Law. However, as the rights of a holder in due course are not involved, the assignment can be treated as that of an ordinary chose in action. That choses in action are alienable is now clearly recognized, at least where there is a consideration for the assignment. See Walter W. Cook, The Alienability of Choses in Action (1916) 29 HARV. L. REV. 816; (1917) 30 HARV. L. REV. 449. At common law the assignee would have to sue in the name of the payee. Gookin v. Richardson (1847) 11 Ala. 889; Smalley v. Wright (1857) 44 Me. 442. By statute in nearly all states, however, the assignee may now sue in his own name. National Bank v. McCullough (1008) 50 Oreg. 508, 93 Pac. 356. The California court found no difficulty, although the assignment was gratuitous, in recognizing the assignee as owner. In that state all distinctions between sealed and unsealed instruments have been abolished. Civ. Code, sec. 1629. As a result, gifts of realty and personalty may be made without delivery by instruments in writing not under seal. Driscoll v. Driscoll (1904) 143 Cal. 528, 77 Pac. 471. In the principal case, the same rule was applied to choses in action, the instrument in question being regarded as a deed. The result reached seems both a sensible one and a natural application of modern views as to the alienability of choses in action. Cf. (1917) 26 YALE LAW JOURNAL, 304.

G. L. K.

CONSTITUTIONAL LAW—ADMIRALTY—STATE WORKMEN'S COMPENSATION ACT NOT APPLICABLE TO INJURIES WITHIN ADMIRALTY JURISDICTION.—An employee of a company operating a coastwise steamship line was accidentally killed while engaged in the work of unloading a cargo at a pier in New York. In proceed-

ings under the New York Workmen's Compensation Act, his widow and children received an award which was approved by the New York Court of Appeals. The case was taken by writ of error to the United States Supreme Court. Held, that the state compensation act, as applied to matters within admiralty jurisdiction, was in conflict with the grant of exclusive admiralty jurisdiction to the federal courts by the constitution, and was to that extent invalid, and the award must be set aside. Southern Pacific Co. v. Jensen (1917) 37 Sup. Ct. 524. See Comments, p. 255.

Constitutional Law—Due Process of Law—Jurisdiction Over Non-Resident.—In a suit in Minnesota by an insurance society to cancel the policy issued by it on the life of the original defendant who was duly served with process but died before trial, a statutory substitution was made of the beneficiaries as parties defendant. One of these, a resident of California not served in Minnesota, contested the jurisdiction of the Minnesota court. Held, that jurisdiction was not obtained and that a judgment against the beneficiary would be a denial of due process. National Council of Knights and Ladies of Security v. Scheiber (1917, Minn.) 163 N. W. 781. See Comments, p. 252.

Constitutional Law—Impairment of the Obligation of Contracts—Judicial Decision.—Several interurban street car companies were merged, their tracks connected and the entire set of properties then operated by the consolidated company as one line of railway. The company later went into the hands of receivers and the bonds of each of the constituent lines went to default. Suits were brought by the trustees to foreclose separately each of the underlying mortgages. On a petition by the receivers setting forth that great injury would be done to all creditors if several foreclosure proceedings were permitted, since the property mortgaged was clearly more valuable as a unit than as a number of stub lines, the trial court ordered a sale of the entire assets discharged of all prior liens. The trustees appealed contending that the mortgage contracts with the original companies had been impaired. Held, that the order below, even though judicial action, did amount to an impairment under Article I, Section 10, of the Federal Constitution, and should be modified. Phila. Trust Co. v. Northumberland County Trac. Co. (1917 Pa.) 101 Atl. 907.

Although certain language in early United States Supreme Court opinions and some decisions may be found in accord with the doctrine laid down in this case, the tendency at the present time is certainly toward the contrary interpretation, namely, that legislative action is necessary to accomplish an unconstitutional impairment of contract. Hanford v. Davies (1896) 163 U. S. 273, 278, 16 Sup. Ct. 1051, 1053; Centl. Land Co. of W. Va. v. Laidley (1895) 159 U. S. 103, 109, 16 Sup. Ct. 80, 82; cf. Chicago v. Sheldon (1869 U. S.) 9 Wall. 50, 56, Ohio Life Ins. Co. v. Debolt (1853 U. S.) 16 How. 416, 432. Such would appear to be the clear meaning of the words used in the impairment clause itself. Such also is the accepted view where retroactive criminal law is concerned. Ross v. Oregon (1912) 227 U. S. 150, 161, 33 Sup. Ct. 220, 222. The state courts, however, are at variance. Swanson v. Ottumwa (1906) 131 Ia. 540, 549-550; 106 N. W. 9, 12-13; King v. Phoenix Ins. Co. of Bklyn. (1906) 195 Mo. 290, 307, 92 S. W. 892, 896-897. Cf. Ruf v. Mueller (1911) 49 Ind. App. 7, 12, 96 N. E. 612, 614. From the principal case it may be gathered that Pennsylvania is holding to the interpretation which the United States courts have now abandoned. But there seems to have been no necessity of invoking either state or federal constitutional provisions in support of the decision, since, without these grounds,

the Pennsylvania Supreme Court could reverse the lower court on the simple law of contract. For a discussion of a related topic, the treatment of judicial decisions as denying due process under the Federal Constitution, see (1917) 27 YALE LAW JOURNAL, 121.

M. S. B.

CONFLICT OF LAWS—CONTRACTS—RETROACTIVE MORATORIUM AND DEPRIVATION OF INTEREST BY LEX CONTRACTUS.—A German company having property in Great Britain owed a debt to an English creditor under a contract to which, as regards all ordinary aspects, the English court deemed the German rules of contract applicable. A German retroactive ordinance postponed payment of claims until further notification, with no interest for this period of postponement. Held, that the German ordinance was to be disregarded as contrary to the usage of nations, and interest computed according to German law existing prior to the ordinance. Re Fried Krupp Aktien-Gesellschaft (1917, Ch. D.) 117 L. T. Red. 21.

It is a general rule of English and American law that the lex contractus (that is, either the lex loci contractus or the lex loci solutionis, as the case may be) is the law which governs a contract not merely with regard to its creation but with regard to all the conditions applicable to it as a contract. Gibbs v. Société Industrielle (1890, C. A.) 25 Q. B. D. 399; Pritchard v. Norton (1882) 106 U. S. 124, 27 Sup. Ct. 104. The same rule that applies to the primary obligation also governs the secondary obligation of a contract. See Atwood v. Walker (1901) 179 Mass. 514, 61 N. E. 58; cf. Davis v. Mills (1904) 194 U. S. 451, 24 Sup. Ct. 692; Are Secondary Contractual Obligations Governed by the Law of the Contract? (1915) 25 YALE LAW JOURNAL 147. This rule is applied to ordinary matters of discharge. Gibbs v. Société Industrielle, supra. And even to a postponement of payment by a retroactive moratorium decree. Rouquette v. Overman (1875) L. R. 10 Q. B. 525; see Moratorium Decrees and the Conflict of Laws (1917) 26 YALE LAW JOURNAL, 771. In the principal case, therefore, prima facie the court should apply the German ordinance in question, but the adoption of foreign laws "is to be regulated purely according to considerations of justice, policy, expediency and international reciprocity." Moratorium Decrees and the Conflict of Laws, ubi supra, at p. 772; see Professor Wesley N. Hohfeld, The Individual Liability of Stockholders and the Conflict of Laws (1909) 9 Col. L. Rev. 492, 496, 520. It is submitted that the court was wrong in declaring the German ordinance contrary to the usage of nations. Brown v. Hiatts (1872, U. S.) 15 Wall. 177; Du Belloix v. Lord Waterpark (1822, K. B.) 1 D. & R. 16. Yet the decision is believed to be correct since, on general principles of the conflict of laws, it was proper to deny application of a statute of an enemy nation prejudicial to British interests and against British public policy. Cf. Wolff v. Oxholm (1817, K. B.) 6 M. & S. 92. See also The Holley (1868) L. R. 2 P. C. 193; Kaufman v. Gerson (C. A.) [1904] 1 K. B. 591; Morisette v. Canadian Pac. R. Co. (1904) 76 Vt. 267, 56 Atl. 1102.

CONFLICT OF LAWS—TRANSFER OF BOND IN FOREIGN STATE—LAW GOVERNING PURCHASE FOR VALUE.—In a suit in Wisconsin to foreclose mortgage bonds issued by a Wisconsin corporation in that state and delivered to the appellant in New Mexico by a previous holder as collateral security for a pre-existing debt, the appellant claimed to be a holder for value in due course according to the law of New Mexico. The trial court excluded evidence as to the law of New Mexico. Held, that the exclusion was proper since the Wisconsin law, not the law of New Mexico, governed the question whether the appellant was "holder

for value in due course." Badger Machinery Co. v. Columbia, etc., Lt. & Power Co. (1917, Wis.) 163 N. W. 188. See Comments, p. 246.

Contracts—Acceptance—Sufficiency of Acts to Constitute Acceptance as Matter of Law.—The defendant was put in possession of an old automobile under an agreement, as alleged by him, to buy it, if he found it useful for his business. He kept the machine for nearly two years, in the meantime having offered it for sale, and then notified the plaintiff that he did not wish to buy it. Held, that the defendant's acts constituted an acceptance as a matter of law. Ostman v. Lee (1917, Conn.) 101 Atl. 23.

An acceptance is an act of the offeree whereby he exercises the power conferred on him by the offeror. Professor Arthur L. Corbin, Offer and Acceptance, and Some of the Resulting Legal Relations (1917) 26 YALE LAW JOURNAL, 199, 181. The offeror at the beginning has full power to determine what acts are to constitute an acceptance, and when he prescribes a certain mode the offeree can accept in no other way. Weiner v. Gill (1905) 2 K. B. 172, 74 L. J. R. 845; cf. Wheeler v. Klaholt (1901) 178 Mass. 141, 59 N. E. 756. If no mode is prescribed, any overt act which would lead a reasonable man to believe that the offeree had assented, is considered an acceptance. Kirkham v. Attenborough (1897) 1 Q. B. 201; Indiana Mfg. Co. v. Hayes (1893) 155 Pa. St. 160, 26 Atl. 6; Hobbs v. Massassoit Whip Co. (1893) 158 Mass. 194, 33 N. E. 495. But silence is generally not so construed, not even when the offeror has prescribed it as the mode of acceptance. Felthouse v. Bindley (1862) II C. B. N. S. 869; Prescott v. Jones (1898) 69 N. H. 305, 41 Atl. 352; cf. Emery v. Cobbey (1889) 27 Neb. 621, 43 N. W. 410; Hanson v. Wittenberg (1910) 205 Mass. 319, 91 N. E. 383. Whether acts constitute an acceptance within the rule above stated is ordinarily a question for the jury. Wheeler v. Klaholt, supra. In the principal case the acts done would seem clearly sufficient to justify a finding in accordance with the decision, but it may be doubted whether the inference was so clear as to justify the court in deciding it as a matter of law.

C. I.

Contracts—Assignability—Future Book Accounts.—The plaintift's assignor had advanced money to the defendant company on notes which were secured by an assignment of present and future book accounts. The notes were not paid, and the plaintiff filed a bill in equity to enforce the assignment. Soon thereafter, the defendant was adjudged bankrupt, and its trustee defended the action. Held, that the assignment in so far as it concerned future book accounts could not be enforced against the defendant or its trustees, since there had been no act indicating a taking of possession on the part of the grantee after the accounts came into existence. Taylor v. Barton-Childs Co. (1917, Mass.) 117 N. E. 43.

The court treats this case as governed by the same principles as mortgages of future-acquired chattels. This treatment is a logical recognition of the fact that, by gradual development of the law, an assignment of a chose in action has come to be a real transfer of property. But the Massachusetts rule is exceptional on mortgages of future-acquired chattels, holding them to be mere executory contracts, unenforceable either in law or equity unless the mortgagee has taken possession after acquisition by the mortgagor. Jones v. Richardson (1845, Mass.) 10 Metc. 481; Moody v. Wright (1847, Mass.) 13 Metc. 17; see in accord Ross v. Wilson (1869, Ky.) 7 Bush 29. This is contrary to the general rule which protects such mortgages in equity. Mitchell v. Winslow (1843) 2 Story 630; Holroyd v. Marshall (1862) 10 H. L. Cas. 190. The same rule has

been very generally applied to future-acquired choses in action. Toilby v. Official Receiver (1888) 13 App. Cas. 523; Union Trust Co. v. Bulkely (1907, C. C. A. 6th) 150 Fed. 510. In view of its doctrine as to chattels, Massachusetts has gone a long way in upholding assignments of future wages based on the expected continuance of an existing employment, though the employment is terminable at will. Boylen v. Leonard (1861) 2 Allen 407. An analogy might possibly have been drawn between wages to be earned under an existing but indefinite employment, and book accounts to arise in the natural course of an existing business. In refusing to draw such an analogy the court has made it clear that the doctrine of the wages cases is not to be extended, and the result is to be commended in so far as it tends toward the consistent application of the same rule to all classes of future-acquired personalty.

M. B.

Contracts—Illegality—Collateral Contract.—An architect sued upon a contract with the defendants for services in the preparation of plans and specifications for a building. The building was to contain a motion picture theatre and also dwellings, bathhouse, and stores in the cellar. A statute provided that, "No portion of any building used for moving pictures hereafter erected . . . shall be occupied or used as a dwelling or tenement house, apartment house, hotel, or department store." Act of June 9, 1911 (P. L. 746). Held, that the architect was a party to an agreement to do an unlawful act and hence could not recover. Medoff v. Fisher et al. (1917, Pa.) 101 Atl. 471.

A collateral contract may be so far removed from the unlawful object of one of the parties as to be itself legal. Rogers v. Waller (1817, Tenn.) 4 Hayw. 205. Some Courts have held that where the illegal act ultimately contemplated is greatly opposed to public policy, mere knowledge on the part of the contractor is sufficient to make the collateral contract unenforceable. Hanauer v. Doane (1870) 12 Wall. 342 (treason); Pearce v. Brooks (1866) L. R. 1 Ex. 213 (prostitution). On the other hand where the illegal act intended by one is a crime of minor importance, mere knowledge by the other of such intention does not make the contract unenforceable by the latter. Brooks v. Martin (1863) 2 Wall. 70; Thomas v. Brady (1848) 10 Pa. St. 164. Yet the distinction between great and small crimes is at best hard to draw. Where, however, the plaintiff has participated in the intent or has aided and abetted its fulfilment, he cannot enforce his contract, irrespective of the magnitude of the offense intended. Rose v. Mitchell (1881) 6 Colo. 102; Graves v. Johnson (1892) 156 Mass. 211, 30 N. E. 818; (1901) 179 Mass. 53, 60 N. E. 383; Webber v. Donnelly (1876) 33 Mich. 469. If the drawing of the plans is to be regarded as a participation in the intent or as aiding and abetting the ultimate illegal act, the principal case is clearly sound. F. C. H.

Contract—Performance by Instalments—Anticipatory Breach.—An instalment contract provided that the seller should deliver coal daily from December 28, 1909, to March 30, 1910, and that the buyer should pay before the tenth of each month for the coal delivered during the previous month. On January 10, the purchaser failed to pay for the December coal and the seller at once stopped deliveries. The payment was made and accepted on January 15 at which time the vendor gave notice of cancellation. Coal delivered from January 1 to January 9 remained unpaid for even after the tenth of February. Action was brought by the buyer to recover for failure to deliver the rest of the coal. Held, that the failure of the plaintiff to make proper payments on the contract after the repudiation was fatal to his cause of action. Chicago Washed Coal Co. v. Whitsett (1917, Ill.) 116 N. E. 115.

The decision might have been rested on the plaintiff's first breach under the prevailing American rule which treats as vital a default in one instalment, though not accompanied by insolvency or repudiation as required by English cases. Rugg v. Moore (1885) 110 Pa. St. 236, 1 Atl. 320; Wald's Pollock, Contracts (Williston's ed.) 332, note; cf. Freeth v. Burr (1874) L. R. 9 C. P. 208; Mersey Steel & Iron Co. v. Naylor (1884) 9 A. C. 434. The court, however, did not discuss this point, but assuming the defendant's failure to deliver coal as the first "vital breach," saw only two courses open to the plaintiff if he wished to recover for loss of the contract. He could "treat the contract as terminated" and sue at once, or treat it as subsisting and sue at the end of the term. But in the latter case, he had to show complete performance on his part and keep the contract alive for the benefit of all parties. This is the English doctrine of anticipatory repudiation. Hochster v. De la Tour (1852, Q. B.) 2 E. & B. 678. Its application to an actual breach may be attributed to the peculiar Illinois rule that, though a breach in one instalment, without repudiation, excuses the other party from going on, he cannot, after ceasing performance on this ground, recover damages for the loss of the contract. Keeler v. Clifford (1897) 165 Iil. 544, 46 N. E. 248. Hence the court apparently considered that the plaintiffs' rights rested not on the defendant's breach, but on the accompanying repudiation. This seems an unfortunate departure from the general rule that any actual breach which excuses further performance gives an immediate right of action for loss of the entire contract. Pierce v. Tennessee etc. Co. (1898) 173 U. S. 1, 19 Sup. Ct. 335; Wald's Pollock, Contracts (Williston's ed.) 363, n. 20.

M. B.

Contracts—Third Party Beneficiary—Bond to Secure Payment of Material Men.—The defendant, as surety, gave a bond to the Passaic Valley Sewerage Commissioners to secure the performance of a building contract. The bond was conditioned to be void, "if the contractor shall pay for all labor and materials furnished and shall perform all the obligations of his contract." The plaintiff, having furnished materials, sued upon the bond. Held, that the plaintiff was not a beneficiary within the meaning of a statute (Comp. St. 1910, p. 4059, sec. 28) giving a right of action to third parties for whose benefit a contract is made, the bond being solely to indemnify the obligee. Standard Gas Power Corp. v. New England Casualty Co. (1917, N. J. Ct. Err.) 101 Atl. 281.

A third party beneficiary is allowed to sue in New Jersey, whether he is a creditor or a donee beneficiary. Berry v. Doremus (1863, Sup. Ct.) 30 N. J. L. 399; Joslin v. New Jersey Car Spring Co. (1873, Sup. Ct.) 36 N. J. L. 141; Whitehead v. Burgess (1897, Sup. Ct.) 61 N. J. L. 75. The court in the principal case denies a remedy to the plaintiff solely on the ground that he was not intended as a beneficiary. As a general proposition, public property is not the subject of a mechanic's lien. Frank v. Hudson Co. (1877, Sup. Ct.) 39 N. J. L. 347. If such were the case here the plaintiff should have been given the right to sue as the sole beneficiary; for the obligee would then have no interest of his own to protect by securing payment of the material men, and the latter must have been intended as beneficiary. Baker v. Bryan (1884) 64 Ia. 561, 21 N. W. 83; King v. Downey (1899) 24 Ind. App. 262, 56 N. E. 680. By statute in New Jersey, however, a mechanic's lien on public property is given. Commissioners v. Fell (1894, Ch.) 52 N. J. E. 689, 29 Atl. 816; Act of Mar. 30, 1892 (3 Comp. St. p. 3315) P. L. 1892 p. 369, as amended P. L. 1909 p. 260. Under such a statute it is a reasonable inference that the bond is one of indemnity to protect the obligee against loss that might result from the filing of liens. This tends to show that the bond in the principal case was not in fact made for the benefit of the material men. In other jurisdictions material men have been allowed to

maintain suit on such a bond irrespective of the question whether or not a material man has a lien on public buildings. School District v. Livers (1899) 147 Mo. 580, 49 S. W. 507; Kaufmann v. Cooper (1896) 46 Neb. 644, 65 N. W. 796. By Federal statutes (30 St. 906, ch. 218, 33 St. 811, c. 778) material men are expressly given the right to sue in the name of the United States on construction bonds given to the government. Equitable Surety Co. v. McMillan (1913) 234 U. S. 448, 34 Sup. Ct. 803; Illinois Surety Co. v. Davis Co. (1916) 37 Sup. Ct. 614.

F. C. H.

DEATH BY WRONGFUL ACT—NATURE OF PLAINTIFF'S RIGHT—EFFECT OF RELEASE BY DECEDENT.—The husband of the plaintiff while a passenger on a car of the defendant corporation received injuries which ultimately resulted in death. Before his death he had executed a release of liability to the defendant. The widow brought suit under a statute which provides that: "When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, . . . ." Held, that, the release by the husband was not a bar to the plaintiff's cause of action. Earley v. Pacific El. R. Co. (1917, Cal.) 167 Pac. 514.

By the common law the death of a human being could not be complained of as a civil injury. Baker v. Bolton (1808) I Camp. 493. In 1846 Lord Campbell's Act—the foundation, with various modifications, of subsequent American legislation-created a new right of action in favor of the persons for whose benefit a suit by the decedent's administrator or executor was authorized. Blake v. Midland Ry. Co. (1852) 18 Q. B. 93, 110. It was not a "survival act" and hence the injured person's right of action still terminated with his death. Pulling v. Great Eastern Ry. Co. (1882) L. R. 9 Q. B. D. 110. But Lord Campbell's Act gave the new right subject to the condition that the injury must be "such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof." 9 & 10 Vict. (1846) c. 93. Consequently a release by the injured person would bar a suit for the benefit of the widow or other relatives. Read v. Great East. Ry. Co. (1868) 3 Q. B. 555. The courts in this country in construing statutes with a similar clause have followed the English decisions. Southern, etc. Co. v. Cassin (1900) 111 Ga. 575, 36 S. E. 881; Jones v. Kansas City Ry. Co. (1903) 178 Mo. 528, 77 S. W. 890. But there are a number of statutes in this country which do not contain such a provision and under such statutes a release given by the injured party does not bar the beneficiaries' right of action. Eichorn v. New Orleans, etc. Co. (1904) 112 La. 236, 36 So. 335. Donahue v. Drexler (1884) 82 Ky. 157. Similarly, in states which have a "survival act" and also an act creating a new and separate cause of action, recovery under one should not logically bar recovery under the other; and some courts so hold. Davis v. St. Louis, etc. R. Co. (1890) 54 Ark. 389, 13 S. W. 801. Stewart v. United Electric Light & Power Co. (1906) 104 Md. 332, 65 Atl. 49. Contra, Louisville & Nashville R. R. Co. v. McElwain (1896) 98 Ky. 700, 34 S. W. 236. The difficulty, both in the decisions and in the legislation, has arisen from a failure to recognize that two independent rights are involved, one being that of the injured person, the other that of the next of kin not to be injured in support.

J. N: M.

EJECTMENT—ENCROACHING BAY WINDOW AND EAVES.—The bay window and eaves of the defendant's house projected nearly five feet over the line of the

adjoining owner who brought an action of ejectment to recover possession of the strip of land thus encroached upon. *Held*, that the action could be maintained. *McDivitt v. Bronson* (1917, Neb.) 163 N. W. 761.

See Comments, p. 265.

EQUITY JURISDICTION—CORPORATIONS—INTERNAL AFFAIRS OF A FOREIGN CORPORATION.—A bill was filed by the minority stockholders of a foreign corporation to prevent a majority of the directors from winding up the business and selling the corporate property to another company, in which the defendant directors owned nearly all the stock. *Held*, that the relief asked for might properly be given, even though it involved an interference with the internal affairs of a foreign corporation. *Corry v. Barre Granite and Quarry Co.* (1917, Vt.) 101 Atl. 38.

The rule has been laid down very generally, and is often very broadly stated. that a court of equity will not attempt to exercise jurisdiction over the internal affairs of a foreign corporation. Howell v. Chicago R. R. (1868 N. Y. Sup. Ct.) 51 Barb. 378; Van Dyke v. Railway Mail Assoc. (1912) 118 Minn. 390, 137 N. W. 15. It is the modern tendency to limit the application of this rule. Some courts have accomplished this by narrowing the definition of internal affairs. Guilford v. Western Union Tel. Co. (1894) 59 Minn. 332, 61 N. W. 324. Cf. North State Copper Min. Co. v. Field (1885) 64 Md. 151, 20 Atl. 1039. The true rule is not one of jurisdiction, strictly speaking, but one of sound judgment and discretion, depending on the facts in each case. Babcock v. Farwell (1910) 245 Ill. 14, 91 N. E. 683; Ives v. Smith (1888, Sup. Ct.) 3 N. Y. Supp. 645, 651. Two sound reasons for applying the rule are the practical difficulty of enforcing the decree effectively against a foreign corporation, and the danger of confusion through opposite decisions, in different jurisdictions, on the same right in the case of different individuals. Kimball v. St. Louis R. R. (1892) 157 Mass. 7. 31 N. E. 697; Madden v. Electric Light Co. (1897) 181 Pa. St. 617, 37 Atl. 817. Where these two reasons do not apply the court may well proceed. On this ground the decision in the principal case seems sound.

EQUITY—LACHES—PURSUING MISTAKEN REMEDIES FOR 25 YEARS.—The defendant company was charged with using its control of the majority of the stock of a railroad corporation to gain an inequitable advantage over the minority stock holders. A series of legally misdirected and unsuccessful suits were brought by the minority stock holders who finally filed the present bill 25 years after the cause of action had arisen, in which for the first time they were held to have conceived their remedy correctly. Held, that the suit was not barred by laches. Bogert v. Southern Pacific Co. (1917, C. C. A. 2d) 244 Fed. 61.

The general rule followed in state courts is that where equity and law have concurrent jurisdiction the statute of limitations is a bar in equity. Tucker v. Linn (1904, N. J. Ch.) 57 Atl. 1017. Apparently where equitable jurisdiction is exclusive, except where the statute expressly applies to equitable proceedings, state courts act only on analogy. Wood, Limitations (4th ed.) sec. 59; see Hall v. Law (1880) 102 U. S. 46, 26 L. Ed. 217. In both state and federal courts, in cases where equitable jurisdiction is exclusive and where unusual conditions make it inequitable to forbid the maintenance of a suit even though a longer period than that fixed by the statute of limitations has elapsed, the question whether laches will bar the complaint will be determined by the equities which condition it. Kelley v. Boettcher (1898, C. C. A. 8th) 85 Fed. 55, 62; Stevens v. Grand Central Min. Co. (1904, C. C. A. 8th) 133 Fed. 28. The better

rule is that laches is not mere delay but delay that works a disadvantage or change of position. Chase v. Chase (1897) 20 R. I. 207, 37 Atl. 804. Pomeroy, Eq. Rem. secs. 20-23 and note to sec. 23. The pendency of another action relating to the same matter is frequently accepted as an excuse to overcome the defense of laches. Schaefer v. City of Fond du Lac (1899) 104 Wis. 39, 80 N. W. 59; Williams v. Neeley (1904, C. C. A. 8th) 134 Fed. 1. Where there had been continuous litigation for 20 years in various suits and proceedings against the defendant upon the question in issue, the complainant has been held not to be chargeable with laches. Pacific R. Co. v. Boyd (1913, C. C. A. 9th) 177 Fed. 804, 822. Cases where actions have been maintained after so long a period are unusual, yet, where such delay has not been prejudicial, and constant effort has been made in the meantime to obtain relief, there seems to be no sound reason why relief should not be given in equity.

R. L. S.

EQUITY—MANDATORY INJUNCTION—ENCROACHMENT OF FOUNDATION WALL BELOW THE SURFACE.—After the plaintiff had procured a judgment in an action of ejectment by reason of the encroachment of the defendant's foundation wall below the surface, and had had execution issued thereon, the sheriff failed to remove the encroaching wall because the existing conditions made such removal impossible without trespassing on the defendant's land. Thereupon the plaintiff applied for a mandatory injunction to compel the defendant himself to remove the obstruction. *Held*, that the injunction should issue. *Hirschberg v. Flusser* (1917, N. J. Ch.) 101 Atl. 191.

See COMMENTS, p. 265.

EQUITY—SPECIFIC PERFORMANCE—MUTUALITY—PLAINTIFF HAVING OPTION TO TERMINATE LEASE.—The plaintiff was assignee of an oil lease which gave the lessee an option to terminate the lease at any time on payment of \$1. The lessors, being dissatisfied, undertook to declare the lease forfeited, and executed a second lease of the same kind to other parties. The plaintiff sought to enjoin the lessors and the new lessees from entering on the land in alleged violation of the covenants in his lease. Held, that the plaintiff was not entitled to an injunction to prevent such breach, because the contract was not mutual. Advance Oil Co. v. Hunt et al. (1917, Ind.) 116 N. E. 340. See Comments, p. 261.

EVIDENCE—Admission of Liability.—In an action arising from a collision between the defendant's automobile, driven by his son, and the plaintiff's team, the only evidence given to show that the necessary relation of master and servant existed between the father and son was the admission of the father that "so far as the liability extended, he was responsible." *Held*, that this admission of liability was a direct admission of facts essential to establish his legal liability. *Farnham v. Clifford* (1917, Me.) 101 Atl. 468.

The admission of the defendant is a conclusion arrived at by the process of reasoning, applying the rules of law to the totality of non-legal facts. Such a conclusion is commonly called a conclusion of law, though more correctly termed a conclusion of mixed law and fact. An admission of law made by a party will not be noticed by the court, the determination of the rules of law being for the court and not for the parties. Polk's Lessee v. Cockrel (1809) I Tenn. 456. It has been held that an admission of liability, since it involves a question of law as well as of fact, falls within the same rule and is inadmissible. Crockett v. Morrison (1847) II Mo. 3. But the majority of cases would allow

admissions of liability to go in as some evidence of the non-legal facts upon which the conclusion, if correct, must necessarily be based, though not conclusive. Detroit v. Beckman (1876) 34 Mich. 125; cf. Patton v. Frost-Johnson Co. (1917, La.) 76 So. 580. So an admission of debt made not in the course of negotiations for compromise (if made at such time, it is excluded on grounds of public policy) is admissible. Draper v. Horton (1901) 22 R. I. 592, 48 Atl. 945; Colburn v. Groton (1889) 66 N. H. 151 28 Atl. 95; Chamberlayne, Evidence, § 1443. An admission of liability in civil proceedings would seem to be analogous to a confession in criminal law, both being admissions of legal liability-one to make compensation and the other to suffer punishment. The Maine court therefore rightly admitted the admission of liability. But it was inaccurate in stating that this was "a direct admission of facts essential to establish his legal liability." It was a direct admission of his legal liability, from which the jury could infer that the non-legal facts existed, which, combined with the rules of law, would give rise to the mixed conclusion of legal liability. On principle, such an admission should be admitted. The danger that the defendant may have been laboring under a misapprehension, either of fact or of law, is offset by the opportunity of explanation. Furthermore, the facts which the jury may thus infer are facts which the defendant very likely would not testify to directly. Accordingly, just as under the so-called "Opinion Rule" with respect to opinions of witnesses on the stand, the opinion as to his liability should be admitted as a distinct aid to the jury in determining facts which could not easily be otherwise placed before them.

W. W. G.

FOREIGN CORPORATIONS—FAILURE TO QUALIFY—INDIVIDUAL LIABILITY OF OFFICERS AND DIRECTORS.—A marine corporation did business in Illinois without having complied with the Illinois statutory requirements relating to foreign corporations. The plaintiff, who had had transactions with the corporation in the corporate name, sued the defendants—officers, agents and directors of the foreign corporation, some of whom had no direct connection with the transactions involved—claiming that they were individually liable. Held, that the defendants were individually liable. Ryerson & Son v. Shaw (1917) 277 Ill. 524, 115 N. E. 650. See Comments, p. 248.

INTERNATIONAL LAW—Sovereign State as Plaintiff—Waiver of Immunity from Interpleader of Third Person by Defendant.—The Kingdom of Roumania instituted suit against the Guaranty Trust Company to recover a certain fund. An individual, claiming part of the fund, brought suit against both Roumania and the Trust Company, the agent of the Roumanian Government. The Trust Company sought to have the individual interpleaded. Held, that where a foreign government voluntarily becomes a party to a suit by bringing an action, it waives its immunity from an interpleader of a third party, requested by the defendant. Semble, that where a sovereign state becomes a partner in a commercial enterprise, it loses to that extent its immunity from suit. Kingdom of Roumania v. Guaranty Trust Co. (1917, S. D. N. Y.) 244 Fed. Rep. 195.

A sovereign cannot be forced into court by suit. De Haber v. Queen of Portugal (1851) 17 Q. B. 171, 196. And this personal exemption of a sovereign from foreign jurisdiction is not lost by reason of his assuming a false name. Mighell v. Sultan of Johare (C. A.) [1894] 1 Q. B. 149. But if a sovereign sues, the defendant may counterclaim to the extent of defeating the claim, and may file a cross bill or take other proceedings in order that complete justice may be done, and a sovereign may also be named as defendant in order to

give him notice of a claim which the plaintiff makes to funds in the hands of a third person over whom the court has jurisdiction. See Strousberg v. Republic of Costa Rica (1880, C. A.) 44 L. T. Rep. N. S. 199. But a sovereign by bringing suit does not submit to a cross action, and another claim arising from a different and distinct matter may not be set up. South African Republic v. La Compagnie Franco Belge [1898] I Ch. 190. By statute in the United States, however, a defendant sued by the United States may set off any credit, whether arising out of the same transaction or another, which would defeat the claim of the United States in whole or in part. United States v. Wilkins (1821, U. S.) 6 Wheat. 135. The sovereign is immune, however, from an affirmative judgment in favor of the defendant. People v. Dennison (1881) 84 N. Y. 272; United States v. Eckford (1867, U. S.) 6 Wall. 484. In Germany where the defendant was given judgment on a counter claim, the property of the sovereign plaintiff in Germany was held not subject to execution. Von Hellfeld v. Russia (1910) 5 Am. Jour. of Int. Law 490. However, if a sovereign power commences proceedings, it must conform to the practice and regulations of the court, such as giving discovery, etc. United States v. Prioleau (1866, V. C.) 14 L. T. Rep. N. S. 700. The decision in the principal case, while raising a novel point, seems in line with established principles.

The proposition, also supported by the principal case, that where a foreign government becomes a partner in any trading company, it divests itself of its sovereign character and assumes that of a private person, is not free from doubt. It is approved in a dictum in The Charkieh (1873) L. R. 4 A. & E. 59, 99. Other dicta to the same effect are cited in an article by Nathan Wolfman, Sovereigns as Defendants (1910) 4 Am. Jour. of Int. Law, 373. It has found some support in the decisions of certain continental courts, e. g., those of Belgium and Italy, where the distinction of administrative law between acte de gouvernement and acte de gestion is accepted. De Paepe, Etude sur la Compétence Civile à l'égard des Etats Etrangers, Brussels, 1894; C. F. Gabba in 15 Clunet (1888) 180-191, 16 Clunet (1889) 538-554 and 17 Clunet (1890) 27-41 and 51 Giurisprudenza Italiana (1888) 65-80. See criticism of the Italian decisions in two articles by Dionisio Anzilotti in 5 Zeitschr. für Int. Privat u. Strafrecht (1895), 24-37 and 138-147. But there is weighty authority to the effect that even in such case the courts will not proceed against the person or the property of a sovereign. The Parlement Belge (1880, C. A.) 5 P. D. 197, 216; Mason v. Intercolonial Railway of Canada (1908) 197 Mass. 349, 83 N. E. 876.

JUDGMENTS—BAR OF FORMER JUDGMENT—Successive Actions for Seduction and Breach of Promise.—In an action for breach of promise the plaintiff alleged that the defendant promised to marry her, and later took advantage of such promise to seduce her, and that he failed to keep his promise. The defendant pleaded a judgment obtained against him by the plaintiff in a prior action for the seduction in which the breach of promise was also set forth in the complaint. Held, that the judgment in the first action barred the second, as both actions must be considered as resting on the same wrong for which recovery could not be had twice. Rieger v. Abrams (1917, Wash.) 167 Pac. 76.

A former judgment on the merits on the same cause of action, though under a different form of remedy, is generally a bar to a subsequent action. Hodge v. Shaw (1892) 85 Ia. 137, 52 N. W. 8. 2 Black, Judgments, sec. 725. But here the causes of action are not the same. They arose at different times, and the evidence necessary and sufficient to prove one would not prove the other. It is true that, by the majority view, if the first suit had been for breach of promise the plaintiff could have proved seduction to aggravate the damages. Lanigan v. Neely (1907) 4 Cal. App. 760, 89 Pac. 441; Spelling v. Parks (1900)

104 Tenn. 351, 58 S. W. 126. Of course in such a case, if a complete recovery is sought and allowed, it is a bar to further action. See Lanigan v. Neely, supra. But the plaintiff need not bring in the seduction if she preferred to keep it for a separate suit. The rule that a party cannot split up his cause of action refers only to claims which constitute a part of one inseparable cause of action. Brunsden v. Humphrey (1884) L. R. 14 Q. B. D. 141. Cf. Goodrich v. Yale (1867) 97 Mass. 15. Here the plaintiff apparently sued for the seduction first and, if so, it seems clear that she could not properly be allowed to recover in such action full damages for the subsequent breach of promise, and a second action should therefore be allowed. The complaints in both actions were loosely drawn, however, and possibly the opinion should be interpreted as proceeding on the assumption that the first suit was actually tried as one for breach of promise with the seduction to aggravate the damages. If this assumption was warranted by the facts, the decision would of course be correct.

LIMITATION OF ACTIONS—TOLLING OF STATUTE—TENDER OF PART PAYMENT.—A debtor tendered \$50 on a \$5,000 debt with a statement that he would pay more when he got the money. The tender was rejected as too small to be worth taking. *Held*, that such tender was sufficient acknowledgment of the debt to lift the bar of the statute. *In re Maniatakis' Estate* (1917, Pa.) 101 Atl. 920.

It is good public policy to put an end to litigation. But it is also good policy that debtors be compelled to pay their debts. Hence it is held that under certain circumstances the bar of the statute of limitations should be lifted and the creditor allowed to recover. Part payment accompanied by circumstances warranting the inference that the debtor intends to pay the balance takes the debt out of the statute. Wenz v. Wenz (1916) 222 Mass. 314, 110 N. E. 969; Canal Bank & Trust Co. v. Bank of Ascension (1916) 140 La. 465, 73 So. 269. The same effect is given to an unconditional promise to pay, whether the promise is expressed or implied. Herrington v. Davis (1914) 145 N. Y. Supp. 452; Shaw v. Oliver (1914) 112 Me. 512, 92 Atl. 652. And promises to pay have been implied from very ambiguous language. Burden v. McElhenny (1819, S. C.) 2 Nott & M. 60, 10 Am. Dec. 570; cf. Hornblower v. George Washington University (1908, D. C.) 31 App. Cas. 64. When words are enough to warrant inference of a promise, there seems to be no good reason why acts should not be. Senniger v. Rowley (1908) 138 Iowa, 617, 116 N. W. 695. The extension of the doctrine to a case of an unaccepted part tender seems wholly sound and wise, provided the circumstances are such as to warrant the implication of a promise to pay the rest. If the circumstances do not warrant such implication, the bar should be lifted only to the extent of the tender. The difficulty with the principal decision is that the inference to be drawn from the tender with reference to further payment would seem to be controlled by the accompanying words of promise, which the court held too indefinite in themselves to remove the bar of the statute. It is difficult to see how the tender made the promise any moré definite.

C. I.

Nuisance—Whether Property Interest Necessary to Recovery—Death by Wrongful Act.—Under a statute providing that "a father may maintain an action for the injury or death of a child," the plaintiff sought to recover for the death of his minor son, caused by a nuisance maintained by the defendant near the premises occupied by the plaintiff's family, but owned by the plaintiff's wife. Held, that the plaintiff could recover, regardless of his lack of interest in the real estate, the elements of damage being the value of the child's services during

his minority, and the expenses incurred because of his injury and death. Pere Marquette R. Co. v. Chadwick (1917, Ind. App.) 115 N. E. 678.

The old common law assize of nuisance was maintainable only by the tenant of the freehold. 3 Bl. Com. 220-223. An action on the case for damages for interference by nuisance with the use and enjoyment of property is maintainable by one in possession. Bentley v. Atlanta (1893) 92 Ga. 623, 18 S. E. 1013. But the cases are in conflict (due, it is submitted, to confusion into which the courts seem to fall when the element of nuisance is introduced) whether a plaintiff having no proprietary or possessory interest in the premises may recover for a nuisance which injures his health. Recovery was allowed in Ft. Worth, etc. R. Co. v. Glenn (1904) 97 Tex. 586, 80 S. W. 992; Hosmer v. Republic Iron Co. (1913) 179 Ala. 415, 60 So. 801; Hunt v. Lowell (1864, Mass.) 8 Allen 169; contra, Ellis v. Kansas City, etc. R. Co. (1865) 63 Mo. 131. The principal case adopts the affirmative view and makes a novel application of it to a situation where the nuisance injures not the plaintiff's health but his common law and statutory right to his child's services. At common law the father could recover for loss of services only up to the time of the child's death. Osborn v. Gillett (1873) L. R. 8 Ex. 88. The statute gives him a new right of action for lost services from the time of death until the child would have reached majority. Mayhew v. Burns (1885) 103 Ind. 328, 333, 2 N. E. 793, 796. The defendant, however, is liable to the parent only if he would have been liable to the child had the latter been injured, but not killed. Ohio & Miss. R. Co. v. Tindall (1859) 13 Ind. 366. In adopting the view of liability for nuisance which impairs health regardless of proprietary interest and in applying it to the principal case, the court reaches, it is submitted, a sound conclusion.

C. S. B.

QUASI-CONTRACTS—RIGHT TO RETURN OF ENGAGEMENT RING ON BREACH OF PROMISE TO MARRY.—The defendant broke an engagement to marry and the plaintiff brought an action for recovery of the engagement ring. *Held*, that the plaintiff could recover, since there is an implied condition that the ring shall be returned if the engagement is broken. *Jacobs v. Davis* [1917] 2 K. B. 532.

When the defendant breaks a contract, the plaintiff has an action in assumpsit or the alternative remedy of suing for the value of the benefit received by the defendant. Brown v. Woodbury (1903) 183 Mass. 279, 67 N. E. 327. Kicks v. State Bank of Lisbon (1904) 12 N. D. 576, 98 N. W. 408. The breach, however, must be one so materially affecting the contract as to have the same effect as an absolute repudiation thereof. Cornwall v. Henson, (C. A.) [1900] 2 Ch. 298. Rhymney Ry. Co. v. Brecon, etc., Ry. Co. (1900, C. A.) 69 L. J. Ch. 813, 83 L. T. Rep. N. S. 111. The court in the principal case went one step further and allowed the plaintiff to recover the specific article, treating the delivery of the ring either as a pledge, or as a gift subject to a condition subsequent defeating the gift in case the marriage is not consummated. However, it is submitted that the real duty enforced by the court was of an equitable nature, more closely allied to quasi-contract than to contract, based on the principle that the defendant after repudiating a contract should not be allowed to keep articles given in reliance upon the contract and in expectation of its performance. See Robinson v. Cumming (1742, Ch.) 2 Atk. 409.

J. N. M.

Torts-Negligence of Manufacturer-Restaurant Keeper's Liability to Guest.—The plaintiff, who ordered at the defendant's restaurant a piece of cake, baked and prepared for serving by the defendant, was injured by biting

upon a metallic nail concealed in the cake. Held, that the defendant was not liable. Jacobs v. Childs Co. (1917, N. Y. Mun. Ct.) 166 N. Y. Supp. 798.

The court says that this case is indistinguishable in principle from Hasbrouck v. Armour & Co. (1909) 139 Wis. 357, 121 N. W. 157. That was a suit for injuries sustained from using a piece of soap containing a concealed needle. But in that case the soap had been manufactured by the defendant, sold to a retailer and purchased from the retailer by the plaintiff, so that there was no privity of contract between the manufacturer and the plaintiff. The principles applicable to such a situation were discussed in MacPherson v. Buick Motor Co. (1916) 217 N. Y. 382, 111 N. E. 1050; commented upon in 25 YALE LAW JOURNAL 679. In the principal case, however, there was privity of contract between the defendant manufacturer of the cake and the injured plaintiff. It is true that there is no implied warranty on the part of the restaurant keeper that the food he serves shall be wholesome and fit for consumption. Merrill v. Hodson (1914) 88 Conn. 314, 91 Atl. 533; see 24 YALE LAW JOURNAL 73. But it would seem that where there is privity of contract between the purchaser and the manufacturer of food it may well be held that there is a duty of care in preparing the food which would render the manufacturer liable for injuries due to a foreign substance, such as a nail, contained in the food. Whatever one may think of the policy of exempting manufacturers from liability for injuries sustained by a third person who dealt only with the retailer, as in the Hasbrouck case, it is clear that such a decision is not a precedent for the principal case. It is regrettable that the court did not note this distinction and discuss more thoroughly the real point involved in the facts before it. The distinction taken in the opinion between a foreign substance of a sort which is used in manufacturing the article-as a needle concealed in the seam of a flannel garment-and a foreign substance of a sort having no connection with the manufacture—as a nail concealed in cake—seems of doubtful validity.

VENDOR AND PURCHASER—PROCEEDS OF INSURANCE—RETENTION AS SECURITY.— The defendant sold to the plaintiff, as one transaction, a farm and the chattels thereon for \$3000. The plaintiff gave the defendant a mortgage on the chattels to secure the payment of \$1500 of the whole purchase price. The vendor retained the title to the real estate. The contract provided that the plaintiff should keep the premises insured for the security of the defendant and that upon the payment of the chattel mortgage the defendant should discharge the mortgage and give the plaintiff a warranty deed of the land, taking a mortgage on the real estate for \$1500, the balance of the purchase price. The dwelling was destroyed by fire. Neither party was willing to rebuild. The real estate was now worth but \$800. The plaintiff filed a bill praying that the insurance money be applied in discharge of the chattel mortgage debt, then due, and that a warranty deed of the land be delivered. Held, that the insurance money stood in the place of the property destroyed and that the plaintiff could not require its application to discharge the chattel mortgage. Baker v. Rushford (1917, Vt.) 101 Atl. 769.

No case has been found in which a situation similar to that in the principal case was presented for decision. But see *Thorp v. Croto* (1907) 79 Vt. 390, 65 Atl. 562, 10 L. R. A. (N. S.) 1166 with note. In that case the mortgagee was ordered to apply the proceeds of the insurance upon the mortgage debt as the payments fell due. Part of the debt was due but no question as to the sufficiency of the security was there raised. There are a number of cases in which it is said that the insurance money takes the place of the property, but in those cases

either no part of the mortgage debt was then due or the statement was made by way of dictum. See Power v. Fire Ins. Co. (1897) 69 Vt. 494, 38 Atl. 148; Naquin v. Tex. Savings Asso. (1902) 95 Tex. 313, 67 S. W. 908, 58 L. R. A. 711; Fergus v. Wilmarth (1886) 117 Ill. 543, 7 N. E. 508; Boutelle v. Minneapolis City (1894) 59 Minn. 493, 61 N. W. 554; Brook & Berry v. Hubbard (1901) 73 H. 122, 50 A. H. 802. Injunctions prohibitory of waste indicate the tendency of courts of equity to protect the security of a vendor or mortgagee. Mutual Life Ins. Co. v. Bigler (1880) 79 N. Y. 568. It is evident that the purpose of the contract in the principal case was to give to the defendant reasonable security for the mortgage debt. Compliance with the plaintiff's request would therefore work a manifest injustice.

R. L. S.

Vendor and Purchaser—Sale of Two Lots by Separate Contracts—Effect of Misrepresentation as to One on Contract for the Other.—A purchaser contracted for two lots from the same vendor, intending to use them together, but without communicating this intention to the vendor. There was a misrepresentation as to the second lot and the purchaser rescinded that contract. He then sought to rescind the contract for the first lot and the vendor asked for specific performance. Held, that neither rescission to the purchaser nor specific performance to the vendor would be granted. Holliday v. Lockwood [1917] 2 Ch. 47.

The case illustrates the doctrine that equity may consider certain facts in the formation of a contract as insufficient to establish a claim for rescission but sufficient to cause the court to refuse specific performance of the contract. Mortlock v. Buller (1804 Eng. Ch.) 10 Ves. 292; Scott v. Alvarez (C. A.) [1895] 2 Ch. 603; Moffett, etc. Co. v. City of Rochester (1898 C. C. A. 2d) 91 Fed. 28; and see Shaw, C. J. in Western R. R. Co. v. Babcock (Mass. 1843) 6 Met. 346, 352. The general rule is that the undisclosed intention or understanding of one contracting party does not govern the contract, but he is bound by the interpretation reasonably given to his words and acts by the other party. Professor A. L. Corbin, Offer and Acceptance (1917) 26 YALE LAW JOURNAL, 205; Hodgdon v. Mansfield (1888) 147 Mass. 304, 17 N. E. 544; Jacob Johnson Fish Co. v. Hawley (1912) 150 Wis. 578, 137 N. W. 773. In the principal case there were no such facts, in the absence of an express statement, as to lead the vendor to regard the contracts as interdependent. Under the general rule above stated they must therefore be regarded as separate contracts, and a misrepresentation as to one would not be ground for rescission as to the other. For a statement of facts held sufficient to "complicate" separate contracts, see Casamajor v. Strode (1834) 2 My. & K. 706, 725 and Dyke v. Blake (1837) 4 Bing. N. C. 463, 477. Specific performance, however, is not a matter of strict right, to be demanded on showing a valid legal contract, but will be refused where it would be inequitable to grant it, because of the harshness of the bargain, or the mistake of the defendant as to the terms or meaning of the contract and equity will leave the parties to their remedies at law. 2 Pomeroy, Eq. Jurisp. sec. 860, Mortlock v. Buller, supra; Burkhalter v. Jones (1884) 32 Kan. 5, 3 Pac. 559, Kelly v. York Cliffs Co. (1900) 94 Me. 374, 47 Atl. 898. Particularly is this so if the mistake was occasioned even remotely by the claimant's acts or omissions. 2 Pomeroy, Eq. Jurisp. sec. 860, Denny v. Hancock (1870, C. A.) L. R. 6 Ch. 1. No previous case seems to have called for the application of these doctrines to the same situation as that presented in the principal case but the decision, at least on the question of specific performance, seems a logical extension of the principles established by the cases above cited. On the question of rescission, some courts have gone a long way in granting relief even in the cases of unilateral mistake, and it is submitted that if the purchaser, as a ground for rescission had relied on his mistaken belief that he was to get two lots to use together, whereas he only obtained one, instead of attempting to "complicate" the two contracts, so that the misrepresentation as to one would apply to both, he would have stood on stronger ground. 2 Pomeroy, Eq. Jurisp., sec. 852; Brown v. Lamphear (1862) 35 Vt. 252; Ward v. Yorba (1899) 56 Pac. 58, 123 Cal. 447, but contra, Diman v. R. R. Co. (1858) 5 R. I. 130; Moffett, etc. Co. v. City of Rochester, supra.

L. F.

WILLS—ACCELERATION OF REMAINDERS—ELECTION OF WIDOW GIVEN LIFE ESTATE TO TAKE AGAINST THE WILL.—The testator devised his residuary estate in trust, part of the income to be used to provide an annuity for his sister-in-law, and the remaining income and, upon the annuitant's death, all the income, to be divided equally between his widow, son and daughter. At the widow's death, the principal was to be divided equally between the son and the daughter, the latter's share continuing in trust. The widow elected to take against the will. Held, that the widow's election terminated the trust for her life as though she had died, and accelerated the son's interest so as to entitle him, after a sum sufficient to provide for the annuitant had been set aside; to receive immediately one-half the residue. In re Disston's Estate (1917, Pa.) 101 Atl. 804.

The general rule is said to be that election to take against the will effects the same results as death. Beideman v. Sparks (1900, Ch.) 61 N. J. Eq. 226, 47 Atl. 811. Baptist Female University v. Borden (1903) 132 N. C. 476, 44 S. E. 47. The instant case cites former Pennsylvania cases as establishing this rule. See Ferguson's Estate (1890) 138 Pa. 208, 219, 20 Atl. 945, 946. Vance's Estate (1891) 141 Pa. 201, 213, 21 Atl. 643, 645. But investigation of the authorities shows that they proceeded on the ground that the only purpose of postponing the remainders was to protect the widow's interest. Election does not always lead to acceleration. The superior rights of a disappointed devisee of property passing to the widow by her election may prevent acceleration. Latta v. Brown (1896) 96 Tenn. 343, 34 S. W. 417. And where the widow's death is the time fixed for the payment of specific legacies, it has been held that no acceleration takes place. Lovell v. Charlestown (1891) 66 N. H. 584, 32 Atl. 160; Jones v. Knappen (1891) 63 Vt. 391, 22 Atl. 630. So, when the remainder is to a class which will not be determined till the widow's death. Brandenburg v. Thorndike (1885) 139 Mass. 102, 28 N. E. 575. On principle it would seem that acceleration should not be permitted when the rights of any other beneficiary will be prejudiced. The court in the principal case assumes that the trust was only for the widow's benefit and so puts the case within the general rule, without discussing the rights of the annuitant. It is submitted that nothing warranted such an assumption and the decision seems inconsistent with an earlier Pennsylvania case, cited by the court but not distinguished or overruled, where a similar trust for the widow's life was continued for the protection of an annuitant. Young's Appeal (1884) 108 Pa. 17, 22. See also In re Wyllner's Estate (1917) 65 Pa. Super. Ct. 396, 404.

G. L. K.

Workmen's Compensation Act—Who is an Employee—President and Majority Stockholder of Corporation.—The president of a corporation whose salary was \$70 per week and who, as majority stockholder, received annual dividends of approximately \$30,000, lost his leg as a result of an injury sustained while assisting in carrying lumber. *Held*, that he was not an employee within the meaning of the Act. *Bowne v. S. W. Bowne Co.* (1917) 221 N. Y. 28, 116 N. E. 364.

The New York act, unlike the English act, does not expressly except from its benefits workmen receiving more than a certain remuneration. Nor does its language preclude a construction obliterating the distinction between the officers of a corporation and its workmen. The New York Supreme Court has, therefore, declared that the fact that a claimant was vice president and a stockholder of the employer in no way affects his status as an employee. Beckman v. Oelerich (1917, N. Y.) 174 App. Div. 353, 160 N. Y. Supp. 791. It has also sustained an award to an officer and stockholder, when working as an ordinary workman. Kennedy v. Kennedy Mfg. Co. (1917, N. Y.) 177 App. Div. 56, 163 N. Y. Supp. 944. In the principal case, however, the first, apparently, to come before a court of last resort, the court has denied the benefits of the act to the principal executive officer, attaching considerable weight to the fact that, as stated by the court, he was in reality the corporation, and its employee only by legal fiction. The general ground of the opinion is that claimant was not the sort of employee for whose benefit the legislation was enacted. Cf. New York C. R. R. Co. v. White (1916) 243 U. S. 188, 37 Sup. Ct. 247. This conclusion seems amply justified by the facts of the case, but since the claimant's official position, his control over the corporation, his salary, and his "comfortable dividends" were all relied upon, we are still left in doubt what the ruling would have been, had any one of these elements been missing. H. S.

#### **CURRENT DECISIONS**

Attorneys—Disearment—No Immunity from Previous Compulsory Self-Crimination.—In a criminal trial an attorney had given testimony which amounted to a confession of professional misconduct. In subsequent disbarment proceedings based on such misconduct, he claimed immunity by force of section 584 of N. Y. Penal Code which provides, in substance, that no person shall be subjected to any penalty or forfeiture on account of anything concerning which he may have been compelled to testify. Held, that the statutory immunity from penalties and forfeitures did not prevent disbarment, as disbarment is not punishment but revocation of a privilege conditioned upon honorable professional conduct. In re Rouss (1917, N. Y.) 116 N. E. 782.

In construing this section of the code in its application to disbarment proceedings, the case seems to be one of first impression; and the high plane upon which the court places its jurisdiction to disbar is worthy of note. Cf. Beckner v. Commonwealth (1907) 126 Ky. 318, 103 S. W. 378.

ATTORNEYS—PRACTICE DURING SUSPENSION AS CONTEMPT.—By order of the Supreme Court each of the defendants was suspended from "practice in all the courts of this state" for one year. During the year they kept open an office, displayed the usual signs indicating that the office was a law office and that they were attorneys at law, used and sent through the mails stationery indicating that they were attorneys, and permitted their names to appear as attorneys in the city and telephone directories. Held, that these acts constituted contempt of court. Roberts, J., dissenting. State v. Marron (1917, N. M.) 167 Pac. 9.

Carriers—Hours of Service Act—Computing Time.—The Hours of Service Act (U. S. Comp. St. 1916, sec. 8678) forbids keeping certain telegraph operators on duty for more "than 9 hours in any 24 hour period." An operator whose regular day was 7 A. M. to 4 P. M., on one occasion worked from 7 A. M. to 1.30 P. M., was off duty till 3 P. M., then worked till 5.10 P. M. and next day resumed his regular schedule of 7 A. M. to 4 P. M. Thus he worked more than 9 hours out of the 24 hour period beginning at 3 P. M. but not more than 9 hours out of any 24 hour period beginning at 7 A. M. Held, that the Act was not violated, since in fairness to the Railway Company the 24 hour period should be construed to begin at the time the employee first goes on duty for his day's work. United States v. Missouri Pac. Ry. Co. (1917, C. C. A. 8th) 244 Fed. 38.

Constitutional Law—Due Process—Prohibition of Manufacture of Intoxicating Liquors.—The defendant was charged with violating a Washington statute which provided that it should be unlawful for any person to manufacture, sell, barter, exchange, or give away any intoxicating liquor. His offence consisted in making "grape wine" exclusively for his own personal use. *Held*, that this was an offense prohibited by the statute and that the statute, so construed, was constitutional. *State v. Fabbri* (1917, Wash.) 167 Pac. 133.

This case seems to be the first actually holding it constitutional to forbid the manufacture of liquor for personal use. It is supported by a dictum of Mr.

Justice Harlan in Mugler v. Kansas (1887) 123 U. S. 623, 8 Sup. Ct. 273. A few recent cases presenting closely similar questions follow this dictum. In re Crane (1915) 27 Idaho 671, 151 Pac. 1006 (having in possession); Clark Distillery Co. v. Western Maryland R. R. Co. (1916) 242 U. S. 311, 37 Sup. Ct. 180 (transporting in interstate commerce). There are many cases to the contrary, holding that the mere possession and use of liquor to satisfy one's own personal tastes, and by inference, at least, the manufacture of liquor for such use, is not injurious to the public health, morals, or welfare and therefore is not subject to the police power. Commonwealth v. Campbell (1909) 133 Ky. 50, 117 S. W. 383; Eidge v. Bessemer (1909) 164 Ala. 599, 51 So. 246; Shreveport v. Hill (1913) 134 La. 351, 64 So. 137.

CONSTITUTIONAL LAW—POLICE POWER—ORDINANCE FORBIDDING ADVERTISING ON WALLS AND BUILDINGS.—Under a municipal ordinance construed as prohibiting the painting of advertising signs on walls and buildings within the city, a fine was imposed upon the plaintiff in error. *Held*, that the ordinance, so construed, was unconstitutional, as it constituted taking private property for public use without compensation. *Anderson v. Shackelford* (1917, Fla.) 76 So. 343.

The case illustrates the persistence of the view of the courts that the police power does not extend to the prohibition of practices which merely violate aesthetic taste. See Freund, Police Power, sec. 182; see also Henry T. Terry, The Constitutionality of Statutes Forbidding Advertising Signs on Property (1914) 24 YALE LAW JOURNAL I.

COURTS—JURISDICTION—VIEW IN FOREIGN STATE.—In a divorce proceeding tried without jury, a view of premises located in another state was taken by the judge in the presence of both parties and without exception by the appellant. On appeal from a decree dismissing the complaint the appellant contended that the court had acted without jurisdiction in taking such view. *Held*, that the court did not exceed its jurisdiction since the action of the court corresponded to the taking of a view by a jury, which is regularly done in the absence of the court, and does not require the exercise of judicial functions at the time the view is taken. *Carpenter v. Carpenter* (1917, N. H.) 101 Atl. 628.

The case is noteworthy for its thorough consideration of the nature of a view, as well as for the unusual circumstance that the view was taken outside the state. Cf. State v. Hawthorn (1914) 134 La. 979, 64 So. 873.

HUSBAND AND WIFE—AGREEMENT PENDING DIVORCE TO RESUME MARITAL RELATIONS.—During the pendency of divorce proceedings an agreement was made between the parties by which it was provided that they should resume marital relations, that certain community property should be divided, that the wife should dismiss her suit, and that if the husband should thereafter do any act giving her ground for divorce he should thereupon pay her \$3,000. Subsequently the wife obtained a divorce for misconduct and sued upon the contract, which the husband contended was against public policy and void. Held, that the contract was valid. Bowden v. Bowden (1917, Cal.) 167 Pac. 154.

The court draws the valid distinction between contracts which tend to encourage marital misconduct (as when one of the spouses agrees, should the other give ground for divorce, to accept a certain sum in lieu of such alimony as a court might award) and contracts which tend to deter from misconduct, like the one under review, where neither party gave up any marital rights, but the husband assumed, in addition to his marital duties, the obligation to pay some-

thing additional to what the court would award in a suit for divorce or separate maintenance.

Inheritance and Transfer Taxes—Antenuptial Agreement—Option under Will to Take Payment in Securities.—The widow of a decedent was entitled under an antenuptial agreement to receive on her husband's death \$250,000 as a debt against his estate. By his will he confirmed this agreement and provided that the wife should have the option of taking payment in securities to be selected by her from his estate instead of cash. She exercised this option and accepted securities in payment. Under an inheritance tax act, passed after the antenuptial agreement and expressly not applicable to transfers by "deed, grant or gift" prior to the act, a tax was assessed on the value of the securities so transferred to the widow. Held, that though by the antenuptial agreement the widow became a creditor of the estate for \$250,000, and payment of this debt in cash would not have been a taxable transfer, the option to take securities was a legacy in payment of a debt, and as such, if accepted, was equally taxable with gratuitous legacies. Hill v. Treasurer (1917, Mass.) 116 N. E. 509.

Nuisance—Public Garage in Residential District—Injunction.—An injunction was asked against the proposed erection of a garage in a district exclusively residential, near large churches, on the ground that the operation of a garage would necessarily create noises, odors and dangers, interfere with church services, reduce the value of surrounding property, and increase insurance rates. Held, that the injunction should issue. Prendergast v. Walls (1917, Pa.) 101 Atl. 826.

For cases denying injunctions against the operation of a garage see Sherman v. Levingston (1910) 128 N. Y. Supp. 581, 137 App. Div. 929 (not a nuisance per se); Diocese of Trenton v. Toman (1908, Ch.) 74 N. J. Eq. 702, 70 Atl. 606 (garage near day nursery); Stein v. Lyon (1904) 87 N. Y. Supp. 125, 91 App. Div. 593 (residential district). No previous case has been found in which the operation or erection of a garage was enjoined as a nuisance, though an injunction has been issued against the storage of gasolene in a frame garage surrounded on three sides by other frame buildings. O'Hara v. Nelson (1906, Ch.) 71 N. J. Eq. 629, 63 Atl. 842.

PATENTS—RESTRAINT OF TRADE—PRICE RESTRICTIONS ON RESALE OF PATENTED ARTICLE.—Ford automobiles constructed under various patents were marketed under a so-called "license system" by which dealers agreed to resell only at the plaintiff's full list prices. The defendants induced Ford dealers to break their agreements, and Ford machines were advertised for sale by the defendants at less than list prices. The plaintiff sought an injunction. Held, that the plaintiff's contract with dealers amounted to an absolute, as distinguished from a conditional, sale of its patented machines and that after such sale attempted price restrictions as to resale were invalid, both at common law and under the Sherman Act. Ford Motor Co. v. Union Motor Sales Co. (1917, C. C. A. 6th.) 244 Fed. 156.

For a discussion of the principles involved, see (1917) 26 YALE LAW JOURNAL 600. See also F. Granville Munson, Control of Patented and Copyrighted Articles after Sale, ibid. 270. Cf. Ford Motor Co. v. Benj. E. Boone (1917, C. C. A. 9th) 243 Fed. 335; and Robt. H. Ingersoll & Bros. v. Hohne & Co. (1917, N. J. Ch.) 101 Atl. 1030.

PRINCIPAL AND AGENT—FOREIGN PRINCIPAL—PERSONAL LIABILITY OF AGENT.— The defendants, Liverpool wool brokers, entered into a written contract in behalf of an American firm with the plaintiffs who were Liverpool merchants. The contract recited that "our principals sell, through the agency of" the defendants, certain specified goods to the plaintiffs. The name of the principals was not disclosed but they were referred to in the contract as the "seller." The contract was signed: "By authority of our principals," followed by the name of the defendant's firm and the words "as agents." In suit against the defendants for breach of the contract it was claimed that by established custom of merchants an agent contracting for a foreign principal assumes the liability of a principal. Held, that if the alleged custom still existed, which was doubted, it was a custom by which the agent was liable in place of, rather than in addition to, the principal, and could not apply in the case at bar because inconsistent with the language of the contract, which clearly made the foreign principal a contracting party. Miller, Gibb & Co. v. Smith & Tyrer, Ltd. (C. A.) [1917] 2 K. B. 141.

The case is interesting as indicating a tendency to limit, if not to abandon, a peculiar English doctrine, which, though originally founded on proof of custom, at one time seemed likely to be definitely adopted into the law. The authorities are fully cited in the opinion.

TAXATION—FEDERAL INCOME TAX—ALIMONY NOT INCOME.—By a New York decree of judicial separation entered in 1909 the husband was ordered to pay the wife \$3,000 monthly during her life, and such payments were made during the years 1913 and 1914. Held, that such monthly payments did not constitute income within the meaning of the Federal Income Tax law of Oct. 3, 1913 (38 Stat. 114, 166) and were not taxable thereunder. Gould v. Gould (Nov. 19, 1917) U. S. Sup. Ct. Oct. Term, No. 41.

TELEGRAPHS AND TELEPHONES—REASONABLE SERVICE—DUTY TO FURNISH CUSTOMER CHANGE.—The plaintiff claimed damages for the refusal of the defendant telegraph company to accept a message for transmission. The message was refused because the operator was unable to change a five dollar bill tendered by the plaintiff. Held, that the plaintiff was entitled to recover on the ground that a public service corporation must be prepared to furnish change to a reasonable amount, and that reasonableness with reference to amount, time and place was for the court to determine. Lehman, J., dissenting. Dale v. Western Tel. Co. (1917, App. T.) 166 N. Y. Supp. 740.

The case applies to telegraph companies, apparently for the first time, a rule which seems to be well settled with reference to the duty of common carriers.

Workmen's Compensation Act—Right to Compensation—Effect of Subsequent Insanity.—A workman sustained injury which caused permanent partial incapacity and entitled him to weekly payments under the Massachusetts Workmen's Compensation Act. Subsequently he became insane, his insanity being in no way related to the injury. *Held*, that he was entitled to continue to receive such weekly payments. *In re Walsh* (1917, Mass.) 116 N. E. 496.

The court follows English cases which hold that a subsequent disqualification for work, unrelated to the original injury, does not deprive a workman of the compensation to which he is entitled for such injury. It is believed that this is the first American authority on the point.

## **BOOK REVIEWS**

Equity in its Relations to Common Law. By William W. Billson. Published by The Boston Book Co., Boston. 1917. pp. xii, 234.

This work undertakes to set forth what the author believes to be the real nature of equity and its relations to common law-a subject upon which both judges and writers have differed greatly. When we come to examine the views which have obtained upon the matter, we discover two schools of thought. The point of view of one of these is stated, although without careful analysis, by Spence in his classic work upon The Equitable Jurisdiction of the Court of Chancery. He speaks of "that equity which is opposed to . . . law and stands in opposition to it" and adds: "the principles of Equity, or natural justice, have sometimes to be applied in contradiction to the positive law." (Note to Book II, Chap. I. The italics are those of Spence.) The same view is more clearly expressed in the English Judicature Acts of 1873-1875, which consolidated the courts of common law and chancery and expressly provided: "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." (Subdivision II, Section 25. The italics are those of the present writer.) As Mr. Billson points out (p. 11) the idea that the rules of equity "conflict" with the common law is, among more recent writers, expressed by Pomeroy. (Pomeroy, Equity Jurisdiction, 2 ed., secs. 48-54 and 427.) It seems probable—although apparently Mr. Billson thinks the contrary to have been the case—that this view was the prevailing one down to a relatively modern period.

The opposite view, as is well known, was vigorously advanced by Professor Langdell, Professor Ames, Professor Maitland, and some others, including John Adams in his *Treatise on Equity*. Professor Langdell's views will be found in I Harv. L. Rev. 58; 13 Harv. L. Rev. 673, 677; Summary of Equity Pleading (2d ed.) 210-211; those of Professor Ames are indicated in I Harv. L. Rev. 9; those of Mr. Adams in his *Treatise on Equity* (8th ed.) xxiv and xxix. The following passage from Professor Langdell's writings is typical of his views:

"What has thus far been said of rights and their violation has in it no element of equity. The rights which have been described may be defined as original and independent rights, and equity has no voice either in the creation of such rights or in deciding in whom they are vested. Equity cannot, therefore, create personal rights which are unknown to the law; nor can it say that a res, which by law has no owner, is a subject of ownership, nor that a res belongs to A which by law belongs to B; nor can it impose upon a person or a thing an obligation which

by law does not exist; nor can it declare that a right arising from an obligation is assignable, if by law it is not assignable. To say that equity can do any of these things would be to say that equity is a separate and independent system of law, or that it is superior to law."

Perhaps no clearer statement of the view that there has been no conflict can be found than the following by Professor Maitland:

"... Perhaps you may have fancied that at all manner of points there was a conflict between the rules of equity and the rules of common law, or at all events a variance... It is important that even at the very outset of our career we should form some notion of the relation which existed between law and equity in the year 1875. And the first thing that we have to observe is that this relation was not one of conflict. Equity had come not to destroy the law, but to fulfill it. Every jot and every tittle of the law was to be obeyed, but when all this had been done something might yet be needed, something that equity would require. . . .

"Let me take an instance or two in which something that may for one moment look like a conflict becomes no conflict at all when it is examined. Take the case of a trust. . . . Equity did not say that the cestui que trust was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the cestui que trust. There was no conflict here. . . . The Judicature Act . . . found no conflict, no variance even, between the rules of the common law and the rules of equity."

This second view is undoubtedly that which has for many years been taught in a considerable number of our law schools, largely through the influence of Professor Langdell's teaching and writing. That it is unsound is the thesis of the author of the work under review. To the working out of this thesis in detail the book is devoted. At the outset the learned author laments that these questions "though long mooted, appear never to have received as systematic discussion as they deserve, considering how vitally they concern the origin, nature, functions and limitations of equity" (p. iii).

One who is familiar with the literature of the subject is surprised to find that while Mr. Billson cites many writers, none of whom discuss the question with the care which its importance demands, there is no reference to the systematic and thorough analytical discussion of the whole subject, with a wealth of concrete illustrations, which was published by Professor Hohfeld in June, 1913, in the Michigan Law Review. (11 Mich. L. Rev., 537-572. A supplementary article by the same writer appeared in June, 1917, in 26 Yale Law Journal, 767, under the title, The Conflict of Equity and Law.) By means of a more careful analysis than the matter had previously received Professor Hohfeld demonstrated the correctness of the traditional view, and specifically defended the embodiment of that view in the abovequoted section of the English Judicature Acts. He also exposed in detail the fallacies underlying the specific arguments of Langdell and Maitland, and their followers. This demonstration took the form not

merely of a general discussion but also of a systematic analysis of a large number of concrete illustrative cases.

The present work undertakes much the same task. The general theory of the "conflict" is presented in the first part of the book (five chapters); the second part (three chapters) contains an application of the theory to particular branches of the law. The book is written in an interesting and, at times, even picturesque style; but it is less closely analytical and thorough than the prior treatment of the subject by Professor Hohfeld. The similarity of view of the two writers is strikingly shown by the following comparison of their treatment of the subject.

We find, for example, that Professor Hohfeld discusses the "origin and development of equity," "the fundamental characteristics of equity," the "functions of equity," and "the limitations of the remedial functions of equity," while Mr. Billson, in his preface, refers to "the origin, nature, functions, and limitations of equity." Likewise we find Professor Hohfeld referring to "the dual system of law and equity," Mr. Billson to "The Law's Dualism in Rome and in England." Professor Hohfeld quotes Maitland, Langdell (both in his Summary of Equitable Pleading and his Brief Survey of Equity Jurisdiction), and Adams, as leading examples of the more recent writers declaring that there has been no appreciable "conflict" between equitable and legal rules; Mr. Billson says: "Of its more recent expositions the more notable are by Mr. Adams in his recent work on Equity, by Professor Maitland in his lectures, and by Professor Langdell in his work on the Pleadings, and in his fragment on Jurisdiction in Equity."

After his quotations from these writers Professor Hohfeld summarizes his views as follows:

"As against the proposition of these various scholars that there is no appreciable conflict between law and equity, the thesis of the present writer is this: while a large part of the rules of equity harmonize with the various rules of law, another large part of the rules of equity-more especially those relating to the so-called exclusive and auxiliary jurisdictions—conflict with legal rules and, as a matter of substance, annul or negative the latter pro tanto. As just indicated, there is, it is believed, a very marked and constantly recurring conflict between equitable and legal rules relating to various jural relations; and whenever such conflict occurs, the equitable rule is, in the last analysis, paramount and determinative. Or, putting the matter in another way, the so-called legal rule in every such case, has, to that extent, only an apparent validity and operation as a matter of genuine law. Though it may represent an important stage of thought in the solution of a given problem, and may also connote very important possibilities as to certain other, closely associated (and valid) jural relations, yet as regards the very relation in which it suffers direct competition with a rule of equity, such a conflicting rule of law is, pro tanto, of no greater force than an unconstitutional statute." (The italics here and below are, except in one or two instances, those of the reviewer.)

Again, he says:

"THE CONFLICT OF EQUITY AND LAW: A jural relation may be exclusively equitable,—that is, one recognized and vindicated exclusively by an equity court. As regards every such case there is a conflict pro tanto, between some valid and paramount equitable rule and some invalid and apparent legal rule."

In his more recent article, The Conflict of Equity and Law (26 YALE LAW JOURNAL, 767), replying to Professor Austin W. Scott, Professor Hohfeld reiterates his

"position that while many substantive equitable rules are entirely consistent with legal rules, many other substantive equitable rules (i. e., those relating to the so-called 'exclusive jurisdiction' and 'auxiliary jurisdiction' of equity) are in conflict with so-called legal rules,—the latter being pro tanto 'repealed,' and rendered as invalid as statutes that have been repealed by a subsequently enacted constitution."

Mr. Billson puts the same matter as follows:

"His equity, although thus ostensibly an affirmative, independent right, reacted upon the law's actual operation as correctively as a repeal pro tanto, and in so doing only served the purpose for which it was contrived.

"Viewing the subject in the combined light of law and equity, discarding fictions, and having regard to the substance of things, it is clear that from the time when any principle of law was overgrown by an adverse equity, it was, to the extent of the equity, virtually annulled in its operation." (p. 73.)

In dealing with the "supremacy of equity over law" Professor Hohfeld puts the matter as follows:

"In cases of conflict, as distinguished from concurrence, a jural relation is finally determined by the equitable rule rather than by the legal.

"Since in any sovereign state, there must, in the last analysis, be but a single system of genuine law, since the various principles and rules of that system must be consistent with one another, and since, accordingly, all genuine jural relations must be consistent with one another, two conflicting rules, the one 'legal' and the other 'equitable,' cannot be valid at the same moment of time; one must be valid and determinative to the exclusion of the other.

"As a mere practical matter, the equitable rule would ordinarily prove 'triumphant' because of the superior coercive procedure and remedies of the court of chancery.

"The theoretical finality and supremacy of the rules recognized and sanctioned by the court of chancery may be regarded as established ever since the year 1616,—the time when the notable controversy between Lord Chief Justice Coke and Lord Chancellor Ellesmere in relation to the power and privilege of the chancellor to issue injunctions against the 'enforcement' of common law judgments was settled by a prerogative decree of James I. upholding the chancery jurisdiction.

"While the conflict as to *ultimate* jural relations may be regarded as having been settled since the year 1616, the great indirectness and complexity of the dual procedure involved in vindicating such jural relations continued until, in more modern times, the law courts and equity courts were amalgamated into a single system. . . ."

"In regard to substance as distinguished from form, these changes in administration have not, for the most part, modified the conjoint operation of legal and equitable primary rights, or the conjoint operation of legal and equitable remedial rights: they have simply affected the modes by which legal and equitable rights are defined and vindicated."

Mr. Billson discusses the corresponding matters in the following words (p. 63 and p. 71):

"Such a conflict is of course less distracting than it sounds. For what it imports is not an absence, but only a crude method of co-ordination. The conflict is not real, in the sense that it involves any clash of different sections of State force. The finality of the new system is acknowledged, and its method of asserting its supremacy defined. . . .

"Still again, if we view the relations of the two systems from the standpoint of substance, what we see, as heretofore pointed out, is law and equity although formally distinct yet practically fused into some such harmonious whole as a modulated general rule and its exceptions, the co-ordination of the two systems being crudely effected, despite their nominal discordance and separate administration, by the de facto finality of equity's mandates. It thus becomes possible to mistakenly accredit to an alleged consistency of equity with law, a harmony that has really resulted from the virtual paramountcy of equity over law. The original and transitory clash or conflict may be lost sight of, in the substantial harmony ensuing upon the ascendancy achieved by the equitable view. . . . . ."
(p. 71.)

As a final example of the similar treatment by the two writers of the various points involved, we may notice Professor Hohfeld's words of caution in one of the supplemental notes in his original article:

"At this point, however, it may be necessary to guard against misunderstanding. When, in example 34, it is said that the legal rule is 'annulled,' pro tanto, by the equitable rule, this refers to the very jural relation under consideration, and to that alone. It is meant simply that, in the last analysis, Y is under a duty not to cut ornamental trees.

"As regards that particular relation, the supposed legal rule asserting the privilege is really invalid. It is, to that extent, only an apparent rule, so far as genuine law is concerned. But such 'legal rule,' though invalid, may have important connotations as to independent (and valid) legal rules governing certain other closely associated jural relations. Thus, e. g., despite the conflict in question and the supremacy of the equitable rule, it would still be the duty of the common law judge, in case an action at law were brought against Y, to sustain a demurrer as against a declaration alleging the true facts of the case. . . .

"Conversely, even though a legal primary right conflicts with an equitable 'no-right,' it would be the duty of the common law judge to overrule a demurrer to a declaration setting forth such supposed legal right and its violation, and, ultimately, to render judgment for the plaintiff; and, of course, an execution sale based on such judgment would be valid. . . . These independent (and valid) jural relations, though connoted by the original (invalid) legal right in question, must be carefully distinguished from the latter."

Similar warning against misunderstanding is given by Mr. Billson, who says:

"There are, it is true, several circumstances that impart to the claim [of consistency] a certain degree of speciousness. Thus, it must be admitted that as matter strictly of common law, a common law right was in very truth absolutely unscathed by limitations imposed by equity upon its use. To carry along our recent illustrations, the same common law remedies were at the bidding of a trustee or an enjoined judgment creditor after Chancery's interference as before, the only difference being the imprisonment he might incur by accepting them. All that he ever had was a common law right and its remedies, and as matter of common law he had those still. Some color is thus lent to the idea that equity's limitations upon the use of legal rights do not clash with or impair those rights, and are not inconsistent with their continuance and integrity." (pp. 71 and 72.)

So far as the reviewer has been able to discover, Mr. Billson does not anywhere give a strict classification of jural relations, as does Professor Hohfeld. According to the latter, as the above extracts show, all genuine jural relations fall into only two classes: (I) exclusively equitable; (2) concurrent, i. e., concurrently legal and equitable. What appears to be a third class, viz., "exclusively legal" substantive relations, must be excluded as involving only those so-called relations which have been repealed by the supervening and conflicting equity rules. An understanding of this true classification is essential to a correct apprehension and solution of legal problems. The older classification of Story and other leading writers on equity always was inadequate and misleading, for the reason that it took no account of equitable repeals of so-called legal rules. Mr. Billson's general discussion would, it seems clear, compel him to adopt the same classification if he were to work the matter out.

The book is attractively printed and bound, and contains the usual table of cases as well as an adequate index.

WALTER WHEELER COOK

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The Argentine Civil Code, together with the Constitution and Law of Civil Registry. Translated by Frank L. Joannini. Published by The Boston Book Company, Boston. 1917. pp. lix, 732.

The Comparative Law Bureau of the American Bar Association has again attested its public service by the publication of an English translation of the Argentine Civil Code. The translator, the late Frank L. Joannini, had already rendered important service by the translation for the United States Bureau of Insular Affairs of several of the codes of our insular possessions. The translation before us evidences the valuable supervision of the committee of revision, Messrs. Eder, Kerr and Wheless. No one who has had experience in rendering into English the legal concepts embraced in the system of a civil-law country can fail to appreciate the difficulty of the translator's task, or be unduly captious in the criticism of terminology.

The work under review incorporates civil-law terms in literal translation, such as "prestation," "mandatory," "redhibitory vices," "tutorship," "benefit of inventory," "fisc," "usufruct," "paternal power," "revendication," "transaction" (for the common-law "compromise") and numerous others. Sometimes the expression is explained in a footnote, at other times the Anglo-American lawyer will be compelled to bring to the subject some prior orientation. This method, however, whatever its weakness, is preferable to any attempt at a free translation, with its efforts, inevitably misleading and inaccurate, to employ a complete common-law terminology. Considering the great difficulties involved, the translation is very creditable. Not the least commendable feature of the work is the excellent introduction by Phanor J. Eder.

A translation of the Argentine Civil Code is of more than academic interest to the American lawyer, for the economic bonds between the Anglo-American countries—especially the United States—and Argentina are growing stronger from year to year. Scientifically, the code is not the best in Latin America. It was drafted by the noted jurist Dalmacio Velez Sarsfield in 1865-68, and it was adopted by Congress in "libro cerrado" (as a closed book) without discussion in 1869. With but slight amendment, it is in force today. It was compiled, not as a synthesis of the historical development of a people's law, but as a structure derived from a variety of extraneous sources such as foreign codes, the studies of jurists, etc., and very largely from the draft code of Teixeira de Freitas of Brazil.

While a remarkable example of legal codification, it has not proved uniformly responsive to the practical needs of a rapidly growing community; but fortunately, a good commercial code and much judicial interpretation have been helpful in developing its usefulness. Brazil, which furnished the scholar on whose foundations Velez Sarsfield built, has finally, after years of discussion in Congress and the work of many jurists, adopted a civil code which promises to take rank among the best products of modern codification, including the codes of Germany and Switzerland. Its translation into English, now in course of preparation, is awaited with interest.

An index of one hundred pages adds materially to the practical utility of the present translation of the Argentine Code, and the physical make-up of the book is attractive. It should be heartily welcomed by the American bar.

EDWIN M. BORCHARD.

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The Law Applied to Motor Vehicles. By Charles J. Babbitt. 2d edition by Arthur W. Blakemore. Published by John Byrne & Co., Washington. 1917. pp. cxxvi, 1262.

The author of this book rightly considers that the law is based upon fundamental principles which are not new, and that the decisions now rendered with reference to the motor vehicle merely present the old principles of jurisprudence as applied to new circumstances. The author constantly keeps this in view and leads the legal mind to basic principles, at the same time keeping his work to date by recent decisions. For example, throughout the chapter on municipal powers, the fundamental principle that the state is an interested third party through which public welfare is expressed is adhered to in the exposition of the basis of automobile legislation.

The scope of the book—by scope I refer not alone to the variety of topical subdivisions, but to the range of state decisions—is broad. The book covers all the contractual subjects of the law in their application to automobiles, citing automobile cases where possible. Likewise, municipal law, tort, and criminal responsibility are dealt with. Pleading, practice in negligence cases, evidence and damages receive a limited space. The decisions are taken from all states. Viewing the matter from a provincial point, I should say there are a sufficient number of New York cases cited to render the book valuable to the New York lawyer. The statutory basis from which the author works in his treatment of automobile legislation, namely, the Massachusetts automobile legislation, in no wise renders the book of such a sectional character as to lessen its value.

Aside from a purely legal treatment of the automobile, the book is instructive through its forceful way of impressing upon the reader the completeness with which the automobile has entered into the social, business and every-day life of all people, be they automobile owners or not. Further, it clearly impresses one with the fact that man sometimes opposes and impedes progress by subtle reasoning and skilful utilization of precedents of the law.

The leading cases used are well chosen. The book does not present a panacea for all automobile difficulties, but is a valuable addition to a lawyer's library as a first aid. Its utility is enhanced by a good index.

OSWALD PRENTISS BACKUS, JR.

Rochester, N. Y.

Unfair Competition. By William H. S. Stevens, Ph.D. Published by University of Chicago Press, Chicago. 1917. Pp. xi, 265.

Dr. Stevens uses the phrase constituting the title of his book in a broader sense than that usually adopted by legal text writers and legal encyclopedias. The meaning until recent years seems to have been limited, in most cases, to the marketing of goods by fraudulent methods. This book includes under unfair competition twelve methods, among which are found such practices as espionage, coercion, exclusive arrangements, operation of bogus independent concerns, engrossing machinery, etc. As many and as varied as are the examples treated, the author does not pretend to treat of all unfair methods of competition.

The various practices are illustrated chiefly by extracts from the records of government anti-trust suits. To one not thoroughly conversant with the subject, the chapters illustrating the different methods are intensely interesting, illustrating as they do the working of "shady" business.

The author agrees only partially, if at all, with the theory that free competition inevitably results in monopoly. He maintains that the creation of monopoly by combination is not countenanced in this country, and would not be possible at the present time; and, further, that monopoly by elimination—the only other possibility—could hardly take place without the employment of unfair competition. He further asserts that the maintenance of monopoly through superior efficiency is not feasible for a long period of time because of necessary changes in men and methods. If, therefore, the privilege of maintaining monopoly by unfair methods should be withdrawn, monopoly would fall of itself. The record of the Steel Trust seems to support his theory.

The book, although written by an economist from an economic rather than a legal point of view, should prove interesting to the legal profession.

A. E. HOWARD, JR.

Hartford, Conn.

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# INTER-CITIZENSHIP: A BASIS FOR WORLD PEACE

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In the early Roman State to be a Roman and to possess rights were synonymous terms, and what is true of Rome was equally characteristic of the ancient city state in general. The word civis, the root from which are derived both "citizen" and "civilization," meant a member of the city, and it was one's connection with the city that gave him rights. He who was not a civis was in the early Roman law regarded as destitute of legal rights.

"Citizens alone are entitled to the protection of the laws. An alien is an outlaw, no less destitute of all legal rights and remedies than if he were a slave. He can own no property, can make no contract, nor any claim in a court of justice, can enter into no valid marriage, nor have any lawful issue. He is an enemy of the Roman State and at the mercy of any of its members. In practice he may enjoy some measure of precarious security by placing himself under the protection of some Roman citizen, who as his host and guardian, will see to it that no harm befalls him, but in his own person and in his own right he has no standing before the law."

At a later stage in the evolution of Rome, the peregrinus or foreigner,

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¹Based upon an address delivered at Seattle, Wash., before a joint meeting of the Washington, Oregon, Idaho and British Columbia Bar Associations in August, 1917. The germ of the idea here discussed is due to an address by Professor A. V. Dicey at Cambridge University on February 26, 1897, on a Proposal for the Common Citizenship of both Branches of the English People. A brief summary of the address may be found in (1897) 64 New York NATION, 198. See also 8 John Adams, Works, 136; 3 John Quincy Adams, Memoirs, 513; Franklin, The Legislative History of Naturalization in the United States, 8-12.

² Salmond, Citizenship and Allegiance (1901) 17 LAW QUART. Rev. 276; Sohm, Institutes of Roman Law (3d ed. translated by Ledlie) 173.

if he was a member of a state bound to Rome by treaties of friendship, received protection. The praetor peregrinus was established by the side of the practor urbanus to hear the complaints of such foreigners, and to determine their causes according to the laws of their own states. But such persons were not entitled to the privileges conferred by the law of Rome; the jus civile was reserved for Roman citizens alone. And even when with advancing civilization the system of distinct personal laws applying to citizens and aliens was supplemented by the jus gentium, the principles of justice and fair dealing, the possession of the jus civile still remained synonymous with Roman citizenship. In 212 A. D. the Emperor Caracalla conferred Roman citizenship upon all free members of political communities within the empire. The possession of rights and the possession of citizenship were thus conferred upon all free men within the civilized world. But in legal theory, rights still depended upon citizenship as truly as in the earliest stages of Rome's development, and the barbarian or the person deprived of citizenship as a punishment for crime or otherwise had no rights except so far as they were recognized under the jus gentium.8

It would be an interesting study to trace the evolution of the principle of citizenship through the period that followed the fall of the Roman Empire up to the present time. It is sufficient for the purpose of this article to point out that feudalism brought a new principle into the law of citizenship. The theory of a law which in its essence was tribal gave way to the principle which determined one's legal status by one's allegiance.⁴

In the earlier stages of the development, as Maitland says, "the law of feudal contract attempts for a while to swallow up all other law." The law of the lord's court governed the vassal, save in so far as the law of the universal church controlled him in some of his most important relations. Even to the present day, the English law of citizenship bears marks of its feudal origin; it knows no "citizens." The technical designation of persons born within the king's allegiance is "British subjects." There was probably a time in the development of feudalism when a man's descent and when the place of his birth

⁸ Sohm, op. cit., 176; Leonhard, Institutionen des römischen Rechts, 188-189. Traces of its origin still are apparent in the law of citizenship of some of the modern nations whose legal systems are based on the law of Rome. Thus, Austria, Civil Code § 28: "The full enjoyment of civil rights is acquired by virtue of citizenship"; France, Civil Code, Arts. 8 and 11. Under the French law, to enjoy political rights one must be a French citizen; to enjoy civil rights, he must be French. Baudry-Lacantinerie, Précis de droit civil (3d ed. 1914) 902 et seq. On the rights of aliens in France, see Professor Antoine Pillet's article, Some Observations on the Private International Law of the Future (1917) 26 YALE LAW JOURNAL, 631, 635-636.

⁴ Salmond, Citizenship and Allegiance (1901) 17 LAW QUART. Rev. 270; (1902) 18 LAW QUART. Rev. 49.

were neither of them very significant, the essential question being, to what lord did he owe homage? But by the end of the thirteenth century—the time when the fundamental principles of the common law of England had been outlined—the territorial element at the base of the feudal system has triumphed, though feudalism itself has decayed. Those born in England or in territory subject to the English king are subjects of the English king; those born elsewhere are aliens, excepting those who were children of English subjects within the king's allegiance. The law has thus shifted from the tribal basis to the territorial. But though the foundations have changed, the alien is still in a sense regarded as a person without rights, and Littleton at the end of the fifteenth century tells us that he can bring no action.

The modern conception of citizenship, while it retains traces both of the ancient personal theory and of the medieval feudal theory, has undergone a profound change. In the United States and England, for example, the possession of civil rights does not rest upon citizenship as in Rome, or in the barbarian kingdoms founded upon the wreck of Rome, nor does it rest upon allegiance as in the feudal state. It is to-day in our legal system the rare exception when one's citizenship or allegiance have anything to do with his civil rights. And the exceptions are becoming rarer every day. Such aberrations as are afforded by the alien land legislation of some of our states do not diminish the force of the assertion that citizenship has little to do with the possession of rights. A statute which forbids the acquisition of land by one who is disqualified by federal laws from becoming a citizen has plainly a very limited orbit. In general, it may be said that the British and American theory is that the laws of a state bind all who are within it whether citizens or aliens, and that they do not in general bind its own citizens who are absent from the state. Incapacities arising from alienage have for the most part been removed either by statute or by treaty. Any person, whether citizen or alien, resident or non-resident, is entitled to invoke the law for the protection of his rights.7

Our federal Constitution well illustrates the diminished importance which the American system attributes to citizenship and the increased importance which it attributes to the individual. Nowhere in that instrument as it was drafted and adopted in 1787 was there any defini-

⁵ r Pollock and Maitland, Hist. Eng. Law, 458-467.

[°] Co. Litt. § 198.

[&]quot;An alien, which is born out of the ligeance of our soveraigne lord the king, if such alien will sue an action reall or personal, the tenant or defendant may say, that he was borne in such a country, which is out of the king's allegeance, and aske judgment if he shall be answered."

On the various statutes passed during the fifteenth century for the protection of alien friends, see 2 Holdsworth, Hist. Eng. Law, 392-394.

Beale, Treatise on Conflict of Laws (1916) §§ 55-57.

tion of citizenship, though both citizenship in the United States and in the states are referred to.8 It is significant that the first ten amendments proposed in 1789 reiterate the importance of the individual. Rights not granted are reserved to the "people," not to the "citizens" of the states or of the United States; the rights of the "people" to bear arms, to assemble for redress of grievances, to petition the government, to be secure from unreasonable searches, are guaranteed.9 The Fourteenth Amendment in 1868 for the first time puts a limitation upon the power of the states to deny citizenship to persons born in the state, but it does not itself contain a complete definition of citizenship. All persons born or naturalized in the United States are citizens of the United States and of the state wherein they reside, but under the language of this amendment it would seem to be competent for a state to consider other persons citizens. The most important provisions of the amendment guarantee "persons" against deprivation of life, liberty and property without due process of law. and guarantee to "persons" within the jurisdiction of the states the equal protection of the laws.10

American citizenship as such does not even confer ordinary political rights as distinguished from civil rights. A citizen of the United States by virtue merely of his citizenship has no more right to vote than an alien. That right comes wholly from local law. Even the selection of the franchise qualifications in the case of those voting for presidential electors and members of Congress is left to the states.¹¹ The only provisions of our federal laws and Constitution upon this subject have to do with a state's forbidding a citizen of the United States to vote on account of race, color, or previous conditions of servitude, and with the reduction in representation by reason of denying citizens the right to vote.¹² The right to vote has been conferred by many of the states upon persons not citizens of the United States.¹³

⁸E. g. Art. III, sec. 2; Art. IV, sec. 2. Compare with the silence of our Constitution on the definition of citizenship, Art. 3 of the Constitution of the German Empire of 1871. Annuaire de législation étrangère, 1871, 236-237.

⁹Amendments to the Constitution of the United States, Arts. I, II, IV and V. See the admirable article on *The American Philosophy of Government and its Effect on International Relations* by Alpheus Henry Snow, 8 Am. Jour. Int. Law, 191-212, particularly at pages 193 et seq. Mr. Snow points out that the American constitutional theory under which rights are not "granted" but only "declared" by constitutions and laws, (Logan v. United States (1892) 144 U. S. 263, 293) has been transferred to the field of international relations.

¹⁰ The provision that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" has been less often invoked and has a less important effect than either of the other two clauses of the second sentence of section 1 of the Fourteenth Amendment.

¹¹ Art. II, § 1.

²² Art. XIV, § 2, and Art. XV, § 1, Amendments.

¹³ Constitution of Delaware, Art. V, § 2; Massachusetts, Art. II, §§ 1 and 2,

The civil rights incident to the condition of American citizenship are equally tenuous. Aside from certain restrictions in the Revised Statutes of the United States upon aliens acquiring claims under the mining laws, and upon their ownership of American vessels, there is scarcely any difference in the legal status under federal laws of citizens and resident aliens.¹⁴ The former of the restrictions, that in respect to ownership of mineral lands, is so construed by the courts as to render it practically unimportant. No one but the government can question the alien's right to the claim, and even the government can not do so after he has made an assignment to a qualified person.¹⁵ And the ownership of shipping may be held by a corporation whose stock is controlled by aliens. American citizenship, therefore, as distinguished from state citizenship, means very little indeed so far as concerns the enjoyment of rights and privileges in time of peace.

State citizenship in one of the states of our Union is of even less importance as an independent legal conception than citizenship in the United States. Indeed, a condition that can be put on or off as easily as a suit of clothes may be said to be characterized with too high sounding an expression when it is called citizenship. A citizen of the United States by merely changing his domicile from one state to another is said to change his state citizenship. If he changes it to a foreign country, he loses his state citizenship, though he remains a citizen of the United States. Truly, state citizenship is but another phrase for domicile. The latter conception is one fraught with important legal consequences, but it is wholly independent of citizenship.

In time of war, and generally with respect to military duties, citizenship is a matter of great importance. The state demands military service only from its citizens. But in determining questions of enemy character and neutrality, the question of citizenship is by no means controlling. An American citizen living in Germany is an alien enemy so far as concerns his right to sue in an American court, or to make contracts with Americans living in the United States. His goods are subject to seizure as enemy prize upon the seas. Reprisals may be made against his property. On the other hand, the German citizen living in the United States is entitled to all the civil rights and privileges

and Art. III, Amendments; Michigan, Art. 7, § 1; New Hampshire, Art. II, §§ 12 and 27; New York, Art. II, § 1; Pennsylvania, Art. VIII, § 1 and West Virginia, Art. IV, § 1; Stimson, Federal and State Constitutions (1908) § 240; I Willoughby, The Constitutional Law of the United States (1910) pp. 272-273.

¹⁴ U. S. Rev. Stat. §§ 2319 and 4131.

¹⁵ Manuel v. Wulf (1894) 152 U. S. 505.

¹⁶ See, e. g., Political Code of California, § 51.

[&]quot;The citizens of the state are: 1. All persons born in this state and residing within it, except the children of transient aliens and of alien public ministers and consuls; 2. All persons born out of this state who are citizens of the United States and residing within this state."

¹⁷ Picquet v. Swan (1831, C. C. 1st) 5 Mason, 35.

which belong to citizens, though in the interests of public safety he may be subjected to certain restraints in regard to his power of free locomotion. His property is not enemy property; his contracts are legal; he may sue in our courts as freely as a citizen of the United States.¹⁸ Neutral character, too, is determined, not by allegiance or citizenship, but by the fact of residence within the neutral state.¹⁹ Sometimes language is strangely interpreted to conform with the general principle that all within the state are subject to its laws. For example, treason is defined by Section 5331 of the U. S. Revised Statutes thus:

"Every person owing allegiance to the United States who levies war against them, or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason."

The phrase "person owing allegiance" includes an alien of enemy nationality living in the United States.²⁰

If American citizenship is thus attenuated, British citizenship is equally so. The alien may not own shipping registered under the British flag;²¹ he may not make a claim against the Crown;²² he may not sue in a consular court in a place where Great Britain has extraterritorial privileges;²³ he may not be married under the Foreign Marriage Act in an embassy at Paris or Rome.²⁴ On the other hand, he is free from some disadvantages which follow the British subject abroad. He is not mentioned in the Treason Act of Henry VIII and presumably

A full comment on *The Right of Alien Enemies to Sue in Our Courts* is to be found in the November, 1917, issue of the YALE LAW JOURNAL, p. 104. The various Trading with the Enemy Acts in England and the United States have materially changed the common-law definition of enemy.

²⁰ Carlisle and Henderson's Case (1873, U. S.) 8 Ct. Cl. 153; sub nom. Carlisle v. U. S. 16 Wall. 147. So also in England: De Jager v. Attorney General of Natal [1907] A. C. 326. See articles by Samuel MacClintock on Aliens under the Federal Laws of the United States (1909) 3 Ill. L. Rev. 493 and 565; 4 Idem. 27 and 95. [See also Charles Warren, What is Giving Aid and Comfort to the Enemy? p. 331, post.—Ed.]

¹⁵ Oppenheim, International Law (2d ed.) 110-112, 133-135; Porter v. Freudenberg [1915] I K. B. 857. The National Conscription Act of May 18, 1917, subjects to draft aliens, not of enemy character, who have declared their intention to become citizens.

the word is sometimes so used, as in Art. 16 of Convention V of the Second Peace Conference. The character, of course, is one belonging to states. But to determine whether or not the subjects of a given state are to be treated as the subjects of a neutral state, the test is as stated in the text. Thus, subjects of neutral states living in Germany or even in the parts of Belgium occupied by Germany bear a certain degree of enemy character. Oppenheim, 365; Mitsui & Co. Ltd. v. Mumford [1915] 2 K. B. 27.

²¹ Merchant Shipping Act (1894) 57 & 58 Vict. c. 60, § 1; 26 Halsbury, 16.

²² Salmond, Citizenship and Allegiance (1902) 18 LAW QUART. Rev. 49, 59-60.

^{23 (1890) 53 &}amp; 54 Vict. c. 37.

^{24 (1892) 55 &}amp; 56 Vict. c. 23.

is not punishable where an act charged to be treason is committed abroad;²⁵ he is not punishable in England for murder, manslaughter or bigamy committed abroad;²⁶ he is not liable as are British subjects for certain offenses under the Merchant Shipping Act of 1894 and under the Explosive Substances Act.²⁷ So far as concerns the civil and criminal law, the advantages and disadvantages of British citizenship are about equal.

The jus honorum, the right to be elected and appointed to places of honor, is reserved to British subjects. There was until 1915 some doubt by reason of unfortunately phrased statutes whether one who was not a natural born subject could hold the office of a Privy Councillor. But the cases of Rex v. Speyer and Rex v. Cassel solved the doubt in favor of the right.²⁸ In general, the mother country is by no means jealous with regard to the political privileges attaching to citizens. All political privileges are extended without discrimination to persons born within the king's dominions and allegiance and to persons naturalized in the United Kingdom or in any British possession according to its laws.29 There is no office or honor to which a native born Canadian or an alien naturalized according to the law of Canada may not aspire, not only in the British Empire but in the government of England itself. He may represent an English borough in Parliament, though he has never resided in England; he may be a member of the Cabinet, a Lord Chancellor, a Prime Minister.

The conception connoted by the expression "British subject," even more than that covered by American citizenship, fails to fit in with any mechanical theory of sovereignty or of the State. Theoretically it might be said, of course, that the Imperial Parliament, elected by the voters of England, Ireland, Scotland and Wales might repeal the British North America Act and put the government of Canada entirely in the hands of the House of Commons and House of Lords at Westminster or in any other body that it pleased. But such an event is unthinkable. The material tie that has linked the colonies to the mother country has been of the slenderest sort. The Canadian or the New Zealander or the Australian has not even been bound to the empire by the duties that are personified by the tax collector and the drill sergeant. He has neither had to pay taxes nor to come to the defense of the empire when her very life is threatened. And yet how

²³ (1543) 35 Henry VIII, c. 2; Rex v. Casement [1917] 1 K. B. 98, L. J. 467; Report of Interdepartmental Committee on Naturalization. Parliamentary Papers, 1901, Cd. 723, reprinted in Report of American Citizenship Board, H. R. Doc. 326, 59th Congress, 2d session.

^{26 (1861) 24 &}amp; 25 Vict. c. 100, § 9.

²⁷ Merchant Shipping Act, 57 & 58 Vict. c. 60; Explosive Substances Act, (1883) 46 & 47 Vict. c. 3 § 3.

^{28 [1916] 1} K. B. 595.

²⁰ British Nationality and Status of Aliens Act (1914) 4 & 5 Geo. V, c. 17.

absurd is the language which Goldwin Smith used in 1888, in view of the events of the past three years!

"What interests," said he, "of the class with which a federal parliament would deal have Australia and Canada in common? What enemy has either of them when the other would be inclined to fight?"20

The British Empire is a perpetual contradiction to the theory of sovereignty on which our jurists and statesmen have been nourished. An "empire" that does not command, "subjects" who are not bound to obey,—small wonder that the Germans denied that there was any reality corresponding to the phrases, British Empire and British subjects. And British nationality is just as hard to fit into the traditional definition as is British citizenship. The languages, the religions, the laws, the institutions of the various peoples making up the British Empire are as various as the colors of their skins.³¹ Yet the British Empire and British nationality are very real things.

The ease with which citizenship may nowadays be put on or off both in the United States and in the British Empire is another indication of the weakening of the traditional relation between sovereign and subject. No law, to be sure, has gone to the extent of the French Revolutionary Constitution of 1793 which wholly abolished the oath of allegiance and made citizens of all persons domiciled in France for one year, who lived by labor. But our own naturalization law passed at the first Congress in 1790, while it required the oath of allegiance, required only two years as a basis for citizenship.33 In 1795 this period of residence was extended to five years, because of the fear that injury might result to republican institutions through the French émigrés.34 Those who were residents of the United States when these acts were passed were entitled to naturalization upon proof of two years residence. During the ascendancy of the Federalist party in 1798, an act was passed requiring fourteen years residence as a condition of naturalization,35 but in 1802 Congress restored the five-year period,36 which, in spite of the subsequent assaults of the Know-Nothing and American parties has remained stationary ever since.37

Liberality toward the naturalization of foreigners has always been

³⁰ Macmillan's Mag. August, 1888. Cf. Frederick Scott Oliver, Alexander Hamilton (1912): "The British Empire is not a political fact, but only a phrase, an influence or a sentiment."

²¹ Pollard, Factors in Modern History, 14-17.

Morse, Citizenship by Birth and Naturalization, 323.

²³ 2 Laws of the U.S. from the 4th of March, 1789, to the 4th of March, 1815, 82-83; IU.S. Stats. at Large, 103.

² Laws of the U. S. 466, I U. S. Stats. at Large, 414.

³³ Laws of the U. S. 61, 1 U. S. Stats. at Large, 566.

³⁶ 3 Laws of the U. S. 475, 2 U. S. Stats. at Large, 153.

⁵¹ Franklin, The Legislative History of Naturalization in the United States, 184-300.

a prevailing American tradition. One of our grievances in the Declaration of Independence was that the king

"has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners."

In accordance with this liberal spirit, the Act of 1790 introduced a radical innovation in the procedure for naturalization by authorizing any court of record to grant the privilege upon proof of the facts. The English law at the time of our Revolution and until 1844 knew only one avenue whereby an alien could be naturalized, namely, a special act of Parliament. When one considers the difficulty and expense of securing the passage of a private bill, this requirement made naturalization practically prohibitive. Blackstone, in the edition of his *Commentaries* published in 1788, thus states the law upon the subject:³⁸

"Naturalization cannot be performed but by act of parliament: for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, etc. No bill for naturalization can be received in either house of parliament, without such disabling clause in it: nor without a clause disabling the person from obtaining any immunity in trade thereby, in any foreign country, unless he shall have resided in Britain for seven years next after the commencement of the session in which he is naturalized. Neither can any person be naturalized or restored in blood, unless he hath received the sacrament of the Lord's supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament. But these provisions have been usually dispensed with by special acts of parliament, previous to bills of naturalization of any foreign princes or princesses.

American ideas have completely conquered the mother country, and it is hardly necessary to point out that the British law of naturalization is to-day as liberal as our own.³⁰ The state is no longer regarded as a sort of guild which exists only for those who are so fortunate as to have been born in a certain place or of parents possessing certain privileges.

^{*} I Bl. Com. 374.

The first general statute in England which permitted naturalization, by certificate of the Secretary of State, was passed in 1844. (7 & 8 Vict. c. 66.) The doctrine of "indissoluble allegiance" was abandoned in the Act of 1870. (33 Vict. c. 14); the remaining trace of the doctrine of descent of citizenship beyond the immediate children of British subjects was abandoned in 1914 by a statute prepared before the war. (4 & 5 Geo. V, c. 17.) This last statute permits each of the Dominions to confer British citizenship, if they choose to do so. The act may be adopted or not by the Dominions and they may rescind it whenever they please. This is the high-water mark of liberality in conferring citizenship.

Mr. Salmond thus sums up the situation:

"The acquisition and loss of citizenship are being gradually made easier, while the legal effects of such acquisition and loss are gradually being made less. The present state of things is indeed a compromise between two fundamentally different ideas as to the constitution of a political society. Citizenship and its remaining privileges are the outcome of the primitive conception of the state as a personal and permanent union of determinate individuals, for whose exclusive benefit the laws and government of the state exist. Residence, regarded as a title of membership and protection, is the product of the more modern conception of the state as consisting merely of the inhabitants for the time being of a certain territory. The personal idea is gradually giving place to the territorial."

In passing it may be noticed that the contrast between the personal and the territorial idea does not exhaust the matter. The laws under our system exist as well for persons who have never been in the state as for citizens or inhabitants. The state does not, in general, inquire whether one claiming a right under its laws is or is not a resident any more than it inquires whether he is a citizen. The question of residence or domicile does, indeed, become important in questions of status and succession. But as a general principle the idea of domicile itself is, like that of citizenship, one of diminishing importance in the determination of rights. The territorial theory of law is gaining ground both in England and America.

Equally significant with respect to the increased importance attributed to the individual and the modification of the idea of allegiance have been the changes in the law regarding expatriation, especially in the United States and in England. In 1817, Jefferson in a letter to a friend said:

"My opinion on the right of expatriation has been so long ago as the year 1776 consigned to record in the Act of the Virginia Code drawn by myself recognizing the right expressly and prescribing the mode of exercising it. The evidence of this natural right like that of the right to life, liberty and the use of our faculties, the pursuit of happiness, is not left to the feeble and sophistical investigations of the reason but is impressed on the sense of every man. We do not claim these under the charters of Kings or legislators, but under the King of Kings."⁴¹

Notwithstanding Jefferson's views and those of political thinkers of the school to which he belonged, it was not until 1868 that Congress wrote into our laws the following provision in language that recalls Jefferson:

"Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life,

⁴⁰ Salmond, Jurisp. 195.

^{41 10} Jefferson, Writings, 87.

liberty and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the Government thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic."42

The status of a British subject under Section 13 of the British Nationality and Status of Aliens Act, 1914, provides that a British subject by obtaining a certificate of naturalization or otherwise becoming naturalized in a foreign country ceases to be a British subject.⁴³

The right of expatriation, and, indeed, the entire law of naturalization, has been much extended by conventions entered into between the United States and other powers. One of the first of these was that negotiated through the offices of George Bancroft, Minister at Berlin, with the North German Confederation in 1868.44 This convention, which is the model of subsequent treaties on the same subject, provides for the reciprocal recognition of naturalization in either by the other of the contracting powers. The ratification of the convention was followed immediately by the Act of Congress of July 17, 1868, recognizing the right of expatriation, and that act in turn was followed by the adoption of the British act to the same effect in 1870.45 The recommendations of the commission appointed to report to Congress in 1906 upon the subject of naturalization, consisting of Messrs. James Brown Scott, David Jayne Hill and Gaillard Hunt, were strongly in favor of extending the number of these conventions. Comparatively few new naturalization treaties have been negotiated since that date, but the fact that since 1868 a large number of such conventions have been made has done much to increase the scope of the principle of expatriation.46

The diminishing importance of the principle of descent in determining citizenship is another evidence of the loosening tie which the state holds over the individual. In Roman law and in the continental nations of Europe, the question of citizenship has always been determined by descent. The governing principle of nationality—under the French

²² U. S. Rev. Stat., Sec. 1999. Cf. (1870) 33 Vict. c. 14.

^{4 (1914) 4 &}amp; 5 Geo. V. c. 17.

[&]quot;2 Malloy, Treaties, Conventions, etc., between the U. S. and Other Powers (1910) 1298.

^{*} Supra, n. 42.

⁴⁶ See Report of American Citizenship Board (1906) H. R. Doc. 326, 59th Congress, 2d Session; Borchard, The Diplomatic Protection of Citizens Abroad (1915) 544-552, 674-687.

law, for example—is the jus sanguinis. A child of American parents, born in Paris, was until 1889 not French, nor were his grandchildren or his descendants to the remotest generation French, so long as they remained unnaturalized; e converso the descendants of French people living in foreign countries retained and still retain their French nationality.47 On the other hand, the English law from which our law of citizenship is derived determines citizenship by the place of birth. The child of Chinese parentage, born in a British colony or in the United States, is a British or American citizen, even though he belongs to a race excluded from the benefit of the naturalization laws.48 It is very plain that the English and the American rule which determines citizenship by the principle of place of birth, the jus soli, rather than by that of descent, the jus sanguinis, operates in favor of diminishing the importance of the idea that citizenship is an unchangeable status, and makes for mobility in respect to the individual. English law from 1350 to 1914, however, retained so much of the principle of jus sanguinis as to recognize, in the case of persons of English or British blood born abroad, their British nationality to the third generation. The United States at the beginning of her legislation abandoned the English rule, and confines the privileges of American citizenship to children of Americans born abroad; the right of citizenship has never descended to the grandchildren of American citizens who may happen to be born abroad, unless their parents have resided in the United States. In 1914 the British Parliament adopted the American view and abandoned the principle of English law maintained for more than five centuries which permitted grandchildren of English subjects born abroad to retain their British citizenship.49 The Latin-American countries, too, though their legal systems are based upon the civil law, indicate a very distinct tendency toward the adoption of the doctrine of jus soli, or at least toward a minimization of the principle of jus sanguinis. The Constitution of Brazil, for example, permits children of Brazilian parents born abroad to claim Brazilian citizenship, provided they become domiciled in Brazil. It recognizes the principle of jus sanguinis, therefore, to a much less degree than France or Italy, which do not mention domicile. It is said that at least fourteen states of Latin America claim as nationals all born within their territory.

While it must be conceded that the law of continental Europe still clings to the principle of descent or blood as the test of citizenship, it is also true that some inroads have been made upon that principle

[&]quot;Baudry-Lacantinerie, *Précis de droit civil* (1914) 902-918; (1915) 9 Am. Jour. Int. Law, 942.

⁴⁸ U. S. v. Wong Kim Ark (1898) 169 U. S. 649.

⁶ This recommendation was made by the Interdepartmental Committee on the subject of naturalization in its *Report to Parliament* of July 24, 1901. See H. R. Doc. 326, 59th Cong., 2d Sess., at p. 346, where this report is reprinted.

in favor of the doctrine of jus soli. France, until 1889, held that a person born on French soil of foreign parents followed the nationality of his parents, but in that year a law was passed whereby such person, if he remains domiciled in France until majority, is French, unless he disclaims French nationality within the year following his reaching majority. He cannot disclaim, however, if he has not performed military service as required by the country of his parent's nationality. Since 1893, every person born in France, one of whose parents is French, is also French, subject to the right to disclaim as provided in the law of 1889. The provisions of the law of 1889 may be modified by treaty. The French Civil Code permits expatriation, but insists on the consent of the French government where the party seeking naturalization abroad is liable to military duties. France, however, still insists that children and grandchildren of French parents born abroad remain French.⁵⁰

Italy, whose jurists and legislators are deeply impregnated with theories of nationality, has, like France, adopted in a modified form the principle of jus soli, in her more recent legislation. Article III of the Law of June 13, 1912, accords to persons born in Italy the privileges of Italian citizenship, somewhat as under the French law of 1889. Conversely it is provided by Article VII of this law-and in this respect Italy has gone beyond France-that persons of Italian parentage born and residing abroad, may, at majority, renounce their Italian nationality, if their place of birth claims them as citizens. Treaties may modify these provisions. The Italian law also recognizes expatriation under Article VIII, but the acquisition of a new nationality does not absolve the person acquiring it from his Italian military obligations. In presenting this legislation the government declared its purpose to avoid conflicts between the various laws of nationality, giving rise to perplexing questions of "dual nationality." The government desired to make the law of nationality conform

"with the actual exigencies of social life, in particular those which result from the great currents of emigration and from the facility with which citizens of divers nationalities are detached from their countries of birth."

The law as passed indicates a broader spirit of comity and a greater willingness to leave to the individual choice with reference to the selection of his nationality than has been the case in former Italian legislation on this subject. The modification of the principle of indissoluble allegiance in a country whose legal thinkers have stood in the front rank as champions of the principle of nationality, is significant of the changing conception of the relation of the individual to the state.⁵¹

⁵⁰ Civil Code, Art. 8, § 5, added by the Law of June 26, 1889.

⁵¹ On "dual citizenship" see 3 Moore, Digest of International Law (1906)

Of the great western nations, Germany alone has during the last half-century tended to show in her legislation upon citizenship a retrogressive tendency. The law of the German Empire of 1871 in respect to nationality, which was adopted from the North German Confederation, was indeed framed on liberal lines. It expressly declared, for example, that adoption cannot affect the nationality of the person adopted; it recognized the right of expatriation by a provision that a citizen lost his nationality by ten years residence abroad, and it authorized this period to be reduced to five years by treaties with foreign countries.⁵² But in January, 1914, six months before the war, a new nationality law was adopted for the empire. The spirit of this law indicates something of a return to the tribal theory of citizenship. Loss of German citizenship no longer follows upon absence in a foreign country as was the case under the law of 1871, nor is there any provision for naturalization treaties. Some of the provisions of the new law show an extreme disregard for the legislation and internal policy of other countries. Thus, a former German or a descendant of a former German may secure naturalization in Germany without ever living there or leaving the country of which he is a citizen, and this rule even applies to the adopted children of Germans. As Germany, like France, adopts the principle of jus sanguinis, this can only mean that the children, natural or adoptive, the grandchildren and descendants to the remotest generation of those who were once German but have ceased to be such by naturalization or other act, can, without leaving the country to which they owe allegiance, even if it is the country of their birth and parentage, become citizens of the German Empire.⁵³ No modern state before this law had permitted naturalization to persons who have never been in the country, though the French National Assembly did by special act confer French citizenship upon some distinguished individuals, among others, Jeremy Bentham, Thomas Paine and George Washington. The conferring of citizenship in such a way, however, could hardly be said to interfere with the internal policy of other states as does the German Act of 1914. The

⁵¹⁸ et seq., and Borchard, The Diplomatic Protection of Citisens Abroad (1915) 580 et seq. On the French law, see Baudry-Lacantinerie, Précis de droit civil (3d ed. 1914) 902 et seq. For the Italian law of 1912, see Annuaire de législation étrangère (1912) 147. The law of the Latin-American states is discussed by Harmodis Arias, Nationality and Naturalisation in Latin America from the Point of View of International Law (1910) 11 Jour. Soc. Comp. Leg. (N. S.) 126. The English law of 1914 may be found in (1915) 9 Am. Jour. Int. Law, Supp. 413, and an article on the same by Richard W. Flournoy, Jr., The New British Imperial Law of Nationality, 9 Ibid. 870.

⁵² Annuaire de législation étrangère (1871) 183, contains a French translation of the text of the Reichsgesetz of June 1, 1870.

⁵³ The full text of the law in English translation may be found in (1914) 8 Am. Jour. Int. Law, Supp. 217-227. It is commented upon in the same Journal, vol. 8, 477 by Richard W. Flournoy, Jr., and also in vol. 9, 939.

twenty-fifth section of the new Nationality Act contains this remarkable provision:

"Citizenship is not lost by one who, before acquiring foreign citizenship, has secured upon application the written consent of the competent authorities of his home state to retain his citizenship."

While elsewhere the claims of blood descent have been weakening, Germany proclaims that those of German blood may demand German citizenship, though there be no territorial relation between them and the state. It might be noted that a German seeking naturalization in the United States and attempting to take advantage of section 25 of the German Act would have to commit perjury, for he must by our laws forswear his former allegiance.⁵⁴

stated the object of the law to be to preserve to Germans residing abroad their nationality to the farthest degree possible and to permit them to recover it when they have lost it. Annuaire de législation étrangère (1912) 29: "Il a annoncé le depôt d'un projet de loi ayant pour objet de conserver le plus possible leur nationalité aux Allemands résidant à l'étranger et de leur permettre de la recouvrer quand ils l'ont perdue; c'est encore un moyen de fortifier l'influence germanique hors des frontières."

Professor Borchard has kindly called the writer's attention to the fact that the clause of the German law permitting the retention of German citizenship was designed, as the committee reports of the Reichstag show, to preserve German citizenship for such Germans as become nationals of other countries without their demanding such new nationality, as is the case where one marries a Brazilian woman, or for merely economic reasons, as to enable them to practice certain professions or to own real estate in certain South American countries. The language of the statute, of which the writer unfortunately has been able only to procure the English and French translations, is certainly sufficiently broad to justify the statement made in the text. The law is certainly not worded with the precision which we might expect from a German statute, if its purpose was only as stated in the Reichstag's committee report. That the Bancroft treaties would probably prevent the application of the law to the United States is immaterial, for the reference was only used for the general purpose of illustrating the fact that the new German law indicates a narrow conception of the principle of nationality, and a disregard of the internal policy of other states.

Professor Borchard also suggests that a German applying for naturalization in the United States would no more be guilty of perjury than a Frenchman forswearing allegiance to France. The Frenchman, however, may well be honest when he forswears allegiance, though his native law refuses to give his act legal effect. He certainly means to forswear allegiance, and hopes that the United States will support his claim of citizenship even as against France. The German, on the other hand, who has expressly claimed his German citizenship in writing can hardly speak the truth when he takes an oath to the effect that he forswears allegiance to the fatherland. The view of the clause stated in the text is also taken by the writer of a comment on the German Nationality Act, 9 Am. Jour. Int. Law, 941.

[An exhaustive article on the question of dual allegiance in relation to the German Nationality Act of 1913, by Theodore H. Thiesing of the Legislative Reference Division of the Library of Congress, will be published in an early number of the YALE LAW JOURNAL.—Ed.]

The illustrations in this article pointing out the altered views concerning membership in the state in the great liberal nations of the world, must have suggested the idea that it would not be very revolutionary to extend the analogy of interstate citizenship which now exists among the states of our Union to an international citizenship among the states of the world. A citizenship in a world state would thus be created, not so very unlike that now existing in the British Empire. Indeed, that situation in practice almost exists to-day. Treaties of the United States confer upon the citizens of other countries most of the privileges, other than political, which are possessed by our own citizens. A rather recent treaty with Italy even goes so far as to grant to Italian subjects, whether resident or non-resident, the benefit of local statutes for wrongful death, for the purpose apparently of nullifying an unfortunate line of court decisions. 55 The most favored nation clause may, in some cases, extend privileges granted to the subjects of one country to other countries. No very radical change would be effected in the civil rights of aliens if what is done indirectly by special treaties were done directly by ordinary legislation. Suppose, for example, that the United States should confer American citizenship upon all British subjects, and that the Imperial Parliament should confer British citizenship upon all Americans. The civil rights of citizens of the United States in England or Canada would scarcely be changed, nor would those of British citizens living in the United States. The most important single change with respect to civil rights would be that each might own interests in the other's shipping, certainly not a very fundamental matter in these days of corporation and international finance.

But, it may be said, inter-citizenship would frightfully upset our political system. An Englishman or a Canadian under such a system might vote to hold office even though he was not permanently attached to our country. It is to be remembered, however, that the right to vote and hold office is not universal among our own citizens. Local statutes protect the franchise by varying requirements with reference to length of residence, educational standards, etc. Moreover, the holding of office is dependent upon the power of getting it, and there would be little likelihood of a stranger being elected or appointed to important office. As English law now exists, any British citizen, no matter where he lives, may represent an English borough in Parliament, but the instances where Australians or Canadians have availed themselves of the privilege are rare. It is by no means certain that it would not be desirable to have an occasional foreign representative in our halls of legislation.

With respect to international relations, the innovation would have

⁸⁵ 3 Charles, Treaties, etc., between the U. S. and Other Powers, 442. (Feb. 25, 1913.)

more important consequences. Indeed, the main purpose of the alteration in the law would be for its effect upon those relations. The duty of military service should doubtless be limited to those who were actually within the territory of the country demanding the services, and, perhaps, an Englishman born should not be required by the law of the United States to fight against the country of his birth. In dealing with other nations, the sovereignty of each of the states granting common citizenship would be undisturbed. Thus, the United States would be under no greater legal obligation to aid in redressing the violation of Belgium's neutrality than it was in August, 1914, even though its citizens were also British or French citizens. Perhaps, if a common citizenship had existed, we would have entered the war in 1914, rather than in 1917, just as Australia and Canada entered it. But this would not have been because of any legal compulsion, but because of the consciousness of close relations with those who shared citizenship with us. Indeed, if a common citizenship had existed between subjects of the British Empire and citizens of the United States, it may well be doubted whether the attack upon Belgium would have been made. Such a power as that represented by the United States joined with that of the British Empire would be one that could not lightly be defied. The world war has demonstrated how effective such a nondescript political device as British citizenship can be even in terms of military power. The lesson will not soon be lost.

It may be urged by Americans against the notion of common citizenship that it would involve us in the intrigues of European diplomacy. But the United States has never been a party to secret treaties, and her influence will weigh to lessen the possibility of such arrangements in the reconstructed world. While secret diplomacy is more or less of a myth, since the mutual rights and duties of the parties to secret alliances are usually as well known to the public men of those nations against whom the alliances are directed as to those of the contracting parties, democracy demands that the forms of secrecy be abandoned, and that the agents of the people should not be permitted to withhold from the principal their private knowledge. The diplomacy of the present is suitable only to dynastic states, and it should disappear with the dynastic form of government. The force of a public opinion based upon a wider principle of citizenship would have a powerful tendency towards placing the diplomacy of the world on a surer basis. Statesmen, conscious that they are dealing with units bound together by moral ties only, will be obliged to defer to a wider public opinion than has been the case in the past.56

⁵⁶ Hobhouse, Morals in Evolution, 64:

[&]quot;Every human being, in proportion as he is normally developed, is able to enter into and contribute to the good life so conceived, and that he should do so is the sum and substance of all his duties to society and all the duties of society to him. But this same principle once pushed through, annuls, ethically speaking,

The plan proposed is not designed to undermine the idea of nationality or to interfere with the virtue of patriotism. Indeed, that virtue is by no means dependent upon the existence of an autonomous state. The Scotchman has never been blamed for a defect of patriotism nor of a keen sense of nationality, nor does the loyalty of the Californian to his native or adopted state interfere in the slightest degree with his loyalty to the United States. On the contrary, the spirit of loyalty has been intensified rather than diminished by the dual spiritual allegiance. Even if it be conceded that the consciousness of citizenship in other national units would at first produce but a faint glow in the heart of the American citizen, it is nevertheless one that might be warmed to flame. He might come in time to think in terms of humanity rather than of nationality, to prize the possession of common ideals and aspirations rather than the accident of place of birth or descent, to regard himself as a citizen of a world state rather than the fortunate inheritor of a special and superior civilization.

President Wilson in an address delivered on September 8, 1916, before the National American Suffrage Association pointed out that the older theories of government were fundamentally based upon the mechanistic idea of the universe to which Newton gave voice. We know that in our own country the attempt to control the development of our life by mechanistic formulas has failed. In the wider field of international relations, it is doubtful whether a league to enforce peace based upon the principle of written compacts and formal understandings is capable of solving the problem of world peace. If there is to be an effective league to enforce peace, it must rest upon an international public opinion. One of the best bases for such a public opinion is the conception of inter-citizenship between the citizens of the great powers.

the distinction between citizen and foreigner, for the foreigner may be quite equally capable of the same life, and, if so is morally seized of the same rights and duties, and if, through difference of race, he is not always equally capable, still his rights and duties cannot fall to zero, but vary only with the degree of his incapacity. Hence the fully developed state in which the principle of personality is vigorously carried through, must also find itself in definite ethical relation to humanity as a whole."

## SURVIVING FICTIONS II*

## **TEREMIAH SMITH**

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Example Six: As to the alleged presumption that every one knows the law.

"Every one is presumed to know the law."

This, on its face, is a rule of evidence.

"Ignorance of law excuses no one" (for breaking the law); or, more fully, ignorance of law affords no excuse for crime, breach of contract, or tort.

This is a rule of substantive law whose precise limits or applications need not now be considered.

The alleged presumption is sometimes treated (spoken of) as if it were either

(1) identical with the rule of substantive law (a paraphrase or free translation of the rule); or

(2) as giving us a correct reason for the rule of substantive law.

Neither view is correct.

As to the first view.

It has been said:

"The presumption is a rhetorical paraphrase for the statement that

ignorance of law is no defence to legal liability."107

"Often these maxims and ground principles get expressed in this form of a presumption perversely and inaccurately, as when the rule 

"When we say that men are conclusively presumed to know the Criminal Law, we mean that men are to be punished for certain acts without regard to whether they know them to be against the law or

not."109

As to the second view-that the alleged presumption gives the correct reason for the rule of substantive law.

This again is erroneous, though more plausible than the first view.

To this second view there are two answers:

- (a) There is no such presumption.
- (b) There is another, and a sufficient, reason for the rule of substantive law.

^{*} Continued from the December, 1917, issue—27 YALE LAW JOURNAL, 147-166.

 $^{^{107}}$  Best, Evid. (8d Am. ed. by Chamberlayne) 310 b.

¹⁰⁸ Thayer, Prel. Treatise on Evid. 335.

¹⁰⁰ Gray, Nature and Sources of the Law, s. 228.

(a) There is no such presumption. It is not well founded on fact. It is a fiction.¹¹⁰

"There is a rule of law that in certain cases ignorance of law excuses no one; but there is no presumption that every one knows the law."

"If this presumption can be taken to mean that most persons know the law, it is on its face absurd."

"112

That any actual system of law is knowable by those who are bound to obey it

"is so notoriously and ridicuously false that I shall not occupy your time with proof to the contrary." 113

"There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so."114

"Now to affirm 'that every person may know the law,' is to affirm the thing which is not. And to say 'that his ignorance should not excuse him because he is bound to know,' is simply to assign the rule as a reason for itself."

"Its identity with the recognized maxim ignorantia juris non excusat being disproved, the proposition that a man is presumed to know the law is proved to be of decidedly questionable character."¹¹⁶

"As regards knowledge of law the rule is that ignorance of the law is no excuse for breaking it, a doctrine which is sometimes stated under the form of a maxim that every one is conclusively presumed to know the law—a statement which to my mind resembles a forged release to a forged bond."¹¹⁷

(b) There is another, and a sufficient, reason for the rule of substantive law, and there is no need to resort to the fiction of a presumption of knowledge.

The rule is an arbitrary one, founded not in mere expediency, but on necessity. The real reason is fully stated by Austin in substance as follows: If ignorance of law were admitted as a ground of exemption, the court would be compelled to enter upon interminable questions of fact. They would have to try not only the question whether the party was ignorant of the law, but also whether his ignorance

¹¹⁰ It might not be unreasonable to presume that most men know that theft is a crime, but the alleged presumption, as usually stated, is not limited to the most common instances of unlawfulness.

¹¹¹ Keener, Quasi-Contracts, 87.

¹¹² Edwin R. Keedy, Ignorance and Mistake in the Criminal Law (1908) 22 HARV. L. REV. 91.

¹¹³ I Austin, Jurisp. (3d ed.) 497.

¹¹⁴ Maule, J., *Martindale v. Falkner* (1846) 2 C. B. 706, 719. See also Lord Mansfield, *Jones v. Randall* (1774) Cowp. 37, 40; Abbott, C. J., *Montriou v. Jefferys* (1825) 2 Car. & P., 113, 116.

¹¹⁸ 1 Austin, *Jurisp*. (3d ed.) 498.

¹¹⁶ Woodward, Quasi-Contracts, s. 36.

^{117 2} Stephen, Hist. of Crim. Law of Eng. 114.

¹¹⁸ I Bishop, New Crim. Law, s. 294 ¶ I.

was inevitable, whether he might have known the law if he had tried to know it. And for the purpose of determining whether he was to blame for his ignorance,

"it were incumbent upon the tribunal to unravel his previous history, and to search his whole life for the elements of a just solution."119

By the great weight of judicial decision, money paid under a mistake of law cannot be recovered back; in an early leading case the reason given was: "Every man must be taken to be cognizant of the law." Two recent writers have strenuously contended that the decisions denying recovery are erroneous; the rule *ignorantia juris non excusat* applying only to cases of delinquency. Into the discussion of this question we do not enter. For present purposes it is enough to say that if the alleged presumption as to knowledge of law is not recognized in cases of delinquency, there is no good ground for recognizing it in cases of money paid under mistake.

Example Seven: Constructive Fraud. 121

"Looking to the common sense of the question, it seems that constructive fraud is, or was, so called just because it was not actual fraud." 122

It is used only "in an artificial sense of the word." Fraud, actual fraud, involves the element of moral delinquency, such as conscious dishonesty, or conscious disregard of truth.

How came the term "constructive fraud" to be used? Is there any good reason for continuing to use it?

Equity originally was a system intended to allow parties relief which could not be obtained under the stiff and unbending rules and procedure of the common law. It involved a more elastic procedure and new rights. But in time, equity itself began to harden into a rigid system. There was a tendency to refuse to entertain a case unless the particular case could be brought under some already recognized head of equity jurisdiction. Fraud was one of those heads. Hence,

¹¹⁹ I Austin, *Jurisp*. (3d ed.) 498-499. See also reason stated in Holmes, *Common Law*, 48. The difficulty of investigation is not rated so high in Holmes, nor in one passage in Salmond, *Jurisp*. (ed. 1902) 460: but in an earlier passage, on p. 458-9, Salmond seems to agree substantially with Austin.

¹²⁰ Keener, Quasi-Contracts, 85-90; Woodward, Quasi-Contracts, ss. 35-37.

¹²¹ "Among the regular though not invariable marks of fictions in modern English law is the use of the word 'constructive' or the word 'implied,' as any careful student may note for himself." Sir F. Pollock, Notes on Maine's

careful student may note for himself." Sir F. Pollock, Notes on Maine's 'Ancient Law' (1905) 21 LAW QUART. REV. 165, 173. See the same learned writer as to constructive notice, constructive possession, and constructive delivery, in 31 LAW QUART. REV. 94.

¹²² Sir F. Pollock, Nocton v. Lord Ashburton (1915) 31 Law Quart. Rev. 93-94.

in cases where there was no actual fraud, but where justice required the granting of relief, there was an attempt to discover some analogy or resemblance to fraud which might plausibly justify the court in applying the epithet "constructive" fraud and in regarding the case as falling under the general head of fraud. The result was that "constructive fraud" became a prominent title in equity, occupying a large space in Judge Story's work on Equity Jurisprudence, covering more than 160 pages in the first edition of that work, published in 1835. 123 Jurisdiction was taken as to certain classes of persons, or upon certain states of fact, where there was no actual dishonesty, but which were classed under the general head of constructive fraud.

Judge Story, at the beginning of his long chapter on Constructive Fraud, has sometimes been regarded as almost apologizing for doctrines which (as he says) "may seem to be of an artificial, if not of an arbitrary, character." But Mr. Bower has recently said that the apology should have been made,

"not for the doctrines, which are admirable, but for the nomenclature, which is vile. . . . The 'arbitrariness' is in describing these acts by a name in popular use to which they do not answer . . . instead of simply laying down that certain acts and omissions are prohibited, irrespective of fraud or honesty, on the ground of the tendency and temptation to evil which would otherwise result." 125

At the present time, however, there is no longer any need to resort to subterfuges or to employ fiction phraseology. "At this day we have learnt a bolder and simpler method." Courts of equity as well as courts of law do not now hesitate to declare distinctly that certain duties are incumbent upon specific classes of persons, or in certain situations of fact. And they hold persons liable for violations of these duties utterly irrespective of dishonesty or of conscious wrong doing. Liability is imposed where there is no tinge of actual fraud nor any ground for applying the epithet of constructive fraud.

The modern method of dealing with cases which might formerly have been classed under "constructive fraud" is illustrated by the recent decision of the House of Lords in Nocton v. Lord Ashburton.¹²⁷ In that case a solicitor advised his client to release part of a mortgage security in which the solicitor himself was interested. The result of following this advice was that the security became insufficient and

[&]quot;Some of you may remember the terribly multifarious contents of the heading 'Constructive Fraud' in the old-fashioned books on equity. Logically, nothing could be less defensible than such a catalogue, or more bewildering to young students." Pollock, Expansion of the Law, 115.

¹³⁴ I Story, Eq. Jurisp. (1st ed.) sec. 258.

Bower, Actionable Misrepresentation, App. s. 455, p. 387.

²⁰⁰ Pollock, Law of Fraud in British India, 15, 16, 41, 42.

¹³⁷ L. R. [1914] App. Cas. 932. See 40 Law Mag. & Rev. (5th Ser., 1915) 223-226.

part of the mortgage money was lost. The client sued the solicitor in the Chancery Division to recover for the loss. Fraud was prominently averred as a ground for relief. Upon a hearing, it appeared that the solicitor had negligently failed to ascertain the truth of the representations which he made to his client. The judge of first instance, Neville, J., while holding that the solicitor stated what was not true in fact, and in advising as he did fell far short of his duty as solicitor, nevertheless found there was no actual fraud proved, and dismissed the action. The Court of Appeal reversed the decision on the ground that actual fraud was proved. The House of Lords held that the Court of Appeal was not justified in reversing the finding of fact by Neville, J., as to there being no actual fraud. But they decided in favor of plaintiff upon the ground (1) that there was a duty upon the solicitor, arising from the fiduciary relation, to use care in ascertaining and imparting information; (2) that there had been a breach of this duty; and (3) that the breach of this duty gave the client a right to relief without proving conscious dishonesty, or conscious disregard of truth, or actual fraud of any kind, on the part of the solicitor. They distinguished Derry v. Peek128 on the ground that that was "an action wholly and solely of deceit, founded wholly and solely on fraud"; and that deceit being "a necessary factor, actual dishonesty, involving mens rea, must be proved." They say that the decision in Derry v. Peek "has no bearing whatever on actions founded on a breach of duty in which dishonesty is not a necessary fact."129

Sir F. Pollock, in commenting on Nocton v. Lord Ashburton, concurs in the view that this case is not affected by the decision in Derry v. Peek:

"and this is not the less so because the breach of these special fiduciary duties was called 'constructive fraud' in the days when equity practitioners used the word Fraud as nomen generalissimum."

### He also says that

"a rule of law making wilful falsehood or at least conscious disregard of truth a necessary element in actual fraud is not, on the face of it, applicable to the various breaches of duty which for historical reasons have been gathered under the catchword of 'constructive fraud.' "120

There is no more justification for using the term "constructive fraud" in courts of law than in courts of equity.

^{128 (1880)} L. R. 14 App. Cas. 337.

Lord Shaw, p. 970: Lord Parmoor, p. 978. As to alleged inconsistencies in the law now applied to misrepresentation in its various aspects, see the valuable article by Prof. Williston, Liability for Honest Misrepresentation (1911) 24 Harv. L. Rev. 415-440.

³¹ LAW QUART. REV. 93, 94. Compare Lord Dunedin, L. R. [1914] App. Cas. 963, and Lord Haldane, 953.

In both courts there has been a tendency to confuse negligence and fraud.

"Negligence and fraud are in truth mutually exclusive conceptions; although the same facts may [sometimes] be evidence either of one or of the other." ¹³¹

But it is a mistake to assume that evidence which proves negligence must necessarily prove fraud. It is an error to treat

"facts which on no reasonable interpretation could be evidence of more than negligence as in themselves evidence of fraud." 132

It is an error to say that gross negligence "implies fraud," or that gross negligence is fraud.

The objections to the term "constructive fraud" (including the confusion resulting from its use) have been strongly stated by authorities entitled to great respect.¹³⁴ The reasonable conclusion is that the term should be dropped from the law.¹³⁵

Example Eight: Constructive Trust.

In the cases generally described by the term "constructive trust," that expression is confessedly a fiction phrase. The so-called constructive trusts recognized and enforced by chancery "are neither express trusts nor resulting trusts." Cases classed under this head are largely, if not wholly, cases where a defendant has wrongfully acquired possession of, or legal title to, property in violation of the rights of the beneficial owner, generally by fraud, actual or "constructive." A court of equity in order to give the sufferer an efficacious remedy permits him to employ the same "machinery" applied by such courts to cases of violation of express trusts. But

¹³¹ Ashburner, Equity, 87.

¹³² See Ashburner, Equity, 88.

¹⁸⁸ See I Story, *Eq. Jurisp.* (8th ed.) s. 391.

¹³⁴ See, for example, Lord Romilly, M. R., *In re Agriculturists' Cattle Ins. Co.* (1867) L. R. 3 Eq. 769, 771-772; and Mr. Ewart in his work on *Estoppel*, 160, 232, 286, 259-261, 87, 98.

The high authority of Mr. Pomeroy is opposed to this conclusion, although that very able writer recognizes the objections to the term. See 2 Pomeroy, Eq. Jurisp. (ed. 1881-1882) s. 874, n. 2; and see also s. 922.

¹³⁸ See I Perry, Trusts (6th ed.) s. 166, p. 262; Prof. Pound, The Decadence of Equity (1905) 5 Col. L. Rev. 20, 20.

¹⁵⁷ See Professor Costigan, The Classification of Trusts as Express, Resulting, and Constructive (1914) 27 Harv. L. Rev. 437, 448.

¹³⁸ I Pomeroy, Eq. Jurisp. s. 155; 2 ibid. s. 1044; I Perry, Trusts (6th ed.) s. 166, p. 250.

As to constructive trusts in cases other than those of fraud; see Bispham, *Principles of Equity* (9th ed.) s. 91, p. 168 et seq.; Adams, Equity (8th ed.) p. 36, n. 2.

there is no "trust" in any proper sense of that term.¹³⁹ There is no fiduciary relation; no relation created in pursuance of the intent of the parties; no trust or confidence reposed by the beneficial owner in the so-called trustee.¹⁴⁰

As to the meaning of the expression "constructive trust" when used in such connection, and as to the reason for so using it, there is a very clear statement by Lord Westbury in Rolfe v. Gregory¹⁴¹ which may be regarded as a representative case. In that case, there had been a fraudulent abstraction of trust property by the trustee and a fraudulent receipt and appropriation of it by another party (the defendant Gregory) for his own personal benefit. The defense was set up that the plaintiff beneficiary had lost his remedy by lapse of time, it being contended that Gregory's liability "was to be considered as resulting merely from constructive trust." Lord Chancellor Westbury said¹⁴² that this view

"involves a misapprehension of the true principles on which the action of this Court is founded. The relief is founded on fraud and not on constructive trust. When it is said that the person who fraudulently receives or possesses himself of trust property is converted by this Court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to as against an express trustee who had fraudently committed a breach of trust."

So Professor Scott says of "constructive trust":

"It is the name given to the remedy, not the right for which the remedy is given. There is as good reason in the case of a non-fiduciary as in the case of a fiduciary for imposing a duty to surrender property acquired by a wrongful act; it should make no difference whether it is acquired by breach of trust or other fiduciary obligation, or by fraud or theft."

¹³⁹ See 2 Pomeroy, Eq. Jurisp. s. 1044, 1 Perry, Trusts (6th ed.) p. 262.

¹⁴⁰ See Professor Scott (1913) 27 Harv. L. Rev. 126, n. 4. Professor Costigan, op. cit. 27 Harv. L. Rev. 437, 439, n. 6.

¹⁴¹ (1865) 4 De G. J. & S. 576.

¹⁴² Ibid. 579.

The Right to Follow Money Wrongly Mingled with Other Money (1913)

²⁷ Harv. L. Rev. 125, 126, n. 4. Mr. Bispham says:

[&]quot;Equity . . makes use of the machinery of a trust for the purpose of affording redress in case of fraud . . . But in such cases, the interference of courts of equity is called into play by fraud as a distinct head of jurisdiction; and the complainant's right to relief is based upon that ground, the defendant being treated as a trustee merely for the purpose of working out the equity of the complainant." Bispham, *Principles of Equity* (9th ed.) s. 91, p. 168.

The cases of fraud do not fall within any generally approved definition of the term "resulting trust." Hence, we do not here consider whether resulting trusts should be classed, as by Maitland, under the head of trusts created by act of the law, or, as by Costigan, under the head of trusts created by act of a party. See Professor Costigan, op. cit. 27 HARV. L. REV. 437, 461, 462.

What phrase should be substituted for "constructive trust" in order to indicate the cases heretofore improperly described by that term? Answer: cases of tortious misappropriation of property for which there is a remedy in equity as well as at law.

EXAMPLE NINE: As to Fiction Contracts.

Under this head must be classed a very large number of cases which, under the old forms of action, were enforced in an action of contract, but in which there was no contract whatever, the promise alleged in the declaration being an absolute fiction.

These cases are generally described as implied contracts or quasicontracts. There are objections to both terms.

"Implied contract" is an ambiguous term. It may be understood as denoting either a contract implied in fact or a contract implied in law. The former is a genuine contract, the latter is a fiction contract.

A genuine contract includes two varieties. It may be what is called an express contract, *i. e.* where the consent of the parties is "expressly stated in words spoken or written." Or it may be a contract "implied in fact" (sometimes described as "a tacit contract") *i. e.* a contract inferred as a fact from the conduct of the parties (some sort of conduct other than the use of words). Each of these varieties is a true contract. They differ only in "the character of the evidence" by which the existence of the contract is proved. "The source of the obligation in each case is the intention of the parties."

"The term 'contract implied in law' is used, however, to denote, not the nature of the evidence by which the claim of the plaintiff is to be established, but the source of the obligation itself. It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent."

A contract implied, or created, by law "is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor."¹⁴⁶

The term quasi-contract is unsatisfactory to many jurists. 147 It

¹⁴⁴ See Terry, Leading Principles of Anglo-American Law, s. 483.

¹⁴⁵ Keener, Quasi-Contracts, 5.

¹⁴⁶ Professor J. B. Ames, Lectures on Legal History, 160.

¹⁴⁷ See Sir F. Pollock, Notes on Maine's 'Ancient Law' (1906) 22 LAW QUART. REV. 89; I Halsbury (2d ed.) Introd. 11. Professor Knowlton, The Quasi-Contractual Obligations of Municipal Corporations (1911) 9 MICH. L. REV. 671.

"suggests a relation and an analogy between contract and quasicontract. The relation is distant and the analogy slight. The differences are greater than the similarities." 148

A happier designation "would be one that avoided altogether the use of the word 'contract.' "149

The term quasi-contract, used in a very broad sense, applies "to all non-contractual obligations which are treated, for the purpose of affording a remedy, as if they were contracts." In Anson on Contracts (12th ed.) 8, it is said:

"This is a convenient term for a multifarious class of legal relations which possess this common feature, that without agreement, and without delict or breach of duty on either side, A has been compelled to pay or provide something for which X ought to have paid or made provision, or X has received something which A ought to receive. The law in such cases imposes a duty upon X to make good to B the advantage to which A is entitled."

The scope of Woodward on Quasi-Contracts is confined solely to "obligations arising upon the receipt of a benefit, the retention of which is unjust." ¹⁵¹

In the two treatises which have been published on the special subject of quasi-contract, the learned authors, Keener and Woodward, both affirm that, in all the cases grouped under this head, there is no genuine agreement or assent; and that the "contract" heretofore alleged in the declaration is a pure fiction. 152

Why was the fiction of a contract employed by the courts in this class of cases? "The answer to this question is to be sought, not in the substantive law, but in the law of remedies." In modern times, until the very recent changes in the law as to forms of action, it was commonly assumed that (apart from suits to obtain possession of specific articles of property) there were only two great divisions of causes of personal action, contract and tort; and that there could be no cause of personal action unless it could be classed under one or

¹⁴⁶ Professor Corbin, Quasi-Contractual Obligations (1912) 21 YALE LAW JOURNAL, 533, 544

¹⁴⁰ See Woodward, *Quasi-Contracts*, s. 4. As to reasons for retaining the term quasi-contract now that it is in such general use, and as to the difficulty of finding a completely satisfactory substitute, see Professor Corbin, op. cit., 21 YALE LAW JOURNAL, 533, 545, 553. Pollock and Knowlton prefer the term constructive contract to quasi-contract. See also Lowrie, J., in *Hertzog v. Hertzog* (1857) 29 Pa. 465.

¹⁸⁰ Woodward, Quasi-Contracts, s. 1.

Woodward, s. 1. As to topics which might be included under quasi-contract, see Woodward, s. 1; Keener, Quasi-Contracts, 16-25. Cf. Corbin, op. cit.

¹²² See Woodward, s. 4; Keener, pp. 5, 6; Maine, Ancient Law (3d Am. ed.) 332; Ames, Lectures on Legal History, 160; Judge Francis J. Swayze, The Growing Law (1915) 25 YALE LAW JOURNAL, I, 4.

¹⁵⁸ Keener, Quasi-Contracts, 14.

the other of these two heads.¹⁵⁴ Hence the court, in order to allow a remedy upon what was really a non-contractual obligation, used the fiction of a contract (alleged a fictitious contract).¹⁵⁵ Incidentally, it may be noted that this resort to fiction sometimes relieved the court from giving reasons for the existence of an obligation (from inquiring carefully into reasons for imposing absolute liability).

"It is easier for the courts to say that a man is bound to pay because he must be taken to have so promised, than to lay down for the first time the principle that he is bound to pay whether he has promised or not." 156

"I think that there is at present, wherever the old forms of action have been abolished and pleadings are required to contain simply a statement of the actual facts, . . . no sufficient reason for persisting in the use of this fiction, but that it is for many reasons desirable to admit the existence of non-contractual obligations much more freely than we now do . . . and to confine the doctrine of contracts strictly within its legitimate bounds instead of suffering it to overspread nearly the whole area of the law of obligations."

(The author then says that he shall discard the fiction, and shall describe "the obligations commonly said to arise from quasi-contracts as non-contractual obligations.")¹⁵⁷

"It seems clear that a rational system of law is free to get rid of the conception of quasi contractual obligation altogether. No useful purpose is served by it at the present day." ¹⁵⁸

In the cases just mentioned, there was no contract whatever between the parties; and the contract invented for the sake of the remedy was an entire fiction. But there are cases where there is a contract between the parties as to certain terms, and where the court adds other terms which were not subjects of agreement. In the latter instances

"the law adds terms to an actual contract independently of the will of the parties or puts an arbitrary construction upon particular words. In such cases the contract may be partly expressed or implied in fact, and partly implied in law." ¹⁵⁹

¹⁵⁴ See citations in Tort and Absolute Liability—Suggested Changes in Classification (1917) 30 HARV. L. REV. 241, 242-243.

¹⁶⁵ See Salmond, Jurisp. (ed. 1902) 563; Keener, Quasi-Contracts, 14, 15.

¹⁵⁶ Salmond, Jurisp. (ed. 1902) 564.

¹⁵⁷ Terry, Leading Principles of Anglo-American Law, s. 483.

[&]quot;In an arrangement of the law the notion of an implied contract, so far as that means a purely fictitious contract, and of a quasi-contract, should be dropped, and non-contractual obligations be frankly recognized as such." Professor H. T. Terry, 17 Col. L. Rev. (May, 1917) 378.

¹⁵⁸ Salmond, Jurisp. (ed. 1902) 564. And see Keener, Quasi-Contracts, 160, 172.

¹⁵⁰ Terry, Leading Principles of Anglo-American Law, s. 485: "Implied Contracts of a Mixed Nature." Compare W. G. Miller, Lectures on the Philosophy of Law, 213.

See Terry, s. 488:

[&]quot;That the implied terms which the law sometimes inserts in true contracts..., although they are inserted without the actual consent of the parties, are not inserted against their manifested will."

Judges do not often avowedly add to a contract terms which were never agreed to by the parties. Rather, they profess to be ascertaining (interpreting) the meaning of the language actually used by the parties. But sometimes they are, in reality, guessing as to what the parties would have agreed to upon a certain point in case that point had been present to their minds (as it was not).¹⁶⁰

Assuming that the court has power to add terms to a contract, how shall such additions be designated? Shall the court, invoking the aid of fiction, describe them as contracts (contracts implied in fact)? Or shall the court speak of them as absolute obligations imposed by law? As to this there is a difference of opinion.

Professor Terry says:161

"In drawing the line here between contractual and non-contractual obligations, it seems to me that such implied terms cannot be separated from the contract, and that where there is an actual contract all the obligations resulting must be regarded as contract obligations even though they take their form from terms in the contract arbitrarily inserted by the law and not actually agreed to by the parties."

Professor Williston, however, says:162

"But when a seller is held liable on a warranty for making an affirmation of fact in regard to goods in order to induce their purchase, to hold that such an affirmation is a contract is to speak the language of pure fiction. . . . In truth, the obligation imposed upon the seller in such a case is imposed upon him not by virtue of his agreement to assume it, but because of a rule of law applied irrespective of agreement." 188

Thus far we have been discussing examples of surviving fictions. But we wish now to consider briefly a discarded fiction whose history will repay examination. This is:

The fiction of presuming a lost grant in order to establish an easement in case of twenty years user.

It can hardly be said that this is a *surviving* fiction. The courts are now discarding the fiction presumption; and are substituting for it a positive rule of substantive law; "a rule of the law of property, to be applied absolutely." But it is interesting to consider briefly the origin, growth and final disuse of the fiction; and the adoption of a positive

¹⁸⁰ See Professor Gray as to the judicial interpretation of statutes and wills, *Nature and Sources of the Law*, ss. 370, 702, 703.

¹⁶¹ Op. cit. s. 485.

¹⁰² Liability for Honest Misrepresentation (1911) 24 HARV. L. REV. 420.

As to Implied Warranty, see 2 Mechem, Sales, s. 1295; Professor Costigan, Change of Position as a Defense in Quasi-Contracts (1907) 20 HARV. L. REV. 201-207

rule of law not based on the presumption, but giving practically the same results.

"The fiction of presuming a grant from twenty years possession was invented by the English courts in the eighteenth century, to avoid the absurdities of their rule of legal memory." 164

"The doctrine was originally adopted for the purpose of quieting titles, and giving effect to long-continued possession." 165

At first, the presumption was not a conclusive one. Juries were allowed to find the existence of a lost grant ("were told that they might presume a lost grant") but the presumption could be rebutted.¹⁶⁸

"In truth it was nothing but a canon of evidence. . . . This presumption of a lost grant or covenant was nothing more than a rebuttable presumption of fact. . . . It must at the same time be conceded that the Courts exhibited a disinclination to treat the presumption as an ordinary one. They preferred to leave it in a logical cloud, and juries were encouraged, for the sake of quieting possession, to infer the existence of deeds in whose existence nobody did believe." 167

Subsequently, juries were told that they not only might, but were bound to, presume the existence of such a lost grant. They were not merely advised, but directed, to presume a lost grant. And they

"were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction."¹⁶⁹

Such instructions are given, said Wilde, J., 170

"not . . . because either the court or jury believes the presumed grant to have been actually made, but because public policy and convenience require that long continued possession shall not be disturbed."

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¹⁶⁴ Washburn, Easements (4th ed.) 125. See Lord Blackburn, in Dalton v. Angus (1881) L. R. 6 App. Cas. 740, 812.

¹⁰⁵ Washburn, op. cit. 126.

¹⁰⁰ See early cases collected in note to Yard v. Ford in 2 Williams' Saunders (ed. 1845) 175. See especially Lord Mansfield, C. J., in Mayor of Hull v. Horner (1774) Cowper, 102, 108, 109.

²⁵⁷ Bowen, J., in Dalton v. Angus (1881) L. R. 6 App. Cas. 740, 781, 782-783.

¹⁸⁸ 11 Halsbury, s. 529.

¹⁶⁰ Cockburn, C. J., in Angus v. Dalton (1877) L. R. 3 Q. B. 85, 105.

^{170 (1829) 8} Pick. 504, 508-509.

¹⁷¹ In an article on Legal Fictions: The Case of Angus v. Dalton, 4 LAW MAG. AND Rev. (4th Ser., 1879) 281, 284, Sir Wm. Markby says:

[&]quot;The grand error... is making the existence or non-existence of this fictitious grant part of the question to be submitted to the jury. Submit what? The truth of a fiction?"

In Angus v. Dalton (1877) L. R. 3 Q. B. 85, 94, Lush, J., speaks of "the revolting fiction of a lost grant." In the First Report of the English Commissioners on the Law of Real Property, the learned Commissioners call it "the clumsy fiction of a lost grant," and say that it is "well known to counsel, judge, and jury that the plea is unfounded in fact."

Next, the question arose whether the presumption could be displaced by showing that no grant was in fact made. Upon this question there is not unanimity. Conflicting views were expressed by various judges in the leading case of Dalton v. Angus. 172 But we think that the weight of authority, both in England and America, is opposed to the admissibility of direct evidence to show that no grant was ever made.178

The practical result is that, in place of what was originally a presumption of fact, the courts have substituted a positive rule of law. Where a result was originally alleged to be founded on a presumption, the courts have discarded the presumption, and have established a positive rule of law not based on the presumption, but giving the same results. In effect,

"prescription has been advanced from the law of evidence to a place in the substantive law."174

"The familiar doctrine about prescription used to be put as an ordinary rule of presumption; in twenty years there arose a prima facie case of a lost grant or of some other legal origin. The judges at first laid it down that, if unanswered, twenty years of adverse possession justified the inference; then that it 'required the inference,' i. e. it was the jury's duty to do what they themselves would do in settling the same question, namely, to find the fact of the lost grant; and at last this conclusion was announced as a rule of the law of property, to be applied absolutely."¹⁷⁵

## In Dalton v. Angus,176 Lindley, J., said:

"The theory of an implied grant was invented as a means to an end. It afforded a technical common-law reason for not disturbing a long continued open enjoyment. But it appears to me contrary to the reason for the theory itself to allow such an enjoyment to be disturbed simply because it can be proved that no grant was ever in fact made. If any lawful origin for such an enjoyment can be suggested, the presumption in favor of its legality ought to be made. . . . The theory

^{173 (1881)} L. R. 6 App., Cas. 740.

ma... the presumption cannot be displaced by merely showing that no grant was in fact made; the long enjoyment either estops the servient owner from relying on such evidence or overrides it when given." Gale, Easements (9th ed.) 192. But, compare Goddard, Easements (7th ed.) 174.

English writers who seem inclined to adopt the view taken in Gale on Easements, state it cautiously. Thus, in Jenks' Digest of English Civil Law, Book 3, "Property," s 1439: "(Probably) direct evidence may not be adduced to show that no grant . . . was in fact made." And in 11 Halsbury, s. 531: "Direct evidence that the grant was never made would appear to be inadmissible to rebut the presumption of a lost modern grant raised by the uninterrupted user."

As to American authorities: see 14 Cyc. 1146-1147. And compare 2 Chamberlayne, Mod. Law of Evid. ss. 1163a, 1163b. See also Wallace v. Fletcher (1855) 30 N. H. 434.

¹⁷⁴ Salmond, Jurisp. (ed. 1902) 533.

¹⁷⁵ J. B. Thayer, Prel. Treatise on Evid. 317. Compare Bell; J., in Wallace v. Fletcher (1855) 30 N. H., 434, 447-8, 452.

^{178 (1881)} L. R. 6 App. Cas. 740, 765.

of an implied grant as distinguished from a legal presumption of some lawful origin, is, in my opinion, untenable and practically misleading. . . ."¹⁷⁷

In Markby, Elements of Law, 178 the learned author says:

"I do not think that the English law of prescription will ever be put upon a satisfactory footing until the notion is got rid of that all prescription presumes a grant, and until prescription is recognized here, as on the continent of Europe, as a means of acquiring ownership. The grant is only a fiction, and the fiction here is not a useful one. It does not indicate the principles to be applied."

¹⁷⁷ In Goddard, Easements (7th ed.) 180 it is said, in reference to the opinion of Lindley, J., in Angus v. Dalton:

[&]quot;. . his opinion is of importance, as he expressed a view that goes to the root of the whole theory of presumption of grant and tends to its destruction."

178 (3d ed.) s. 588.

# WHAT IS GIVING AID AND COMFORT TO THE ENEMY?

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The elements of the law of treason are extremely simple, and yet are little understood by laymen, and even by practicing lawyers of the present day. Hence, a critical summary of the principal features of that branch of the crime which consists in giving "aid and comfort" to the enemy may be of assistance during the present trying times. The law in this country on the subject is to be found in very few court decisions, and has been largely laid down in generalities in charges to the grand jury in inferior federal courts. As a result, there has sometimes been a lack of discrimination between the doctrines of law applicable to "levying war" and those applicable to "giving aid and comfort."

Treason is the only crime specifically described in the Constitution. Article III, Section 3, provides:

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

This definition was based upon the Statute of Treasons of 25 Edward III, ch. 2, in 1351, which comprehended all treasons under seven distinct branches. The framers of our Constitution selected one of these branches and declared that treason against the United States should be confined to the acts which it designated. The Congress can neither enlarge, restrict, nor define the crime; and its power over the subject is limited to prescribing the punishment.¹

"The word 'only,'" said Chief Justice Chase, "was used to exclude from the criminal jurisprudence of the new republic, the odious doctrines of constructive treason. Its use, however, while limiting the definition to plain overt acts, brings these acts into conspicuous relief as being always and in essence treasonable."

The first Congress provided a penalty for the crime of treason by the Act of April 30, 1790,³ as follows:

¹ United States v. Greathouse (1863, D. C.) 2 Abb. 364, 371.

² Shortridge v. Macon (1867, C. C. No. Car.) Chase, 136; 22 Fed. Cas. No. 12, 312.

⁸ Ch. 9, sec. 1, 1 St. at L. 112.

"That if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States. and shall suffer death.'

This statute became Revised Statutes, Sections 5331, 5332, as follows:

"Sec. 5331. Every person owing allegiance to the United States, who levies war against them, or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

"Sec. 5332. Every person guilty of treason shall suffer death; or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years, and fined not less than ten thousand dollars, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States;

and is now contained in the Act of March 4, 19094—the Federal Criminal Code—as follows:

"Sec. 1. Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort

within the United States or elsewhere, is guilty of treason.
"Sec. 2. Whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less than five years and fined not less than ten thousand dollars, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States.'

The general principle of construction was laid down by Chief Justice Marshall in 1807:

"It is therefore more safe as well as more consonant to the principles of our constitution that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."5

The two branches of treason, "levying war," and "adhering to

⁴Ch. 321, secs. 1 and 2, 35 St. at L. 1088.

Ex parte Bollman and Swartwout (1807, U. S.) 4 Cranch, 77, 127.

their enemies, giving them aid and comfort,"—are distinct, and do not embody synonymous actions.

"The term 'enemies,' as used in the second clause, according to its settled meaning, at the time the Constitution was adopted, applies only to the subjects of a foreign power in a state of open hostility with us. It does not embrace rebels in insurrection against their own government."6

Hence, treason by levying war is more generally committed in internal insurrections directed against the government by persons in the United States; whereas giving aid and comfort is generally committed in connection with a war waged against the United States by a foreign power. When those who commit treason by levying war become an organized body politic, however, they may become "enemies" within the purview of the law, and giving aid and comfort to such enemies will constitute treason.7

The acts constituting giving aid and comfort to the enemy are more numerous and of wider scope than the acts constituting the first branch of the crime, viz., the levying of war. It is important to note this point, for it has been largely disregarded by text-book writers and by judicial authorities (owing probably to the fact that prior to the Civil War every case of treason in the federal courts, with few exceptions, was a case of levying war). As a result of this failure to distinguish between the different elements necessary to constitute the separate branches of the crime, doctrines of law applicable only to levying war have been stated by writers and judges to apply to giving aid and comfort to the enemy. Careful consideration shows, however, that while every action which, when performed by domestic insurrectionaries, will constitute a levying of war, will, when performed in connection with a war with a hostile foreign nation, also constitute a giving of aid and comfort to the enemy, the reverse of this statement is not true. For many actions which give aid and comfort to the enemy are not actions which necessarily constitute a levying of war. Thus, since levying of war consists, in general, of the actual assemblage of men in force, the mere "enlistment of men to serve against the government does not amount to levying war," unless followed up by actual assemblage in force.8 But, on the other hand, there can be no possible doubt that the enlistment of men in the United States to serve in the forces of a foreign enemy would constitute giving aid and comfort to the enemy, within the purview of that

See Field, J., in United States v. Greathouse (1863, C. C.) 4 Sawyer, 457, 466, 2 Abb. (U. S. D. C.) 364, 26 Fed. Cas. No. 15,254.

Prize Cases (1862, U. S.) 2 Black, 635.

Marshall, C. J., in Ex Parte Bollman and Swartwout (1807, U. S.) 4 Cranch, *7*5, 126.

branch of the crime of treason; and in the treason statute of Pennsylvania, enacted before the adoption of the United States Constitution, the crime of aiding and assisting the enemy was expressly defined:

"to aid and assist any enemy... by joining the armies of the enemy, or by enlisting, or procuring, or persuading others to enlist for that purpose; or by furnishing such enemies with arms or ammunition, provision, or any other article, or articles, for their aid or comfort, or by carrying on a traitorous correspondence with them."

Other examples of the manner in which giving aid and comfort includes acts of a broader scope than levying war are noted *infra*.

THE ELEMENTS OF THE CRIME OF "ADHERING TO THEIR ENEMIES, GIVING THEM AID AND COMFORT"

What constitutes giving aid and comfort to the enemy may be described, in general, in the words of Mr. Justice Field:

"The term 'enemies' . . . applies only to the subjects of a foreign power in a state of open hostility with us. . . . Wherever overt acts have been committed which, in their natural consequence, if successful, would encourage and advance the interests of the rebellion, in judgment of law aid and comfort are given. Whether aid and comfort are given—the overt acts of treason being established—is not left to the balancing of probabilities—it is a conclusion of law." 10

In the recent Casement treason case in England, in 1917, on an indictment under the English Treason Act of 1351 which reads:

"be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," the Lord Chief Justice charged the jury as follows: "If a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King, that is in law the giving of aid and comfort to the King's enemies. Again, if a British subject commits an act which weakens or tends to weaken the power of the King and of the country to resist or to attack the enemies of the King and the country, that is in law the giving of aid and comfort to the King's enemies." 11

^o Respublica v. Carlisle (1778, U. S.) 1 Dall. 35, 37; Respublica v. Roberts (1778, U. S.) 1 Dall. 39; Respublica v. M'Carty (1781, U. S.) 2 Dall. 86.

¹⁰ Charge to the Grand Jury in *United States v. Greathouse* (1863, C. C.) 4 Sawyer, 457, 466, 472. These words were quoted with approval by the Supreme Court in *Young v. United States* (1877) 97 U. S. 39, 65.

The italics above, as well as in the case quoted in note 32, post, and in the quotations from the cases cited in notes 16, 27, 33 and 46, post, are those of the present writer.

¹¹ Rex v. Casement [1917] 1 K. B. 98, 133.

And Judge Leavitt, in 1861, gave an equally broad definition, saying:

"The words in the definition, adhering to their enemies, seem to have no special significance, as the substance is found in the words which follow—giving them aid and comfort. As before remarked, it is not an easy task to classify or specify the acts, which bring a party within the range of this branch of the definition. In general, when war exists, any act clearly indicating a want of loyalty to the government, and sympathy with its enemies, and which, by fair construction, is directly in furtherance of their hostile designs, gives them aid and comfort." 12

Among the specific acts which have been held to come within the purview of the above are the following:

(a) Selling goods to or buying goods from the enemy government or to or from its agents or forces.

The Supreme Court has said that

"any person owing allegiance to an organized government, can make a contract by which, for the sake of gain, he contributes most substantially and knowingly to the vital necessities of a treasonable conspiracy against its existence, and then in a court of that government base successfully his rights on such a transaction, is opposed to all that we have learned of the invalidity of immoral contracts. A clearer case of turpitude in the consideration of a contract can hardly be imagined unless treason is taken out of the catalogue of crimes.

"The case is not relieved of its harsh features by the finding of the court that the claimant did not *intend* to aid the rebellion, but only to make money. It might as well be said that the man who would sell for a sum beyond its value to a lunatic, a weapon with which he knew the latter would kill himself, only intended to make money and did not intend to aid the lunatic in his fatal purpose." ¹³

In Young v. United States it was held that the words "aid or comfort to the rebellion" as used in the Captured and Abandoned Property Act of March 12, 1863, in the Civil War, were used in the same sense as in the Constitution defining treason—"that is to say, in their hostile sense"; and in that case, where a man contracted with the government of the State of North Carolina to provide warlike supplies and to aid in running cotton out through the blockade, and performed acts carrying out his contract, it was held that the acts were clearly treasonable.

Furnishing provisions to public warships of the enemy is treason;14

¹² Charge to Grand Jury (1861, C. C.) I Bond, 609, 611, 30 Fed. Cas. No. 18,372.

¹³ Sprott v. United States (1874, U. S.) 20 Wall. 459, 463; Hanauer v. Doane (1870, U. S.) 12 Wall. 342, 347; Carlisle v. United States (1872, U. S.) 16 Wall. 147, 155; Young v. United States (1877, U. S.) 97 U. S. 39, 64, 65; United States v. Aaron Burr (1807, U. S.) 4 Cranch, App. 469, 471.

¹⁴ People v. Lynch (1814, N. Y.) 11 Johns. 549.

but mere proceeding to shore from a ship with intent to search for or procure provisions for the use of the enemy is not treason.¹⁵

#### (b) Communication of intelligence.

Aid and comfort may be furnished to the enemy by giving intelligence, either oral or written, in an attempt to aid him in his acts of hostility. Judge Leavitt, in his *Charge to the Grand Jury*, in 1861, said:

"Without going into details on the subject, I will briefly notice some things clearly involving the guilt of treason. Thus, to sell to, or provide arms or munitions of war, or military stores, or supplies, including food, clothing, etc., for the use of the enemy, is within the penalty of the statute. And to hire, sell, or furnish boats, railroad cars, or other means of transportation, or to advance money, or obtain credits, for the use and support of a hostile army is treasonable. It is equally clear that the communication of intelligence to the enemy by letter, telegraph, or otherwise, relating to the strength, movements, or position of the army, is an act of treason. These acts, thus briefly noted, show unequivocally an adherence to the enemy, and an unlawful purpose of giving him aid and comfort."

(c) Joining the enemy in time of war, or offering service by letter. It is held that joining the enemy is the most flagrant instance of the crime of treason and nothing except the fear of death can excuse it.¹⁷

The writing, uttering and sending of a letter to the President of the Confederate States making an offer of service "was an act of aid and comfort" to the enemy, though the mere writing of a letter, unaccompanied by the sending, uttering or publishing, would not constitute aid and comfort.¹⁸

- (d) Delivering up prisoners and deserters to an enemy is treason.19
- (e) Trade with enemy subjects.

Trade with enemy subjects may, under certain circumstances, be treason. As Mr. Justice Nelson said in a Charge to the Grand Jury in 1861:

¹⁵ United States v. Pryor (1814, C. C.) 3 Wash. 234.

¹⁶ Charge to Grand Jury (1861, C. C. S. D. Oh.) 1 Bond, 609, 611, 30 Fed. Cas. No. 18,272. See also Respublica v. Carlisle (1778, U. S.) 1 Dall. 35.

¹⁷ United States v. Greiner (1861, D. C. E. D. Pa.) Fed. Cas. No. 15,262.

¹⁸ Medway v. United States (1870) 6 Ct. Cl. 421, 433. See also Respublica v. M'Carty (1781, U. S.) 2 Dall. 86.

¹⁹ Duval, J., in *United States v. Hodges* (1815, C. C. D. Md.) 2 Wheel. Cr. 477; 26 Fed. Cas. No. 15,374, held:

[&]quot;First: The overt act laid consists in the delivery of certain prisoners, and I am of opinion that the overt act laid in the indictment and proved by the witness is high treason against the United States.

[&]quot;Second: When the act itself amounts to treason it involves the intention, and such was the character of this act."

"Trade with the enemy . . . according to the law of nations, is forbidden, and, the property engaged in it is liable to forfeiture. . . . The act is not made criminal; and, until it is made so by Congress, no punishment is annexed to it, except the forfeiture of the goods. But, this interdicted trade may be carried on in such a way as to expose the parties concerned to the crime of treason. If carried on for the purpose and with the intent of giving aid and assistance to the enemy in their hostility against the Government, the act would furnish an overt act of adhering to the enemy, giving him aid and comfort. Every citizen, therefore, engaged in carrying on this illicit trade, will find a much greater peril accompanying the enterprise than the mere forfeiture of his goods."²⁰

(f) Acts directed against the government or governmental property with intent to cause injury thereto and in aid of the enemy.

Acts of this description usually amount to "levying war," and therefore generally come within the scope of decisions on the subject of the first clause of the definition of the crime of treason. In reference to this branch of the crime, Mr. Justice Story said in 1842:

"It will be equally treason, if the intention is by force to prevent the execution of any one or more general and public laws of the Government, or to resist the exercise of any legitimate authority of the Government in its sovereign capacity. Thus, if there is an assembly of persons with force, with an intent to prevent the collection of the lawful taxes or duties, levied by the Government,—or to destroy all Custom Houses,—or to resist the administration of justice in the Courts of the United States, and they proceed to execute their purpose by force,—there can be no doubt, that it would be treason against the United States."²¹

But acts of injury to, or destruction of, property of the United States, or property in which the United States has an interest, which property is used or intended to be used for the successful prosecution of the war, may equally constitute treason as giving aid and comfort to the enemy, if the injurious acts are performed with the intent to give or for the purpose of giving, such aid to the enemy in its hostilities against the United States; and, as stated *infra*, every man must be held to intend the direct, natural and reasonable consequences of his own act.

(g) "Acts which tend and are designed to defeat, obstruct, or weaken our own arms."

The Lord Chief Justice, in the Casement case, said:

"If a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against

²⁰ Charge to the Grand Jury (1861, C. C. S. D. N. Y.) 5 Blatch. 549, 552, 30 Fed. Cas. No. 18,271. See also The Tulip (1812, C. C.) 3 Wash. 181, 183. ²¹ Charge to Grand Jury (1842, C. C.) 1 Story, 614, 616, 30 Fed. Cas. No. 18,275.

the King, that is in law the giving of aid and comfort to the King's enemies. Again, . . . to weaken the power of the King and of the country to resist or to attack the enemies of the King and the country, that is in law the giving of aid and comfort to the King's enemies."²²

This would probably include all acts directed to causing insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or obstructing the recruiting or enlistment service or the operation of draft laws.

(h) Acts which, if performed by domestic insurrectionaries, would constitute levying of war, may equally constitute giving aid and comfort to the enemy if performed in connection with or for the assistance of a foreign enemy waging war against the United States.

Two elements must always be present to constitute a levying of war: (1) actual assemblage of an armed force, or of a force sufficient to intimidate by numbers; (2) intent to overthrow the government or to prevent the enforcement in general of one of its laws. As Mr. Justice Patterson, in one of the earliest treason cases, said in substance: To resist or prevent by armed force and intimidation the execution of a general act of the United States is a levying of war against the United States.²³ This was made more precise by Marshall in the Burr case:

"War can only be levied by the employment of actual force. Troops must be embodied, men must be assembled, in order to levy war."24

And again, in another phase of the Burr case, Marshall amplified this:

"It is necessary to show the assemblage in order to substantiate the two important elements, first of intent, and, secondly, of ability to carry out the crime. That is to say, that if the intent were not shown and if there were not a sufficient body of people together assembled to make it clear that they had the ability to carry out such an intent the conspiracy could not amount to treason. . . . All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may with correctness and accuracy be said to levy war." 25

And, speaking for the Supreme Court in *United States v. Bollman* and Swartwout, Marshall said:

²² Rex v. Casement [1917] 1 K. B. 98, 133. And see Sprague, J., in Charge to Grand Jury (1861, C. C.) 2 Sprague, 285, 30 Fed. Cas. No. 18,277.

²² United States v. Mitchell (1795, C. C.) 2 Dall. 348. See United States v. Vigol (1795, C. C.) 2 Dall. 346. See also opinions of Iredell, J., Chase, J., and Peters, D. J., in the Fries Case (1799, C. C.) Whart. St. Tr. 458, 3 Dall. 505, Fed. Cas. No. 5126, pp. 840, 909.

²⁴ United States v. Aaron Burr, Fed. Cas. No. 14,692a, p. 13.

²³ *Idem.* Fed. Cas. No. 14,693, p. 161.

"It is not the intention of the court to say that no individual can be guilty of this crime who has not prepared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men, for the treasonable purpose, to constitute a levying of war."²⁸

This doctrine was later summed up by Mr. Justice Story, in 1842, as follows:

"To constitute an actual levy of war, there must be an assembly of persons, met for the treasonable purpose, and some overt act done, or some attempt made by them with force to execute, or towards executing, that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in a condition to use force, and must intend to use it, if necessary, to further, or to aid, or to accomplish the treasonable design." 27

The conspiracy and insurrection connected with it must be to effect something of a public nature, to overthrow the government, or to nullify some law of the United States, and totally to hinder its execution or compel its repeal.²⁸

In an able article on *The Law of Treason*, Professor Simon Greenleaf, in 1851, speaking of the purpose

"to resist the execution of a law of the United States; not in a particular instance or case alone, but in pursuance of a determination to prevent its operation at all, in any and every case," says: "Wherever a body of men are assembled in force for such a purpose, and are in a condition to carry that purpose into effect, the assemblage itself is an act of levying war."²⁹

If there be an actual assemblage for the above purposes, it is not necessary that actual acts of violence should take place in order to make the assemblage treasonable.

"When a body, large or small, of armed men, is mustered in military array for a treasonable purpose, every step which any one of them

²⁶ (1807) 4 Cranch, 75, 126.

²⁷ Charge to Grand Jury (1842, C. C.) 30 Fed. Cas. No. 18,275.

²⁰ Grier, J., in *United States v. Hanway* (1851, C. C. E. D. Pa.). 2 Wall. Jr. 139, 26 Fed. Cas. No. 15,299, p. 128. See also *Druecker v. Salomon* (1867) 21 Wis. 621. See esp. Curtis, J., in *Charge to Grand Jury* (1861, C. C. D. Mass.) 30 Fed. Cas. No. 18,269; *United States v. Hoxie* (1808, C. C. D. Vt.) 1 Paine C. C. 265, Fed. Cas. No. 15,407.

^{22 (}December, 1851) 14 MONTHLY LAW REPORTER, 409, 416.

takes in part execution of this purpose, is an overt act of levying war. This is true, though not a warlike blow may have been struck."20

(i) Advising, inciting and persuading others to give aid and comfort to the enemy may in itself constitute treason.

"Mere expressions of opinion," said Judge Leavitt in his *Charge* to the Grand Jury in 1861, "indicative of sympathy with the public enemy will not ordinarily involve the legal guilt of that crime."³¹

Nevertheless, the speaking or writing of words may in itself be an act of such a nature as to constitute treason. Thus, while words which merely express a man's opinions or statements of intentions may not be treason, words which embody advice, or counsel, or inducement, or persuasion, to others to commit any of the acts recited in subdivisions (a), (b), (c), (d), (e), (f), (g), (h), supra, may constitute in themselves the act of advising, counselling, inducing, or persuading, which act may in itself be a treasonable act; and the embodiment of such words in circulars, or other printed matter, and their circulation or distribution may be treasonable acts. "Inciting or encouraging others" to aid the enemy, even if such incitement or encouragement is merely verbal, may constitute very substantial acts of aid and comfort.³²

In the Casement case, in which the defendant was indicted for giving aid and comfort to the enemy, one of the overt acts alleged was as follows:

"Of soliciting and inciting and endeavouring to persuade certain persons being British subjects and members of the military forces of the King and being prisoners of war . . . to forsake their duty and allegiance to the King and to join the armed forces of his enemies

²⁰ United States v. Greiner (1861, D. C. E. D. Pa.) Fed. Cas. No. 15,262, p. 39. An article on Treason written prior to the Burr case is to be found in (1808) I AM. LAW J. 344, 359, which takes the opposite view, and contends:

[&]quot;Laying, therefore, the opinion of the supreme court out of the case, I hold it to be clear and settled law, that the actual employment of the force, after it has been assembled, in some unlawful act of violence conducive to the accomplishment of the hostile design, is necessary to constitute the crime of levying war." See Curtis, J., in *Charge to Grand Jury* (1851) Fed. Cas. No. 18,269.

³¹ Charge to Grand Jury (1861, C. C. S. D. Oh.) 1 Bond, 609, 30 Fed. Cas. No. 18,272. See also Mr. Justice Nelson, in Charge to Grand Jury (1861, C. C. S. D. N. Y.) 5 Blatch. 549, 30 Fed. Cas. No. 18,271.

³² Judge Smalley in Charge to Grand Jury (1861, U. S. D. C. S. D. N. Y.) 4 Blatch. 518, Fed. Cas. No. 18,270, states:

[&]quot;What amounts to adhering to, and giving aid and comfort to our enemies, it is somewhat difficult in all cases to define; but certain it is, that furnishing them with arms or munitions of war, vessels or other means of transportation, or any materials which will aid the traitors in carrying out their traitorous purposes, with a knowledge that they are intended for such purposes, or inciting and encouraging others to engage in or aid the traitors in any way, does come within the provisions of the act."

⁽The word "traitors" in the above charge is synonymous with "enemies.")

and to fight against the King. . . . . " Another overt act was "circulating and distributing and causing and procuring to be circulated and distributed to and amongst certain persons being British subjects and members of the military forces of the King and being prisoners of war . . . a certain leaflet . . . with intent to solicit, incite, and persuade the said last-mentioned British subjects, being Irishmen, to forsake their duty and allegiance to the King and to aid and assist his enemies in the prosecution of the said war against the King and his subjects." 33

Of course, it may be difficult to draw the line between treasonable incitement and legitimate expressions of views and propaganda. The circumstances in each case must control, and it must be remembered that a course of conduct or acts, under modern conditions, may render vital aid and comfort to the enemy, where similar conduct or acts would not have done so in earlier days. As has been well said in a recent thoughtful pamphlet on this topic:

"In simpler times—only a comparatively few years ago—when daily printing of information and news was unknown, when cables and wireless did not convey what is written, done and spoken to the four quarters of the world on the instant, such cases as, in view of modern conditions, might well arise today under the law of treason were naturally unknown. But we are concerned with today, not yesterday, and must expect modern acts to be adjudged in accord with modern conditions. . . . A persisting series of speeches or written or printed articles or editorials conveying, when taken in the mass, information which might be reasonably deemed to be of assistance to the military endeavors of the enemy, or consisting of statements either true or false of existing or of claimed conditions or facts the knowledge of or belief in truth of which, by encouraging would tend to increase his resistance, or by discouraging would tend to diminish the effective of the United States, would be sufficient foundation for a finding both of adherence to the enemy and of giving of aid and comfort. In other words, the cumulative effect of such a series of addresses or articles would, within the rules of law, be held to afford suitable foundation for a finding by a jury that the accused not only adhered to the enemy, but gave them aid and comfort."34

It is clear, however, that plotting and scheming and conferring of persons having traitorious designs—mere conspiracy—cannot constitute treason unless the plot or private conference is followed by some step to put the treasonable design into effect. Such a mere conspiracy is now punishable as a separate crime known as seditious conspiracy, under Section 6 of the Federal Penal Code.

With reference to that branch of treason which consists in levying war, it is a more doubtful question, much discussed in the courts in early days, whether the advising or inciting others to levy war can ever constitute a levying of war itself. The point still remains unde-

^{** [1915] 1} K. B. 98, 99.

²⁴ Pamphlet by Charles Stewart Davison, Treason (Aug. 24, 1917).

termined by any express adjudication.³⁵ Mr. Justice Curtis, however, in a *Charge to the Grand Jury* in 1851, stated that if the levying of war actually occurred through assemblage of men, then

"they who have the wickedness to plan and incite and aid, and who perform any part however minute, are justly deemed guilty of this offence, though they are not present at the immediate scene of violence." And he stated further: "Influential persons cannot form associations to resist the law by violence, excite the passion of ignorant and unreflecting, or desperate men, incite them to action, supply them with weapons, and then retire and await in safety the result of the violence which they themselves have caused. To permit this, would not only be inconsistent with sound policy, but without a due regard to the just responsibilities of men. The law does not permit it."

If the person is present during the actual perpetration of the levying of war, and is countenancing, encouraging, aiding, counselling or abetting the actual perpetration, he is clearly guilty of treason.³⁸

On the other hand, it is equally clear that a mere conspiracy to levy war, not followed by any actual levying of war, does not constitute the crime of treason itself;³⁹ for, as Marshall said:

"However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the assemblage of men

⁸⁷ So Kane, J., in *Charge to Grand Jury* (1851, C. C. E. D. Pa.) 30 Fed. Cas. No. 18,276, held in case of "levying war" that if forcible acts had been committed,

"If he was present, directing, aiding, abetting, counselling, or countenancing it, he is in law guilty of the forcible act. Nor is even his personal presence indispensable. Though he he absent at the time of its actual perpetration, yet if he directed the act, devised or knowingly furnished the means, for carrying it into effect, instigating others to perform it, he shares their guilt."

The same doctrine is vigorously upheld by Professor Simon Greenleaf, On the Law of Treason (1851) 14 Law Rep. 409. As to Judge Kane's charge, Note A in the Burr case, 25 Fed. Cas. No. 14,693, p. 182, says:

"These mere obiter dicta of a district judge, thrown out in a charge to the grand jury, derive their only consequence from the fact that Judge Grier, subsequently in his charge to the petit jury in Hanway's case expressed his general concurrence in the doctrines and sentiments of said charge to the grand jury delivered by Judge Kane. But, as has been before stated, there was nothing in Hanway's case to call for any opinion on the question now under consideration.

³⁵ See *United States v. Aaron Burr* (1807) Fed. Cas. No. 14,693, Note A, p. 181. Marshall, C. J., in the *Burr* case expressly declined to pass upon it (*ibid.* p. 161). ³⁶ (C. C. D. Mass.) Fed. Cas. No. 18,269, p. 1026.

^{**} Grier, J., in *United States v. Hanway* (1851, C. C. E. D. Pa.) 2 Wall. Jr. 139, 26 Fed. Cas. No. 15,299, p. 126.

⁸⁹ United States v. Hoxie (1808, C. C. D. Vt.) I Paine, 265, 26 Fed. Cas. No. 15,407; Nelson, J., in Charge to Grand Jury (1861, C. C. S. D. N. Y.) 30 Fed. Cas. No. 18,271; United States v. Hanway (1851, C. C. E. D. Pa.) 2 Wall. Jr. 139, 26 Fed. Cas. No. 15,299; United States v. Burr (1807) 25 Fed. Cas. No. 14,692a, p. 14, 4 Cranch, App. 469; United States v. Pryor (1814, C. C. D. Pa.) 27 Fed. Cas. No. 16,096.

for a purpose treasonable in itself, or the fact of levying war cannot have been committed. . . . "40

#### OVERT ACT

There must be an overt act, for it is well settled that the law cannot punish a mere operation of the mind. The words "overt act" mean an act of a character susceptible of clear proof and not resting in mere inference or conjecture. An "overt act," however, can be as well words as deeds if they can be proved by direct evidence. The requirement of proof of an "overt act," it has been said, was intended to exclude the possibility of a conviction of the odious crime of treason upon proof of facts which may be only treasonable by construction or inference, or which have no better foundation than mere suspicion.⁴¹

Where the overt act is a composite thing, made up of several circumstances, and passing through various stages, it is not necessary, in order to satisfy the provisions of the statute requiring two witnesses to an overt act, that there should be two witnesses to each circumstance at each stage.⁴²

Conviction of treason cannot be had on confession, unless such confession is in open court. But evidence of confession out of court is admissible to corroborate evidence of overt acts.⁴³

#### INTENT

There must be intent to commit the crime. This, however, does not mean that the intent described as a constituent element of the crime may not be deemed to exist unless the accused can be proved to have had an actual mental purpose to commit the crime of treason, as described in the Constitution and the statutes enacted for its punishment. It does not mean that if the accused had the design to perform some specific act, but did not specifically intend to commit the crime of treason, such act may not be properly considered as within the definition of the crime.

In that branch of the crime of treason which consists in giving aid and comfort to the enemy, the act itself, in most instances, may prove *ipso facto* the intent; and, as was stated by Mr. Justice Duval: "When the act itself amounts to treason, it involves the intention, and such was the character of this act" (in that case the act being delivery to

^{*}Ex Parte Bollman and Swartwout (1807, U. S.) 4 Cranch, 75, 126.

^{et} Charge to Grand Jury (1861, C. C. S. D. Oh.) 1 Bond, 609, 30 Fed. Cas. No. 18,372.

⁴²United States v. Mitchell (1795, C. C. D. Pa.) 2 Dail. 348; Regina v. Mc-Cafferty (1867) 10 Cox Cr. 603.

^{*}Respublica v. Roberts (1778) 1 Dall. 39; Respublica v. M'Carty (1781) 2 Dall. 86; United States v. Lee (1814. C. C. D. Col.) 26 Fed. Cas. No. 15,584.

the enemy of certain prisoners). 44 If, therefore, a person intends to do and actually does specific acts the natural and probable consequences of which are the giving of aid and comfort to the enemy, then he intends to commit treason, within the purview of the law. The purpose or motive of the act is not essential.

As the Supreme Court said, as we have seen, in Sprott v. United States:

"The case is not relieved of its harsh features by the finding of the court that the claimant did not *intend* to aid the rebellion, but only to make money. It might as well be said that the man who would sell for a sum beyond its value to a lunatic, a weapon with which he knew the latter would kill himself, only intended to make money and did not intend to aid the lunatic in his fatal purpose."

And again, in Hanauer v. Doane:

"No crime is greater than treason. He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof. He voluntarily aids the treason. He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act." 46

Every man is presumed to intend the necessary and legitimate consequences of his acts. The rule was laid down in Reynolds v. United States as follows:

"A criminal intent is generally an element of crime, but every man is presumed to intend the necessary and legitimate consequences of what he knowingly does."47

And by Chief Justice Shaw in the famous Webster murder case in a most lucid manner:

"This rule is founded on the plain and obvious principle, that a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts . . . The ordinary feelings, passions, and propensities under which parties act, are facts

[&]quot;United States v. Hodges (1815, C. C. D. Md.) 2 Wheel. Cr. 477, 26 Fed. Cas. No. 15,374.

^{45 (1874,} U. S.) 20 Wall. 459, 463.

^{46 (1874,} U. S.) 12 Wall. 342, 347. See also Leavitt, J., in Charge to Grand Jury (1861) 1 Bond, 609, 30 Fed. Cas. No. 18,272:

[&]quot;If this be the natural effect of the act, though prompted solely by the expectation of pecuniary gain, it is treasonable in its character."

[&]quot; (1878) 98 U. S. 145, 167; United States v. Patten (1913) 226 U. S. 525, 543.

known by observation and experience; and they are so uniform in their operation, that a conclusion may be safely drawn, that if a person acts in a particular manner he does so under the influence of a particular motive. Indeed, this is the only mode in which a large class of crimes can be proved. I mean crimes, which consist not merely in an act done, but in the motive and intent with which they are done. But this intent is a secret of the heart, which can only be directly known to the searcher of all hearts; and if the accused makes no declaration on the subject, and chooses to keep his own secret, which he is likely to do if his purposes are criminal, such criminal intent may be inferred, and often is safely inferred, from his conduct and external acts."48

Although the Constitution requires two witnesses to the same overt act to prove treason, two witnesses are not required to prove the intention.⁴⁰ This may be established by the declarations of the party prior to or during the commission of the treasonable acts, or the same may be established by the prisoner's conduct in other places. As was said in the *Burr* case:

"The conduct of a prisoner at other places and times tends to show the intent with which the overt act is committed and his acts at those places can be introduced as evidence of the treasonable design, although the prisoner is not on trial for such offense and is not punishable therefor, as all the acts are caused by one general design." ⁵⁰

And it is further said that since the intent or design is a hidden or obscure mental act, all evidence of its outward expression is admissible. How far this doctrine is carried out is shown in the case of Sprott v. United States, 52 where there was a specific finding of the trial court that the claimant did not intend to aid the rebellion in purchasing three hundred bales of cotton from an agent of the Confederate States, but as to which the Court replied as cited supra.

## SUCCESSFUL CARRYING OUT OF TREASONABLE ACT

To constitute treason, it is not necessary that the treasonable act should have been successfully performed. The leading decision on this subject is by Mr. Justice Field in *United States v. Greathouse.* ⁵³ In that case the defendant was indicted for purchasing a vessel, guns and ammunition; getting her ready for sea and preparing her for service in aid of the rebellion against the United States after the levy

^{*}Commonwealth v. Webster (1850, Mass.) 5 Cush. 295, 305, 316. See also United States v. Hoxie (1808, C. C. Vt.) 1 Paine, 265, 280; Charge to Grand Jury (1842) 1 Story, 614; United States v. Bollman (1806) 1 Cranch, 373, 384.

United States v. Fries, supra.

⁶⁰ United States v. Burr, 25 Fed. Cas. No. 14,693.

⁵¹ United States v. Fries, supra.

^{™ (1874,} U. S.) 20 Wall. 459.

^{55 (1863,} C. C. D. Cal.) 2 Abb. 364, 379.

of war with the purpose of attacking and destroying the United States vessels. These were held to be overt acts of treason as giving aid and comfort to the enemy; and it was said:

"It is not essential, to constitute the giving of aid and comfort, that the enterprise commenced should be successful, and actually render assistance. If, for example, a vessel fully equipped and armed in the service of the rebellion should fail in its attack upon one of our vessels, and be itself captured, no assistance would, in truth, be rendered to the rebellion; but yet, in judgment of law—in legal intent—the aid and comfort would be given. So if a letter containing important intelligence for the insurgents, be forwarded, the aid and comfort are given, though the letter be intercepted on its way. Thus, Foster, in his *Treatise on Crown Law*, says: 'And the bare sending money or provisions, or sending intelligence to rebels or enemies, which in most cases is the most effectual aid that can be given them, will make a man a traitor, though the money or intelligence should happen to be intercepted; for the party in sending it did all he could; the treason was complete on his part, though it had not the effect he intended.'"

So, also, in case of letters to the enemy which are intercepted and never reach the enemy, it is held that the treason is complete on the defendant's part, in that he has done all that he can to carry it forward. As was said by Lord Chief Justice Kenyon:

"Letters of advice and correspondence and intelligence to the enemy, to enable them to annoy us or to defend themselves, written and sent in order to be delivered to the enemy, are, though intercepted, overt acts of both these species of treason [levying war and giving aid and comfort]."⁵⁴

That treason may be committed by aliens as well as by citizens is not generally understood by laymen. It is clearly established, however, in the law. The theory underlying this crime and its punishment is that every individual owes fidelity and allegiance to the government under which he is living, in return for the protection which he receives from that government. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or, at least, until by some open and distinct act he renounces it and becomes a citizen or subject of another government or another sovereign. The alien whilst domiciled in the country owes a local and temporary allegiance which continues during the period of his residence; and this alien or stranger born, for so long a time as he continues within the dominions of the foreign government, may be punished for treason.

In Carlisle v. United States⁵⁵—a leading authority—Mr. Justice Field stated the doctrine as follows:

210, United States v. Wiltberger (1820, U. S.) 5 Wheaton, 76.

^{**}Rex v. Stone (1796) 6 Term Rep. 527, 529. To the same effect are Rex v. Hensey (1758) 1 Burr. 642, and Gregg's Trial (1708) 14 How. St. Tr. 1371.

** (1872, U. S.) 16 Wall. 147, 155. See also Radich v. Hutchins (1877) 95 U. S.

#### ADDENDA

[Through editorial oversight, the concluding portion of the article on What Is Giving Aid and Comfort to the Enemy? by Charles Warren, Esq., was omitted from the January issue. This portion is printed below. The present sheet should be bound after page 346.—Ed.]

MEANING OF "AID AND COMFORT" AS USED IN OTHER STATUTES

There have been various federal statutes other than the Treason Act in which the words "aid and comfort" to the enemy have been used and construed by the courts,—see the Abandoned and Captured Property Act of March 3[12], 1863,56 the Court of Claims Act of June 25, 1868.57 Decisions of the Court of Claims may be somewhat helpful in ascertaining the meaning of these words, although those decisions (prior to 1870) are not an entirely safe precedent; for that court in holding, in 1866, that they included "any acts voluntarily committed which would tend to assist, countenance, abet, or encourage the rebellion," also held that the words were not confined "to such acts as would under the Constitution and laws constitute treason."58 If this expression simply meant that which was decided in the Supreme Court in 1870 in Young v. United States, 59 viz.: that "a claimant to be excluded need not have been a traitor: it is sufficient if he has done that which would have made him a traitor if he had owed allegiance to the United States," then the Court of Claims cases are of value. The following acts, among others, have been held to constitute "aid and comfort": standing guard over Federal prisoners and being enrolled for local defense in Richmond;60 superintending enemy boats, and running through the federal blockade, engaging in commercial transactions within the enemy lines;61 connection with blockade companies and violations of blockade law;62 bringing slaves within the Confederate lines to prevent their emancipation;63 allowing a steamboat to be used in the military service of the

⁵⁶ Ch. 120, 12 St. at L. 820.

⁶⁷ Ch. 71, sec. 3, 15 St. at L. 75.

The Diplomatic Protection of Citizens Abroad (1915) by Edwin M. Borchard, pp. 786 et seq. contains a valuable compilation of decisions and findings construing the words "aid and comfort" by the Court of Claims and by international arbitration and other boards and commissions.

⁵⁸ Bond v. United States (1866) 2 Ct. Cl. 529, 533; Wylie v. United States (1870) 6 Ct. Cl. 295, 300; Collie v. United States (1873) 9 Ct. Cl. 431, 452; (1876) 12 Ct. Cl. 648, 685, 699; 97 U. S. 39.

^{1877) 97} U. S. 39, 62.

^{*} Kuper v. United States (1867) 3 Ct. Cl. 74.

^{e1} Gearing v. United States (1867) 3 Ct. Cl. 165, 172.

Bates' Case (1868) 4 Ct. Cl. 569.

^{*}Armstrong v. United States (1869) 5 Ct. Cl. 623—see (1872, U. S.) 13 Wall. 154.

enemy.⁶⁴ In Grossmeyer v. United States⁶⁵ it is said: "To constitute them [aid and comfort] such they must have been committed with the intention and for the purpose of aiding the rebellion, and promoting its power and success, or from other improper motives." It is not sufficient to prove a purpose to give aid and comfort; the actual fact of the giving of such aid is necessary to be proved.⁶⁶

#### GENERAL CONSIDERATION

Criminal statutes serve their purpose, of course, only so far as they tend to prevent crime and to secure the punishment of violators of law. Because of the limitations imposed by the Constitution and by the federal statutes upon the crime of treason and its proof, because of the heavy penalties and the odium attached to the crime, and because of the disinclination of courts to rule and of juries to indict and to find that treason has been committed, except in cases which present extreme facts, Congress has at very various periods of our history found it desirable to enact special statutes making penal certain classes of acts which might already come within the purview of acts of treason. Illustrations of such statutes may be found in recent legislation. See Title I relating to Espionage of the Act of June 15, 1917, and certain provisions of the Trading with the Enemy Act of October 6, 1917. The performance of one act may constitute a violation of more than one criminal statute, and a person may, in fact, be guilty of committing treason, even though prosecuted and convicted for a violation of a statute constituting a lesser degree of crime; therefore, whether a person shall be prosecuted under one of these special statutes or under the treason statute is a question of practical administration of the law. Finally, it may be pointed out that no man, even from motives of religion or other fundamental belief, may render aid and comfort to the enemy without being liable to conviction of treason if the legal proof be forthcoming and if the jury does its duty. As the court well said in Culliton v. United States in 1869:

"It [the proclamation of war] forms the dividing line. . . . Before hostilities began, many loyal persons, North as [well as] South, believed that a separation, reluctantly consented to, would be peacefully accomplished. When the reality of war came, there was no ground left for either hope or equivocation. The duty of the citizen then became as clear as imperative; men became *eo instanti* loyal or disloyal. As thunderstorms are commonly supposed to clear the atmosphere, so the reverberations of . . . guns cleared away hopes and doubts, and left every citizen either the friend or the enemy of the nation."

⁶⁴ Slawson's Case (1870) 6 Ct. Cl. 370, (1873, U. S.) 16 Wall. 310.

es (1868) 4 Ct. Cl. 1, 13.

⁶⁸ Hill v. United States (1872) 8 Ct. Cl. 470.

⁶⁷ 5 Ct. Cl. 627, 631.

"Every foreigner born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws, as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country. Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that by the public law an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation."

All aliens, therefore, in the United States who in any way give aid and comfort to the enemy, even though that enemy be of their own blood and kin, are guilty of treason to the United States, and may be punished by death, exactly as any citizen native born or naturalized who performs the same acts may suffer that penalty.

# INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES

HERBERT A. HOWELL

Copyright Office, Library of Congress

The Act to define and regulate trading with the enemy1 excepts copyrights from the inhibition of the general law of trading with the enemy as well as from the Act itself, subject to the right of any citizen of the United States or corporation organized under its laws to obtain during the existence of the war a license to use any copyrighted matter owned or controlled by an enemy or ally of an enemy. on such conditions as the President may prescribe. The Act moreover expressly permits an enemy or ally of an enemy to file in the United States an application for registration of copyright under the provisions of existing law and gives him a maximum extension of fifteen months after the war if necessary to complete the transaction by deposit of the necessary copies or otherwise, provided, however, that the nation of the enemy applicant shall grant substantially similar privileges to citizens and corporations of the United States.2 That such reciprocal treatment will be accorded as a matter of course seems highly probable, as from the beginning there has been manifested in all the belligerent countries a strong disposition to respect all international copyright relations.3

These relations have been established in various ways, as by treaty, convention, or statute defining the conditions and the manner in which the offer and acceptance of reciprocity may be made. Our Copyright Act of March 4, 1909,⁴ provides for exchange of the copyright privilege when the foreign nation either (1) grants by treaty, agreement, or law substantially similar protection to citizens of the United States, or (2) is a party to an international copyright agreement to which the United States may at its pleasure become a party.⁵ The President is authorized to determine and proclaim from time to time the existence of such reciprocal conditions, and thus far proclamations have been issued in favor of the following thirty countries and their possessions: Austria, Belgium, Chile, China, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, France, Germany, Great Britain, Guatemala, Honduras, Hungary, Italy, Japan, Korea, Luxemburg, Mexico, The

¹ H. R. 4960, approved Oct. 6, 1917.

² Sec. 10, subsec. a, c.

³ See Le Droit d'Auteur, June 15, 1917, 68.

⁴³⁵ Stat. at L. 1075-1078.

⁵ *Ibid.* sec. 8, b.

Netherlands, Nicaragua, Norway, Panama, Portugal, Salvador, Spain, Sweden, Switzerland and Tunis.

All these countries except the Latin-American Republics come within the first category (Germany, Hungary, China and Japan through treaty, the others through diplomatic negotiation). Protection is obtained upon compliance with the domestic law and regulations in force in the country where it is desired. It is to be noted, however, that the United States has the advantage here, for though not a member of the International Copyright Union established under the Berne Convention, the United States nevertheless enjoys the substantial benefit of it by virtue of these reciprocal agreements with practically all the various countries of the union, and American authors and publishers have merely to comply with the provision whereby through first or simultaneous publication in one country party to the union they automatically obtain copyright in all the others.

Under the new British Copyright Act of 1911⁶ citizens of the United States may, as before, obtain copyright by publishing their works in the United Kingdom (or such other parts of the empire to which the Act extends) first or simultaneously.⁷ Following diplomatic negotiations an Order in Council was issued (effective since January 1, 1915) extending protection also to the unpublished literary, dramatic, musical and artistic works of citizens of the United States, "subject to the accomplishment of the conditions and formalities prescribed by the law of the United States." The Order expressly excepts from its operation Australia, Canada, Newfoundland, New Zealand, and the Union of South Africa.

Of these five "self-governing dominions over seas" Canada alone has not adopted the new British Copyright Act. At a special copyright conference in London in 1910 the Canadian delegate, Mr. Sydney Fisher, took the position that Canada was under peculiar circumstances owing to the proximity of the United States and to the fact that the literature of the two countries is similar, and that in consequence it was necessary to be a little more careful in regard to the provisions of copyright in Canada than any other country. He urged that it was not a wise policy for Canada to give copyright privileges where the other side did not give those privileges on equal terms, which the United States did not on account of the so-called "manufacturing clause" requiring typesetting and printing of English books in the United States; and that as regards the International Copyright Union the only acceptable basis for Canada's adhering to it, as long as the United States remained out of the union or did not give equivalent

^{6 1 &}amp; 2 Geo. V, ch. 46.

⁷ The British Act provides that

[&]quot;a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days." (Sec. 35, 3.)

privileges, would be with a reservation that the copyright privilege in Canada should only go to the countries of the union with respect to their own citizens or subjects.⁸

No new copyright legislation has yet been enacted in Canada, but the Minister of Agriculture has the whole matter under consideration and a comprehensive measure may be expected presently.9 Meanwhile the Imperial Copyright Act of 1842 and the Act of 1886, passed in order to give effect throughout the empire to the Berne Convention. remain in force in Canada as well as the old domestic Act of 1875. The Canadian authorities have never regarded the international arrangement between the United States and Great Britain as a "copyright treaty" within the meaning of the clause in the Canadian Act which grants the copyright privilege to "the citizens of any country having a copyright treaty with the United Kingdom," and therefore American citizens have not been accorded the right to take direct action under that section of the Act but must proceed under another provision and first obtain copyright in the United Kingdom by publishing there first or simultaneously,10 whereupon they may then take action also under the domestic Act if this privilege should appear to present any additional advantages.

On the other hand, our copyright relations with the Latin-American Republics of Ecuador, Guatemala, Honduras, Nicaragua, Panama, and Santo Domingo come under the second category, being now founded on the Fourth Pan-American Convention signed at Buenos Aires in 1910 and proclaimed by the United States on July 13, 1914.¹¹ It is understood also that the governments of Bolivia, Brazil, Costa Rica, and Salvador have announced through diplomatic channels their adhesion to it. This convention affords an example of almost pure reciprocity and is the first of the kind in our copyright annals. It provides in Article 3 that:

"The acknowledgment of a copyright obtained in one State, in conformity with its laws, shall produce its effects of full right, in all the other States, without the necessity of complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the property right."

As the institution and extension of copyright agreements is proverbially difficult and slow compared with legislation on matters which command the popular attention, it would seem that prompt advantage should be taken of the present favorable time to urge the other Latin-

⁸ H. C. Debates, Can. Sess. 1910-11, Vol. IV, 7807, Vol. V, 8895.

^o See remarks of the Premier, H. C. Debates, Can. Sess. 1915, Vol. I, 203.

¹⁰ The fourteen days' grace is peculiar to the Act of 1911 and is not operative in Canada; in order to be "simultaneous" the publication must take place on the same day under interpretation of the Act of 1842.

¹¹ 38 Stat. at L. pt. 2, 1785.

American states to ratify and proclaim this convention, and also to take proper steps looking to similar reciprocal protection in the matter of mechanical musical reproduction which presumably would require a special treaty or agreement. The result would be a uniform agreement between some twenty-one American countries to acknowledge and protect the right of literary, musical and artistic property on the sole condition of complying with the copyright law of the country of first publication in America (including on the work itself a notice of copyright reservation).

This is substantially the basis of the copyright union existing between the countries of Europe under the Berne Convention, by the express terms of which any author, though outside the jurisdiction of any one of the union countries, who publishes his work "for the first time" in one of these countries shall enjoy in that country the same rights as native authors, and in the other countries of the union the rights accorded by the convention. Under the revised text of 1908 these

now include also

"the exclusive right to authorize the adaptation of musical works to instruments serving to reproduce them mechanically, and the public performance of the same works by means of these instruments,"

subject, however, to the limitations and conditions to be determined by the domestic legislation of each country in its own case. No protection is extended to the unpublished works of alien authors wherever they may reside at the time of making their works.

As stated above, the United States is in the anomalous position of enjoying the privileges of this union and yet not being a member of it because of unwillingness to meet the necessary conditions, namely, the abolition of the legal and technical formalities of notice, registration, and (in the case of English books) typesetting, printing and binding within the United States. But an important modification of the convention has now been made which may have serious consequences for this country. It will be recalled that the United States Copyright Act of 1909, while taking a long step forward in renouncing the "manufacturing clause" in favor of works in a foreign language, retained it for works in the English tongue and allowed a maximum of only sixty days' grace for reprinting in the United States. Protection in Great Britain, on the other hand, is given to authors of the United States without their having to observe any formality, it

¹² The following eighteen countries and their possessions are reported in *Le Droit d'Auteur* as members of the union on January 1, 1917: Belgium, Denmark, France, Germany, Great Britain, Haiti, Italy, Japan, Liberia, Luxemburg, Monaco, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and Tunis. Thus the three nations of first rank not yet members are the United States, Russia, and Austria-Hungary.

being sufficient merely to publish their works there or in another union country. This inequality of treatment was made the basis of formal complaint on the part of Great Britain before the contracting countries of the union, and according to its official organ (Le Droit d'Auteur, June 15, 1914) it became necessary either to give up counting upon the British Empire as a member of the union, or to find some acceptable solution of the difficulty. As there was no desire to disrupt the union merely because of a question of the treatment of strangers to it (e. g., the United States) the contracting countries on March 20, 1914, gave their unanimous assent to the solution elaborated and proposed by Great Britain herself in the form of a protocol to the convention18 framed in general terms to permit any one of them, or any of their transmarine possessions, to restrict the protection of works by authors who, not actually domiciled in the union, belong to a non-union country which does not protect "in a sufficient manner" the works of authors within the jurisdiction of a country of the union.

The protocol provided that it should be ratified within a year from its date and come into effect one month after the expiration of this period, and that the countries ratifying it must then file with the Swiss government a written declaration indicating the countries against which the protection is to be restricted and what the restrictions are. So far as officially announced the following nine countries ratified it: Denmark, France, Great Britain, Japan, Luxemburg, Monaco, The Netherlands, Spain, and Switzerland. At this juncture the war broke out and further action was suspended, but sooner or later the matter is bound to be revived and it would seem that unless steps shall be meanwhile taken on our part looking to the removal of at least some of the grounds of complaint, American authors and publishers may ultimately find their protection in foreign markets somewhat restricted if not practically nullified.

¹⁵ French and English texts are printed in Copyright Office Information Circular No. 4.

# NEW TRIAL IN PRESENT PRACTICE

## WILLIAM RENWICK RIDDELL Supreme Court of Ontario

In the former article, we discussed the practice in new trials at the common law in England, and pointed out that the trial courts were inferior courts whose judges derived their authority from royal commissions and that they had no power to grant a new trial.

In the present article it is proposed to discuss the practice in new trials as it at present exists on both sides of the Atlantic in the English-speaking world which bases its jurisprudence on the English common law.²

### IN ENGLAND-CIVIL CASES

The greatest change in English courts was effected by The Supreme Court of Judicature Act of 1873.³ This far-reaching act united and consolidated all the superior courts of England into "one Supreme Court of Judicature in England" (sec. 3). This supreme court was to consist of two permanent divisions, one of which, "Her Majesty's High Court of Justice," was to have original jurisdiction with certain appellate jurisdiction from inferior courts; the other, "Her Majesty's Court of Appeal," appellate jurisdiction with certain original jurisdiction (sec. 4). The High Court was vested (inter alia) with all the jurisdiction which was or could be exercised by "the courts created by Commissions of Assize,4 of Oyer and Terminer and of Gaol Delivery, or any of such commissions" (sec. 16 [eleven]).

But this did not abolish the Court of Commissioners. Commissions still continue to be issued (sec. 29), and the only change that was

¹ New Trial at the Common Law (November, 1916) 26 YALE LAW JOURNAL 49. ² This will exclude from consideration Quebec and Louisiana, etc., as well as Scotland and some of the small British Isles.

⁸ 36 & 37 Vic. Ch. 66. Sec. 2 of this act providing that (with a few exceptions) the act should come into operation on November 2d, 1874, was repealed by the act of 1874, 37 & 38 Vic. Ch. 83, which by sec. 2 directed that the act of 1873 should come into force on November 1st, 1875.

⁴We have seen (26 Yale Law Journal 49, 51) that at the common law, the commissioners usually had five commissions: I. Assize. 2. Nisi Prius. 3. Oyer and Terminer. 4. General Gaol Delivery, and 5. The Peace. The commission of Assize was directed to the judges and the clerk of assize to take assizes and do right upon writs of assize brought before them by such as were wrongfully thrust out of their possessions; these writs and the original and substituted practice on them are explained in 3 Bl. Comm. 184 et seq. When ejectment took the place of these writs, reducing such actions to trial at Nisi Prius, the commission of Assize became obsolete and the only civil commission issued was (properly speaking) that of Nisi Prius: nevertheless the term "Assizes" was retained and the commission was called a "commission of Assize."

made was by making the Court of Commissioners part of the High Court; certiorari did not lie to it, but when it was desired to bring up a record in a criminal case, an order was made to bring the record from one part of the High Court, the Court of the Commissioners, to another, e. g., the Queen's Bench Division.⁵ No additional powers were given to the trial judge;6 applications for a new trial must still be made to the "court above." Of the five divisions into which the High Court was divided, three were common-law divisions: the Queen's Bench, the Common Pleas and the Exchequer Divisions-in all cases in any of these divisions, whether the case was tried with or without a jury, an application for a new trial was made to the divisional court "in term" for an order to show cause why a new trial should not be directed, quite the same as the rule nisi in the former practice;7 an appeal lay to the Court of Appeal. In 1876 a rule of court directed the application to be made to the Court of Appeal if the case was tried without a jury.

When the common-law divisions were consolidated into one, the Queen's Bench Division, in 1880,8 the new rules substituted a simple notice of motion for an order nisi and changed the form in some instances—where the trial was by a judge without a jury, the application must be by appeal to the Court of Appeal, where with a jury in the Probate, Divorce and Admiralty Division to a divisional court of that division and in every other case to a divisional court of the Queen's Bench Division.9 Moreover, it was expressly provided that "no judge shall sit on the hearing of any motion for a new trial in any cause or matter tried with a jury before himself." The Act of 1890¹¹ directs that all motions for a new trial are to be made to the Court of Appeal "in any cause or matter in the High Court in which there has been a trial thereof, or of any issue therein with a jury." The effect of this enactment is to eliminate the divisional court; 12

⁵ See, per Lord Coleridge, C. J., in Queen v. Dudley and Stephens (1884) L. R. 14 Q. B. D. 273, 280.

⁶We shall see that from 1883, the right of a trial judge to take part in the hearing of an application for a new trial in a case tried before him was taken away.

⁷In the Chancery Division, whose judges had not a Nisi Prius commission, the application for a "rehearing" was to the judge: the judge before whom the action was pending could order a new trial of an issue directed by himself. In the Probate, Divorce and Admiralty Division, the application was to the judge who tried the case.

⁸By Order in Council, December 16th, 1880, authorized by the Act of 1873, sec. 32; this may be seen in Wilson, *Judicature Acts* (5th ed. London, 1886) 45-48.

^o Rules of 1883. Order XXXIX, r. 1 (R. 551).

¹⁰ Idem. Order XXXIX, r. 2 (R. 552).

¹¹ Supreme Court of Judicature Act of 1890, 53 & 54 Vic. Ch. 44, sec. 1.

¹² The language of Lord Justice Kay in Allcock v. Hall (C. A.) [1891] 1 Q. B. 444, 449. The present rule governing applications for new trials is Order

applications in cases tried without a jury still go to the Court of Appeal.

#### IN ENGLAND-CRIMINAL CASES

We have seen that at the common law there was no power in any court to grant a new trial in cases of felony, and that while power was considered to exist in the Court of King's Bench to grant a new trial in cases of misdemeanor, the power was sparingly exercised,—never when there was an acquittal except in certain quasi-civil cases, e. g., in Quo Warranto.¹³ In the previous article, no account was taken of the venire facias de novo juratores, which was not technically an order for a new trial, but which had substantially the same effect—this was awarded by the court (not the trial judge) where a jury was discharged without verdict, where a special verdict was insufficient and in a court of error in cases of mistrial or imperfect verdict.

None of these powers was affected in any way by the various judicature acts, but in 1907 a very great change was effected by the Criminal Appeal Act of 1907. This act abolished writs of errors and all the jurisdiction and practice of the King's Bench Division (which had, under the judicature acts, succeeded to the position of the former Court of King's Bench) as to the grant of new trials in criminal cases, and substituted an appeal against a conviction to a Court of Criminal Appeal on questions of law or (by leave) on questions of fact, or of mixed law and fact, or as to the legality or propriety of the sentence imposed. But no power was given to grant a new trial; and however regrettable the result—an appeal succeeding even on the ground of misdirection to the jury—the conviction is quashed and the accused goes free. 15

In the British Colonies the course of amendment has been not dissimilar to that of England—I trace that in Ontario (Upper Canada) only.

XXXIX, r. 1 (R. S. C. August, 1913)—all applications must be made to the Court of Appeal whether the case is tried with or without a jury.

¹³ 26 YALE LAW JOURNAL 49, 58.

 ^{(1907) 7} Edw. VII, Ch. 23.
 In Rex v. Dyson (Ct. Cr. App.) [1908] 2 K. B. 454, 458, Lord Alverstone,
 C. J., said:

[&]quot;It is to be regretted the Legislature when passing the Criminal Appeal Act did not empower the Court to order a new trial, for the present is a case in which it is eminently desirable that such a power should exist. But they did not think fit to do so, and we have no choice but to allow the appeal."

This was a case of misdirection as was the later case of Rex v. Ahlers (1914) 24 Cox. C. C. 623, where a German-born British subject escaped the punishment of high treason.

I have not said anything of the practice under The Crown Cases Act of 1848, 11 & 12 Vic. Ch. 78, still in force in Ireland, never in force in Scotland, and repealed as to England by the Criminal Appeal Act of 1907. That act authorized

## IN UPPER CANADA (ONTARIO)—CIVIL CASES

Upper Canada in 1792 began its provincial career with its immense territory divided into four districts. In each of these districts there was a Court of Common Pleas with full civil but no criminal jurisdiction. This condition lasted but a short time; but while it lasted, applications for a new trial were made to the judges of the Court of Common Pleas of the district. These judges presided at the trial of actions by virtue of their office and did not have commissions of Assize, etc. The law administered was Canadian, i. e., French-Canadian, although trial by jury was allowed. In 1794 these four Courts of Common Pleas were abolished and a Court of King's Bench created with the same jurisdiction, civil and criminal, as the Courts of King's Bench, Common Pleas and Exchequer (on the common-law side) in England. This Court of King's Bench has been continued into and is now (with other courts consolidated with it) the Supreme Court of Ontario.

With the institution of the Court of King's Bench, the English system of Nisi Prius and Assize Courts was introduced. Before this time, as the Courts of Common Pleas had no criminal jurisdiction, commissions of Oyer and Terminer and General Gaol Delivery had been issued for each district, and this practice continued after the Act of 1794.

The act provided that commissions of Assize and Nisi Prius should be issued into each district once or twice yearly as was thought proper for the trial of issues in vacation between terms; and power was given to issue special commissions to try special offenders, *i. e.*, special commissions of Oyer and Terminer.

the trial judge in case of a conviction for crime to reserve any question of law which might have arisen on the trial for the consideration of the justices of either bench or the barons of the Exchequer. These, a Court for Crown Cases Reserved, had large powers but not the power to grant a new trial.

¹⁶ A full description of these curious courts will be found in a series of articles, The Early Courts of the Province (1915) 35 Can. Law Times, a paper read before the Royal Society of Canada, May 28th, 1913, Practice of Court of Common Pleas of the District of Hesse, 7 Transactions R. S. Can. (3d Ser. 1913) 43 et seq., and an Address before the Michigan Bar Association, June, 1915, The First Judge at Detroit and his Court—all by myself.

¹⁷ By 34 Geo. III, Ch. 2 (U. C.).

18 For example, the first chief justice of Upper Canada, William Osgoode, never sat in the Court of King's Bench, as he had left the province to become chief justice of Lower Canada before the Court of King's Bench in Upper Canada had been organized; but he sat several times in criminal courts under commissions of Oyer and Terminer and General Gaol Delivery. So, too, William Dummer Powell, afterwards chief justice of Upper Canada, when he was still first judge at Detroit (then British) in the Court of Common Pleas for the district of Hesse (afterwards the Western District) is known to have sat at criminal courts under such commissions (I have a photostat copy of one before me as I write).

It was not until 1855¹⁰ that commissions of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery were rendered unnecessary, Parliament providing that such courts should be held at such times as the judges of the courts of common law (by this time a Court of Common Pleas had been formed²⁰ with the same powers as the Court of Queen's Bench) should appoint. The judges of the courts of common law were to sit in these courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery with the same powers as though they had commissions as formerly.

By the Common Law Procedure Act of 1856²¹ the times of the sittings of these trial courts were to be fixed by the judges, and the judges might sit with or without commissions as the Governor (i. e., the Ministry) should deem best.²² In 1874 the Administration of Justice Act²³ provided for Courts of Assize and Nisi Prius to be held without commissions and that any judge or Queen's Counsel presiding at any court of Assize, Nisi Prius, Oyer and Terminer and General Gaol Delivery should have all the powers which he would have had under commissions under the former practice.

It may be said that since the act of 1856 we have not had in Ontario commissions for trial courts, except special commissions of Oyer and Terminer, etc., the power to issue which is still continued and has been exercised.

When in 1881, the two common-law courts and the court of chancery were united in one court, the Supreme Court of Judicature for Ontario,²⁴ there was an express provision for commissions of Assize, etc., issuing by proper authority, but the existing condition was not interfered with that the ordinary trial courts should be held with or without a commission as the Governor (i. e., the Ministry) should deem best. At the present time the days upon which such courts are to begin their sittings, and the judge who is to preside over each, are fixed by the judges of the High Court Division of the Supreme Court and no commission issued. But no power was ever given to a judge presiding at a trial court to grant a new trial: when the Courts of Queen's (King's) Bench and Common Pleas were separate and distinct courts, the application for a new trial must be made in term to the court from which process issued. When by the Judicature Act of 1881 the courts were amalgamated, there was still

^{19 18} Vic. Ch. 92, sec. 43 (Can.).

²⁰ By 12 Vic. Ch. 63 (Can.) in 1849.

²¹ 19 & 20 Vic. Ch. 43, secs. 152, 153 (Can.).

² The legislation is continued and slightly amended in 1857, 20 Vic. Ch. 57, sec. 30; 1859, C. S. U. C. Ch. 11, secs. 1, 2, 3; 1866, 29 & 30 Vic. Ch. 40, sec. 3; all statutes of the province of Canada—after Confederation the Province of Ontario passed (1873) Ch. 8, sec. 52 (Ont.).

^{22 (1874) 37} Vic. Ch. 7 (Ont.).

²⁴ By The Ontario Judicature Act of 1881, 44 Vic. Ch. 5 (Ont.).

as in England a division into divisional courts corresponding to the former separate courts; and for a time the application must be made to the divisional court of the division to which the action was instituted.²⁵ Such was the case where an action was tried by a jury: if the action was tried by a judge without a jury, the application was to the Court of Appeal. Later amendments permitted the application even in cases tried without a jury to be made to the divisional court if desired.²⁶ When actions ceased to be assigned to any division²⁷ and all writs were styled simply "In the High Court of Justice," the motion for a new trial was heard by any divisional court or the Court of Appeal.

All divisional courts of the High Court were abolished by an act²⁸ coming into force January 1st, 1913, and now all applications for a new trial must be made to the Appellate Division of the Supreme Court of Ontario, corresponding to the former Court of Appeal. It should be said that by rule in Ontario, as in some other provinces, the trial judge may grant a new trial where a party does not appear and judgment has gone against him.

It is not necessary to trace the history of the practice of new trial in the other Provinces; in none of them has the trial judge any power in that regard and the application must be made to the "court above."

Esefore the Judicature Act of 1881, common-law actions were begun by writs which were issued from the two common-law courts alternately (in order to equalize the work of the two courts, each of which had the same jurisdiction, practice, etc.): proceedings in chancery were begun by bill of complaint. The Judicature Act abolished the bill of complaint and directed that all actions (now including suits) should begin by writ of summons, but that the writ should be styled in one or other division—Queen's Bench Division, Common Pleas Division or Chancery Division, secs. 23, 25. Writs in the Queen's Bench and Common Pleas Division were to be issued alternately, R. 21. The action was accordingly styled in some division and application for a new trial was made to the divisional court (generally of three but sometimes only two judges) of that division, R. 307. The application was by way of order nisi corresponding to the former rule nisi—in the Court of Appeal, a simple notice was given.

²⁶ When the rules were amended in 1888 (in force March 1st, 1888) it was directed that writs should issue alternately from the Queen's Bench, Chancery and Common Pleas Divisions (R. 226); and that after a trial by a judge without a jury, the application for a new trial might be made either to the divisional court or the Court of Appeal.

²⁷ By rules coming into force September 1st, 1897: R. 127, Forms 1, 2, 3.

²⁸ The statute 3 & 4 Geo. V, Ch. 19—The Judicature Act—brought into force January 1st, 1913, by proclamation. This forms one superior court, the Supreme Court of Ontario, with two divisions, the Appellate Division and the High Court Division—the latter being the trial division. I may add that while there has never been any express prohibition against the trial judge sitting in a court upon an application for a new trial in a case tried before him, it has never been done since the abolition of the practice of issuing writs out of a particular division.

## IN UPPER CANADA (ONTARIO) — CRIMINAL CASES

In Upper Canada the English practice was followed: there was no new trial in felonies, nor in misdemeanors in cases of acquittal except in certain quasi-civil cases.²⁹ In 1851 an act was passed³⁰ which enabled the trial judge in case of a conviction to reserve a case for the consideration of either common-law court, but it was held that this did not empower the court to grant a new trial.³¹

In 1857,32 Parliament enacted that a person convicted of a crime might

"apply for a new trial upon any point of law or question of fact in as ample a manner as any person may apply to the Superior Courts of Common Law for a new trial in a civil action" and "if the conviction be affirmed the person convicted may appeal to the Court of Error and Appeal."

If the conviction was in the Quarter Sessions, the application for a new trial must be made to that court and if the appeal should fail, a further appeal lay to a court of common law. In 1869,³³ all power was taken away from every court to grant a new trial. Thereafter the convicted person must rely upon a case reserved for one of the common-law courts; the appeal from the common-law courts to the Court of Error and Appeal was also taken away.

When the Criminal Code was enacted in 1892,³⁴ power was given on the refusal of the trial judge to reserve a case for the convict (with the leave of the attorney general given in writing) to move the Court of Appeal for such a case: when a reserved case should come before the Court of Appeal, that court might order a new trial or make such order as it should deem proper. If the judges of the Court of Appeal were unanimous, their decision was to be final; if not, an appeal might be taken to the Supreme Court of Canada.

Some changes have been made in the practice: at the present time the "Court of Appeal" is in Ontario the Appellate Division of the

²⁹ I mention only Upper Canada, but the English criminal law was in force in Lower Canada from 1763; and the laws of the two provinces in criminal matters have always been practically the same.

^{** 14 &}amp; 15 Vic. Ch. 13 (Can.) passed by the Parliament of United Canada—the two Provinces of Upper and Lower Canada became one Province of Canada by the Union Act of 1840, 3 & 4 Vic. Ch. 35 (Imp.) coming into effect February 10th, 1841, and so continued until the formation of the Dominion of Canada by The British North America Act of 1867, 30 & 31 Vic. Ch. 3 (Imp.) coming into effect July 1st, 1867.

⁸¹ Reg. v. Baby (1854) 12 U. C. Q. B. 346: the act was much like the English Act of 1848 referred to above which also was held not to enable a new trial to be granted.

²⁰ Vic. Ch. 61, secs. 1, 2, 4 (Can.): Cf. C. S. U. C. Ch. 113, secs. 1, 3, 6, 7.

^{**} By 32 & 33 Vic. Ch. 29, sec. 80 (Dom.).

^{84 (1892) 55 &}amp; 56 Vic. Ch. 29 (Dom.), The Criminal Code of 1892.

Supreme Court of Ontario, and a convict may move without the leave of the attorney general; if he moves on the ground of weight of evidence, however, he must obtain the leave of the trial judge.³⁵

#### IN THE UNITED STATES

The common law of England became the common law of the United States as it had been the common law of the thirteen colonies: while there is no report of any decision in the colonies before the Revolution granting a new trial, there is no doubt that the courts of general jurisdiction exercised the power of granting new trials in proper cases.

The Nisi Prius system was not in vogue and the trial judge (at least in most cases) sat as the court and not as a mere commissioner; and he it was to whom the application for a new trial was made. In Massachusetts the Nisi Prius system was adopted in 1803-4 with the necessary consequence: but in most cases the trial judge was always "the court."

In some of the states the losing party could have a new trial as of right by merely claiming an appeal as in Massachusetts,³⁷ Connecticut³⁸ and some other states.

²⁵ R. S. Can. 1906, Ch. 146, The Criminal Code, secs. 1013, 1014 (proceedings in error prohibited), 1015, 1016, 1018, 1019, 1021, 1024. Sec. 1022 gives power to the minister of justice to order a new trial if he "entertains a doubt whether such person ought to have been convicted." This power has been exercised once and (I think) only once. Practice in criminal cases, like criminal law in general, being by The British North America Act (the written constitution of Canada) entrusted to the Dominion, criminal practice is now uniform throughout the Dominion.

 $^{^{38}}$  See Miller v. Baker (1838, Mass.) 20 Pick. 285, 288, per Shaw, C. J., delivering the judgment of the court.

⁶⁷ See U. S. v. 1363 Bags of Merchandise (1863, U. S. D. C. Mass.) 2 Sprague, 85, 86 (25 Monthly Law Rep. 600), per Sprague, J., who adds:

[&]quot;If the second verdict was the same as the first, it was conclusive unless the court, in its discretion, should see fit to set it aside. If the result of the second trial was different from that of the first, the losing party had a right, by a process of review, to have another trial. The losing party in the third trial, having had two verdicts against him, was concluded thereby, unless the court should grant him a new trial. By this system it was not thought safe to rely upon the finding of a single jury. A party could claim a re-trial as matter of right until two verdicts had gone against him, and even then the court had the power to grant another trial if in their discretion they should deem it proper. This system commenced at an early period, and was in operation for a long time. It continued for some years after Maine became a separate State. I had then some agency in bringing about a change."

[&]quot;O fortunatos nimium sua si bona norint advocati."

⁸⁹ Bartholomew v. Clark (1816) I Conn. 472, 473, per N. Smith (arguendo) "... which was granted of course to the unsuccessful party, until there had been two verdicts the same way." The reporter, Thomas Day, adds a note: "This practice still exists, to a certain degree, in some of the New-England states." It certainly did exist in Massachusetts, as Maine did not become a separate state till 1820,—and we have seen that the practice was in vogue in Massachusetts at that time.

But the rule in granting new trials became much the same as in England in respect of grounds for such a proceeding. At the present time in practically every state of the Union, the trial judge has power to grant a new trial.³⁹ New Jersey is an exception: there the practice is to apply to the trial judge for a rule to show cause why the verdict should not be set aside and a new trial ordered (the common-law rule nisi); the rule is then argued before the full court (the trial judge being a member) in term. This is substantially the common-law system, except that in New Jersey it is the trial judge and not the court *en banc* who grants the rule to show cause.

In most of the states it is considered that the power of the trial judge to grant a new trial is purely statutory: but in some it is considered that the right is "inherent in the trial court" (Alabama), that the right is a common-law right (Massachusetts, Michigan, Minnesota), but regulated and modified by statute (Missouri, New York, North Carolina, Wisconsin). Connecticut thinks it an affirmance of the common law; Indiana can trace her statutory power back to 1852; Maine derived her jurisprudence from Massachusetts but now it seems to be wholly statutory.⁴⁰

The decision of the trial judge is final in Delaware, Maine and New Mexico; where a new trial is granted there is no appeal in California (though the order is reviewable on an appeal from the judgment), Colorado, Indiana, Michigan, Minnesota, Missouri (in criminal cases); in North Carolina an appeal from the trial judge's decision is allowed only when a new trial is granted on the ground of error committed in the trial, while in South Carolina the supreme court cannot review the facts and can grant a new trial only where a question of law is involved on which the trial judge has made an erroneous finding.

In the other states named in note 39, there is an appeal from the decision of the trial judge.

I have not considered the case of inferior courts: in all instances any power they possess to grant a new trial is statutory; nor have I considered the *venire de novo* employed where the verdict was defective, etc.—in some states, e. g., Indiana, that is considered not affected by legislation.

³⁹ I have to thank the chief justices of the following states for their ready and courteous answers to my enquiries: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Carolina, Wisconsin, Wyoming.

I have not made an independent examination but have contented myself with the information these eminent gentlemen have given me either expressly or by reference to authority.

⁴⁰ See Averill v. Rooney (1871) 59 Me. 580, Laws of 1872, Ch. 83: R. S. (1903) Ch. 84, sec. 54.

## DOES A PRE-EXISTING DUTY DEFEAT CONSIDER-ATION?—RECENT NOTEWORTHY DECISIONS

#### ARTHUR L. CORBIN

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The problem of Shadwell v. Shadwell¹ has recently come before the New York Court of Appeals in the case of Attilio De Cicco v. Schweizer.² The facts of the two cases have much similarity. In the New York case a written document was prepared containing the following:

"Whereas, Miss Blanche Schweizer, daughter of Joseph Schweizer . . . is now affianced to and is to be married to Count Oberto Gulinelli. Now, in consideration of all that is herein set forth, the said Joseph Schweizer promises . . . to pay annually to his said daughter Blanche . . . the sum of two thousand five hundred dollars."

This was delivered to the count, and four days later the marriage took place. For ten years the payment was made, and the present suit was brought to recover the eleventh annual instalment. The plaintiff sues as assignee of both the daughter Blanche and her husband. The court holds that there was sufficient consideration for the defendant's promise, thus agreeing with Shadwell v. Shadwell.

Some of the inferior courts of New York have failed to recognize the general distinctions between bilateral and unilateral contracts, speaking of the latter as if they were not contracts at all but were mere unenforceable unilateral promises, void for want of acceptance and consideration.³ In the present case the Court of Appeals makes no such mistake. The contract is plainly described as "unilateral," and the defendant's promise is enforced because the acts of acceptance constituted a sufficient consideration. Neither the count nor the defendant's daughter made any promise, and the court assumes that the contract became binding upon the defendant only when the marriage was celebrated.

This decision deserves extended comment because the opinion by Mr. Justice Cardozo shows a clear understanding of a unilateral contract and familiarity with the best literature on the subject in both books and periodicals, because the decision is correct in principle and in policy, and because it very probably will be a starting point in the reversal of a large number of decisions and in the abandonment of a

¹ (1860) 9 C. B. N. S. 159, 30 L. J. C. P. 145.

² (1917, N. Y.) 117 N. E. 807.

³ See Meade v. Poppenberg (1915) 167 App. Div. 411, 153 N. Y. Supp. 182; Fish v. Batterson (1914) 165 App. Div. 952, 150 N. Y. Supp. 242.

rule now generally prevailing in the United States. In some matters of detail the reasoning of the court will be criticised herein; but this must not be regarded as in any way intimating unsoundness in the decision, and in spite of such possible differences the opinion is one to be received with grateful appreciation.

It will not be denied in this article that when A has contracted with B for a certain performance, this creates a specific duty in A. A duty is a legal relation that exists whenever certain action or forbearance is expected of an individual, and in default of it the representatives of organized society will act in some predetermined manner injurious to the defaulting individual. In any case there is a possibility that this societal action will not in fact take place; for the default may not be discovered, or no one may care to start a proceeding against the defaulter, or he may by evasion or by force prevent any action. This possibility exists in the case of a secondary duty to pay damages or to make restitution, as well as in the case of a primary duty to perform specifically. Such a possibility, therefore, does not prove the non-existence of a duty in a particular case, for it is to be found in all cases.

Furthermore, A's duty is not in the alternative, to perform or to pay damages. The term duty describes one of the primary legal relations, existing from the moment a contract is made. With the occurrence of each subsequent operative fact, the existing legal relations change. One of this new group may be a duty to pay damages. This is a new legal relation, a secondary duty. If the fact that new legal relations follow each new operative fact justifies our calling the original duty an alternative duty, it justifies our calling the secondary duty to pay damages an alternative duty. Suppose a judgment for damages is given by a court; still the debtor does not have to pay. What will society do about it? In former times, the debtor would have been imprisoned. Was it then the duty of the contractor to perform or to pay damages or to lie in jail? To-day, the court will merely issue a writ of execution commanding the sheriff to seize goods of the debtor. If there are none to seize, there is little else that can be done. In such a case, it would then appear to be the contractor's duty to perform or to pay damages or to do nothing at all. If the sheriff finds goods and takes them, the duty of the contractor is merely the negative one not to interfere with possession and enjoyment. Thus his original duty appears to be either (1) to perform specifically, or (2) to pay damages, or (3) to forbear to interfere after his goods are seized, or (4) to pay damages for interfering, etc., ad infinitum. Duties change as new facts arise, but this does not justify the description of any particular duty as an alternative one.4

^{*}See comment by W. T. Barbour, The "Right" to Break a Contract (1917) 16 MICH. L. Rev. 106; also comment by the present writer, Part Payment of a

The present decision, therefore, should not be justified by asserting that the daughter and her husband were under no duty to marry. Each was under such a duty to the other. It serves no useful purpose and may do positive harm to say that they were merely under the alternative duty to marry or to pay damages. The duty to pay damages may also be shown to be merely one of several alternatives. It is equally as justifiable to say that the duty of the count after marriage is to be faithful to Blanche or to pay alimony.

In the case now under discussion the court makes an effort to distinguish previous New York decisions⁵ on the ground that they were cases of "a promise by A to B to induce him not to break his contract with C," whereas this is a case of "a promise by A, not merely to B, but to B and C jointly, to induce them not to rescind or modify a contract which they are free to abandon." Such a distinction would seem to require an assumption that if the defendant offered his promise to both the count and the daughter instead of to the count alone, this in some way causes it to be no longer the duty of each to carry out the engagement contract. They are said to be "free to abandon," seeming to mean thereby that their marriage is no longer the performance of a pre-existing duty in each. This line of reasoning, it is submitted, is inaccurate.

In the first place the court is not entirely convincing in its effort to show that the defendant made his offer to the daughter as well as to the count, thus creating the relation commonly described as "privity." Either Blanche was a promisee or she was not one. This is to be determined, not by her subsequent action in reliance upon her father's promise to the count, but by the expressions used by the father. If she reasonably understood from what he said that the offer was to her as well as to the count, and that the power of acceptance was being intentionally conferred upon her, then she is a promisee. If she did not reasonably understand so, then it is hardly correct to say that "action on the faith of it put her in the same position as if she had been in form the promisee." The principle applicable here is identical whether the offer confers a power to make a unilateral contract or to make a bilateral one. The question whether the power to accept was conferred upon one person or upon two persons jointly is one of fact simply. This offer may well have been made to the count alone, and the fact that his power of acceptance was dependent upon his being able to induce Blanche to say yes at the wedding does not make the offer an offer to Blanche. It seems highly probable that the defend-

Debt as Consideration for a Promise (1908) 17 YALE LAW JOURNAL 470. A case adopting this erroneous conception of contractual duty is Frye v. Hubbell (1907) 74 N. H. 358.

⁵ Arend v. Smith (1897) 151 N. Y. 502; Robinson v. Jewett (1889) 116 N. Y. 40; Seybolt v. New York, etc. R. R. Co. (1884) 95 N. Y. 562; Vanderbilt v. Schreyer (1883) 91 N. Y. 392.

ant's promise in this case was to the count alone, and that the daughter was merely a donee-beneficiary. The court itself says: "though the promise ran to the count, it was intended for the benefit of the daughter." As such donee-beneficiary, the daughter would clearly have an enforceable right in nearly all of our states; but this does not make her a promisee and does not make her act a consideration for the defendant's promise.

But if we suppose the offer to have been to the count and Blanche jointly, their marriage in acceptance of the defendant's offer was nevertheless the performance on the part of each of them of an existing duty to the other. Neither one of them was at any instant "free to abandon" the engagement. The fact that the offer is to them both, and that the acceptance must consist of their joint action, does not cause their physical bodies to become one, nor should it cause us to imagine the existence of some fictitious legal personality, a quasicorporation. Each still owes a duty to the other, even in the (frequently blind) "eye of the law." Neither one was privileged to break the engagement. Neither one was privileged not to marry, and would not become so privileged unless and until the consent of the other should be given. Non constat that such consent had been or could be obtained. The fact that each was willing to marry and thus to accept the father's offer is far from showing that in the absence of the father's offer either one would have been willing to rescind or modify their contract. The unity of husband and wife was the merest fiction; the notion was often productive of harm, and it no longer prevails to its former extent. The fiction of unity between joint contractors is also one that should not be indulged. Therefore, it serves no purpose to say that they were "free to abandon" their engagement, if at the same time we are bound to admit that neither one was free to abandon it. The fact that the father made an offer to both of them has no effect whatever upon their individual duties to each other. For our present purpose, their legal relations are the same as in a case where A has made a promise to B and C,—B being under a duty to X, and C being under a duty to Y. Very different would their legal relations have been if, at the time of the defendant's offer, the count and Blanche had not yet become engaged or had mutually rescinded their engagement. Then, indeed, they would have been "free" not to marry.7

⁶ No doubt it would now be so held in New York. Buchanan v. Tilden (1899) 158 N. Y. 109; Pond v. New Rochelle W. Co. (1906) 183 N. Y. 330. The doctrines of Buchanan v. Tilden were wholly disregarded in the earlier case of Durnherr v. Rau (1892) 135 N. Y. 219, and the two cases are reconcilable only with great difficulty. The present case of DeCicco v. Schweizer must be regarded as confirming Buchanan v. Tilden.

⁷These two cases put for contrast and comparison were suggested by my colleague, Professor Hohfeld, whose analysis and definition of jural relations

If the foregoing argument is sound, the case stands just as it would if the defendant's promise had been to the count alone, the only consideration being the performance of the count's legal duty to Blanche. He was under this duty, and he was not free to abandon it or privileged not to marry. Blanche owed the same duty and lacked the same privilege. Each, it is true, had the *power to offer a rescission*—a relation of value, however uncertain it might be whether the other would exercise the power of rescission thereby conferred. Each one had this valuable power even though the defendant's promise was made to the count alone. This is of importance and will be discussed below.

Assuming, then, that the only consideration given by the count was the performance of acts which his existing duty to Blanche required, and that the only consideration given by Blanche was the performance of similar acts which her existing duty to the count required, is there any good reason why this should not be held a sufficient consideration and cause for the enforcement of the father's promise? It is submitted that there is none and that such performance fulfils the usual requirements as to consideration. Let us now consider these usual requirements.

#### CONSIDERATION AS AN INDUCING CAUSE

Where the new promise of C has been offered by him in return for the actual performance by A of his previous contract with B, the requested performance is certainly the object of C's desire and is, in this sense, the conventional inducement of C's promise. Likewise, the promise of C is one of the inducing causes of A's performance and is the conventional equivalent therefor. The fact that A had other inducements which might or might not have been sufficient in themselves to cause him to perform, is not material so far as the doctrine of consideration is concerned. The causes and motives of human action are always complex. The law does not define consideration as the sole inducing cause of a contractor's action, and if it were so defined a valid contract would seldom be made. Insofar, then, as the law requires consideration to be an agreed equivalent and a conventional inducement, the performance by A fulfils the requirement.8

In DeCicco v. Schweizer it is, perhaps, not entirely certain that the marriage ceremony of the count and the daughter was performed by them as the requested equivalent and conventional inducement of the

have been of the greatest service in the solution of complex problems. See his articles on Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL 16; (1917) 26 ibid. 710. The writer is also indebted to Professor Hohfeld for much valuable criticism.

⁸The term "inducing cause" is here used merely to describe the object of desire. The antecedent fact causing the defendant to make his promise is the defendant's subjective desire itself.

defendant's promise. The signed document merely recites the approaching event as a preamble to the promise.

"Whereas, Miss Blanche . . . is now affianced to and is to be married to Count Oberto Gulinelli. Now, in consideration of all that is herein set forth, the said Joseph Schweizer promises . . . to pay," etc.

This is not a direct statement that the act of marriage is to be the consideration for the promise. The preamble merely recites the engagement contract. It appears to be merely in contemplation of that fact and because of the pleasure afforded by that fact to the defendant that he makes the promise. He delivers the document as a sort of antenuptial gift and as a provision for his daughter's future support. As to this the court says:

"If they forbore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract it. . . . If pressure, applied to both, and holding both to their course, is not the purpose of the promise, it is at least the natural tendency and the probable result. The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or to delay. That they neither retracted nor delayed is certain. It is not to be expected that they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct. It is enough that the natural consequence of the defendant's promise was to induce them to put the thought of rescission or delay aside."

It will be observed that in the foregoing the court expresses the opinion that the promise of the defendant was one of the inducing causes of the marriage, although not the sole inducing cause; but it does not consider whether the marriage was the inducing cause of defendant's promise. It would appear from this that, in the court's mind, consideration need not be the object of the promisor's desire for which he expressly offers his promise in exchange; but that, instead, it may be merely action or forbearance by the promisee as the result or natural consequence of the promise. Mr. Justice Holmes has recognized the possibility of this, though apparently without approval.

"Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void. There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive, and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps having found it in matters which would

seem to be no more than conditions or natural consequences of the promise."9

Two years later, in the United States Supreme Court, he said:

"But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting." ²¹⁰

There are altogether too many decisions enforcing a promise where the only consideration was some expected action in reliance upon it for us to adopt without reserve the statement last quoted from Mr. Justice Holmes. The previous statement quoted is considerably more guarded and accords more nearly with prevailing applications of the law. DeCicco v. Schweizer therefore should not be disapproved on this ground. Moreover, the wording of the written document is not so definite and certain in meaning as to exclude extrinsic data indicating that the marriage was in fact the intended equivalent and actual inducement of the defendant's promise.

#### CONSIDERATION AS A BENEFIT TO THE PROMISOR

The commonest of all definitions of consideration requires that it shall be either a detriment to the promisee or a benefit to the promisor. In view of the fact that this definition is being constantly approved by the courts, expressed as it is in the alternative form, it should not be disapproved on any merely a priori ground or even for the purpose of justifying some historical hypothesis as to the origin of consideration. Recent writers have been willing to admit that a benefit to a promisor may be a sufficient consideration even in the absence of any detriment to the promisee.¹¹ In the case now under discussion it is

^{*}Martin v. Meles (1901) 179 Mass. 114. This case in itself goes far to justify the statement contained in the last sentence of the quotation.

¹⁰ Wisconsin & Mich. R. R. Co. v. Powers (1903) 191 U. S. 379, 386. This is quoted and approved by Mr. Justice McKenna in Banning Co. v. California (1915) 240 U. S. 142, 153. In 2 Street, Foundations of Legal Liability (1906) 81, it is said:

[&]quot;Between the consideration and the promise there must be a causal relation. The consideration must draw the promise from the promisor, and the promise must be the inducement which causes the promisee to incur the detriment which constitutes the consideration."

¹¹ Samuel Williston, Consideration in Bilateral Contracts (1914) 27 Harv. L. Rev. 518, 524; Edmund M. Morgan, Benefit to the Promisor as Consideration (1917) 1 MINN. L. Rev. 383. A decision clearly in agreement is Union Bank v. Sullivan (1915) 214 N. Y. 332.

perfectly clear that the performance by Count Gulinelli was of some benefit to the defendant. Mr. Schweizer received all those benefits that are to be derived from alliance with a noble Italian family. Such an alliance carries with it social prestige, even though some not enjoying such an alliance may be inclined to scoff. This social prestige means power to influence the action of others in business affairs as well as in social life. The action of the count has money value, and the fact that this value cannot be determined with certainty is not material. The same can be said of many other matters the sufficiency of which as a consideration is not questioned, as, for example, a forbearance to compete in business or a forbearance to press a doubtful claim.

The existence of actual benefit to C from the performance by A is well shown in McDevitt v. Stokes, recently decided by the Kentucky Court of Appeals.12 Here, the defendant (C) promised the driver (A) of a race horse owned by B that, in return for his driving in an important race, he would receive \$1,000 if he won the race. A was already under contract with B to drive the horse in this race.13 He drove with skill and was the winner. The defendant was the owner of the sire, the dam, and two full brothers of the horse to be driven by A. As such owner, he received a prize of \$300 from the racing association; and, in addition, the value of the four horses owned by him was increased by \$25,000, this fact being admitted by demurrer. The act of A in driving with skill was certainly one of the causes of C's increase in wealth. The act was therefore a benefit to C. As to the \$300, C received new property rights. As to the \$25,000, he received no new rights, powers, or privileges; and yet he received benefit. The winning of the race whetted the appetites of others for the horses already owned by C.

In *McDevitt v. Stokes* the court does not deny the existence of the above benefit, nor does it attack the definition of consideration as being either a detriment to the promisee or a benefit to the promisor; but

¹² (1917, Ky.) 192 S. W. 681. This case follows the prevailing rule that the promise of C cannot be enforced. The reasons upon which it is based are believed to be quite erroneous.

¹⁸ If in such a case A does at C's request any act not previously required by his contract with B, this is a sufficient consideration for C's promise. Such is not the case now under discussion. It may, indeed, be argued that A's duty to B is to do acts that are normally commensurate with the size of the promised reward, and that when C offers a larger reward A will necessarily be stimulated to make even greater efforts. This is certainly the view of the practical man, for that is why C offers a new reward. Stokes promised McDevitt \$1,000, not because he feared a breach by McDevitt of his previous contract with B, but in order to stimulate him to greater effort and to greater skill. Everyone knows that a man can and will do more in return for \$2,000 than for \$1,000. McDevitt owed to B only such skill and effort as the agreed salary normally induces. Stokes's new promise enabled both B and himself to obtain a considerably greater degree of skill and effort.

it quotes certain authors14 to the effect that by detriment and benefit is meant "legal detriment" and "legal benefit" and not mere financial detriment and benefit. It may not be an easy matter to determine with exactness the boundaries of the field properly described by the word benefit; but on the other hand it adds nothing to the definition to substitute for it the term "legal benefit." This indicates only that there may be certain benefits that are not a sufficient consideration, but gives no criterion for determining what they are. The court asserts that the benefit in this case is not sufficient because A's performance as legally required of him by his contract with B would inevitably have resulted in the benefit received by C, even though C had made no promise to the plaintiff. The statement as made is not necessarily true;15 but even if true, it does not show that the defendant did not receive a benefit in fact in return for his promise. If the defendant's promise was one of the inducing causes of the plaintiff's action, it is wholly impossible now to determine whether the plaintiff would have driven in the race at all without it or whether the race would have been won.

#### CONSIDERATION AS A DETRIMENT TO THE PROMISEE

No one now doubts that a detrimental act or forbearance by the promisee is a sufficient consideration, provided it was an agreed equivalent—one of the conventional inducing causes of the promise. There are many cases holding that such a detriment may be sufficient cause for the enforcement of a promise, even though it was wholly antecedent to the promise, or was subsequent thereto and a mere natural consequence of the promise. The present New York case should probably be included among these. The next question that must be determined, however, is whether performance by A of an act required by his duty to B is a detriment. There can be no doubt that it is in fact a detriment from both the practical and theoretical standpoints. A's performance of this duty requires the expenditure of time, strength and money. In McDevitt v. Stokes the plaintiff refrained from doing other things, he bore a considerable physical strain, and he risked bodily injury. In DeCicco v. Schweizer the count assumed all the marital relations by performing a ceremony that in itself cannot be contemplated without emotion. In both cases there were accompanying benefits. There are pleasure and physical stimulus in driving a racehorse. There are happiness and new valuable rights in marriage. In no case, however, does the law make an estimate of the comparative values of these detriments and benefits. It does not

¹⁴ E. g., Page, Contracts (1905) sec. 274.

¹⁵ See note 13, supra. Pollock admits that A's performance is a benefit to C, but denies that it is a detriment to A. Wald's Pollock, Contracts (Williston's ed. 1906) 206.

require a showing of a net loss in order to satisfy the requirement of consideration. Nor does the law require a showing that the performance now set up as a consideration was more detrimental than any other possible alternative line of action. If the count had failed to perform his duty to Blanche he might have been sued for breach of promise. It cannot now be determined whether or not she would have sued, nor can it now be determined whether or not such a suit would have damaged the count more than the marriage has damaged him. Forbearance to go to France is a sufficient consideration in spite of the fact that actually going might involve mutilation or death.

It is true that in performing such acts as are required by his preexisting duty, A does not surrender any right, privilege, or immunity. In other words, he has not assumed any no-right, duty, or liability. Not only does he retain all of his old rights, privileges, and immunities, during the course of his performance and after its completion, but, also, he has gained some new ones, e. g., the right to compensation from B. Instead of becoming burdened with new duties, he has discharged one that previously weighed upon him. For these reasons it is sometimes said that A's performance of his previous duty cannot be detrimental to him.

It happens, however, that prior to his performance A had certain valuable powers; and that after his performance they are extinguished. He had the power to break the contract with B, thereby creating in B new rights and privileges and at the same time preventing B from having the rights and privileges that performance would have given Thus, the count's breach of promise would have prevented Blanche from having a right of dower, although she would have a right to damages. She would still have the power to contract as a feme sole, but she would have no power to bind the count to pay millinery bills. It must be admitted that this power of the count is one that he was not privileged to exercise (although the courts spiritual no longer attempt to enforce his duty by a decree for specific performance). Nevertheless, the power in itself, even when unaccompanied by privilege, is of value to its possessor. If not, why does the engaged youth ever prefer a breach of promise suit and a new sweetheart to wedding bells with possible future alimony?

There is another valuable power possessed by A that is effectively extinguished by his full performance of the acts required by his duty to B, one that he is legally privileged to exercise. This is the power to offer a rescission to B. This is not a power to rescind; neither party to the contract has such a power. It is a power to create in B the power to rescind by accepting A's offer of rescission. Of course, it cannot be determined now whether or not B would have accepted;

¹⁰ For an explanation of this terminology see the articles by Professor Hohfeld, cited in note 7, supra.

but the probability of B's accepting affects merely the value of A's power to make the offer. In any case, B might accept; and this possibility gives some value to A's power.¹⁷ After full performance by A, if he says to B "let us rescind," his words are void of legal effect. A still has power to discharge B, if B has not yet performed his part; but he cannot confer upon B the power to discharge A. The relation is now a valueless disability in place of a valuable power.¹⁸ In DeCicco v. Schweizer, indeed, B has fully performed as well as A. They are man and wife and neither has the power to release or to make an effective offer of release.

It appears, therefore, that performance of a contractual duty owed to a third person satisfies the usual requirements of the law as to consideration. It is a benefit to the new promisor, C; it is a detriment to the one so performing, A; it is the conventional inducement and equivalent of C's act. Is there any imperious principle of public policy that forbids the courts to recognize it as sufficient and to enforce C's promise?

#### ARGUMENTS BASED UPON PUBLIC POLICY

It is perhaps generally believed that a rule approving as a sufficient consideration either a performance in accordance with a pre-existing duty, or the promise of such a performance, would operate to encourage the non-fulfillment of duties and the making of threats of non-fulfillment. Thus, it is conceivable that if policemen are allowed to enforce payment of a reward offered for the performance of official duty, or for promises of such performance, they will be tempted to postpone the performance of duty until some additional reward is offered. So too an unscrupulous contractor might threaten to break his contract or might improperly postpone performance for the purpose of inducing an offer of a greater compensation. If this general welfare argument is sound it justifies the prevailing American decisions, and it applies equally to bilateral and to unilateral contracts.

It must be admitted that the above argument has some weight. No

³⁷ In DeCicco v. Schweizer Judge Cardozo asserts that the probability of acceptance by B of the offer to rescind is exceptionally high in engagements to marry. This is probably true, except in the case of the adventuress; but it is also immaterial, because it goes only to the question of adequacy of consideration.

¹⁸ It is not at all uncommon for legal theorists to say that consideration must always involve the surrender of some legal right. No doubt the term "right" is here used in an ambiguous sense; but the statement is altogether unsound for other reasons. Without attempting a complete definition, it may be pointed out that an act whereby a promisee surrenders a legal privilege or a legal power or a legal immunity will serve as well as one whereby a legal right is surrendered. In addition, many acts will serve as consideration when in themselves they create no new legal relations whatever. An exercise of simple physical power will serve, even though close analysis shows that the actor gave up no right, privilege, power, or immunity. The same is true of a simple forbearance to act.

doubt it should be regarded as conclusive in cases of policemen and other officials with public duties. It would have much weight, also, in cases where the pre-existing duty was a contractual one and was a duty owed by the promisee to the present promisor. There may be some danger that dishonest contractors will attempt to blackmail the other party to the contract into promising a higher compensation. There is far less danger, however, that such blackmailing efforts will be directed against third persons who are strangers to the contract; and even where there was such a conscious and successful effort, it is much more difficult to see that anyone is wronged. Of course, if the effort to get a promise of compensation from a third party results in a breach of the pre-existing duty to a second party, this is a wrong not to be encouraged.

It would not be particularly difficult to classify cases of this sort along strictly moral lines, to separate the sheep from the goats, and to enforce the new promise in favor of an honest contractor while refusing to enforce it in favor of the blackmailer or the dishonest. There is reason to believe that a considerable part of the apparent conflict in the decisions can be explained on this ground. Such a distinction could not often be made in cases of public officials where the non-fulfillment of the pre-existing duty would be a tort or other public injury; and yet there are some cases holding that public officers can collect promised extra rewards. The distinction can often be drawn very properly in cases where there are only two parties involved and the previous duty was owed to the present promisor.²¹

The distinction is very easily drawn in cases like the present one

¹⁹ Pool v. Boston (1849, Mass.) 5 Cush. 219; Stamper v. Temple (1845, Tenn.) 6 Humph. 113.

²⁰ Lingenfelder v. Wainwright Brewing Co. (1890) 103 Mo. 578; Stilk v.

Myrick (1809) 2 Campb. 317.

Thus, in Munroe v. Perkins (1830, Mass.) 9 Pick. 298, the plaintiff had done his best and had reached a point where his lack of credit was preventing further performance. It is not too much to say that the moral sense of the community would be shocked by allowing the defendant to break his new promise. On the other hand, in Lingenfelder v. Wainwright Brewing Co. (1890) 103 Mo. 578, the promise was extorted from the defendant by threats and other inexcusable conduct. This distinction seems to be adopted in effect in King v. Duluth & M. Ry. Co. (1895) 61 Minn. 482, in the following dictum:

[&]quot;But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him the additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration."

This distinction is approved by Brantly, Contracts (2d ed. 1912) sec. 40; by H. W. Ballantine, Doctrine of Consideration (1913) 11 MICH. L. Rev. 434; by the present writer, Part Payment of a Debt as Consideration for a Promise (1908) 17 YALE LAW JOURNAL 470; and in Linz v. Schuck (1907) 106 Md. 220.

where the previous duty was a contractual duty to a third person. Indeed, it is believed that a great number of such cases would fall on the enforceable side, and the sheep would be far more numerous than the goats. In very many of these cases it would be shocking to the conscience and in conflict with the prevailing *mores* of society to refuse to enforce the new promise.²²

## CONSIDERATION IN BILATERAL CONTRACTS

Neither the case of DeCicco v. Schweizer nor the case of McDevitt v. Stokes requires a discussion of the law as to bilateral contracts, but a brief discussion may be of service. This will be limited to cases similar to DeCicco v. Schweizer, except that the consideration for the defendant's promise is not merely a performance in accordance with the plaintiff's pre-existing contractual duty to a third person, but is a promise of such performance. A few of the writers, and perhaps one court, have made a distinction in these cases between unilateral contracts and bilateral contracts.²³ They assert that where A merely performs as required by his duty to B in return for a new promise by C, the consideration for C's promise is not sufficient; but that where A makes a new promise to C of such a performance, the consideration for C's promise is sufficient. They would enforce a bilateral agreement and refuse to enforce a unilateral one.

In cases actually decided, the courts are practically unanimous in making no such distinction. They either enforce both classes of contracts (as in England) or refuse to enforce either. The latter is the generally prevailing rule in the United States. This being true, if the decision in *DeCicco v. Schweizer* causes a re-examination and an alteration in the rule applied to unilateral contracts, the same result will be effected in the case of bilateral contracts.

Such a result will be found to be the correct one, both theoretically and practically; but, nevertheless, there are important logical distinctions between the two kinds of cases, and these will now be considered. In both cases the actual consideration for C's promise is the performance of an act by A; but in the unilateral case this act is the performance of service due to B—like the building of a bridge or the delivery of goods, and in the bilateral case this act is a promise—an expression of an intention to do other acts in the future, made in

This was undoubtedly true in the following cases: Bagge v. Slade (1616) 3 Bulstr. 162; Shadwell v. Shadwell (1860) 9 C. B. N. S. 159; Abbott v. Doane (1895) 163 Mass. 433; and in the case under present discussion, DeCicco v. Schweizer. In Schuler v. Myton (1892) 48 Kan. 282, where the court held the promise to be unenforceable, it did so with strongly expressed regret, but a regret that only accentuates the injustice of the decision.

²² Langdell, Summary of Contracts, sec. 84; Wald's Pollock, Contracts (Williston's ed. 1906) 206-209; 2 Street, Foundations of Legal Liability (1906) 111 ff.; Merrick v. Giddings (1882, Dist. Col.) 1 Mackey, 394, 411. This distinction is referred to by Mr. Justice Cardozo.

the conventional form used to create obligation. In the one case, A's act is exactly the same as was required of him by his previous duty to B. In the other case, the new promissory act is one that was not required of A by any pre-existing duty. These differences would seem ample to justify the application of different rules to the two kinds of contracts, and the enforcement of the bilateral agreement even if the unilateral one is not enforced. If the unilateral contract is enforceable, as this article has already attempted to show and as was held in DeCicco v. Schweizer, it follows—almost a fortiori—that the bilateral contract should be enforced.

In the unilateral case the act of A, constituting the acceptance and the consideration, is of such a sort that it cannot give a special right in personam to C or create a special contractual duty in A. In the bilateral case the act of A is of such a sort that under ordinary conditions it would create a right in C and a duty in A. Does the fact that A was under a similar pre-existing duty to B prevent his promise to C from operating to create this new relationship of right and duty?

A word is necessary at this point in regard to bilateral contracts in general, in order to anticipate any possible charge of begging the question. It has been a favorite doctrine with a number of writers that for any consideration to be legally sufficient it must involve a detriment to the promisee. Having laid down this doctrine as a universal test, it became necessary to explain its application to bilateral contracts. It was thereupon said that a binding promise was a detriment, at the same time tacitly (and sometimes expressly) admitting that an unenforceable promise was not a detriment; and this was said to be the reason why a promise is a sufficient consideration for a return promise. It is obvious that this is reasoning in a circle. One promise is binding because the return promise is a detriment to its maker, and this return promise is a detriment because it is binding.²⁴

In order to avoid this vicious circle, it is necessary either to show that any promissory act is in itself sufficiently detrimental to satisfy the legal requirement as to consideration, whether it creates a legal duty or not, or to abandon the detriment theory of consideration altogether in the case of bilateral contracts. The first of these alternatives is not at all a hopeless one; but the second one is much to be preferred over the first. Mutual promises create a legal obligation because—in English-speaking countries, at least—the customary notions of honor and well-being cause men to perform as they have promised, and the lawmaking powers have decreed that in such cases

²⁴ Previous discussions of this problem are to be found as follows: Anson, Contracts (Huffcut's 2d Am. ed. 1906) sec. 143; Williston, Successive Promises of the Same Performance (1894) 8 Harv. L. Rev. 27, Consideration in Bilateral Contracts (1914) 27 ibid. 503; Langdell, Mutual Promises as a Consideration (1901) 14 ibid. 496; Ames, Two Theories of Consideration (1899) 13 ibid. 29.

promise-breakers shall make compensation. Our prevailing credit system in business requires such a rule. The basis for the enforcement of bilateral contracts lies in mutual assent and fair dealing.

The fact is that "consideration" is an undefined and nebulous concept. Our efforts at definition have been inharmonious and unsuccessful for the reason that a great variety of facts must be included. This is an excellent illustration of the general truth that we do not have universal principles or mechanical rules or clean-cut definitions in the beginning. It is evident that we have a strong desire for such universal and mechanical tests so that we can predict societal action with greater certainty. Therefore, we continually construct exact definitions and general rules. Some thus "lay down the law" with dogmatic vigor, even asserting an a priori necessity, logical or divine.

In all contract law our problem is to determine what facts will operate to create legal duties and other legal relations. We find at the outset that bare words of promise do not so operate. Our problem then becomes one of determining what facts must accompany promissory words in order to create a legal duty (and other legal relations). We must know what these facts are in order that we can properly predict the enforcement of reparation, either specific or compensatory, in case of non-performance. We are looking for a sufficient cause or reason for the legal enforcement of a promise. This problem was also before the Roman lawyers, and it must exist in all systems of law. With us it is called the problem of consideration.

By the common law, the sealing and delivery of a writing are operative facts sufficient to create a legal duty. We do not call them "consideration," although to say that a seal *imports* a consideration²⁴⁸ is next door to saying that a seal *is* a consideration. But among those facts that are judicially deemed to be a sufficient reason for the enforcement of a promise we find a return promise, and it is customarily described as a "consideration." If we are asked why this return promise is deemed to be a sufficient consideration, the answer is the same as the answer to the question why various detrimental acts are deemed to be sufficient. The answer lies in the prevailing notions of honor and well-being, notions that grow out of ages of experience in business affairs and in social intercourse. At all events, it is quite unnecessary to reply that a return promise is a sufficient consideration because it is a detriment. It is much better to answer: because the parties have expressed their mutual assent in conventional form.²⁵

²⁴As used in modern times, this expression is quite erroneous; for a seal is not evidence of an agreed equivalent and never has been. Those who invented the expression in the sixteenth century used the term consideration in a much broader sense so as to include deliberate volition or well-considered intention. See the argument of Bromley in Sharington v. Strotton (1565, K. B.) I Plow. 298, 308a.

This view of bilateral contracts has been ably maintained in 2 Street, Foundations of Legal Liability (1906) ch. 12. See to the same effect W. S. Holdsworth, Debt, Assumpsit, and Consideration (1913) 11 MICH. L. REV. 347.

It does not follow from the foregoing that every return promise is a sufficient consideration, any more than it follows that every detrimental act is a sufficient one. Some exact and general rule is, indeed, desirable as a test of enforceability; but no attempt to formulate such a rule is necessary for the purposes of this article. Its formulation would require the analysis and classification of innumerable past cases. It will be sufficient if we can show that the test ought not to lie in the existence or non-existence of a duty to a third person. Many courts have adopted this test, it is true; but it is believed to be arbitrary and unsatisfactory. The case of  $DeCicco\ v.\ Schweizer$  shows that the authorities are not such as to make debate unprofitable. At least, it was not unprofitable to Count Gulinelli.

It should now be clear that the mutual promises of A and C to do acts not illegal are sufficient to create mutual rights and duties, without calling the promissory acts themselves either detriments or benefits. Does a pre-existing contract by A with B to perform the very same acts prevent such a legal result? One good reason why it should not prevent it. No public interest will be damaged by giving to the mutual promises their normal operative legal effect. Instead, the refusal to enforce such promises gives a moral shock to the community; and uniformity of rule is in itself advantageous. The public interest here is the same as in the case of unilateral contracts discussed in the first part of this article.

In holding that A's new promissory act creates new contractual relations with C (that is, that the promises are binding), we are no more begging the question than in the case of any other bilateral contract. The fact that A's promises to B and C can be fulfilled by his doing one and the same act does not affect this particular problem in the least

It can easily be shown that there is nothing impossible in the idea of two separate and independent duties in A to perform one act. Let us suppose a case based upon *McDevitt v. Stokes*. A has contracted with B to drive the latter's mare, Grace, in the "Futurity." Later, C procures A's new promise to drive Grace in this race by paying to A \$1,000 cash in advance. There can be no question that this is a valid and enforceable unilateral contract. C's cash is ample consideration for A's promise.²⁶ This being true, if A now fails to drive in the race as promised, he is bound to pay damages to both B and C. The right of B and the right of C are wholly independent of each other, however; likewise, A's correlative duty to B is wholly independent of and separate from his correlative duty to C. The fact

²⁶ It is immaterial whether A's promise is a valid consideration for the cash payment (although it would be one) because that payment is executed. The money no longer belongs to C, so it is certain that he has suffered a detriment. The money now belongs to A, and it is certain that he has received a benefit.

that A might have satisfied his duty to B and his separate duty to C by performing one and the same act is quite immaterial and shows no identity in the *legal relations*. A's new promise to C is an operative fact that lays a train of new consequences. It causes non-performance of the promised act to have new legal effect. The resulting duty to compensate C is not the same as his secondary duty to compensate B; these two duties cannot even be performed by making one payment.

Furthermore, if A and B now unite in rescinding their original agreement, this discharges A's duty to B, but it does not discharge A's duty to C; neither is this rescission in itself a breach of A's duty to C. A's new contract with C, absolutely binding though it was, did not deprive A of either the power or the privilege of joining with B in a rescission. It deprived him merely of the privilege, in relation to C, of not driving Grace. Such a rescission, absolutely valid though it was, leaves A's duty to C just as it was before; and A's subsequent failure to drive in the race will still create in C a secondary right to damages. All these facts go to show that A's promise to C has an operative effect different from that of his promise to B.

In many cases of this sort A's duty to B will be substantially different from his duty to C in another respect. His duty to B may be expressly or constructively conditional upon some performance by B. A's duty to B to drive in the race may be conditional upon B's payment of salary then due and his furnishing of board and lodging. The new duty to C may not be subject to these conditions. However, even if A should make his new duty to C expressly subject to the same conditions—of payment of salary by B, etc.,—the reasons given above are amply sufficient to show that it is a duty different from that owed to B. The fact is that a duty is a legal relation between two persons, and such a relation between A and B is not a relation between A and C.

Such being the legal relations of the parties in the case of a unilateral contract between A and C, where A has promised and C has paid, there is no impossibility in creating similar legal relations where the new agreement between A and C is bilateral. A's new duty to C, if created by the law, will be beneficial to C and detrimental to A, just as in the case of other bilateral contracts. Also, A's promissory act will be just as valuable and effective, per se, as in the case of other bilateral contracts. The fact that A may now receive a greater compensation than he would have received had C made no contract is immaterial. B and C both receive exactly what they desired: each of them obtains a separate promissory act from A; each also obtains from A's promised performance exactly the benefit that he expected; and if we hold that the new agreement is valid, each obtains an enforceable legal right against A. On the other hand, A has done wrong to no man and the public interest has been fully protected.

The new duty of A to C where C has paid A \$1,000 for his new promise to drive Grace in the "Futurity" is not a duty not to rescind his pre-existing contract with B. The same is true where the new contract between A and C is bilateral. After A has promised C that he will drive Grace in the "Futurity," he remains privileged, just as before, to accept an offer of rescission made to him by B. Such a rescission by A will be no breach of his promise to C. In spite of such a rescission, it is still quite possible for A to drive Grace. The only ways in which A can break his contract with C are to fail to drive Grace when the day arrives, or to send to C an unconditional anticipatory repudiation. The rescission of the contract with B is neither of these. This is true even in cases like DeCicco v. Schweizer; for a mutual rescission by the count and the daughter would be no breach of a promise by the count to the father. Blanche and the count might still appear before a magistrate and be married, and this would fulfill perfectly the count's promise.27

It has been said of bilateral contracts that a promise is a sufficient consideration in all cases where the performance of the thing promised would be a sufficient consideration in a unilateral contract.28 Probably no such test as this was consciously in the minds of the judges when they first began to enforce bilateral contracts, nor is it often consciously in the minds of the judges to-day. It may be, however, that the decided cases can be consistently explained on such a theory. If this is true, the doctrine may now be used to establish the validity of a bilateral contract between A and C similar to that discussed above. For, an actual payment by C to A of \$1,000 for A's new promise is clearly a sufficient consideration and makes A's promise to C a binding one. Then, by the above doctrine, C's promise of \$1,000 would likewise be a sufficient consideration, irrespective of the content of A's promise, and A's promise would create a legal duty to C.20 Likewise, if the attempt in the earlier part of this article was successful to show that A's performance as required by his previous duty to B is sufficient consideration for a promise by C, then A's promise of such performance would be sufficient. The validity of the bilateral contract, however, need not rest upon this supposed doctrine, but may properly

²⁷ See in accord, Edmund M. Morgan, Benefit to the Promisor as Consideration (1917) 1 MINN. L. Rev. 383, 391.

²⁸ 2 Street, Foundations of Legal Liability (1906) 110: "the promise in question must appear to be for the doing of some act which if actually performed would be a good consideration for a binding unilateral promise." Samuel Williston, Consideration in Bilateral Contracts (1914) 27 HARV. L. REV. 518, quoting Leake, Contracts (1st ed. 1867) 314, and Thorp v. Thorp (1701, K. B.) 12 Mod. 455.

²⁹ This is vigorously maintained by Sir Frederick Pollock: Wald's Pollock, Contracts (Williston's ed. 1906) 208. The American editor, however, is unwilling to hold that C's promise to pay \$1,000 would make A's new promise binding, in spite of the fact that C's payment would do so.

rest upon the fact that when making the promises the parties contemplate new and different legal relations. The acts of A and C are sufficient to create contractual relations in the absence of a previous contract between A and B; and the existence of such a previous contract is no adequate reason for depriving A and C of their ordinary powers.

It has been suggested that it is "intrinsically unreasonable" to make this distinction and to hold that a promise of future performance may be regarded as better and more effective legally than actual performance itself.30 The same idea has been expressed in figure of speech by alleging that a bird in the hand must always be at least as good as the same bird in the bush.31 The homely answer to this suggestion is that in the two cases it is not the same bird. In the bilateral case the new promisor (C) requests and obtains a promissory act on the part of A-a statement of intention. In the unilateral case, C requests and obtains certain other action by A, not including any promise. The law should make no effort to determine the relative value of these two actions by A. Here, as in other connections, their value is to be measured by the appetite of C, who is agreeing to pay for them. It is to be remembered that in both cases it is A's immediate act that is requested by C as the return for his own promise. In the bilateral case this act is the immediate promissory act and not the remote performance of the promise.32 No doubt this remote performance is an object of C's desire; but it is desired only as an expected consequence of the contract now being made, and generally as only one of several such consequences. This remote performance may be known in advance to be very uncertain, just as other desirable consequences are. This is always true in the case of aleatory contracts. In such cases the remote performance is neither the requested consideration nor a condition precedent to the duty of the other party. In no bilateral case is the remote performance the requested equivalent of C's promise; it is not the "bird" he is buying. The requested acts in the two cases are known to be different, and the contemplated legal relations are different also. Whether in these cases we regard the "bird" as the requested act of A, or as the legal relations resulting therefrom, it is not the same bird.

In many instances a right to some future performance may be of a greater market value than is the performance itself. Thus, from the

³⁰ Samuel Williston, Consideration in Bilateral Contracts (1914) 27 HARV. L. REV. 524. "To hold that it is a better consideration than actual present performance seems extreme"; Wald's Pollock, Contracts (Williston's ed. 1906) 210. n.

⁵¹ J. B. Ames, Two Theories of Consideration (1899) 13 HARV. L. Rev. 40; H. W. Ballantine, Is the Doctrine of Consideration Senseless and Illogical? (1913) 11 Mich. L. Rev. 427.

²² See Ames, Two Theories of Consideration (1899) 13 HARV. L. REV. 29.

standpoint of benefit to the defendant, a right to the future delivery of a white elephant would be in many instances of great value, whereas by actual delivery he would often have nothing but an elephant on his hands. In DeCicco v. Schweizer, the defendant might easily discover that it was far more advantageous socially and financially to have the promise of a count in the family than to have actual possession and enjoyment of the count in person. From the standpoint of detriment to the plaintiff, it is equally conceivable that the count might find a mere engagement promise more detrimental to himself socially and financially than the final and irrevocable wedding ceremony itself. The very irrevocability of the latter makes for reconciliation with parents and for credit with tradesmen.

What the law has been in the past is to be determined solely by the sum total of its applications in actual cases. What it is to be in the future depends upon the desire of the community and the opinion of the courts. The courts strain after consistency, and their opinion will be swayed by legal theory and logic as well as by precedent. In future cases agreeing with *McDevitt v. Stokes*, the plaintiff will find that his performance as in duty bound to a third person is not a sufficient consideration. But because of the decision of the New York Court of Appeals in *DeCicco v. Schweizer*, a plaintiff in such a case may be encouraged to hope for a righteous decision in his favor.

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# THE FORMATION OF A UNILATERAL CONTRACT

The important distinctions between unilateral and bilateral contracts are slowly coming to be recognized. The case of Brackenbury v. Hodgkin (1917, Me.) 102 Atl. 106 affords an excellent opportunity for setting forth some of these distinctions.1 The exact words used by the parties are not given in the opinion, but the facts are reported by the court substantially as follows: The defendant wrote a letter to her son-in-law, the plaintiff, offering that if he would move from Missouri to Maine and would care for the defendant during her life, he should have the ownership of the home place after the defendant's death and the use of it during her life. The plaintiff moved as requested and cared for the defendant for a few weeks. Trouble ensued, caused, as the court finds, by the unreasonable demands and bad disposition of the defendant, whereupon she conveyed the premises

¹Two other recent cases of unilateral contracts, involving the problem of Shadwell v. Shadwell (1860) 9 C. B. N. S. 159, are discussed at length in this number in an article at page 362.

to her son—a co-defendant. The plaintiff filed a bill in equity to compel a reconveyance from the son to his mother, to restrain the prosecution of a statutory ejectment suit brought by the son, and to obtain a decree that the mother should hold the land in trust for the plaintiff. The relief asked was granted in full.

The court says: "The offer was the basis, not of a bilateral contract, requiring a reciprocal promise, a promise for a promise, but of a unilateral contract requiring an act for a promise. . . . The plaintiff here accepted the offer by moving from Missouri to the mother's farm in Lewiston and entering upon the performance of the specified acts. . . . The existence of a completed and valid contract is clear."

In this case the defendant was the offeror, and by her letter she created in the plaintiff the power to form a contract between them by accepting.2 What was this power and how was it to be exercised? The defendant has clearly offered to undertake the duty of allowing the plaintiff to enjoy the use of certain lands during her life and of conveying to him the fee therein at her death. Did she in return ask the plaintiff to promise to support her until her death? No such promise was asked for in express terms, nor was such a promise expressly made. Nevertheless, it would not be unreasonable to find an implication of such a promise both in the offer and in the acceptance. In such case, the contract would be bilateral, for each of the parties would be undertaking to perform certain acts in the future. The contract would include mutual rights and mutual duties. The act of the plaintiff in moving to Maine might have been understood by both parties as an expression of an intention to undertake the duty of supporting the defendant during her life; that is, this act would be a promissory act. If such was the fact, the decision is justifiable; for the contract was fully completed,—the requested promissory acceptance had been given, and the offeror had knowledge of it.

The court expressly holds, however, that the contract was unilateral. This means that the plaintiff was requested to make no promise, either by words or by other action. He undertook no duty for breach of which he would be bound to pay damages. He could have abandoned the place in Maine and ceased to support the defendant, without committing any breach of contract. Does it not follow from this that the defendant was not bound, either, and still had the power and privilege of revoking her offer?

Suppose the words of the defendant were as follows: "I promise to convey my land to you in return for your moving to Maine and caring for me during my life." Such words as these indicate that the

² For a discussion of the whole subject of the formation of contract from the present writer's point of view, see Arthur L. Corbin, Offer and Acceptance, and Some of the Resulting Legal Relations (1917) 26 YALE LAW JOURNAL, 169.

power of the offeree can be exercised only by a long series of acts extending through the entire life of the defendant. Acceptance would not be complete, and the contract would not be formed, until the instant of the defendant's death.8 Could not the defendant, therefore, at any time prior to her death and prior to complete acceptance, revoke her offer by giving notice to the plaintiff? In general, an offer is supposed to be revocable prior to acceptance. The present case indicates how very inequitable such a revocation might be.4 A quasicontractual action for quantum meruit would not do justice; for the defendant has received only a few weeks' support; and to recover the value of this would not compensate the plaintiff for breaking up his home in Missouri and moving to Maine. In many cases, a very simple remedy would be to hold that the plaintiff's power of acceptance is irrevocable after the plaintiff has done some substantial act in part performance of the requested acceptance. In the present case, however, the plaintiff is deprived of the physical power to accept, even though he may still have the legal power. Readiness to support is not the same as actual support and is not the specified acceptance.5 Perhaps, the chief criticism of the suggested rule of irrevocability is that it operates with too great severity against the offeror.6

There is a third possible assumption in the present case. Suppose the defendant said: "I promise to convey my land to you in return for your moving to Maine, and on condition that you support me during my life." This, too, is an offer of a unilateral contract. The agreed equivalent for the defendant's promise is the plaintiff's action in

³ It might be questioned whether in such a case the formation of a contract is possible, for the reason that death would revoke the offer. Surely, however, no court would give weight to such a suggestion. Even if the offer is revocable (and it probably is not), the acceptance is complete, and the revocation by death does not take effect prior to the completion of the acceptance. If it be true that two living persons are necessary to make a contract, in this case there were two living persons during the entire period of formation. To adopt the opposite view would be worse than mediæval casuistry.

⁴It has been vigorously denied that the revocation is inequitable and as firmly asserted that no offer can be irrevocable. See I. Maurice Wormser, The True Conception of Unilateral Contracts (1916) 26 YALE LAW JOURNAL, 136, following Langdell, Summary of the Law of Contracts (1880) secs. 4, 178. In support of the text above, see the article cited in note 2, supra.

^{*}It appears to be the opinion of the New York Court of Appeals in DeCicco v. Schweizer (1917, N. Y.) 117 N. E. 807, that the requested act must be completed before a contract results. "Until marriage occurred the defendant was not bound. It would not have been enough that the count remained willing to marry." Similarly, a part performance with readiness to complete was held insufficient in Pain v. Bastwick (1621) Cro. Jac. 583. Yet in the present case the court seems to think it enough that the plaintiff "remained willing" to support the defendant during her life.

⁶ Such severity could be avoided as suggested in 27 YALE LAW JOURNAL, pp. 195, 196.

moving to Maine.7 The support of the defendant during her life is a condition precedent to the plaintiff's right to an immediate conveyance. The supposed "contract" is formed upon the plaintiff's arrival in Maine, and thereafter it is too late for the defendant to revoke her offer. It is probable that this was the view that was actually held by the court. In this view the acts of moving to Maine operate to create new legal relations called contract. These relations would include the right not to be disturbed in possession of the home place, the privilege of occupying that place, and the legal power to create a right to the fee by supporting the defendant during her life. These relations were all irrevocable by the defendant. As a correlative to the plaintiff's conditional right to the fee, there would be the conditional duty of the defendant to cause such acts to be done as will convey the fee. The acts of the plaintiff in supporting the defendant for life are facts subsequent to the formation of the contract (the preceding relations), and precedent to the plaintiff's right to an immediate conveyance of the fee.

In cases of this sort, the parties may not be at all clear in their own minds as to the legal relations that they desire to create; and the court must determine the legal relations, not because the parties clearly assented to them but because they willed to do certain acts that ought to result in such legal relations.8 If the court holds that the legal relations are as above, the remedy in the present case was a proper one. The decree is one for specific reparation and specific performance. The defendant is ordered not to disturb the plaintiff's possession; also to hold the fee in trust for the plaintiff. Whether or not the plaintiff will ever be entitled to a conveyance of the fee is a question yet to be determined. His right to such a conveyance is conditional upon support of the defendant during the rest of her life. It does not seem probable that the plaintiff will be able to fulfil this condition after the litigation and ill-will between him and the defendant. Of course, it will be the defendant who is causing the nonfulfillment of this condition; but a court of equity would hardly compel her to continue to live with the plaintiff. She has perhaps promised by implication that she would not prevent the plaintiff from fulfilling the conditions; but even if her conduct is a breach of this

⁷ In this case, also, the problem just discussed above is involved; for the defendant might telegraph her revocation after the plaintiff had sold his home and started for Maine. If the defendant had sent such a telegram the court would no doubt have pushed the moment of acceptance still further back. In Martin v. Meles (1901) 179 Mass. 114, 60 N. E. 397 Mr. Justice Holmes said: "If necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendant's obligation."

^{*}Perhaps this is a further step in the development away from contract back to status. Cf. Nathan Isaacs, The Standardizing of Contracts (1917) 27 YALE LAW JOURNAL, 34.

implied promise or is tortious, it does not follow that the plaintiff should get the entire compensation without rendering any of the service. This is a separate problem. It may be, however, that the present decree will eventually result in the plaintiff's obtaining the fee, on the theory of constructive service and on the ground that the defendant has waived the condition by preventing its fulfillment.

A. L. C.

## "GOING VALUE" FOR PURPOSES OF RATE REGULATION

A recent California case raises in an interesting form the much disputed question, when or to what extent "going value" is value upon which a public utility is entitled to base its rates. San Joaquin Light & Power Corp. v. Railroad Commission (1917, Cal.) 165 Pac. 16. It is generally admitted that "going value" is, to some extent at least, an item of value for rate purposes,1 but there is much confusion with respect to the questions when and to what extent it constitutes such value.2 In the latest ruling on the subject by the United States Supreme Court's it was held that "going value" is "a property right and should be considered in determining the value of the property upon which the owner has a right to make a fair return." This holding, it seemed at first, had practically settled the whole conflict; for, inasmuch as the Supreme Court is, under the Constitution, the court of last resort upon the question of valuation for ratemaking purposes,4 it was to be supposed that other tribunals would follow the Supreme Court upon this question. On the contrary, however, there has been a tendency on the part of many authorities to construe away the apparent effect of the Supreme Court's decision.

A striking illustration of this tendency is the California case above cited. In that case the court affirmed the decision of a commission⁵ in which, it seems, no allowance whatever was made for "going

¹Des Moines Gas Co. v. City of Des Moines (1915) 238 U. S. 153; People v. Wilcox (1914) 210 N. Y. 479, 104 N. E. 911; Public Service Gas Co. v. Board of Commissioners (1913, Sup. Ct.) 89 N. J. L. 463, 87 Atl. 651. See Beale & Wyman, Railroad Rate Regulation (2d ed.) secs. 276, 280.

²Hermann v. Newtown Gas Co. (1916, N. Y. P. S. C., 1st Dist.) P. U. R. 1916 D, 825; People v. Wilcox, supra; Rich v. Biddeford, etc. Co. (1917, Me. P. U. C.) P. U. R. 1917 C, 982; Appleton Waterworks Co. v. Railroad Commission (1913) 154 Wis. 121, 142 N. W. 476; Re Clarksburg Light & Heat Co. (1916, W. Va. P. S. C.) P. U. R., 1917 A, 577; East Bakersfield, etc. Association v. San Joaquin etc. Corporation (1916, Cal. R. C.) P. U. R. 1916 C, 380 (the principal case before the Commission); and numerous other cases. See Whitten, Valuation of Public Service Corporations, secs. 550-644.

⁸ Des Moines Gas Co. v. City of Des Moines, supra.

^{*}Public Service Gas Co. v. Board of Commissioners, supra.

⁵ East Bakersfield, etc. Association v. San Joaquin, etc. Corporation, supra.

value." The reason assigned for the exclusion is that the utility's excessive earnings had been sufficient to offset all past deficits. As the opinion expressly purports to follow the above mentioned Supreme Court decision, the question thus raised by the case is reduced to this: May "going value" under the Supreme Court doctrine be wiped out by subsequent earnings?

The passage in the Supreme Court's opinion, upon which the recent cases rely, is as follows:

"Included in going value as usually reckoned is the investment necessary to organizing and establishing the business, which is not embraced in the value of its actual physical property. . . . For aught that appears in this record these expenses ["overhead charges"] may have been already compensated in rates charged and collected under former ordinances . . . and it is not to be presumed, without proof, that a company is under the necessity of making up losses and expenditures incidental to the experimental stage of the business."

These cases, however, fail to notice that the Supreme Court, not-withstanding its language, did not exclude these expenses. In fact the above-quoted passage is only a *dictum*, for the point was not squarely before the court. Besides, the court, by negative inference, ultimately approved the allowance of these expenses.

Can the doctrine of these cases, then, be supported upon principle? In order to answer this question it will first be necessary to determine definitely just what "going value" is, for it seems that the whole conflict and confusion on the subject is due fundamentally to a confused conception of the nature of the thing in question. What, then, is "going value?" As was pointed out in one of the latest cases, "experts, courts and commissions" do not agree as to what this "elusive, intangible and troublesome" thing is. The United States Supreme Court, however, has supplied a definition which sufficiently expresses the general principle involved. "Going value" that court defines as "the value which inheres in a plant where its business is

⁶The language of the commission is somewhat ambiguous, but both the court and the commission expressly purport to follow the above mentioned decision of the United States Supreme Court, and the Commission expressly states that the development cost has been wiped out by later earnings and that the United States "Supreme Court clearly intimates that if the expense of organizing and establishing the business has already been made good to the utility out of later rates no additional allowance for 'going concern value' may properly be made in a rate case." At any rate both the court and the Commission excluded the whole "item of development cost," estimated, by the deficit method, at \$1,651,021.

Des Moines Gas Co. v. City of Des Moines, supra, at p. 165.

⁸Re Indianapolis Water Co. (1917, Ind. P. S. C.) P. U. R. 1917 E, 556. A very illuminating and thorough discussion of the subject is contained in the report of Hon. H. M. Wright, Master in Chancery, in Spring Valley Water Co. v. City & County of San Francisco, now pending in U. S. Dist. Ct. N. D. Cal.

established, as distinguished from one which has yet to establish its business." "Going value," then, is the difference between the value of a plant considered as a whole in its present condition and the sum of the values of the various component parts of the plant, considered as a "non-going" or static plant with its business and operating system yet to establish. It is indisputable that this added element is a thing of value; but just what does this value represent? It is, apart from "good will," the present representative of the time and effort spent in transforming the static "bare bones" of the plant into the present "going" concern. It is clear, then, that the utility must in some way be compensated for this expenditure. It is settled, however, that "good-will" value, though a part of "going value" as above defined, is not value for purposes of rate regulation. The ultimate question, then, is whether this remaining part of "going value" may be offset by subsequent earnings.

In the first place it is clear that this "going-concern" element, when once it is created, is a continuous instrument of production. i. e., it continues from year to year a permanent item of value which, without further outlay, brings in its annual return. Hence, this part of the "going value," possessing, as it does, the distinguishing characteristic of capital expenditure, constitutes a part of the capital value of the plant. In the second place, the doctrine of these recent cases allows this capital value to be wiped out by subsequent earnings. But if this capital value may be wiped out by later earnings, then by the same reasoning all items of capital value may be wiped out by later earnings, and, therefore, if a utility is allowed to charge sufficient excessive rates the plant's total capital value would be wiped out. and the utility would have to serve the public gratuitously-an absurd conclusion which would seem to establish the fallacy of the doctrine.11 It would seem, therefore, that the above mentioned part of "going value" is always value for purposes of rate regulation, and that cases which make "going value" depend in whole or in part upon the existence of past deficits, or allow "going value" to be offset by subsequent earnings, proceed upon an erroneous theory as to the fundamental nature of this item of value.

T. P. H.

Des Moines Gas Co. v. City of Des Moines, supra, at p. 165.

¹⁰ Willcox v. Consolidated Gas Co. (1909) 212 U. S. 19. See Wyman, Public Service Corporations (2d ed.) sec. 1102.

¹¹ That past rates and earnings, though excessive, may not be considered in fixing present rates, see Kindell v. Adams Express Co. (1908) 13 I. C. C. 475, 490; Bluefield v. Bluefield Waterworks, etc. Co. (1917, W. Va. P. S. C.) P. U. R. 1917 E, 22, 32. See also Beale & Wyman, Railroad Rate Regulation (2d ed.) sec. 271.

CONSTRUCTIVE TRUSTS ARISING FROM BREACH OF EXPRESS ORAL TRUSTS
OF LAND

A recent Washington case raises the troublesome question of the rights of proposed beneficiaries under an oral trust of land. A husband by will left real estate to his wife. At the time of the execution of the will it was orally agreed that the wife, if she survived the husband, should have the use of the property for her life, holding it intact until her death, at which time it should be divided equally among their children. The wife conveyed the property to one of the children. It was held that the other child had no enforceable interest in the property. Brown v. Kausche (1917, Wash.) 167 Pac. 1075.

In reaching this decision the court professed to follow the settled law of Washington, relying upon prior cases in which it had been held that there was no enforceable trust where land was conveyed by absolute deed but upon an oral agreement by the grantee to reconvey to the grantor. In order to determine whether the decisions relied upon by the Washington court were really in point, it is necessary to distinguish more carefully than the court did between different types of cases. They may be grouped under three general heads: (1) transfers inter vivos on oral trusts for the grantor; (2) transfers inter vivos on oral trusts for others than the grantor; (3) gifts by will.

In the first of these groups the authorities in the United States, with hardly a dissenting voice, refuse to recognize that the grantor has an enforceable interest in the property.¹ On the other hand, the modern English rule recognizes a "constructive" trust, based upon the principle that one who refuses to perform an express oral agreement must restore either what he received or its value.² In some cases the result is, of course, to require the grantee to do exactly what he orally agreed to do. This coincidence need not blind us to the real basis for the decision, any more than when the action is brought at law on a quasi-contract where an express oral contract within the statute of frauds has been broken by the defendant after performance by the plaintiff.³ It seems clear that the American courts are

¹ Titcomb v. Morrill (1865, Mass.) 10 Allen, 15. For numerous cases in accord, see the note in 39 L. R. A. (N. S.) 906. In at least one jurisdiction the grantor is permitted to recover the value of the land at law. Cromwell v. Norton (1906) 193 Mass. 291.

² Davies v. Otty (1865) 35 Beav. 208; Haigh v. Kaye (1872) L. R. 7 Ch. App. 469; In re Duke of Marlborough [1894] 2 Ch. 133. There is a tendency in a few American jurisdictions to adopt the English rule. See Taylor v. Morris (1912) 163 Cal. 717, 127 Pac. 66; Bowler v. Curler (1891) 21 Nev. 158, 26 Pac. 226; and other cases cited in 12 Mich. L. Rev. 527, note 64. In many cases, however, the court relies on a "special confidential relation."

^{*}For citation of authorities, see Woodward, The Law of Quasi-Contracts, Chap. VI.

guilty of failing to recognize what is after all a very simple application of ordinary equitable principles, obviously being misled by the coincidence referred to. The almost universally recognized rule that an absolute deed may be shown by extrinsic evidence to have been given to secure the payment of money seems to be based upon a more or less unconscious recognition of the same equitable principle.²

In the second and third groups of cases, however, a different problem is presented, since the trust is for persons other than the grantor or testator. Granting that the express oral trust is unenforceable, does the principle applied in the first group of cases enable us to impose a "constructive" trust obligation upon the grantee or devisee in favor of the proposed beneficiary? So far as the authorities go. this question is usually answered in the negative for the second group⁵ and in the affirmative for the third.6 If all that we have is a failure to keep an express oral agreement to hold in trust for third persons, it seems difficult to find any basis for raising a "constructive" trust on behalf of the proposed beneficiaries on the theory that the grantee or devisee otherwise will be unjustly enriched at their expense, unless we at least tacitly assume that these beneficiaries have been deprived of something to which they were in some way or other entitled-which is, of course, to assume just what we are trying to establish. Nevertheless, as stated, in the third group of cases the authorities (outside of Washington) are very nearly unanimous in imposing a so-called "constructive" trust on behalf of the intended beneficiary. A typical argument is that of Cardozo, J., in a recent decision in New York.

"The principle is now a settled one in this state that where a devise is induced by the promise, express or implied, of the devisee, to devote the gift to a lawful purpose, a secret trust is created; and equity will compel him to apply the property in accordance with the promise by force of which he procured it. . . . A court of equity in such cases exerts its power, not merely because there has been a breach of contract, but because the promise has been used as an instrument to induce the promisee to part with his property, so that the retention of it by the promisor in violation of the promise would result in an unjust

⁴The opinions of the courts are not as a rule very clear as to the real basis for this doctrine, and many apparently believe it to be purely anomalous. Typical cases are: Linkemann v. Knepper (1907) 226 Ill. 473, 80 N. E. 1009; Campbell v. Dearborn (1872) 109 Mass. 130.

⁵Lantry v. Lantry (1869) 51 III. 458. Some authorities are contra, e. g., Fox v. Fox (1906) 77 Neb. 601, 110 N. W. 304. For other authorities in accord and contra, see the note in 39 L. R. A. (N. S.) 906; also 12 MICH. L. Rev. 442, notes 27 and 28. In Ahrens v. Jones (1902) 169 N. Y. 555, 62 N. E. 666, the grantor executed the conveyance while on his death bed and the court enforced the oral trust, apparently assimilating the case to those in group three.

⁶ Riordan v. Bannon (1871) Ir. Rep. 10 Eq. 469; Curdy v. Berton (1889) 79 Cal. 420, 21 Pac. 858. For other authorities in accord see the note in 39 L. R. A. (N. S.) 906.

enrichment and would constitute a fraud. It is not the promise only, nor the breach only, but the promise and the breach combined with the extortion of property from the owner upon the faith of the engagement, which puts the court in motion."

Undoubtedly decisions of this kind appeal to our sympathy, for the only alternative is to impose a constructive trust for the heir of the testator, who in many cases turns out to be identical with the devisee, and who, in any event, is not likely to carry out the testator's wishes. It is, however, difficult to reconcile them with the plain language of the statutes, and it is equally hard to see why, if we are to be consistent, the same result must not be reached where the land is transferred by deed instead of by will.⁸

It has indeed been suggested that in the second and third groups a distinction should be drawn between the mere breach of an oral agreement made in good faith and the obtaining of the gift by means of a promise made in bad faith, i. e., one made with no intention to perform and for the purpose of obtaining the property. This distinction has, to some extent, been followed in the American authorities dealing with transfers inter vivos on oral trusts for third persons,9 but not where the gift is by will. If the statutes of frauds and wills are to be enforced in letter and in spirit, even in the case of bad faith referred to, it seems questionable whether anything more than damages for a tort should be given to the proposed beneficiary. That in a suitable case a tort liability in damages should be recognized for diverting from the plaintiff property which would otherwise have come to him by inheritance or devise, seems clear. See (1917) 27 YALE LAW JOURNAL, 263. To create for the proposed beneficiary an equitable interest in the property, however, under pretence of giving specific reparation for a tort, seems in essence to be nothing more than the enforcement of the oral trust which is forbidden by the statutes. For this reason the decision of the Washington court in the principal case, opposed as it is to the general current of the authorities, seems to be based on sound principles. It is to be hoped. however, that the Washington court, and the American courts in

⁷ Golland v. Golland (1914, Sup. Ct.) 84 Misc. Rep. 299; 147 N. Y. Supp. 263, 267.

⁸ Professor George P. Costigan, Jr., in his exhaustive treatment of the whole subject in 28 Harv. L. Rev. 237, 28 *ibid.* 366, argues (p. 266) that the courts should recognize a constructive trust in both cases. See also the same author's discussion in 12 Mich. L. Rev. 427, 12 *ibid.* 514.

^o Crossman v. Keister (1906) 221 III. 69, 79 N. E. 58. This distinction was approved by the late Professor James Barr Ames. See his essay upon Constructive Trusts Based upon the Breach of an Express Oral Trust of Land, in his Lectures on Legal History, 425, 430. The same result is reached where the conveyance is solicited, or where there is a violation of some "special confidential relationship." The authorities are collected by Professor Costigan in 12 Mich. L. Rev. 442, and note 29.

general, will ultimately come to recognize and enforce a constructive trust on behalf of a grantor who has conveyed on an oral trust for himself.

#### IMMUNITIES OF DIPLOMATIC OFFICERS

A recent English case, Re Suarez (1917, Ch. D.) 117 L. T. 239, again emphasizes the privileged position with respect to judicial process held by diplomatic officers of foreign governments accredited to England. In that case the Bolivian Minister to Great Britain acted unofficially as administrator of the estate of a fellow-national. There being a balance due on his account as such administrator, the plaintiff, as beneficiary of the estate, sought to have a writ of sequestration issued against property of the defendant which was not necessary to maintain his personal comfort or dignity as Minister. Although the Minister had waived his diplomatic immunity from suit, the Court held that no writ of execution could issue against any of his property, in view of the Diplomatic Privileges Act¹ which declared null and void all writs and processes sued out against the person or property of public Ministers.

The immunities of diplomatic officers are extended to them in their official character of state agents and are enjoyed by them as representatives of their sovereigns. The immunity from civil process belongs technically to the Minister's State and does not vest in him personally, and it has been held that, in principle, a diplomatic officer is incompetent to waive it.² The immunities mentioned extend to his family and to the members of his official household.³ Nor do these expire, according to the better opinion, with the cessation of his functions; but they are retained for a reasonable time after he has presented his letters of recall.⁴ It seems also that an ambassador is immune from arrest on civil process while traveling through a third state to which he is not accredited.⁵ Some of the customary diplomatic immunities, particularly the immunity from judicial process, have in many countries found legislative expression in municipal statutes.⁶

¹ Act of 1708 (7 Anne c. 12).

² United States v. Benner (1830, U. S. C. C. Pa.) 1 Baldwin 234.

^{*}Lockwood v. Coysgarne (1765, K. B.) 3 Burr. 1676; Respublica v. DeLong-champs (1784, Pa. O. & T.) 1 Dall. 111.

⁴D'Azambuja v. Pereira (1830, U. S. D. C. Pa.) 1 Miles 366; Contra, Marshall v. Critico (1808, K. B.) 9 East 447.

⁵ Holbrook v. Henderson (1851, N. Y. Super.) 4 Sandf. 619; Wilson v. Blanco (1889) 56 N. Y. Super. 582 and criticism of this case in I Westlake, Int. Law, 265-266.

⁶In the United States, secs. 4063-4064 of the Revised Statutes. In Great Britain, the Act of 1708 (7 Anne c. 12) applied in the principal case. See also, for foreign legislation, Odier, Des privileges des agents diplomatiques, 53-78.

While, in principle, the immunity from judicial process cannot be waived by a Minister, at least without the consent of his government, exceptions have been introduced in various classes of cases in which the Minister has acted in his personal and unofficial character. The most usual cases of this kind arise in civil law countries where the Minister has engaged in trade or commerce, or where he has contracted obligations in a fiduciary capacity as guardian, administrator or trustee. An exception is also made in cases involving local real property held by the Minister as a private individual. By the United States Instructions to Diplomatic Officers this immunity is narrowed still further by a provision that not only real, but also "personal property, aside from that which pertains to him as a Minister, . . . is subject to the local laws."

The broad provisions of the British Statute of 7 Anne c. 12 extends the immunity of foreign envoys from compulsory civil jurisdiction even to cases arising out of commercial transactions in which they may have engaged. And even in cases where by reason of his voluntary submission jurisdiction is assumed, as in the principal case, the court's process by way of execution or sequestration will not, by virtue of the above mentioned Statute extend to any of his property, whether necessary to his official character or owned by him solely as a private individual. Thus, it would seem that in England and probably in the United States, where the liberal provisions of the statute of 7 Anne have been substantially adopted, the property of foreign diplomatic envoys, official or private, is exempt from seizure on execution.

## UNCONSTITUTIONALITY OF SEGREGATION ORDINANCES

The constitutional aspects of race conflict problems are again brought up by Buchanan v. Warley (1917) 38 Sup. Ct. 16.1 Overruling the Court of Appeals of Kentucky, the Federal Supreme Court held a Louisville segregation ordinance unconstitutional, as depriving citizens of property without due process of law. "In effect, premises situated . . . in the so-called white block are effectively debarred from sale to persons of color, because if sold they cannot be occupied by the purchaser nor by him sold to another of the same color."

⁷ See Hershey, Essentials of Int. Pub. Law, 289.

^{8 (1897)} Sec. 47, p. 19, 4 Moore's Digest of Int. Law, 646.

^o Magdalena Steam Navigation Co. v. Martin (1859, Q. B.) 2 El. & El. 94; 1 Oppenheim, Int. Law (2d ed.) 465.

¹⁰ See Taylor v. Best (1854) 14 C. B. 487; Snow, Cases on Int. Law, 90.

¹¹ U. S. Rev. St. Secs. 4063-64.

¹s. c. below (1915) 165 Ky. 559, 177 S. W. 472; see (1915) 25 YALE LAW JOURNAL 81.

² The ordinance classified the blocks on the basis of the relative number of residences, places of abode, and places of public assembly occupied in each block

The line of cases culminating in Buchanan v. Warley gave a new twist to race conflict problems. Hitherto the decisions on such questions have turned on the point of discrimination. So, for example, with the establishment of a negro's right to be tried before a jury from which men of his own race have not been, as such, excluded, whether the exclusion be by legislation,3 or by discrimination in administering a statute fair on its face.4 So, too, with the fruitless attacks on statutes requiring "separate and equal accommodation" for the two races in schools⁵ and in public conveyances.⁶ The Supreme Court was, however, ready to find such discrimination when a statute authorized sleepers and diners to be provided for white persons without corresponding accommodations for colored persons-however slight might be the demand from the latter class.7 Legislation forbidding intermarriage between persons of white and black blood,8 or laying severe penalties on fornication and adultery where the offenders were of different race,9 was attacked on similar grounds, but was upheld. Discrimination, finally,-deprivation of rights and liberties because of race, color, or previous condition of servitude—is the issue on which the disenfranchisement cases have sought a square decision, with varying results.10

But in the principal case the plaintiff was a white man, a landowner, seeking to enforce against a negro a contract for the sale of land made subject to the purchaser's liberty under the law to occupy the premises, which liberty the Louisville ordinance would destroy. All the segregation legislation, indeed, since the original Baltimore ordinance in 1911, has been carefully drawn to avoid any question of discrimination by applying to whites and blacks alike.¹¹ But the earlier ordinances were found to exceed the police power as being in some respects unreasonable in their provisions. North Carolina found one out of keeping

by the different races. This discussion follows the court in speaking only of "residences" to include all the above.

It is to be noted that the last phrase in the passage quoted must mean "sold so as to convey the privilege of occupancy."

³ Strauder v. West Virginia (1879) 100 U. S. 303.

⁴Ex parte Virginia (1879) 100 U. S. 339.

⁵Roberts v. City of Boston (1849, Mass.) 5 Cush. 198; People v. Gallagher (1883) 93 N. Y. 438; and see, as to private schools, Berea College v. Commonwealth (1906) 123 Ky. 209, 94 S. W. 623.

⁶ Plessy v. Ferguson (1896) 163 U. S. 537, 16 Sup. Ct. 1138.

⁷ McCabe v. Atchison etc. R. Co. (1914) 235 U. S. 151, 35 Sup. Ct. 69.

⁸ State v. Gibson (1871) 36 Ind. 389, cited and approved, Plessy v. Ferguson, supra, 545; and see Keen v. Keen (1904) 184 Mo. 358, 83 S. W. 526.

Pace v. Alabama (1882) 106 U. S. 583, 1 Sup. Ct. 637.

¹⁰ Cf. Anderson v. Myers (1910, C. C. Md.) 182 Fed. 223, with Atwater v. Hassett (1910) 27 Okla. 292, 111 Pac. 802. On this question of disenfranchisement see Julien C. Monnet (1912) 26 HARV. L. Rev. 42.

¹¹ Cf. State v. Gurry (1913) 121 Md. 534, 546, 88 Atl. 546, 551.

with the public policy of the state.¹² Even where they were welcomed as useful and desirable for the purpose of reducing race friction and promoting race purity in congested city districts, the courts found one fault in them fatal: they did not respect the full property rights existing at the date of passage.¹³ Though a man already had the legal privilege of residing on certain land, his privilege was cut away if the land lay in an area forbidden to his race, and he had not yet moved in. It may be questioned how far this legislative deprivation of privilege is more stringent than the concededly valid denial to liverymen¹⁴ or liquor dealers¹⁵ of the use of their premises in certain districts for the only purpose for which they bought. Be that as it may, the ordinance in the present case was drawn to avoid that difficulty: it was expressly left free to anyone to exercise whatever privilege of residence, etc., he possessed at the time of enactment.¹⁶

Invalidity in the principal case, then, arises not out of denial of user to present owners, but out of restriction of the power of alienation. Alienation is the extinguishment in the present owner of all the legal relations which go to make up ownership, and the creation of a full new set of corresponding relations in the new owner.¹⁷ If the power to alienate the legal interest in certain premises includes the power to create in another just such legal relations with regard to those premises as the alienor himself enjoys, it is clear that the ordinance in question does seek to cut down that power. Where the land lies, e. g., in a "white block," the owner himself has the privilege of occupancy; he can extinguish his own privilege by selling to a negro, but he can no longer create a corresponding privilege in a negro vendee.

¹² State v. Darnell (1914) 166 N. C. 300, 81 S. E. 338.

¹³ State v. Gurry, supra; Carey v. City of Atlanta (1915) 143 Ga. 192, 84 S. E. 456. In Coleman v. Town of Ashland (1915) 117 Va. 692, 86 S. E. 139, the court drew this same distinction, declared the ordinance invalid as to rights, etc., existing prior to its passage, but upheld it as to those accruing subsequently.

For a more drastic attempt at segregation, requiring even established residences in the forbidden district to be vacated, see *In Re Lee Sing* (1890 C. C. N. D. Cal.) 43 Fed. 359. And see note 16.

¹⁴ Cf. the principal case, p. 18.

¹⁵ State v. Ball (1909) 19 N. D. 782, 123 N. W. 826.

¹⁶ After the Louisville ordinance had been held valid (see note 1) Atlanta tried again, borrowing the Louisville text; this time the Georgia court upheld the ordinance. Harden v. City of Atlanta (1917, Ga.) 93 S. E. 401. It was distinguished from that in the Carey case, supra, as not disturbing rights already vested. The present discussion seeks to show that such a distinction is misleading, vested rights, etc., being disturbed in any such case. But there might be tenable ground for differentiation in the varying value of the landowner's loss under one or the other form of ordinance. See note 22, infra.

¹⁷ So in the case of simple bargain and sale; the new relations differ somewhat, even in their sum, from the old, where the new estate is divided—for example, a life estate with remainder over.

But may it not be doubted whether this cuts down the owner's market for unimproved real estate further than would a fire regulation forbidding the erection in a certain district of any but stone houses?18 None would then be able to buy for residence purposes but those whose cash or credit was sufficient for a stone house; the governmental action would "effectively debar sale" to persons whose pocketbook lacked a certain fatness. And the question which the court finds presented in the instant case would be rephrased: "May the occupancy, and, necessarily, the purchase and sale of which occupancy is an incident, be inhibited by the states, or by one of their municipalities, solely because of the financial standing of the proposed occupant of the premises?"19 Undoubtedly, yes, where public policy demands; yes, as well, where the sole objection is the proposed occupant's actual or proposed business. Nor is it clear that the evils from intermingling of the races in crowded residence sections are less than those arising from the liquor traffic, nor of less importance to the public.

Neither does the power by contract of sale to create each of the property relations in a person of another race seem more sacred and immutable²⁰ than that other power which a statute may destroy: the

¹⁸ Cf. First Natl. Bk. v. Sarlls (1891) 129 Ind. 201, 28 N. E. 434.

¹⁹ "Solely because of the color," the opinion reads, p. 18. This phrasing of the question does not fairly present the question involved in the case. It stresses—or over-stresses—one of the conflicting interests, that of the property owner, but opposes to it not the community interests it must be weighed against, but the proposed yardstick of classification. Yet the justification for such legislation lies not in the fact of one man's color or financial inability, but in the interest of the public to keep down the danger of fire, or of amalgamation, on the one hand, and race friction, on the other. Any yardstick reasonably suited to the purpose should be held good, as it has been in the school cases.

It is submitted that underlying the illogic of the court's question and whole opinion there is an inchoate sense of rebellion against extending such exercise of the police power as practically confiscates much of the value of a man's property. The legality of such exercise is indeed established by the cases; but would not some proceeding in the nature of eminent domain better satisfy our present idea of justice?

²⁰ Compare the language in State v. Darnell, supra, quoted in Carey v. City of Atlanta, supra, 200, with that of Justice Lumpkin's admirable special concurrence, ibid. 202. Rights, etc., cannot be immutable or absolute. They are creations of society, exist only where and while society exists, and change with society's changing complexion. Even so-called natural rights are merely those, counterparts of which are conferred by most of the societal groups known to us. If, therefore, the community sense ever insistently demands, for instance, a certain restriction of the power to alienate residences, sooner or later that restriction will force its way into the law. Cf. Prof. Arthur L. Corbin, The Law and the Judges (1914, Jan.) Yale Review. It will be noted that Harden v. City of Atlanta, supra, brings the Georgia court substantially into the position marked out previously by Lumpkin, J.

power by marriage contract to create in oneself and a person of another race the whole of the complex relations of marriage.²¹

Where a segregation ordinance is drawn, then, to apply similarly to members of both races, and where public policy justifies its passage,²² analogy would seem to show that no undue strain on the police power is required to sustain such restriction of rights, privileges, and powers as is occasioned by the ordinance. The more certainly would it seem that Kentucky and Virginia were sound in upholding such legislation where it cut off only privileges of occupancy accruing after enactment. None the less the decision in the principal case is, unfortunately, conclusive that for the time being the interests of the public in race segregation are in law outweighed by those of landowners whose power of alienation segregation would restrict; city residence districts must still be tailored in pepper-and-salt, and not in checks.

#### STATE VERSUS FEDERAL RULES AS TO PRICE RESTRICTIONS

A recent decision by the court of chancery of New Jersey presents a novel aspect of the much-discussed subject of price-fixing agreements as restraints of trade. A statute of that state¹ prohibits, among other acts discriminatory against the good will of another's business, price inducements extended by dealers in violation of the terms of printed notices accompanying the goods from the hands of the manufacturer. In the principal case watches manufactured in New York were sold to jobbers in New Jersey, each watch bearing a notice as to its retail

²¹ Some cases go so far as to hold an inter-race marriage invalid, although it was good by the *lex loci celebrationis*. So *State v. Tutty* (1890, C. C. S. D. Ga.) 41 Fed. 753.

²² Here, in the present state of the law, is the real crux in police power cases. The interests of him who suffers must be balanced against those of his neighbors and those of the public at large. The up-shot of the balancing will show the ordinance reasonable or unreasonable; distinguishing segregation in crowded centers, for instance, from that in thinly peopled country. Even then, previous decisions—whose dicta are cited to support this!—show that the unreasonableness must be flatfooted to justify action by the court. Booth v. Illinois (1902) 184 U. S. 425, 22 Sup. Ct. 425. For a criticism of the principal case on similar grounds, see (1917) 16 Mich. L. Rev. 109.

^{1&}quot;It shall be unlawful for any merchant, firm, or corporation to appropriate for his or their own use a name, brand, trade-mark, reputation, or good-will of any maker in whose product said merchant, firm, or corporation deals, or to discriminate against the same by depreciating the value of such products in the public mind, or by misrepresentation as to value or quality, or by price inducement, or by unfair discrimination between buyers, or in any other manner whatsoever, except in cases where said goods do not carry any notice prohibiting such practice and excepting in case of a receiver's sale, or a sale by a concern going out of business." N. J. Laws of 1916, c. 1907.

price. The defendant was a retail dealer who acquired the watches from the jobbers. It was held that the manufacturer was entitled to an injunction against a violation by the defendant of the terms of the price-fixing notice. R. H. Ingersoll & Bro. v. Hahne & Co., 101 Atl. (N. J.) 1030.

In upholding the statute and construing it as applying to the fixing of wholesale and retail prices by the manufacturer, the court vigorously challenged the doctrine of the federal Supreme Court in the *Dr. Miles Medical Co.* case² that such price-fixing arrangements by contract are in unlawful restraint of trade at common law. The merits of this controversy do not primarily concern us.³

A more serious question for our purpose is whether this controversy was open to the New Jersey court or to the New Jersey legislature. The court unquestionably regarded its decision as in conflict with those of the Supreme Court of the United States on the common law

It is submitted that the decisions which ignore the arguments in favor of the validity of such agreements mark a reversion to an old condition of rigid rules governing this subject prior to the decision of Nordenfelt v. Nordenfelt Co. (H. L.) [1894] A. C. 535, and in particular that the reasoning which limits the protection of good will to the case of a purchase of an established business is an artificial deduction from the incidental fact that the general doctrine of restraints of trade happened to reach its maturity with respect to this class of cases. See, for example, opinion of Hughes, J., in Dr. Miles Medical Co. v. Park & Sons, supra, and article in 25 Harv. Law Rev. 59, supra. No reason exists for assuming the classification by Taft, J., in U. S. v. Addyston Pipe & Steel Co. (1898, C. C. A. 6th) 85 Fed. 271, 282, to be exhaustive. The nature of the subject is such as to preclude the possibility of an exhaustive classification.

For the "rule of reason" as applied generally, see also Central Shade Roller Co. v. Cushman (1887) 143 Mass. 353, 9 N. E. 629; Meyer v. Estes (1895) 164 Mass. 457, 464, 41 N. E. 683; United Shoe Machinery Co. v. Kimball (1907) 193 Mass. 351, 79 N. E. 790; Leslie v. Lorillard (1888) 110 N. Y. 519, 18 N. E. 363.

²Dr. Miles Medical Co. v. Park & Sons (1911) 220 U. S. 373, 31 Sup. Ct. 376; Bauer v. O'Donnell (1913) 229 U. S. 1, 33 Sup. Ct. 616; Motion Picture Patent Co. v. Univ. Film Co. (1917) 243 U. S. 502, 37 Sup. Ct. 416; Straus v. Victor Talking Machine Co. (1917) 243 U. S. 490, 37 Sup. Ct. 412; (see on the last two cases, Comment in (1917) 26 Yale Law Journal 600); Ford Motor Co. v. Union Motor Sales Co. (1917, C. C. A. 6th) 244 Fed. 156. See also "Price Restriction on the Resale of Chattels," by William J. Shroder, 25 Harv. Law Rev. 59.

^{*}For the arguments in favor of the validity of such agreements see the principal case; Dr. Miles Medical Co. v. Park & Sons, supra (dissenting opinion of Holmes, J.); Garst v. Harris (1900) 177 Mass. 72, 58 N. E. 174; Fisher Flouring Mills Co. v. Swanson (1913) 76 Wash. 649, 137 Pac. 144; Walsh v. Dwight (1899, N. Y.) 40 App. Div. 513, 58 N. Y. Supp. 91; Com. v. Grinstead (1901) 111 Ky. 203, 63 S. W. 427; Elliman & Sons Co. v. Carrington & Sons [1901] 2 Ch. 275; Nat. Phonograph Co. v. Edison-Bell Consol. Phonograph Co. (C. A.) [1908] 1 Ch. 335. See also Grogan v. Chaffee (1909) 156 Cal. 611, 105 Pac. 745, and Ghirardelli Co. v. Hunsicker (1912) 164 Cal. 355, 128 Pac. 1041.

issue involved.⁴ No attempt was made, or could be made, to distinguish the case in favor of the validity of the contract, as such, under the federal decisions. No pretense of an actual agency between the parties existed as in the recent case of Ford Motor Co. v. Boone, Inc.⁵ The relation of the parties, if contractual at all, was not more clearly so than in the Dr. Miles Medical Co. case. The fact, mentioned in the opinion, that the goods were unpatented, manifestly could not help the case in favor of validity.⁶ In a few brief sentences the question was dismissed as to whether the statute of the state was inconsistent with, and therefore overridden by, the Sherman Law.⁷

This decision could not have been based on the ground that such contract as there may have been did not relate to interstate commerce. The price-fixing scheme, if it was such, affected shipments across state lines as clearly as did those in the *Dr. Miles Medical Co.* case. Yet the last named authority, while not bringing into prominence the Sherman Act, expressly bases its decision in part upon a determination of what was prohibited by that statute.⁸ This leaves open no sliding scale of legality dependent upon the diverging local rules of reasonableness. The sole question is, therefore, can a state legislature command the performance of certain acts which the federal laws have forbidden the parties to contract, or combine, or conspire to do?

If this were an attempt by a state to validate a contract rendered invalid by federal legislation, the answer would be too obvious for discussion. Such contracts are past all question subject to the interstate commerce power. That power has been exercised by Congress. No more directly incompatible legislation could be conceived than an attempt by a state to impose a new and inconsistent rule of validity applicable to interstate and intrastate contracts alike.⁹

Can the legislature, however, interpose after the goods have reached the New Jersey dealer, and become mingled with the general mass of commodities subject to local jurisdiction, 10 and then compel the performance of the very acts which the parties could not have contracted to do, this coercion operating not by way of the enforcement of a contractual obligation, but by the creation of a new, independent, non-contractual, statutory duty—a rule of conduct merely, to which the

See principal case, p. 1031.

⁵ (1917, C. C. A. 9th) 244 Fed. 335.

⁶ See opinions in Motion Picture Patent Co. v. Univ. Film Co. and Straus v. Victor Talking Machine Co., supra.

⁷ See principal case, p. 1032.

⁸ See Dr. Miles etc. Co. v. Park & Sons, supra, 409.

^o Gibbons v. Ogden (1824, U. S.) 9 Wheat. 1; Co. of Mobile v. Kimball (1880) 102 U. S. 691; Wisconsin v. Duluth (1877) 96 U. S. 379; Manchester v. Mass. (1891) 139 U. S. 240, 11 Sup. Ct. 559.

¹⁰ See Brown v. Maryland (1827, U. S.) 12 Wheat. 419 and Crowley v. Christensen (1890) 137 U. S. 86, 11 Sup. Ct. 13.

domestic dealers must submit as well as to all other regulations against infringements of the trade rights of others?

We must carefully differentiate two distinct lines of decisions. Numerous cases have accorded to the states the power to exercise certain police functions affecting interstate commerce incidentally and only measurably, and operating only when the acts of Congress are silent.¹¹ Such are the pilotage cases,¹² the quarantine cases,¹³ and those involving intrastate carriers constituting parts of a larger interstate nexus of transportation.¹⁴ In these cases the failure of Congress to legislate and the moderate degree of the interference are both important criteria of the constitutionality of the state legislation.

But another important class of cases exists where no such limitation of degree is recognized with respect to the state power, and where the presence or absence of congressional legislation of a contradictory purpose is of no importance. Such are the decisions giving to the states the full power to prohibit the sale of intoxicating liquors after removal from the original package, although the effect of such exercise of power is to render valueless a privilege of importation guaranteed against state interference.15 Similar instances are those of state powers of taxation of imported goods after they have lost the character of imports,16 or the power to tax17 or prohibit18 the manufacture of an article intended for transportation in interstate commerce. The examples could be multiplied hypothetically.19 Not merely has the state these powers, but no one would seriously ascribe to Congress, under the interstate commerce clause, the power to take them away by legislation. Moreover, the extent to which the legislation may interfere with a purpose of the interstate commerce power is an irrelevant inquiry. The single decisive question is, has the interstate transaction begun, or if begun has it terminated, at the time that the police power of the state attempts the exercise of its function?

¹¹ Wilson v. Black Bird Creek Marsh Co. (1829, U. S.) 2 Pet. 245; Cooley v. Board of Wardens (1851, U. S.) 12 How. 299; New York v. Miln (1837, U. S.) 11 Pet. 102; Gilman v. Philadelphia (1865, U. S.) 3 Wall. 713, 727; Escanaba Co. v. Chicago (1882) 107 U. S. 678, 2 Sup. Ct. 185.

¹² Cooley v. Board of Wardens, supra.

¹⁸ Morgan v. Louisiana (1886) 118 U. S. 455, 465, 6 Sup. Ct. 1114.

¹⁴ Chicago, etc. Ry. v. Iowa (1876) 94 U. S. 155.

¹⁵ Crowley v. Christensen, supra.

¹⁶ Brown v. Maryland, supra.

¹¹ Coe v. Errol (1886) 116 U. S. 517, 6 Sup. Ct. 475; Diamond Match Co. v. Ontonagon (1903) 188 U. S. 82, 23 Sup. Ct. 266; U. S. v. Knight Co. (1895) 156 U. S. 1, 15 Sup. Ct. 249.

¹⁸ Bartemeyer v. Iowa (1873, U. S.) 18 Wall. 129; Kidd v. Pearson (1888) 128 U. S. 1, 9 Sup. Ct. 6.

Thus Congress has complete control of the subjects of immigration. Henderson v. New York (1875) 92 U. S. 259. Yet no one would deny to the state the exclusive power to legislate respecting the civil rights of aliens to a degree rendering the Congressional policy abortive within the state jurisdiction.

Obviously the principal case, if upheld, must fall in this the latter class of decisions. The protection of the good will of an established business is incontestably a legitimate object of the exercise of the police power of a state, yet its exercise in this instance approaches in effect the actual undoing of the positive dispositions of Congress. Has the interstate transaction ended at the time that the act of New Jersey comes into application? The conduct of the wholesale and retail dealers after the receipt of the manufactured product, is, taken by itself, plainly outside the sphere of interstate commerce in its most liberal sense. Not merely had Congress not enacted that they should not observe the terms of the accompanying notices but it undoubtedly could not impose such a restriction upon intrastate commercial conduct. It is, as we have seen, no novelty to the law that this limitation of power may sometimes render the purposes of federal legislation liable to be defeated by state legislation intervening after the subject-matter has passed from federal control.

But other difficulties remain. If, for example, the contract as such is void under the federal law, but the printed notice may be effectual under the state law to accomplish the purpose of the manufacturer or producer, is the act of sending the notices itself a violation of federal law? Is an intention to contract or combine or conspire to accomplish his purpose necessarily presupposed in an attempt to avail himself of the rights accorded by the law of the state? Does the party who buys goods accompanied by the printed notice participate by virtue of that act in an illegal combination? To answer these questions affirmatively would be tantamount to an admission that the price-fixing combination or conspiracy which is in its totality an interstate transaction is not completed until its purpose is effected, and that state legislation intervening prior to this point of time is void.20 But is not the intention to contract or combine in a price-fixing scheme quite distinct from the intention to avail oneself of the non-contract right or to subject oneself to the non-contract duty created by the statute of a state requiring observance of the terms of a price-fixing notice, and may not the latter exist entirely apart from the former, however difficult of determination the question of fact may be? It is submitted that this situation of fact is entirely possible, and, if it exists, the right and duty created by state law are in no true sense a part of an antecedent combination or conspiracy, that the interstate transaction is, from every possible viewpoint, closed, and that the state is, from that point forth, sole judge of its commercial policy.

The inconsistency in purpose in this case, however, must not be exaggerated. Prohibitions of restraints of trade, common law or statutory, do not decree that restraints of trade shall not exist but that

²⁰ Swift & Co. v. U. S. (1905) 196 U. S. 375, 25 Sup. Ct. 276; Northern Securities Co. v. U. S. (1904) 193 U. S. 197, 338, 24 Sup. Ct. 436.

individuals by their private acts, pursuant to their own judgments of business expediency, shall not have the power to create them. A state statute enacting a new and compulsory standard of trade morality, in itself creating what from the standpoint of federal law is a restraint of trade, does not, except in its ulterior aspects, contravene or frustrate their purpose.

It may be urged that a recognition of this state power concedes an unlimited opportunity to frustrate interstate commerce legislation, or in particular legislation against restraints of trade. If a state can, pursuant to the domestic policy of protecting business good will, require the performance of acts which federal legislation was intended, not to forbid, but to prevent, can it also resolve upon a policy requiring the performance of all acts which parties have contracted, though in violation of federal law, to perform? Such an inquiry ignores the essential distinction between a domestic policy which incidentally frustrates a purpose of the interstate commerce power, and a domestic policy which consists merely in the frustration of such purposes. The latter might well be held not to be an exercise of the police power at all. The present statute, however, has a purpose clearly bringing it within the former class.

We conclude, therefore, that the decision in the principal case is correct, both with respect to the rule of policy enunciated, and with respect to the power of the state to establish that policy.

C. R. W.

# RECENT CASE NOTES

Bankruptcy—Jurisdiction of Federal Courts—Suit on Unpaid Stock Subscription.—The trustee of a bankrupt California corporation brought suit in equity in the United States District Court for the Southern District of California against the defendant and about 3,000 other residents of the district to recover overdue balances on unconditional stock subscriptions. The defendant moved to dismiss the bill. *Held*, that the Federal Court had no jurisdiction to entertain the suit. *Kelley v. Gill* (1917) 38 Sup. Ct. 38.

This decision settles an important point, previously uncertain, in the administration of bankrupt corporations. The broad jurisdiction conferred upon bankruptcy courts by section 2(7) of the Bankruptcy Act is restricted by section 23(b), which prohibits the trustee (subject to certain exceptions) from suing a defendant, without his consent, in a court other than that in which the bankrupt might have sued had bankruptcy not intervened. The limits of the federal court's jurisdiction were much clarified by Bardes v. Hawarden Bank (1900) 178 U. S. 524, and the 1903 and 1910 amendments to section 23(b). But some authorities still asserted that a suit in equity to collect unpaid stock subscriptions would lie in the district courts. Skillin v. Magnus (1907, D. C., N. D. N. Y.) 162 Fed. 689; 7 C. J. 255. In the instant case it was argued that a bill in equity against all the stockholders was authorized by the 1910 amendment to section 47a(2), giving the trustee all the rights, remedies and powers of a judgment creditor; that this was not a suit which the bankrupt itself could have brought and that therefore the suit was not within the prohibition of section 23(b). But the Supreme Court held that the appropriate remedy for the trustee, as well as for the bankrupt, was a separate suit at law against each stockholder, the reason being that there was no common issue between the alleged stockholders and the corporation and therefore no basis for equity taking jurisdiction to avoid a multiplicity of suits at law. It is true that a judgment creditor may sue all the stockholders in equity to reach unpaid stock subscriptions as assets of the debtor corporation. Harmon v. Page (1882) 62 Cal. 448. But to the argument that section 47a(2), as amended in 1910, gave the trustee a similar remedy, the court merely replied that the amendment "did not confer new means of collecting ordinary claims due the bankrupt." Whether this was intended as an authoritative interpretation of that amendment is left somewhat doubtful by the additional statement that even if equity were to take jurisdiction to avoid multiplicity of actions at law, the suit could not be brought in the federal court, because the cause of action was one on which the bankrupt could have sued only in a state court. The trustee's power to sue at law in the state courts is clear. Jeffery v. Selwyn (1917) 220 N. Y. 77, 115 N. E. 275; Clevenger v. Moore (1904) 71 N. J. L. 148, 58 Atl. 88. In the instant case the subscriptions were overdue, so that no order by the bankruptcy court directing payment of subscriptions was a necessary condition precedent to fixing the stockholders' liability. The opinion expressly leaves open the question whether the federal court has jurisdiction when such an order is necessary, either in lieu of a call or for the purpose of pro-rating among the stockholders the amount necessary to be collected to satisfy creditors. Cf. Scoville v. Thayer (1881) 105 U. S. 143.

BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—INSURANCE POLICY RESERVING POWER TO CHANGE BENEFICIARY.—Policies on the bankrupt's life having a cash surrender value were payable to named beneficiaries but reserved to the insured

the power to change the beneficiaries without their consent. The trustee claimed that the bankrupt must either deliver the policies or pay him their cash surrender value. *Held*, that the trustee was entitled to the relief claimed. *Cohen v. Samuels* (1917) 38 Sup. Ct. 36.

The interpretation of section 70a(5) of the Bankruptcy Act has caused much disagreement among the lower federal courts. Clause (5) 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 representatives," he may pay its cash surrender value to the trustee and continue to hold "such policy free from the claims of the creditors . . .; otherwise the policy shall pass to the trustee as assets." This language was capable of two constructions. One line of cases held the view that only policies having a cash surrender value passed to the trustee. Gould v. N. Y. Life Ins. Co. (1904, D. C., E. D. Ark.) 132 Fed. 927. Other courts maintained that all policies payable to the bankrupt were vested in the trustee by that portion of clause (5) which preceded the proviso, and that the proviso merely gave the bankrupt a power to redeem such policies as had a cash surrender value by paying this sum to the trustee. In re Welling (1902, C. C. A. 7th) 113 Fed. 189; and see Remington, Bankruptcy (2d ed.) sec. 1002 et seq. The controversy was settled by the Supreme Court in Burlingham v. Crouse (1913) 228 U. S. 459, 33 Sup. Ct. 564 and Everett v. Judson (1913) 228 U. S. 474, 33 Sup. Ct. 568. These cases held that the interest of the trustee in life insurance policies extended only to their cash surrender value determined as of the date of the filing of the bankruptcy petition. On the strength of these decisions it has been thought by some authorities that the trustee's sole source of title is the proviso, and that consequently a policy not expressly payable to the bankrupt, his estate or representatives, does not pass to the trustee, even though the bankrupt has the power to change the beneficiary at will and thus obtain for himself the cash surrender value of the policy. This was the holding of the District Court and of the Court of Appeals in the instant case. In re Samuels (1917, C. C. A. 2d) 237 Fed. 796. See also Remington, Bankruptcy (2d ed.) sec. 1009; In re Arkin (1916, C. C. A. 2d) 231 Fed. 947; cf. In re Hammel (1915, C. C. A. 2d) 221 Fed. 56. But see contra: Malone v. Cohn (1916, C. C. A. 5th) 236 Fed. 882; In re Bonvillain (1916, E. D. La.) 232 Fed. 370; In re Shoemaker (1915, E. D. Pa.) 225 Fed. 329. Fortunately the dispute has now been settled by supreme authority and the more liberal interpretation finally established. The court did not deem it necessary to support its decision by any extended argument. The fact that the policies, while not payable to the bankrupt, could be made so at his will and by his simple declaration, was thought to bring the case within the proviso, even if that were regarded alone. But the court also buttressed its decision by a reference to clause (3) of section 70a which confers upon the trustee all powers which the bankrupt might have exercised for his own benefit. Whether the reference to clause (3) was intended as an argument in support of the court's construction of the proviso, or as an assertion that the bankrupt's power to change the beneficiary passed to the trustee by virtue of clause (3), does not clearly appear.

Carriers—State Regulation of Rates—Commutation Tickets.—A railroad company sought an injunction to restrain the Public Service Commission of Maryland from enforcing an order revising a schedule filed by the company of proposed increases in its voluntarily established commutation rates for intrastate passenger service. *Held*, that the injunction was properly refused since, in a case where the railroad had itself established special commutation rates, the

state had power to regulate such rates on the basis of a lower charge than for ordinary passenger service. White, C. J., McKenna and Reynolds, J. J. dissenting (without opinion). Pennsylvania R. R. Co. v. Towers (1917) 38 Sup. Ct. 1.

The limitation to cases where the railroad had itself voluntarily established commutation rates resulted from the state court's construction of the powers of the State Commission as limited to such cases. The reasoning of the opinion would seem equally applicable to cases where no such rates had previously been established and also to interstate commutation rates. The authority to establish a lower rate for special forms of passenger service than is enforced as a reasonable rate for general service had been recognized by the Supreme Court in earlier decisions. Interstate Cons. St. Ry. Co. v. Massachusetts (1907) 207 U. S. 79, 28 Sup. Ct. 26 (reduced rates for school children's tickets); Minnesota Rate Cases (1913) 230 U. S. 352, 33 Sup. Ct. 729 (half fare tickets for children under 12). This principle had also been expressly applied to commutation tickets both by the Interstate Commerce Commission and by state courts. Commutation Rate Case (1911) 21 Int. Com. Rep. 428; People v. Public Service Commission (1914, N. Y.) 159 App. Div. 531, 145 N. Y. Supp. 503, affirmed 215 N. Y. 689, 109 N. E. 1089. In the regulation of freight rates, and of the rates of such public utilities as telephone companies and electric light and power companies, more or less elaborate classification with different unit charges for different classes of service is of course familiar practice, and in fact is recognized as a practical necessity. The doubt in regard to commutation rates arose from the decision in Lake Shore & M. S. R. R. Co. v. Smith (1899) 173 U. S. 684, 19 Sup. Ct. 565. In that case the court held that a state could not by statute require the issuing of mileage tickets at a less rate than the maximum rate per mile also fixed by statute for passenger travel in general. In the principal case commutation tickets are distinguished from mileage tickets, and expressions in the opinion in the Lake Shore case at variance with the present decision are expressly overruled. The result commends itself as in line with the general principles of public service regulation.

CONFLICT OF LAWS—DUE PROCESS—JURISDICTION OF NON-RESIDENT SERVED BY PUBLICATION.—An equitable action for separate maintenance was brought in Washington, one defendant, the husband, being a non-resident served by publication only, and the others defendants, personally served in Washington, being respectively a trustee of the absent husband and the maker of a promissory note payable to him. Against the frustee and the debtor an injunction issued restraining payments to the husband and ordering the funds to be paid into court when realized or due. The defendants contested the court's jurisdiction. Held, that the injunction was a sufficient proceeding against the property interests of the defendant to stamp the suit as one in rem and that the court had jurisdiction. Four justices dissenting. Kelley v. Bausman (1917, Wash.) 168 Pac. 181.

Three successive questions may arise for determination in such a case: (1) Whether the statutes governing suits against non-residents are intended to include not only attachments and garnishments but also suits in equity wherein an injunction is sought against a resident debtor, or other obligor, of the non-resident defendant. Under their respective statutes some courts have decided the question affirmatively. Bragg v. Gaynor (1893) 85 Wis. 468, 55 N. W. 919; Benner v. Benner (1900) 63 Oh. St. 220, 58 N. E. 569. Contra, Waldock v. Atkins (1916, Okla.) 158 Pac. 587. See also, Rhoades v. Rhoades (1907) 78 Neb. 495, III N. W. 122 (receiver appointed and jurisdiction sustained). (2) Whether in the absence of statutory authorization a court of equity may assume jurisdiction in such a case. No case has been found involving this precise point. (3) Whether with or without a statute such an assumption of jurisdiction is

due process of law to the absent defendant. In the principal case there was an injunction plus an order to pay into court. A garnishment proceeding is practically the same in object, method and effect, and seemingly identical in principle. A garnishment is regarded as a suit quasi in rem and has been held to be due process of law even as to defendants served only by publication. Coyne v. Plume (1917) 90 Conn. 293, 297, 97 Atl. 337, 339. It is submitted that a proceeding by injunction, as in the principal case, should likewise be held to be due process. See Pennington v. Fourth Nat. Bk. (1917) 243 U. S. 269, 37 Sup. Ct. 282; also (1917) 27 Yale Law Journal 252, and the following headnote.

Confiling of Laws—Judgments quasi in Rem—Full Faith and Credit.—Suit having been brought in Missouri on a policy of life insurance and a judgment in Connecticut having been set up by the insurance company as a defense, the Missouri court so interpreted both the Connecticut judgment and the company's Connecticut charter as to favor the plaintiff's recovery. Held, that not only must the judgment be given full faith and credit but the powers conferred by a Connecticut charter, as interpreted by the Connecticut court, must be likewise observed. Hartford Life Insurance Co. v. Barber (1917) 38 Sup. Ct. 54.

See Comments, next month, and compare the discussion of a closely related problem (1917) 27 YALE LAW JOURNAL 255.

Constitutional Law—Powers of the States—Treaty-Making Powers.— A local drainage board of North Dakota entered into an agreement with a Canadian municipality for the construction of a drain across the international boundary. *Held*, that the agreement was not unconstitutional as a violation of Article I Section 10 of the Federal Constitution prohibiting a state from entering into any agreement or compact with another state or foreign power without the consent of Congress. *McHenry County.v. Brady* (1917, N. D.) 163 N. W. 540.

A case in which the United States Supreme Court discussed the power of a state to enter into agreements with a foreign country contains a dictum adverse to such a power. Holmes v. Jennison (1840, U. S.) 14 Pet. 540. Numerous cases, however, have supported the power of a state to enter into agreements with other states of the Union on matters not infringing the political prerogatives of the Federal Government. Virginia v. Tennessee (1892) 148 U. S. 503, 13 Sup. Ct. 728; Wharton v. Wise (1893) 153 U. S. 155, 14 Sup. Ct. 783; Fisher v. Steele (1887) 39 La. Ann. 447, 1 So. 882; Stearnes v. Minnesota (1900) 179 U. S. 223, 21 Sup. Ct. 73; Union Branch Railroad v. E. Tenn. (1853) 14 Ga. 327. In reliance largely upon dicta in these cases the court in the principal case concluded that the local board had the power without the consent of Congress to enter into an agreement with a foreign municipality which did not "encroach upon or interfere with the just supremacy of the United States." Whether the contract did so encroach would be a question of fact in each case. The Constitution by another clause of Section 10 of Article 1 absolutely prohibits a state under all circumstances from entering into any formal treaty with a foreign state. The power of states to enter into interstate (and, according to the instant case, apparently international) non-political agreements without the consent of Congress finds an analogy in the power of the federal executive to enter into agreements with foreign countries without the consent of the Senate. But the distinction should be noted that while states are limited with respect to subject matter to unimportant non-political administrative matters, the power of the federal executive to enter into agreements is not limited by the importance of the subject matter but only by the form of the agreement, i. e., treaties proper. Witness the Lansing-Ishii agreement recently concluded, the importance of which is not in any way reflected by the informal documents in which it is recorded.

Constitutional Law—Taking Property without Due Process—Invalidity of a Segregation Ordinance.—A white man brought a bill for specific performance of a contract to sell land to a negro, the contract being expressly made subject to the latter's "right" under the law to occupy the premises as a residence. A Louisville ordinance, held valid by the Court of Appeals of Kentucky, forbade the future occupancy by white man or negro of a residence in a block where the majority of residences were occupied by persons of the other race. All privileges of occupancy already accrued at the time of enactment were expressly saved. Held, that the power of unrestricted alienation was a property right protected by the Constitution, and that the ordinance was invalid as taking property without due process of law. Buchanan v. Warley (1917) 38 Sup. Ct. 16. See Comments, p. 393.

Contracts—Acceptance—Acts Necessary to Form a Unilateral Contract.—The defendant wrote to the plaintiff, her son-in-law, that if he would move from Missouri to Maine and would care for the defendant on the home place during her life, he should have the use of the place during her life and the complete ownership at her death. The plaintiff moved as requested and cared for the defendant a few weeks, when the defendant repudiated her promise without just cause. The plaintiff sued in equity for an injunction against an ejectment suit and for a decree that the defendant should hold the legal title as trustee for the plaintiff. Held, that a unilateral contract was formed when the plaintiff moved to Maine and there began to care for the defendant, and that the plaintiff was entitled to the relief asked. Brackenbury v. Hodgkin (1917, Me.) 102 Atl. 106.

See COMMENTS, p. 382.

Contracts—Consideration for Unilateral Contract—Performance by Promisee as Required by Previous Contract with a Third Person.—The defendant's daughter became engaged to an Italian count; and thereafter the defendant made a written promise that, in consideration of the fact that the daughter was affianced to and was to be married to the count, he would pay \$2500 to his daughter on the day set for the marriage and annually thereafter. This writing was delivered to the count, and the wedding took place as expected. The plaintiff, as assignee of both the count and his wife, sues for the eleventh annual instalment. Held, that the marriage in accordance with their previous engagement was a sufficient consideration for the defendant's promise. Attilio DeCicco v. Schweizer (1917, N. Y.) 117 N. E. 807.

The plaintiff was under contract with the owner of a mare, named Grace, to drive her in the Kentucky Futurity race. The defendant, being the owner of the sire, the dam, and two brothers of Grace, promised the plaintiff \$1000 if he would drive Grace and win the Futurity. The plaintiff, with intent to accept, drove and won the race. Held, that such performance as required by his previous contract was not a sufficient consideration for the defendant's promise. McDevitt v. Stokes (1917, Ky.) 192 S. W. 681.

For a discussion of these cases see ARTICLE, Does a Pre-existing Duty Defeat Consideration? p. 362.

CONTRACTS—CONSTRUCTION—CAUSES BEYOND SELLER'S CONTROL.—The defendants contracted in January, 1915, to sell to the plaintiff prussiate of soda, a German product, to be imported by the defendants from Germany. They stipulated that they should not be liable for losses or damages due to "causes beyond their control," expressly including war, and also that, if cut off in whole or in part from their supply "by any other cause or reason," they should not be liable for non-delivery. Thereafter British Orders in Council, by preventing the exportation of the product from Germany, cut off the supply. The defendants had on hand when the contract was made a quantity sufficient to fill the plaintiff's contract, if applied to that alone. When the supply was cut off they made a ratable distribution of their stock on hand among all the customers with whom they then had contracts. The plaintiff sought damages for the failure to deliver the entire quantity. Held, that the defendants were liable, both because the stipulation in regard to "war" must have referred to the possibility of participation by the United States in the war, and could not be construed as referring to the war between England and Germany, as that war was an existing fact when the contract was made; and because the defendants, having a sufficient supply to perform their contract with the plaintiff, could not diminish their obligation under that contract by contracting with others. Standard Silk Dyeing Co. v. Roessler & Hasslacher Chemical Co. (1917, S. D. N. Y.) 244 Fed. 250.

As to the war meant by the parties, the court's interpretation of the contract is hard to follow. A more natural explanation would seem to be that the then existing war was directly contemplated, and that the seller put the exception into his contract for the very purpose of being protected against difficulties which were feared as a result of that war. Moreover, this part of the opinion entirely ignores the other very explicit provisions for relief from liability, which could hardly have been worded more broadly to cover all possible contingencies which might result, without fault on the part of the defendants, in a diminution of the supply. The court seems to have been hopelessly confused between the rules applicable to an unqualified agreement and those governing the construction of one in which the promisor's obligation is expressly qualified.

The court's conclusion on the other point seems hardly more satisfactory. Though the parties to contracts would do well to express such clauses more specifically, a clause in the usual general terms must be construed so as to give effect to the obvious purpose for which it was inserted. When the contract is made by a manufacturer or jobber in the ordinary course of business, the purpose of such a clause is clearly to enable the seller to continue business in the normal and usual way until the shortage occurs or the contingency develops. To construe the provision in each contract as if the seller were expected to have no other contracts, is to defeat its purpose altogether. See B. P. Ducas Co. v. Bayer Co. (1916, Trial T.) 163 N. Y. Supp. 32, 37; and cf. McKeefrey v. Connellsville Coke & Iron Co. (1893, C. C. A. 3d) 56 Fed. 212, 217. When the shortage arises, two views are theoretically possible: first, that the contracts should be filled in the order of their priority in time,—a view which would find some analogies in equity, but little support in common law doctrines,—or second, that the available supply should be prorated among customers then holding contracts. The latter view is more in accordance with the usual business understanding and practice, and is generally supported by the authorities. Jessup & Moore Paper Co. v. Piper (1902, C. C. E. D. Pa.) 133 Fed. 108; Garfield, etc., Coal Co. v. Pennsylvania C. & C. Co. (1908) 199 Mass. 22, 41; and cases above cited. This rule assumes, of course, that the seller has not over-contracted his normal capacity. Luhrig Coal Co. v. Jones & Adams Co. (1905, C. C. A. 6th) 141 Fed. 617, 623. And unless justified by usage or special

circumstances, the seller must not include in the distribution non-contract customers, or new contracts taken after the contingency occurred. See cases above cited. For an apparent exception in favor of regular customers, which on principle seems open to doubt, cf. Oakman v. Boyce (1868) 100 Mass. 477; Metropolitan Coal Co. v. Billings (1909) 202 Mass. 457. The principal case seems an unfortunate departure from a just and reasonable rule.

Contracts—Restraint of Trade—Validity of Restrictions on Resale Price.—The plaintiff sought an injunction to prevent the defendant from selling Ingersoll watches at prices below those specified in a notice attached to each watch. The plaintiff manufactured the watches in New York and sold them, subject to the price restrictions, to jobbers in New Jersey, from whom the defendant acquired them. The defendant moved to dismiss the bill. Held, that the bill was sufficient. Robt. H. Ingersoll & Bro. v. Hahne & Co. (1917, N. J. Ch.) 101 Atl. 1030.

See Comments, p. 397.

CRIMINAL LAW—ASSAULT—DISEASE COMMUNICATED BY HUSBAND TO WIFE.—The defendant, knowing himself to be afflicted with a venereal disease, had sexual relations with his wife without informing her of his condition. She contracted the disease. *Held*, that the defendant was guilty of an assault. *State v. Lankford* (1917, Del. Gen. Sess.) 102 Atl. 63.

The marital relation confers upon the husband a privilege of intercourse, but whether this privilege permits a husband knowingly to infect his wife without incurring criminal liability is in dispute. The leading English case holds that it does. Regina v. Clarence (1888) 16 Cox C. C. 511. But Hawkins, J., dissenting, said that though a simple act of communion is lawful, one combined with contagion is not, there being no consent to the injection of poison. This raises the much disputed question of what is meant by consent. American courts have held that the administering of poison in food constitutes an assault, on the ground that there is no consent to the taking of poison. Commonwealth v. Stratton (1873) 114 Mass. 303 (Spanish fly in figs); Johnson v. State (1893) 92 Ga. 37, 17 S. E. 974 (arsenic solution in coffee). The English cases are contra. Regina v. Walkden (1845) 1 Cox C. C. 282 (Spanish fly in ale); Regina v. Hanson (1849) 2 C. & K. 912 (Spanish fly in liquor). Intercourse secured by impersonation is, because of the consent, at most an assault and not rape. Regina v. Saunders (1838) 8 C. & P. 265; Regina v. Williams (1838) 8 C. & P. 286; but see Regina v. Dee (1884) 15 Cox C. C. 579, and section 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict., C. 69). "Consent" to sexual intercourse induced by advice that it is a surgical operation is no consent. Regina v. Flattery (1877) L. R. 2 Q. B. D. 410. Consent is a form of intent, the consenting party intending to undergo certain consequences. See Prof. Walter W. Cook, Act, Intention and Motive (1917) 26 YALE LAW JOURNAL 645. If the husband's marital privilege cannot be exercised without producing other consequences not intended by the wife, i. e., not consented to, the exercise of the privilege must be foregone or a criminal liability will be incurred. No other American authority on the precise point has been found.

CRIMINAL LAW—LARCENY—DIVERSION OF WATER FROM CITY MAINS.—The defendant had surreptitiously diverted water around a meter located on his land so as to prevent registration of the total amount used. In a prosecution

for larceny the defendant contended that the city which supplied the water had merely the privilege of taking the water from its natural courses and charging for its distribution and that the water had not assumed such character as personal property as to become the subject of larceny; and also that possession and ownership of the water had been surrendered to the defendant when the water came on his land and before it reached the point of diversion. Held, that the defendant was guilty of larceny of the property of the city. Clark v. State (1917, Okla.) 167 Pac. 1156.

On the question when possession passes to a customer supplied with an article by means of pipes the decision is supported by cases involving larceny of gas. See Woods v. People (1906) 222 Ill. 293, 78 N. E. 607, 5 L. R. A. (N. S.) 560, 6 A. & E. Ann. Cas. 736, and cases there collected. But with respect to ownership by the company or municipality furnishing the supply, the case of water presents theoretical questions which do not arise in the case of a manufactured or mineral product like gas. Water flowing in its natural course is not itself the subject of property, either as realty or as personalty, the rights and privileges of the public or of the owner of the soil underneath or of riparian owners being merely rights and privileges of appropriation and user. Race v. Ward (1855, Q. B.) 4 E. & B. 702; Brown v. Cunningham (1891) 82 Ia. 512, 48 N. W. 1042. But when lawfully appropriated and reduced to possession in a cistern or other artificial container by any person for his own private use there seems no doubt that it becomes personal property. See Race v. Ward, supra. Just what constitutes sufficient appropriation and possession is a question not fully answered by the few authorities found. It is clear that ice cut and stored is properly held a subject of larceny. Ward v. People (1843, N. Y. Ct. Err.) 6 Hill 144. And it has been held that one who lawfully enters on the surface of the ice in a public river, stakes off a portion, prepares it for cutting, and continually guards and protects it, has sufficient possession to maintain an action for conversion. Hickey v. Hazard (1877) 3 Mo. App. 480; see also Brown v. Cunningham, supra. In an English case, which seems to be the decision nearest to the principal case, one drawing water without right from a pipe was held guilty of larceny, but the case is distinguishable in that there the water was, when stolen, in the pipes of and under the control of a purchaser from the water company. Ferens v. O'Brien (1883) II Q. B. D. 21. Purely as a matter of legal theory it would seem that the question whether a municipality, in a case like the principal case, acquires a property right in the water in its distribution system, or merely the right to divert and conduct the water to the consumer, might be answered either way. The actual decision was no doubt influenced by the court's lack of sympathy with what seemed a highly technical defense, and the absence of any criminal statute to reach the case, if the elements of larceny were found wanting. The result will commend itself to the practical man and it avoids the necessity of special legislation such as has been found necessary in some states to reach the case of "stealing" electricity. See 6 A. & E. Ann. Cas. 739, note.

CRIMINAL LAW—SPECIFIC INTENT—ASSAULT UPON MISTAKEN PERSON.—A statute declared it an offense to make "an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury," without provocation or "where the circumstances of the assault show an abandoned or malignant heart." The information charged the defendant with an assault with a revolver upon S with intent to injure K. Held, that the indictment was insufficient since it failed to allege that there was intent to injure the person assaulted. People v. Stoyan (1917) 280 Ill. 330, 117 N. E. 464.

In homicide, under the doctrine of "implied" or "constructive" malice, so-called, "constructive intent" or "transposed intent" is held to be sufficient. State v. Smith (1847, S. C.) 2 Strob. 77; see Clark, Crim. Law 53. Thus if A intends to kill X but the bullet strikes and kills Y, it is said that there is "constructive intent" to kill Y. State v. Pollard (1897) 139 Mo. 220, 40 S. W. 949; see 63 L. R. A. 660. This is but a fictitious way of stating the rule that A may be guilty of the murder of Y, although he have no intent to kill or even to injure Y. See 33 L. R. A. (N. S.) 1070. But when a statutory or a common law crime has as one of its essential elements an actual or specific intent to injure the person attacked, it is obvious that the doctrine of "constructive" or "transposed" intent is not applicable. See Carter v. State (1890) 28 Tex. App. 355, 13 S. W. 147. If A assaults B in the belief that he is C, it may well be questioned whether it is strictly true that A "intended" to attack B. He certainly intended to attack C. Has he, then, more than one intent? See the discussion in Professor Cook's article, Act, Intention and Motive (1917) 26 YALE LAW JOURNAL 645. In the principal case the court construes the Illinois statute as requiring a specific intent to injure the person assaulted. If this is the true construction, the conclusion of the court necessarily follows. But it may well be doubted whether if the indictment had alleged an "intent" to injure the person assaulted, the court would not have held the charge proved by evidence that the attack had been made under a misapprehension as to the identity of the person assaulted. See McGeehee v. State (1885) 62 Miss. 772; Walker v. State (1856) 8 Ind. 290. See also 7 L. R. A. (N. S.) 630 and 37 ibid. 172.

EVIDENCE—Interpretation—Devise by Mistaken Description.—The testator's will contained a provision devising to his daughter M "the north 25 acres of the northeast quarter of section 17." He did not own any part of the northeast quarter but he did own the northwest quarter of the section. The devise in question followed a clause giving another daughter the south 15 acres of the northeast quarter of the northwest quarter of section 17. There was no residuary clause. Held, that the will was correctly interpreted to vest in M the north 25 acres of the northwest quarter. Alford v. Bennett (1917, III.) 117 N. E. 89.

The operative, or "ultimate," facts which, as a matter of substantive law, determine the legal effect of a devise fall into two groups, namely, (1) the testator's intentions; and (2) an approximate, though not necessarily a perfect, expression thereof in a properly attested writing. Hence the process of interpretation has two objects of inquiry: (1) What were the testator's actual intentions as shown by such evidence, intrinsic and extrinsic, as may be admissible; and (2) have those intentions been sufficiently expressed in the will? Cf. Hawkins, 2 Jurid. Soc. Papers 298. No cases involving interpretation have caused the courts more difficulty than those in which the devise has accurately described land that the testator does not own, but would describe, with the change of a word or figure, land that he does own. In such cases the difficulty is not to ascertain the testator's actual intentions—he clearly intends to devise his own property-but to determine whether the expression of those intentions is a close enough approximation to be given legal effect. If, disregarding the erroneous words or figures, the remaining words of the will approximately, although not perfectly, express the intention to convey the property he owned, the devise should be given effect. Patch v. White (1886) 117 U. S. 210, 6 Sup. Ct. 617; Govin v. Metz (1894, N. Y. Sup. Ct.) 79 Hun. 461, 29 N. Y. Supp. 988. Illinois, however, adopted the contrary view in Kurtz v. Hibner (1870) 55 Ill. 514. This case has been severely criticised [e. g., see Judge Redfield's note in (1871) 10 Am. L. Reg. (N. S.) 97 and Judge Caton's reply, ibid. 353]; but it has continued to be followed in numerous decisions. See Lomax v. Lomax (1905) 218 Ill. 629, 75 N. E. 1076; Graves v. Rose (1910) 246 Ill. 76, 92 N. E. 601. Side by side, however, with this line of decisions has been another which, without repudiating the former, recognizes and applies the more liberal doctrine of Patch v. White. See Decker v. Decker (1887) 121 Ill. 341, 12 N. E. 750; Gano v. Gano (1909) 239 Ill. 539, 88 N. E. 146. When the will contains descriptive words indicating possession or ownership, the decisions holding that the intentions are sufficiently expressed are not necessarily in conflict with the Kurtz case. Bowen v. Allen (1885) 113 Ill. 53; Lawrence v. Lawrence (1912) 255 Ill. 365, 99 N. E. 675. But since the lack of such descriptive words may, according to other cases, be supplied by the "presumption" that the testator intended to dispose of property which he owned [as declared in Collins v. Capps (1908) 235 Ill. 560, 85 N. E. 934, and the principal case], it would seem that the Kurtz case might well be recognized as no longer law. For a collection of authorities outside of Illinois, see 6 L. R. A. (N. S.) 942. It is believed that much of the difficulty and confusion would be avoided if the courts were to recognize that, as indicated at the outset, the primary problems involved in the so-called process of interpretation, or construction, are those of substantive law, not those of the law of evidence.

EVIDENCE—Self-Incrimination—Compulsory Taking of Finger Prints.—Under a statute providing "that no person convicted of . . . disorderly conduct . . . shall be sentenced . . . until the finger print records are officially searched," the court ordered that finger prints be taken of the defendant. The defendant objected to the order as a violation of his constitutional privilege against self-incrimination. Held, that the taking of finger prints is not a violation of the constitutional privilege. People v. Sallow (1917, Gen. Sess.) 165 N. Y. Supp. 915.

There is some doubt as to the origin and original policy of the self-incrimination rule. Professor Wigmore contends that it is not a common law rule at all, but a gradual perversion of a statutory rule, intended to prevent a usurpation of jurisdiction on the part of the Ecclesiastical Courts. See his articles in 5 Harv. L. Rev. 71 and 15 ibid. 610. With reference to the forcible exhibition of the person, there is a line of cases which have followed the rule blindly. State v. Height (1902) 117 Ia. 650, 91 N. W. 935. Carried to its logical conclusion, the rule would forbid a jury to look at a prisoner, against his will, for the purpose of drawing deductions from his appearance, and it has even been so held. State v. Jacobs (1858) 50 N. C. 259. The rule has been severely criticized, the modern tendency limiting its application to testimonial utterances, and, by analogy, to documents taken from the defendant, though even here a distinction has been drawn between documents which are the basis of the charge, and those which are merely of an evidentiary character. State v. Krisinski (1905) 78 Vt. 162, 62 Atl. 37. Holt v. United States (1910) 218 U. S. 245, 252, 31 Sup. Ct. 2, 6. The instant case presents a novel application of the objection against self-incrimination. Similar rulings have been made in somewhat analogous cases. State v. Ah Chuey (1879) 14 Nev. 79 (exhibition of defendant's arm); Garvin v. State (1876) 52 Miss. 207 (profert of his person); State v. Graham (1876) 74 N. C. 646 (comparison of boots with boot-prints). The instant case suggests a distinction between cases in which the defendant was required merely to remain passive and those in which he was required to exercise volition, the latter being regarded as a violation of the constitutional privilege. It is submitted, however, that the distinction is of doubtful validity. Strictly speaking, even so-called passivity involves an exercise of volition. Moreover the application of the court's test would lead to practically the same results as would blind adherence to the original rule. It is believed that the constitutional privilege should be deemed to prohibit compulsory exhibition by the defendant only in cases where such exhibition might tend to create undue prejudice in the jury.

FEDERAL EMPLOYERS' LIABILITY ACT—SURVIVAL OF ACTION FOR INJURIES—CONTRIBUTORY NEGLIGENCE OF BENEFICIARY AS DEFENSE.—The plaintiff's sixteen year old son was injured while in the defendant's employ and died as a result of such injuries. The plaintiff had obtained this employment for his son by fraudulently misrepresenting his age as seventeen. This conduct by the father had been adjudged by the trial court as contributory negligence. Held, that the contributory negligence of the father was a defense to the action. Crevelli v. Chicago, M. & St. P. Ry. Co. (1917, Wash.) 167 Pac. 66.

The federal Employers' Liability Act of 1908 provided two distinct rights of action: one in the injured employee for his personal loss and suffering when his injuries were not immediately fatal, the other in his personal representative for the pecuniary loss sustained by certain designated relatives from his death, whether the death was instantaneous or resulted later. Michigan Cent. R. R. Co. v. Vreeland (1913) 227 U. S. 59, 33 Sup. Ct. 192. Prior to the Amendment of 1910 the first named right of action did not survive the employee's death. American R. R. Co. v. Didricksen (1912) 227 U. S. 145, 33 Sup. Ct. 224. But that Amendment provided for its survival for the benefit of the same relatives as were beneficiaries of the second cause of action above mentioned. St. Louis Iron Mt. Ry. Co. v. Craft (1915) 237 U. S. 648, 35 Sup. Ct. 704. In the principal case it was admitted that the father's contributory negligence was a defense to the second cause of action, i. e., his right to recover for his own pecuniary loss due to his son's death; but the plaintiff contended that such negligence did not defeat recovery on the first cause of action, i. e., the son's right to recover for his pain and suffering. Under state statutes where survival is for the benefit of the estate, it is generally held that the negligence of one who will ultimately be benefited is no bar to recovery. Love v. Detroit etc. R. R. Co. (1912) 170 Mich. 1; 135 N. W. 963; Nashville Lumber Co. v. Busbee (1911) 100 Ark. 76; 139 S. W. 301. The court attempts to distinguish such cases on the ground that recovery under the federal Act is for the benefit of named beneficiaries, and from this the court argues that the right of action which the Amendment causes to survive, is really a new right of action and that the beneficiary is therefore barred by his negligence. This construction of the Act seems opposed to the express terms of the Amendment and also to the language of the Supreme Court in St. Louis & Iron Mt. Ry. v. Craft, supra. Under a similar state statute, the Connecticut court has declared that negligence of the statutory distributee would not bar recovery by the administrator. Wilmot v. McPadden (1905) 78 Conn. 276, 284, 61 Atl. 1069, 1072; see also Warren v. Manchester etc. Ry. (1900) 70 N. H. 352, 47 Atl. 735. No precise authority construing the federal Act was cited by the court, and none has been found.

Foreign Corporations—Service on Secretary of State under Statute not Requiring Notice to Corporation.—Section 405 of the California Civil Code provided for service of summons upon the Secretary of State in case a foreign corporation doing business in the state should fail to designate an agent for service. The Code did not provide for notification by the Secretary of State to the foreign corporation. *Held*, that the provision for such service was unconstitutional as not amounting to due process of law. *Knapp v. Bullock Tractor Co.* (1917, S. D. Cal.) 242 Fed. 543.

Authority on this subject is divided. See in support of the principal case, King Tonopah Mining Co. v. Lynch (1916, Nev.) 232 Fed. 485. The decision is opposed to that of the California Supreme Court on the same statute. Olender v. Crystalline Mining Co. (1906) 149 Cal. 482, 86 Pac. 1082. An apparently similar statute was upheld in North Carolina on the theory that a state, having the privilege of excluding foreign corporations altogether, may impose any con-

dition upon their admission, which does not conflict with federal policy. Fisher v. Traders' etc. Ins. Co. (1904) 136 N. C. 217, 48 S. E. 667. To this the California court added that consent to service on the Secretary of the State might be inferred from the failure to designate any other agent. On the other hand statutes which require foreign corporations to waive the privilege of removing cases to the federal courts have been held invalid by the United States Supreme Court on the ground that the state could not enforce an agreement attempting to deprive the corporation of rights and privileges guaranteed by the Constitution. Home Insurance Co. v. Morse (1874 U. S.) 20 Wall. 445; Southern Pacific Co. v. Denton (1892) 146 U. S. 202, 13 Sup. Ct. 44. In answer to this reasoning it may be pointed out that many constitutional privileges may be waived by the voluntary consent of the person intended to be benefited, and that the admitted power of excluding foreign corporations altogether would seem to include the power of requiring such waiver as a condition of admission. Cf. Horn Silver Mining Co. v. New York (1892) 143 U. S. 305, 315, 12 Sup. Ct. 403, 405. The true explanation of the decision in Southern Pacific Co. v. Denton would seem to be that suggested by Mr. Justice Holmes, that the agreement required in that case was contrary to the policy of the federal constitution as embodied in the provisions for the establishment of federal courts. See Western Union Tel. Co. v. Kansas (1910) 216 U. S. 1, 54, 30 Sup. Ct. 190, 208, per Holmes, J., dissenting. The real question in the principal case would be, then, whether there is a similar policy preventing a valid agreement to be bound by a personal judgment without notice. The difficulty seems less serious when it is pointed out that the corporation had only to designate an agent as the statute provided, to avoid the risk of which it complained. But the whole subject of what Mr. Justice Holmes called "unconstitutional conditions" will remain in some doubt until the Supreme Court clears it up. In the principal case any inference that the corporation consented to the statutory condition that service might be made upon the Secretary of State would have been purely fictitious, as there was no attempt whatever to comply with the statute regulating the admission of foreign corporations.

Fraudulent Conveyances—Consideration—Agreement to Support Grantor.—A grantor conveyed property to the defendant in consideration of the latter's promise to support the grantor for life. The property retained by the grantor was of little value and less than the existing claim of the plaintiff but there was no evidence of actual intent to defraud creditors. Held, that the conveyance was fraudulent and void. Ludlow Savings Bank v. Knight (1917, Vt.) 102 Atl. 51.

The law of fraudulent conveyances does not avoid transfers made on good consideration and bona fide. But "good consideration" is construed to mean, as between the grantor's creditors and those claiming under the transfer, a valuable consideration. Bump, Fraud. Conv. (3d ed.) 221; Seymour v. Wilson (1859) 19 N. Y. 417. In the principal case the transaction was valid inter partes and, since they were innocent of actual fraud, courts of equity would have given the grantor a remedy had the grantee failed to provide the promised support. Payette v. Ferrier (1899) 20 Wash. 479, 55 Pac. 629. As to existing creditors, however, the weight of authority holds such a transfer fraudulent and void irrespective of the intent of the parties. Egery v. Johnson (1879) 70 Me. 258; Rolfe v. Clarke (1916) 224 Mass. 407, 113 N. E. 182; see Bigelow, Fraud. Conv. (Knowlton's ed.) 545. The opinion in the instant case states that "though the consideration is valuable, it is wanting in good faith as to creditors and the character of the transaction is such as to put the grantee upon inquiry." It is submitted, however, that a sounder explanation is to say that though the grantee is a purchaser in good faith, the consideration is not valuable as to existing creditors. As to them, the conveyance is considered gratuitous, because the

consideration is an unperformed executory promise for something of no value to the grantor's creditors. This view is consistent with the generally recognized rule that the grantee will be protected to the extent that he has actually provided support. Kelsey v. Kelley (1890) 63 Vt. 41, 22 Atl. 597; Harris v. Brink (1896) 100 Iowa, 366, 69 N. W. 684. While the view that the original transaction was lacking in good faith would prevent the grantee claiming reimbursement for such support. See Finnell v. Million (1903) 99 Mo. App. 552, 74 S. W. 419; also Bigelow, Fraud. Conv. (Knowlton's ed.) 466 et seq. It is true that an unperformed executory promise to pay money may, under certain circumstances, be deemed a valuable consideration as against creditors. See Bump, Fraud. Conv. (3d ed.) 225. But it is believed the cases support the contention that an unperformed executory promise is not valuable consideration when the promise relates to something valueless to creditors. Cf. Swift v. Hart (1885, N. Y. Sup. Ct.) 35 Hun 128 (executory contract for legal services). An exception, perhaps illogical, exists in the case of an executory promise to marry in consideration of the conveyance. See De Hierapolis v. Reilly (1901) 168 N. Y. 585, 60 N. E. 1110. Somewhat analogous to the support cases are those which declare that a person cannot create a spendthrift trust in his own favor. Ghormley v. Smith (1891) 139 Pa. 584, 21 Atl. 135. The principal case undoubtedly reaches a sound conclusion, though its reasoning may perhaps be subject to the criticism above suggested. Cf. Merithew v. Ellis (1917, Me.) 102 Atl. 301.

International Law—Diplomatic Officers—Immunity of Property from Execution.—The defendant, the accredited Minister of Bolivia, had waived his diplomatic privileges in proceedings involving the settlement of an estate of which he had acted as attorney and administrator. The plaintiff, as beneficiary of the estate, sought to have a writ of sequestration issued against the property of the defendant for a balance, surcharged upon his accounts as administrator, which he had failed to pay into court. The plaintiff agreed not to enter the Bolivian Legation or to seize anything necessary to maintain the personal comfort or dignity of the defendant as Minister. The Diplomatic Privileges Act (1708, 7 Anne c. 12) declared null and void all writs and processes sued out against the person or property of public Ministers. Held, that a writ of execution directed against personal property of the defendant was void. Re Suarez (1917, Ch. D.) 117 L. T. 239.

See Comments, p. 392.

NEGLIGENCE—LIABILITY TO VOLUNTEERS—INJURY TO FIREMAN.—The plaintiff, a city fireman, sued in case for injuries received while attempting to extinguish a fire, alleged to have been caused by sparks negligently thrown from the defendant's locomotive. *Held*, that the defendant owed the plaintiff no duty and was, therefore, not liable. *Clark v. B. & M. R. R.* (1917, N. H.) 101 Atl. 795.

It is well settled that firemen or policemen who are injured through the negligence of the owner with respect to the condition of premises on which they have come in the course of their duty, cannot recover, since they were mere licensees to whom the property owner owed no duty of care. Lunt v. Post Go. (1910) 48 Colo. 316, 110 Pac. 203. But see Cameron v. Kenyon-Connell Commercial Co. (1899) 22 Mont. 312, 56 Pac. 358. The instant case is distinguishable, however, in that it is an action against the negligent third party who caused the fire. The cases are uniform in permitting recovery by a volunteer injured in attempting, reasonably and with due care, to save human life endangered by the negligence of the defendants. Eckert v. Long Island R. Co. (1871) 43 N. Y. 502. Where the risk is incurred to save property, the courts are not agreed, although the weight of authority seems to favour a recovery. Pegram v. Sea-

board (1905) 139 N. C. 303, 51 S. E. 975. Contra, Cook v. Johnston (1885) 58 Mich. 437, 25 N. W. 388. And this is thought to be true whether or not the volunteer has an interest in the property which he seeks to save. Cf. Kambour v. B. & M. R. R. Co. (1913) 77 N. H. 33, 50, 86 Atl. 624, 633. The objection raised to the volunteer theory is that the defendant ought not to be held because injuries to a volunteer are not consequences which could be foreseen as likely to occur. See Pike v. Grand Trunk Ry. (1889 C. C. N. H.) 39 Fed. 255. But this objection is met in the instant case by the fact that a defendant who negligently starts a fire might well foresee that firemen would attempt to extinguish it and thereby incur risk of injury. It is submitted, therefore, that even courts which refuse to permit recovery to an ordinary volunteer attempting to save property might well regard a plaintiff fireman more favorably.

Public Utilities—Rate Regulation—Excluding "Going Value" in Valuation of Property.—In valuing the property of the petitioner for purposes of fixing rates, the California Railroad Commission excluded the item of development cost as an element of "going value" because excessive earnings since the development period had been sufficient to offset all deficits of that period. Held, that such exclusion by the Commission was correct. San Joaquin Light & Power Corp. v. Railroad Commission (1917, Cal.) 165 Pac. 16.

See Comments, p. 386.

Torts—Right of Burial.—Fallure to Notify Parent of Child's Death.—The mutilated body of the plaintiff's son was found by the defendant's employes upon its railroad track. Letters upon the body disclosed the plaintiff's name and address. The defendant notified only the coroner, who buried the body without notifying the plaintiff. Suit was brought for mental anguish alleged to have been caused by the defendant in depriving the plaintiff of the solace of burying her son. Held, that the railroad company was not liable. Awtrey v. Norfolk & Western Ry. Co. (1917, Va.) 93 S. E. 570.

It is frequently said that "there can be no property in a dead body." See 13 Cyc. 267 and cases there cited. While it is true that neither the executor nor the relatives of a decedent have, with respect to the corpse, all the rights, privileges, powers and immunities which make up the complex aggregate of jural relations usually connoted by the term "property," nevertheless the courts do recognize and enforce certain rights, privileges, etc., with respect to dead bodies, similar to those of an owner in ordinary property. The near relatives may enjoin interference with the corpse after interment. Pierce v. Proprietors of Swan Point Cem. (1872) 10 R. I. 227; cf. Pulsifer v. Douglass (1901) 94 Me. 556, 48 Atl. 118. And before interment, in the absence of testamentary disposition of the body, the surviving spouse or next of kin is entitled, for the purpose of burial, to have possession of it turned over in the same condition in which it was at death. Foley v. Phelps (1896) I N. Y. App. Div. 551, 37 N. Y. Supp. 471; Larson v. Chase (1891) 47 Minn. 307, 50 N. W. 238; cf. Reg. v. Fox (1841, Eng. Q. B.) 2 Ad. & El. N. S. 246. In the case of a deceased child this right belongs to the surviving father or mother. Floyd v. Atlantic Coast Line Ry. Co. (1914) 167 N. C. 55, 83 S. E. 12; Darcy v. Presbyterian Hospital (1911) 202 N. Y. 259, 59 N. E. 695. A wilful or negligent mutilation or withholding of the corpse is a violation of this right, for which the surviving spouse or next of kin may, by the weight of authority, recover not only actual damages, such as increased burial expenses, but also damages for outraged feelings and distress of mind. Kyles v. Southern Ry Co. (1908) 147 N. C. 394, 61 S. E. 307; Larson v. Chase, supra; contra, Long v. Chicago R. I. & P. Ry. Co. (1905) 15 Okla. 512, 86 Pac. 289; cf. Deavors v. Southern Express Co. (1917, Ala.) 76 So. 288.

In the principal case, the plaintiff attempted to establish a violation of her right to receive her son's body for burial by showing a failure by the defendant to notify her of his death. As the court points out, a failure to notify—a mere omission—is a very different act on the part of the defendant from an affirmative mutilation or withholding of the body. Cf. Doxtator v. Chicago etc. Ry. Co. (1899) 120 Mich. 596, 79 N. W. 922. Only rarely does the law of torts hold a person liable for mere nonfeasance. See Bigelow, Torts (8th ed.) III. For an interesting case holding a carrier liable for the affirmative act of burying a deceased passenger at sea, see Finley v. Atlantic Trans. Co. (1917, N. Y.) 115 N. E. 715, commented upon in 26 YALE LAW JOURNAL 790.

TRIALS—MISCONDUCT OF JURY—STATEMENT BY JUROR OF FACTS NOT IN EVIDENCE.—The defendant was convicted of manslaughter for the death of a child run over by his automobile. There was conflicting evidence as to whether the defendant was intoxicated at the time. During the jury's deliberations two of the jurors made statements to the others in regard to their own knowledge of the defendant's habits of intoxication. After a verdict of guilty the defendant moved for a new trial and presented a juror's affidavit that these statements had induced him to change his vote. *Held*, that the defendant was entitled to a new trial. *State v. Salmer* (1917, Ia.) 164 N. W. 620.

The majority of the states have followed the doctrine laid down by Lord Mansfield, that the affidavit of a juror in regard to the jury's misconduct will not be received. See Vaise v. Delaval (1785, K. B.) 1 T. R. 11. For recent cases on both sides, see State v. Ausplund (1917, Oreg.) 167 Pac. 1019, and Barber v. Emery (1917, Kan.) 167 Pac. 1044. The cases considering what misconduct, so proved, will be ground for new trial are therefore limited to a few jurisdictions, including Iowa, Kansas, Nebraska, Tennessee, Texas, and the federal courts. A statement of facts not offered in evidence, when made by a juror during the deliberations of the jury, is a plain violation of the theory of the "hearsay" rule. See 2 Wigmore, Evid. sec. 1362. Moreover, the accused has a right of crossexamination and quite generally by constitutional guaranty the right of confrontation. See People v. Schallman (1916) 273 Ill. 564, 113 N. E. 113; Morris v. United States (1907, C. C. A. 5th) 149 Fed. 123. There has been some difference of opinion whether the law will presume that the verdict was influenced by statements by a juror of facts not in evidence; but the bulk of authority is that the statement must be of such weight that it might reasonably be calculated to influence the verdict. Douglas v. Agne (1904) 125 Ia. 67, 99 N. W. 550. In the majority of the cases in which a new trial was ordered there was a conflict of evidence and it appeared affirmatively that the juror's improper statement influenced the verdict. State v. Wegener (1917, Ia.) 162 N. W. 1040, 1042; Hambright v. State (1905) 47 Tex. Cr. 518, 84 S. W. 597. There is found in a number of cases, a strong suggestion that a different rule might be applied in civil cases. See State v. Wegener (supra). It is true that criminal cases present a stronger case, since confrontation is then quite generally a matter of constitutional guaranty; but though in civil cases confrontation of witnesses by the party may be dispensed with, the right to cross-examination has been universally recognized as a basis for many of the rules of evidence. On principle, therefore, it would seem that no distinction should be made between civil and criminal cases in respect to misconduct which should be the ground for a new trial.

TRUSTS—CONSTRUCTIVE TRUSTS—ABSOLUTE DEVISE ON ORAL TRUST.—A husband by will left real estate to his wife. On the face of the will the devise was absolute, but at the time of the execution of the will the wife orally promised the husband that the property would be kept intact and on her death

divided equally between their two children. After the husband's death the wife conveyed all the property to one of the children. The other child brought an action in equity to establish a trust in her favor. Held, that she had no enforceable interest. Brown v. Kausche (1917, Wash.) 167 Pac. 1075.

See Comments, p. 389.

TRUSTS—UNINCORPORATED ASSOCIATIONS—DISPOSITION OF PROPERTY ON DISSOLUTION.—Funds were held in trust for a constantly changing group of beneficiaries. These funds were contributed by the beneficiaries in accordance with certain rules, and were to be used to perform certain services for the contributors for the time being. The need for the service came to an end. *Held*, that the funds remaining should be divided among the contributors "ascertained at the date when the purpose of the fund came to an end, in proportion to their contributions." In re Customs & Excise Officers' Fund [1917] 2 Ch. 18.

The English law of trusts provides a flexible scheme by means of which voluntary unincorporated associations may obtain many of the advantages which incorporation would confer. See 3 Maitland, Collected Papers, 321. Trusts of this kind usually have a changing group of beneficiaries and are thus frequently confused with charitable trusts, from which they differ in the fact that there is always at any moment a group of definite beneficiaries. See Old South Society v. Crocker (1875) 119 Mass. 1, 23. When the affairs of an unincorporated association whose property is held in trust are to be wound up, it is not always clear just who is entitled to the property. The guiding principle is undoubted, and is well stated in the principal case: "the right . . . in these cases is founded on contract," i. e., upon the agreement of the parties. The chief difficulty is to ascertain the fair meaning of that agreement. When that is done, apparently inconsistent decisions prove not to be so in fact. For example, in Braithwaite v. Attorney-General [1909] I Ch. 510—a decision which at first may be thought to be inconsistent with the principal case—the court found that, upon the true construction of the agreements involved, all the contributors to the fund had received all they had bargained for. That being so, the surplus remaining went to the Crown as bona vacantia. A similar result was reached on the same reasoning in Cunnack v. Edwards [1896] 2 Ch. 679. On the other hand, the court in another case held that on the true construction of the agreement the fund remaining on dissolution should be divided among those who were members of the association at the time of the passing of the resolution for dissolution. In re Printers' etc. Society [1899] 2 Ch. 184. Cf. Coe v. Washington Mills (1889) 149 Mass. 543, 21 N. E. 966. The decision in the principal case is reached by following the same guiding principle, ascertaining the fair meaning of the agreements of the various parties as found in the rules of the association.

WILLS—MISTAKE—Effect of Testator's Erroneous Belief of Son's Death.—In a will contest the only son of a testator offered evidence that the will was made under the mistaken belief that he was dead. *Held*, that the will was not open to attack on this ground. *Bowerman v. Burris* (1917, Tenn.) 197 S. W. 490.

Mistakes of a testator with respect to his will may be classified as intrinsic or extrinsic. Intrinsic mistakes relate to the nature or contents of the instrument. Extrinsic mistakes relate to collateral facts in consequence of which the terms of the will may have been drawn differently than they would have been if the testator had not entertained the mistake. Mistakes of the former class which concern the nature of the instrument render the whole will void for lack of animus testandi. Swett v. Boardman (1804) I Mass. 258; In re Meyer's Estate [1908] P. 353; Nelson v. McDonald (1891, N. Y.) 61 Hun. 406, 16 N. Y.

Supp. 273. If the intrinsic mistake consists in the insertion of words without the testator's knowledge such words may be stricken out and the rest of the will admitted to probate. Morrell v. Morrell (1882) L. R. 7 P. D. 68. But words omitted by mistake cannot be added by a court of probate. Goods of Schott [1901] P. 190. On the other hand, extrinsic mistakes do not affect the validity of the will or any part of it. In re Tousey's Will (1901, N. Y. Surr. Ct.) 34 Misc. 363, 69 N. Y. Supp. 846 (mistake as to death of cousin); Howell v. Troutman (1860) 53 N. C. 276 (mistake as to testator's fatherhood of beneficiary); Kidney's Will (1895) 33 N. B. 9 (mistake as to legitimacy of child named as legatee). In order to make the fact of extrinsic mistake material, not only the mistake but also the disposition which the testator would have made had he not entertained the mistake must appear from the will. Dicta in Gifford v. Dyer (1852) 2 R. I. 99, and Dunham v. Averill (1877) 45 Conn. 61. The correctness on principle of this view is strengthened by analogous cases which apply the doctrine of dependent relative revocation when the mistake appears on the face of the revoking instrument. Campbell v. French (1797) 3 Ves. Jun. 321. In some states by express statute, a child erroneously assumed to be dead is allowed to share in the estate. See In re Garraud (1868) 35 Cal. 336. More usually statutes protect pretermitted heirs unless their disinheritance was intentional. Whitby v. Motz (1914) 125 Minn. 40, 145 N. W. 623. The effect of showing a mistaken belief as to death in such a case would clearly be to allow the child to share in the estate. The principal case is interesting as an additional authority upon a point on which the cases are not numerous.

WORKMEN'S COMPENSATION ACT—BASIS OF COMPENSATION—GRATUITIES.—In addition to his weekly wage as railway porter, the claimant received "tips" averaging 12 shillings a week. The custom of "tipping" was sanctioned by the employer. *Held*, that such gratuities were part of the "earnings" on which the amount of compensation should be based. *Helps v. Great Western Railway Co.* (1017, C. A.) 117 L. T. 229.

The compensation to be paid an injured employee under workmen's compensation acts depends, according to the great majority of the statutes, on his recompense under the contract of hiring. The expression used in the Acts is either "earnings" or "wages." Usually a legislative definition of the term used is contained in the Act. But, despite such attempt at definition, the solution of the problem whether gratuities are to be considered requires the interpretation by the court of the terms used, except in New Jersey where the Act expressly excludes gratuities. In England, the phrase "average earnings in the employment" had previously been held, under certain conditions, to include money received as "tips" from one other than the employer. Penn. v. Spiers & Pond Ltd. (C. A.) [1908] 1 K. B. 766, 98 L. T. 541. This holding was reaffirmed in the principal case. In the only American case found on the point, the term "wages" was similarly construed to include "tips" of a taxicab driver. Sloat v. Rochester Taxicab Co. (1917) 177 N. Y. App. Div. 57, 163 N. Y. Supp. 904. The court in that case declared that other provisions of the Act indicated that the legislature saw no broad distinction between the two phrases. In view of the economic considerations behind the enactment of the legislation a liberal interpretation is justified to effectuate their purpose. See New York C. R. R. Co. v. White (1916) 243 U. S. 188, 37 Sup. Ct. 247; Powers v. Hotel Bond Co. (1915) 89 Conn. 143, 146, 93 Atl. 245, 247. The decisions as to "tips" are believed sound.

## CURRENT DECISIONS

ACKNOWLEDGMENTS—TAKING SEPARATE ACKNOWLEDGMENT BY TELEPHONE.—A husband and wife executed a trust deed, and the wife's acknowledgment was taken over the telephone. The Code of Tennessee requires that a wife's acknowledgment be taken separately and after privy examination. The wife, claiming the trust deed was void as to her, sought to enjoin a sale of her homestead. Held, that her privy examination could not legally be taken over the telephone, that the notary's certificate could be impeached by her testimony, and that the deed was void as to her homestead rights. Roach v. Francisco (1917, Tenn.) 197 S. W. 1099.

It is not an uncommon practice of notaries to take acknowledgments by telephone, yet the courts have very seldom passed upon the validity of such acknowledgments. The principal case follows an earlier Tennessee decision. Only one other case has been found. Banning v. Banning (1889) 80 Cal. 271, 22 Pac. 210. There the court held that the notary's certificate could not be impeached by the wife's testimony. Cf. Sullivan v. Bank (1904) 37 Tex. Civ. App. 228, 83 S. W. 421 (holding that the oath to an affidavit cannot be taken over the telephone).

ALIEN ENEMIES-RIGHT TO SUE-SUMMARY SUSPENSION OF SUIT.-A German partnership, of which two members were subjects of Germany and resident therein and the third was a German subject resident in London, began suit in 1910 to recover funds embezzled by an agent and paid to the defendants. When the United States entered the war, the evidence had been closed, and the case was pending before a referee whose decision was being withheld to await the submission of briefs. A motion to dismiss the suit, made after our declaration of war, was denied on the ground that the alien enemy status of the plaintiffs must be set up by answer. It also appeared by affidavit that in 1910 the plaintiffs had assigned their cause of action to American citizens, as trustees for the benefit of creditors, of whom some were American banks and others alien enemies. Held, that the court had jurisdiction summarily to suspend prosecution of the suit whenever it was established by affidavit, or otherwise, that the plaintiffs were non-resident alien enemies, and that this defense need not be raised by supplemental answer; also that the prejudice to the American banks by suspending the suit was not a sufficient reason to refuse suspension; with a dictum that the Alien Enemy Property Custodian might intervene and continue the prosecution of the suit. Rothbart v. Herzfeld (1917, Sup. Ct.) 167 N. Y. Supp. 199.

On the general subject of the right of alien enemies to sue in our courts, see COMMENTS (1917) 27 YALE LAW JOURNAL 104, 108.

CONFLICT OF LAWS—MARRIED WOMAN'S CONTRACT—ENFORCEMENT IN STATE WHERE COMMON LAW DISABILITY PREVAILS.—In a suit brought in Idaho on a joint promissory note of a woman and her husband, made and payable in Oregon, judgment and execution was sought against the woman's separate property. In Idaho a feme coverte can contract only for her own benefit; Oregon has removed all common law disabilities. Held, that the wife's separate property was subject to execution. Budge, C. J., dissenting. Meier & Frank Co. v. Bruce (1917, Idaho) 168 Pac. 5.

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The weight of authority, following Milliken v. Pratt (1878) 125 Mass. 374, is that a married woman's capacity to contract is to be determined by the law of the place where the contract is made rather than by that of her domicile. A fortiori is this true where the place of making and the place of performance coincide, as here. The dissent seeks to bring the case within the rule as to contracts contrary to the settled policy of the forum, being apparently influenced largely by the fact, not discussed by the majority, that the note was given to an Oregon assignee of a debt previously contracted in Idaho. Cf. as to extra-territorial effect of disability to contract marriage (1917) 27 YALE LAW JOURNAL 131.

CONSTITUTIONAL LAW-EQUAL PROTECTION OF THE LAWS-OHIO WORKMEN'S COMPENSATION ACT.—The Compensation Act of Ohio provides for compulsory contribution by employers to a state insurance fund from which compensation is paid to injured employees; but section 22 authorizes "employers who will abide by the rules of the state liability board of awards and may be of sufficient financial ability or credit to render certain the payment of compensation," to pay individually and directly to the injured employees the compensation provided for in the Act. In proceedings to oust certain insurance companies from the franchise of writing accident insurance for such employers, the constitutionality of section 22 was challenged on the ground that it prevented the Act from having a uniform operation. Held, that the section was a valid enactment. State v. United States Fidelity etc. Co.

The constitutionality of other sections of the Ohio Act was upheld in Porter v. Hopkins (1914) 91 Oh. St. 74, 109 N. E. 629. As to the validity of compensation acts in other states, see (1917) 26 YALE LAW JOURNAL 618; 27 ibid. 136.

CONSTITUTIONAL LAW-FREEDOM OF CONTRACT-MINIMUM WAGE LAW FOR Women.—In 1915 Arkansas enacted "an act to regulate the hours of labor, safeguard the health and establish a minimum wage for females." In proceedings by the State, the defendant contended that the portion of the act which relates to fixing wages was unconstitutional. Held, that the act was a valid exercise of the police power, being a regulation tending to guard the public morals and public health. McCullock, C. J., dissenting. State v. Crowe (1917, Ark.) 197 S. W. 4.

A similar statute in Oregon was upheld by the Supreme Court of that state, and its decision was recently affirmed by the federal Supreme Court without opinion, the court being equally divided. Stettler v. O'Hara (1914) 69 Oreg. 519, 139 Pac. 743; s. c. (1917) 243 U. S. 629, 37 Sup. Ct. 475. Cf. The Oregon Ten Hour Law (1917) 26 YALE LAW JOURNAL 607.

CONSTITUTIONAL LAW—QUALIFICATIONS OF VOTERS—WOMAN SUFFRAGE IN CITY ELECTIONS.—The charter of East Cleveland conferred upon women the right to vote in city elections. The petitioner sought by mandamus to enforce her right, the defendant election officials contending that the charter provision violated Sec. 1, Art. V of the Constitution which declares that "every white male citizen . . . shall have the qualifications of an elector, and be entitled to vote at all elections." Held, that the charter was valid since the Constitutional definition of the qualifications of electors is controlling only in offices and elections of Constitutional origin or cognizance and does not embrace municipal elections. Jones, J., dissenting. State, ex rel. Taylor v. French (1917, Oh.) 117 N. E. 173.

Many of the conflicting authorities are collected in the opinions.

Corporations—Powers of Majority Stockholders—Renewal of Charter.—The charter of a commercial corporation was granted for a term of twenty years with the privilege of renewal at the expiration of such term. Under the authority of a majority vote of the stockholders the corporation filed application for a renewal. Certain minority stockholders brought suit for an injunction and a receivership to wind up the corporate affairs. *Held*, that the injunction should be denied, since, in view of the express provision in the charter for renewal, the vote of the majority stockholders was controlling. Fish, C. J., and Atkinson, J., dissenting. *McKemie v. Eady-Baker Grocery Co.* (1917, Ga.) 92 S. E. 282.

The rule that a "fundamental" change in the charter or organization of a corporation cannot be made without unanimous consent does not apply to changes expressly authorized by the charter itself or by general laws in force at the time of incorporation. 2 Clark & Marshall, Private Corporations, 1501; 3 ibid. 1916, and cases cited. But this statement in turn is of course subject to the qualification that the charter or statutory provision authorizing the changes may expressly or impliedly require something more than a majority vote. It was on this point that the court in the instant case divided, the minority holding that unanimous application for this renewal was impliedly required by the statutes in force at the time of organization.

DEATH BY WRONGFUL ACT—WHO MAY SUE—ADULT CHILDREN LOSING PROSPECTIVE GIFTS.—In an action for death by wrongful act, the administrator sued for the benefit of adult children. The decedent had habitually made to each child gifts of vegetables, fruit, etc., worth in all about fifty dollars a year. Held, that a verdict for the defendant was properly directed by the trial court, as the loss of prospective gifts of a similar character was not a "pecuniary injury" within the meaning of the Michigan Statute. Bird, J., dissenting. Ormsbee v. Grand Trunk Western Ry. Co. (1917, Mich.) 164 N. W. 408.

The authorities on the point involved are conflicting. In the majority of jurisdictions a recovery is allowed on behalf of adult children under similar circumstances. Tiffany, Death by Wrongful Act, sec. 169.

EDUCATIONAL INSTITUTIONS—CONTROL OF STUDENTS—EXPULSION FOR DISLOYALTY.—Leon Samson, a student in the junior class at Columbia University, made an address at a public "Emma Goldman meeting" in June, 1917. The newspapers reported that he stated that "as much as we hate the German Kaiser, we hate still more the American Kaiser," and he predicted that there would be "a draft revolution." After the conclusion of the academic year Samson was notified that he could not complete his course at Columbia. He brought suit to obtain a decree that he be allowed to continue as a student. Held, that the plaintiff had been guilty of such conduct as entitled the University to drop him from its student body. Samson v. Trustees of Columbia Univ. (1917, Sup. Ct.) 167 N. Y. Supp. 202, 101 Misc. 146.

The court expressed the view that a University impliedly contracts, upon admitting a student, that he may complete his course, but only on condition that he will so conduct himself as not to injure the University or lessen its proper control over its student body or impair its influence for good upon its students and the community. Clearly the plaintiff's unpatriotic and disloyal public statements violated this condition.

EXTRADITION—WHO ARE FUGITIVES—CRIMINAL WHOSE PROSECUTION IS BARRED BY STATUTE OF LIMITATIONS.—The petitioner was arrested in New York on a warrant for extradition to Illinois. On habeas corpus proceedings he contended that

he had left the state of Illinois after the statute of limitations had barred criminal prosecution in that state, and that consequently he had not "fled" and was not "a fugitive from justice" within the meaning of the constitutional and statutory provisions relating to interstate extradition. Held, that the defense of the statute of limitations could not be entertained on habeas corpus proceedings and that the petitioner was properly remanded to custody for extradition. Biddinger v. Commissioner of Police (1917) 38 Sup. Ct. 41.

On the precise point there appear to be few authorities, although the general principle has long been established that when the papers from the demanding state are in proper form, the only evidence admissible on the habeas corpus hearing is evidence tending to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed.

International Law—Admiralty Jurisdiction—Public Vessel of Foreign Power.—A libel was filed against an Argentine naval transport, whose officers and crew were enrolled in the Argentine navy. The libel was based upon collision with a scow while the naval vessel was engaged in transporting a cargo of general merchandise for the benefit of the Argentine Republic and as an incident to a proposed return voyage with coal and ammunition for the account of that government. *Held*, that the ship could not be libeled, it being a public vessel of a foreign government and under its control, custody and operation. *The Pampa* (1917, E. D. N. Y.) 245 Fed. 137.

This decision is in line with the decided weight of authority. The Parlement Belge (1880) 5 P. D. 197; The Exchange (1812, U. S.) 7 Cranch 116; The Attualita (1916, C. C. A. 4th) 238 Fed. 909, 911. On a question indirectly related, namely the immunity of diplomatic officers, see COMMENTS, p. 392.

Interstate Commerce—Federal Employers' Liability Act—Crossing Flagman,—A crossing flagman, engaged in flagging on a railroad where interstate and intrastate trains were operated, was struck by an interstate train. He sued under the New Jersey Workmen's Compensation Act. Held, that the plaintiff was engaged in interstate commerce and that the federal Employers' Liability Act excluded compensation under the state Act. Flynn v. New York, S. & W. R. R. Co. (1917, N. J. Sup. Ct.) 101 Atl. 1034.

The court states that no federal case has been found which passes upon the question whether a crossing flagman is engaged in interstate commerce. On the other point, that the federal act is exclusive when the injured employee is engaged in interstate commerce, the recent Supreme Court decision is conclusive. New York Cent. R. R. Co. v. Winfield (1917) 244 U. S. 147, 37 Sup. Ct. 546. See (1917) 27 YALE LAW JOURNAL 135; (1916) 25 ibid. 497.

JURY—QUALIFICATIONS OF GRAND JURORS—WOMEN INELIGIBLE.—The defendant moved to set aside an indictment against him on the ground that the grand jury which found it was composed of women as well as men. The California Code, Sec. 192, defined the grand jury as "a body of men." Section 7 of the Penal Code provided that "words used in the masculine gender include the feminine." Held, that women were incompetent to sit on the grand jury and that the indictment must be set aside. People v. Lensen (1917, Cal. App.) 167 Pac. 406.

No other case on the precise point has been found. A recent California statute settles the controversy for the future in favor of the women. St. 1917, p. 1282.

PROCESS—IMMUNITY FROM SERVICE—NONRESIDENT TRUSTEE IN BANKRUPTCY.—The defendant, a nonresident, was appointed trustee of a bankrupt's estate by the U. S. District Court for the District of Kansas. While present in Kansas to make a sale authorized by the bankruptcy court, he was served with process in the present suit. His motion to quash service on the ground that he was immune from process while attending the sale was denied, and judgment was entered against him. Held, that the judgment was erroneous, as the nonresident trustee was immune from service. Eastern Kansas Oil Co. v. Beutner (1917, Kan.) 167 Pac. 1061.

This is a novel, but, it is believed, a sound, application of the principle which, in the interests of judicial administration, exempts nonresident parties, witnesses and attorneys in attendance upon court from liability to civil process in another suit. See *Powell v. Pangborn* (1914, Sup. Ct.) 145 N. Y. Supp. 1073, 161 App. Div. 453; Stewart v. Ramsay (1916) 242 U. S. 128, 37 Sup. Ct. 44. But compare Greenleaf v. Peoples Bank (1903) 133 N. C. 292, 45 S. E. 638; Brooks v. State (1911, Del.) 3 Boyce 1, 79 Atl. 790.

WATERS AND WATER COURSES—PERCOLATING WATERS—"REASONABLE USER" DOCTRINE.—For the purpose of supplying the City of Ann Arbor and its inhabitants with water the city sank wells and erected a pumping station upon land which it owned. Its pumping operations caused wells upon the plaintiff's land to become dry. Held, that the plaintiff was entitled to damages. Schenk v. City of Ann Arbor (1917, Mich.) 163 N. W. 109.

The court rejected the English rule concerning the withdrawal of percolating waters (which was carried to an extreme in Mayor v. Pickles [1895] A. C. 587) and adopted the rule of "reasonable user" of which New Jersey and New York decisions are the chief exponents.

Workmen's Compensation Act—Injury "Arising out of" Employment—Peril Attached to Particular Location.—There being 1.0 sanitary convenience for women in the respondent's factory, he made arrangements whereby the claimant, the only woman in his employ, might have access to the conveniences on adjacent premises belonging to another employer. It was necessary to cross a yard to reach the other factory and, while so doing, the claimant slipped on a very small piece of wood lying on the ground. Her fall resulted in serious injuries, for which compensation was claimed under the Act. Held, that the injury resulted from a peril to which the claimant was exposed by obligation of her contract of service, and hence was one "arising out of" her employment. Fearnley v. Bates etc. Ltd. (1917, C. A.) 117 L. T. 193.

The court felt itself driven to this decision by the case of *Thom v. Sinclair* [1917] A. C. 127. The new rule which that case established as to the character of causation required to satisfy the Act, was discussed in (1917) 27 YALE LAW JOURNAL 143.

# **BOOK REVIEWS**

Mental Conflicts and Misconduct. By William Healy. Published by Little, Brown & Co., Boston. 1917. pp. xi, 330.

Dr. Healy, now Director of the Baker Foundation Juvenile Court, Boston, offers in this volume a straightforward and practical, rather than theoretical, account of a special type of juvenile delinquency, attributable to conflict in the mental life of the offender. Forty selected cases provide the illustrative material, of which the first case cited is typical: a girl with recurrent impulses to stealing which originate at the sight of, or in connection with imagery concerning, an older girl who had earlier provoked in her abnormal emotional (sexual) excitement. These impulses prove irresistible, though their anti-social character is fully recognized and though no positive pleasure is derived from giving way to them. Repression of the sexual tendencies seems to be purchased at the expense of repeated outbreaks in another direction. In other cases conflict arises in the mental mechanisms through the possession by the offender of unsuspected and unwelcome knowledge, as for example that he is of illegitimate birth.

Dr. Healy is professedly prejudiced against the typically Freudian bias in favor of explaining all conflict through repression of early sex experiences, because of the suspiciously aprioristic character of such analyses. Nevertheless he confesses himself "utterly surprised" and finds it "a constant source of wonderment" that so much delinquency of such varied character proves on examination to have a sexual origin. In other respects, too, notably perhaps in the matter of dream significance, Healy's book contributes support to Freudian contentions.

However, "mental analysis," as Dr. Healy, borrowing the term, describes his procedure, gains support through its very lack of pretension; in this respect contrasting sharply with the more esoteric and fantastic forms of psychoanalysis. One is refreshed to find the incontrovertible facts of case histories arranged so that they may be studied on their own merits—not as proponents for theories which sound scientific procedure would restrain us from formulating. In the meantime Dr. Healy is gathering immensely valuable material and achieving splendid practical results.

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Cases on the Law of Property. Volume I. Personal Property. By Harry A. Bigelow. (American Case Book Series.) Published by the West Publishing Co., St. Paul. 1917. pp. xx, 404.

There is no great departure in this book from the steps developed in Professor Gray's collection of cases; the loose ends of personal property law, which he first threw into a collection of cases, have no very definite beginning or middle, or end; what is not elsewhere dealt with is here included.

Comparison is inevitable, and eight years' teaching from Gray's book and the admiration of Gray consequent thereon are not enough to overcome the opinion that the present collection is in two respects definitely better for classroom purposes: in the interesting fact situations, and in the more complete rounding out of several—if not all—of the subdivisions dealt with by the two authors. An apparently greater examination of cases is shown in the new book by the

frequent citation of cases in notes, but of the value of these nothing is ventured here, as they have been taken on faith. As to choice of cases, this casebook, like various others, offends by inserting several cases dealing with slaves as subject matter of property, and in these cases the problem is in no way affected by the human qualities of the chattel. The obvious embarrassment and pain that result from the unguarded call for recital of such cases in any cosmopolitan law school, is quite reason enough for omitting them from the books.

The choice of cases is of prime importance in the classroom; of no less importance, probably of more, is clean-cut, logical division of the whole subject-matter, and on this point the new work is not as good as the old. The chapter on Acquisition of Ownership suggests no distinction between original and derived ownership; sections on the former are followed by sections on the latter, with no suggestion of departure. The cases on Finding do not deal with questions of lien, but later under Lien, as a subdivision of Bailment, we find interesting cases dealing with claims of lien by a finder. Of course, opinions may differ as to the proper location of such cases, but as between Bailment and Finding, they seem to belong with the latter.

Professor Bigelow, like Professor Gray, seems content to rest his case of distinction between personalty and realty on a few pages quoted from Williams on *Personal Property*. Entering students read these pages, no doubt, with the respect due to learning, but with no ray of understanding. Surely these leaves could well be clipped from page one volume one, and laid aside for an appendix to volume six—if six is the last.

The first three or four cases in Gray embody a very broad principle of personalty that seems either to have escaped or to have been disregarded by Bigelow—that the law regards the ordinary merchantable chattel as of no specific importance, but as of mere money value—and this great distinction between personalty and realty, it is submitted, is to the average beginner concrete and convincing; its importance when he reaches the study of real property is obvious.

The author provides against serious dispute regarding his order of presentation by so arranging his subdivisions, as he says, that if we wish we may begin at page 141, and, perhaps after finishing Gifts, go back to the cases on Possession. If only for simplicity of problem in the cases, the arrangement is obviously inverted.

No one can say, of course, that the inclusion of cases on fixtures in a work on personal property is illogical in the abstract; the same would be true of the inclusion of cases on tenancy for years, including a very great part of our modern law of landlord and tenant, but the need of some familiarity with real property before approaching cases on either of these topics is a controlling reason with most authors.

The cases, omitting those on fixtures, present just about enough interesting work to occupy two class hours a week until the Christmas recess; there is ample room for the book in case schools, not merely for business reasons, but because it covers substantially the same field as that of the older work and with an obviousness of treatment that at once interests and informs many a student who would stumble blindly through the purposely darkened passages of Gray.

M. F. DEE

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# THE JUDICIAL REGULATION OF INDUSTRIAL CONDITIONS¹

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#### HISTORICAL

For some time Australia and New Zealand have been engaged in a series of experiments which involve a wide extension of the "sphere of the state," in relation to the control of industrial conditions. The systems most in vogue in Australia involve a combination of wages boards and courts of industrial arbitration. The structure and functions of the wages board are now familiar to students of industrial progress. Courts of industrial arbitration have an appellate jurisdiction with respect to the determination of wages boards, and an original jurisdiction in industrial matters generally. Both the boards and the courts are parts of a system of control (as distinguished from the ownership or management) of industry by organized public authority. In earlier times, wages boards aimed mainly at the elimination of sweating; but the system of public control of industrial conditions now aims at securing justice to employers and employees by a progressive expansion of the rule of law.

The incalculable importance of the movement is indicated by the title of an article written by Mr. Justice Higgins, President of the Commonwealth Court of Conciliation and Arbitration, entitled A New Province for Law and Order.² It rarely happens in the history of mankind that the full importance of a great movement is realized until long after its initiation. Certainly, I think few people in Aus-

¹ The following article has been written as part of a work on Australia shortly to be published. The writer has the consent of the General Editor that the present article should first appear in the YALE LAW JOURNAL.

² (Nov. 1915) 29 Harv. L. Rev. 13.

tralia realize the immense significance of the effort of the organized community to determine industrial conditions by judicial or quasijudicial tribunals. The causes which tell for an increasing importance of all questions relating to the organization of industry, and the fact that the relations between citizen and citizen which call for determination are more and more economic, imply that the new province for law and order is a province likely to become one of ever growing, if not of supreme, importance. Criminal law and civil law will remain; but alongside of them will be the great subject of industrial law. This law is, in point of fact, now being evolved out of a long series of conflicts and disputes relating to industrial matters. Even if one were to disregard for the moment such multitudinous issues between employer and employee as those relating to hours of work, sanitation in its widest sense, conditions of boy labor and apprenticeship; and supposing industrial courts dealt only with the single question of wages, the fact would remain that in the particular cases which come before a judge of an industrial court, the judge has to settle issues which, when capitalized, involve hundreds of thousands of pounds, and sometimes millions. In a recent case, a trade union secretary objected that the legal expenses incurred in the course of the hearing had been £200. I pointed out to him that the statement of claim of his organization as to wages alone had really amounted to a claim for £300,000! He answered, "Yes, but we did not get it." My rejoinder was, "No, you didn't get £300,000; you got only £240,000!" Of course, it is sometimes the other way. On occasion, I have had to reduce the rate of wage. But whether an industrial judge decreases or increases the rate of wage, though the amount seem small as regards the weekly earnings of a particular employee, the total result on the yearly earnings of the employees in the industry generally is apt to attain figures of such dimensions as to impose upon the judge a responsibility of the gravest character.

It is not, however, the money aspect that is necessarily the most important of the movement toward the public control of industrial conditions. The rapid progress of modern industry, the increase in the output of the worker (whether due to mechanical inventions, scientific research, improved business organization, or other causes), and the increased complexity of modern industrial organizations, necessarily create a thousand new problems of which many must be settled either by an appeal to law or by an appeal to might. After all, such weapons as the strike and the lockout are but forms of an appeal to might. The settlement of industrial differences by a wages board or industrial court involves an appeal to law. These differences have been so numerous and are so certain to increase with the progress of society, that the organized community ought to deal with them according to reason and justice through the action of impartial tribunals.

#### INDUSTRIAL LEGISLATION AND INDUSTRIAL LAW

The industrial legislation of Australia is scarcely more than a provision of machinery for the purposes of settling industrial disputes and dealing with industrial matters. The term "industrial law" may be used in the wide sense to include both the legislation which provides the machinery, and also the principles which that machinery from time to time formulates. The latter sense of the term, however, appears to me the sense most appropriate, and the subject-matter of greater interest to the general reader.

I propose, therefore, to limit myself in the present article to industrial law in the sense indicated. But further limitations follow almost as a matter of course. I have not space to speak of the work which is being done by wages boards. The settlement of industrial conditions by such bodies is necessarily of a more or less empirical, if not opportunist, character. To arrive at the code of industrial law, one has to pass beyond the determinations of wages boards, and beyond the important functions discharged by industrial courts acting as tribunals of conciliation with a view to effecting an amicable settlement of disputes. One must go directly to the awards of industrial courts in cases which have been heard before them, either in their original or appellate jurisdiction, with the usual judicial procedure as to argument by counsel and the evidence of witnesses. Further, there are several industrial courts in Australia, and, while it would be uncharitable to suggest that there are as many distinct codes of industrial law, yet the fact remains that some divergencies exist between the principles underlying the awards of the different courts. Limited as I am in the matter of space, I shall content myself with a statement of the general principles evolved or adopted in the particular court over which I preside.

### SCOPE OF "INDUSTRIAL CONDITIONS"

In the South Australian Industrial Arbitration Act of 1912, the term "industrial matters" is defined in a sense so wide as to include almost every conceivable question likely to arise between employer and employee. It includes, for example, wages, hours of employment, sex, age, qualification or status of employees, apprenticeship, employment of children, the right to dismiss, the right to employ or reinstate in employment persons or classes of persons in any industry; and all questions of what is fair and right in relation to any industrial matter having regard to the interests of the persons immediately concerned and of society as a whole. The act defines "industry" in a broad sense—a sense which includes, according to a recent decision of the Supreme Court, the work done by employees of municipalities. The act provides machinery for punishing offences against the act; and

it prohibits the lockout and the strike under penalties of imprisonment and of fine (which *must* be made a charge on wages due or to be due, and *may* be made a charge on the association of which the offender is a member).

It will thus appear how multitudinous are the issues which may come before the industrial court. I propose to confine myself in the main to the most difficult of all issues—the determination of rates of wage. But before entering upon this subject, I venture a word on the topic of industrial conditions generally.

#### RESTRICTIONS UPON EMPLOYERS IN THE CONDUCT OF BUSINESS

While a large section of the employees object to a prohibition of the strike—a subject to which I shall refer later—a large number of employers object, if not to some public control over their business, at least to the scope of that control as exercised by industrial courts. In the Carpenters and Joiners Case³ I stated three general propositions which appear to me to be applicable to the question of how far the court ought to go in imposing conditions on the way in which employers should conduct their business. I quote the substance of the three propositions here:

- (I) Reasonable conditions or restrictions which control the employers in an industry generally, and not merely particular employers, are in the interests of the reasonable employer. Few phenomena of industrial evolution have been more common or more distressing than that of the reasonable employer endeavoring to provide reasonable conditions for his employees, but prevented from doing so by competition with the less scrupulous employer. Indeed, where there are fifty employers in an industry, half a dozen of them, or even a lesser number, by standing out against the establishment of desirable practices and conditions of employment, may make it impossible for the great body of employers to effect desired reforms. It is intolerable, to take an extreme example, that an employer who desires to pay his workmen reasonable wages, or who desires to observe reasonable conditions generally, should be subject to the danger of losing his market as the result of competition with some other employer who is prepared to sweat his employees.
- (2) Reasonable restrictions are not only in the interests of the reasonable employer. They are the very condition of the well-being of the employee. Of course, when speaking of restrictions on the conduct of a business, one is apt to think almost exclusively on such matters as wages and hours. There is a tendency at present in Australia to be obsessed by the question of wages and hours. But the

³ S. A. A. R. 1917—No. 10.

health, comfort, and general conditions under which a laborer works, are often of more importance to him than the question of wages and hours. They may involve, and in many cases do involve, a number of restrictions on employers. Their recognition and sanction are not the least important of the functions which an industrial court can discharge as an agency of industrial progress.

(3) The restrictions must be reasonable. In industries generally, there is need for a certain degree of elasticity. This is no doubt the reason why Mr. Justice Higgins has so frequently affirmed the principle of "non-interference with employers in the conduct of their business." One business might be conducted on quite legitimate lines, and yet not be conducted on the same lines as another legitimate business. One reasonable employer's methods may not be the same as another reasonable employer's methods. One locality is not the same as another locality.

"The appellants ask that a lock-up should be provided on all jobs. The respondents reply that, while this is generally done, there are many jobs on which a lock-up is not necessary, and some jobs on which it is not practicable. Cast iron regulations, or excessive regulation, may regulate reasonable employers, or even a whole industry, out of existence. Hence, with regard to several of the claims submitted, I propose to introduce in my award the words wherever reasonably practicable. Mr. Hargrave said, on behalf of the employees, that these words would stultify the value of the award, and throw upon the employees in a particular case the impossible burden of proving that the observance of the prescribed condition was reasonably practicable. I am unable to concur with Mr. Hargrave's argument. In the first place, if an employer fails to observe the conditions where he might reasonably have done so, I cannot see for a moment that it would be impossible in all cases, or even in the majority of cases, for the employees to prove to the satisfaction of the Court, that he had been guilty of a violation of the award. In the second place, even conditions which are qualified by such words as I have suggested, have a value as setting up a standard which an employer, even in his own interest, should respect. It is certainly not to the interest of an employer to act in a matter of this kind in a way that would be likely to give offence to his employees. One of the first conditions of successful business management is to keep on good terms with the employees. An employer, or a manager, who neglects this elementary principle by capriciously disregarding restrictions which are awarded by this Court, is not likely to get the best possible results out of his workmen. In the third place, if it should be shown that the introduction of such words as I have indicated have the effect of nullifying to a serious extent the value of the conditions to which the words are attached, then the employees have the right to come before this Court and ask the Court to vary its award, and to make conditions absolute which previously had been qualified."

#### WAGES: THE LIVING WAGE

Of all the questions which have arisen for decision in cases before me, the question of the rate of wage has been at once the most difficult and the most important. In the Salt Case, I referred at length to the section of the South Australian Industrial Arbitration Act of 1912 which precludes the court from awarding less than a living wage. An earlier decision by Mr. Justice Gordon had laid down the unchallengeable principle that the living wage must have regard to what is necessary for the maintenance of a married man with wife and children to support. The adoption of any other principle would have placed a premium on celibacy and infecundity. The act above referred to, section 22, defines a living wage as

"a sum sufficient for the normal and reasonable needs of the average employee living in the locality where the work under consideration is done or to be done."

I pointed out in the case cited that the words "normal and reasonable" qualify and complement one another. A wage might be normal which is not reasonable; it might be reasonable and not normal. The term "reasonable" has sometimes been described as a question-begging epithet. In the Carpenters and Joiners Case⁵ I elaborated the meaning of the term. An industrial court, when declaring the living wage in a particular community, should endeavor to give an award which will stand the following tests:

- (a) A proper maintenance of margins for workers who have a claim to additional remuneration (on the ground of skill or circumstance), and for salaried employees generally, including management.
- (b) A fair margin of profit for capital reasonably invested in industries efficiently conducted.
- (c) The avoidance as far as practicable of the danger of increasing the nominal wage while decreasing the real wage. Any benevolently minded judge can raise nominal wages, but it may take much thought and the co-operation of many agencies, both public and private, to secure an enduring rise of real wages interpreted in the purchasing power of money.
- (d) The provision for the unskilled worker of a remuneration which will enable him to maintain himself and his family in health and efficiency. I may add that, under the various South Australian acts, special provision is made for bona fide cases of aged, slow, inexperienced or infirm workers.

Of course, these remarks as to the living wage have to be qualified in the case of apprentices and improvers under twenty-one years of age, or in cases where employees are "kept." The complex question of woman labor cannot be considered in the present article. Since

⁴S. A. A. R. 1916-No. 1.

⁵ S. A. A. R. 1917—No. 10.

several cases are now pending before the South Australian Industrial Court in which it will be necessary for me to deal exhaustively with the subject of the wage for women, it would not be proper for me at the present moment to express my own preconceptions on the subject.

From the preceding sentences it will appear that the "reasonable needs" of a worker involve some reference to the question of an equitable distribution of the national income and output. While a court which took upon itself the part of a universal providence would introduce inconsistency and chaos in the industrial system, it is nevertheless true both that the "reasonable needs" of the worker in a community where the national income is high are greater than those of the worker in a community where the national income is low, and also that the judicial interpretation of "reasonable needs" must be affected by substantial variations in the national income. The judge of an industrial court must not lose his head because he sees some employers, or even some industries, making large profits. Nor, on the other hand, must he allow his estimate of the living wage to be affected by the existing wage in a sweated industry.

#### WAGES: THE MINIMUM WAGE

I distinguish between the living wage and the minimum wage for unskilled labor. The living wage is the bed rock below which the court cannot go; it applies to all industries irrespective of whether the industry can afford it or not, and in fact, irrespective of how much such industries can afford to pay. The claims of a struggling industry which it is desirable to retain in the community, but which cannot pay a living wage, are matters for the consideration of the legislature or the government, which in manifold ways may subsidize the industry until it has become established on a sound financial basis. On the other hand, the minimum wage applies solely to a particular industry. The wage may be affected by considerations of expediency which would be irrelevant in the calculation of the living wage, e. g., the fact that a certain rate of wage has already been agreed upon by the parties; possibly, the fact that the work in a particular industry is peculiarly responsible, laborious or disagreeable, or possibly the fact that the particular industry (as distinguished from a particular business concern) is flourishing. All these considerations, and even others, may be relevant for the purpose of determining the minimum wage. Further, I distinguish not merely between the living wage and the minimum wage, but also between the living wage and nominal variations of the living wage. Intermittent labor is an obvious example. If, in a particular industry, a worker obtains an average of only forty

^e See The Plumbers Case, S. A. A. R. 1916—Nos. 6 & 10, at pp. 5-10.

hours' employment per week, and some days ten hours' work and some days four, a living wage of 9 shillings per day of eight hours means not is. 1½d. per hour, but say is. 4d. per hour. It is similar in industries seriously prejudicial to the health of the worker, or seasonal industries, or again, industries which involve an exceptional charge on wages—for example, as a result of a necessity to keep up appearances.

#### WAGES FOR SKILLED LABOR

It has been my custom in fixing wages for the skilled laborer, to be guided mainly, though not exclusively, by customary margins hitherto prevailing in the industry concerned between the unskilled and the skilled rates of remuneration, and by the rates of remuneration existing for comparable work in kindred industries. The most common difficulty has been to determine whether labor is skilled or not. In illustration I may quote from my judgment in the Salt Case:

"The arguments for awarding a higher wage for skilled labor need no statement. . . . The labor engaged in the salt industry generally is unskilled labor. Much evidence has been adduced to show that the various classes of workers so engaged are skilled. But the evidence has been quite unconvincing. I do not know of a single occupation that does not require some kind of skill in a sense. It even requires some skill to blow one's nose. But I have to distinguish between the knack, to be learned for example in carrying a bag of salt with the minimum expenditure of energy and with the minimum discomfort, and that positive skill which implies training or special aptitude, and which alone can be taken into consideration, when awarding a higher than the minimum wage."

#### THE APPLICATION OF WAGE PRINCIPLES

Anyone at all acquainted with economic problems will realize how difficult must be the application of the foregoing general principles in terms of money. But in undertaking this difficult, important, and delicate task, an industrial court has a good deal of assistance, not merely from custom (as evidenced, for example, by family budgets of weekly earnings and expenditure), but also both from the precedents of other industrial courts, commonwealth and state, and also from the carefully tabulated investigations of the commonwealth statistician as to variations in the purchasing power of money, industrial conditions, the national savings, output, and income. Further, there are certain correctives which at once afford a hint to an industrial judge and a temporary palliative in case of errors of miscalculation which he may make. Apart from the possibility of governmental action in

⁷ S. A. A. R. 1916—No. 1, p. 14.

relation to the promotion of industrial efficiency—an action particularly appropriate in the case of struggling industries—there exists in Australia the power to subsidize an industry either by bounty, or by promoting facilities for transport and marketing, or by raising the tariff, etc. Of all the corrective measures the most obvious is an increase in the price of the commodity produced. Although an increase in wages should come as far as possible out of profits, it may sometimes be necessary where wages are raised to pass on the increase in the cost of production to the consumer.

#### WAGES AND PRICES

From the remark at the end of the preceding paragraph, it will be inferred that the subject of the price of commodities is one which must be ever present in the mind of an industrial judge. The relation of wages to prices involves questions of such difficulty and importance for the purposes of industrial arbitration, that I make no apology for quoting at length from my own judgment in the Carpenters and Joiners Case:⁸

"The fixing of wages is among the most important functions of the Industrial Court. If the Court is to discharge the function wisely, it must act in accordance with general principles to some of which I have referred in previous cases. It is a part of the work of the Court to enunciate these principles, not merely for the purpose of explaining or justifying its award in a particular case, but also for the purpose of simplifying or preventing litigation in the future. If an omniscient legislator could frame a complete code of Industrial Law, applicable to all conditions, and to the future as well as the present, the delays and expenses of litigation might be altogether avoided. The omniscient legislator, however, has yet to be found. Meanwhile the Industrial Court, fallible though it be, has to do its best to make good the deficiency, and to give form and substance to the conception of Industrial Law as a body of progressive principles regulating the relations of employer and employee. In pursuance of this function, as well as incidentally to a just settlement of the present case, I regard it to be my duty to refer very briefly to what I may call the 'Theory of the Pernicious Circle.' Briefly stated the theory is this: (1) That prices of commodities vary with the cost of production; (2) that an increase in wages is reflected in an increased cost of production; (3) that a Court of Industrial Arbitration, which awards an all-round increase of wages, necessitates an increase in the prices of commodities; (4) that when this increase has taken place the Court must revise its previous estimate of wages, in order to maintain its standard interpreted in the purchasing power of money; and (5) that again the cost of living must go up. And so on, ad

"While this theory is sometimes used to discredit the whole system of industrial arbitration, it is of course used more especially as an

⁸ S. A. A. R. 1917-No. 10, pp. 3-8.

argument against proposals for awarding an increase in the rate of wage. The theory, in one form or another, and with many variants, has caused amongst employers a good deal of unrest and uncertainty, with a corresponding disinclination to take those risks which the efficient functioning of industry demands. Among employees, too, there has been an attitude of unrest and discontent, sometimes amounting to despair. 'What is the good,' the employee asks, 'to get an increase of wages if the increase may be rendered merely nominal by decrease in the purchasing power of money?'

"For the reasons just mentioned, and for others that I might indicate, I think I ought to state certain facts: (1) This Court has never admitted that wages should necessarily be either increased or decreased in arithmetical ratio to the purchasing power of money. (2) The theory in question overlooks the variety and relative importance of the factors which go to determine the purchasing power of money. It is, of course, quite true that wages in Australia have been generally and substantially raised in recent years. In order to be consistent with pre-established standards, Courts of Arbitration have had from time to time to adjust what is called in this State the living wage. But this readjustment has been an effect rather than a cause of the increased cost of living. An eminent American economist, Irving 'The shrinkage of the dollar, amounting to more Fisher, writes: than one third in the last 18 years, is due to the inflation of money and credit, or, in other words, to the fact that the means for conducting trade have outrun the volume of trade to be conducted thereby. (Why the Dollar is Shrinking (1914) 189.) Speaking of Australian experience, it is safe to say that, while increased rates of wage have often contributed to an increase in the price for particular commodities, the general rise in the cost of living is mainly due to world prices and world influences. But supposing other factors than wages should remain the same, an increase in wages does not necessarily mean a decrease in the purchasing power of money. The increase in wages may come out of profits, where profits of an industry admit of this being done; or again, increased efficiency by employers or employees may more than make good the difference in wages. It is the duty of Price-Controlling Authorities to see than any increase in wages is not made a pretext for an undue enhancement in the price of commodities. Such authorities, in arriving at a decision in any particular case will naturally take into consideration the question whether the increase in wages could reasonably come out of profits, and even the question whether, assuming the increase in wages could not come out of profits of the industry as previously conducted, an increased efficiency, a better organization, or better work by the workmen, would not enable the higher wage to be paid without charging higher prices for the commodity produced. (3) Most of those who use the 'Theory of the Pernicious Circle' as an argument against the system of regulation of wages by public authorities, probably fail to realise that they are, by implication, advocating a return to supply and demand, or to collective bargaining, with its corollary of appeals to lawless force. The public regulation of wages does not eliminate supply and demand, but it qualifies their operation. For example, it precludes, or should preclude, anything in the nature of sweating. Per contra, since the Courts only prescribe minimum rates for all workers, they do not preclude the operation of supply and demand in favor of the more efficient worker. (4) Some socialists use the argument of the 'pernicious circle' as a proof against the possibility of progress under private-owned industry; but without expressing any opinion as to the relative merits of private and public-owned industry—which is a question for the High Court of Parliament—it ought to be apparent that under any scheme of socialism which is likely to prove at all workable, increased rewards for services rendered, whether called wages or not, would be liable to a like danger of enhancing the costs of production and the charges for the commodity produced.

"The element of truth in the 'Theory of the Pernicious Circle' is that, at a given stage in the history of a particular society, there is a limit to the amount which should properly be awarded for wages. I use the term wages here in a very broad sense to include not only the living wage for unskilled labor, which is partly ethical in the sense that it discards the value of the work produced by particular workers, and is based on normal and reasonable needs, but also to include the superstructure of wages or salaries for other classes, all of which of course affect the cost of production. Both wages and profits have to be paid for out of the price paid by the consumer. If, whether by collective bargaining, or by strike, or by judicial regulation on the part of public authorities, an attempt is made to narrow unduly the margin of profit on capital, then there is likely to be a period of industrial dislocation, and every class of the community is likely to suffer. I am not now thinking of the fact that, in a young country like Australia, we are largely dependent upon the allurement of capital from abroad, although this fact is significant. I will suppose for the sake of argument that our community is self-contained. Even in such a case, if a fair return on capital is not allowed, the immediate result is the crippling of industries generally. Employers, instead of expanding their business, scrapping old machinery, and taking the risks necessary to the efficient functioning of capital, will 'sit tight.' All classes are likely to suffer—probably the employees most of all. Per contra, conditions in a particular community favorable to the investment of capital mean a multiplication and expansion of industries, an increased demand for labor, and an increased opportunity for labor to obtain rates above the minimum rates fixed by law, custom, etc. Parenthetically, I may remark that I am here holding no brief for individual capitalists. It is no part of the duty of this Court to keep down wages in a particular industry, so as to ensure to all capitalists engaged therein a margin of profit. Again and again, this Court has said that if an industry cannot carry on without recourse to sweating it must go under, unless indeed, the community sees fit to subsidise it by bounty or tariff. Further, it is no part of the duty of this Court to act as a protector of the inefficient capitalist. In its estimate of marginal profits, the Court is justified in assuming a reasonable degree of efficiency on the part of those who control capital. Every day individual capitalists are going to the wall. It is equally true, of course, that some capitalists make extraordinary returns. It would conduce to lucidity of thought if the distinction between capital and individual capitalists were more generally appreciated.

"I may give point to my previous remarks by referring to my estimate of 9s. od. per day, as the living wage for South Australia, in the *Tinsmiths Case*. In that estimate, I assumed an abnormal economy on the part of the worker owing to war conditions. But, for the moment, and in order to clarify the present issue, we will suppose that

the 9s. od. per day was a fair and reasonable estimate of the living wage, apart from the call for economy resulting from war conditions. By that I mean that 9s. od. per day represented what, on a comprehensive view of the output of the community, it was safe for the Court to fix as a bed rock, below which wages must not be allowed to go. Suppose that, despite the reasonableness of the estimate of 9s. od. I had decided that at current prices 12s. od. should be declared the living wage. What would have happened? I will assume, of course, no intention to interfere with the just margin involved in the maintenance of the superstructure of wages for other classes than the unskilled laborer. It might be reasonably anticipated, I think, that there would be great, possibly a frantic, effort on the part of employers to meet the new conditions by increased efficiency of organisation, management, and industrial mechanism generally. ficial results of such an effort are hypothetical; the probably certain result of awarding 12s. would have been as follows: (1) A period of dislocation would follow, involving much unemployment, and the ruin of many establishments. (2) Some industries not absolutely essential to the community would die out, leaving their employees to swell the ranks of unemployment. (3) Many industries essential to the community would have to be supported either by increased tariff (in which case the consumer pays directly), or by increased taxation (in which case the general public contributes indirectly). In so far as taxation involves a levy on industry, it affects, or is likely to affect, the costs of production, and therefore the costs of commodities. A wise Legislature may do much to bring about an equitable distribution of the national income by a carefully reasoned scheme of taxation. But if it oversteps a certain margin, it increases the costs of production and the costs of the commodities produced. Returning to the question of the effect of an increase of the tariff in raising the cost of living, it does not follow that the employees only pay the increased price of the commodity in proportion to the quantity of the goods which they consume. In the Tinsmiths Case, at pp. 23 and 24, I said: 'Whether wages rise through an award of the Court, or through the operation of supply and demand, is immaterial with respect to the effect of the rise of wages on prices. To put the matter rather crudely I will suppose a self-contained community in which wages go up by an amount indicated by the symbol X. Suppose in the same community that the laboring class consume three-fifths of the commodities. It would be natural to argue that, even if the whole of the increased cost of production is passed on to the consumer, the laborers will receive a net gain. As consumers, they would pay three-fifths of X; as employees they receive the whole of X. Unfortunately the matter does not work out in this easy arithmetical way. In the long course of production from the raw material to the finished article for consumption, there are many parties involved; and we certainly cannot assume, especially in view of the difficulty of dealing in fractions of a penny, that each party will only add an exact proportion. He would be more likely to add a little extra. The net result might be that the laboring class, while receiving X increase of wages, would pay more than X increase in the cost of living.

"It will be apparent from the preceding paragraph that the cost of living would, in all probability, be largely increased as the result of the decision of a living wage of 12s. under the circumstances indicated. In the course of time, and probably a very short time, to

maintain the same standard wage interpreted in the purchasing power of money, it would become necessary for the Court to fix a much larger sum as the living wage; and this, again, would lead, in all probability, to a further rise in prices. And so on, ad infinitum.

"There is thus an element of truth in what I call the 'Theory of the Pernicious Circle.' But that theory comes into operation where there is a miscalculation by the Industrial Court, or a failure on the part of Price-Controlling Authorities to supplement, by wise supervision, the operation of the determinants of the prices charged for commodities. In this connection I may again mention my award in the Tinsmiths Case. In that case I increased the living wage from 8s. to 9s. per day. I am not aware that there has been an all-round increase in the cost of living since that award, although undoubtedly the cost of some commodities has gone up, mostly owing to war conditions. The evidence goes to show that, in declaring a living wage of 9s., I was keeping within the margin of safety. One reason why the rise in wages should not have been reflected in an increased cost of living was that, in a large number of industries, the employees were already receiving at least 9s. per day. The effect of my decision was to bring other industries into line. Further, it was probable that there was some diversion of profits to wages. In any case, it is the duty of an Industrial Court, if it is going to raise the *living wage* (which is the basis on which it works with regard to the secondary wage for the other classes), to have regard to any increase in the cost of living which may reasonably be anticipated to result from such action. If the Court declares X as the living wage, and, as an immediate result the general cost of living goes up, and no allowance has been made for such increase, then the estimate of the living wage will need to be reviewed. Such a revision would mean a confession of miscalculation."

To the foregoing, I may add that the commonwealth statistician's figures relating to the decrease in the purchasing power of money in Australia in recent years require a good deal of qualification when considering the question of the actual increase in the cost of living.⁹

# RESULTS OF INDUSTRIAL ARBITRATION IN AUSTRALIA

While the public control of industrial conditions has been of undoubted advantage in multitudinous ways to employees, and has also protected the great majority of employers from competition with employers who show a disposition to regard the wage earner as a mere machine for turning out profits, the system cannot be said to have been an unqualified success. One proof of the fact may be found in the number of strikes in Australia, a number which in 1916 was so high as to constitute a record. Nor are things better in 1917. This is a grave indictment, and suggestive of serious imperfections. A lockout or a strike is an antiquated method of settling industrial

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^o The Tinsmiths Case, S. A. A. R. 1916-No. 2, pp. 5-10.

disputes, is costly to the community, and involves a substitution of force in the place of an appeal to reason and justice. Economic relations, like civil relations, have to pass through three stages. In the first stage, the person wronged must take the chance of being able to redress the wrong by appeal to force. In the second stage, tribunals of conciliation are instituted, and these, while undoubtedly saving much injustice, are still quite inadequate. In the third stage, the settlement of disputes, industrial no less than civil, must be according to law. I do not say that strikes in the past have not fulfilled useful functions. Nor do I say that even to-day at a particular moment in a particular industry the workers may not on occasion get more easily what they want by a strike than by law. But looking at the interests of the employees as a whole, and in the long run (to say nothing of the interests of the employers and of society), it has yet to be realized in Australia how greatly those interests depend upon loyalty to the reign of law as distinct from the dominance of unregulated force. Employees who resort to force bring contumely on the whole system of industrial arbitration. They alienate that general public sympathy which has hitherto contributed towards the legislative redress of grievances or ill conditions under which the workers have suffered. They besmirch the whole class of wage earners. They are false not only to the common good, but, ultimately, to those very interests which they profess to champion. In a given case, both employee and employer should consider not only his own particular grievance; he should consider also the welfare of the class to which he belongs; and again, he must consider society. If he neglects to do so, and resorts to force in derision of the law, he is not merely a disloyal citizen; he betrays the real and abiding interests of his class and of society. His betrayal is none the less dangerous because he may be acting in accordance with what he believes to be good motives, or because he does evil in the hope that good will come of it.

Notwithstanding what I have just said, the public control of industrial conditions has not been signally successful in Australia generally, although it has gone far to supersede the strike and the lockout in South Australia—a result for which much is due to the efforts and tact of trade union secretaries. Until it is a success in superseding the strike and the lockout, it must be regarded as being in an experimental stage. I propose to indicate some reasons why, in my opinion, the public control of industrial conditions in Australia has yet to make good in the particular respect indicated.

Quite a number of causes might be suggested all of which have more or less influence: the discontent shared by Australian workers with workers in a great part of the civilized world against the capitalistic system; a complacent view with regard to the issue of the present war (accompanied by a tendency to regard loyalty to class interests as the supreme loyalty); and the effect of increasing wages both on prices and the *morale* of the worker. To these causes may be added, since the recent division in the labor party on conscription, an irritation against coalition governments which do not include adequate representation of the official labor party, and a comparative lack of the restraining influence of wise leadership amongst the body of employees. I content myself, however, with dealing at length with three special causes which appear to me to have had a wide influence over a period of years.

In the first place, the existing legislation is imperfect. The functions of wages boards are too limited. State industrial courts, though having wider powers, are not infrequently hampered as regards either their jurisdiction or their functions. Further, while there is a Commonwealth Court of Conciliation and Arbitration, as well as state industrial courts, no machinery has been provided for securing an approximate harmony between the decisions of the commonwealth and state tribunals. The state court has jurisdiction to deal with state industrial disputes. The Commonwealth Court of Conciliation and Arbitration has jurisdiction to deal with disputes which extend beyond a state. The state courts have necessarily to defer to the possibility that an award which they might think just in a particular case would cripple an industry which is in competition with the same industry in other states where a low rate of wage exists. On the other hand, the commonwealth court, though it may be unhampered by considerations of competition between industries in one state and those in another, is unable to declare a common rule. One of the most urgent requirements of the moment is the constitution of a commonwealth court of industrial appeals, representative of both commonwealth and states, and empowered to grant leave to appeal from a state award or an award of the Commonwealth Court of Conciliation and Arbitration, to hear the appeal, to take fresh evidence where necessary, to establish a common rule, and generally to rectify the errors or limitations of the court below, and to secure an enduring harmony between the existing commonwealth and state industrial courts.

In the second place, the increase in the cost of living, the progress of popular education, aspiration and ideals, and world-wide influences such as the syndicalistic movement, have combined to create, if not a divine discontent, certainly a considerable discontent. In particular, literature of a somewhat syndicalistic character is imported into Australia. Although such literature may find its more energetic exponents among recent immigrants from foreign nationalities which have never enjoyed the measure of political, civil, and industrial freedom and justice which is enjoyed in Australia, the contagion spreads; conclusions, possibly applicable in some older countries under a despotic sway, are accepted in all their force as if they were as applicable in Australia as in the country of their origin.

In the third place, I fear it must be admitted that a large proportion

of the workers in Australia do not realize the complexity of the interrelation between capital and labor. It is not apparent to them that an indiscriminating attack on capital reacts unfavorably on themselves. As I remarked in the Tug Boats Case, 10 if it is desired to increase wages generally and substantially, it becomes necessary to increase national production—a fact which concerns employers, employees, and the general community alike. To increase national production, we must keep industries going, and we must attain a maximum of efficiency in each industry. This maximum of efficiency is apt to be associated in the minds of the employees with the distrusted process of "speeding up." But, as a matter of fact, efficiency experts in America are more particularly concerned to make suggestions as to greater intelligence in the management, and increased intelligence in the worker, so that every ounce of effort attains the maximum of result. A maximum of national production, again, demands a spirit of initiative on the part of the employers, a willingness to scrap old machinery, to extend plant and premises, to extend business, even to speculate. If the industrial tribunals of Australia, or the price regulation authorities of Australia, should fail to proceed with due regard to the facts just stated, the result would be to justify the criticism which has been so frequently made against them—that they are instrumentalities for the restriction of national production. In the net result, the community suffers, the employers suffer, and the employees suffer.

What are the prospects of the public control of industrial conditions superseding the strike and the lockout in the near future? Personally, I am optimistic as regards the answer to this question. More just legislation is promised, and popular education and experience are at work with respect to certain antisocial influences just mentioned. At present, public opinion in Australia is inclined to hold that the lockout and the strike are wrong. I think that the day is not far distant when the great body of workers will recognize that the strike does not pay. When this day dawns, the militant unionist will find an outlet for his zeal in such forms of social amelioration as are referred to below. Those who take a pessimistic view of the future of compulsory arbitration are apt to refer to the impossibility of imprisoning a large number of strikers. But there are many other forms of penalty besides imprisonment—e. g., power to summon compulsory conferences (and in case of obstinacy to refer the matter into court); deregistration of unions; fines on individuals and on associations; variation or cancellation of awards. The ultimate efficacy of such forms of socially regulated force, like the law against duelling, will depend upon public opinion. In the meantime the advocate of compulsory arbitration has the consolation that occasional violation of a law is no proof that it is worthless, and that compulsory arbitration,

¹⁰ S. A. A. R. 1916—No. 20, pp. 3-4.

while aiming at eliminating the lockout and strike, has also various other objects. All these objects may be subsumed under the heading of "substitution of reason and justice for appeals to unregulated force." But the variety of the objects should not be overlooked: the haphazards of collective bargaining, the elimination of sweating, the creation of a new status of employee, the protection of the fair employer from competitive tactics of the unfair employer.

## CONCLUDING REFLECTIONS

## (1) The Progressive Character of Industrial Law.

In the course of my experience in industrial court work I have frequently had occasion to emphasize the necessity for an observance of legality, in the sense of uniformity, consistency, and conformity to reasonable expectancy, in the application of rules to varying industrial disputes. If an industrial judge decides without reference to the guidance of general principles, the substitution of law and order for unregulated force is not achieved. I heard one capable observer say that so far as he could see, the main function of industrial courts was to give to the wage earners just enough to keep them quiet. Such an attitude is conceivable in very early stages in the history of an industrial court; but as the institution develops and precedents broaden, an industrial judge is driven towards the goal of a coherent and enduring body of principles, if he is to ensure industrial stability. But the point which I am most anxious to emphasize here is that the principles so formulated must not be regarded as a kind of cast-iron code. A great judge, Jessel, M.R., did not shrink from describing civil law as a body of progressive principles. Certainly, industrial law ought to be so regarded. It is a body of principles worked out from precedent to precedent, and adapted from time to time to meet the needs and aspirations of a progressive society. I do not here advocate an unlimited discretion, which might be paraphrased as unfettered caprice. I do not advocate an equity which will vary according to "the length of the lord chancellor's foot." But between the extreme of cast-iron regulation and unfettered discretion or caprice, there is a middle course which it is incumbent upon an industrial judge to follow.

# (2) The Potential Economy of High Wages.

There are several limitations upon the natural ambition of an industrial court to raise the rate of wage. Apart from the danger to which I have previously referred, that high wages may affect the prices of commodities in such a way as to neutralize the advantage of the increase of wages, an Australian tribunal has to remember that the rural industries are the mainstay of the country; that those

industries have to be carried on in competition with other industries all over the world; and that to raise the wage in such rural industries so as to make them unprofitable, or to raise wages in metropolitan areas to such an extent as to achieve the same results indirectly, would tell for national bankruptcy. Subject, however, to limitations such as I have indicated, the potential economy of high wages, so often insisted upon by economists, cannot be ignored by industrial courts. It is not to the interests of employers that wages should be kept down to a bare subsistence level. In order to make possible a high state of industrial efficiency on the part of the employees, it is necessary that the wages should be such as to ensure the workman sufficient to maintain him in a high state of industrial efficiency and to provide his family with the necessaries for physical health and physical wellbeing. The mistake is often made by private employers—which is often, and I fear justly, attributed to governments-the mistake of seeking efficiency through economies rather than economies through efficiency. But the argument does not stand on this basis alone. It stands also on the broader basis of the interests of society. Malnutrition, whether of the workman, or of his wife and children, spells for national inefficiency. Further, although in the past large families have been commonly associated with the lower paid workman, in a community like Australia where a fairly high standard of popular education exists, a low estimate of the living wage places a premium both on celibacy and on a low birth rate,—a consequence of immense significance in view of the fact that Australia needs a large increase of population for its defense and the development of its resources. Finally, as economists have frequently pointed out, high wages mean an increase in the demand for those commodities which involve a maximum of employment.

The preceding paragraph was written in reference to the present time. But looking at time to come, it is reasonable to anticipate an increase in the productivity of industry resulting from the progress of mechanical inventions, improved methods in the organization of industry, or an increased efficiency of the worker. No one will deny the right of the worker to share in this increased productivity of industry. It is true, of course, that the workers themselves may fail to co-operate with the employers for the purpose of securing the maximum of output; and such failure might neutralize the good results which would otherwise follow from new inventions or improved methods in the conduct and organization of business concerns. But assuming that the workers as a body recognize, or come to recognize, the fatuity of failure to co-operate with employers in the processes of production, there should be a progressive rise in wages without precluding a proper margin for profit on capital reasonably invested in concerns efficiently managed.

## (3) Complementary Agencies of Social Amelioration.

Some workers appear to hold that upon wages boards and industrial courts rests the whole burden of ameliorating the conditions of the working class. Hence a good deal of recrimination, which a great statesman has described as the easiest and least expensive form of selfindulgence. As a matter of fact there are a number of compulsory agencies, to some of which I may refer here. In the first place, industrial courts prescribe only minimum rates of wage, together with what are considered just conditions of labor generally. But the prescribing of minimum rates of wage does not prevent the operation of supply and demand in favor of the more competent worker, or indeed, in times when labor is scarce, or capital abundant, in favor of all workers. In the second place, the action of industrial courts does not preclude the possibility of such schemes of social amelioration as distributive co-operation, profit-sharing, or copartnership (in the sense of a share in the profits and control of business concerns). Objection to profit-sharing or copartnership which has told against their adoption in other countries does not apply in Australia with its public machinery for the regulation of hours of labor and rates of wage. The systems could be grafted on the present system of public regulation to the advantage of all parties and of the community in general. In the third place, there is an immense field for legislative and administrative activity in the way of increasing industrial efficiency by provision of public departments of research; by raising the standard of popular education; by adjustment of the incidence of taxation (with special reference, inter alia, to the man with a family to support); old age pensions; schemes for insurance against unemployment; the public control of monopoly or quasi-monopoly prices.11 It has been sometimes said that the chief function of wages boards and industrial courts is to prevent sweating. While, as a matter of fact, both industrial courts and wages boards go far beyond this end, they still leave an immense field for the activity of private and public agencies along the lines just suggested. It has been well said that

"The working class has four legs, and unless it has all four at once it cannot stand upright. These four are the trade union movement, the co-operative movement, education, and the political movement."

Industrial courts may be regarded as a particular application of the political movement. Those courts constitute but one of many agencies in the process of social amelioration. If some of the energy which is occasionally spent in criticising the industrial awards was diverted into other channels, the results would prove more beneficial.

¹¹ Cf. W. Jethro Brown, The Prevention and Control of Monopolies.

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I have some hesitation in making suggestions as to reading for the benefit of students who may desire to go into the subject more thoroughly than it has been possible for me to do within the compass of a single article. My hesitation is certainly not the result of a paucity of materials. I may, however, refer especially to the awards of the various Australian industrial courts; to the article, already cited, by Mr. Justice Higgins on A New Province for Law and Order; to the report of Mr. A. B. Piddington, K. C. (now chairman of the Interstate Commission) printed in 1913, on Industrial Arbitration in New South Wales; to the various reports of Mr. Stewart from time to time, extracting the essence of the decisions of the Commonwealth Court of Conciliation and Arbitration; to the published contributions of Mr. J. B. Hammond; and to Mr. Hamilton's Compulsory Arbitration in Industrial Disputes, published in 1913. In the article of Mr. Justice Higgins, the reader will find crystallized in the briefest possible form the principles upon which the Commonwealth Court of Conciliation and Arbitration acts. Two of these principles may be quoted here:

"The principle of the living wage has been applied to women, but with a difference, as women are not usually legally responsible for the maintenance of a family. A woman's minimum is based on the average cost of her own living to one who supports herself by her own exertions. A woman or girl with a comfortable home cannot be left to outbid in wages other women or girls who are less fortunate.

"But in an occupation in which men as well as women are employed, the minimum is based on the man's cost of living. If the occupation is that of a black-smith, the minimum is a man's minimum; if the occupation is that of a milliner, the minimum is a woman's minimum; if the occupation is that of fruit-picking, as both men and women are employed, the minimum must be a man's minimum."

Since writing the above article, Mr. Murphy, Secretary of the Department of Labor, Melbourne, has published a most interesting book on Wages and Prices in Australia. The book may be recommended to the general reader although there are some parts which, in my opinion, require to be read with caution. For instance, on page 11 the author quotes Mr. Knibbs' figures for the purpose of proving that, taking the years 1901 to 1916, the rise in the cost of living in Australia had been 50 per cent., while the rise in wages is only 39 per cent., thus showing a balance against the worker. The figures of Mr. Knibbs relate to the purchasing power of money and have to be taken with considerable qualifications with regard to the cost of living. (See The Tinsmiths Case, S. A. A. R. 1916-No. 2.) Further, the author neglects to point out that the increase in the cost of living is largely due to the war and to world prices. It seems fair to assume that after the war prices will go down without a corresponding reduction in wages. I wish to dissent also from the suggestion made in various parts of Mr. Murphy's brochure that industrial tribunals have given their awards on an empiric and opportunist basis rather than upon scientific formulae. Of the two formulae suggested by the author, the earlier has been adopted in substance—at any rate in this state. On page 38 the author suggests handing over to the commonwealth complete and exclusive jurisdiction of certain matters, reserving other matters to the states. Such a division of the field of industrial enterprise would lead to a good deal of litigation in order to determine in particular instances which employees were under commonwealth jurisdiction and which were under state jurisdiction; and it would not, moreover, provide any means for securing an approximate harmony between the decisions of the commonwealth and state courts. The lack of such harmony in the past has probably been a more fruitful

cause of discontent and of strikes than any other single cause. On page 55 the author says that penal laws in Australia with respect to strikes have not been carried out. The remark does not apply to South Australia—a fact which may have some bearing on the relatively small amount of wages lost in industrial disputes in South Australia for the years 1913-1916. Whereas the loss suffered by each individual worker in New South Wales for that period is put at £3.8.8, in South Australia it is put at only 5s. 11d. At various places in Mr. Murphy's brochure there are references to the increase of output as compared with the increase in wages. There is a failure to recognize that the tendency of modern industrial organization is in the direction of machinery which is increasingly costly and has to be scrapped from time to time, and that other causes of a like nature exist which all tend to diminish the amount paid in wages relating both to capital invested and to the value of the output.

## THE INDEXING OF LEGISLATION

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It has long been recognized that law-books constitute the principal tools in trade of the lawyer. If these tools are to be kept sharp and ready for use, they must be accompanied by some device through which the particular point sought can be quickly located. In the case of court reports, this vital need is effectively met by the numerous digests, citations and tables of cases. Through the use of all the digests arranged in accordance with the three or four principal digest classification schemes, it is possible in a very short time to discover substantially every judical precedent bearing upon any particular point of law.

Far less adequate are the devices for finding the statutory law, which is becoming every year a matter of greater importance to the lawyer, as well as to the scientific legislator. Not only is there no single classification scheme which will reveal at a glance all the legislation of a large number of states on any given topic, but in many cases there is even an absence of uniformity in the indexing of successive volumes of session laws of the same state.

There is little fault to find with the devices available for finding the legislation, especially recent legislation, enacted by Congress. The indexes included in each volume of the Statutes at Large are prepared by a relatively permanent force of expert indexers at the State Department, who have followed a substantially uniform classification scheme for many years. In 1903 the indexes of the first 32 volumes of the Statutes at Large were consolidated in a single index, of which unfortunately only a few copies were ever published; this Consolidated Index is for many purposes the most useful available index of the Federal statutes, in spite of a considerable lack of uniformity in the classification scheme for the first ten or twelve volumes of the Statutes. The permanent general legislation enacted from 1789 to 1907 is included in a single classification scheme, with an extensive use of cross-references, in the two Scott and Beaman indexes prepared in the Library of Congress; the same scheme has been continued in the form of a card index at the Library of Congress, for the permanent general legislation from 1907 to date and also for a considerable amount of recent Federal legislation of a temporary, local or private nature. In addition to these official indexes, there are very satisfactory unofficial indexes in the latest editions of the Compiled Statutes and the Federal Statutes Annotated. There are also many compilations of laws on particular subjects, prepared by

the bureau or office having charge of the enforcement of such laws; in most cases these compilations include satisfactory and reliable indexes.

The indexing of British and colonial laws, though somewhat less extensive than that of the Acts of Congress, is for the most part adequate after one has learned the system of indexing; there is, however, little uniformity in the classifications employed in the different jurisdictions. Still greater, of course, is the lack of uniformity in the indexing of laws in foreign languages.

But from the standpoint of the average American lawyer or legislator, the most aggravating lack of uniformity of indexing is that exhibited in the compilations and session laws of the various states and territories of the United States. One who is seeking all the American statutory law on a particular point is likely to meet with several distinct sources of annoyance. In the first place, unless the point in which he is interested has already been covered by some recent and reliable compilation or treatise, he is obliged to make at least forty-eight distinct investigations before he has completed his task. Nor is the process of investigation by any means uniform in the case of all the states, on account of the great diversity of the statute material in the different states. In about half the states the entire body of the statute law has been officially consolidated in a single volume, variously labeled General Statutes, Revised Laws, Code, Compiled Statutes, etc., such compilations being for the most part completely revised every ten or twenty years. In other states the statute law is divided into several different codes; one of the most conspicuous examples being California, with its General Laws, Political Code, Civil Code, Code of Civil Procedure, and Penal Code, each of which is composed of sections numbered independently of the other codes. In such states there is seldom a recent official revision of any of the codes; but these are ordinarily amended specifically by section number, so that the frequent unofficial editions of the codes are entirely reliable. In a few of the states, of which Pennsylvania is perhaps the best example, the entire matter of compiling the laws has in recent years been left altogether to private initiative, so that the reliability of the existing compilations depends entirely upon the ability and diligence of the unofficial compilers. In these cases it is always difficult to determine to what extent a recent law should be regarded as repealing an earlier and apparently inconsistent law, since the best unofficial compiler is likely to be either unable or unwilling to determine such a question; in short, situations are frequently likely to arise in which it is necessary to go behind the unofficial compilations and consult the session laws themselves.

The indexing of the statute material of the different states is even more diverse than the material itself. In New York and California and a few other states, there are indexes which contain in a single

alphabetical arrangement references to all the laws enacted from the earliest period to a comparatively recent date. Such indexes, however, soon become obsolete unless they are kept up to date by current supplements; and this is seldom done. Where, as is ordinarily the case, the matter under investigation is the law in force on a particular topic at a given time, it is for the most part necessary to consult the latest revision or compilation, and all the session laws subsequently enacted. As there are likely to be five or perhaps ten volumes of these session laws, it is necessary, before the investigation can be completed, to consult from one to two hundred distinct indexes. The indexes contained in the various revisions and compilations, whether official or unofficial, are in general fairly reliable, although they exhibit a considerable diversity in the method of classification employed. With respect to the session laws, there is likely to be a lack of uniformity, not only between the indexes for different states, but even between those of different years for the same state. Nor is it certain that any particular index will prove entirely satisfactory from the standpoint of the ordinary investigator. For example, the South Carolina Blue Sky Law¹ is not indexed at all under Blue Sky, Stock, Corporations or Fraud, but only under Bonds, where few persons would think of looking for it.

It is often a matter of considerable difficulty to ascertain whether or not a particular law is actually in force at a given time. A frequent source of confusion from this standpoint is the practice, especially common in connection with local legislation, of amending the same section four or five times at the same legislative session.2 Inasmuch as the latest of these amendments is usually worded in such a way as to supersede all the others, it is always difficult to ascertain whether or not a particular amendment is still in force except by means of a table of repeals and amendments. Such a table is generally found in the index of each volume of session laws, but in many cases it is either unreliable, or located in an unexpected place, or missing altogether. Moreover, it is by no means an infrequent custom of legislatures to ignore a recent revision of the statutes and amend an earlier act included in the revision;3 in such a case even a table of repeals and amendments would usually fail to indicate the change in the revised laws.

There have been several attempts in recent years to establish a uniform scheme of indexing current state legislation. Some of these attempts showed much promise, and were continued for a number of years; they did not receive any great amount of support, and were eventually abandoned. One of the most promising of them was

¹ South Carolina Laws, 1915, No. 160, p. 251.

² See, for example, South Carolina Laws, 1916, Nos. 421, 487, 488.

² See, for example, Minnesota Laws, 1915, ch. 134, 250.

the scheme worked out by the New York State Library. This scheme included both an alphabetical index and an elaborate subject-classification which was continued as a uniform classification for several years; it was discontinued about ten years ago. A more recent attempt, extremely ambitious in its scope, was the Official Index to State Legislation. This index consisted of two parts: a numerical list of all the bills and resolutions introduced in the state legislatures, with a brief statement of the subject-matter and the action taken by the legislature with respect to them; and an alphabetical list of subjects with a reference to every bill bearing upon each subject. This arrangement was but partially satisfactory as an index of laws, not only because of the necessity in every case of consulting two different parts of the index before finding a citation to the law itself, but also because the subject-index made no distinction between laws and bills failing to become law, thus increasing tenfold the amount of effort required to find all the law on a particular topic.

Undoubtedly the greatest obstacle to uniform indexing of state laws is the general failure to recognize the importance of the entire subject. For the most part it seems to be taken for granted that any reasonably intelligent person is competent to prepare the indexes for the session laws of the various states. The publication of these laws is almost universally left to the secretary of state, whose office force is generally chosen more for political reasons than because of any special fitness for performing detailed work carefully and accurately, and is likely to suffer a complete change after every state election. Under such a system, it is a matter of uncertainty whether the session laws will be well or poorly indexed; and there is little prospect of securing a uniform system of indexing for all the successive laws of the state, to say nothing of uniformity with the systems employed in other

In several states, indexes of current legislation are prepared and published by the legislative reference bureaus in advance of the publication of the official volumes of session laws. Such indexes are likely to be relatively free from the defects to which we have referred. A legislative reference force is not ordinarily chosen primarily for political reasons; and there is apt to be a considerable continuity in the personnel and in the methods of work. Moreover, the members of a legislative reference force are peculiarly fitted to determine the system of indexing laws which would be most valuable to the investigator, since they are themselves obliged to make constant use of these indexes in the course of their ordinary duties. If the preparation of the official session law indexes could be put in the hands of the legislative reference bureaus, a long step in the direction of uniformity would be accomplished. Such a step might also pave the way for a still further approach to uniformity. Through co-operation among the different reference bureaus, it would be a matter of relatively little difficulty to develop something in the nature of a standard index classification comparable to any of the leading digest classification schemes. But before any material progress in the direction of uniformity can be reasonably expected, there must be developed a wider appreciation of two facts: first, that there is a real need for a uniform method of indexing; and second, that the indexing of laws is a highly technical process which should be performed only by persons possessing special qualifications and training therefor.

## SCOTTISH PRIZE DECISIONS OF THE SEVEN-TEENTH AND EIGHTEENTH CENTURIES

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The neat and handy Reports of Christopher Robinson have made the decisions of the English Prize Court a ready storehouse of the laws of maritime war, just as the compilation of Pistoye and Duverdy made those of the French prize tribunals. The decisions of the Scottish prize courts, on the contrary, are sunk in the volumes of miscellaneous repertories of jurisprudence—Morison's Decisions, Stair's Compilations, etc. So far as the writer knows, they are never once referred to by editors on the law of nations, and only occasionally emerge to the light of day in treatises on the law of Scotland.

Yet they are interesting and important. Moreover, they throw light on a dark period—that preceding the dawn of Stowell and Story. For the corresponding period in England we have nothing beyond the fragmentary and meager notes put together in the volumes known as Hay and Marriott and Burrell and such correspondence as is preserved, for instance, in the Life of Sir Leoline Jenkins. Totally neglected as these Scots cases are, it would seem well worth while to have them reprinted and made generally available, for nobody is likely to break a set of Morison, or to purchase the half-hundred volumes for the sake of two.

Volume XXVIII of William Maxwell Morison's Decisions of the Court of Session . . . in the form of a Dictionary (Edinburgh, 1805) contains the title Prize, at page 11,857. The industry of my friend, Dr. G. C. F. Schirrmeister, Marshal of the Inner Temple, enables me to present succinctly the cases there set out.

### CONCLUSIONS

On a review of the whole cases we see the following appearing mostly as early as the seventeenth century:

- I. The mode of trial on the ship's papers without a word of captor's evidence, established in uniform and settled working, as declared in the Lee-Murray *Memorandum* of 1753, as reported to Mr. Jay by Scott in 1793, and as subsisting up to 1914.
- 2. The corollary that throwing of papers overboard is already "an unquestionable ground of prize."
- 3. The recognition of domicile as the criterion of national character for prize purposes, not only for the treatment of a neutral as an enemy, but also for the treatment of an enemy as a friend.

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- 4. The absolute coincidence, for this purpose, of trade-domicile with personal, family domicile.
  - 5. That true domicile is unique and single.
- 6. The doctrine that false documents, or no documents, make prize, unless the claimant is indulged with further proof (in which case it may be made a condition that captors shall have the same indulgence).
- 7. The practice of restoring prizes taken in contempt of territorial sovereignty. (Eighteenth century.)
  - 8. The three-mile limit of territorial waters. (Eighteenth century.)
  - 9. The fact that declaration of war is not needed to constitute war.
- 10. The voluntary exemption of ships in port from capture at the outbreak of a war. (Eighteenth century.)
- II. The admission of enemy persons to claim in prize. (Eighteenth century.)
  - 12. The independence of the prize jurisdiction from royal dictation.

The first case dates from 1558.¹ It establishes the principle that a lawful capture gives an unimpeachable title. Lindsay had bought a ship from a French man-of-war, but on bringing her into Leith, he was met by the claim of a former Dutch owner, who alleged that she had been taken from him by pirates. But it was decreed that, whatever her previous history, she was a just prize to the Frenchman, who took her from a Hollander "who was bringing victuals to the town of Berwick, in time of war, to furnish our old enemies of England." In other words, she was acting as an enemy's transport. It will be seen that the court examined the grounds of the capture: also that no French prize decree is alleged.

Case 2 is of 1566,² and merely establishes that capture by pirates does not of itself divest the owner's title, but it seems to recognize the recaptor's right to salvage, as they were required to bring in an account of their expenses. They had lost their own ship to the pirates and made a gallant recapture of the claimant's.

Case 3 is more important: no less than a determination of what constitutes a vessel neutral—a point still warmly controverted. It is of date a hundred years later (1666), and turns on the still unsettled and thorny topic of divided sovereignty. We are familiar with "leases" of territory in these days: in those, pledge was the more important (and in point of fact, the Orkney Islands and Kirkwall

¹ A Dutchman v. Lindsay (1558) 2 Fol. Dec. 127, Maitland MS. 127. Note, that this is not a prize cause, but a civil law issue turning on a question of prize. It is added that the carriage of victuals in wartime "prehebatur inter reges Gallorum, and the Hollanders, and the Flemings, and English. . ."

² A Frenchman v. Scotsman (1566) Fol. Dec. ut sup. 177, Maitland, ut sup. 166.

³ Paul Henrison v. Lord Ludquharn (Dec. 22, 1666) 1 Stair, 418, 425.

itself were originally Danish territory in pledge to Scotland). Henrison was "an indweller in the island of Helgilland, being at the mouth of the Elbe." Heligoland was Danish, and Scotland was at war with Denmark. But the island had been pledged to the Duke of Holstein, who was a prince of the empire and in amity with His Scottish Majesty. Therefore, when Henrison was taken by a privateer and carried into Peterhead, the Admiral released his vessel, although the Admiral-Depute there (the Laird of Ludquharn) had condemned it. The case exhibits the hierarchy of courts, somewhat resembling the French; the local "Admiral-Depute"; the central "Admiral"; and the appellate Court of Session. It also shows the Admiral and the Court of Session as taking the common-sense view that in all these cases of complicated sovereignty, the actual exercise of power is the deciding element. Henrison was a subject of a friendly duke, and it was of no-concern how the latter held the island or "how he got the right thereof." The Admiral-Depute (who doubtless had some interest in the forfeiture) was hard to convince, and raised the question again on January 4, 1667. But

"simple acknowledgments of a superior, or investiture from him, do not make subjects, or comprehend them within the wars and quarrels of their superiors,—yea, though there were a tribute or jurisdiction due to that superior, yet if the [inferior] prince do enjoy the privileges of making war and peace, he is not a simple subject."

He is comparable to the princes of Imperial Germany, who may pay tribute and submit to appeals to the Imperial Court, but

"because they can make war and peace, they are not necessarily involved in the Emperor's quarrels. So the Duke of Holstein, being a sovereign prince, and possessing this island, so as to make use of the subjects thereof in peace and war, is not comprehended in the King of Denmark's quarrel. . . ."

Ludquharn sticking to his point, that the islanders were contributing the ship to Henrison on bail till the point should be determined, caution for damages being also exacted from the persistent Ludquharn. The cargo (the property of neutral Hamburg merchants) was directed to be sold, and not made unprofitable: probably it was perishable.

Case 4⁵ turns on the effect of the Swedish treaties of 1661, 1664 and 1665.⁶ Great Britain has always been anxious to limit the operation of these instruments,⁷ which make national certificates of cargo and destination of ship and goods conclusive and are still subsisting.

^{*}Cf. The Ionian Ships, Spinks.

⁵ The Riga Castle v. Capt. Seatonn (July, 1667) 1 Stair, 481, 483, 484, 534.

^c Cf. Wheaton, Elements, ¶ 482.

⁷ See The Maria (1799, H. Ct. Adm.) 1 C. Rob. 287 [340].

One way was to deny that the principal treaty was as wide as it appeared on the face of it. Another was to challenge the passes as forged and fraudulent if inaccurate in any particular, and thus to let in an inquiry which it was the object (and the express stipulation) of the treaty to exclude. Another was to rely on a royal proclamation confiscating ships with enemy crews, and to represent this as overriding the treaty, which was directed to different points. Another was to ignore the explanatory treaties of 1664-1665. In the case before us, the employment of an enemy (Dutch) crew was mainly relied on: "but the pass was also challenged as incomplete, and an attempt was made to narrow the operation of the treaty." The claimants, however, produced a letter from King Charles to the effect that the ship was Swedish, and commanding the delivery up of ship and goods to themselves. This was enough for the Court of Session which, in view of treaty, weak evidence, and royal letter, annulled the decrees. But on July 3d they reconsidered the matter. The captors had not been inactive, and now argued that an act of the Crown, done without hearing the parties, obtained upon importunity and groundless representation, must be disregarded. Acts of the Crown cannot prejudge private rights. Also, Charles had even sent another letter, warranting the court to proceed. (We may suspect some intrigues at Whitehall, and perhaps a little judicious ready cash for the privy purse.) They then proceed to argue in favour of cutting down the Swedish treaty, to which the claimants replied that a solemn treaty was not to be retrenched or limited but by the exceptions contained within itself; that the pass excludes all inquiry, and that the king's earlier letter is conclusive. The king, again invoked, wrote in favour of a restrictive interpretation of the treaty. As it had, however, been decided that the evidence of enemy ownership was not difficult to condemn, in any event, the case was finally determined February 25, 1668, on the point that the ship and goods were prize on account of having a Dutch crew. And the court now agreed that, since the king's declaration of war contained a clause ordering prize to be made of ships navigated by Hollanders and the treaty contained nothing express against this, the Admiral's decree of confiscation must stand.8

Case 5 discloses an executive interference with the prize before condemnation. Colonel Seatonn, governor of the fort at Brassie⁹ Sound, meddled, *brevi manu*, with a ship and loading seized by the Laird of Balwhilly (an uncommissioned¹⁰ captor). Seatonn was sued before

⁸ It was alleged that the confessions of Dutch nationality were obtained by threats; and on this ground the court may never actually have proceeded to condemnation.

Bressay (?)

¹⁰ As to the rights of uncommissioned captors, see Rothery, *Prize Droits of Crown and Admiralty in War* (London, 1915) *passim*, and article by the present writer on *Prize Droits*, 32 LAW QUAR. REV. (Jan. 1916) 38.

the Admiral, but successfully contended that as private captors have no rights, and their captures vest in the state, the Crown was directly concerned, and the cause should be "advocated" before the Lords of Session.¹¹

Case  $6^{12}$  raises a point of evidence. Is the master's admission on the preparatory examination fatal, or has the claimant liberty to contradict it? Not as of right, said the Lords of Session, in the absence of force or fraud practised on the witness.

In Case 7,13 we find the Swedish Treaty of 1661 again discussed. It contains a long and careful enumeration of contraband. Is this exclusive? The vessel had taken tar and stockfish from Norway to France: the latter "being commeatus and contraband goods" within the treaty. She was taken on the return voyage, with Rochelle salt, the proceeds of the outward trade. The claimant argued that the ship was duly provided with the treaty pass, and should not be further vexed. Also, he urged that the quantity of tar was trivial (perhaps a single barrel), and that provisions can only be contraband when carried into a besieged place, or "to those that could not subsist without them."14 In reply, it was attempted to narrow down the scope of the treaty so as to make it apply only to home produce—and the Lords of Session having it from the king that the treaty did not cover such a case as the present, again recurred to the royal wisdom, to know whether the proceeds could be seized on the return voyage. Such a seizure was stated always to have been the custom of Scotland, a case of 1627 being cited in support.15 After deposit of the contraband, it was asserted, the delinquency was far more certain than before when it existed in intention only: it was only with a view to avoid multiplicity of suits that the liability was limited to the return voyage. Contra, it was said that the king's proclamation of war was limited to the seizure of contraband, and not its proceeds, and that a roving commission to seize ships where the cause of offense was not "sensible to the eye" would be destructive of all neutral freedom. Moreover, a certificate was produced from Sir Leoline Jenkins, the English Admiralty Judge, who declared, after consultation with the advocategeneral and search of the records, that he knew of no such practice. On February 25, 1668, the lords decided to inform themselves, by commissions, of the correct procedure; the king having curtly told them to "decide according to the law of Scotland." But on July 9 the lords

¹¹ Seatonn v. Balwhilly, I Stair, 487.

¹² Randolph Davidson v. Richardson (Dec. 13, 1667) Dirleton, No. 49, p. 120.

¹⁸ Parkman v. Capt. Allen (Jan. 16, 1668) I Stair, 502, 529, 550, Dirleton, No. 132, p. 55, Dirleton, No. 153, p. 61.

⁴ Grotius, De jure belli, bk. 2, cap. de his quae in bello licent.

¹⁵ This, however, was explained by the other side as having turned on another point—the present carriage of enemy goods by the ship libelled.

cut the whole knot by falling back on their own decision in the Riga Castle, ¹⁶ and condemning on the ground that thirteen (out of eight) of the crew were Dutchmen—though they had previously exonerated the claimant on this point, on the ground of necessity and distress!

Case 8 is one of competition between two privateer captors, in which the principle of sharing in the prize, although one vessel may not have been participating actively, is clearly recognized as well established.¹⁷

Case 9 deals with the hard position of a captor who obtains a condemnation which is subsequently annulled. On this instance, he had disposed of the cargo at rubbish prices, had paid the king his fifteenth and the Admiral his tenth share. As the ship's pass was informal, the captor was excused from damages but was found liable for negligence in dealing with the perishable cargo, which should have been auctioned.¹⁸ And he had to restore the tenth and fifteenth.

In Case 10,¹⁹ similar considerations arose: the case is important for the captor's observation that it is not the proclamation of war that makes the war, for the king's declaration is only to give an account to the world upon what account the king had made war with the Danes. A captor having taken a Hamburg ship proceeding with contraband to Denmark, before the declaration of war, was forced to abandon it at sea, whereby it was wrecked. The lords found that the Hamburgers were entitled to carry on their trade with Denmark, and to carry to them contraband goods, but on the other hand, the captain was in no fault in executing the king's commission and was liable only to restore what profit he had made of his capture—which was nil.²⁰ This is evidently mistaken law: a court ought always to compel restitution of property captured contrary to the rules of international law, which certainly require that a neutral cannot usually be a contrabandist without knowing of a war in progress.

Case II²¹ is a replica of the Riga Castle: several of the crew were Dutch.

Case 12²² affords an early instance of shipbuilding material being regarded as contraband. It was argued that the loading

"did not consist of such clapboard as could be made use of for the building of ships, it being prepared for making of steps to wine puncheons and for cooper work, not being but about three foot of length."

¹⁶ Supra, case 4.

¹⁷ Capt. Coningsby v. Capt. Mastertown (1668) I Stair, 520.

¹⁸ Capt. Mertumer v. Strangers of Ostend (Feb. 26, 1668) 1 Stair, 532.

¹⁹ Merchants of Hamburg v. Capt. Dishington (Feb. 25, 1668) 1 Stair, 533.

²⁰ Cf. The Oldhamia, Sakuyé Takahishi, International Law Applied to the Russo-Japanese War, with the Decisions of the Japanese Prize Courts (London, 1908) 326.

²¹ Peterson v. Capt. Anderson (June 30, 1668) I Stair, 544.

²² Gilbertson v. Binny (Jan. 8, 1669) Gosford MS. No. 80, p. 28, No. 157, p. 59; The King of Poland, I Stair, 626.

And it also bears on the question of national character. Three sailors were originally Hollanders,

"yet for several years they had remained in Flanders and Bruges, and were burgers, and were taken on to be sailors in Flanders, by the merchants in Dantzic, who were not bound to inquire where they were born." The clapboard was held contraband—"a great part of the most able part of the Lords being," Stair says, "of the contrary judgment."

In case 13, which appears to have turned partly on the national character of the owner of goods laden on board a neutral Spanish ship, we find the individual acknowledging that he was born in Holland, but declaring that for two or three years he had been living in Ghent and Bruges under the King of Spain.

He was allowed to prove his domicile, but only succeeded in proving that in March, 1667, he hired a house in Brussels and began to set up there, and that "some time before" he had lived with his mother in Ghent, without showing how long, or that it was his "constant" domicile. It was said to be a common device for Hollanders to hire houses in the Spanish Netherlands (modern Belgium) and to pretend to be subjects there:

"but they, being Hollanders at the beginning of the war, concurring and contributing to the war, even if they had truly removed tempore belli, they contrived to be the King's enemies; much less can their [merely] taking houses elsewhere sufficiently prove that they totally deserted the Hollanders and concurred not with them in the war..."

This case²³ is, accordingly, important, as throwing light on the true conception of domicile as the criterion of enemy or neutral character. Apparently, it is only when it amounts to a "desertion" of the enemy, a complete incorporation with the neutral country, that it can confer a neutral character—i. e., it must amount to what would now be called naturalization in the neutral country. Certainly a house of trade in the neutral territory, however self-supporting, would not do. The claimants, indeed, argued that "any Hollander deserting Holland at the time of the war ceases to be an enemy,"—and they put this on a most important ground—viz., that

"the King invited such as would desert his enemies to come and live in England, so that it is both his Majesty's interest and intention in any way to weaken his enemies by causing their subjects to desert them."

Can it be that we have here the true explanation of the idea that a neutral personal domicile may confer a neutral character, or that a

²³ Evart Loyson v. Laird of Ludquharn and Capt. Wilson (June 15, 1669). In this case, Ludquharn, varying his activities, appears as privateer-owner. We have already seen him as Admiral-Depute.

British domicile may confer the British character, on the property of an enemy subject—viz., that it is traceable to such a special royal invitation to "desert" the enemy? It is quite clear that the modern idea that a commorant enemy resident and trading in the kingdom has rights of suit, is derived from a misunderstanding of Wells v. Williams, which was decided under a similar proclamation promising protection to enemy subjects already settled in the realm. Case 17 (post), however, treats the neutral or British character derived from domicile as existing independently of royal invitations to desert. The case before us also treats confiscation for carriage of contraband as an undisputed rule (though varied by the Spanish treaty).

No. 14²⁴ is a case of a license issued under a proclamation permitting the import of timber from enemy countries, under certain guaranties, after the burning of London. No. 15²⁵ is a case where a pass under the Swedish treaty was disregarded as palpably inaccurate. This opened a wide door. No. 16²⁶ is a like case, where the master, being examined, contradicted the statements of the pass. (But where there was an apparently valid pass, it was a great departure from the treaty to examine him.)

We find, however, that in case 17,27 the defect of all bills of lading and charterparties and docquets was held not to prejudice the (Dantzic) ship, so long as she had a valid pass and the lading was on account of the owners. The captors then insisted on the other familiar ground—that the crew were Dutch, they having testified that "their wives and families remain in Omland, which is under the jurisdiction of the States-General, and contributes to the war." And they admit—another important point—that the king's declaration inviting Hollanders to settle in England with the protection due to English subjects effected no change in their treatment quoad prize law: since, apart from that proclamation, their change of domicile from Holland to England would be enough.

"Nor doth his declaration impart any alteration, because (albeit it be H. M.'s intention and interest to withdraw the Hollanders, by changing their domicile and habitation) neither is, nor was, there any ground of prize because the seaman is or was by nation a Hollander, unless he was an actual residenter there and contributed to the war, which alone ["only"] makes him an enemy."

²⁴ Capt. Wood v. Boyneilson (July 13, 1669) 1 Stair, 636; sub nom. The Raphael, Gosford MS. No. 169, p. 67.

²⁵ Joachim Burnmaster v. Capt. Dishington (July 29, 1671) 1 Stair, 745.

²⁰ Simpson v. Ludke (Jan. 7, 1673) 2 Stair, 162. (The Fortune.) In this and several other cases, it is assumed that even when the Swedish ship is provided with a pass, the case may be inquired into further, si gravis est suspicio. Whereas, the fact is that such investigation may take place when the pass is not forthcoming. Nobody seems to have troubled to read the Latin text. (Art. 15 of Treaty of 1661.)

²⁷ Anderson v. Douglas (Jan. 21, 1673) 2 Stair, 154. (The Sun.)

This distinct recognition of domicile as the sole criterion of enemy character is, I admit,²⁸ a clear authority against my own opinion to the contrary. But it must be remarked that it is recognized for prize-law purposes only, and has nothing to do with the position of enemy aliens at common law. The argument for the captors proceeds, relying on the personal or family domicile, and disregarding any such conception as a "trade" domicile (the recent invention of Westlake).

"The employing of such as are in actual enmity, and have not changed their residence, is a partaking with the King's enemies; as wherever such persons are, they will always be as spies, and give intelligence to the King's disadvantage of the condition of his ships, or those of his subjects, in any port where they trade, and while they contribute with Holland, a placade there will soon recall them home to that service, so long as their families are there."

The argument adds that it is the common custom of nations to make prize of any ship when the master is an enemy. And they add, what is inconsistent with their admission of domicile as the criterion of neutrality, that in the Anglo-Swedish treaty, although the Swedes are allowed to use Hollander skippers, yet it is with the express provision "that he change his domicile and become an inhabitant of Sweden." If a change of domicile *ipso facto* made him a Swede for prize purposes, no such clause would have been required.

The court allowed further proof as to whether Omland was "free" (neutral), or under the jurisdiction of the States-General. But a further point was taken by the captors: that the cargo (corn bound, according to letters found on board, for Amsterdam) was contraband. The answer was that the ship's certificate, disclosing a destination for neutral Ostend (Spanish) was conclusive; that grain is not contraband, unless carried to a city besieged, and that this was expressly recognized by the Treaty of Breda. The captors replied that the treaty was become evacuate and void, by war between England and Holland, the principal parties, and that "accessory parties taking the benefit thereof . . . could not found upon that which was not;" moreover, the king had expressly declared the carrying of corn to Holland to be contraband. To this the claimants answered that the lords ought not to proceed by the king's private instruction, but by his public treaties confirmed by oath, which could not be dissolved by the outbreak of war between two of the parties, contemplating, as they did, the future possibility of wars. Unfortunately we hear no more of this interesting case.

In case 18,20 the ship's Dantzic pass did not mention the port of destination; and whereas the "tote-brief" said "Bream" (Bremen),

²⁸ But cf. case 13, supra.

The Crown (Dantzic) v. Capt. Lyon (Jan. 23, 1673) 2 Stair. 160.

the master acknowledged it was Amsterdam—a clear case of discrepancy on the primary evidence. Further proof was refused—"the Lords would not admit of contrary probation." Having thus found that ship and goods belonged to the king's enemies, it seems curious that they should "forbear to determine" whether the carriage of victuals to Holland, or the employment of a Holland master, was cause of condemnation. There was no need to determine these points. But the reason is alleged that these points were reserved because the knotty questions raised in *The Sun* (case 17, supra) were still unsolved, and awaited the royal determination.

Case 19³⁰ released the neutral (Lübeck) carrier of enemy goods, but only because the lading was before the war broke out. It is seldom remembered that England at any such recent period acted on the French rule "la robe ennemie confisque le vaisseau ami." But at the close of the violent struggle with Holland strange things were done. The point, however, of the legality of such a rule was expressly reserved. The cargo (salt, sugar and tobacco) seems to have been loaded in America, in great part for the Portuguese envoy at Amsterdam (who was a citizen and merchant of that place).

Nos. 20 and 2131 exhibited a certain discrepancy and concealment of papers: further proof ("contrary positive probation") was allowed the claimants and captors alike. No. 2232 shows that where, by treaty, a ship's pass, in wartime, was an entire protection if on oath, the defect of such a pass raised a presumption against the claimant. The question was also raised (the ship having been originally Dutch) whether she could acquire a neutral (East Friesland) character pendente bello before touchings3 at an East Friesland port; and it was determined that she could. This is in accordance with modern English (though not French) practice. The court allowed further proof of ownership (the master having made depositions inconsistent with the pass), but declined to issue a commission to Friesland, as being too near Holland. The witnesses were to come to Scotland, well recommended. "By the common law of nations false documents, or no documents, make prize," and the court was not satisfied with the master's offer to reconcile the discrepancies by his own fresh evidence.

The next case—No. 23—is an important one in many respects.³⁴ The ship and cargo had been condemned on a variance of documents

⁵⁰ Kincardine (Earl) v. The St. Andrew (Feb. 11, 1673) 2 Stair, 171. Kincardine had been presented with the prize by the king. He was Admiral-Depute for the Duke of York: see Gosford MS. p. 334.

³¹ The Palm Tree and The Patience v. Capt. Acheson (Feb. 19, 1673) 2 Stair, 173. The White Horse and The Margaret v. Capt. Smeitonn (Feb. 21, 1673) 2 Stair, 177.

The Prince of E. Friesland v. Capt. Binning (Feb. 21, 1673) 2 Seton, 177, 179.
 "Touching ground."

³⁴ The Calmar v. Capt. Smeitonn (Feb. 25, 1673) 2 Stair, 178, 608.

from the master's evidence. The owner, according to the master, was an Englishman, one Sutton, residing at Stockholm, "where he carried on trade with Holland only"; but the master, who had an eighth interest in the ship, was Dutch. The lords found that Sutton was only a blind for Dutch traders, and on the ground that the master and part-owner was Dutch, condemned ship and cargo. On February 6, 1678,35 the claimants returned to the charge, insisting that Sutton, as an English subject residing in Sweden as an English factor, was not to be considered as trading ("participating") with the enemy merely because he put goods on board a ship in which a Dutchman had a share: how could he know where the master lived? The ship was going to England. Observe that the ground of condemnation is not now, as in the earlier cases, that the king's proclamation condemns everything on board a vessel with a Dutch, or partly Dutch, crew;36 but, first, the variance, and then, the "participation" of Sutton with the enemy, involved in putting his goods on board a partly Dutch ship, i. e., it is a case of what is now termed "trading with the enemy." The Dutch character of the master is drawn exclusively from his domicile. He had been duly made a burgess of Calmar, and paid scot and lot there, and traded from there. But his home was in Holland.

"Albeit he was called a master for Sweden in a former war, and had then passes, yet, after the war, he had gone home to Holland, and had his domicile with his mother, in Hem, in Holland, and had resided there the winter before the capture; and though he was called again of new to be a master in the Swedish service, in this war, yet he had not again changed his domicile; which is by . . . paying scot and lot, without which none can be burgess in those countries: and which therefore was ordinarily in several places, yet his true domicile could be but in one place, and was found to be in Holland."

As a matter of fact, Sutton turned out to be the king's agent at Stockholm for the purchase of goods, with liberty to import them to England in free or unfree ships: and *The Kalmar* and *The Fortune* were the only two that had been stopped. The court released the goods, subject to Sutton's oath verifying such import: otherwise it would seem they would have condemned. And if the Dutch master were simply employed to deceive the Dutch, and to secure the adventure from being taken into Holland, he also should have his interest released to him.³⁷

If Sutton (apart from his royal agency) were regarded as a domiciled Swedish trader, it is hard to see why he might not ship his

²⁵ See, for the intervening proceedings in this case, infra ad fin.

²³ This pretension had been withdrawn.

³⁷ See, contra, case 22, supra.

goods on a Dutch ship without exposing them to condemnation. Either, therefore, his native character was not displaced by his Swedish residence (which may not have amounted to domicile)—or else the principle was by this time adopted of "la robe ennemie confisque le cargaison neutre."³⁸

Case 24 shows the increasing power of the Dutch. It was now the turn of the English to shelter themselves under Swedish colors. As "the King's subjects may, and must, trade under cover of Swedish, or other free [neutral] passes, and otherwise can drive no trade considerable," a discrepancy of papers was held no ground of condemnation. But it was "just ground for bringing up the ship." Case 25 is one of post-bellum sale, and almost amounts to a denial of its possibility, since it is laid down that, the sale being in Amsterdam, the proof of it ought to be sworn there, and by reason of the war could not be. 40

In case 26, the great question of the confiscability of the ship and her return cargo in cases of contraband was settled in the negative,⁴¹ but only on the language of the Swedish treaty of 1661, which provides that contraband can in certain cases be seized, but says nothing about its proceeds. The question whether Sweden had the benefit of the Treaty of Breda (England, France, Denmark, Holland) to which she had acceded, but which had been dissolved as between the principals, was raised but not decided.

That the principle "la robe ennemie confisque le vaisseau ami" was at this time accepted seems clear from case No. 27.42 The Treaty of Breda had, in the interest of the Dutch carrying-trade, reversed it, and in the present case it was questioned whether the Hamburgers had adhered to it, and whether it was still valid, quoad hoc. In No. 28, it was held that "joists, balks" and other timber, might be contraband; and that the omission of any port of destination from the ship's papers was fatal to such a cargo. But the question was reserved whether the ship itself was saved by the operation of the Treaty of Breda.43

The same state of affairs arose in No. 29 as appear in No. 23. The master, being part-owner, and a domiciled Hollander, infects the whole adventure with a hostile character. The master acknowledged that he was a born Hollander and had left his wife at Amsterdam, and although he had a burgers-ticket in Sweden, this was held insufficient to confer on him the character of a Swede. The vessel had

²⁸ Cf. case 19, supra.

³⁹ The Rostock v. Capt. Brown (Feb. 26, 1673) 2 Stair, 179. The sale was very suspicious, being one from a Dutchman to his Swedish sister.

⁴⁰ See contra, case 22, supra.

⁴¹ The King David v. Donaldson (Feb. 27, 1673) 2 Stair, 180, 220.

⁴² The Patriarch v. Wilson, 2 Stair, 182.

³ The S. Peter v. Stuart (Feb. 28, 1673) ibid.

a pass, which might have prevented further inquiry by the terms of the Swedish treaty: but it was not duly sealed, and as we have seen, it had become usual to disregard such passes when contradicted by the depositions, however improperly taken. Further proof was refused.

In case 30,44 it is stated that "the throwing of papers overboard is an unquestionable ground of prize." The fact was proved by the supercargo45 and the captain's son: but it was said the latter was threatened and the former bribed. In the event, further proof was allowed, and, on July 15, held satisfactory, the cargo being really intended for England, and so insured. The Bonnder46 was not so fortunate: spoliation of papers did for her. In this cause, general principles of prize were laid down which justify a little minuteness in examining the case. Once more the pass was contradicted by the master's oath (and the situation of the vessel)—"the skipper's oath being the only mean to secure his majesty against enemies trading under other names" and to evade the treaty. (It will be observed that even in this exigency, the captors did not ask the court to receive evidence dehors the ship.) The curious old custom is referred to, in Gosford's report, of rendering decisions in prize causes within three tides, for the avoidance of delay and damage. And it is expressly determined:47

- (1) That informality in a pass shall not be a ground of condemnation, but only for plea and proof by both sides (as it would be termed in English practice).
- (2) That absence of pass, spoliation of papers, or variation in testimony shall, on the contrary, be sufficient to condemn.
- (3) Contraband (saving the Treaty of Breda quantum valeret) may be adjudged prize (and the proceeds on the return voyage); things which may be useful for shipping or war are not contraband, but only things "properly and only useful" ad instrumenta bellica. And on July 19, 1673, it was expressly added that victual or other (ambiguous) goods carried to Amsterdam are not contraband, according to the Treaty of Breda "which is conformed to the maritime law, making them only contraband when they are carried to a besieged town or castle."
- (4) That enemy goods do not infect friends' goods in the same ship (but query, whether enemy ship infects the cargo belonging to friends).—The Mary.
  - (5) Various circumstances may unite to prove fraud: and if the

[&]quot;The White Dove v. Alexander (ibid.) 183, 213.

^{45 &}quot;Timberman."

^{46 (}June 12, 1673) 2 Stair, 185, 207; Gosford MS.

[&]quot;See Gosford.

master is a co-owner and a Hollander, the whole ship and loading is prize "albeit some of the copartners are friends but knew the master to be a Hollander." Duplicity of papers is a ground of condemnation.—The Venus.

In case 3248 there was a contrariety of documents; but one was a royal pass, which was not needed, and the variance was immaterial, being only that the master's name was interlineated over an erasure. On July 18 captors urged that the cargo was contraband in part, and that new instructions by the king confiscated the ship in such a case, and that Sir R. Wiseman (king's advocate in England) had written to say that pitch was contraband; which was a fait nouveau. Held, that the question could not be reopened.

Case 32 was again a question of the Swedish treaty.⁴⁹ A Swedish vessel was duly provided with a Swedish pass, conforming to the treaty of 1661, for a voyage from Nantes to Stockholm with a specified cargo of brandy. She was driven in distress into Portsmouth, unloaded and sold the brandy. She then made a fresh start; went to Nantes and took in more brandy, sailing with the old pass, and an alternative intention of going to Bremen if prevented from reaching her home port. Held, that there was no reasonable ground for adjudication: it would be absurd to have her pass renewed at every port she touched at. The Admiral absolved "without further probation," but further proof was ordered by the Court of Session.

In case 34⁵⁰ the master had again admitted that his pass was incorrect and unsupported by oath when granted. It was alleged that the master and part-owner was "by nature" a Hollander, that his being a "residenter" in Copenhagen was falsely stated, and that he was still a Hollander "whereby the ship would become prize, and in consequence the loading." ["Enemy ship, enemy goods."] His residence was sworn by his son and godson to be with his wife in Holland "in a house belonging to himself in property"; and was only two months in Copenhagen four years ago; "and by several other missives taken aboard, written from Holland, she intreats her husband to come home." The claimant replied that an error in the pass does not make it a forged pass. As Prof. Courtney Kenny puts it, a document must misrepresent itself, to be a forgery: that it misrepresents facts is beside the question. A lying document is not necessarily

⁴⁸ Winchester v. The St. Andrew (June 13 and July 18, 1673) 2 Stair, 187, 216.

⁴⁹ Donaldson v. The Debora (June 17, 1673). The headnote is misleading in saying the point was "What ground of suspicion warrants seizure?" unless it means that something more than the usual grounds of suspicion are requisite in order to interfere with a vessel bearing a Swedish pass—since the treaty bears that no such vessel is to be interfered with, and the only method of evading this was to represent an inaccurate pass as a worthless one.

²⁰ The S. Katherine v. The S. Mary (June 25, 1673) 2 Stair, 191.

a forged document.⁵¹ "A false pass is that which is forged, having a forged seal or subscription; but albeit some assertions in it be not true, it does not render it false." They urged further that the variance in the pass was occasioned by the misleading formula in the Danish treaty; and that the master had "a chamber" in Copenhagen, and had had his wife there since February, though she had gone back to Holland to see her sister. More cogently, they remark that, if he were really a Dutchman, it could only forfeit his own share. On the other hand, the captors, anxious to disembarrass themselves of the system of passes, insisted that a pass shown to be false in any material particular could be disregarded as a forgery.

They are quite emphatic as to what kind of domicile is meant for prize purposes. It is ordinary civil domicile, and not an artificial trade domicile.

"At one time a party may have many domiciles, but his residence is estimated by his principal domicile, which is always understood when his wife and family are in his own house, unless there were evidences of their separation; for a skipper, who is ordinarily at sea, may have a chamber in many towns where he uses to trade; and though he had a part of his stock [there] and bore contribution for it, yet his chief residence must be where his wife and family were."

They proceed that the wife seems to have taken no furniture or servants to Copenhagen, but only one daughter, whence it seems to be a mere visit. And they contend for the principle that an unfree ship confiscates the loading and that

"a part of the ship being unfree, she cannot be said to be free, and being one body, cannot be condemned in part and [released] in part."

In fact, I do not think there is any English case in which the ownership of a vessel has been split and neutrals allowed to save their share. Cases of *goods* jointly owned may be adduced: so may cases of pledge and mortgage. But these are another matter.

The court, on the whole, declared the ship [and lading] prize, reversing the Admiral, and treating the pass as a forgery, or at least fraudulent. Fraud, of course, condemned the whole adventure, whether enemy property or neutral.

Case 35 is a clear one of inefficiency and duplicity of documents.⁵² The doctrine of *la robe ennemie confisque le vaisseau d'ami* was distinctly announced by the court, although the shipowners contended that

⁵¹ See Regina v. Ritson (1869) L. R. I C. C. 200; Regina v. Kay (1870) 22 L. T. Rep. N. S. 557 (antedated deed), and Regina v. Riley [1896] I Q. B. 309 (antedated betting telegram), both wrongly decided, as it seems to me. ¹² The Venus v. Capt. Wilson (June 26, July 15, 1673) 2 Stair, 196, 212.

"neuters cannot be hindered, by a war falling in between any princes or states, to continue commerce. . . . If enemies' goods be found on board, these goods may be confiscate; but the neuters, who freely might serve the enemies in any thing but in the war, and so might take their goods in fraught upon their own peril, yet could not thereby confiscate [i. e., subject to confiscation] their ships."

It was answered, à la mode de 1916, that it was to partake with enemies, either to carry them contraband, or to carry their goods. And although the Treaty of Breda stands contrary, the king has declared it void.

Cases 36, 37, and 38 explain the propriety of condemning without further proof in a clear case.⁵³ The last-named reaffirms the conclusiveness of personal (family) domicile in the enemy country. Case 39⁵⁴ shows the mere employment of an enemy master (not being a part-owner) is not enough to condemn. This, it will be recollected, is contrary to former cases,⁵⁵ but the king's instructions had been altered in this particular. Nor is victual contraband, though expressed as such in the Swedish treaty: because at the desire of the Swedish Ambassador, the king, countersigned by Secretary Moriss, had declared that victual and money is contraband only when carried to a besieged place. Nor, if it were contraband, could the ship be captured on the return voyage. (The Lords, however, there being no pass as provided by the treaty, allowed a proof as to Dutch ownership.)

Case 40 is a curiously modern-sounding one. The ship was owned as to three thirty-seconds in Amsterdam. It was argued that this confiscated the whole adventure. Moreover,⁵⁶ the ship was insured in Holland, and so the risk lay upon the king's enemies.⁵⁷ It was replied that, although a partnership by neutrals with enemies after outbreak of war would expose their property to condemnation, there was no obligation, or even opportunity, of dissolving one already subsisting. As to the insurance, it did not change the property and vest it in the insurer, but was only a personal obligation upon him to make up the hazard,

"upon which pretext the King cannot justly confiscate the property of his allies, because they have taken warrandise of his enemies; and that the [neutrals] remain proprietors is clear, that in stress of weather they might throw out the loading."

But the court found that the neutrals should have avoided all con-

¹³ The Katharine v. The King David (July 9, 1673) 2 Stair, 207. Frazer v. The Flying Hart (July 10, 1673) 2 Stair, 207; Frazer v. The Young Tobias (July 10, 1673) 2 Stair, 208.

⁵⁴ Capt. Lyel v. The Leopard (July 16, 1673) 2 Stair, 213.

⁵⁵ See Nos. 4 and 7, supra.

⁵⁶ The Golden Falcon v. Buchanan (July 17, 1673) 2 Stair, 215.

⁵⁷ Cf. The Cap Corso.

nection with the enemy by selling the ship at Amsterdam. The question of insurance, therefore, did not arise.

There was also a further ground of condemnation, in the spoliation of papers: and this was again relied on in case 41;58 where also variance of primary evidence, and enemy insurance, were shown. Further proof was allowed, and the ship was proved Swedish, but the loading was left in a singular ambiguity. Sutton of Stockholm deposed that it was shipped on the terms that if it came safe to Britain, it should be his; but if taken by the Dutch, then to be the property of the Swedish Tar Company. The contrariety of pass and oath as to the ship was waived (contrary to what was done in No. 34) because the ship would have been free either way. The spoliation was rejected as resting on a single passenger's evidence. But the ambiguity of the property in the cargo was held fatal to it. It was not as if Sutton had been clearly owner, subject to an insurance by the Tar Company against Dutch capture. It may seem that the variance was not important: both Sutton and the company were friends. But the cargo was tar: and the ambiguity was held evidence of a design that it should go to Holland. By the Swedish treaty, however, the penalty did not extend beyond the cargo.

Case 42 is a strong reaffirmation of the principle that prize domicile is the place where a person has his family, 59 and not (as Lord Lindley and so many English authorities, making the doctrine of "house of trade" superfluous, will have it) the place where he carries on business. Case 43 was tried on an interlocutory bill, for swifter despatch, the ship having been released by the Admiral. The ship 60 had been bought in Holland, and taken "before she broke ground in any other dominions"—which was alleged to be, by the custom of nations, a sufficient ground of prize (citing the practice of France and the Spanish Netherlands). It was replied that there was

"neither reason nor custom for such a pretence to hinder neuters to buy ships from enemies more than any other goods, seeing thereby they do not partake of the war, or assist the enemy."

And, although there was no bill of sale, and the alleged Swedish ownership rested solely on the oath of the master, yet his possession was held sufficient, and the vessel was released. The court was again favorable in case 44,61 where there was a variance of documents. The variance, however (as in No. 24), was necessitated because

"H. M. subjects cannot carry on trade without making use of simulate and colourable documents. . . . Otherwise the privateers may watch

⁵⁸ The Fortune (July 22, 1673) 2 Stair, 218.

¹⁰ Capt. Seatonn v. The King David (July 23, 1673) 2 Stair, 219.

[∞] Cf. No. 22, supra.

a The Live Day (Livadia?) v. Middleton (Nov. 14, 1673) 2 Stair, 229.

H. M. ports and seize all his subjects' ships that come in; which never want [are without] such colourable documents, but when they have convoys—which is very seldom."

Further proof was ordered, to be made before the magistrates of Hamburg and Hull.

Case 45⁶² turns on a point of practice as to the jurisdiction of the Admiral and the Court of Session respectively. "Admirals being obliged to judge between two tides, by the general custom of nations, could not allow further proof"63 (as to domicile). If the Admiral did, the Court of Session ought to "advocate" the cause into its own hands. A somewhat curious reply was made, that by the Danish treaty, prize cases were to be judged "by a court of Admiralty" alone; but the Court of Session held that, as judges in the second instance, they were "the King's Great Court of Admiralty," comparing their jurisdiction in consistorial matters, which they could not entertain in the first instance.

Case 46⁶⁴ cannot be regarded with much patriotic pride. Dirleton adds a note that he has reported it at too great length—

"à cause que les plus habiles et sçavans des seinteurs opinoyent pour les estrangers, et aucuns de ceux qui estoyent de l'autre coste, estoyent parens ou aliens de Luthquharne, qui estoyt partie; et gagnait par l'arrest 2000 livres sterl. ou environ; et l'emportait par une voix seulement."

The master and part-owner was born in Holland, but had removed with his wife and furniture to Stockholm. A commission was granted to the Stockholm magistrates to take evidence as to the change of domicile by way of further proof, but it was executed ex parte; and the court, though regarding the report as satisfactory, suspended action on it until the other side had taken evidence in its turn. The Stockholm court declined to take any more evidence on the commission, and the Scottish court had then to consider whether their determination that the claimants had pro tanto succeeded in clearing themselves should be made a definitive finding, or whether a new commission should be granted to the captors, or whether the prize should be condemned. The better opinion was that there was so little ground of suspicion, that the primary evidence, corroborated ex parte, was sufficient: or at least that a new commission should be issued. But actually, condemnation passed.

⁶² Stuart v. The Seel-fish (Dec. 17, 1673) 2 Stair, 281.

⁶³ This seems to be the effect of what is meant by "act before answer." The Court of Session instructed the Admiral to alter the procedure by allowing a "contrary positive probation" of change of domicile (if he did not see his way to condemn).

⁶⁴ Capt. Gordon and Ludquharn v. The Winegrape (Dec. 17 and 23, 1676) Dirleton No. 207, p. 93, No. 208, p. 95.

Some jealousy appears between Scotland and England in case 47.65 A Scottish privateer interfered in the pursuit by Prince Rupert's Nightingale and an allied French galiot of a French ship (Tortoise) made prize by the Dutch. The Scot boarded and took the Tortoise, after ascertaining that the French galiot (which was flying Dutch colors) was really an ally. In the Scottish process by the captor against the owners, the prize commissions for England in Scotland intervened, relying on the Nightingale's capture of the Tortoise's convoy. The privateer replied that no matter who had taken the prize, the Scottish courts have jurisdiction over it, ratione loci, and that, even if not, the English commissioners had submitted to the jurisdiction. The Court of Session allowed these reasons, and sustained the jurisdiction. On the question of substance they decided in favor of the privateer, that the Tortoise would have escaped if the privateer had not cut her off: and that this gave her full title86 (subject to the privateer's witnesses being satisfactorily proved to be disinterested). The argument for the privateer is well worked out. Starting from the proposition that the French Tortoise was perfectly vested in the Dutch by capture, it proceeds on the analogy of the Roman law to show that the English and French pursuers had no right in it, but a mere expectation, which it was open to the Scot to defeat. (The difficulties of these inquiries led in the course of time to the simple rule that all ships in sight at the time of capture are entitled to share pro rata.)

There now comes a considerable gap of nearly thirty years before the next case, which is after the Union, in 1705.⁶⁷ It is one of false documents (No. 48). Here the Dutch were allies and the enemy was Spain. Trading with the enemy being improper for an ally, ⁶⁸ documents are for a voyage to and from the Canaries. The rather hopeless point was taken that it was right to trade with Spain, because "Her Majesty is in alliance with King Charles of Spain; and though the Duke of Arigon assumes that title, and has seized and possessed the dominions, that ought not to prejudice private persons in those

dominions who have not owned nor recognized him as King Philip."

⁶⁶ King's Advocate v. Rankin (Feb. 15, 1677) 2 Fol. Dec. 177; 2 Stair, 507. Gosford MS. No. 966, p. 640. The Tortoise. See infra, ad fin.

⁶⁶ She was within 45 miles of the Dutch coast, and the Nightingale had two other prizes in chase.

^{e1} The Katharine v. Capt. Gordon (Feb. 23, 1705) 62 Dalrymple, 78; 2 Fountainhall, 271 (the better report).

construction that they are amenable only to their own law, which allows them a free trade with Spain. The captors reply that war by necessary consequence imports the shutting up of all commerce; and if any of the confederates, who are *sorii belli*, should by private treaty agree to trade, such pactions can import nothing in this case.

But it was answered that on this showing the French ought not to confiscate the goods of Britons—the true subjects of King James VIII. The Canary documents were found sunk at the bottom of a water-cask, so that the plea that double papers were necessary and usual⁶⁹ was deprived of much of its force. The captors allude to royal letters declaring the opinions of Kings Charles II and James II, and it is interesting to note that they seem to admit that these cannot conclude the court,

"though it be pretended [asserted] that the advising with the King how to decide in cases is against the claim of right, discharging any such letters to be wrote to judicatures,"

yet in these questions of jus publicum, depending on declaration of war, alliances, etc., it was not unreasonable to consult the public authorities.

On May 17, 1710,⁷⁰ the *Joanna* of Aberdeen for Virginia was taken by the *Pontchertrain* which in its turn, with a ransom-bill for 200 guineas on board, and other spoil, was taken with eleven days by Her Majesty's ship *Mermaid*. It will be seen that the spoil had not been taken *infra praesidia*, but it had been possessed for twenty-four hours. Had the ownership been divested? Grotius, Zieglius, Voet, Malloy, Lircenius, and the French regulations were cited for and against the twenty-four hour rule. The court found that, both as regards bill and spoil, the original owner remained entitled: this is the modern doctrine. A curious remark is that the ransom-bond would be matter of general average, but not the spoil actually taken on board the cruiser: for this is not sacrificed for the common benefit. And the principle is regarded as clear that recapture of a cruiser with a hostage, instead of a ransombill, on board, discharges the capture. (No. 49.)

After these two cases, we again leap a gulf which extends to 1761. The limits of the doctrine of continuous voyage are seen very clearly in No. 50. Trade with the French West India Islands—a close trade—was interdicted to neutrals. Doubtless this, "the rule of the war of 1756," enabled such a voyage to be stopped, even when the ship which had left the West Indies had already called at a port in Europe. But if she had completed her voyage, and left the goods to be carried on by another ship, condemnation never ensued; no record of condemnation in the case of such a broken voyage exists. And when Sir W. Scott later gave clear expression to the doctrine of stopping the ship after an interposed call—the doctrine of continuous voyage—he never applied it except where the ship was the same throughout. In the present case⁷¹ the ship was from Trondhjem to Amsterdam,

⁶⁹ See Nos. 20, 24, 44, supra.

⁷⁰ Stuart v. Capt. Collar (Feb. 16, 1714) 2 Fol. Dec. 177; Forbes, 663; Forbes MS. 27.

⁷¹ The Stavorse Lynbaan v. Capt. Harden (March 3, 1761) 4 Fol. Dec. 144; Fac. Col. No. 27, p. 54; 178 Kames, Sel. Dec. No. 178, p. 241.

both neutral (Danish and Dutch) ports; she had French West India cargo (the property of French subjects) on board. The privateer Boscarven took her into Burntisland. The Judge-Admiral (this is the first time the title occurs) awarded restitution without costs and damages. French property was not confiscable on Dutch ships: Anglo-Dutch treaties, 1668, 1676; but it was argued that this was not applicable so as to admit the Dutch to carry on a French close trade, which is a different ground of confiscation, and would equally enable Dutch property coming from those French islands to be condemned: the treaty of 1674 itself extends only to free merces quae in pace subveherentur. And it was attempted to assert that—

"it makes no difference whether a Dutch ship shall bring a cargo directly from the French West Indies to Amsterdam, or if the voyage shall be divided, and the cargo be brought to Trondhjem in order to be there reshipped on board a Dutch vessel. The first and last of these voyages is equally prohibited by the commercial law of France."

But the Court of Session declined to accede to the argument. The voyage to Trondhjem was attackable. But trade between Trondhjem and Amsterdam could not be subjected to constant interference to see if any goods which should never have been at Trondhjem were on board.

It may be suggested that one considerable reason why the "Rule of 1756" was struck out was this—that the English had (in 1674) conceded to the Dutch liberty to carry enemy goods, without having the foresight to make it a condition that their own goods should be similarly secure vis-à-vis the opponent belligerent. They thus found themselves obliged to respect French goods on board Dutch vessels, while the French were under no corresponding restriction. But for this situation the rather forced doctrine of the impropriety of neutrals engaging in close trade would scarcely have suggested itself.

We have seen that case 49 appears to establish that deductio infra praesidia is necessary to divest the owner's title in captured property. What if someone becomes a bona fide purchaser meanwhile from the captor? Case 51⁷² was one in which a Newcastle ship, The John & Robert, was captured by a French privateer and carried into Christiansand, where on Oct. 15, 1757, sentence of condemnation passed by decree of the Duke de Penthièvre, High Admiral of France. The Danish judge, however, ordered the vessel to be released as taken within the limits of the port: but his order was reversed by higher tribunals. The vessel was then sold to one Christian Severine Balle, merchant in Christiansand, and sent to Aberdeen under the command of Brink, from whom she was claimed by her former owner. Brink

¹² Benton v. Brink (July 23, 1761). The John & Robert alias The Johanna Catharina, 8 Fol. Dec. 143; Fac. Col. No. 49, p. 104.

questioned a Danish edict of May 7, 1756, permitting the bringing in and sale of prizes (but the latter only after due condemnation): and the cause was removed from the Aberdeen Bailies to the High Court of Admiralty, and appealed by the Danish purchaser to the Court of Session. It was there pleaded by the original owner that though success in war was effectual to transfer property, yet it was not so with every transitory and casual possession acquired by an enemy. "The law requires a firm possession, and supposes the property to remain with the former owner as long as there is any probable expectation of recovering it." Albericus (Gentilis) and Bynkershoek are added to the authorities cited in No. 49, supra (The Pontchertrain). Groenwegen is referred to on the opposite side, and it is urged that "what is still stronger than a thousand opinions of lawyers or doctors" -general practice-is in favour of the appellant. Certificates were adduced under the seal of Wm. Fuller, procurator-general in England. certifying the condemnation of several vessels in England which had been carried into (neutral) Mediterranean ports. Gentilis is set aside as "not of the number of those distinguished practical writers generally referred to in questions of this kind." And Bynkershoek is explained as laying down no general rule beyond the necessity of firm possession, though observing that deductio in praesidia must always be sufficient. The cases in Malloy are dealt with as referring only to the prizes made by letters of marque: and it is said that these were very distinct from captures made by war-ships or privateers. They were made under license to recoup oneself, and passed under particular rules.73 The purchase was founded also on the Danish decree, which their opponents represented as incompetent to decide the question of property. All parties, however, fully recognize that-

"the province of the courts in [a neutral] state is to try whether or no the peace of the port has been violated by the capture. . . . If that has been the case," it is added, "they order [the captor] to restore the possession."

The Court of Session found that what had happened was adequate to pass the property, notwithstanding the ship had never been in France. She had, of course, been out of British reach: and the fact of the Danish decree may have gone for something, being regarded as a decree in rem in the locus rei sitae.⁷⁴

Case 5275 is one where a recaptured vessel was returned, as having

⁷⁸ For this distinction, there are cited Jacob's Law Dictionary, and The Laws of the Admiralty, 219.

¹⁴Cf. Imrie v. Castrique (1860, Exch.) 8 C. B. N. S. 405, Castrique v. Imrie (1869) L. R. 4 H. L. 414.

Thunter v. DeBothmer (Count) and Capt. Stewart (July 6, 1764). In the Judge-Admiral's decree, King George is styled "the King of Britain": rather a unique use in an official formula. 4 Fol. Dec. 145; Fac. Col. No. 130, p. 312.

been taken within neutral limits. The Maria, belonging to a London merchant, Hunter, was bound from Quebec to London with whale-oil, was taken off the Orkneys by the Malice and carried into Norway, where H. M. S. Lynx's boats cut her out. Stewart was dismissed (though afterwards reinstated) at the request of the King of Denmark, yet Hunter called on him to pay over the proceeds, less salvage, and obtained a decree from the Admiral.

Capt. Stewart turned the action into one of multiplepoinding [interpleader], making the Danish Ambassador, the insurers, and the captors parties. The Court of Session decided in favor of handing over the proceeds of sale to the King of Denmark. The House of Lords affirmed the decree.

We get another case of colonial voyage in No. 53.⁷⁶ But it was a direct voyage from San Domingo to the Texel. Condemnation passed in the Admiralty and in the Court of Session, but was reversed by the House of Lords. For in the war of 1778 it was said that the principle laid down for the war of 1756 had been departed from. Probably the comparative weakness of Great Britain was a reason why it was not thought proper to antagonize neutrals.

Case 54⁷⁷ shows that the practice was employed in 1780 of exempting from capture enemy ships in British ports. The question was as to whether a Dutch ship proceeding to Leith in pursuance of a charterparty and arriving there in ignorance of the war, was within the terms of the proclamation of exemption. It will be seen that no objection was raised to the suit on account of the hostile quality of the claimants (William t'Hart, master, and Class Iaanen Zoonen, owner). This is in accordance with the opinion expressed in the Lee-Murray Report of 1757⁷⁹ to the same effect, that enemies have a locus standi in prize causes. The court, in fact, struck by the hardship of the case, did restore the Noord Holland to her owners. What the latter did with her unfortunately we do not know. Not improbably she was sold, and the proceeds taken circuitously to Holland. Or she may have returned under a safe-conduct.

In June, 1797, the *Diana*, merchantman, casually recaptured the *Lady Bruce*. The owners promptly insured their anticipated salvage. The prize being again retaken by a Dutchman, they sued on the policy. It was replied that they had no insurable interest, being non-commissioned. So Lord Armsdale thought: but the Court of Session observed that although the recapture by the *Diana* might not have been effective

¹⁶ Volkert Hendricks v. Wm. Cunningham (Jan. 30, 1781) 4 Fol. Dec. 145; Fac. Col. No. 85, p. 141. The Catharina. The case is notable as having been decided by Lord Braxfield as Lord Ordinary ("Weir of Hermiston"). Cf. No. 50, supra.

The Noord Holland v. The King Alfred (Dec. 14, 1781) Fac. Col. No. 3, p. 7.

⁷⁸ Orders in Council 20, Dec. 22, 1780, Feb. 16, 1781.

[&]quot; Cf. my edition, p. 134.

in a competition with the king or his officers, the insurers were not entitled to state any such plea; and the insurance ought to be made effectual. Clearly, nobody thought at that date that acts of war by a private ship were to be considered as acts of piracy! Not even revolutionary France appears to have entertained the notion.

We may pass rapidly over the more recent cases collected in the appendix. In case I,⁸⁰ the modern doctrine is laid down that it is neither twenty-four hours' possession nor deductio infra praesidia that divests the property in prize, but sentence of condemnation passed in an enemy territory or territory⁸¹ under enemy control. It is said in argument that there is no instance of an enemy appearing in prize process. The investigation of the cases must have been very superficial, to allow of such a statement.⁸²

A most interesting—and I think still an undecided—point arises in case II. Can a neutral trade direct between opposing belligerents? If he is domiciled in either country, of course such trade is trading with the enemy. And clearances for enemy ports can, I suppose, be refused by municipal law. But on the high seas, can a neutral's ship or goods be confiscated for such trading, if, viis et modis, they have got a clearance? The Stettin, si in April, 1799, sailed from Rotterdam for Leith, and was taken by the revenue cutter Coburg. The ship was given up to the owners, and Cordes and Gronemeyer of Hamburg claimed the cargo. It was held that the traffic was legitimate, so long as it was not a blind for a specific enemy export. The possession of the bills of lading by the neutral was considered strong evidence of the genuineness of his ownership and enabled the majority to decide for the claimants: though it was urged

"it must not be a trade where the British merchant commissions the goods from the Dutch merchant, and the neutral merely acted as agent, in order if possible to deceive the two countries, and forward this unlawful intercourse."

The fact that the neutral—agent or not—was made entire master of the property, was held sufficient to rebut any suspicion of Dutch (or Scottish) ownership.

In the writer's view⁸⁴ the reason of the prohibition of trade not being primarily to injure the enemy (for the injury is mutual), but

⁸⁰ Roman numerals assigned to cases are our own.

⁸¹ This extension was only carried by a majority. Several judges thought Holland an independent state, and that, though it was allied to France, no French court could be established there. Others thought it a mere province of France.

⁸² Wake v. Bauerman (July 7, 1801). The Stettin alias The Mary. Fac. Col. No. 246, p. 556.

^{**}O'Neal v. Cordes and Gronemeyer (Nov. 19, 1805) Fac. Col. No. 221, p. 498, No. 2, p. 7.

⁸⁴ See War and its Legal Results.

the dangers of direct communication, trade conducted by a neutral

is legitimate enough in principle.

From M. P. Brown's Supplement to the Dictionary of Decisions in the Court of Session (1826) may be extracted notes of a few other cases. No. III (Vol. II, p. 168) in a case of July 24, 1673 (The Pearl) is one of variance of evidence.85 No. IV (p. 174)86 reports a further point which arose in the Calmar. A small quantity of brass wire was shipped along with the tar, and claimed for Sir Francis Clark, of London. But there was no document relating to it on board. However, it was laid down very strongly that the absence or duplicity of documents, which might be fatal to a "neuter," was not to be relied on to the prejudice of the king's subjects resident in his dominions. Nor could a latent enemy interest in the vessel prejudice them. The important point was added, that if the wire was sold after adjudication, the captor would only be liable to restore the price obtained: otherwise he must pay the cost of the wire at Stockholm ("such wire not having a known price here"). No. V (p. 183)87 is a case like No. 9, Sir James Stamfield and his partners had paid over the tenth and fifteenth shares of the proceeds of their privateer's capture. On appeal, the ship was restored, the Crown disgorged the fifteenth, and now Sir James sued the Admiral for the tenth. This, it was replied, was "sentence-silver," due for the Admiral's trouble: but, since the obvious answer was that his trouble was the same even when he did not condemn at all, he was obliged to restore the tenth. Case VI (Vol. III, p. 23)88 is one of recapture and postliminium, and only the argument is given. Case VII (p. 125)80 is another report of the Tortoise (supra). It is curious for the citation of Plutarch, Quaest. Greganica, 29, who observes that the Isle of Acanthus being deserted, it was adjudged to the Chalcidians who first entered it, and not to the Andrians, who first took symbolical possession by throwing in a dart: an early instance of effective occupation! Vinnius, ad (?E) dictum ¶ 13, Alexander King's Tractatus consuetudinum navalium (tit. 4), Aerodius, Pandectae rerum judicetarum (tit. de acq. rer. dom., c. 10), and Voet, De Jure Militari were also cited.

And the curious remark is added, of date Feb. 16, 1677:

"The Lords [of Session] preferred the Scots privateer to the King, to give a demonstration of their equity that they durst determine against the King. This was done, valde reclamante Praeside, for Sir James Stamfield's sake."

⁸⁵ 2 Stair, 220.

⁶⁸ Clark v. Smeitonn (Dec. 13, 1673) 2 Stair, 220. Cf. The Calmar, supra.

⁸⁷ Stamfield v. Lennox (Duke) (Jan. 29, 1675) 2 Stair, 313.

^{*} Anon. (July, 1673), Fountainhall, Advocate's MS. No. 418, p. 224.

^{*} The Tortoise. Fountainhall, et supra, No. 535, p. 273.

This, in the days of Blindy Mackenzie, when we are accustomed to think of the Scottish Bench as the king's tool!

Case VIII is an afterglow of the Calmar. Fountainhall explains that in December, 1676, the king "with Sir Lionell (Leoline) Jenkins, one of the Judges of the Admiralty of England, wrote to the Lords of Session remonstrating with them for having declared" the ship and loading prize, merely because some of the crew were Hollanders.90 "This was charged upon John Inglis, and he was blamed for informing the Swedes resident and the Stockholm College of Commerce." The lords wrote up a vindication of themselves, and of the Scots' practice of not making public the depositions in preparatorio, though they admitted that such secrecy was elsewhere characteristic of courts of equity, and not of law. But the king in April, 1677, peremptorily called for the depositions, and for the parties to attend him at Whitehall. John Enterkin "the king's writer" lodged an "unheard of" summons to that effect, "which is a most extraordinary act, and astonished all: for, besides that it may be used as an argument of our dependence on England," it would be a precedent for a general practice of appeal to the king in person: "so it is a sore wipe upon the Lords . . . and called twenty times worse than Almond's appeal from them to Parliament in February. 1674." Fortunately, His Majesty, "being better informed" wrote a new letter in June confirming the finality of the decisions of the Lords of Session. "It is hard," says Fountainhall, "to make a King contradict himself in a month's time." But there was no sinful pride about Charles II.

Thereupon, on July 27, the lords found the ship prize. "And the President tartly reproved John Inglis for blowing up the poor strangers and making them believe the Lords had done them injury and injustice," and did not understand the law of nations. On July 31, however, John Inglis, sticking to his guns, obtained a new hearing, and the lords then released the ship, as freighted for H. M. service. "And on this knock, in a trice, did the Lords retract four consecutive sentences of their own, finding it prize. . . Some thought Lauderdele influenced this change." On February 7, 1678, they went into the matter again: "and, because of John Inglis, advocate, his passion in the matter, anagrammatized the clamour," but finally declared the ship free, subject to the master's oath that it was not Dutch property.

John Inglis appears to have been a worthy ancestor of his namesake, of Glencorse, in pertinacity and independence.

⁹⁰ This is not a fair observation: it was not the old allegation of Dutchmen being among the crew that was founded on, but the use of a part-owned enemy ship by a British subject.

## DUAL ALLEGIANCE IN THE GERMAN LAW OF NATIONALITY AND AMERICAN CITIZENSHIP

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Recently, a United States district court in refusing naturalization to a German petitioner¹ under Section 2171 of the Revised Statutes,² as construed by that court,³ said that "any doubt as to the meaning of our law should be construed against their [meaning German petitioners'] admission." In reaching its conclusion the court was influenced by its interpretation of the German law of nationality of July 22, 1913, and particularly of Section 25, which the court undertook to notice judicially, the court concluding that this section permits German nationals to retain their German nationality on becoming naturalized in a foreign country; adding, "Some of the provisions [of the German law] are wholly contrary to, and at variance with, our ideas of the obligations of a naturalized citizen. No divided allegiance is tolerated by our law." Whether or not the court was correct under our rules of evidence in taking judicial cognizance of such foreign law⁴ need not be discussed

¹ In Re Haas (July 16, 1917, D. C. N. D. Tex.) 242 Fed. 239.

² Rev. Stat. s. 2171. No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States.

³ "The time of his application" was construed to mean the time during which the petitioner's application is pending and not the date on which his application is filed.

^{&#}x27;It is one of the fundamental rules in our law of evidence that the courts do not take judicial notice of the laws of foreign countries with, perhaps, an exception in the case of the general system of law prevailing in such foreign countries and, particularly, with the further exception of their maritime laws, on the ground that they are a subject of common concern to all nations. Foreign laws must be pleaded and proved, like any other matters of fact; see Wigmore, Evid. (1905) s. 2573; 15 R. C. L. 1070-1071; Note in 67 L. R. A. 38 seq.; Story, Conflict of Laws (8th ed. 1883) 863 seq. The naturalization proceedings in the United States are judicial in nature and not administrative. A case is presented for adjudication, facts and evidence are submitted, and a judgment is entered accordingly on the record of the court. In the naturalization proceeding here referred to, the provision of the German law and its interpretation should have been proved as a fact; see Spratt v. Spratt (1830) 4 Peters, 393; Campbell v. Gordon (1810) 6 Cranch, 175; also Van Dyne, A Treatise on the Law of Naturalization of the United States (1907) 9-11. The question of naturalization could have been properly adjudicated under Rev. Stat. s. 2171 without reference to the German law of nationality, as was done in the following cases: United

here, but the court's interpretation of Section 25 of the German nationality law, in view of the public interest which has attached to that statute, warrants careful examination.

The court's interpretation of the particular section of the German nationality law seems to have been largely influenced by statements in the press and articles⁵ written by public men in magazines of wide

States v. Meyer (April 12, 1917, C. C. 2 C.) 241 Fed. 305; In Re Jonasson (April 28, 1917, D. C. Md.) 241 Fed. 723; In Re Kreuter (May 25, 1917, D. C. S. D. Cal.) 241 Fed. 985; In Re Naturalization of Subjects of Germany (May 14, 1917, D. C. E. D. Wis.) 242 Fed. 971; Ex Parte Borchardt (June 28, 1917, D. C. E. D. S. C.) 242 Fed. 1006; In Re Nannanga (July 5, 1917, D. C. S. D. Ga.) 242 Fed. 737; cf. note on these cases in (Nov. 1917) 27 YALE LAW JOURNAL, 128. Assuming the court's interpretation of the German law in In Re Haas, supra, to be correct, would the decision not be in conflict with the laws and practice of the United States, which refuses to recognize any limitation upon expatriation? Naturalization papers are granted to aliens here notwithstanding any legal restrictions in the law of their native country which do not recognize foreign naturalization. See Supplemental Note, p. 507 post.

⁵ Of the numerous references to and adverse comments on the question of dual allegiance in the German law only a few need be mentioned here. Gibbons, The New Map of Europe (1914) 34-35:

"A legal means has been given to these naturalized Germans to retain, without the knowledge of the nations where their oath of allegiance has been received in good faith, citizenship in Germany."

The same author: The Menace of 'Paragraph Twenty-Five,' 205 NORTH AM. REV. 560-565, replying to J. Mattern's article, Paragraph 25 in the New German Citizenship Law, 204 NORTH AM. REV. 856-868. See also Theodore Roosevelt in his article When is an American not an American? (June 1915—No. 2) 42 METRO-POLITAN MAG. 15, in which he calls the State Department to account for the position taken in the case of P. A. Lelong, Jr., of New Orleans, involving the question of dual allegiance under his American citizenship and his liability in France for performance of military service. He also takes occasion to refer to the German law of nationality and places the following interpretation upon it:

"Two or three years ago it was announced that Germany had passed a law by which she provided for her citizens, who became naturalized in the United States or elsewhere the means of also retaining their German citizenship, so that these men would preserve a dual citizenship."

R. W. Flournoy in his article on *Problems of Dual Nationality in Time of War*, N. Y. Times, Sept. 12, 1915, v. 17, replies, although not speaking in his official capacity as chief of the Bureau of Citizenship in the State Department, yet with expert knowledge, to Mr. Roosevelt's criticism of the Department's stand in the particular case and to his comment on the German law, leading Mr. Roosevelt ad absurdum. Rear Admiral Casper F. Goodrich, U. S. N. (ret.) goes a step further in his article *Why Stranger in Our Gates remains an Alien*, N. Y. Times, June 24, 1917, v. 14. He says that "this law undermines the validity of any naturalization paper issued to a person of German birth," and proposes "to cancel all German naturalization papers and to issue no more until the Delbrück law (the German law of nationality of 1913) is repealed."

France passed a law on April 7, 1915 (Duvergier, Lois, Décrets, etc., 1915, 116) and issued a decree on April 24, 1915. (2 Sirey, Législation de la Guerre de 1914-1915, 135) in execution thereof, ordering the denaturalization by an administrative proceeding of naturalized French citizens of enemy origin who have pre-

circulation which have created and propagated a misunderstanding of a certain provision of this German statute relating to dual nationality, giving rise to the assumption that a German subject, naturalized in the United States, could by the German law of July 22, 1913, retain his

served their former national character, and under the administrative regulations, 94 certificates out of 758 granted since Jan. 1, 1913 to former subjects of the Central Powers have been revoked. This law has been superseded by the law of June 18, 1917 (Journal officiel, 20 Juin 1917) providing for cancellation by the courts of naturalization certificates granted since January 1, 1913 to persons of enemy origin who have preserved their former nationality. All persons are to be deprived of their naturalization papers when it appears from their conduct that they have conserved "attachment" to their country of origin. The government will not wait until a disloyal act has been committed, but will take measures compatible with the interests of the country and will denaturalize and intern these persons on the presumption that they have retained their original national character. See Journal officiel Chambre des Députés. Doc. Sess. ord. 1916, V. 2. No. 2291, pp. 1055-1058; Sénat. Doc. Sess. ord. 1916. Annexe No. 447, pp. 598-601, containing also a discussion of the German law.

GREAT BRITAIN is considering an amendment to the Nationality and Status of Aliens Act, 1914 so as to provide for revocation of naturalization certificates for reasons other than false representations or fraud. In the memorandum submitted to the Imperial War Conference, 1917, references are made to the German law of nationality which in paragraph 25 allows, according to the interpretation by the Home Office, naturalized British subjects of German origin to retain their original nationality. See Imperial War Conference, London, 1917, Extracts from Minutes of Proceedings. 7 Geo. V, A, 1917. Sess. Pap. No. 42a, pp. 70-78, 160-166, being a reprint of Paper by Command 8566. See also Schuster, Nationality and Naturalization, Jan. 1917, Contemporary Rev. 93-99, recommending amendments to the British act.-Of great interest is a test case tried in the English courts and finally affirmed by the House of Lords-Rex v. Halliday, 52 LAW JOURNAL, London, No. 2677, May 5, 1917, 173. The appellant, who was born in Germany, became a naturalized British subject in 1905. Upon the order of the Home Secretary issued under Regulation 14B of the Defence of the Realm Regulations, he was deprived of his liberty and interned together with alien enemies "in view of his hostile origin and associations." Lord Shaw, in a very interesting dissenting opinion, arrays the great charter, the petition of right, liberty of opinion, and other constitutional rights of an English subject against the arbitrary acts of the government.

PORTUGAL by decree No. 2355 of April 23, 1916 (JOURNAL DU DROIT INTERNATIONAL PRIVÉ (Clunet, 1917) 794) ordered the cancellation of all naturalization certificates granted prior to the declaration of war to individuals of enemy origin, and authorized the expulsion of such persons and those of enemy origin but having another or Portuguese nationality whenever their presence in Portugal should be deemed to constitute a menace.

Canada passed in Sept. 1917 a War-time Elections Act (see text of the Act in Instructions for the Guidance of Returning Officers, Their Deputies and Enumerators, p. 21 seq.) which provides in ch. 6, s. 67, par. h, for the disfranchisement of all naturalized British subjects who were born in an enemy country and naturalized subsequent to March 31, 1902.

ITALY suspended, by decree of July 25, 1915 (4 Leggi e Decreti, 1915, 3175) the operation of the naturalization provisions of the law of June 13, 1912 (2 Leggi e Decreti, 1912, 1490).

German citizenship. Great legal and political importance has been given to this view.

How potent has been the influence of this misunderstanding of the German law is evidenced by the fact that a bill was introduced during the last session of Congress "to prevent the naturalization of aliens who seek or are permitted to retain their citizenship under the state or sovereignty of which they are citizens or subjects." This proposed amendment to the naturalization act would seem to have had in mind German aliens who apply for naturalization papers.

In the following pages the writer hopes that he will be considered as rendering a service in the interests of legal accuracy by endeavoring to demonstrate the erroneous character of the prevailing view, and to arrive at a correct interpretation of the German law in so far, at least, as the United States is concerned.

Ι

It is within the exclusive domain of the municipal law of every sovereign state to decide when and under what conditions an individual loses or acquires its nationality. By the process reciprocal obligations are imposed, the individual being released from his allegiance and the state from extending its protection, or the individual being invested with the national character and the state extending protection to him. The different states do not, however, follow uniform rules in the determination of a person's nationality, and the law of nations8 con-

⁶ Senate Bill No. 1485. 65th Cong., 1st Sess., April 9, 1917 by Mr. Sterling. No action was taken. The proposed law was intended as an amendment to the Naturalization Act of June 29, 1906 (34 Stat. L. 596) and provided:

[&]quot;Be it enacted, etc., That no alien, although otherwise qualified under the laws of the United States to become a citizen thereof, but who, before seeking admission to such citizenship, has applied for or obtained the consent of the authorities of the foreign state or sovereignty of which such alien is at the time a citizen or subject to retain his citizenship under such foreign state or sovereignty or who has in any form or manner reserved any right under the laws of such foreign state or sovereignty to retain such foreign citizenship while a citizen of the United States, shall be admitted to become a citizen of the United States."

⁷ It was probably overlooked by the persons interested that Russia, Turkey, Italy, France (in the case of men under 42), and Switzerland, to mention but a few countries, prohibit their subjects from acquiring foreign naturalization without consent of the country of origin, so that whenever we naturalize a subject of those countries who has not obtained special consent thereto from his native country we are naturalizing a person who is still claimed in every respect as a citizen of his country of origin. See Supplemental Note, p. 507 post.

⁸L'Institut de Droit International adopted at its meeting in Venice on Sept. 29, 1896, a resolution relating to conflicts of laws of naturalization and expatriation. Only Arts. 5 and 6 are of interest here. Art. 5. No person may be admitted to naturalization in a foreign country unless he proves that his country of origin has released him from his allegiance, or that he has, at least, made known his intention to his country of origin, and has fulfilled the military

tains no provision concerning the acquisition and loss of nationality except as to conquest and cession. Cases of conflicts will necessarily arise unless countries with divergent laws have by agreement removed the cause of potential conflicts. Thus, under incongruous principles an individual may possess a dual nationality acquired either (a) by birth—where the state wherein the child is born (jus soli) and the state of which the parents are citizens (jus sanguinis) both claim the child as a subject⁹—(b) by marriage, (c) by legitimation of illegitimate children, or (d) by naturalization. Any individual who intentionally or unintentionally possesses such dual nationality, is hardly in an eviable position. Two different states claim his allegiance and demand the duties and obligations owed under it. Awkward as his position is under ordinary circumstances, his status will make him the subject of an irreconcilable conflict of duties in case a serious controversy should engage the two countries.¹⁰

obligations during the period prescribed for active service in conformity with the laws of such country. Art. 6. No person may lose or renounce his nationality unless he proves that he is complying with the conditions requisite for obtaining his admission in another country. Loss of nationality may never be inflicted as a punishment. (15 Annuaire de l'Institut de Droit International, 271.) Cf., however, v. Bar, The Theory and Practice of Private International Law (2d ed. 1892) 195; Weiss, Erwerb und Verlust der Staatsangehörigkeit, Kritik und Reformvorschläge (Annalen des Deutschen Reichs 1908, pp. 836, 902; 1909, pp. 383, 472).

^o See arrangement of countries under the jus sanguinis and jus soli by Zeballos, La Nationalité (1914) 246, 632; slightly different classifications may be found in v. Keller und Trautmann, Kommentar zum Reichs- und Staatsangehörigkeitsgesetz (1914) 38-42; see also Verhandlungen des Reichstags. XIII. Legislatur-

periode. I. Session, 1912. Anlagen No. 4, pp. 72, 78.

¹⁰ As to dual nationality and questions of nationality in general see more in detail: v. Bar, The Theory and Practice of Private International Law (2d ed. 1892) s. 41-103; Bluntschli, Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt (1878) 211-227; Bodmann, Die Rechtsverhältnisse der sog. 'Sujets mixtes,' 12 Archiv für öffentliches Recht, 200, 317; Bonfils, Manuel de Droit International Public (7e éd. 1912 by Fauchille) Nos. 410-432; Borchard, Diplomatic Protection of Citizens Abroad (1915) s. 253-262, and passim; 2 Calvo, Le Droit International (5e éd. 1896) s. 539-654; Cockburn, Nationality (1869); Cogordan, La Nationalité (2e éd. 1890); Folleville, Traité Théorique et Pratique de la Naturalization (1890); Fromageot, De la Double Nationalité des Individus et des Sociétés (1892); Hall, A Treatise on International Law (6th ed. 1909) ch. V; I Halleck, International Law (4th ed. 1908 by Baker) 430-469; Hartmann, Institutionen des practischen Völkerrechts in Friedenszeiten (1874) s. 79-82; Heffter, Das Europäische Völkerrecht der Gegenwart (8th ed. 1888 by Geffcken) 2s. 59, 60; Kahn, Gesetzeskollisionen s. 16 (30 Jhering's Jahrbücher 1-143); 2 Kent, Commentaries (14th ed. 1896) 61-103; 3 Laurent, Droit Civil International (1880) 174-437; Lehr, La Nationalité dans les Principaux Etats au Globe (1909); Liszt, Das Völkerrecht (9th ed. 1913) 102-104; 2 Martens, Völkerrecht (1886) s. 43-48; Martitz, Das Recht der Staatsangehörigkeit im internationalen Verkehr (Hirth's Annalen des Deutschen Reichs. Jahrg. 1875, 794-835, 1114-1170); 3 Moore, History and Digest of International Arbitrations Naturalization, as that phase of acquisition and loss of nationality to which we propose to confine our attention, may create the above mentioned dilemma, since the naturalizing state grants naturalization in accordance with its own laws regardless of the fact as to whether or not the naturalized person ceases to be or remains a subject or citizen of his native state.

Paragraph I of Section 25 of the present German law of nationality¹¹ provides that

"A German who has neither his domicile nor permanent residence in Germany loses his nationality¹² upon the acquisition of a foreign nationality where the latter is acquired on his voluntary application or on the application of the husband or legal guardian; in case of a married woman or ward, however, only if the conditions are fulfilled under which expatriation may be applied for according to Sec. 18 and 19."¹³

(1898) Ch. LIV; 3 Moore, Digest of International Law (1906) 518 seq.; 1 Oppenheim, International Law (1912) s. 293-313; 3 Pradier-Foderé, Traité de Droit International Public (1887) Nos. 1654-1691; 1 Rivier, Principes Du Droit des Gens (1896) 303-306; 1 Sieber, Das Staatsbürgerrecht im internationalen Verkehr (1907); Stoerk in 2 Holtzendorffs Handbuch des Völkerrechts (1887) s. 113 seq.; Taylor, A Treatise on International Law (1901) s. 169 seq.; Ullmann, Völkerrecht (2d ed. 1898) s. 97-101; Westlake, International Law (2d ed. 1910) 228-232; 1 Weiss, Traité Théorique et Pratique de Droit International Privé (2d ed. 1907)—La Nationalité; Wheaton, Elements of International Law (4th ed. 1904 by Atley) 238-251; Zeballos, La Nationalité (1914).

¹¹ Reichs- und Staatsangehörigkeitsgesetz. Vom 22. Juli 1913; Reichs-Gesetzblatt 1913, 583-593.

¹² According to s. I of the law, "Anyone who possesses the nationality of a Federal State or direct Imperial nationality is a German." The term "nationality" for the German word Staatsangehörigkeit seems to be the most appropriate inasmuch as it disregards differences in constitutions and forms of government. It is used here not in its racial, but in its political and legal sense like the term "citizen" in our law, and denotes the political membership in a nation and the bond which attaches an individual to the state. (Cf. v. Bar, op. cit. III-II2.) The German law of nationality does not use the term "citizen" which is generally used to indicate the holder of political rights and privileges in a state. The term is employed, however, in Germany when an individual has acquired political and civic rights in a city.

¹³ "S. 18. The expatriation of a married woman may only be applied for by the husband, and, if he is a German, only at the same time as his own release. The application requires the wife's assent.

"S. 19. The expatriation of a person who is subject to parental authority, or who is under the care of a guardian, may be applied for only by the legal guardian, and only with the assent of the German Court for the Protection of Wards (Vormundschaftsgericht). The State Attorney's Office (Staatsanwaltschaft) has the right to appeal against the decision of the Court for the Protection of Wards; further appeal against the decision of the court hearing the appeal is admissible without restriction.

"The assent of the Court for the Protection of Wards is not required if the father or the mother apply for expatriction for the moders and at the second of the court in the second of the court in

"The assent of the Court for the Protection of Wards is not required if the father or the mother apply for expatriation for themselves and at the same time for a child, on the strength of their parental authority, and if the person making the application has charge of the child. If the person appointed to assist the mother also has charge of the child, the mother's application for the expatriation of the child requires the assent of such person."

This new provision is not found in the repealed German law of nationality¹⁴ and expresses unambiguously the legal maxim, not new to other countries¹⁵ but novel to German legislation, that the acquisition of a foreign nationality affects the loss of the original nationality.¹⁶ It takes the place of the abolished provision¹⁷ that uninterrupted

¹⁴ Gesetz über die Erwerbung und den Verlust der Bundes- (Reichs-) und Staatsangehörigkeit. Vom 1. Juin 1870 (Reichs-Gesetzblatt 1870, 355-373) s. 21, par. 3, however, recognizes the principle of the Bancroft treaty referred to below.

¹⁵ See Supplemental Note at the end of this article.

¹⁸ This maxim should not be confused with the right to emigrate or the right of expatriation. Among the modern states to recognize these rights in their fullest extent Prussia was one of the first: see Kapp, Der deutsch-amerikanische Vertrag vom 22. Februar 1868, 35 Preussische Jahrbücher (1875) 510 seq.

It may be of interest to note that the United States is largely responsible for the general adoption of a principle first embodied in the French Constitution of Sept. 3, 1791. Acording to Titre II, Art. 6, No. 1 (see 3 Duvergier, Lois (2e éd.) 242) French nationality is lost by naturalization in a foreign country. Yet, this maxim was never formally incorporated in our statutes until the passage of the Act of March 2, 1907, s. 2 (34 Stat. L. 1228), though the Courts (see Talbot v. Janson (1795) 3 Dall. 133; J. Inglis v. Trustees of the Sailors Snug Harbor (1830) 3 Pet. 99; M'Ilvaine v. Coxe's Lessee (1804) 2 Cranch, 280) and the Executive (see 3 Moore, Dig. of Int. Law s. 431-438) have acted in accordance with such principle. Before that time the rule of the English common law "Once a subject, always a subject" and Nemo patriam exuere potest, was still the law of the land, though not always strictly applied. Kent says in his Commentaries, II, 71:

"From this historical review of the principal discussions in the federal courts on this interesting subject [expatriation] in American jurisprudence, the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States without the permission of government, to be declared by law; and that as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered."

(See also Ainslie v. Martin (1813) 9 Mass. 454.) The Act of July 27, 1868 (15 Stat. L. 223), being the result of English-American controversies over the participation of naturalized American citizens in the Fenian movement (see Cockburn, op. cit. 70-106) declares "the right of expatriation" to be "a natural and inherent right of all peoples." The act, although apparently a general declaration, is directed against foreign governments and refers merely to people of other countries residing in the United States. This becomes quite evident from reading the debates in Congress (see Congressional Globe 1867-68, 40th Cong. 2d Sess. 783, 831, 865, 967, 1012, 1098, 1127, 1156, 1160), where frequently requests were made that the right of expatriation of American citizens should also be expressly stated by an enactment. See also H. Doc. No. 326, 54th Cong. 2d Sess. 24 seq. Only by implication and inference may the declaration of the act, as passed, be applied to citizens of the United States who seek to expatriate themselves (see the opinion of Atty. Gen. Williams, 14 Op. 295; 3 Moore, Dig. of Int. Law, s. 439; also v. Martitz, op. cit. 1157-1167; Knapp, op. cit. 513-524).

¹⁷ Law of June 1, 1870, supra, s. 13, 21. If a German acquired a foreign nationality during this period of prescription, he was regarded by the German government for all intents and purposes as a foreigner, and if he had not acquired any foreign nationality before the expiration of ten years he became heimatlos—a man without a country. It is the tendency of the new nationality law to facilitate repatriation of former Germans, but the law does not auto-

residence abroad for 10 years entails, as a matter of course, loss of German nationality, by prescription, and embodies the principle formally acknowledged by the concessions made in the Bancroft Treaties of 1868, 18 that the citizens or subjects of one of the contracting parties who become naturalized within the jurisdiction of the other, and who shall have resided therein uninterruptedly for five years, are to be treated as naturalized citizens or subjects of the latter. We shall have occasion, presently, to indicate the relation of the recent German law of 1913 to such treaties.

The loss of German nationality no longer occurs merely because of a failure to comply with a formality.¹⁹ On the contrary, circumstances must now exist which clearly indicate the intention of the particular person to cease to be a German subject.²⁰ Such intention is expressed by the voluntary application for foreign naturalization. The application is an expression of will, a voluntary act, and constitutes, even if not expressed in definite words, a renunciation of the former allegiance, and at least, upon principle, an act incompatible with the retention of another nationality. The German law requires that the acquisition of a foreign nationality must rest upon a positive expression of the will, which is found when a person files a petition for naturalization according to the laws of a foreign state and becomes thereupon a national of the latter.

A mere application for naturalization or the declaration of intention to become a citizen at a future time will not, however, suffice. The complete acquisition of foreign nationality effects an automatic loss of the German nationality, if no domicile or permanent residence

matically repatriate all heimatlos persons. Such individuals desiring to reacquire German nationality may be naturalized like any other foreigner, in accordance with s. 8-12, 14-16, or they may, according to s. 13, be repatriated in certain cases, referred to in the text below, upon their petition the grant of which lies entirely within the discretion of the German authorities. The law does not vitiate the grounds upon which German nationality has been lost before Jan. 1, 1914, the date it went into effect. It seems, therefore, that all persons domiciled in this country who had lost their German nationality for any reason prior to Jan. 1, 1914, have taken no steps for repatriation and have not become naturalized American citizens, are heimatlos—i. e., legally they are not Germans, and logically are not subject to disabilities and restrictions as such.

¹⁸ See *post*, p. 495 *et seq*.

¹⁹ The requirement was registered in a German consul's office, Law of June 1, 1870, s. 21.

²⁰ According to s. 17-29, 32 of the new German nationality law, nationality is also lost by expatriation, and noncompliance with military obligations [our American law provides that in case of desertion or avoiding the draft in time of war rights of citizenship are forfeited; such forfeiture may be remitted. Rev. Stat. s. 1996-98 as amended by Act of Aug. 22, 1912, ch. 336, s. 1, 37 Stat. L. 356], legitimation of illegitimate children by a foreigner, marriage (in the case of a German woman marrying a foreigner), or by the declaration of the German authorities (in the case of a German residing abroad who, although able to do so, fails to join the colors in case of war or mobilization).

is maintained in Germany, without requiring any other act on the part of the German authorities; the limitations upon the release from German allegiance provided in Section 22 of the law²¹ do not apply, and the German government treats the individual naturalized in another country as a foreigner to all intents and purposes. All legal relations which are inconsistent with his new status cease to exist, notwithstanding his German origin or language.²² If, however, the naturalized person's conduct—as, e. g., noncompliance with military obligations²³—before the acquisition of the foreign nationality rendered him liable to criminal or disciplinary prosecution, his new nationality will not protect him against eventual punishment when coming within the jurisdiction of the German law, unless the Bancroft treaties concluded with the United States prevent it.²⁴

²¹ Under s. 22 of the law expatriation or release from German nationality is not granted to the following classes of persons:

"I. To persons liable to military service, as to whose liability to serve no definite decision has yet been given, unless they produce a certificate from the recruiting commission (*Ersatzkommission*) to the effect that in the opinion of the commission expatriation is not applied for with the intention of avoiding liability to active service;

"2. To men of the active army, the active navy, or the active colonial troops;
"3. To men of the reserve of the class defined in s. 56, Nos. 2-4, of the Imperial Military Law, unless they have received the consent of the Military authorities;

"4. To other men of the reserve after they have been called to active service; "5. To officials and officers, including those of the reserve, before they have been discharged from service;

"Expatriation may not be refused in times of peace for reasons other than those mentioned in paragraph 1. In time of war and danger of war the right is reserved to the Emperor to issue special decrees."

²² Entwürfe nebst Begründung. Verhandlungen des Reichstags. XIII. Legislaturperiode. I. Session, 1912. Anlagen. Drucksache Nr. 6, p. 15-16; also v. Keller und Trautmann, op. cit. 287-290.

²² Sec. 140 of the German Penal Code punishes for noncompliance with military obligations the following classes of persons:

"I. Persons liable to military service who without permission and with the intent to escape service in the standing army or the navy, either leave the Empire, or after reaching military age remain outside of the Empire—by a fine of not less than 150 marks nor more than 3,000 marks, or by imprisonment for not less than one month nor more than one year.

"2. Officers or medical men ranking as officers of the reserve who emigrate without permission—by a fine not exceeding 3,000 marks, or by arrest or imprisonment not exceeding six months.

"3. Any person liable to military service who, after proclamation by the Emperor of a special regulation during a period of war or danger of war, emigrates contrary to such proclamation—by imprisonment not exceeding two years to which may be added a fine not exceeding 3,000 marks. Any attempt is punishable.

"The property of the accused may be attached in so far as is necessary in the opinion of the judge to cover the highest fine which may possibly be imposed upon the convicted person, and the costs of the proceedings."

(Henle und Schierlinger, Das Strafgesetzbuch für das Deutsche Reich (1912) 142.)

²⁴ See v. Keller und Trautmann, op. cit. 291; as to cases of punishment for breach of military obligations see 3 Moore, op. cit. 363 seq., 564 seq.; Tingle, Germany's Claims upon German-Americans in Germany (1903).

A certain perplexity is caused by paragraph 2 of Section 25 which provides as follows:

"[German] nationality is not lost by one who before acquiring foreign nationality has applied for and obtained the written consent of the competent authorities of his home State to retain such nationality. Before this consent is given, the German Consul is to be heard."

The principle proclaimed in the first paragraph of Section 25 that

"a German who has neither his domicile nor permanent residence in Germany loses his nationality upon the acquisition of a foreign nationality where the latter is acquired on his voluntary application"

has thus apparently been limited. In express terms, the legal anomaly of dual nationality seems to be recognized. The language employed in the second paragraph of Section 25 gives apparent ground for the erroneous interpretation of some writers, as will be shown hereafter, because such language is rather sweeping and conveys the impression that the possession of a dual nationality is generally allowed, and that a German residing abroad may acquire a foreign nationality without losing his German nationality. Such a general application of the provision was, however, not sanctioned or intended, as a closer examination of the subject fully reveals.

While it is a familiar legal doctrine that the language of a law determines its sense, it is, nevertheless, common practice to go beyond the surface meaning of words used, especially where they would indicate a departure from universally recognized principles, and to consider the origin and history of the statute, the motives which prompted its adoption, and the attending circumstances,—particularly legislative committee reports and debates—to determine, in case of doubt, the true meaning and application of a law. The German courts in particular resort to the preparatory legislative material in order to determine the purpose of a law and to interpret the intention of the legislator.²⁵

An examination of the explanatory remarks which accompanied the bill when introduced by the government in the Reichstag, of the committee report on the bill, and of the commentaries on the law, discloses the attitude which the German government has taken with reference to the question of dual nationality and clearly indicates the scope of the law itself.

When introducing the Bundesrat's bill in the Reichstag, Dr. Delbrück, then Minister of the Interior, presented the point of view of the government with regard to dual nationality by saying that persons owing allegiance to more than one country were of no benefit to such countries, they rather constituted a burden, and spoke of double

²⁵ As to such practice in the German courts see Düringer, Richter und Rechtsprechung (1909) 13-25; Rumpf, Gesetz und Richter (1906) 120 seq.

allegiance as an anomaly,26 indicating thereby the government's antipathy to the existence of such a status.

This attitude was even more clearly emphasized during the discussion at the first reading of the Bundesrat's bill in the Reichstag committee. The question of dual nationality was there raised by one of the members, who declared that as a matter of principle dual nationality should be avoided, and that the possibility of a dual nationality would be inconsistent with the idea of allegiance owed by a German; for a person could owe only single allegiance. He, therefore, moved to strike out paragraph 2 of Section 25. The representative of the Bundesrat in defending paragraph 2 explained the attitude of the several states of the empire towards the question of dual nationality, and stated the reasons for the proposed provisions and their scope. He said that several of the federal states had taken the position that a plural international citizenship was extremely undesirable; that it could not, however, be completely abolished in fact, and must be allowed for practical purposes and in emergencies. Such dual nationality, as proposed by the provisions of paragraph 2, would exist where a German might acquire a foreign nationality automatically, as he would in any foreign country where the jus soli governed the matter. In that instance, it would certainly be very unjust to declare that a German had forfeited his nationality. Circumstances might also exist which would force a German to acquire foreign nationality without giving up his German nationality in order to protect his economic interests.27 He referred to the laws of several countries, particularly to the law of Russia which prohibits foreigners from acquiring and owning real property. Should, for instance, a German inherit real estate situated in such a country, the material welfare and interests of his family might demand the retention of such property. Since his precarious legal position would be known to possible purchasers of such property, they would naturally hold back their offers until the expiration of the time limit would force the heir to dispose of his property at an inadequate price. In cases of this nature, it would be only equitable to allow a German who, due to local exigencies, had acquired a new nationality to retain his German nationality.28

²⁶ Verhandlungen des Reichstags. XIII. Legislaturperiode. I. Session. Stenographische Berichte. 13. Sitzung, 250.

²¹ A similar doctrine seems to have been favored in our law. Kent says in his Commentaries, II, 75:

[&]quot;An American citizen may obtain a foreign domicile, which will impress upon him a national character for commercial purposes in like manner as if he were a subject of the government under which he resided, and yet without losing on that account his original character, or ceasing to be bound by the allegiance due to the country of his origin."

²⁸ Bericht der 6. Kommission zur Vorberatung der Entwürfe vom 24. April, 1913. Verhandlungen des Reichstags. XIII. Legislaturperiode. I. Session 1912-13. Anlagen. Drucksache Nr. 962. p. 1441.

In the report on the second reading of the bill in committee it was again stated, still more definitely, as the unanimous opinion of the committee, that the provisions of Section 25 of the new law would deprive any German of his German nationality *immediately* upon the voluntary acquisition of any foreign nationality whatsoever, regardless of treaty. The Bundesrat's representative concurred in this interpretation and asserted that there was no conflict between Section 25 and the provisions of the Bancroft Treaties which were reaffirmed in Section 36.²⁹

Should a German subject desire to become a naturalized citizen in a foreign country and at the same time remain a German subject, the realization of such desire would depend entirely upon the discretion of the German authorities acting upon the individual's application to retain German nationality. The authorities to whom such petition is to be made must examine whether or not conflicts are likely to arise from granting such permission, and since dual allegiance is looked upon with disapproval, as pointed out above, a favorable consideration of such application would naturally, it seems, be very exceptional. To be apprised of the attitude of foreign governments on this question the co-operation of the German consuls is provided. The latter must express an opinion on the opportuneness of giving permission to retain German nationality to petitioners from their respective districts.³⁰

The law provides a further check on these petitions by prohibiting entirely the grant of permission in cases where such dual nationality might cause controversies and complications with foreign governments, and gives the Imperial Government an effective supervision of all petitions for retention of German nationality in paragraph 3 of Section 25, by providing that:

"The Imperial Chancellor with the consent of the Bundesrat may order that persons who wish to acquire nationality in a particular foreign country, shall not be granted the consent provided for in paragraph 2."

In the explanations accompanying the bill when introduced in the Reichstag it was said with reference to the above cited paragraph that whenever the political interests of the empire might demand it, the Imperial Chancellor should prevent the retention of German nationality by Germans who acquire the nationality of a foreign country, and that such limitation would especially apply to applicants in countries which require prospective citizens to renounce allegiance to their former country.³¹ This view was also expressed by the Bundesrat's repre-

²⁰ Ibid. 1456; as to Bancroft treaties see note 47 post.

³⁰ As to the procedure in such petitions see v. Keller und Trautmann, *ap. cit.* 204-205.

³¹ Entwürfe nebst Begründung, supra, 29.

sentative during the discussions on the bill in the Reichstag committee.³²

So far as can be ascertained, the Imperial Chancellor has not, as yet, by formal promulgation announced the countries where the retention of German nationality is not possible upon the acquisition of the new nationality.

The question of dual nationality as proclaimed in the German law, approached in the light of the legislative material analyzed in the foregoing paragraphs, finds a ready and satisfactory solution so far as the United States is concerned, and leaves hardly any doubt as to the full status as an American citizen of a German who has duly acquired American naturalization.

The consensus of opinion of German publicists³⁸ with respect to the

22 Bericht der 6. Kommission, supra, 1441.

See Romen, Reichs- und Staatsangehörigkeitsgesetz vom 22. Juli 1913 (1913) 100, 102, 142; Meyer, Reichs- und Staatsangehörigkeitsgesetz (1913) 169-172, 202; Cahn, Reichs- und Staatsangehörigkeitsgesetz (1914) 135, 136-137, 163; v. Keller und Trautmann, op. cit. 237-295; Cahn, La Loi Allemande sur la Nationalité, son Passé, son Présent, son Avenir (9 Revue de Droit International Privé (Lapradelle, 1913) 335); Seeger, Das neue Reichs- und Staatsangehörigkeitsgesetz (42 Juristische Wochenschrift, 951); Lifschütz, Vergleichende Betrachtung der Staatsangehörigkeitsgesetze vom 1. Juli 1870 und vom 22. Juli 1913 (33 Archiv des Öffentlichen Rechts (Laband, 1915) 155); Blüher, Das neue Reichs- und Staatsangehörigkeitsgesetz (18 Deutsche Juristenzeitung, 890-893); Nelte in his article Die durch das 'Reichs- und Staatsangehörigkeitsgesetz' vom 23. Juli 1913 herbeigeführten Aenderungen des bestehenden Rechtszustandes (32 Archiv des Offentlichen Rechts (Laband) 22-36, esp. 33) says that loss of German nationality through acquisition of a non-German nationality occurs only if such acquisition is based upon the exercise of the will of the German.

There is also an article by Weil, La Nationalité dans les Rapports de l'Allemagne avec les Etats Unis et les Traités Bancroft (44 Journal du Droit Inter-NATIONAL (Clunet, 1917) 424-435, 899-910) in which the author discusses the loss of German nationality under the former and the present law. With reference to the retention of German nationality in accordance with s. 25, par. 2, he thinks (908-909) that German nationality cannot be preserved so far as the United States is concerned. A similar view is expressed in the same author's article La Double Nationalité en Droit Allemand avant et après la Loi du 22 Juillet 1913 (12 REVUE DE DROIT INTERNATIONAL PRIVÉ (Lapradelle, 1916) 142-158, esp. 147, 152); see also his article Ambiguité de la Dénationalisation Allemande (43 Journal du Droit International (Clunet, 1916) 69 seq.). Another review of the German law (9 Revue de Droit International Privé (Lapradelle, 1913) 962-969) calls the provision of s. 25 a fraud, and says with reference to the United States that the naturalized individual of German origin commits perjury and the consul accepting the application for the retention of German nationality is his accomplice. This statement would seem to have no foundation in fact or law; while the author cites the Report of the Reichstag Committee, he has apparently omitted the reference to the United States. See also Pillet, Die Charactère Politique de la Notion de Nationalité (12 Revue de Droit Inter-NATIONAL PRIVÉ (Lapradelle, 1916) 14-33), especially his reference to the German law and the Bancroft treaties (27, 28); Haennig, Une Fourberie Allemande. La Loi Delbrück (1915).

application of Section 25 of the law is that, although paragraph 2 of this section would permit, in a specific class of cases, the retention of German nationality, a German subject loses his German nationality ipso jure upon the acquisition of American citizenship for the simple reason that the conferring of the American national character is conditioned upon the unequivocal renunciation, in definite words, of any prior allegiance by taking the oath of allegiance in a formal court proceeding.³⁴ The retention of German nationality would, therefore, be inconsistent with the idea and legal conception of American naturalization and would create an anomaly. After passing through the crucible of naturalization the individual is no longer a German, but an American.

American writers take the same view. Richard W. Flournoy, Jr., in discussing the question of dual nationality as involved in Section 25, paragraph 2, says:

"According to this provision [s. 25] a German residing in a foreign land may acquire naturalization therein without giving up his German nationality unless the laws of that country require the renunciation of the prior allegiance. This provision is apparently intended for the benefit of Germans residing in foreign lands which extend the franchise, the right to hold real property, etc., only to their citizens." ³⁵

And again: "This provision [s. 25] can have no application to Germans who are naturalized as citizens of the United States, since it is a specific requirement of our naturalization law that an alien who applies for naturalization must expressly renounce allegiance to all other sovereignties, and particularly by name to the sovereignty to which he at the time owes allegiance."

Edwin M. Borchard comments on the German law as follows: "The new German law of nationality of 1913 apparently sanctions such conflicts [arising from a dual nationality] by providing that a German residing in a foreign country may acquire naturalization therein without giving up his German nationality unless the laws of that country (as is the case in the United States) require the renunciation of the prior allegiance."⁸⁷

A brief reference, at least, to Section 13 of the German law under discussion should be made here, although few of the critics of Section 25 have called attention to that earlier section, which in greater degree than Section 25 would seem to sanction and favor the principle of

⁸⁴ As to naturalization proceedings see below.

³⁵ Flournoy, Observations on the new German Law of Nationality, 8 Am. Jour. Int. Law (1914) 480.

³⁰ Ibid. 481; the same view is also expressed in his article in the New York Times, note 5, ante; see also 9 Am. Jour. Int. Law (1915) 939-942.

⁵⁷ Borchard, The Diplomatic Protection of Citizens Abroad (1915) 576, 584, 685, note 5; see also Mattern, Paragraph 25 of the New German Citizenship Law, 204 North Am. Rev. 856-868, explaining the correct meaning of the German law by drawing comparisons with the provisions in foreign naturalization laws, especially in the British Act of 1870.

dual allegiance. If any criticism is justifiable, it might be applied to the provision embodied in the following section:

"Section 13. A former German who has not settled in Germany, may on his application be naturalized (repatriated) by the Federal State to which he formerly belonged, provided he fulfills the requirements of Section 8, paragraph 1, Nos. 1, 2:38 the same applies to the child or adopted child of a former German. The Imperial Chancellor must be informed prior to the naturalization (repatriation); naturalization (repatriation) does not take place if he raises objections."

According to the law⁸⁹ previously in force only those Germans who had lost their nationality through ten years' continuous absence abroad and without having acquired another nationality could be repatriated by their former home state without having taken up residence there. In all other cases of loss of nationality residence in the home state and the fulfillment of other conditions40 was formerly required. Thus, a great number of individuals whose retention as German subjects was most desirable from the German government's standpoint were precluded from redintegration because their calling and employment prevented them from resuming residence in Germany. Section 13 of the new law of nationality, the most important in the whole law, grew out of and fulfilled this desire, frequently voiced in the Reichstag: the repatriation of former Germans abroad. It provides that such repatriation does not require settling in Germany, that not only former Germans who have become heimatlos-having lost German nationality and not having acquired any other nationality-but also their children and those who have become nationals of other countries. The significance and import of these provisions call for a brief explanation.

The Bundesrat's representative in commenting on Section 13 during the first reading of the government's bill in the Reichstag committee said that the mode of repatriation of persons "without nationality" (heimatlos) as set forth in this section would be favored in all cases where individuals abroad had been of great service to Germany. This included, first of all, representatives and agents of German business houses; furthermore, members of German communities in Palestine, missionaries, and those who had fostered German interests and extended German influence through German societies, and maintained

⁵⁵ Sec. 8, par. 1.

[&]quot;An alien who has settled in Germany may on his application be naturalized by the Federal State within whose territory such settlement has taken place—

[&]quot;I. If, according to the laws of his former home State he is legally competent, or would be legally competent according to the laws of Germany, or if the application is made in accordance with s. 7, par. 2, sentence 2, by his legal guardian or with the latter's consent.

[&]quot;2. If he has led an irreproachable life."

²² See s. 21, par. 4 of Law of June 1, 1870.

[∞] *Ibid.* s. 8.

and supported German churches or schools. Of course, Section 13 was not intended to vitiate genuine facts on which a loss of German nationality had been predicated, and especially in cases where individuals had lost their nationality on account of noncompliance with military obligations, or where they had without good reason acquired a foreign nationality.41 Section 13 does not confer a right to repatriation, and the application may be refused without stating reasons therefor. A very careful examination is to be made of an application by a person who has obtained foreign naturalization by reason of the fact that in such a case conflicts growing out of dual allegiance must be expected. Great consideration must be paid to the fact whether or not the applicant had acquired foreign naturalization of his own free will and volition, and the deciding factor should be whether or not the repatriation would cause loss of his present nationality. If he would not by repatriation lose it according to the law of the naturalizing country, repatriation will not be granted. The Imperial Chancellor passes upon the application.42

### II

The foregoing deductions have shown, it is believed, that Section 25 of the German law of nationality does not admit dual nationality in general, and not at all so far as the United States is concerned, or that it affects in any way the American citizenship of individuals of German origin. This alone would appear sufficient to make clear the interpretation given in Germany to Section 25. Yet a study of other parts of the same law would seem to remove all doubt and to preclude false interpretations.

In drafting the law, the Bundesrat thought of the probability that the lack of a provision relating to the applicability of existing treaties might give rise to a question as to their further validity.⁴⁸ To prevent all doubt, it is set forth in Section 36 of the law that existing treaties⁴⁴

^a Begruendung, supra, 16; Bericht der 6. Kommission, supra, 1433.

E See extensive commentary by v. Keller und Trautmann, op. cit. 157-165; see also Meyer, op. cit. 119-123; Romen, op. cit. 59-63; Cahn, op. cit. 79-80; Nelte, op. cit. 30. These writers maintain that such repatriation is not possible where conflicts with foreign countries are likely to arise. Also the provision in s. 33, par. 2, that "direct Imperial nationality (unmittelbare Reichsangehörig-heit) may be granted to a former German, who has not taken up residence within the German Empire," should be read in the light of the above explanations.

^{*} See Begründung, supra, 33.

[&]quot;Naturalization Convention of Feb. 22, 1868, between the North German Union and the United States; similar treaties with the other German States; see Treaties, Conventions, etc., between the United States of America and other Powers, 1776-1909 (61st Cong., 2d Sess. Sen. Doc. No. 357) 53-55 (Baden); 60-63 (Bavaria); 949-951 (Hesse); 1298-1299 (North German Union); 1895-

are not affected by the law. Any inaccurate interpretation which uninformed publicists may have made of Section 25, the literal words of which, it must be conceded, do give rise to possible ambiguity, must be corrected by an examination of the legislative material upon which the section was based, and, beyond any possible room for doubt, by the provisions of Section 36.

Some of these publicists, who have probably not been in a position to give the matter careful study, appear entirely to have overlooked the existence of the Bancroft treaties, the stipulations of which govern the naturalization of German subjects in this country, and which are applicable regardless of the provisions of the German statute, even if it bore the erroneous interpretation ascribed to it.

It is not intended to discuss in detail the engagements embraced in these treaties or their scope, but it appears desirable to undertake a brief survey of the conditions which brought about their conclusion, and to point out their relation to the present German law of nationality.

1808 (Württemberg). The treaties are the only instances before the enactment of the present law of nationality where Germany recognized the principle that naturalization in a foreign country effects loss of German nationality. "Prussia was the first of the European States to acknowledge the American principle of freedom of naturalization and denationalization" (Seward, Travels Around the World (1873) 711). No other treaty of this sort has ever been concluded with any other foreign country by the German government. The treaty of Amity, Commerce and Navigation with Persia of June 11, 1873 (Reichsgesetzblatt 1873, 351), obligated the two contracting parties in Art. 17 to grant naturalization to persons only after permission of the respective governments had been obtained. The Treaties of Amity, Commerce, Navigation, and Consular Conventions with Guatemala of Sept. 20, 1881 (Reichsgesetzblatt 1888, 238), Nicaragua of Feb. 4, 1896 (Reichsgesetzblatt 1897, 171), Honduras of Dec. 12, 1887 (Reichsgesetzblatt 1888, 262), and Bolivia of July 22, 1908 (Reichsgesetzblatt 1910, 507), do not refer to naturalization of the respective nationals.

The conclusion of the Bancroft treaties had such an effect upon other governments that they, upon the initiative of the United States, entered into similar naturalization treaties. The text of these conventions may be found in *Treaties, Conventions, etc., op. cit.*, in the volume indicated below. It is stipulated in such conventions that either after a continuous residence of five years coupled with naturalization, or upon voluntary naturalization according to law, the former citizens of the one contracting party should be regarded as citizens of the other. The countries with which the United States has concluded such conventions are the following:

Argentina, Aug. 9, 1909, not ratified (III, 343); Austria, Sept. 20, 1870 (I, 45); Belgium, Nov. 16, 1868 (I, 80); Brazil, April 27, 1908 (Treaty Series, No. 547); Costa Rica, June 10, 1911 (Treaties Series, No. 570); Denmark, July 20, 1872 (I, 387); Ecuador, May 6, 1872 (I, 434), abrogated upon notice by Ecuador Aug. 25, 1892; Great Britain, May 13, 1870 (I, 691); Haiti, March 22, 1902 (I, 939); Honduras, June 23, 1908 (I, 958); Mexico, July 10, 1868 (I, 1132); Nicaragua, Dec. 7, 1908 (Treaty Series, No. 566, 567); Peru, Oct. 15, 1907 (II, 1449); Portugal, May 7, 1908 (II, 1468); Salvador, March 14, 1908 (II, 1570); Sweden and Norway, May 26, 1869 (II, 1758); Uruguay, Aug. 10, 1908 (II, 1829).

Whether or not the conventions are suspended during the period of the war will not be considered. It would seem, however, that a treaty of this kind remains in operation.⁴⁵

The Bancroft treaties were the result of a long standing controversy over the treatment accorded naturalized Americans of German origin upon their return to Germany. The United States Government contended that the acquisition of American citizenship cancelled all obligations owed under the former allegiance, and declared the practice of the German states which, according to their laws, regarded such naturalized American citizens as still their subjects for purposes of military service or held them responsible for the consequences of evading such service by emigration, as inconsistent with the principle of the absolute right of expatriation. The resulting conflicts led to lively discussions extending over many years and made it advisable to reach an amicable understanding by formal conventions. Our Civil War (1861-1865) and the Austro-Prussian War (1866) prolonged the negotiations, and it was not until 1868 that the first treaty was signed by Prussia on behalf of the North German Union. This was due to the untiring efforts of George Bancroft, then United States Minister to Prussia, and to the frankness of Bismarck, who expressed thereby the Prussian government's aversion to the doctrine of dual allegiance. The other German states followed: Great Britain fell in line in May, 1870, and Austria in September, 1870. American diplomacy had scored a decided victory upon the ratification of the treaty, which was frankly conceded in Prussia. The German states received nothing in exchange for their engagements, for, although in form the treaty rests upon reciprocity, the advantages are all on the side of the United States. Criticism was, therefore, soon directed against the Prussian government for its action, and a demand made for the revocation of the treaty.46

⁴⁵ As to effect of war on treaties see Crandall, Treaties, Their Making and Enforcement (2d ed.) s. 18; also Society, etc. v. New Haven (1823) 8 Wheat 465.

<sup>465.

&</sup>lt;sup>46</sup> As to the diplomatic correspondence concerning the controversy and the negotiations for the treaties see the documents in the following collections: Message of the President of the United States communicating, in Compliance with Resolutions of the Senate Information relative to the Compulsory Enlistment of American Citizens in the Army of Prussia, etc. (Sen. Ex. Doc. No. 38, 36th Cong. 1st Sess), containing the diplomatic correspondence with Prussia from 1840 to 1860; Message of the President of the United States and Correspondence between the Government of the United States and the Government of France and Prussia, touching Military Service asserted by those Governments with reference to Persons born in those Countries, but who have since become Naturalized under the Laws of the United States (Sen. Ex. Doc. No. 4, 40th Cong., 1st Sess., 53-144), containing the correspondence with the Prussian Government during 1858-66; Message of the President of the United States and Accompanying Documents (H. Ex. Doc. No. 1, 40th Cong., 2d Sess. 582-600), giving the diplomatic correspondence of 1867; Papers relating to Foreign

The principles expounded in these treaties are the same, although the language employed varies slightly. It will suffice for our purposes to outline briefly the treaty with the North German Union.47

Article I states the conditions upon which change of allegiance must be recognized; Article II refers to punishment for offenses committed

Affairs, 1868, II, 40-56, containing the diplomatic correspondence of 1867 and 1868 leading to the conclusion of the conventions; see also 3 Moore, op. cit. s. 390-394 as to diplomatic correspondence and application of the treaties, Kapp, op. cit. Vol. 35, p. 524-534, 660-683; Vol. 36, p. 189-227; v. Martitz, op. cit. 820-821, 824-828, 833; also Bendix, Fahnenflucht und Verletzung der Wehrpflict durch Auswanderung (1906) (Staats- und Völkerrechtliche Abhandlungen No. 5).

Bendix, op. cit. 103-104, 123 seq., who claims that upon the establishment of the German Empire in 1871 the naturalization treaties concluded with the different German states became obsolete except the treaty with the North German Union. This view has not been shared either by the German or the United States Government: see Crandall, op. cit. s. 179, especially the cases cited there in footnote 23.-Text of the Naturalization Convention of Feb. 22, 1868, concluded with the North German Union (2 U. S. Treaties, etc., 1298):

"Article I. Citizens of the North German Confederation, who become naturalized citizens of the United States of America and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such.

"Reciprocally, citizens of the United States of America who become naturalized citizens of the North German Confederation, and shall have resided uninterruptedly within North Germany five years, shall be held by the United States to be North German citizens, and shall be treated as such. The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of naturalization.

"This article shall apply as well to those already naturalized in either country

as those hereafter naturalized.
"Article II. A naturalized citizen of the one party on return to the territory of the other party remains liable to trial and punishment for an action punish-

or the other party remains hable to trial and punishment for an action punishable by the laws of his original country and committed before his emigration; saving, always, the limitations established by the laws of his original country. "Article III. The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part and Prussia and other States of Germany on the other part, the sixteenth day of June, one thousand eight hundred and fifty-two, is hereby extended to all the States of the North German Confederation.

"Article IV. If a German naturalized in America renews his residence in

"Article IV. If a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization in the United States. Reciprocally, if an American naturalized in North Germany renews his residence in the United States, without the intent to return to North Germany, he shall be held to have renounced his naturalization in North Germany. The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country.

"Article V. The present convention shall go into effect immediately on the exchange of ratifications, and shall continue in force for ten years. If neither contract that the other country and the other contracts that the other country and the other country.

party shall have given to the other six months' previous notice of its intention then to terminate the same, it shall further remain in force until the end of twelve months after either of the contracting parties shall have given notice to

the other of such intention.

"Article VI. The present convention shall be ratified by the President, by and with the advice and consent of the Senate of the United States, and by His Majesty the King of Prussia, in the name of the North German Confederation; and the ratifications shall be exchanged at Berlin within six months from the date hereof.

"In faith whereof, the Plenipotentiaries have signed and sealed this convention. Berlin, the 22d of February, 1868."

prior to emigration; Article III reaffirms existing extradition treaties, and Article IV deals with repatriation. We may confine our attention to Article I. It sets forth, as pointed out above, the maxim that nationals of the North German Union who have become naturalized citizens of the United States and have resided there uninterruptedly five years shall be regarded and treated by the former as citizens of the latter, and *vice versa*.

This stipulation declares that the North German Union must regard its nationals who have emigrated to the United States and have acquired American citizenship as American citizens and no longer as subjects of the states comprising the North German Union, provided such individuals have resided within the jurisdiction of the United States continuously for five years.

Since the new German law went into effect, loss of German nationality is no longer consequent upon mere length of residence abroad. The loss occurs *immediately*, as we have seen above, upon the acquisition of a foreign nationality. The provision of the law goes further than the stipulation in the treaties; it does away with the condition as to the period of foreign residence, thus constituting a modification of the treaty stipulation and an apparent conflict.

Reference to the Reichstag committee report will again elucidate the matter. It is there stated in answer to a question regarding the relation of the treaties to Section 25 of the new law, that the German states were quite at liberty to regard any German residing in the United States as having lost his German nationality for specific reasons before the expiration of five years. The loss of this nationality might under the new law of nationality (Section 25, paragraph 1) occur regardless of the length of his residence abroad.

The relation of Section 25, paragraph 1 of the German law to the Bancroft treaties is analogous to the situation which was created by our law of March 2, 1907. According to Section 2 of this act, an American loses his citizenship upon his naturalization in a foreign country. The question never appears to have been raised whether such provision would conflict with the engagements in the Bancroft treaties. 49

Both the German as well as the American law are, with respect to the foreign country of naturalization, more lenient than the treaties. Whereas the treaties require naturalization plus five years' residence abroad as a prerequisite to the recognition of a loss of original nationality, the statute requires merely naturalization. The modification does not, therefore, create conflicts, but rather tends to avoid them.

⁴⁸ 34 Stat. L. 1228. The act makes an unfortunate distinction between native and naturalized American citizens.

As to effect of legislation on existing treaties see Crandall, op. cit. s. 186; also notes in 11 Compiled Statutes Annotated (1916) 13884-85.

Under the United States naturalization laws, however, five years' residence is a condition precedent to naturalization,⁵⁰ so that in practice a German does not lose his nationality until after the expiration of this period, and the treaty stipulation remains in fact still applicable. Yet there are a few unimportant exceptions to the requirement of residence.

Shorter terms are allowed to aliens of at least twenty-one years of age, who, after an honorable discharge from the United States Army, the regular or volunteer forces, may be admitted to citizenship upon proof of only one year of residence.⁵¹ Also, aliens, qualified under existing law to become American citizens, who have been honorably discharged from the United States Navy, Marine Corps, or Revenue Cutter Service after one enlistment of four years may be admitted to citizenship without proof of residence,⁵² or sailors in the merchant marine after three years' service on an American vessel.⁵³

To these exceptions the Bancroft treaties do not apply; the German states were not bound before the adoption of the new law of nationality to recognize naturalization granted upon a term of less than five years' residence. Nor did the treaties extend to German subjects from Alsace-Lorraine and the German colonies,⁵⁴ for these territories never constituted a part of any one of the states which have concluded the naturalization conventions. The benefit of the Bancroft treaties does not, therefore, extend to individuals from such parts of the German Empire nor to German subjects who have acquired American citizenship in less than five years.

This embarrassing defect in the treaties, as has been pointed out, is now removed and remedied, and individuals coming under the exceptions just stated are placed in a more advantageous position, in that they are put on an equal footing with other German subjects. They will be regarded by the German government as having lost their German nationality immediately upon the acquisition of American citizenship regardless of the period of their residence in the United States.

This is not the place to take up the other provisions of the treaties. It may, however, be pointed out that the naturalization treaties do not extend to the individual immunity against any pre-existing claim of his native country. The former national still remains subject, upon his return to his country of origin, to punishment for offenses committed prior to his emigration, particularly for the evasion of military service,

⁵⁰ Sec. 4 of Act of June 29, 1906, 34 Stat. L. 596.

⁵¹ Rev. Stat. s. 2166, Act of July 17, 1862, ch. 200, s. 21; 12 Stat. L. 577.

¹²² Act June 30, 1914, ch. 130, 38 Stat. L. 395. This act has probably superseded the Act of July 26, 1894, ch. 165, 28 Stat. L. 124, providing that aliens honorably discharged from service in the Navy or Marine Corps after one term of enlistment may become American citizens.

⁵⁸ Rev. Stat. s. 2174, Act of June 7, 1872, ch. 322, s. 29; 17 Stat. L. 268.

⁵⁴ See 3 Moore, op. cit. s. 392; Bendix, op. cit. 191.

if such liability was an existing or accrued and not merely a future obligation, unless lapse of time bars the operation of the law.⁵⁵

The war has also created a new problem in this respect. A German imperial ordinance⁵⁶ issued shortly after the outbreak of the war denies release from German nationality to all persons liable to military service. How will those persons of German origin who have become naturalized after the issuance of this ordinance be treated upon their return to Germany? Will the United States government protect them inasmuch as our own law contains an analogous provision,⁵⁷ that, namely, prohibiting any American citizen to expatriate himself when this country is at war?

That the position of the United States with regard to renunciation

⁵⁵ See Borchard, op. cit. 549; v. Keller und Trautmann, op. cit. 297-315, notes to s. 26 of the law relating to punishment for evasion of military service and desertion.

⁵⁶ Law of Aug. 3, 1914, s. 1, Reichs-Gesetzblatt 1914, 323.

⁵⁷ Act March 3, 1907, s. 2, 34 Stat. L. 1228; see also In Re Look Tin Sing (1884) 21 Fed. 905; 9 Op. Atty. Gen. 63 (1857). A strict construction of the provision of s. 2 of the Act of March 2, 1907, that "no American citizen shall be allowed to expatriate himself when this country is at war" apparently affects the marriage of an American woman to an alien during time of war. Sec. 3 of the act is declaratory of the common law and provides "that any American woman who marries a foreigner shall take the nationality of her husband." See also recent case of MacKenzie v. Hare (1915) 239 U. S. 299; aff. (1913) 165 Cal. 776. The question arises whether or not s. 2 suspends the application of s. 3. If so, an American woman retains upon such marriage her American citizenship; her legal status as an American citizen remains unchanged, and her constitutional rights and privileges are not curtailed. If she resides in this country she may, where a state statute has conferred upon her the franchise, exercise such right. Upon such a woman would, however, also devolve all the duties of citizenship including those incident to a state of war. If her acts should be incompatible with her American allegiance, she might be guilty of treason, while such acts might only constitute a crime defined under the Espionage Act if she had taken the nationality of her husband upon marriage. Obviously, the statute in question results in the conferring of a dual nationalitythe unhappy status which the United States Government has always combated. Suppose the woman having married a friendly alien should go to the country of her husband, or the woman has married such alien abroad, the laws of that country would probably not regard her as an American citizen, but as one of its own citizens. Would the United States Government be in a position to extend protection to such a woman? Suppose the woman should marry an enemy alien, she would, under the law, be an enemy of her husband; certain restrictions placed upon the intercourse with enemy aliens would also apply to her, while at the same time she would be exempt from the limitations placed upon enemy aliens. Would the declaration of peace as a matter of course change such a woman's status from that of an American citizen to that of a citizen or subject of her husband's country, or would some definite act be necessary to effect the change of nationality? Would the United States Government grant such a woman a passport to travel abroad? These are a few of the possibilities that readily present themselves as being involved in the conflict of the provisions of the Act of March 2, 1907.

of allegiance is unmistakably very decided, becomes evident from the rigid requirements which must be fulfilled before an alien can be naturalized.⁵⁸

The Naturalization Act⁵⁹ provides that an alien before filing his declaration of intention to become a citizen

"shall declare on oath before the clerk of any court authorized by this act to naturalize aliens . . . two years at least prior to his admission, and after he has reached the age of 18 years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject."

And accordingly, the alien's declaration of intention reads:

"... It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly [in the case of a German] to William II, German Emperor, of whom I am now a subject . . . "62"

⁵⁸ As to naturalization proceedings see Van Dyne, op. cit.; Wise, A Treatise on American Citizenship (1906).

⁵⁹ Act June 29, 1906, 34 Stat. L. 596.

[∞] *Ibid.* s. 4, par. 1.

The form of the oath is technically incorrect. The alien German petitioner owes allegiance to the sovereign of his particular home state in the German Empire. No allegiance is owed to the German Emperor except in the case of an individual from Alsace-Lorraine, or of a person having acquired German nationality in the German colonies, or of a person having obtained imperial nationality in accordance with s. 33-35 of the present law. German nationality is primarily based upon the nationality acquired in one of the Federal states by birth, legitimation, marriage or naturalization (s. 3-16 of the law of nationality), and with the acquisition of the state nationality, imperial nationality is automatically conferred. An individual does not need special naturalization to obtain the imperial nationality. He is a part of the empire as a member of his state, he cannot be a German national without being a member of a particular state. The contrary is true in this country where a person becomes a citizen of a particular state through residence after the acquisition of American citizenship; the federal citizenship is the primary relationship. A German may change his state nationality without affecting thereby his German nationality; the latter is lost when he ceases to be a member of a particular federal state (see Laband, Das Staatsrecht des Deutschen Reiches (5th ed. 1911) 143; Fischbach, Das Öffentliche Recht des Reichslandes Elsass Lothringen, 26 Das Öffentliche Recht der Gegenwart (1914) 20, 26-27). This primary relationship of a German subject to the sovereign of his home state is also expressed when a German wishes to expatriate himself by a release from German nationality. Such release, which is granted by his home state, in accordance with the provisions of s. 18-24 of the present nationality law, bears the following language: "When this document is delivered . . . [name, etc., of person] loses the nationality of . . . [Prussia, Bavaria, Saxony as the case may be] and thereby German nationality" (see v. Keller und Trautmann, op. cit. 368). The same principle is proclaimed when the German recruit takes the oath of allegiance

When the alien files his petition for naturalization, such petition shall set forth

"that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty, of which he at the time of filing of his petition may be a citizen or subject . . ."68

In the petition for naturalization the alien deposes:

"... I am attached to the principles of the Constitution of the United States and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly [in the case of a German] to William II, German Emperor, of whom at the time I am a subject ..."

At the final hearing upon the alien's petition for naturalization before a judge, the petitioner

"shall before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all

(Fahneneid). He first takes this oath to the sovereign in whose jurisdiction the contingent is located, and then he pledges obedience to the commander-inchief, the German emperor (see Endres, Karl, Deutsche Wehrverfassung (1908) 15, 19; also Gronow und Sohl, Militärstrafrecht (1906) 238-242). The form of the oath of allegiance in our naturalization proceedings should be changed by inserting the name of the sovereign of the petitioners' home state. The present inaccuracy does not seem to be of so serious a nature as to invalidate the naturalization certificate, because allegiance is sworn off to any sovereign to whom the petitioner might owe allegiance. Yet, if the question should be raised and the assertion be made that the former allegiance was never sworn off, advantage might be taken of the technically incorrect form, and the court might sustain the contention, especially where the question of citizenship will be the deciding factor, as, e. g., in the case of treason or under one of the present war measures. Cf., however, In Re Denny (1917) 240 Fed. 845, where the question of mistake in the name of the sovereign whose allegiance the petitioner meant to abjure was decided. To quote the court:

"The only vitally necessary allegation in this connection is his explicit purpose to assume his new allegiance and to abjure his former sovereign, whatever he may suppose it to be. It would be an extreme scholastic technicality to suggest that, where an applicant has twice asserted his intention to become a citizen of the United States and to renounce his fealty to the sovereign of whom he was then a subject, any doubt could be cast upon that intention because he had by mistake named the wrong sovereign."

⁶² Act of June 29, 1906, supra, 27.

⁶³ Ibid. s. 4, par. 2.

⁶⁴ Ibid. s. 27.

enemies, foreign and domestic, and bear true faith and allegiance to the same."65

From the early case of John Philipp Knoche, who, after becoming a naturalized American citizen was, upon his return to Prussia, compelled to do military service, and whose petition to the American legation at Berlin for relief was denied on the ground that protection did not extend to naturalized American citizens when they returned to their native country,66 down to the latest rulings of the Department of State,67 the attitude of our government towards the question of dual allegiance has become more definite and certain. Mr. Moore best expresses the policy and practice of the government of the United States in the following passage:

"It is sometimes stated that double allegiance also exists where a person born in one country afterwards emigrates to and becomes a citizen of another country. That a person in such a situation may be a subject to the claims of allegiance in two countries, is in point of fact no doubt true; but in point of principle equally true that, when writers place such case under the head of double allegiance, they at least impliedly hold that the doctrine of voluntary expatriation, as maintained by the United States, is not well founded. . . . From the point of view of the doctrine of expatriation, as enunciated by the United States, the man who, voluntarily forsaking his original home and allegiance, acquires a new one, has thereafter but one allegiance—that of his adopted country."68

Considering the American naturalization of an individual of German origin in the light of the German law of nationality, the accompanying legislative material, the commentaries on the statute, the provisions of the Bancroft treaties, and the practice and policy of the United States government, we must necessarily reach the conclusion that the alleged "infamous" provision in the Delbrück law finds no application to the naturalization of German subjects in the United States. There is no conflict between the German law and the Bancroft treaties, and the principles enunciated in the American and German law are in perfect accord and harmony. Both agree that, to quote from an instruction of July 8, 1859,60 by Secretary of State Lewis Cass to J. A. Wright, Minister to Prussia,

^{. 63} Ibid. s. 4, par. 3.

^{ee} See 3 Moore, op. cit. 564; Borchard, op. cit. 543 seq.

a Department of State, Diplomatic Correspondence with Belligerent Governments relating to Neutral Rights and Duties. European War, No. 3. Part XVI. The case of Frank Ghiloni involves, however, a slightly different principle. The petitioner was born in this country of Italian parents and was compelled by the Italian government to do military service. This government took the position that Ghiloni had exercised the right of election of nationality by being domiciled here at the time of attaining majority.

³ 3 Moore, Dig. of Int. Law 513-519.

[&]quot;Ibid. 574; see also the interesting article by Whelpley, Naturalized Americans, 108 FORTNIGHTLY REV. 594-603.

"the moment a foreigner becomes naturalized his allegiance to his native country is severed forever. He experiences a new political birth. A broad and impassable line separates him from his native country."

## SUPPLEMENTAL NOTE

The following is a list of provisions in the municipal law of foreign countries showing to what extent the right of expatriation, exercised when acquiring a new nationality by naturalization in a foreign country, is recognized by the native country. Regard should be paid, however, to the existence of naturalization treaties concluded between some of the countries, as such conventions affect the application of the municipal law. Unless otherwise indicated, expatriation through foreign naturalization may be regarded as recognized unconditionally by the particular native country.

ARGENTINA. Ley de Ciudadania Argentina de Octubre 8 de 1869, Titulo IV, Art. 8 (Registro Nacional, 1869. Tomo octavo, 292) (H. Doc. No. 326, 59th Cong. 2d Sess. 273). Political rights may not be exercised in the republic by former Argentine citizens naturalized in a foreign country.

Austria. There is no uniform law of nationality. The recognized principle that acquisition of foreign nationality causes loss of Austrian nationality is limited only in so far as persons of military age remain subject to military obligations. See 2 Mayerhofer, Handbuch für den politischen Verwaltungsdienst (1896) 918 seq., esp. 942.

Belgium. Loi sur l'Acquisition et la Perte de la Nationalité du 8 Juin 1909, s. 11.1 (Servais et Mechecynck, Les Codes Belges (1912) 1136).

Bolivia. Constitución Política, 15 de Febrero de 1880, Art. 35.1 (Camera de Senadores. Constitución Política del Estado (1912) 24) (H. Doc. No. 326, p. 288). Código Civil, Art. 9.1 (Siles, Código Civil (1910) 10).

Brazil. Decreto N. 569 de 7 de Junho de 1899, Art. 1.1 (Collecção das leis de 1899 (1902) 2) (H. Doc. No. 326, p. 288). Constitução, Art. 71, s. 2a (Tarquinio e Montenegro, Leis usales (1903) 2) (H. Doc. No. 326, p. 290).

BULGARIA. Law of Jan. 5-18, 1908, and law of Dec. 8-21, 1911, C. V, Art. 17.1; 21; see v. Keller und Trautmann, op. cit. 643. Permission of the government is required if military obligations have not been fulfilled; no Bulgarian national residing in Bulgaria may acquire a foreign nationality without the permission of the government.

CHILE. Constitución Política, C. III, s. 9.3 (Collectión de Códigos (1912) 9) (H. Doc. No. 326, p. 291).

CHINA. Law of nationality of Dec. 30, 1914, s. 12.4, 5 par. 2; 13; 14; see 44 JOURNAL DU DROIT INTERNATIONAL (Clunet) 770. Permission of the Minister of the Interior is required. Such permission will not be given unless the applicant is 20 years old; if he is still liable to military service; if he is in active military or civil service; if he is under indictment for a criminal offense; if he is defendant in a civil action; if a judgment of a criminal or civil court is still unsatisfied; if bankruptcy proceedings against him are still pending; if taxes, fines, or other debts are still owed by him.

COLOMBIA. Constitución Pólítica, Art. 9 (Rodriguez, Constitución y Leyes Usuales (1913) 6) (H. Doc. No. 326, p. 292). Naturalization in a foreign country is recognized when person resides there.

Costa Rica. Constitución Pólítica de 1917, Art. 40.1 (La Gaceta. Diario Oficial. 13 de Junio de 1917, 597). Ley de Extranjería y Naturalizatión de 21 de Diciembre de 1886, Art. 4.1 (Colección de las Disposiciones Legislativas y Administrativas (1887) 640) (H. Doc. No. 326, p. 296).

CUBA. Constitución de 21 de Febrero de 1901, Art. 7.1 (1 Colección Legislativa (1906) 7) (H. Doc. No. 326, p. 300).

DENMARK. Lov Nr. 42 of 19. Marts 1898 as amended by Lov Nr. 57 of 23. Marts 1908, s. 5.1 (Samling of Love, Anordninger m. m. Afdeling A (1908) 106). Person desiring to become naturalized in a foreign country may, by royal decree, be released from Danish nationality. Such release will be granted on condition that petitioner becomes a national of a foreign country within a specified period.

DOMINICAN REPUBLIC. Constitución, 20 de Marjo de 1908, Art. 7, s. 1 (Gaceta Oficial. 21 de Marzo 1908, No. 876). No Dominican may claim any other except Dominican nationality while temporarily or permanently residing within the Republic. Art. 13.5 and §§ of the proposed new constitution (Boletin Oficial de la Asamblea Constituijente, Noviembre de 1916, año 1, num. 1, p. 6) declares that the rights of citizenship but not the nationality are lost by naturalization in another country.

ECUADOR. Constitución Política, 23 de Diciembre de 1906, Art. 14.2 (Registro Oficial, 24 de Diciembre de 1906, 2224).

France. Loi dû 26 Juin 1889 sur la Nationalité, Art. 17.1 (Tripier et Monnier, Les Codes Français (1912) 9) (H. Doc. No. 326, p. 318). Permission of the government is required if the person is liable to military service in the active army. See also recent case in Cour de Cassation, 8 Mars 1913, Aff. Grandjean (Sirey, Recueil Général (1913) Bull. des Sommaires I, p. 77). Similar provisions apply to French colonies.—A bill introduced on Nov. 11, 1913 (Journal Officiel Sénat. Documents, Sess. Extr. 1913. Annexe No. 404) proposed the following amendment to the above law:

"If a person is still liable to military service in the active army or the reserve, foreign naturalization or voluntary acquisition of foreign nationality shall not result in the loss of French nationality, unless authorized by the French government."

GREECE. Civil Code of Oct. 29 (Nov. 10) 1856, Art. 23a, as amended by law No. 120 of Jan. 2 (15) 1914; see Gt. Brit. Parl. Pap. Misc. No. 4, 1914 [Cd. 7362]. Foreign naturalization will be recognized, if permission of government was obtained. Such permission will not be granted if applicant has not fulfilled his military obligations, or if he is prosecuted criminally.

Great Britain. Nationality and Status of Aliens Act, 1914, s. 13-16 (4 & 5 Geo. V, ch. 17; 18 Chitty's Statutes (1915) 14-15). Loss of nationality does not discharge from obligations incurred while individual was still a British subject.

GUATEMALA. Ley de Extranjería en 21 de Febrero de 1894, Art. 8 (12 Recopilación de las Leyes (1893-94) 690) (H. Doc. No. 326, p. 432). Foreign nationality will only be recognized during person's residence abroad.

HAITI. Loi du 22 août 1907, Art. 17.1 (Annuaire de Legislation (1908) 29). Constitution de 1839, Art. 10.1 (Ganthier, 1 Recueil des Lois et Actes de Républic d'Haiti de 1887 à 1904 (1907) 357) (H. Doc. No. 326, p. 430).

HONDURAS. Ley de Extranjeria, 8 de Febrero de 1906, Art. 1.4, 9, 11 (Codificación de 1906) (H. Doc. No. 326, p. 438). Hondurian nationals having acquired nationality in a foreign country must reside there in order to lose Hondurian nationality.

Hungary. Gesetzartikel über den Erwerb und Verlust der ungarischen Staatsbürgerschaft, Dec. 20, 1879, s. 36, 20-30 (Landesgesetze des Jahres 1879, 378, 374-377). Naturalization in a foreign country will be recognized if person has complied with the conditions relating to release from Hungarian nationality.

ITALY. Legge 13 Giugno 1912 sulla Cittadinanza Italiana, Art. 8 (11 Leggi e Decreti (1912) 1490). Acquisition of foreign nationality does not exempt from military obligations.

JAPAN. Law of nationality of March 15, 1916, Art. 17, 24, 20 bis. (10 Am. JOUR. INT. LAW, 367-368). Foreign naturalization will be recognized if person (age 17-40) has complied with or is exempt from military obligations.

LIECHTENSTEIN. Gesetz über die Erwerbung und den Verlust des liechtensteinischen Staatsbürgerrechts, 28 März 1864, s. 8, 10 (Liechtensteinisches Landes-Gesetzblatt 1864, No. 3). Individual may expatriate himself upon proof that he has satisfied his creditors, has fulfilled his military obligations, and has obtained foreign nationality.

LUXEMBURG. Code Civil, Art. 17.1 (Ruppert, Code Civil (1903) 3).

MEXICO. Ley de Extranjería y Naturalización de 28 de Mayo de 1886, Art. 2, V; 6 (Annuario de Legislación y Jurisprudencia. Sección de Legislación ano 1886, 420, 430) (H. Doc. No. 326, p. 454). Constitución Política de 5 de Febrero de 1917, Art. 37.1 (5 Diario Oficial. 5 de Febrero de 1917, No. 30, p. 152) (1 MEXICAN REVIEW, Washington, D. C., No. 6, p. 5).

Monaco. Ordonnance du 13 Avril 1911 sur la Nationalité, Art. 17.1 (Code Civil Monaco, 1913, 5).

NETHERLANDS. Wet van 15 Juli 1910, houdende wijziging der wet van 12 December 1892 op het Nederlanderschap en het ingezetenschap, gewijzigd bij de wet van 8 Juli 1907 en bij de wet van Februari 1910, Art. 7.1, 5.3 (Fruin, De Nederlandsche Wetboeken (1912) 1693).

NICARAGUA. Constitución Política, 21 de Diciembre de 1911, Art. 10.1 (Constitución Política de la República de Nicaragua (1912) 8). Foreign naturalization of Nicaraguans is recognized only if acquired in other than Central American countries and only during residence there.

NORWAY. Lov om norsk. Statsborgerret m. m., 21 April 1888, s. 6.a (Norsk Lovtidende 2den Afdeling (1888) 63) (H. Doc. No. 326, p. 474).

PANAMA. Constitución, 15 de Febrero de 1904, Art. 7.1 (Gaceta Oficial. Numero Extraordinario. 16 de Febrero de 1904).

PARAGUAY. Constitución, 18 de Novembre de 1870 (2 Rodriguez, American Constitutions (1906) 390) (H. Doc. No. 326, p. 481). Art. 40 has no provision as to loss of nationality by naturalization in a foreign country.

Persian. Law of Aug. 7, 1894, Arts. 8, 9, 10 (H. Doc. No. 326, pp. 484-485). A Persian subject may not acquire foreign nationality unless he has obtained the permission of the Shah. Permission will not be given if the applicant has ever been convicted of a crime by a Persian court; if he is under indictment for a criminal offense; if he is a fugitive from justice; if he is a deserter; if he is in debt or seeking to escape his liabilities. Upon the return to Persia of any person who has acquired foreign nationality unauthorized and to whom any of the foregoing disabilities are applicable, such person will be regarded as a Persian subject. Even where a person is under no disability and has acquired foreign nationality without permission, he must dispose of his property situated in Persia, and upon his return he will be excluded from the country.

Peru. Constitución de Noviembre de 1860, s. 41.3 (Leyes y Resoluciones el año de 1860, 3) (H. Doc. No. 326, p. 483).

PORTUGAL. Código Portuguez de Julho de 1867, Art. 22.1 (Setima Edição Official (1907) 6) (H. Doc. No. 326, p. 487).

ROUMANIA. Code Civil, Art. 17.a (Extraits de la Legislation de la Roumania (1889) 4) (H. Doc. No. 326, p. 491).

RUSSIA. There is no direct legal provision for the release from Russian allegiance of natural-born Russian subjects, such release depending entirely upon the will of the sovereign, which is not frequently exercised. There are, however, provisions for the release of naturalized Russian subjects.

A person above the age of 15 may be released only if he has complied with his military duties, or drawn a lot which frees him from military service (see Martens, Nouveau Recueil Général de Traités. 2e Série, Tome 19 (1895) 610-611) (H. Doc. No. 326, p. 495). An attempt to draft legal provisions for the expatriation of Russian subjects was commenced some years ago, but the result is not known. Art. 325 of the Criminal Code (see Glasenapp, Gesetzbuch der Criminal-

und Correctionsstrafen (1892) 102, also s. 326, 327, 328) provides, however, that any voluntary emigration or unauthorized naturalization abroad or entering into foreign service will be regarded as a breach of allegiance and be punished by loss of civil and political rights and permanent exile from Russia (see Cahn, Reichsund Staatsangehörigkeitsgesetz vom 22. Juli 1913 (1914) 531; For. Rel. (1895) II, 1105; 3 Moore, Dig. of Int. Law, s. 453; Borchard, op. cit. s. 237). This provision is not contained in the Criminal Code of March 22, 1903: see Bernstein, Das neue russische Strafgesetzbuch (1908).

The provisional government, established immediately after the outbreak of the revolution in March, 1917, has apparently made no change in the law. It did not recognize the right of expatriation, for in its proclamation abolishing religious and political restrictions, the right of expatriation is not mentioned (see Bulletin of the Temporary Government, March 22, 1917). Therefore, the status of naturalized American citizens of Russian origin in relation to the Russian Government remains as it is set forth in the State Department's Circular of Jan. 9, 1914, Notice to American Citizens formerly Subjects of Russia who contemplate returning to that Country. According to this circular the United States Government regards itself absolved from the obligation to protect such American citizens while they remain in their native land.

SAN SALVADOR. Constitución, 13 de Agosto de 1886, Art. 53.3 (Rodriguez, op. cit. 269) (H. Doc. No. 326, p. 500). Ley de Extranjería, 30 de Setiembre de 1886, Art. 6.7 (Diario Oficial. I Nov. 1886).

Serbia. Decree of Jan. 20, 1860 (see v. Keller und Trautmann, op. cit. 722) (H. Doc. No. 326, p. 502). A Serbian subject may change his nationality upon proof of naturalization in a foreign country and of the fulfillment of his obligations towards the state, his family, and other persons.

SIAM. Nationality law of April 10, 1913 (Buddha year 2456) s. 5-10 (Gt. Brit. Parl. Pap. Misc. No. 8 (1913) [Cd. 7057]). Foreign naturalization will not be recognized if acquired without the Siamese government's authorization.

Spain. Código Civil, 1888, Art. 20 (Garcia, Código Civil (3d ed. 1914) 22) (H. Doc. No. 326, p. 510).

SWEDEN. Lag, om förvärfvande oct förlust af medborgaverått, Oct. 1, 1894, s. 5 (Svensk Författnings-Samling för 1894 (1895) No. 71, p. 2) (H. Doc. No. 326, p. 514). Release from Swedish nationality will be granted by the king on condition that the individual acquires a foreign nationality within a specified time.

SWITZERLAND. Loi Fédéral sur la Naturalisation des Étrangers et la Renonciation à la Nationalité Suisse du 25 Juin 1903, Art. 7-9 (19 Recueil Officiel des Lois et Ordonnances, N. S. (1904) 654-655) (H. Doc. No. 326, p. 519). Release from Swiss nationality will be granted by the home canton, if person has no domicile in Switzerland, and if he has been naturalized in a foreign country.

Turkey. Loi sur la Nationalité du 19 Janvier 1869, Art. 5, 6 (2 Young, Corps de Droit Ottoman (1904) 227) (H. Doc. No. 326, p. 525). Foreign naturalization will not be recognized unless acquired with the government's permission.

URUGUAY. Constitución, 10 Setiembre de 1829, Art. 12.3 (Criado, 1 Colección Legislativa (1879) 139) (H. Doc. No. 326, p. 534). Art. 12 of the proposed new constitution (Diario Oficial. Marzo 21 de 1917. Convención Nacional Constitugente, 82) provides that citizenship shall be lost through naturalization in another country.

VENEZUELA. Ley de Naturalización, 24 de Mayo de 1913, Art. 7, 8 (Gaceta Oficial. 27 de Mayo 1913, No. 11.930). Constitución, 18 de Junio de 1914, Art. 10 (Gaceta Oficial, 19 de Junio de 1914). Change of nationality accomplished with the intent to escape the effects of a law, is regarded as fraudulent and void.

As to diplomatic correspondence between the United States Government and particular foreign countries respecting the question of expatriation see 3 Moore,

Dig. of Int. Law, 586-711, and citations given in note 46, supra, p. 496. As to the attitude of United States Government towards foreign governments with respect to expatriation and naturalization see Compilation of Certain Departmental Circulars relating to the Citizenship, Registration of American Citizens, etc. (1916) 62-75, also Borchard, op. cit. s. 237-240, 321.

The text of foreign laws relating to nationality, expatriation, or naturalization may be found in the sources cited above or in the following works: For older laws see Opinions of the Heads of the Executive Departments and Other Papers relating to Expatriation, Naturalization and Change of Allegiance. United States Foreign Relations 1873, II, 1197-1438. Nationality and Naturalization. Reports by Her Majesty's Representatives abroad upon the laws of foreign countries. Misc. No. 3 (1893) [Cd. 7027]; Martens, Nouveau Recueil Général de Traités. 2e Série, Tome 19 (1895) 514 seq., giving the preceding reports.

For more recent laws see United States Foreign Relations; 3 Moore, Dig. of Int. Law, 276, references; H. Doc. No. 326, 59th Cong. 2d Sess. Appendix III; 2 Sieber, Das Staatsbürgerrecht im internationalen Verkehr (1907); Verhandlungen des Reichstags. XIII. Legislaturperiode. I. Session, 1912. Anlagen No. 6, p. 72 seq.; Lehr, La Nationalité dans les Principaux États au Globe (1909); Cahn, Reichs- und Staatsangehörigkeitsgesetz (1914) 369 seq.; v. Keller und Trautmann, Kommentar zum Reichs- und Staatsangehörigkeitsgesetz (1914) 627 seq.; Zeballos, La Nationalité (1914); Rodriguez, American Constitutions (1906); Dodd, Modern Constitutions (1907); Oudin, État des Traités et Lois relatifs à la Nationalité et la Naturalization en vigueur dans les Principaux Pays au 15 Avril 1917 (44 Journal du Droit International (Clunet, 1917) 817-841), giving an almost complete list of references to the laws in force.

# THE RENVOI DOCTRINE IN THE CONFLICT OF LAWS—MEANING OF "THE LAW OF A COUNTRY"

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T

Some years ago in writing on the present subject the author made the statement that the renvoi doctrine was no part of the conflict of laws of the United States.1 In the light of certain more recent decisions or judicial utterances the question may properly be asked again: Should the courts of the United States adopt the renvoi theory in the conflict of laws? Although no discussion of the problem is yet to be found in any American decision, there are cases in which the renvoi doctrine has been sanctioned either expressly or by necessary implication. The case of Guernsey v. The Imperial Bank of Canada2 and the case of Lando v. Lando³ may serve as illustrations. In the former case an action was brought in the Circuit Court of the United States for the District of Wyoming against the indorser of a promissory note. The note was made and indorsed in Illinois, but it was payable in Canada. Presentment, demand and protest were made, and notice of dishonor was given in compliance with the law of Canada; but the indorser claimed that the notice would have been insufficient to charge the indorser if the note had been payable in Illinois. The court below held that the notice was good and rendered judgment against the indorser. The latter's counsel insisted that the ruling was error on the ground that the sufficiency of the notice was governed by the law of the place of indorsement and not by the law of the place of payment. On appeal, the learned court made the following remarks concerning the above contention:

"To this contention there is a short and conclusive answer. The place of the indorsement was the state of Illinois. The law of that state was, when the indorsement was made, and it still is, that when commercial paper is indorsed in one jurisdiction and is payable in

¹ The Renvoi Theory and the Application of Foreign Law (1910) 10 Columbia L. Rev. 327, 344.

The Annuaire de l'Institut de droit international will be cited in this article as Annuaire; the Journal du droit international privé, as Clunet; the Revue de droit international privé et droit pénal international, as Darras; the Zeitschrift für internationales Privat- und Strafrecht, as Niemeyer.

² (1911, C. C. A. 8 C.) 188 Fed. 300.

^{* (1910) 112} Minn. 257, 127 N. W. 1125.

another the law of the place where it is payable governs the time and mode of presentment for payment, the manner of protest, and the time and manner of giving notice of dishonor, and the law of the place of indorsement is inapplicable to them. Wooley v. Lyon, 117 Ill. 248, 250, 6 N. E. 885, 886, 57 Am. Rep. 867. If, therefore, as counsel contend, the law of the place where the indorsement was made, the law of Illinois, governs the sufficiency of the notice of dishonor in this case, that notice was good, for it was sufficient under the law of Canada where the note was payable, and the law of Illinois was that in a case of this character the law of the place where the note was payable governed the time and manner of giving the notice of dishonor."

The statement quoted assumes that if the law of the place of indorsement (Illinois) must be satisfied in the matter of notice, and the law of the place of indorsement requires the notice to comply with the law of the place of payment (Canada), a notice sufficient under the law of Canada would be good. The reference to "the law of the state of Illinois" is understood thus, not as covering merely the ordinary law of Illinois governing notice, but as incorporating the law of Illinois as a whole, inclusive of its rules of the conflict of laws.

The decision in the case of Lando v. Lando rests upon the same assumption. The facts of the case were the following: Ida Oberg and David H. Lando, residents of Minnesota, were married at Hamburg, Germany, by a person who was not authorized by the law of Germany to join persons in marriage, but whom Ida Oberg believed in good faith to be a minister of the Gospel. The parties in question afterwards lived as husband and wife in Vienna, where they held themselves out as husband and wife, and where they were generally so regarded by their friends and acquaintances. David H. Lando died before returning to this country. Ida Lando claimed to be entitled to appointment as administratrix of his estate and thus put in issue the validity of their marriage. The supreme court of Minnesota was in doubt as to the meaning of the German rules of the conflict of laws governing the validity of marriage; but, applying the rule of interpretation semper praesumitur pro matrimonia, it reached the conclusion that the marriage would be sustained in Germany by virtue of the national law of the parties, that is, the law of Minnesota.

So far as the reasoning of the court bears upon the question of the conflict of laws, Justice Jaggard contented himself with the following statement:

"I. The validity of the marriage is to be determined by the law of Germany, where it was celebrated. It is a generally accepted principle of interstate and international law that the validity or invalidity of a marriage is to be determined by the law of the place where the ceremony is performed; that a marriage legal where solemnized is valid everywhere; and that a marriage void where it is celebrated is void

^{(1911) 188} Fed. 300, 301. The italics are those of the present writer.

⁵ (1910) 112 Minn. 257, 127 N. W. 1125.

everywhere. If the law of the place of trial were to control, a marriage might be valid in one state and invalid in another. It is obviously essential to the welfare of mankind that a marriage valid in one place should be valid everywhere. . . .

"This rule applies to cases where the parties attempting to marry are mere sojourners in the place where the marriage ceremony is

claimed to have been performed. . . .

"2. The decisive question in the case is whether the parties were married in accordance with the German law. The court does not take judicial cognizance of the law on this point. It is elementary that foreign laws must be pleaded and proved like any other fact. . . ."

The court thereupon discusses the German law as it was stipulated by the parties and concludes its opinion with the following:

"We are unable to perceive why the presumption of validity of an attempted marriage should be denied to these parties, both innocent of moral wrong, and the presumption of innocence extended to the most confirmed recidivist. Certainly the considerations relied upon to repel that presumption are not clear nor satisfactory, nor at all conclusive. We are therefore constrained to hold that the marriage in question, conforming as it did to the Minnesota law, conformed also to the German law as its translation has been here agreed upon."

Not a word is said in the opinion about the fact that the term "German law" may mean either the ordinary German law of marriage, or the German law inclusive of its rules of the conflict of laws. The learned court assumes that the Minnesota law incorporates the German law as a whole.

II

The question raised by the above cases is one which has been greatly mooted among the writers on the conflict of laws. It is known as the problem of *renvoi.*⁶

The recognition of the *renvoi* theory implies that the rules of the conflict of laws are to be understood as incorporating not only the ordinary or internal law of the foreign state or country, but its rules of the conflict of laws as well. According to this theory "the law of a country" means the whole of its law.

Let us consider briefly the modes of reasoning which have led certain courts and text-writers to support this doctrine. The purpose of this article will be served best if the *renvoi* theory be presented only in the two principal forms in which it has appeared. One is the theory which we shall call, for convenience, the "theory of *renvoi* 

⁶ The literature may be found in an appendix to this article.

In a recent work by Emil Potu, La question du renvoi en droit international privé (Paris, 1913), a complete list is given of all the authors who have expressed themselves on the question of renvoi, with an indication of their attitude in the matter. A similar attempt was made some years ago by the author of this article: see 10 COLUMBIA L. REV. 190, 194, 196.

proper." The other is known as the "mutual disclaimer of jurisdiction theory." As the latter theory has the weighty support of Westlake, it will be considered first.

## MUTUAL DISCLAIMER OF JURISDICTION THEORY

According to von Bar, who was the first to favor *renvoi* in this form, all rules of the conflict of laws are in reality rules by which one state, for the purpose of administering private law, defines its own jurisdiction and the jurisdiction of foreign states. Starting from this premise he reasoned as follows:

"Due respect for the sovereignty of the state of X should forbid the state of Y to ascribe to the state of X a jurisdiction which the state of X declines. Inasmuch as Italy applies the principle of nationality to the determination of capacity, England has no right to say that the capacity of an Englishman domiciled in Italy should be determined by the internal law of Italy relating to capacity. Italy having declined jurisdiction in the case, England must accept the reference back to its own law and determine the capacity of the Englishman in question by English law. If the renvoi is not accepted and the question is decided according to the internal law of Italy, Italian law is applied to cases for which it is not enacted. In so doing England would usurp the function of the Italian legislator, filling an assumed gap in the Italian law, directly contrary to the will of the Italian legislator."

Von Bar presented his views at the meeting of the Institute of International Law, at Neuchatel, in 1900, in the form of the following theses:⁸

- "(1) Every court shall observe the law of its country as regards the application of foreign laws.
- (2) Provided that no express provision to the contrary exists, the court shall respect:
- (a) The provision of a foreign law which disclaims the right to bind its nationals abroad as regards their personal statute, and desires that said personal statute shall be determined by the law of the domicile, or even by the law of the place where the act in question occurred.
- (b) The decision of two or more foreign systems of law, provided it be certain that one of them is necessarily competent, which agree in attributing the determination of a question to the same system of law."

Westlake originally rejected the *renvoi* doctrine except in special cases.⁹ He changed his view, however, before long and accepted the *renvoi* theory fully. The reasoning which led Westlake to this change of attitude is similar to the one employed by von Bar, but it is developed in a clearer and more logical manner. It was first

⁷ See von Bar, 8 Niemeyer, 177-188. Also in 2 Holtzendorff, *Encyclopädie der Rechtswissenschaft* (6th ed. by Kohler) 19.

^{* 18} Annuaire, 41.

^{° 17} Annuaire, 31, 34.

expressed by Westlake in a note addressed to the Institute of International Law.10 In substance it is as follows:

"A distinction between internal law and international law belongs only to the science of law but does not actually exist. Suppose a legislator says (a) that the capacity to make a will shall be acquired at the age of 19; (b) that the capacity of persons shall be governed by their national law. Rule (a) would have no meaning without rule (b). Whose testamentary capacity is acquired at 19? No answer can be given without the aid of rule (b) fixing the category of persons whose capacity the legislator believes be had a right to five According to capacity the legislator believes he has a right to fix. According to (b), (a) says that the capacity of the legislator's subjects is acquired at 19, but says mat the capacity of the legislator's subjects is acquired at 19, but says nothing regarding the capacity of foreigners domiciled within the territory. If rule (b) had said that capacity, shall be governed by the law of domicile, (a) would have enacted that the capacity of persons domiciled within the territory of the legislator is acquired at 70 but would have said nothing regarding the capacity acquired at 19, but would have said nothing regarding the capacity of his own subjects domiciled abroad.

"In whatever terms rule (b) may be expressed, its true sense will be limited to the cases which, according to the ideas of the legislator, fall within his authority. There are normal cases which the legislator deems to belong to him and with regard to which he intends to legislate. The Danish legislator, for example, who attaches a decisive importance to domicile, will regard as the normal case in the matter under discussion a person domiciled in Denmark for whom he fixes the age at 21. To the Italian legislator, on the other hand, who attaches a decisive importance to nationality, the normal case will be that of an Italian subject; and for him he fixes the age at 19.

"A legislator who regards a certain case as normal will regard analogous cases as being normal for other legislators and as belonging to them. A Darieh legislator will direct his judges, therefore, to

to them. A Danish legislator will direct his judges, therefore, to recognize persons domiciled in a foreign country as capable or incapable of making a will in accordance with the law of their domicile, and the Italian legislator will regard foreigners as having such capacity to make a will as may have been conferred upon them by their national legislator.

"By means of this second step the Danish legislator provides for persons domiciled in a country whose legislation in the matter is also based on the *lex domicilii*. But it does not provide a rule for persons domiciled in a country such as Italy, whose legislation is silent as to the capacity of persons domiciled in such jurisdiction.

'In the same way the Italian legislator provides by this second step for the subjects of a country the legislation of which, like that of France, is based likewise on the principle of nationality, but it lays down no rule for the subjects of a state the legislation of which, like

that of Denmark, makes no provision for its own subjects.

"A third step is necessary in these cases, namely, to direct the judge to apply in the absence of another law, the normal law. The Dane domiciled in Italy will be deemed in Denmark, therefore, to have reached the age of testamentary capacity only at 21; but in Italy he will be deemed to have reached it at the age of 19.

"The case known in Germany by the name of Weiterverweisung remains to be considered, that is, where the law incorporated by

^{10 18} Ibid. 35-40.

reference would have the law of a third state applied. Suppose two citizens of New York (capacity to contract being governed there by the lex loci) enter into a contract in Italy, being at that time domiciled in France, and that litigation with respect thereto arises in England. The lex fori (England), applying the law of the domicile at the time of the making of the contract to determine the capacity of the parties to enter it, will refer the matter to France. France having adopted the principle of nationality with respect to capacity will answer: 'The case does not belong to me; it belongs to the New York legislator.' Should the English judge, following the direction of the French law, ask the New York law, it would tell him that, in its opinion the case did not belong to New York, but (under the rule lex loci) to the Italian legislator.

"But rule (b) does not require the English judge to follow the direction given by France to consult New York law. Instead, he should apply the normal law of his own country, rule (a). The judge must determine in the first instance to which country the legal relationship presented to him belongs; if the law of the latter, based upon another system regarding the conflict of laws, says that the case does not belong to it, there is no further reference to the law of a third state."

Westlake discusses the problem also in his treatise on *Private International Law*, Chapter II,¹¹ where he states the problem in a somewhat different form:

"The matter is so cardinal in relation to the real meaning of private international law that, at the risk of being tedious, I will put it again in different language, but with a difference only of language. The English or Danish judge cannot hold the lad of nineteen to have attained his age unless he is prepared to answer the question, what lawgiver made him of age? That is independent of all views about the conflict of laws, for it results from the nature of law itself. Now the Italian code does indeed seem to lay down a rule about the status and capacity of all persons without exception, but this is only a misleading generality, for no one can doubt that the principle of a finiseauting generality, for no one can doubt that the principle of nationality adopted in Italy prevents the Italian lawgiver from claiming authority over the capacity of a British or Danish subject. The English or Danish judge therefore cannot say that the Italian lawgiver made the *de cujus* of age at nineteen: Then, it will be asked, who is the lawgiver that keeps him a minor till he has attained twenty-one? And the answer is, the British or Danish lawgiver; for no one can doubt his authority over the capacity of his subjects if he no one can doubt his authority over the capacity of his subjects if he chooses to exercise it, and the Italian lawgiver's disclaimer removes the objection which he would have felt to exercising it in the case of one of his subjects who was not domiciled in the British dominions or in Denmark. The result will coincide with that given by the *renvoi*, properly limited so as to avoid an endless series of references to and fro, but its real base lies, not in the doctrine of renvoi, but in the duty of considering the essential nature of the legal relation in question in any concrete case, and the essential meaning of the rules of private international law adopted in the different countries concerned.

^{11 (5}th ed.) 33.

The mutual disclaimer of jurisdiction theory of von Bar and Westlake, contrary to the theory of renvoi proper, necessarily leads to the application of the internal law of the forum in practically all cases in which the rules of the conflict of laws of the forum differ from those of the country whose law has prima facie been adopted and incorporated. Whenever there is a diversity in the rules of the conflict of laws of the two countries concerned, it means, according to this theory, that there is no internal rule in either country actually applicable to the case. In reality, there is a gap in the law which the judge of the forum, who is obliged to decide the case in some manner, is forced to fill up by applying his own internal law. As Westlake points out, there can be no question under this theory of a forward reference or Weiterverweisung. The judge is not to regard himself as sitting in the foreign country, as he is required to do under the theory of renvoi proper in its wider form; nor is he to follow the directions of the foreign law. All he is asked to do by the law of the forum is to ascertain whether the law of the foreign country which is incorporated claims jurisdiction over the case. If it does not, its law has nothing further to say in the matter; the law of the forum directs its judge in such event to apply its own internal law.

Von Bar would restrict his renvoi theory, as appears from his thesis No. 2 (a) quoted above, 12 to the cases where the personal statute is involved, that is, where the law of nationality comes into collision with the law of domicile or with the law of the place where the act in question occurred. Westlake, on the other hand, would apply the above reasoning to all cases in which divergent rules of the conflict of laws of the countries in question amount to a mutual disclaimer of jurisdiction. Such a disclaimer would follow in all cases where the rules of the conflict of laws differ, unless such difference arises from the fact that a foreign law leaves it optional with the parties whether they will be governed by such foreign law or by that of another state, such option not being allowed by the law of the forum. Let us assume, for example, that a question arises in the state of X in respect to the validity of a conveyance of land in the state of Y; the deed being executed in the state of Z in the form prescribed by the law of Z, but not in the form required by the local law of the state of Y. Let us assume also that the law of the state of Y authorizes the execution of deeds either in the form customary in the place of execution, or in that prescribed by the law of the situs. Should the courts of the state of X recognize the validity of the deed? Westlake's reasoning would not include this case, for the law of the state of Y as the law of the situs, which the law of the state of X has incorporated, does not disclaim jurisdiction. All it has done is to facilitate

¹² Supra, p. 512.

the formal execution of deeds relating to land within its territory by giving an option or choice.

One of the rapporteurs on the question of renvoi before the Institute of International Law, Professor Buzzati, raised the following objections to renvoi in the form suggested by von Bar and Westlake:

- (I) The starting point, namely, that a legislator adopting the law of domicile to determine capacity is not interested in his subjects abroad and does not legislate with reference to them, and that a legislator adopting the law of nationality in his system of the conflict of laws is not interested in foreigners domiciled within his territory and does not legislate with respect to them, rests upon an erroneous assumption. It is absurd to say that the provisions of the Italian Civil Code do not apply to an Englishman who is domiciled in Italy.
- (2) Neither von Bar nor Westlake denies the competency of a state to extend its jurisdiction over a matter which another state claims for itself. And yet, their theory rests upon the fundamental proposition that due respect for the state of X makes it improper for the state of Y to assign to the state of X a jurisdiction which the state of X declines. Just as if it were not a greater offense to deprive the state of X of a jurisdiction which it claims than it would be to assign to it a jurisdiction which it does not claim.
- (3) The fundamental error of the theory consists in the assumption that it is possible for the state of Y to bring its own jurisdiction into perfect accord with that of other states so that there will be no infringement upon their jurisdiction. But this is impossible and will remain so as long as the states have different rules relating to the conflict of laws. Each state is, therefore, obliged to adopt its own rules without deferring to those of other states.

The first objection mentioned by Buzzati is elaborated more fully by Kahn.

"According to this writer the thought of the legislator in directing the application of foreign law is about as follows: "Though I regard my law as the better and the more reasonable, it is generally more important to aim at international uniformity of treatment, even at the risk that objectively the result is not so good. If we should desire to apply our law exclusively in those cases also in which the legal relationship has a much more important connection with foreign countries, the advantage gained from the application of our better law would be out of proportion to the disadvantages with respect to international uncertainty of law resulting therefrom. . . . Just as I treat foreign law, so shall I also be treated in general. If I expect and demand that my law shall be taken into consideration by other countries, I must as far as possible admit the application of foreign law in analogous cases.

¹⁸ Buzzati, Nochmals die Rückverweisung im internationalen Privatrecht, 8 NIEMEYER, 449, 451-452.

"We see, therefore, that the rule of private international law, however closely it may be connected with the rule of substantive law, is, nevertheless, by no means a pure expression of the applicability of our law; that the legislator establishing a certain point of contact for his private international law is far from asserting that he has no substantive law for other cases.

"The legislator determining the right of succession according to the domicile of the deceased says merely: 'For me, domicile is a more important point of contact than nationality or any other principle. I would gladly apply my rules concerning succession also to my subjects residing abroad, to all property situated in my territory, etc. Yet I know that if I want to aim at international uniformity of law I can claim, on principle at least, but one point of contact. That being so, I prefer to assure the strict application of my rules concerning succession as to those who live in my territory. I will rather suffer an application of foreign law to my subjects abroad than to admit its application to persons domiciled within my territory.'"

The writer of the present article called attention, on a former occasion, to the fact that Westlake's theory also lacks all support from an historical point of view. He there made the following observations:¹⁵

"Without dwelling upon the singular results that would be obtained if Westlake's theory that there is in reality no positive conflict but merely a mutual disclaimer of jurisdiction became accepted law, it is easy to show that it rests upon premises which lack all real support. His point of departure—that there is an inseparable connection between the rules of Private International Law of a given country and its internal or territorial law, so that, according to the real intention of the legislator, the former must be deemed to define the limits of the latter's application, cannot be admitted. In Roman Law, for example, there were no rules of Private International Law in the proper sense; hence it would appear that the Roman legislator enacted laws without reference to their application in space. As to the modern continental countries, notwithstanding the fact that the science of Private International Law has been known to them since the fourteenth century, their present codes, almost without exception, contain such scant provisions relating to the Conflict of Laws that an assertion that the legislator in adopting a rule of internal law in reality defined its operation in space by the corresponding rule of Private International Law is an absurdity. In most instances no such rule of Private International Law could be found in any law. And with respect to England and the United States the unsoundness of Westlake's contention is all the more apparent for the reason that the law of England was fully developed before the rules relating to the Conflict of Laws, taken over from the continent, became a part thereof. With what show of reason can it be said then that the two are one and inseparable? Laws are enacted by a legislator without any thought of their operation in space. The object of the science of Private International Law of a particular country is to fix the limits of the application of the territorial law of such country, but its

^{14 40} Jhering's Jahrbücher für die Dogmatik, 67-68.

¹⁵ 10 COLUMBIA L. REV. 190, 202-204.

aim is not restricted to this. It includes also the determination of the foreign law applicable in those cases in which the *lex fori* does not control. Otherwise the courts of the forum would be left by the national legislator without a guide as to the applicatory law in that class of cases."

Nothing further need be added to show that the renvoi theory in the above form is untenable.

# THEORY OF RENVOI PROPER

The term renvoi includes two notions: the notion of a "return reference," that is, Rückverweisung, and the notion of a "forward reference," that is, Weiterverweisung. Some of the writers would support the theory of renvoi proper only so far as it involves a return reference. The English and American courts, however, so far as they have recognized the renvoi doctrine, appear to have done so in its wider form, so as to include the possibility of a reference to the law of a third state. 16

The theory of renvoi proper in its narrower form—Rückverweisung—has the following meaning:

If, for example, the English law directs its judge to distribute the personal estate of an Englishman who has died domiciled in Belgium in accordance with the law of his domicile, he must first inquire whether the law of Belgium would distribute personal property upon death in accordance with the law of domicile, and if he finds that the Belgian law would make the distribution in accordance with the law of nationality—that is, English law,—he must accept this reference back to his own law.

Bentwich appears to accept the *renvoi* theory in this form and advances the following argument in its support:

"The renvoi is in principle a reference back not to the whole law of the foreign country including its different rules of Private International Law, but simply to its internal law. Suppose a case where the lex fori (hereinafter called A) submits the matter to the lex domicilii (B), and B refers the matter back to A as the law of the nationality. A accepts the Renvoi, and applies its own law. If we regard first principles, we see that what has happened is this. Law is primarily sovereign over all matters occurring within the territory, and so A would ordinarily apply to the succession. A from motives of international comity and to secure a single system of succession, resigns its ordinary jurisdiction to B. But B, by reason of its special juristic conceptions, does not take advantage of the sacrifice or accept jurisdiction. A's primary jurisdiction consequently is properly exercised, and there is no ground for A to decline to accept

¹⁶ In re Trufort (1887) 36 Ch. D. 600; Guernsey v. The Imperial Bank of Canada (1911, C. C. A.) 188 Fed. 300.

the renunciation of B, since it thereby puts into operation its fundamental principle of regulating every matter within the territory."¹⁷

It will be noted that the renvoi theory in the above form, like Westlake's mutual waiver of jurisdiction theory, always leads to the application of the ordinary, or internal, law of the forum. The reasoning, however, upon which it is based is very different. According to Bentwich the rules of the conflict of laws of each state rest, as it were, upon the theory of an implied agreement among the states for the application of each other's law. The law of the foreign state is to be enforced only if the foreign state under the same circumstances would enforce the law of the forum. Unless reciprocity is guaranteed, the law of the forum will apply its own internal law. The question is thus raised whether the rules of the conflict of laws rest solely upon the principle of reciprocity. It is submitted that they do not. No doubt the courts of a state have come to apply foreign law partly because of their desire to assure the application of their own law by foreign courts. But this does not mean that reciprocity must exist with reference to any particular rule. Indeed, in the common law of the United States there is only a single instance where the courts insist upon reciprocity in the latter sense, namely, in the enforcement of foreign judgments by the federal courts.18 Considerations of justice and of expediency have played a very important part in the adoption of specific rules in the conflict of laws. To take the example which Bentwich cites for an illustration, can it be said that the law of domicile was adopted by the English and American courts in the distribution of personal property upon death solely because the continental courts had adopted this rule, so that reciprocity would be guaranteed? If this were so it would follow that if, at the time of the adoption of the lex domicilii in England in the distribution of movable property upon death, the rule of nationality had prevailed on the continent, as it does to-day, the English courts should have accepted the latter rule. It is clear, however, that they would not have done so, because it would not have suited English conditions. In a country in which private law is not unified, the law of nationality is an impracticable standard by which to determine private rights. The law of nationality being unacceptable, one of three rules might have been adopted—the law of the domicile of the deceased, the law of the situs of the property, or the internal law of the forum. Considerations of justice and expediency would probably have led to the adoption of the lex domicilii. Similarly, it may be shown that all other rules in the conflict of laws rest to a large degree upon considerations of justice, expediency, or policy.

As the individual rules in the conflict of laws of England and the

¹⁸ Hilton v. Guyot (1895) 159 U. S. 113.

¹⁷ Bentwich, The Law of Domicile in its Relation to Succession and the Doctrine of Renvoi (1911) 184.

United States are not based upon the principle of reciprocity, it follows that these rules should, in the absence of clear reasons to the contrary, apply independently of the existence of like rules in the foreign system some provision of which is, in a given case, incorporated by reference. The theory of renvoi proper in its narrower sense, leading as it does to the application of the internal law of the forum in all cases where the rules of the conflict of laws of the forum differ from those of the foreign law which is incorporated by reference, has no basis unless it be a desire to apply, wherever possible, the law of the forum. It is nothing else than a return pro tanto to the doctrine of the exclusive prevalence of the internal law of the forum.

According to the theory of renvoi proper in its wider form, that is, inclusive of Weiterverweisung, the lex fori hands over the question to the legal system of the foreign country whose law is incorporated. The judge of the forum is to decide the case, therefore, as the courts of the foreign country would decide it. The English and American cases, so far as they sanction renvoi, have expressed it in this form. Their attitude appears clearly from the opinion of Sir Herbert Jenner in Collier v. Rivaz, where the learned justice, speaking of Belgian law, said: "The court sitting here . . . decides as it would if sitting in Belgium."19 It must be noted, however, that the statement made by Sir Herbert Jenner is not to be taken literally. The English court does not actually decide the case as the Belgian court would. An illustration will make this plain. Suppose that an English judge is called upon to distribute the personal estate of an Englishman whose domicile at the time of his death was in Belgium. The English law would direct the judge to apply the lex domicilii, that is, the law of Belgium. If Sir Herbert Jenner's statement is to be taken in its literal meaning, the English judge would be compelled to ascertain how the Belgian judge would decide the case. Upon investigating the law of Belgium he would find that it would distribute the property in accordance with the principle of nationality, that is, in accordance with English law. He would also discover that the courts of Belgium have followed the renvoi theory consistently since 1881,20 and that in consequence the distribution would actually be made by them in accordance with the Belgian statute of distributions. The English judge should consequently apply the same statute of distributions. Although the English judge purports to sit in Belgium, he would, as a matter of fact, apply the English statute of distributions. He would not decide the case as the Belgian judge is obliged to do

¹⁹ (1841) 2 Curt. Eccl. 855, 862-63. The italics are those of the present writer. 
²⁰ Bigwood v. Bigwood, App. Brussels, May 14, 1881 (Belgique Judiciaire (1881) 758). See also Trib. Civ. Brussels, March 2, 1887 (14 Clunet, 748); App. Brussels, Dec. 24, 1887 (D. 1889, 2, 97); Trib. Nivelles, Feb. 19, 1879 (Belgique Judiciaire (1880) 982); Trib. Civ. Brussels, Dec. 1, 1894 (23 Clunet, 895); Trib. Civ. Antwerp, March 16, 1895 (23 Clunet, 655).

under Belgian law, ignoring the existence of the renvoi doctrine in the Belgian law. The reason why the renvoi doctrine of the foreign state is ignored is very plain. No decision could be reached if both judges should attempt to apply the renvoi doctrine actually existing in the foreign system. Each law would refer the judge to the law of the other state. There would thus be an endless series of references from which there is no escape.²¹

Because of this, renvoi is understood by each judge as a return reference simply to the internal law of his country and not to the whole of its law. It is not so certain, however, that the English courts would ignore a foreign renvoi doctrine in the case of a forward reference (Weiterverweisung), as distinguished from a return reference (Rückverweisung), like that just considered. The renvoi doctrine appears to be a mere expedient to which the courts resort in order to justify the application of their own law. Hence, if the foreign law (of the state of X), instead of directing the English judge back to his own law, should refer him to the law of another foreign state (state of Y), it is quite possible that he might state the conflict of laws rules of X (now assumed to be referred to by English law in a renvoi sense in accordance with the actual law of X), if by so doing he might be enabled to apply his own local law. Suppose, for example, that the law of the state of X has adopted the law of nationality in the distribution of personal property upon death, and that the law of the state of Y makes the distribution in accordance with the law of the situs; also that the decedent was a subject of the state of Y but was domiciled at the time of his death in the state of X. The property to be administered being in England, the English judge might say: "The law of the state of X which I am directed to apply, recognizing as it does the doctrine of renvoi, is referring me to the law of the state of Y as a whole, inclusive of its rules of the conflict of laws." This mode of reasoning would enable him to apply the statute of distributions of the forum.

The suggestion might be made that Sir Herbert Jenner used merely an inapt expression in characterizing the *renvoi* theory of the English courts, and that Bentwich's explanation given above²² is a more accurate statement of the process. The two theories are, however, fundamentally different. Bentwich's theory necessarily leads to the application of the law of the forum, while the English courts apparently sanction the *renvoi* doctrine in its wider form, that is, inclusive of *Weiterverweisung*.²³ Such a forward reference can be justified only if the final decision in the case is handed over to the foreign law. Bentwich's theory is opposed to this.

¹¹ Westlake suggested the mutual waiver of jurisdiction theory for the very purpose of avoiding this endless series of references: Westlake, *Private International Law* (5th ed.) 32-34; supra, p. 514.

²² Supra, p. 518.

²⁸ See Re Trufort (1887) 36 Ch. D. 601; Guernsey v. The Imperial Bank of Canada (1911, C. C. A.) 188 Fed. 300.

The untenability of the theory of renvoi proper in its wider form will appear more clearly if its real meaning be set forth in another manner. What actually happens is this: When the English judge in the above case seeks to ascertain the statute in accordance with which he is to make the distribution, he is told by the English law: "I cannot tell you; go and ask the Belgian law." All the English law will do for him is to point out the country which is to give him the final answer. What is true in this case will happen in all cases in which the English judge is called upon to apply foreign law. In no case will the English law answer any question directly. It will always delegate the task to another state.

Should the Belgian courts have accepted the *renvoi* doctrine in the same form as the English courts, the Belgian judge again would get no final answer to his questions from the Belgian law, but would be told to ascertain it from the English law.

It is evident, however, that if the English rules of the conflict of laws do not point out any rule of internal law, but merely point out the country whose law is to decide the case, and if the Belgian rules of the conflict of laws are to be understood in the same sense, no direct answer can be found in either system, whether the question be asked by a national judge or by a foreign judge. There would be an endless chain of references, as we have already seen. As the doctrine is actually worked, there is no rule in the English law which will enable an English judge to reach a direct decision, but such a rule is, more or less arbitrarily, assumed to be found when a foreign judge is called upon to apply English law. The same inconsistency would be true of Belgian law. It would not point out a statute of distributions to the Belgian judge, but would be deemed to do so where an English judge is called upon to apply Belgian law.

The writer would submit that the rules of the conflict of laws of the forum should be regarded as incorporating by reference only the internal law of the foreign state and not its rules of the conflict of laws. The moment it is granted that the adoption of the rules of the conflict of laws rests upon considerations of justice, expediency, and policy, it follows that each state must exercise its own judgment in the matter and determine the matter finally. This it fails to do when it adopts the theory of renvoi proper in its wider sense. Many writers have argued that the acceptance of the renvoi doctrine amounts to an abdication on the part of one sovereign in favor of another.²⁴ Bentwich denies this. He says:²⁵

"It is said again that the renvoi is 'a denial of Private International

²⁴ Audinet, s. 1899, 2, 105; Bartin, 30 Darras, 295; I Gierke, Deutsches Privatrecht, 214; Klein, 27 Archiv für bürgerliches Recht, 273; Labbé, 12 Clunet, 12; Lainé, 23 Clunet, 256; 3 Darras, 334-335; Laurent, s. 1881, 4, 42; Potu, La question du renvoi du droit international privé, 319, 321.

²⁵ The Law of Domicile, 186-187.

Law and of the internal autonomy of states.' By this apparently is meant that where a Court accepts the renvoi, it puts into force the principle of a foreign country for settling questions of conflict, and renounces its own principle. Thus in a particular case the English Court might apply the law of the nationality in place of the law of the domicile to the movable succession of a person who died abroad (cf. Re Trufort and Re Johnson). But to this it may be answered (1) that the renvoi is applied by way of exception, and, as already remarked, to secure the practical object for which private international law was designed; and (2) that it is a more serious denial of the autonomy of States to compel the operation of a foreign law upon a matter where it refuses to apply itself, than to apply the municipal law because the foreign law refuses jurisdiction. For example, if a French Court were to apply the English statute of distributions to the intestate succession of an Englishman dying domiciled in France, it would be really misapplying the English law to a case where the English legislator never meant it to operate. Like most of the objections to the renvoi, this argument against it is purely academic, based entirely on theoretical premises, and entirely regardless of practical consequences. And even on the ground of the pure theory of sovereignty, it may be pointed out that an English Court has no right to assume sovereignty, and decide what part of the foreign law is to be applied, when the person whose succession is in question is not subjected to it either ratione personae or ratione territorii."

In reply to Bentwich it may be said that there are no practical advantages to be derived from the adoption of the renvoi doctrine, as will be shown later.²⁶ The second argument advanced by Bentwich is but a repetition of the arguments advanced by von Bar and Westlake in favor of the mutual disclaimer of jurisdiction theory. Its unsoundness has been pointed out by Professor Buzzati.27 To say that, when the French court applies the English statute of distributions to the intestate succession of an Englishman dying domiciled in France, it is misapplying the English law to a case where the English legislator never meant it to operate, is to misstate the whole problem. The very equality of states makes it impossible for one state to yield to the wishes of another state in this respect. France, therefore, is perfectly within her rights when she directs her judges to apply English law in the above case. And, contrary to Bentwich's assertion, the English courts are equally within their rights should they apply French law. Whether they do so ratione personae or ratione territorii or by virtue of any other principle cannot be questioned by anyone as long as no established principles of international law are violated. Unless the action of the legislature of a state or of its courts would amount to a "fundamental" denial of justice to the citizens of another sovereign, each state is free to act as it may deem best.28

²⁶ Infra, p. 524 et seq.

²⁷ Supra, p. 516.

²⁸ See, for a full discussion of "fundamental" denial of justice to aliens, Borchard, Diplomatic Protection of Citizens Abroad (1915) 13, 178, 196-199, 330-343. See also, Kahn, Über Inhalt, Natur und Methode des internationalen Privatrechts, 40 Jhering's Jahrbücher für die Dogmatik, 1, 40-41.

III

Should anyone be inclined to brush the foregoing arguments aside as "purely academic," let us consider the practical consequences to which the *renvoi* theory would lead. The chief object of the science of the conflict of laws being to bring about international uniformity of law, let us see whether the *renvoi* theory would be conducive to such an end.

According to the mutual waiver of jurisdiction theory, whenever the rules of the conflict of laws of the forum diverge from those of another state whose law has been incorporated by reference, the ordinary or internal law of the forum prevails. This result follows also from the theory of renvoi proper in its narrower form, as presented by Bentwich. Instead of promoting uniformity of decision in the different countries, the above theories will have the very opposite effect. If the renvoi doctrine be rejected, there is a possibility, it is true, that one state may distribute the personal estate upon death in accordance with the law of domicile, and another state, in accordance with the law of nationality. Two different statutes may thus become applicable.³⁰ But if renvoi in either of the forms just mentioned be accepted, the property will be distributed in accordance with as-many statutes as there are states before whose courts the question may come. Bentwich again takes a contrary view and says:

"The objection, however, is a figment of theory, and is not based on a solid practical difficulty. Even if no rule were established by an international convention for the application of the *Renvoi*, in any particular case the English Court or the French Court would know whether the other had already dealt with the succession. If this were so, it would adopt the principle already applied to the succession, and apply either its own rules of private international law or the doctrine of *renvoi* so as to subject the whole moveable succession to one law. Thus in the case supposed, if the English Court, first seised of the matter, had accepted the *renvoi* and applied English law to the English assets of the deceased, a French Court would naturally apply English law to the French assets according to its own rules."

Instead of being a figment of theory, what has been set forth above represents the actual state of the decisions. Bentwich does not cite a single case in which a court has resorted to renvoi in one case and refrained from using it in another solely with a view to bringing about the application of the same ultimate rule of decision. The writer is convinced that no such cases can be found in any country. One or two examples will show the extraordinary results to which,

²⁹ The Law of Domicile, 186.

There is a possibility that the law of a third state might become applicable; for example, if property should be left in a state which has adopted the law of the situs for the distribution of personal property upon death.

^{*1} The Law of Domicile, 183.

under the above theory, the substitution of the law of the forum for the foreign law may lead. Let us assume, in the first place, that an Englishman who is domiciled in Italy makes a contract in Italy, and that suit is brought in the United States for breach of the contract, the defense being lack of capacity. Let us assume also that England applies the law of domicile,³² Italy the law of nationality, and the United States the law of the place where the contract is made as the rule governing capacity to contract. According to Westlake's theory the law of the forum, that is, American law, would govern the question, although its only connection with the case is the fact that suit is brought there.

Assume, in the next place, that according to the law of a given forum (state of X), the law of the *situs* (state of Y) would govern the validity of a testamentary trust, but that under the law of the *situs* the national law of the testator (state of Z) controls. The internal law of the state of X would determine the validity of the trust; and that solely because suit is brought there and because the law of the state of Y, which the law of the state of X incorporates, has a different rule in the conflict of laws.

There is no escape from consequences such as the above under the mutual disclaimer of jurisdiction theory as it has been developed by Westlake; and these prove the impossibility of accepting the renvoi theory in this form. To the extent that this theory is applied, it means a return to the exclusive application of the ordinary or internal law of the forum, and a sacrifice of all that has been gained during the last century in the development of the rules of the conflict of laws.

What has been said of the practical consequences to which the mutual disclaimer of jurisdiction theory leads is true also of the theory of renvoi proper in its narrower sense. According to the latter theory, whenever the foreign law declines to accept the jurisdiction which is offered to it by the law of the forum, the latter will control. As has been stated, there is nothing in the suggestion made by Bentwich that the renvoi theory may be invoked by the court for the purpose of bringing about uniformity of decision. No court, legislator, or writer other than Bentwich, so far as the present writer is aware, has ever suggested that a judge should apply, now the internal law of a foreign country, now its law as a whole, with a view of harmonizing his decision with the decision that has already been rendered in the case by a foreign court.

The doctrine of renvoi proper in its wider sense includes, as we have seen, the possibility of a forward reference (Weiterverweisung), and

⁸² Whether the English law would apply the *lex domicilii* as regards ordinary business contracts is doubtful. As to such contracts the law of the place where the contract was made may control. See *Male v. Roberts* (1800) 3 Esp. 163; Dicey, Conflict of Laws (2d ed.) Rule 149, exception 1, p. 538; Cheng, Rules of Private International Law Determining Capacity to Contract, 70-72.

may thus lead to the application of the internal law of a third state. In so far as the application of the theory of renvoi proper in its wider form leads to a return reference (Rückverweisung), that is, to the lex fori, it has exactly the same disadvantages as the other theories. Instead of bringing about international uniformity of decision, it will cause the greatest disharmony possible by subjecting the determination of each case to the internal law of the forum. The English judge in the case above put³³ would distribute the personal property in accordance with the English statute of distributions, while the Belgian judge would apply the Belgian statute of distributions. If the case should arise in New York, the judge would apply the New York statute of distributions.

In so far as the application of the theory of renvoi proper in its wider form leads to a forward reference (Weiterverweisung), it constitutes no gain whatever. Suppose that two Englishmen who are domiciled in the state of New York enter into a contract in Italy. Suit for breach of the contract is brought in New York, and the defense is lack of capacity. Which law should govern? If renvoi is rejected, the New York judge would apply the lex loci contractus, that is, the ordinary Italian law relating to capacity. England would apply New York law as the lex domicilii of the parties, and Italy would apply the English law as the lex patriae of the parties. If, on the other hand, these countries recognize renvoi proper in the wider sense (inclusive of Weiterverweisung), the New York courts would apply the whole of Italian law (lex loci contractus) and, being directed by the Italian rule of the conflict of laws to apply the lex patriae. would decide the question in accordance with the English law relating to capacity. The English judge would apply the New York law (lex domicilii) inclusive of its conflict of laws, and, being directed by the law of New York to apply the lex loci contractus, would determine the case in accordance with the Italian law relating to capacity. The Italian judge would apply the whole of the English law (lex patriae), and, being directed by the English judge to apply the lex domicilii would hold that the law of New York relating to capacity would control the case.

It is apparent, therefore, that the theory of *renvoi* proper in its wider form leads to no greater uniformity than is attained by rejecting the doctrine. We have seen, moreover,³⁴ that the doctrine of *Weiterverweisung* might be worked by the courts so as to lead to the application of the local law of the forum.³⁵

^{**} Supra, pp. 518, 520.

⁸⁴ Supra, p. 521.

The New York judge might reason that the Italian rule of the conflict of laws was to be understood as referring him to the *lex patriae*, that is, English law, inclusive of its rules of the conflict of laws, and that he must decide the case in accordance with the law of domicile, that is, New York law. The

Whatever form the renvoi doctrine may take, once it is recognized it is difficult if not impossible to limit its operation. In every case where the law of the forum incorporates the law of a foreign country, whether it be the law of the domicile, the law of the situs of the property, the law of the place where the marriage or contract was entered into, the law of the place where the contract was to be performed, the law of the place where the tort was committed or the law where the marriage was dissolved, or the law where the adoption proceedings, or acts upon which legitimation is based, took place, or any other law, the point might be urged that the law of the country referred to had a different rule on the subject. In the case where the law of the domicile and the law of nationality come into collision, it may be easy enough to ascertain the fact that the foreign country has accepted the principle of nationality; but the task of finding and understanding in all other cases the foreign rule of the conflict of laws covering the case in question is indeed Herculean in its nature.36

A court may be inclined to accept the renvoi doctrine readily in cases where it leads to the application of its own law, but once it is accepted it must, if logically consistent, be applied under the theory of renvoi proper in its wider form—the theory of the English courts—

English judge might say that the rules of the conflict of laws of New York referred to the lex loci contractus, that is, Italian law, inclusive of its rules of the conflict of laws, and that he should determine the case, therefore, in accordance with the law of nationality, that is, English law. The Italian judge in the same way might say that the English rule of the conflict of laws referred him to the lex domicilii, that is, New York law, inclusive of its rules of the conflict of laws, and that he must decide the case in accordance with the lex loci contractus, that is, Italian law.

25 If it be recalled how uncertain the law is in most states in this country as regards the rule governing the validity and obligation of contracts, it will be easy to realize what the state of the law must be with respect to the conflict of laws in countries not belonging to the Anglo-American group, in which the doctrine of stare decisis is unknown.

Even though the foreign rule is perfectly clear and definite it is frequently misunderstood. The case of Lando v. Lando (supra, n. 3) furnishes a striking illustration. The parties stipulated that the German law applicable to the case was as follows:

"Art. 13. The contraction of a marriage (otherwise translated 'entering into'), even if only one of the parties is a German, is determined in respect of each of the parties by the laws of the country of which he (or she) is a subject (otherwise translated 'to which each respectively belongs'). The same subject (otherwise translated 'to which each respectively belongs'). The same rule applies to an alien who concludes a marriage within the empire. . . . "The form of a marriage which is concluded within the empire is determined exclusively by Garman law"

exclusively by German law.'

The last paragraph quoted clearly indicates that no marriage celebrated in Germany will be regarded as valid unless it is entered into in the form prescribed by the German law relating to marriage. See Planck, Bürgerliches Gesetzbuch (3d ed.) 50. The Supreme Court of Minnesota finds, however, that "the proper interpretation of the provision abounds in doubt and uncertainty," and thus feels justified in upholding the marriage by invoking the rule of interpretation, semper presumitur pro matrimonia.

whether it sends the judge back to the law of his own country or sends him forward to the law of a foreign state. Whether he is led in the one direction or in the other, he must inquire into the foreign system of conflict of laws; and, after he has done this, which in a large proportion of cases involves a task far greater than that of applying the internal law of a foreign country, he may still be compelled to apply the internal law of a foreign state. This fact alone should be sufficient to deter the courts from adopting the *renvoi* doctrine in the above form.

So far as the effect of the doctrine of renvoi proper in its wider form upon the subject of the conflict of laws is concerned, it must be definitely understood that it will render the whole subject, which in its very nature is full of uncertainty, still more uncertain. The difficulty is not confined to the judge. The lawyer will have much greater difficulty in advising his clients as to their rights. Before he can do so, he must investigate three things: First, the rule of the conflict of laws of his country governing the case; second, the foreign rule of conflict of laws which is incorporated; and third, in many cases, the provisions of the internal or ordinary law of some foreign country. Take the simplest case of a trust in foreign real estate. The moment renvoi proper in its wider form is recognized, the primary question would no longer be whether the law of trusts of the situs of the property should recognize the validity of such trust, but what the rules of the conflict of laws of the situs are; and the latter may refer the judge to the law of another country, for example, to the national law of the owner.37 In other words, in all cases the rights of the parties will depend not alone upon the rules of the conflict of laws of the forum, but also upon those of the foreign country whose law is incorporated by the law of the forum. A greater state of uncertainty in the law than that which arises from the theory of renvoi proper in its wider form is difficult to conceive. The general recognition of the renvoi doctrine in either of the forms outlined above would be fatal to the harmonious development of the rules of the conflict of laws in the future. No proper system of the conflict of laws can be built up among the civilized nations as long as this doctrine remains. It cannot be built up on the mutual waiver of jurisdiction theory, nor upon the theory of renvoi proper in its narrower form, because they imply a reversion pro tanto to the exclusive application of the local or internal law of the forum, a seizing of every opportunity on the part of the courts to apply their own law. It cannot be built up on the theory of renvoi proper in its wider form, because the latter implies a shirking of all direct responsibility on the part of each state. According to the latter theory, a state is not bound to give a final answer to any question in the conflict

⁸⁷ See the unreported case of *Re Baines*, decided March 19, 1903, by Farwell, J., given in Dicey, *Conflict of Laws* (2d ed.) 723.

of laws, but is regarded as having performed its full duty by handing a power of attorney for that purpose to another state. It is only when each state, through its legislature or courts, conceives itself obliged to assume direct responsibility in the matter, and learns to discharge its duty with a view to promoting international justice rather than petty and selfish ends of its own, that a proper basis will be created for any real progress in the science of the conflict of laws. The renvoi doctrine, however, in whatever form it be adopted, tends in just the opposite direction. Whatever strength this doctrine may gain temporarily because of the equivocal meaning of the term "law of a country" and the natural predisposition on the part of judges to apply their own law, there can be no doubt of its ultimate overthrow. Its days ought to be few after its deceptive character is fully understood.

#### IV

The conclusion having been fully established that the *renvoi* doctrine cannot be accepted as a general principle in the conflict of laws, we may briefly consider certain exceptional cases in which a recognition that the *lex fori* should incorporate the foreign law inclusive of its rules of the conflict of laws may be either necessary or expedient.

- (1) It has been found necessary to accept the *renvoi* doctrine in the framing of international conventions as the only means of bringing together nations with different rules in the conflict of laws.³⁸
- (2) Von Bar has called attention to a certain class of cases in which on grounds of justice it is necessary, it would seem, to recognize renvoi or something akin to it. He gives the following examples:30

"Two subjects of the State of X are married in the State of Y, where they are domiciled. The validity of the marriage is questioned in the State of Z on the ground that the parties had no capacity to enter into the marriage under the provisions of the laws of the State of Y relating to marriage, though it is conceded that they possessed such capacity under the national law with respect to marriage. The laws of the States of X and Y agree that the lex patriae shall govern the essentials of a marriage. The law of the State of Z, on the other hand, applies the lex loci celebrationis. Should the courts of the State of Z regard the marriage as valid?

"A, a citizen of the State of X, dies domiciled in the State of Y. The laws of the States of X and Y agree that B is entitled to A's personal estate in accordance with A's national law. Subsequently B's heirship is contested in the State of Z, in which State the lex domicili is held to govern the distribution of personal property upon death. Should B's title be recognized by the courts of the State of Z?"

²⁸ See Art. 1 on The Hague Convention of June 12, 1902, relating to marriage, and Art. 74 of the Uniform Law of The Hague Convention of 1912, relating to bills of exchange.

^{*9 8} NIEMEYER, 183-184.

Von Bar would answer both questions in the affirmative. He submitted the following rule, intended to cover the above class of cases, to the Institute of International Law:

"Provided that no express provision to the contrary exists, the

"(b) The decision of two or more foreign systems of law, provided it be certain that one of them is necessarily competent, which agree in attributing the determination of a question to the same system of law.⁴⁰

A motion embodying the above proposition was submitted to the Institute of International Law, but its consideration was postponed because the motion was deemed to embody something quite distinct from the *renvoi* doctrine in general.⁴¹

The rule in the form above stated actually accepts the doctrine of renvoi proper, provided (I) that the foreign countries with which the transactions may be connected have the same rule in the conflict of laws; (2) that the law of one of them be applicable under the law of the forum. Thus limited, the renvoi doctrine not only leads to results which are obviously just, but also tends to promote international uniformity in the decisions. The statement in Guernsey v. The Imperial Bank of Canada quoted above,⁴² may be supported on this ground.

- (3) Because of the favor shown to marriages, the lex loci celebrationis might be deemed to incorporate the foreign law as a whole for the purpose of sustaining a marriage, as in the case of Lando v. Lando, 43 but not to defeat it. It would be preferable, however, if this result were reached through the adoption of an alternative rule in the conflict of laws. If, for example, the law of Minnesota, instead of saying that the marriage must satisfy the lex loci celebrationis, had said that a marriage should be upheld if it satisfied either the law of the place where it was entered into or the law of the domicile of the parties, it would not have been necessary in Lando v. Lando to resort to the renvoi doctrine in order to render the marriage valid.
- (4) It would seem that, by reason of the permanent and exclusive physical control which a nation has over immovable property within its territory, the validity of a conveyance of such property should be determined in accordance with the law of the *situs* as a whole. It would follow that if the law of the *situs* authorized the execution of a deed or will in the form prescribed by the law of the place of execution, its validity should be recognized everywhere. Similarly, if the law of the *situs* should determine the capacity of a party to dispose of such property by deed or will in accordance with the national law of

^{40 18} Annuaire, 41.

^{41 18} Annuaire, 186-187.

¹³ Supra, n. 2.

Supra, n. 3.

its owner, the courts of all countries should apply this rule. This might lead to a return reference to the law of the forum or to a forward reference to the law of another country. It might involve even a second reference, for example, if the national law of the owner of the property should determine the question of majority in accordance with the law of domicile.

The question may be asked: Does the recognition of the renvoi doctrine as regards conveyances of immovable property not lead to the same insuperable difficulties pointed out in the general discussion? How can these cases be taken out of the general rule without destroying the rule itself? The writer is of the opinion that because of the permanent and exclusive physical control which a state has over all immovable property within its territory, which it does not possess with reference to movable property or with respect to persons, such an exception might be justified. By reason of such control the courts of most countries would probably be willing to look primarily to the law of the situs of the immovable property and to decide the questions actually as the courts of the situs would. In other words, it would seem that in the conveyance of immovable property there is a reasonable basis for the expectation that the adoption of the renvoi doctrine would promote international uniformity of decision.

Uniformity might be reached without recourse to the renvoi doctrine if all countries would adopt alternative rules in their systems of the conflict of laws. As regards the formal execution of a deed or will, the general acceptance of the rule locus regit actum as an alternative rule would be sufficient. With respect to capacity and the substantive validity of wills and deeds, international uniformity could be brought about only in case all countries were willing to sustain such instruments if they satisfied either the law of the situs or the national law of the owner. Under present conditions, the renvoi doctrine would appear to be the only practicable means by which such uniformity can be attained.

## APPENDIX

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[&]quot;If the law of some countries should happen to apply primarily the law of the domicile or the law of the place where the deed or will is executed, complete uniformity would not be attained unless all countries accepted these rules also as alternative rules.

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# NEW CONTRACT BY A DEBTOR TO PAY HIS PRE-EXISTING DEBT

It is generally held that a new promise by a debtor to his creditor to pay an overdue debt in installments is not a sufficient consideration for any return promise by the creditor.1 In jurisdictions following this rule, a new bilateral agreement between a debtor who promises to pay in installments and a creditor who promises forbearance is not valid. In Hay v. Fortier (1917) 102 Atl. 294, the Supreme Court of Maine fully endorses this rule, but it proceeds to hold that the new promise of the debtor becomes binding by estoppel as soon as the creditor has actually forborne in accordance with his invalid promise to forbear.

¹ See Foakes v. Beer (1884, H. of L.) 9 App. Cas. 605 (holding that actual payment of the installments is not a sufficient consideration for a promise of discharge); Warren v. Hodge (1876) 121 Mass. 106 (actual payment no consideration for a promise of forbearance); Lynn v. Bruce (1794, Eng. C. P.) 2 H. Bl. 317. In the present case there is no reference whatever to the payment of interest.

This decision involves three important topics in contract law: (1) offer and acceptance; (2) consideration; (3) accord executory. In appearance at least, it violates a commonly accepted rule in each of the three fields. Nevertheless, it does justice and may well be approved, though its approval may require some restatement of legal principle.

. (I) It is generally asserted with great confidence that the acceptance of an offer must be exactly in the mode specified by the offeror, that the power in the offeree to create contractual relations by accepting is conferred by the offeror exclusively,² and that the courts cannot make a contract for the parties.

Courts cannot make a contract for the parties if we mean by "contract" to include the operative acts of the parties themselves. Nor do the courts make a contract if we mean by that term to describe some physical document. But the courts do, and always must, determine what are the legal relations that follow the operative facts. What rights, privileges, powers, or immunities now exist because of the operative facts. This is for the court to say, and it almost never depends exclusively upon the actual intentions of the parties. Those actual intentions of the two parties may not have been identical, and yet there may be a "contract." Constructive conditions are "implied by law" with great freedom; and the courts can always fall back upon the convenient fiction that parties are presumed to intend the legal consequences of their voluntary acts.

In the present case, the court expressly construes the contract to be bilateral, a promise to pay given for a promise to forbear. This bilateral contract is expressly said to be invalid. Then the court creates a good unilateral contract in its place, under the guise of an "estoppel." Perhaps this would be wholly unjustifiable if the debtor had offered his new promise clearly and specifically for a return promise. Very often, however, an offeree may reasonably understand that his power to accept may be exercised either by promising a specified performance or by actual performance itself. The offeror frequently leaves it at the option of the offeree to make either a unilateral or a bilateral contract. The facts in the case under discussion seem to justify such a construction.

² See Arthur L. Corbin, Offer and Acceptance and Some of the Resulting Legal Relations (1917) 26 YALE LAW JOURNAL 169, 199.

^{*}See Mansfield v. Hodgdon (1888) 147 Mass. 304, 17 N. E. 544; Ayer v. Western Union Tel. Co. (1887) 79 Me. 493, 10 Atl. 495.

⁴ Thus, it has been suggested by my colleague, Professor Henry W. Dunn, that when an order for goods is sent to a dealer it is often so worded as to empower the latter to accept either by shipping the goods or by mailing a letter containing a promise to ship them. There can be no doubt that such is a very common understanding among business men.

⁵ In Strong v. Sheffield (1895) 144 N. Y. 392, 39 N. E. 330, the court held

(2) A very common definition of consideration for a promise requires it to be an agreed equivalent for the promise, something for which the promise is consciously exchanged. In the present case, if the agreement was purely bilateral—as the court assumes—the agreed equivalent of the defendant's promise was the *promise* of the plaintiff. The court admits that this in itself was not a sufficient consideration. Its holding, therefore, is to the effect that a promise that is invalid for lack of consideration may be made valid by subsequent action of the promisee in reliance upon the promise. The defendant is said to be bound by estoppel.

This is quite consistent with the prevailing notions of justice, and it is consistent also with the most common of all the definitions of consideration. When judges say that consideration must be either a detriment to the promisee or a benefit to the promisor they seldom require in terms that it must be a consciously exchanged equivalent for the promise. The cases are so very numerous where a promise has been enforced because of subsequent action by the promisee in reasonable reliance thereon that the principal case is not to be disapproved on such a ground. If the subsequent action in reliance on the promise is not properly to be included within the term "consideration," then we must recognize the existence of a new class of parol promises binding without consideration.

(3) Upon an accord executory no action lies. Such was the rule

that where the defendant's promise was offered for a return promise of forbearance, an actual forbearance would not make the defendant's promise binding. The offer was not properly accepted. If the intention of the parties was clear that the contract should be bilateral only, no doubt their intention should be carried out by the court.

^o See Martin v. Meles (1901) 179 Mass. 114, 60 N. E. 397; Wisconsin & Mich. R. R. Co. v. Powers (1903) 191 U. S. 379, 386; 24 Sup. Ct. 107; Banning Co. v. California (1915) 240 U. S. 142, 153, 36 Sup. Ct. 338; 2 Street, Foundations of Legal Liability (1906) 81.

This has been referred to in the next preceding number of this magazine, in a discussion of the case of *DeCicco v. Schweizer* (1917, N. Y.) 117 N. E. 807. Arthur L. Corbin, *Does A Pre-existing Duty Defeat Consideration* (1917) 27 YALE LAW JOURNAL 362.

**Among such cases are the following: Traver v. (1661, K. B.)

I Sid. 57; Millward v. Littlewood (1850) 5 Exch. 775; Brooks v. Ball (1820, N. Y. Sup. Ct.) 18 Johns. 337; Wigan v. England, etc., Life Ass'n. (Ch. Div.)

[1909] I Ch. 291, 298 (semble; "ex post facto consideration"), Devecmon v. Shaw (1888) 69 Md. 199, 14 Atl. 464; Dunton v. Dunton (1892) 18 Vict. L. R. 114; Shadwell v. Shadwell (1860) 30 L. J. C. P. 145; Ricketts v. Scothorn (1898) 57 Neb. 51, 77 N. W. 365; State v. Lattaner (1916, Oh.) 113 N. E. 1045, L. R. A. 1917 B, 684 and note; Union Bank v. Sullivan (1915) 214 N. Y. 332, 108 N. E. 558; DeCicco v. Schweizer (1917, N. Y.) 117 N. E. 807; State Bank v. Kirk (1907) 216 Pa. 452, 65 Atl. 932; Skordal v. Stanton (1903) 89 Minn. 511, 95 N. W. 449. See also the very numerous cases relating to mutual subscriptions for either business or charitable purposes.

stated by Lord Chief Justice Eyre,9 and it continues to be repeated by courts and text-writers down to the most recent times.10

An accord is an executory agreement to discharge an existing claim in the future by a substituted performance. Usually, though not necessarily, such agreements are bilateral. According to this definition, the agreement in the principal case was an accord executory, and yet it is enforced as a valid contract. In spite of the many dicta to the contrary, the decision is perfectly sound in this respect.

Probably the original reason for not enforcing executory accords was that bilateral contracts were not yet enforceable, a reason that has been of no force for several centuries. In one case it was suggested that reasons of public policy were involved. "Interest reipublicae ut sit finis litium: accord executed is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any extent." An accord executory does not itself discharge and satisfy the prior claim, because it is not so agreed; nor is it "substituted" for the previous claim, for the same reason. There is no injury to the public, however, in enforcing the new agreement if there is sufficient consideration, and the present case has ample support on this point.¹³

It may be observed, in addition, that in the present case the defendant is bound by two co-existing duties. His previous duty to pay his debt as a whole has never been discharged, although it appears that an action thereon was once brought and was discontinued "without prejudice." His new duty, arising out of his new promise, is to pay in certain installments. If the installments are paid and the second duty discharged, this should also discharge and satisfy the first duty, for it is so agreed and the agreement is held to be a valid one. There were two sets of legally operative facts, one creating the original debt and the other creating the new duty to pay in installments. The legal relations resulting from these two sets of operative facts are

^{*}Lynn v. Bruce (1794), Eng. C. P.) 2 H. Bl. 317.

¹⁰ See Hunt, Accord and Satisfaction (1912) secs. 3, 7, 54; Martin, Accord and Satisfaction (1914) 1 Corpus Juris, sec. 23; Bell v. Pitman (1911) 143 Ky. 521, 136 S. W. 1026.

The following is an example of a unilateral accord: A owes B \$1000. A now promises B to convey Blackacre to X in future satisfaction of the debt, in return for B's present payment of \$50 cash and B's assent that the conveyance to X shall be a satisfaction. This agreement creates a duty in A and none in B, and is therefore unilateral. It further creates a power in A to extinguish in the future his debt of \$1000 by conveying Blackacre to X. This power is not revocable by B, for a consideration has been given for it (viz. A's promise to convey Blackacre), and its exercise requires no act whatever on the part of B.

¹² Lynn v. Bruce, supra, note 1.

 ¹⁸ Crowther v. Farrer (1850) 15 Q. B. 677; Nash v. Armstrong (1861) 10
 C. B. N. S. 259; Schweider v. Lang (1882) 29 Minn. 254, 13 N. W. 33; Hunt v. Brown (1888) 146 Mass. 253, 15 N. E. 587; Bryant v. Gale (1832) 5 Vt. 416.

also separate and independent, even though the defendant may have the power of discharging them all by making a single payment.

A. L. C.

# BOYCOTTS OF "NON-UNION MATERIALS"

In spite of the notion which still lingers in the minds of some judges and lawyers that courts do not "make" law but merely "find" it,1 the reshaping by judicial legislation of our law governing the relations of capital and labor goes steadily on. An excellent illustration of this is found in the case of Bossert v. Dhuy (1917, N. Y.) 117 N. E. 582. It was there held that the members of a carpenters' union have a privilege2 not only to refuse to work on materials manufactured in non-union shops, but also to send notices of their intention to do so to owners, architects, builders and contractors. More specifically in a suit brought by a manufacturer who employed non-union labor, the court refused to enjoin the officers and agents of the union from: (1) taking steps to compel the members to observe the rules of the union prohibiting them from working on materials made in the plaintiff's shops; (2) sending circulars to the plaintiff's prospective customers requesting them in making contracts to provide for the employment of union men and the use of union-made materials exclusively, with the suggestion that in this way labor troubles would be avoided; (3) inducing workmen in other trades to quit work on any building because non-union men were there employed in installing materials coming from non-union shops.3

A careful reading of the opinion (written by Chase, J.) reveals that even yet our judges do not realize fully that in many cases they are in fact legislating. The decision in the principal case purports to be based upon earlier cases, especially that of National Protective Association v. Cumming.⁴ In that case it was decided that the members of one union are, as respects members of a rival union, privileged to strike or threaten to strike in order to procure the discharge of the members of the rival union and secure a monopoly of the positions

¹ See the letter of a former Superior Court judge of San Francisco in the New Republic, January 12, 1918, p. 313: "Surely if there are no statutes or precedents in a matter the court must decide the law as the law was some time previously."

² Privilege is here used in a technical sense, to signify absence of duty to refrain from the acts in question. In this sense its correlative is "no-right"; its opposite, duty. See (1914) 23 YALE LAW JOURNAL, 16, 30.

^{*}The opinion emphasizes that "no malice, fraud, violence, coercion, intimidation, or defamation" was used in carrying out the plans of the union, and that the union did not single plaintiff out for the purpose of injuring him, or call upon the public generally to boycott the plaintiff's materials and cease dealing with the plaintiff.

^{4 (1902) 170} N. Y., 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648.

for themselves. Such a situation is of course somewhat like that in the principal case and the decision is therefore useful as an aid in reaching a conclusion. The learned justice who wrote the opinion in the instant case, however, seems to think that the decision in the later case may be reached from that in the earlier by the simple process of deductive reasoning. Such a proposition, it is submitted, cannot be successfully maintained. The real problem is whether the similarity of the two situations is so great that the same policy of freedom of action ought to be applied to both. The opinion throughout-whatever may be said of its conclusion-follows chiefly the merely logical, i. e., deductively logical, method of reaching results. It thus fails to recognize that where there is no precedent precisely in point, in the last analysis the court is legislating, and in doing so is legalizing the acts of the union because, on the whole, it believes that the interests of society are better served by permitting the union to carry on "the free struggle for life"5 in this way. Where the question of policy is discussed in the present opinion it is for the purpose rather of justifying old law rather than of determining what the new rule shall be. Moreover the emphasis is placed by the court too much upon the interests of the members of the union as such and not enough upon that of the community as a whole. Here, as in the other parts of the opinion, the court is merely following the fashion which still prevails in the majority of judicial opinions. Indeed, to find discussions which go to the root of the matter one has to resort largely to the opinions and writings of one judge.6 It is submitted that too great emphasis can-

⁵"I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly 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." Holmes, J., dissenting, in Vegelahn v. Guntner (1896) 167 Mass. 92, 107, 44 N. E. 1077, 1081.

[&]quot;Under Necessities of Industrial Livelihood, we come to some of his most distinctive opinions. [Vegelahn v. Guntner (1896) 167 Mass. 92, 44 N. E. 1077 (dissenting); May v. Wood (1898) 172 Mass. 11, 51 N. E. 191 (dissenting); Weston v. Barnicoat (1900) 175 Mass. 454, 56 N. E. 619; Plant v. Woods (1900) 176 Mass. 492, 57 N. E. 1011 (dissenting); Moran v. Dunphy (1901) 177 Mass. 485, 59 N. E. 125; Aikens v. Wisconsin (1904) 195 U. S. 194.] They deserve an essay or a treatise by themselves; for they invoke and expound a whole philosophy of the economic struggle, with careful shaping of particular distinctions for the several typical situations. No man can consider himself to have a respectable conviction on this subject unless he has faced and settled with the dissenting opinion in Vegelahn v. Guntner. The only opinions (that I know of) to be even mentioned with it in their breadth of thinking are those of Stevenson, V. C., in Booth v. Burgess (1906) 72 N. J. Eq. 181, 65 Atl. 266, and of Baker, J., in Iron Molders Union v. Allis-Chalmers Co. (1908, C. C. A. 6th) 166 Fed. 45." . Professor Wigmore, Justice Holmes and the Law of Torts, 29 HARV. L. Rev. 614.

not be placed upon the desirability of a clearer recognition by our courts of just what they are doing in these cases. If once they see clearly that "the ground of decision really comes down to a proposition of policy of rather a delicate nature," they will also soon come to recognize the truth of the following: "The danger is that such considerations should have their weight... as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a judge and a training which the practice of the law does not ensure, but also a freedom from prepossessions which is very hard to attain. It seems to me desirable that the work should be done with express recognition of its nature. The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society, knowingly seeking to determine its own destinies."

In his opinion the learned justice relied in part upon dicta of Mr. Justice Holmes in the case of Paine Lumber Co. v. Neal. 10 That was an action to enjoin the national carpenters' union from conspiring to have its members refuse to work on materials made by the plaintiffs in non-union shops in other states, and from enforcing by-laws intended to prevent the members of the union from working on these materials. These acts were claimed to be in restraint of interstate trade and so a violation of the Sherman Anti-Trust Act.11 It was held (Pitney, McKenna, Van Devanter and McReynolds, JJ., dissenting) that even if this were admitted, the plaintiffs could not succeed, as a private person cannot maintain a suit for an injunction under the section of that act upon which the plaintiffs relied. In delivering the opinion of the court, Mr. Justice Holmes, inter alia, said: "As this court is not the final authority concerning the laws of New York, we say but a word about them. We shall not believe that the ordinary action of a labor union can be made the ground of an injunction under those laws until we are so instructed by the New York Court of Appeals. National Protective Asso. v. Cumming, 170 N. Y. 315. Certainly the conduct complained of has no tendency to produce a monopoly of manufacture or building, since the more successful it is the more competitors are introduced into the trade."12 In his dissenting opinion Mr. Justice Pitney had no difficulty, on the other hand, in seeing that "The proofs render it clear that defendants are engaged in a boycotting combination in restraint of interstate com-

⁷ See the article by Mr. Justice John E. Young of the New Hampshire Supreme Court, Law as an Expression of Community Ideals and the Lawmaking Functions of Courts (1917) 27 YALE LAW JOURNAL I.

^{*}Mr. Justice Holmes, 8 Harv. L. Rev. 8.

Mr. Justice Holmes, 8 Harv. L. Rev. 9.

^{10 (1917) 244} U. S. 459, 37 Sup. Ct. 718.

¹¹Act of July 2, 1890, Ch. 642.

¹² 244 U. S. 471, 37 Sup. Ct. 720.

merce prohibited by and actionable under the Sherman Law."¹³ It is obvious that the two learned judges are reaching different results chiefly because they have different views as to what constitutes sound economic and social policy.

Especially worthy of note in the principal case is the scope of the privilege given the union. Not only may it call out its own members on strike if non-union men are employed or non-union materials used; it may also induce—by peaceful means, of course—workmen in other trades to leave a piece of work because non-union men are employed to install the materials coming from plaintiff's non-union shops. Whether one agrees with this or with the other results reached in the principal case will, naturally, depend upon one's views as to the desirability of allowing opportunity for the development of nationwide labor unions. The writer of the present comment is convinced that such a development is bound to take place, and that any attempt on the part of our courts to prevent its attainment by peaceful methods similar to those involved in the principal case will in the end prove ineffective. It is of course an open question whether without the aid of the legislature the courts will be able to solve the problem in a manner which, while giving ample opportunity for the development of collective bargaining, will properly protect the interests of all concerned.

W. W. C.

#### TESTAMENTARY CONTRACTS AND IRREVOCABLE WILLS

Confusion often results from the attempt of a property owner to purchase some valuable thing from another while retaining the benefit of the purchase price until his death, a case where the law seems to permit a person to have his cake and eat it too. Frequently the transaction takes the form of an agreement whereby the promisor, in return for some present consideration given by the promisee, agrees to give the latter by will all the property which he has at his death. Thus the promisor obtains the benefit of the contract while retaining that control over his property which is consistent with the power of testamentary disposition. The confusion results from the attempt to attach to the transaction the characteristics of both a will and a contract. These characteristics are, however, entirely distinct. A contract operates immediately to create a property interest in the promisee; while a will is revocable, or, more properly speaking, inoperative or ambulatory until the death of the testator, at which time it operates to create a property interest in the beneficiary. Or to give the more apposite terminology, the formation of a contract immediately vests in the promisee certain rights, privileges, powers and immunities; while a will does not have a like effect as regards the

¹⁸ 244 U. S. 473, 37 Sup. Ct. 720.

beneficiary until the testator's death intervenes.¹ And, as pointed out in Lawrence v. Prosser (1917, N. J. Ch.) 101 Atl. 1040, the distinction need not be obscured by the fact that the same instrument which is the will also contains the written evidence of the contract. The agreement is not made subject to change by reason of being embodied in a document which is so subject. Where the will has been changed, the agreement may be enforced by specific performance or by fastening a trust upon the property left by the deceased.²

Hence, as some recent interesting decisions illustrate, contracts to devise or bequeath are quite uniformly upheld by the courts. In Lawrence v. Prosser, an agreement to make a will amply providing for the promisee was upheld through the medium of a trust, where the parties by making mutual wills subsequent to the contract had indicated what the extent of the provision was to be, though the promisor just before her death altered her will to the promisee's detriment. The same relief was accorded in Steinberger v. Young (1917, Cal.) 165 Pac. 432, where the deceased agreed with the plaintiff and the plaintiff's father to make the plaintiff her sole heir in consideration of the custody and control of the plaintiff and the rendition by her of obedience and services as a daughter. In Quirk v. Bank of Commerce & Trust Co. (1917, C. C. A. 6th) 244 Fed. 682, recovery in quantum meruit was allowed where an agreement to devise in consideration of the promisee's care of the promisor until death was unenforcible because of the statute of frauds.3 So an agreement in a partnership contract whereby one partner was to give each of the others promissory notes to be renewed from year to year and to be paid after his death was upheld in Eisenlohr's Estate (1917, Pa.) 102 Atl. 117.4

¹ See Professor Hohfeld's analysis of fundamental legal conceptions (1913) 23 YALE LAW JOURNAL 16, and (1917) 26 ibid. 710. The Comment in (1917) 27 YALE LAW JOURNAL 263 on Hall v. Hall (1917) 91 Conn. 514, suggests a situation under which the statement of the text may not be strictly accurate. Suppose A makes a will in B's favor, but is later improperly induced by C to change it. If B can obtain damages from C, a point which as the Comment shows is by no means clear, then B does obtain immediately upon the execution of the will by A certain rights, etc. Those would be in the nature of "multital" or in rem rights, etc., while the promisee of a contract obtains not only the "multital" or in rem rights, etc., resulting from the rule that third persons must not interfere with the performance of contracts, but also valuable "paucital" or in personam rights, etc., against the promisee. For this terminology see Professor Hohfeld's article above mentioned in (1917) 26 YALE LAW JOURNAL 710.

² Allen v. Bromberg (1906) 147 Ala. 317, 41 So. 771; Johnson v. Hubbell (1855) 10 N. J. Eq. 332.

^{*} As to the effect of the statute of frauds see p. 568, infra.

Distinguishing Beaumont's Estate (1906) 214 Pa. 445, 63 Atl. 1023, where a deed, in effect a mere power of attorney, containing a power of revocation and conveying no beneficial interest during the grantor's lifetime was held to be revoked by a will.

The Court in Eisenlohr's Estate held that the mere fact that a writing was to become effective only after the death of a party was not sufficient to give it a testamentary character. It would seem immaterial, however, whether the contract had a testamentary character or not. Statutes governing the execution of wills do not apply to contracts, which operate to create present interests, and there is not the same need for formality in order to prevent imposition and fraud in a transaction participated in by two or more persons and involving an immediate change of position as there is in the solitary unilateral act of making a will, though both may look to the disposition of property after death. The immateriality of an intent to evade the wills acts where an otherwise binding contract is made was suggested some years ago by Mr. Justice Holmes in a decision upholding an agreement, without consideration but under seal, providing that the promisor's executors should make a payment of money six months after her death.5

In marked contrast to these cases, and to Eisenlohr's Estate in particular, is the utterly unjust and seemingly unjustifiable decision in Ferrara v. Russo (1917, R. I.) 102 Atl. 86, where a contract between partners that in the event of the death of one the other should have the business and should pay the heirs of the deceased a stipulated sum was held testamentary in character and invalid since not executed as a will.⁶

Sargent v. Corey (1917, Cal. App.) 166 Pac. 1021, presents another angle of the question. Here the Court refused to declare a trust in favor of the plaintiffs upon an agreement looking to their adoption and providing that they should have all the promisor's property at his death, where subsequent to the making of the contract the promisor had married and left surviving him a wife and child to whom he willed his property, neither having knowledge of the contract until after his death. The Court based its decision upon the ground that it would be inequitable to enforce the contract against the widow and child. There may be some analogy to the statutes concerning a widow's property in her husband's estate and the statutes holding a will revoked by a subsequent marriage or birth of a child where the contingency is not provided for in the will. Yet the widow, under modern statutes,

⁵Krell v. Codman (1891) 154 Mass. 454, 28 N. E. 578. See also Bristol v. Warner (1848) 19 Conn. 7.

The cases cited by the Court, Habergham v. Vincent (1793) 2 Ves. Jr. 204, 231; Turner v. Scott (1866) 51 Pa. 126; Frederick's Appeal (1866) 52 Pa. 338; Frew v. Clarke (1875) 80 Pa. 170, 178; and Cunningham v. Davis (1884) 62 Miss. 366, are all cases where the transactions involved were entirely revocable until death. As contrary to Ferrara v. Russo, compare Crofut v. Layton (1896) 68 Conn. 91, 35 Atl. 783, holding valid an agreement between father and son, members of a partnership formed into a corporation, whereby each agreed to make a will leaving his shares of stock in the corporation to the other in order that the survivor should receive the other's stock.

obtains an interest only in the property which her husband owns at death and it is only the ambulatory will which is revoked by marriage or birth of a child. It would seem that both widow and child must be considered more or less as volunteers and as not having claims superior to those acquired previously under a contract founded upon a valuable consideration. The decision would, therefore, seem doubtful unless, indeed, the court would go as far as did a New York court and say that such a contract was against public policy and void.⁷

The Court refused to allow an amendment to the complaint, showing that the promisor and a previous wife had made a joint will, not revoked before the latter's death, in the plaintiff's favor, without an allegation that the will was the result of a contract and was intended to be irrevocable.⁸ This seems clearly correct for joint or mutual wills do not differ in legal effect from other forms of wills, although additional results may flow from the existence of a contract between the makers that neither should revoke his will. And this leads us to our final problem, viz., whether a will itself can be made irrevocable by contract.

This question is answered in the affirmative in the curious case of Walker v. Yarbrough (1917, Ala.) 76 So. 390. Here the probate court had probated an instrument which was in form a deed, reciting a present consideration and conveying all the property the grantor should own at her death to her husband, with the proviso that "this is to take effect only in case of my death prior to that of my husband." In accordance with the state practice permitting those interested who have not contested a will in the probate court to do so by bill in chancery, the beneficiaries under a will later in date filed their bill to set aside the probate of the earlier instrument, a copy of which they incorporated in their complaint. The majority of the court sustained the husband's demurrer to the bill on the ground that the earlier will being based on a valuable consideration was irrevocable. On rehearing they gave as an additional reason for the decision the fact that, as the probate of the later will would simply make necessary the enforcement of a trust of the property in the husband's favor either in a later action or by cross bill in this action, it would be a vain thing-"a display of legal gymnastics"—for a court of equity to act at all.9

⁷ Gall v. Gall (1892, N. Y. Sup. Ct.) 64 Hun. 600, 19 N. Y. Supp. 332. The decision in the principal case followed Owens v. McNally (1896) 113 Cal. 444, 45 Pac. 710, where the court refused to enforce a contract whereby A was to care for B and have all B's property at the latter's death, B having subsequently married. This decision was referred to not unfavorably, though not followed, in Dillon v. Gray (1912) 87 Kan. 129, 123 Pac. 878. There is little direct authority. See Comment (1917) 16 MICH. L. Rev. 55.

⁸ Citing Learned's Estate (1909) 156 Cal. 309, 104 Pac. 315.

^{*}See Comment (1917) 16 MICH. L. REV. 59. In Holcomb v. Gillet (1795, Conn.) 2 Root 448, where a testator covenanted with A not to alter his will in

A well known textwriter takes a somewhat similar position when he says that there seems to be no reason why a party may not agree not to make a will.¹⁰ He regards the agreement as affecting a destruction of testamentary power, making a subsequent will a nullity, or as an agreement to stand seised of the property to the promisee's use, or to hold it to his use, possession to commence at the promisor's death.¹¹

In view of the promisor's power to dispose of his property during his lifetime, the promisee in such a transaction can have no "multital" or in rem relations in the property itself until after the promisor's death. When we say that a will is irrevocable all that we mean is that the fact of the promisor's death shall mark the transforming of the "paucital" or in personam relations against the promisor into the multital relations in the property itself rather than that this transformation should be marked by the specific performance of the contract or the enforcement of a trust under the direction of a court of equity, as is the case where there is a contract to devise or bequeath.12 And since the validity of a will must be tested before some court, what we are doing as a practical matter when we enforce a contract as an irrevocable will rather than as a contract to devise or bequeath is to throw the determination of the existence of the contract into the probate court. If we hold that a will may be made irrevocable by contract, then the court having jurisdiction of the probating of the will must decide whether or not such a contract exists in order to determine whether a later will should not be probated; while if we hold the will to be revocable but enforce the contract upon the property, then we leave it to a court of equity to ascertain the existence of the contract and to enable the promisee to make his relations in the property multital.18 Which course is to be taken is a question of policy. It

A's favor, and later because of the "false suggestions" of B did alter his will in B's favor, B was ordered by a court of equity to release the property to A.

¹⁰ Gardner, Wills (2d ed.) 70.

¹¹ Sed quaere. Would a subsequent will simply appointing an executor be a nullity? See note 15 infra, and compare Sumner v. Crane (1892) 155 Mass. 483, 29 N. E. 1151, holding that it is no objection to the probate of a will that the testator has made a valid contract to dispose of his property in a manner other than that provided in the will, or that the will offered for probate revokes a will drawn in accordance with the terms of the contract. The objection to the second suggestion is that the property upon which the agreement is to operate is entirely indefinite until the promisor's death.

¹² For definition of the terminology used see Professor Hohfeld, cit. note 1, supra.

is If the instrument is irrevocable we ought not to apply to it the term "will," a term definitely appropriated to an important instrument with special legal characteristics, one of which is that it should not be irrevocable during the lifetime of the testator. Whether this is a conveyance, a power of appointment, or a contract enforced by refusing probate to a later instrument, it should not be called a will. It might even be doubted whether it should properly be pro-

would seem that the only argument for testing the matter in the probate court is that suggested in Walker v. Yarbrough, namely, the avoidance of litigation in a circle. On the other hand there are certain objections to such short cuts. The probate court ordinarily does not have the machinery to test such questions and the matter eventually comes to the higher court by a somewhat longer route.14 Then the later will may operate in part and thus necessitate the probating of both wills by the probate court with a resulting confusion which may be easily imagined.¹⁵ And it may be doubted if there is any real saving of litigation by placing the question in the hands of the probate court, for the real contest, which the situation is almost sure to cause, will occur in that court and that court only where the existence of the contract is to be determined. Hence the attitude of the minority judge in Walker v. Yarbrough that the contract should be left to a court of equity to enforce by appropriate action seems on the whole preferable.

This tendency of the majority in Walker v. Yarbrough to look for a short cut may have led them into a serious error, for they do not question the existence of the contract, though there is no evidence that the instrument had ever been delivered. In effect they hold that a contract is conclusively proven by an undelivered paper which recites the giving of a consideration, though the giving of the consideration may actually have been planned to be concurrent with the delivery of the paper as is usually the case where a deed is delivered. Had it been necessary to bring an action upon the contract, the plaintiff in such an action would at least have had to prove his contract. C. E. C.

# JURISDICTION OVER NON-RESIDENT CERTIFICATE HOLDERS OF DOMESTIC INSURANCE COMPANY

In the recent case of Hartford Life Ins. Co. v. Barber (1917) 38 Sup. Ct. 54, the United States Supreme Court reversed a decision of the Supreme Court of Missouri¹ on the constitutional ground that the Missouri tribunal did not accord full faith and credit to a Connecticut judgment.² A bare skeleton of the facts involved will serve our purpose for review. One Dresser, together with thirty others, holders of

bated, but, as the text indicates, if it is not probated, it is then practically assimilated to a contract to bequeath or devise.

¹⁴ Compare the Connecticut rule that courts of probate cannot try title. Wilson v. Warner (1911) 84 Conn. 560, 80 Atl. 718.

¹⁵ Note Lawrence v. Prosser, supra, and Quick v. Bank of Commerce & Trust Co., supra, in each of which the contract did not call for the entire estate. That a will is valid and entitled to probate even if it only appoints an executor see Prater v. Whittler (1881) 16 S. C. 40, 46.

¹ (1916) 269 Mo. 21, 187 S. W. 867.

² U. S. Const. Art. IV, Sec. 1.

certificates of insurance issued by the Hartford Life Insurance Company under an assessment plan,8 had sued the company in Connecticut in behalf of themselves and all other certificate holders, charging various frauds and breaches of agreement.4 The final judgment in that cause appears to have held, among other things, that the company might accumulate \$300,000 in the "safety fund" received by assessment (though any surplus over that amount must be applied proportionally to the credit of the various certificate holders to reduce their indebtedness pro tanto on the assessment next following), and further, that failure by a certificate holder to pay an assessment within the prescribed time would forfeit his insurance. Before the entry of this Connecticut judgment one Barber in Missouri had failed to pay his assessment then due. Apparently, he was not personally a party to the Connecticut suit. When, on his death a few months later, Mrs. Barber sued the insurance company in Missouri, forfeiture was pleaded as a defense and the Connecticut judgment offered in evidence. The trial court excluded this record entirely; the Supreme Court of Missouri, however, conceded that it should have been received,5 and examined the merits of the case as if it had been received, but nevertheless affirmed the trial court on reasoning somewhat as follows: The company is entitled by the Connecticut judgment to have \$300,000 in its "safety fund"; an assessment which raises the fund above that sum in anticipation of future losses is invalid;6 failure to pay an invalid assessment does not work a forfeiture. This reasoning was regarded by the Supreme Court of the United States as a misconstruction of the Connecticut judgment, which seems to have permitted a reasonable accumulation over \$300,000 in the "safety fund." Such a misconstruction might amount to a denial of full faith and credit under the Constitution.7 But as the courts of

⁸That is, calls were regulated proportionally to death losses and were not collected in fixed amounts as premiums.

^{*} See Dresser v. Hartford Life Ins. Co. (1908) 80 Conn. 681, 70 Atl. 39.

⁸Under the rule of *Hartford Life Ins. Co. v. Ibs* (1915) 237 U. S. 662, 35 Sup. Ct. 692, which reversed the Supreme Court of Minnesota for failing to receive the Dresser judgment in evidence.

⁶ For the general rule that an insurance company may not assess in anticipation of losses, see Ann. Cas. 1914 C, 802 note.

⁷Full faith and credit may seemingly be denied to a valid judgment of the courts in a sister state in several ways.

⁽I) Denying the jurisdiction of the court whose judgment is in question.

⁽²⁾ Refusing to enforce the judgment on the ground that it was erroneous in fact or in law—an error too palpable to be often committed.

⁽³⁾ Conceding the jurisdiction and validity and misconstruing the judgment so as to make it ineffective or inapplicable.

The Minnesota (*lbs* case) decision and that of the Circuit Court of Missouri appear to be examples of unconstitutionality under the first of the above classes; that of the Supreme Court of Missouri an example of class three. No cases have been found exemplifying class two.

Missouri would not be required to give full faith and credit to a Connecticut judgment affecting the rights of a Missouri citizen unless the Connecticut court had jurisdiction to bind that citizen,⁸ our inquiry is naturally directed to the foundation and sufficiency of the Connecticut judgment. The Supreme Court of the United States disposed of this question of jurisdiction by reference to the *Ibs* case,⁹ but the matter is so fundamental as to demand attention in any comment on the principal case.

Before determining, however, the question of what court has jurisdiction, we may note the rule as to what law governs transactions between citizens of different states. If the transaction be a contract it is generally governed by the law of the state where the contract is made, which in the principal case appears to have been Missouri, the insurance appearing to have been effected by an agent at St. Louis.

If, however, the relations be those, or legally equivalent to those of stockholder and corporation, ¹¹ the shareholder's rights and liabilities as a member of the corporate body are subject to the rule of the corporate domicile, ¹² which here was Connecticut. ¹³

But, as pointed out by Amphlett, B., in a British case involving the rights of a British stockholder in a French company, ¹⁴ a determination that the law of the corporate domicile is to govern does not necessa-

^{*} D'Arcy v. Ketchum (1850, U. S.) 11 How. 165.

[°] See note 5, supra.

¹⁰ Millar v. Hilton (1915) 189 Mich. 635, 155 N. W. 574; Scudder v. Union Nat. Bk. (1875) 91 U. S. 406; Lloyd v. Guibert (1865) L. R. 1 Q. B. 115, 122, Willes, J. Subject to variation, however, if the intention of the parties appears to be otherwise or if a place of performance different from that of making the contract is fixed by the terms of the agreement. Richardson v. Rowland (1873) 40 Conn. 565, 572; Montana Coal & Coke Co. v. Cincinnati Coal & Coke Co. (1904) 69 Oh. St. 351, 69 N. E. 613.

¹¹ Compare the case of fraternal benefit associations. Supreme Council of the Royal Arcanum v. Green (1915) 237 U. S. 531, 35 Sup. Ct. 724.

¹² Lewisohn v. Stoddard (1906) 78 Conn. 575, 63 Atl. 621, a suit against Connecticut stockholders in a Missouri corporation. It is quite frequently stated that the purchase of stock evidences an intent that the rule of the corporate domicile apply, or that a stockholder is presumed to consent by the act of purchasing shares. Like most presumptions this is a fiction and especially patent in cases where the stockholder pleads ignorance of that very law and a desire not to be bound by it. See Payson v. Withers (1873, U. S. C. C. D. Ind.) 5 Biss. 269, 5 Chi. Leg. News 445; also Professor W. N. Hohfeld, The Individual Liability of Stockholders and the Conflict of Laws, 10 Columbia L. Rev. at 529-530 and the Pennsylvania case there cited. For a case, which is often criticised, applying this stockholder rule to bondholders as well, see Canada So. Ry. Co. v. Gebhard (1883) 109 U. S. 527, 537, 3 Sup. Ct. 363, 370.

¹³ Lastly, if the relations between Barber and the Insurance Co. were those of beneficiary and trustee, the rule is somewhat complicated as to what law governs the beneficiary's rights. See Prof. Joseph H. Beale, Jr., Equitable Interests in Foreign Property, 20 HARV. L. REV. 382, 393 ff.

¹⁴ Copin v. Adamson (1874) L. R. 9 Exch. 345, 354.

rily mean that the courts of the corporate domicile must try the case; they may lack jurisdiction. And it is equally true that the Connecticut court might have had jurisdiction, even though the law of some other state was to be applied. To support the jurisdiction of the Connecticut court several lines of reasoning are current. First, if the relations were those of stockholder and corporation, by purchasing stock the holder might be presumed to consent to the jurisdiction.¹⁵ Second, assuming the same or similar relations, convenience may require that the rights and liabilities of stockholders be determined at one place and time, the logical place being the forum of the place of incorporation.¹⁶ Third, on the analogy of garnishment cases, wherein jurisdiction of the garnishee-debtor is the essential feature,17 the rights of a stockholder may be extinguished by a court which has jurisdiction of the company, even though under the rule of Pennoyer v. Neff18 no valid obligation could be created or imposed against him because there was no personal service within the jurisdiction.19 It seems that this third line of reasoning would justify the Connecticut court in adjudicating a certificate holder's rights whether his status was regarded as similar to that of a stockholder or that of a contingent creditor or that of an equitable part owner of a trust fund.

Another point was raised in the case and disposed of on the authority of Supreme Council of the Royal Arcanum v. Green,²⁰ namely that a charter granted by Connecticut, being a public act of that state, must be accorded full faith and credit elsewhere. For a discussion of this point as presented in the opinion of Mr. Chief Justice White in the Royal Arcanum case, see Comment, Conflict of Laws and Full Faith and Credit (1916) 25 YALE LAW JOURNAL 324.

# JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS

Two recent cases have sustained orders of the Postmaster General excluding from the mail matter adjudged by him to be non-mailable under the terms of the Espionage Act of June 15, 1917. Masses

¹⁵ This presumption appears to be subject to the same criticism as that referred to in note 12.

¹⁸ Hartford Life Ins. Co. v. Ibs, supra. See also 27 YALE LAW JOURNAL 276.

¹⁷ See Comment, Jurisdiction to extinguish Claims of Non-Resident Defendant
(1917) 27 YALE LAW JOURNAL 252.

¹⁸ (1877) 95 U. S. 714.

¹⁹ See, however, a line of cases which uphold a Minnesota statute imposing personal liability on an individual not served within the jurisdiction because of his status as a stockholder in a Minnesota corporation, subject, however, to the defense that he is not a stockholder. Selig v. Hamilton (1913) 234 U. S. 652, 658; 34 Sup. Ct. 926, 928, and cases cited therein.

²⁰ See note II, supra.

¹ Title I, Sec. 3, forbids (a) the wilful making or conveying of false reports or false statements with intent to interfere with the operation or success of the

Publishing Co. v. Patten (1917, C. C. A. 2d) 246 Fed. 24; Jeffersonian Publishing Co. v. West (1917, D. C. Ga.) 245 Fed. 585.² These cases have been discussed in the newspapers and popular magazines as involving the question of the freedom of the press as guaranteed by the First Amendment to the federal Constitution.⁸ Inasmuch as the portions of the statute involved in these cases merely prescribe what matter is to be carried by the postal department and do not attempt to prevent the circulation in other ways of matter declared to be non-mailable, it is clear that questions relating to freedom of the press are not involved.⁴ It has been repeatedly decided that in establishing a postal system "Congress may restrict its use to letters, and deny it to periodicals; it may include periodicals, and exclude books; it may admit books, and refuse to admit merchandise. . . . It may also refuse to include in its mails such printed matter as may seem objectionable to it upon the ground of public policy."⁵

Admitting, therefore, the constitutionality of these sections of the Espionage Act, the cases under consideration raise two questions: (1) the construction of the Act and (2) the extent of judicial review of its application by the Postmaster General. The larger part of the opinion in each of the cases deals with the first of these, but in each the decision finally seems to be based upon the answer to the second.

The general problem is, of course, that of the effect to be given to administrative determinations of fact and of law. The solution of this problem involves answering these questions: (1) Does the language of the statute, properly interpreted, purport to make the determination of the administrative officer final and conclusive? (2) If so, may such a power constitutionally be vested in an administrative official? (3) If the statute is not clear upon the point, what weight will

military or naval forces of the United States, (b) the wilful causing or attempt to cause insubordination, disloyalty, mutiny, or refusal of service, and (c) the wilful obstruction of the recruiting or enlistment service. Title XII, Sec. I, declares non-mailable any publication, matter, or thing in violation of any provision of the Act.

² See also *Milwaukee Social Democrat Pub. Co. v. Postmaster General*, decided by the Supreme Court of the District of Columbia and mentioned in N. Y. Times, Jan. 16, 1918.

³ "Congress shall make no law . . . . abridging the freedom of the press."

⁴ The Trading with the Enemy Act of October 6, 1917, sec. 19, prohibits the distribution by any agency of any matter declared non-mailable by the Espionage Act. The enforcement of this provision will of course squarely raise questions of the freedom of the press.

⁸ Brown, J., in *Public Clearing House v. Coyne* (1904) 194 U. S. 497, 507, 24 Sup. Ct. 789, 793. It was suggested in the case just cited that if Congress should attempt by statute to extend to one the benefits of postal service and to deny it to another person in the same class, the act would be unconstitutional. Other cases establishing the power of Congress to determine what shall be admitted to the mails are: *Ex parte Jackson* (1877) 96 U. S. 727; *In re Rapier* (1892) 143 U. S. 110, 12 Sup. Ct. 374.

be given by the courts to the administrative officer's determination? This determination may involve deciding either a question of law or one of fact, perhaps of both. In the case of questions of fact it has been held that it is entirely constitutional for Congress to vest in an administrative officer the power to settle finally the facts to which legal rights attach, provided that "due process of law" is provided for in the proceedings before the administrative officer. Where the question involved is purely one of law, it seems that it would not be constitutional to place the power of final determination in the hands of an administrative official.

In the case under consideration Congress has not expressly attempted to make the determination of the Postmaster General final. This being so, we are brought to a consideration of the third question, viz., the extent of judicial review where the statute conferring power on the administrative officials is not clear as to the effects to be given to their determinations. Here it is difficult to lay down a general rule applicable to all branches of the government. Much depends upon the extent of the discretion vested in the department concerned. In the case of the postal department it has been held in a series of cases that the decision of the Postmaster General excluding mail of persons whose business is deemed to be fraudulent is final; but here the statute is interpreted as denying any judicial review on the facts.8 The courts have never succeeded in working out any satisfactory statement of the precise principles upon which they will act. A typical statement is that of Mr. Justice Brown, speaking for the United States Supreme Court in cases involving a determination by the Postmaster General whether certain publications were entitled to secondclass rates. "Where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing. . . . Where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive."9

^{*}United States v. Ju Toy (1905) 198 U. S. 253, 25 Sup. Ct. 644; Chin Yow v. United States (1908) 208 U. S. 8, 28 Sup. Ct. 201.

⁷ For a general discussion of the subject, especially from the point of view of what is "due process," see Thomas Reed Powell, *The Conclusiveness of Administrative Determinations in the Federal Government*, I Am. Pol. Sci. Rev. 583.

⁸ Public Clearing House v. Coyne (1904) 194 U. S. 497, 24 Sup. Ct. 789. But Cf. American School of Magnetic Healing v. McAnnulty (1902) 187 U. S. 94, 23 Sup. Ct. 33.

Bates and Guild Co. v. Payne (1904) 194 U. S. 106, 24 Sup. Ct. 595, 597.

Frequently the question determined by the administrative officer is that of the meaning of certain ambiguous terms used in a statute. There it has been held in many cases that an interpretation uniformly followed by a governmental department for many years will not be reversed by the courts.¹⁰

In the cases under consideration the ultimate questions involved seem to have been two in number: (1) the meaning of the terms used in the various sections of the Espionage Act; (2) whether the publications of the plaintiff fall within the classes described by those terms. It was clear that Congress intended both questions to be settled in the first instance by the Postmaster General. Apparently Mr. Justice Brown would call this "a mixed question of law and fact" and apply the rule stated above. The opinion of the Circuit Court of Appeals in the case of the Masses Publishing Co. seems to go on much the same ground, for after stating that the court agrees with the Postmaster General's findings, Circuit Judge Rogers concludes as follows: "Even though we were in doubt... the case would be governed by the principle that the head of a department of the government in a doubtful case will not be over-ruled by the courts in a matter which involves his judgment and discretion and which is within his jurisdiction." The opinion of the district judge in the Jeffersonian case does not deal with the point specifically.11 In both cases the court agreed, at least in part, with the findings of the Postmaster General, and the decisions are in part based upon that agreement.

#### STOCK DIVIDENDS AND THE INCOME TAX

A recent decision of the Supreme Court, relating to the taxation of stock dividends under the Income Tax Law of 1913, has aroused much speculation in regard to its effect on the taxation of such dividends under the present law. The decision was that a stock dividend representing earnings accumulated before January 1, 1913, was not income of the stockholder who received it, within the meaning of the 1913 Act. Towne v. Eisner (1918) 38 Sup. Ct. 158. It will be noted that the only question actually decided was a question of construction of the law of 1913, which contained no express provision either in respect to stock dividends, or in respect to dividends received

¹⁰ See the cases cited in the dissenting opinion in Bates & Guild Co. v. Payne, supra. Where the language of the statute is plain, the interpretation of the administrative department "must yield to the positive language of the statute." Houghton v. Payne (1904) 194 U. S. 88, 24 Sup. Ct. 590. It is assumed that in making the interpretation the officer acted within his jurisdiction.

¹¹ The court contented itself with some vague remarks about the discretion of the chancellor and the maxim that one must come into equity with clean hands. The latter cannot of course apply unless we first find the facts in accordance with the determination of the Postmaster General.

by individual taxpayers, whether in cash or stock, out of corporate earnings accumulated before any given date. The decision itself is therefore inapplicable to the present law, which expressly excludes from taxable income dividends received by the individual tax-payer from earnings which accrued to the corporation before March 1, 1913, and on the other hand expressly includes stock dividends representing earnings which accrued after that date. The case is therefore chiefly interesting for the inferences to be drawn in regard to the constitutionality, under the Sixteenth Amendment, of the provision in the present law for the taxation of stock dividends.

It is to be noted, in the first place, that the decision apparently was not affected by the time when the earnings accrued to the corporation, being rested on grounds equally applicable to all stock dividends. On the other hand, the opinion, which was written by Mr. Justice Holmes in his familiar epigrammatic style, expressly points out that "it is not necessarily true that income means the same thing in the Constitution and the Act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." In other words, in construing either constitutional or legislative enactment, the court must endeavor to ascertain the sense in which the word "income" was intended to be used in the enactment in question, in the light of the internal evidence, surrounding circumstances, and other permissible aids to construction which are available in each inquiry; and since these are not exactly the same for both, they need not inevitably lead to the same conclusion. Thus for example, by express definition, "income" in the present law includes stock dividends; but it does not necessarily follow that they are income within the meaning of the Amendment.

It is significant, therefore, that the ground on which such dividends were held not to be income within the meaning of the Act of 1913 involved no reference to any internal evidence in that act, or any other considerations peculiar to the act, but would seem to be equally applicable to the construction of the Sixteenth Amendment, and that the observation above quoted from the opinion was not made in such a connection as to involve any intimation of a contrary opinion. The Government had moved to dismiss for want of jurisdiction, on the

¹The ground on which the decision was rested is briefly stated in the following passage quoted in the opinion from Gibbons v. Mahon (1890) 136 U. S. 549, 559, 560: "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased . . . . The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones."

ground that no question of constitutionality was involved. The argument was that if a stock dividend was not income under the Amendment, it was not income under the statute, and therefore the error, if any, of the court below, which had sustained the tax, was an error in construing the statute and not in applying the Constitution. To this the court made two answers, the first being, in effect, that the framers of the statute, misconstruing the Amendment, might have used the word income in a broader sense than the true construction of the Amendment would justify; and the second, that the construction whose constitutionality the plaintiff was entitled to submit to the judgment of the court was not merely the theoretically sound construction of the act, but also the practical construction by virtue of which alone the Government had taken and kept his money.2 While it would follow from what was said of the meaning of words, that "income" in the Amendment might be given a broader meaning than in the statute construed by the court, it is evident from the context that the court was not hinting at such a conclusion, but had in fact exactly the opposite possibility in mind.

Only one consideration suggests itself which might lead to a different result when the question arises under the present law. That, however, is an important one. Congress having expressly construed the Amendment as permitting the taxation of stock dividends, the court must indulge every reasonable presumption in favor of the legislative construction.³ The inquiry will be, not whether that construction is the one which, as an original question, the court itself would have adopted, but whether it is so unreasonable as to justify the court in setting it aside. Obviously, the present decision will not be conclusive on that question. The Treasury Department is therefore justified in its ruling that the present law must be enforced as it stands until otherwise decided by a competent court.

Nor is it clear that the legislative construction adopted in the present law is wholly unreasonable. In a sense the net earnings of a corporation, as soon as received by the corporation, represent a current increase in the wealth of the stockholders, which, following the modern tendency to look through the corporate shadow to the substance, may be said to be income accrued to the stockholders in a business conducted by them,—the only difference from partnership earnings, for example, being in the machinery through which the business is operated. There still remains the practical question for Congress to

² The opinion went on to state that, the case being rightly before the court, the question of construction was open, and the decision went off on that question.

² For a valuable discussion of the meaning and importance of this familiar rule, see James B. Thayer, *American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 139 *et seq*.

decide, at what stage in the transaction the taxing power shall be applied. In the ordinary case the simplest method, from the standpoint of administration, is obviously to select the moment when the earnings are distributed in cash to the stockholders. This avoids complicated and difficult questions of valuation and accounting. But there are other ways in which the present law may reach such earnings. If the stockholder sells his shares at a time when their market value is increased by undistributed earnings, and therefore receives more than he paid for the shares, he is taxed on the excess, which in the case supposed represents the undistributed earnings. And if it appears that the corporation was formed or fraudulently availed of to avoid income taxation by permitting profits to accumulate without distribution, the profits so accumulated are treated without further formality as income of the stockholders. Consistently with these provisions, the payment of a stock dividend may be regarded simply as furnishing a convenient method of measuring accumulated profits, and as making the time of such payment a convenient time to assess the tax. The validity of several of the above provisions is yet to be passed upon by the highest court.4 The present intention is merely to point out a theory on which it is possible that they may be upheld.5

⁴ See, however, an interesting decision on similar questions arising under the Massachusetts Income Tax Law, including the taxation of stock dividends, with collection of authorities, in *Trefry v. Putnam* (1917) 116 N. E. 904. On the question of profits on the sale of securities, see *Cleveland*, C. C. & St. L. Ry. Co. v. United States (1917, C. C. A. 6th) 242 Fed. 18, and compare Gauley Mt. Coal Co. v. Hays (1915, C. C. A. 4th) 230 Fed. 110.

⁵ The injustice of the present law would seem to be found, not so much in any one of these provisions taken by itself, as in the possibilities of double taxation by their combined operation. Some of these possibilities have been met by department rulings, but no ruling has been found to cover the case where stock is sold at an advance because of accumulated earnings, and such earnings are later distributed in either cash or stock dividends to the buyer. In such a case the seller is taxed on the increased value realized by the sale, and the buyer, although this value was added to the price he paid, is taxed on it again when received in dividends.

#### RECENT CASE NOTES

ADMINISTRATIVE LAW—JUDICIAL REVIEW OF ORDER OF POSTMASTER GENERAL.—Acting under the Espionage Act of June 15, 1917, the Postmaster General ordered the plaintiff's publication excluded from the mails. From an interlocutory order granting a temporary injunction commanding the defendant, postmaster at New York, to transmit the plaintiff's publication, an appeal was taken. Held, that the order granting the preliminary injunction was erroneous. Masses Publishing Co. v. Patten (1917, C. C. A. 2nd) 246 Fed. 24.

The complainant filed its bill in equity to enjoin the postmaster from acting under the Espionage Act of June 15, 1917, to withdraw its mailing privilege. Held, that the complainant was not entitled to a preliminary injunction. Jeffersonian Publishing Co. v. West (1917, D. C. Ga.) 245 Fed. 585.

See Comments, p. 550.

AGENCY—Void Power of Attorney—Lease Executed thereunder not Subject to Reformation.—A statute provided that powers of attorney to make leases for a term of more than three years must be properly acknowledged and recorded. The plaintiff in error appointed an agent to have general supervision of the premises in question, but such authority was not acknowledged. Subsequently, the agent executed a lease to the defendant in error for a period of five years, the lease reading that the lessee would surrender possession on one year's notice. On refusal to quit after proper notice, action to oust was commenced, whereupon the defendant in error instituted proceedings to have the lease reformed, claiming that a clause had been omitted which would have made the lease terminable only after the happening of a specified event. Held, that since the agent's power of attorney was not acknowledged, the lease was void and could not be reformed. Lithograph Bldg. Co. v. Watt (1917, Oh.) 117 N. E. 25.

A power of attorney ordinarily need not be acknowledged. Moore v. Pendleton (1861) 16 Ind. 481; Tyrrell v. O'Connor (1897, Ct. Err.) 56 N. J. Eq. 448, 41 Atl. 674. But, if required by statute, acknowledgment is a condition precedent to the validity of the agent's acts. Oatman v. Fowler (1871) 43 Vt. 462. See also I Mechem, Agency, 166; I R. C. L. 258. In such cases the factual element of authority is present, for the principal has given the agent what he believed to be sufficient authority; but, because of the effect of the statute, the expected legal relations are not created, and the intended agent does not acquire the "legal power" to convey. Where there is no "power" because of non-compliance with the statute, equity will not take cognizance of the agent's acts with a view to reformation; for there must first be a valid agreement. Gebb v. Rose (1874) 40 Md. 387; Hedges v. Dixon County (1893) 150 U. S. 182, 192, 14 Sup. Ct. 71. See also 34 Cyc. 915. Consequently, since the invalidity could not be remedied, the addition of the omitted words would be vain. An instrument inoperative as such because of the agent's lack of power may be given the effect of a contract to make such an instrument, if such contract would have been within the agent's powers. Heinlen v. Martin (1879) 53 Cal. 321; Lobdell v. Mason (1894) 71 Miss. 937, 15 So. 44; see also 1 Mechem, Agency, 162. In the principal case, power to make any such contract was lacking.

ALIEN ENEMIES—RIGHT TO SUE—FRENCH CORPORATION WITH GERMAN STOCKHOLDERS SUING IN FRANCE.—A mining company incorporated and managed in

France, operating in the Barbary States, Africa, was managed by a board of four directors, of whom only one was German. Eight-tenths of the stock, however, was owned by German subjects resident in Germany. The company was engaged in selling the products of its mines in Germany. The company brought an action in France. Held, that the large stock ownership by Germans was evidence of German control, and precluded the maintenance of the action. Mines de Barbary v. Reymond (Court of Paris, July 7, 1916) reported in (1917) 44 Cluner, 226.

In this case, the French courts had to deal with the same problem which was presented to the English Court of Appeal in the case of Daimler v. Continental Tyre Co. (C. A.) [1915] I K. B. 893, and to a New York court in Fritz Schultz Jr. Co. v. Raimes (1917, N. Y. Sup. Ct.) 166 N. Y. Supp. 567. See COMMENT in (1917) 27 YALE LAW JOURNAL, 108. It was stated as a dictum in the English case that to determine enemy character the court might go behind the English incorporation and ascertain the actual enemy control of the corporation, in spite of the rule of English law that the nationality of corporations is governed by the place of incorporation. According to a uniform line of decisions in France, the nationality of corporations is governed by the law of the place of its center of administration (siège social). Nevertheless, superimposing upon this rule of "private law" (sic) a new rule of public law, a legislative decree of Sept. 27, 1914, had provided that the actual control of corporations by alien enemies was sufficient to permit the sequestration of their property. In the English case the control of the corporation's business was. deemed to be in the Board of Directors, toward which the court looked rather than to the stockholders, as was done in the principal case in France. The English view was the one accepted by the New York Supreme Court in Fritz Schultz, Jr. Co. v. Raimes, supra.

BILLS AND NOTES—DISCHARGE OF CO-MAKER SURETY UNDER N. I. L.—SURRENDER OF COLLATERAL BY PAYEE.—The plaintiff, payee of a promissory note, sued the defendants whose names appeared as makers but whom he knew to have signed as sureties. The sureties defended on the ground that the plaintiff, without their knowledge or consent, had surrendered to the principal debtor collateral securities. The plaintiff claimed that under the Negotiable Instruments Law this was no defense. *Held*, that the sureties were discharged. *Southern Nat. Life Realty Corp. v. People's Bank* (1917, Ky.) 198 S. W. 543.

According to the law merchant the surrender of collateral security by the creditor, or other conduct prejudicially altering the surety's position without his consent, operated to release the surety wholly or pro tanto from liability. Guild v. Butler (1879) 127 Mass. 386; Elsey v. People's Bank (1915) 166 Ky. 386, 179 S. W. 392. Has the Negotiable Instrument Law changed this equitable rule? This problem has had a checkered career in the courts of Kentucky. It was first held, without reference to the statute, that the old law merchant rule obtained. Elsey v. People's Bank, supra. But on petition for rehearing, the court's attention being drawn to section 119, N. I. L., the former opinion was withdrawn and the surety was held liable. Elsey v. People's Bank (1916) 168 Ky. 701, 182 S. W. 873. Finally, in the principal case, the court has overruled the latter decision and, frankly admitting that certain sections of the Act were not then considered, has restored the rule that the surety is discharged. The reasoning upon which this conclusion is reached is as follows: In the hands of the payee the note was merely "issued," not "negotiated" (sections 190, 30, N. I. L.), hence the payee was not a "holder in due course" (section 52), and the note was subject to the same defenses as if it were non-negotiable (section 58). When the question arises between the immediate parties to the instrument,

if it be conceded that the payee is not a holder in due course, the court's conclusion seems necessarily to follow. In accord but not cited in the opinion is Fullerton Lumber Co. v. Snouffer (1908) 139 Ia. 176, 117 N. W. 50 (extension of time to principal). When, however, the instrument is in the hands of a holder in due course, the statute would appear to cut off the surety's defense. Section 29 declares that a surety whose name appears as maker is primarily liable, irrespective of the knowledge of the holder for value; while the provisions of section 119 as to discharging the instrument may well be deemed to be exclusive, and section 120 to refer only to parties secondarily liable. Such has been the holding in a number of cases which have adjudged the surety liable without referring to section 58. Vanderford v. Farmer's Nat. Bank (1907) 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129 (extension of time); Richards v. Market Exch. Bank (1910) 81 Oh. St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99 (extension of time); State Bank v. Jeltz (1917, Kan.) 167 Pac. 1067.

BILLS AND NOTES—NEGOTIABILITY—REFERENCE IN NOTE TO EXTRINSIC AGREEMENT.—After an unconditional promise to pay in a note, there was added, "Value received. Rent for month of August, 1915, for . . . , as per contract dated March 24, 1913." On suit brought by a transferee of the note, defendant claimed that this provision made the note non-negotiable and subject to defenses which existed between the defendant and the original holder. Held, that the words "as per contract" qualified the promise to pay, and made it subject to the conditions of the contract referred to, and the note was therefore non-negotiable. Provosty, J., dissenting. Continental Bank and Trust Co. v. Times Publishing Co. (1917, La.) 76 So. 612.

An instrument, to be negotiable, must be payable unconditionally and at all events. N. I. L., sec. 1 (2). Accordingly it has been held that if a note refers to another writing, so that, on its face, it makes the duty of payment expressly subject to the conditions contained in the other writing, this deprives the note of its status as a negotiable instrument. Titlow v. Hubbard (1878) 63 Ind. 6; Kendall v. Selby (1902) 66 Neb. 60, 92 N. W. 178; Hull v. Angus (1911) 60 Oreg. 95, 118 Pac. 284. But a promise or order may be unconditional, though coupled with a statement of the transaction which gives rise to the instrument. N. I. L., sec. 3 (2). So a reference in an instrument to another agreement does not render it non-negotiable unless it is clearly indicated that the instrument is to be governed by conditions contained in the extrinsic agreement referred to. National Bank of Newbury v. Wentworth (1914) 218 Mass. 30, 105 N. E. 626; 3 R. C. L. 918. And it has been held in many cases that a provision such as that in the principal case is not sufficient to indicate an incorporation of such conditions. Taylor v. Curry (1871) 109 Mass. 36, 12 Am. Rep. 661; Bank of Sherman v. Apperson (1880, C. C. W. D. Tenn.) 4 Fed. 25; National Bank of Newbury v. Wentworth, supra. The majority of the court in the principal, case apparently considered that the words "as per contract" must be read as if directly following the promise to pay and qualifying that promise. Under this interpretation, the decision would be easily supportable. The dissenting judge, however, adopted what seems the sounder view, that these words, in view of their place in the instrument, should be construed as modifying and defining the word "rent," and thus as merely forming a part of the recital of the transaction which gave rise to the notes, identifying the particular rent for which the notes were given.

CARRIERS—TERMINATION OF RELATION OF CARRIER AND PASSENGER—OPPORTUNITY TO ALIGHT.—The plaintiff was a passenger on one of the defendant's street cars, and, because of a ditch on the sidewalk side of the car, was let down by

the defendant in daylight on the highway side, in accordance with a custom known to the plaintiff. Before the plaintiff had taken many, if any, steps, she was struck by an automobile coming in the opposite direction at negligent speed on the wrong side of the road. A statute required automobiles to slow down or stop when approaching a street car discharging passengers. The defendant requested a nonsuit on the ground that the relation of passenger and carrier terminated upon the plaintiff's alighting from the car. The court submitted the question of the defendant's negligence to the jury, who found for the plaintiff. Held, that the ruling of the court was correct. Walker and Brown, JJ., dissenting. Woods v. North Carolina P. S. Co. (1917, N. C.) 94 S. E. 469.

The duty of a carrier to exercise the highest degree of care continues only while the relation of passenger and carrier exists, and it is the generally accepted view that one who has alighted from a street car and is in safety upon the highway is no longer a passenger, but a traveler upon the highway. Powers v. Connecticut Co. (1909) 82 Conn. 665, 74 Atl. 931; Street R. R. v. Boddy (1900) 105 Tenn. 666, 58 S. W. 646. There is some ambiguity in the term "in safety," but generally a passenger must obtain at least a safe footing and is entitled to be landed in a reasonably safe place. McDonald v. St. Louis Transit Co. (1904) 108 Mo. App. 374, 83 S. W. 1001. The carrier is under a duty to warn its passengers of any dangers or defects in the street of which it has knowledge, when not obvious to the passenger. Murnahan v. Cincinnati, etc., St. Ry. Co. (1905) 27 Ky. L. Rep. 737, 86 S. W. 688. But the general rule is that where the passenger has as good an opportunity as the company's servants to observe the conditions which confront him in attempting to alight, there is no such duty on the part of the company. Indianapolis Co. v. Pressell (1906) 39 Ind. App. 472, 77 N. E. 357; Thompson v. Gardner, etc., Ry. Co. (1906) 193 Mass. 133, 78 N. E. 854. The weight of authority is therefore with the dissent in the principal case. The age, sex, and condition of the passenger should of course affect the degree of care required of the carrier, but no evidence of any special disability appeared in the principal case, and it seems asking too much to require a street car conductor to look ahead for approaching automobiles before each passenger alights. Especially is it unreasonable to require the company or its servants to anticipate such a combination of reckless speed, disregard of the rules of the road, and violation of statute, by an independent wrongdoer, as resulted in the accident in question.

Constitutional Law—Delegation of Legislative Power—Commission Form of City Government Valid.—Under the Optional City Government Law (N. Y. Laws 1914, ch. 444) the majority of the voters of the city of Watertown voted to adopt a commission form of government. A taxpayer's action was brought to restrain the city and its officers from organizing under the act on the ground that it was an unconstitutional delegation of legislative powers to the voters of the city. Held, that the act was constitutional. Cleveland v. City of Watertown (1917, N. Y.) 58 N. Y. L. J. 81 (Jan. 8, 1918).

The trial court and the Appellate Division, two judges dissenting, had held the statute unconstitutional as involving a delegation of legislative power. Cleveland v. City of Watertown (1917, App. Div.) 166 N. Y. Supp. 286. In reversing this decision the Court of Appeals adopts the usual line of reasoning, arguing that "the act is complete in itself," but is to take effect only upon the happening of a certain event, viz., the approval of a majority of the voters of the locality. In this it follows earlier New York cases involving analogous statutes, and the view prevailing almost universally. The opinion attempts with slight success to distinguish the case from Barto v. Himrod (1853) 8 N. Y. 483, which held invalid a state-wide statute which was to take effect as a law only

when approved by a majority vote of the electors of the state. As the court says, the doctrine of that case "has not since been applied unless the facts brought the case strictly within it." The plain truth is that legislative power in respect to local affairs is habitually delegated to local governing bodies, although we disguise this fact by calling the resulting local laws ordinances. No sound constitutional reason appears to exist why the voters of a city might not be authorized by legislative enactment—as they are by express constitutional provision in some states-not merely to adopt a complete charter framed for them by the legislature but even to frame the charter for themselves. So far as state-wide laws are concerned, the view taken in Barto v. Himrod, supra, has been followed in a few states. Santo v. State (1855) 2 Iowa, 165; State v. Hayes (1881) 61 N. H. 264; Ex parte Wall (1874) 48 Cal. 279, 23 L. R. A. 113, note; State v. Garver (1902) 66 Oh. St. 555, 64 N. E. 573. It has however been rejected by other states. State v. Parker (1854) 26 Vt. 357; State ex rel. Van Alstyne v. Frear (1910) 142 Wis. 320, 125 N. W. 961. A most illuminating argument against the doctrine of Barto v. Himrod is found in Mr. Justice Holmes's dissent in Opinion of the Justices (1894) 160 Mass. 586, 36 N. E. 488. There seems to be no answer to his contention that in the absence of some limitation the state legislature has the whole of the law-making power, which would therefore include the power to provide that a given law shall not go into effect if rejected by the voters. As there is no express limitation upon the power of the legislature to so enact, if such limitation exists it must be implied. For such an implication there seems to be no real basis, unless the courts are to read their own notions of government into the constitution as implied limitations. It is to be hoped that in the future the narrow and illiberal view of the power of the legislature taken in Barto v. Himrod, supra, and the other cases cited, will come to be recognized as unsound and will ultimately be overruled. It is needless to point out that in many states the adoption of constitutional provisions providing for the state-wide referendum have already settled the question in favor of the more liberal view of the powers of the legislature.

CONTRACTS—ACCEPTANCE—SUFFICIENCY OF ACTS TO CONSTITUTE ACCEPTANCE AS MATTER OF LAW.—The defendant was put in possession of a piano on thirty days' trial under a promise either to sign a contract to pay in monthly installments if he decided to keep the piano, or to return the piano if not satisfied. He kept the piano for several months, but gave notice of dissatisfaction on one or two occasions. Suit was brought for the full purchase price. Held, that as a matter of law the defendant's acts constituted an acceptance of the piano, and that the plaintiff was entitled to judgment. Stevens, J., dissenting. Evans Piano Co. v. Tully (1917, Miss.) 76 So. 833.

It is submitted that the court confused a breach of the terms of a preliminary contract of bailment with an acceptance of the offer to make a contract of sale. No contract of sale was completed in this case for the reason that the offer to sell was never accepted. The power to accept conferred upon the offeree could be exercised only by executing a written document. This power never was exercised and the offeror knew that it was not. See (1917) 27 Yale Law Journal 272; Yazoo & M. V. R. R. Co. v. Jones (1917, Miss.) 75 So. 550. The defendant had, however, promised for a valuable consideration either to sign the written contract of sale at the end of the trial period or to return the piano. Failure to do either would be a breach of this contract. Choice v. Mosely (1828, S. C.) I Bailey, 136; see also Hunt v. Wyman (1868) 100 Mass. 198, and cf. Isaacs v. MacDonald (1913) 214 Mass. 487, 102 N. E. 81. In an action of assumpsit for such breach the plaintiff would be entitled to adequate damages, amounting, in case of the destruction of the piano, to its full value. Drake v.

White (1875) 117 Mass. 10; cf. Sun, etc., Ass'n v. Moore (1901) 183 U. S. 642, 22 Sup. Ct. 240. In the principal case, however, there had been neither destruction nor loss, nor even demand and refusal (which would of course have given an action for conversion), and it would seem that the plaintiff's only right of action was for breach of the bailment contract. To get all the damages to which this breach would entitle him, the plaintiff should first have demanded the piano, and after obtaining it, could have recovered its rental value from the end of the trial period, together with any extra expense involved in securing its return. The actual decision not only makes a contract of sale for the parties, where there was none, but a contract differing substantially in terms of payment from the plaintiff's offer. It is supported, however, by a very similar decision in Wheeler v. Klaholt (1901) 178 Mass. 141, 59 N. E. 756.

Contracts—Consideration—Effect of Performance of an Unenforceable Promise.—In the case of an overdue debt, the creditor and the debtor made a new bilateral agreement, the debtor promising to pay in certain installments and the creditor promising to forbear suit. The creditor forbore as agreed and now sues on the debtor's promise to pay in installments. *Held*, that although the bilateral contract was invalid for lack of consideration, the actual forbearance by the creditor completed a valid unilateral contract upon which action lies. *Hay v. Fortier* (1917, Me.) 102 Atl. 294. See Comments, p. 535.

Contracts—Contracts to Devise or Bequeath—Specific Performance.—The plaintiff deeded certain property to his aunt upon her agreement to make a will amply providing for him. Later both the plaintiff and his aunt made mutual wills, each making the other sole beneficiary. Still later she altered her will to his detriment, and died. *Held*, that a valid, irrevocable contract was made which would be enforced by fastening a trust upon the estate of the deceased. *Lawrence v. Prosser* (1917, N. J. Ch.) 101 Atl. 1040.

The plaintiff's father agreed to and did give up to A and A's wife his parental rights as father of the plaintiff, and they agreed that the plaintiff should have all their property upon the death of the survivor of them. Later A's wife died and A married again and died, leaving his second wife and their child, the defendants. Before his death A had delivered a deed in escrow by which he gave all his property to the defendants, who had no knowledge until after A's death of A's contract with the plaintiff's father. Held, that the agreement was not enforceable against the wife and child because its enforcement would be inequitable; also, that an amendment which alleged that A and his first wife had executed a joint will, unrevoked during her lifetime, in favor of the plaintiff was properly disallowed where there was no allegation that such joint will was made pursuant to a contract with the first wife or was intended to be irrevocable. Sargent v. Corey (1917, Cal. App.) 166 Pac. 1021.

See Comments, p. 542.

Contracts—Testamentary Contracts—Validity.—A partner entered into an agreement with his copartners that certain promissory notes should be given them to be renewed from year to year and paid after his death. *Held*, that the agreement was not testamentary and was not revoked by a later will, but was enforcible. *In re Eisenlohr's Estate* (1917, Pa.) 102 Atl. 117.

A contract was made between partners that in the event of the death of one the other should have the business and should pay the heirs of the deceased a stipulated sum. Held, that the agreement was testamentary and unenforcible, since not executed as a will. Ferrara v. Russo (1917, R. I.) 102 Atl. 86.

See Comments, p. 542.

Contracts—Third Party Beneficiary—Suit by Donee-Beneficiary.—A husband promised his wife on her death bed that in consideration of her executing a certain will he would himself bequeath a certain amount to a favorite niece of the wife. The niece sued the executor of the husband for breach of the above promise. *Held*, that the contract was valid and that the beneficiary could maintain an action upon it. *Seaver v. Ransom* (1917, App. Div.) 58 N. Y. L. J. 1211 (January 15, 1918).

It has long been held in New York that a beneficiary who is a creditor of the promisee can maintain an action on the promise of a third party to pay the debt due. Lawrence v. Fox (1859) 20 N. Y. 268. For a long period, the New York courts refused to extend this rule to the case of a beneficiary who was not a creditor but was a mere donee. The performance of the promise had to be "a satisfaction of some legal or equitable duty" owing by the promisee to the beneficiary. Durnherr v. Rau (1892) 135 N. Y. 219, 32 N. E. 49; Vrooman v. Turner (1877) 69 N. Y. 280. This requirement has been more and more liberally construed, until now it seems probable that any donee-beneficiary will soon be allowed to enforce the contract. A relationship by blood or marriage between the promisee and the beneficiary is held to supply a sufficient "equitable duty" and to create an enforceable right in the beneficiary. Bouton v. Welch (1902) 170 N. Y. 554, 63 N. E. 539; Buchanan v. Tilden (1899) 158 N. Y. 109, 52 N. E. 724; Todd v. Weber (1884) 95 N. Y. 181. The principal case extends this rule to cover the relationship of aunt and niece. See contra, Everdell v. Hill (1901, N. Y.) 58 App. Div. 151, 68 N. Y. Supp. 716. In several cases it has been held that the relation between a municipality and one of its citizens is sufficient to enable the latter to sue on a contract made with the municipality for the benefit of the citizens. Pond v. New Rochelle W. Co. (1906) 183 N. Y. 330, 76 N. E. 211; Smyth v. New York (1911) 203 N. Y. 106, 96 N. E. 409; Rigney v. New York Central R. R. Co. (1916) 161 App. Div. 187, 217 N. Y. 31, 146 N. Y. Supp. 395, 111 N. E. 226. The principal case is in accord with the rule prevailing in most of the states, and it is submitted that the decision need not have been made to depend upon the existence of some shadowy moral duty resting on the promisee in favor of the beneficiary.

EASEMENTS—LIGHT AND AIR—IMPLIED GRANT IN LEASE FOR YEARS.—A land-lord leased a building to a tenant for years, with a covenant for quiet enjoyment. Thereafter the landlord was about to erect on adjoining land, which he owned and had owned at the time of the lease, a structure that would cut off the light and air from the tenant's windows. The tenant sought an injunction. Held, that there was no implied easement of light and air in the lease to the tenant. Anderson v. Bloomheart (1917, Kan.) 168 Pac. 901.

In England easements of light and air may be acquired by prescription, even though this violates the general rule that the adverse user on which prescription is founded must be such as to give the other party a right of action. Cross v. Lewis (1824) 2 B. & C. 686; Acts 2 and 3 Wm. IV, c. 71, sec. 3; Aynsley v. Glover (1875) L. R. 10 Ch. 283. This is said to be due to the cramped conditions in England, leading to a desire to save all open space left. For like reasons the English courts have implied a grant of an easement of light and air, where the owner of two adjoining parcels, with a building on one of them overlooking the other, has leased or sold the parcel on which the building was situated. Broomfield v. Williams (C. A.) [1897] 1 Ch. 602 (sale); Coutts v. Gorham (1829, N. P.) M. & M. 396 (lease); Warner v. McBryde (1877, Ch. D.) 36 L. T. Rep. N. S. 360 (lease); but see Birmingham, etc., Banking Co. v. Ross (1888, C. A.) 38 Ch. D. 295. In this country the same reason for allowing such easements has not existed, and the general policy of our law has been opposed

to unnecessary servitudes which would restrict the beneficial use and development of land in growing communities. The courts have therefore generally refused to allow easements of light and air by prescription. Haverstick v. Sipe (1859) 33 Pa. 368; Stein v. Hauck (1877) 56 Ind. 65, 26 Am. Rep. 10. Nor will they imply such an easement in connection with a sale except in cases of real and obvious necessity. Keats v. Hugo (1874) 115 Mass. 204, 15 Am. Rep. 80; Rennyson's Appeal (1880) 94 Pa. 147, 39 Am. Rep. 777. Where the question arises under a lease, opinion is divided, with perhaps a slight weight of authority in favor of allowing the easement. Case v. Minot (1893) 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536; Darnell v. Columbus Show Case Co. (1907) 129 Ga. 62, 58 S. E. 631, 13 L. R. A. (N. S.) 333; contra, Keating v. Springer (1893) 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544. In such cases the argument from a general policy of free development has less weight because of the temporary character of the right if allowed; but it is perhaps a close question whether, in a country where easements of light and air are so much the exception rather than the rule, an intention to grant such an easement should readily be inferred.

Husband and Wife—Liability of Husband for Wife's Torts—Effect of Married Women's Property Acts.—The plaintiff sued the defendants, husband and wife, on account of personal injuries caused by the defective condition of a garage owned by the wife. The plaintiff was employed by the wife as a chauffeur. A married women's property act was in force. *Held*, that the defendant husband was not liable. *Cole v. De Trafford* (1917, K. B.) 117 L. T. Rep. N. S. 224.

In an action for alienating the affections of the plaintiff's husband, the plaintiff contended that the defendant was liable for his wife's tort although he had had no active participation in it. A married women's property act was in force. Held, that the husband was not liable. Claxton v. Pool (1917, Mo.) 197 S. W. 349.

By the common law the husband was jointly liable with his wife for totts committed by her, subject to the exception that where the tort was not a tort simpliciter, but the substantial basis of the wrong done the plaintiff was an alleged contract made by the wife (invalid, of course, as a contract) no liability could be imposed upon the husband. Liverpool, etc., Ass'n v. Fairhurst (1854) 9 Ex. 420; Wolff & Co. v. Lozier (1902, Sup. Ct.) 68 N. J. L. 103, 52 Atl. 303. It is submitted that the true reason for the husband's liability was the necessity of joining him "for conformity" because the wife could not be sued alone. Capel v. Powell (1864) 17 C. B. N. S. 743; Cuneod v. Leslie (C. A.) [1909] 1 K. B. 880, 887; cf. Henley v. Wilson (1902) 137 Cal. 273, 70 Pac. 21. Consequently it would seem that legislation permitting a married woman to sue and be sued as a feme sole and to own separate property might well be held to abolish the husband's common law liability See Schuler v. Henry (1908) 42 Colo. 367, 94 Pac. 360. In England, however, it has been decided that his liability remains unaltered by the Married Women's Property Act. Earle v. Kingscote (C. A.) [1900] 2 Ch. 585; but cf. remarks of Fletcher Moulton, L. J., in Cuneod v. Leslie, supra, p. 888. And the principal English case above reported is decided, not upon the effect of the emancipating legislation (except so far as that made possible the wife's separate ownership of the garage), but upon the theory that the plaintiff's cause of action arose out of his contract of employment, the invitation to enter the garage arising therefrom and being essential to his cause of action. Hence the case was thought to fall within the exception to the husband's common law liability. In America there is much diversity of opinion as to how far emancipating legislation has abrogated the old rule. See Schuler v. Henry, supra. By the weight of authority the husband is not liable for torts

arising out of the condition or management of the wife's separate property. Boutell v. Shellaberger (1915) 264 Mo. 70, 174 S. W. 384; Quilty v. Battie (1892) 135 N. Y. 201, 32 N. E. 47; cf. Missio v. Williams (1914) 129 Tenn. 504, 167 S. W. 473. But as to pure torts not connected with the wife's separate property, the husband is usually still held liable. Poling v. Pickens (1911) 70 W. Va. 117, 73 S. E. 251, Ann. Cas. 1913 D, 995. The principal Missouri case above reported repudiates this distinction and ranges Missouri with the few states which have held the common law rule entirely abolished by emancipating legislation. It overrules earlier Missouri cases cited in the opinion. The rule laid down by the decision is, for the future, expressly established by a recent statute. Mo. Laws 1915, 269.

Negligence—Imputed Negligence—Joint Enterprise.—The plaintiff, a travelling salesman, desired to cover certain territory. Another salesman of his acquaintance intended to travel over the same territory in his own automobile, driving the car himself. It was arranged that the plaintiff should travel with him, sharing the expense. Through the negligence of the owner in driving, the automobile was struck by the defendant's train. The plaintiff was injured, and sought to recover. Held, that the plaintiff was barred by the driver's negligence, since they were engaged in a joint enterprise. Derrick v. Salt Lake Ry. Co. (1917, Utah) 168 Pac. 335.

The doctrine of imputed negligence, as formerly applied to driver and passenger, is now generally rejected, the principle being limited to cases involving some element of agency, including those of master and servant, and of joint enterprise. Denver C. T. Co. v. Armstrong (1912) 21 Colo. App. 640, 123 Pac. 136; Ward v. Meeds (1911) 114 Minn. 18, 130 N. W. 2. See also L. R. A. 1917 A, 543 and note. Whether or not an undertaking is a joint enterprise is a question of fact, and the courts are not in accord upon the definition. Ward v. Meeds, supra; Judge v. Wallen (1915) 98 Neb. 154, 152 N. W. 318, L. R. A. 1915 E, 436. Generally, it is considered as one in which each participant has authority to act for the other in respect to the control of the means used to execute the common purpose, and an equal right to direct the conduct of the undertaking. St. Louis, etc., Ry. Co. v. Bell (1916, Okla.) 159 Pac. 336; Koplitz v. St. Paul (1902) 86 Minn. 373, 90 N. W. 794. Thus, where two men hired a horse and buggy and jointly bore the expense, it was considered a common enterprise. Christopherson v. Minneapolis Ry. Co. (1914) 28 N. D. 128, 147 N. W. 791. Also, where two men were engaged in moving furniture. Schron v. Staten I. R. R. Co. (1897, N. Y.) 16 App. Div. 111, 45 N. Y. Supp. 124; Cass v. Third Ave. Ry. Co. (1897, N. Y.) 20 App. Div. 591, 47 N. Y. Supp. 356. But it has been held that a common purpose of riding for pleasure does not alone establish a joint enterprise. Lawrence v. Sioux City (1915) 172 Iowa 320, 154 N. W. 494; Chicago, P. & St. L. R. v. Condon (1905) 121 Ill. App. 440. Though the principal case is supported by Judge v. Wallen, supra, it would appear from ordinary experience that where one of the participants is the owner of the car, there is a tacit understanding that the vehicle is under his sole control, thus removing the essential requisite of a joint enterprise. Such a situation is manifestly different from one in which the parties jointly hire another's vehicle. An agreement to share expense would furnish some evidence on the question of joint control, but would seem not to be decisive. For this reason, the decision in the principal case seems open to question.

Practice—Jury—Challenge to Array after Challenge to Polls.—The defendant in a civil action assisted in the selection of the panel of jurymen for the term. The plaintiff, with knowledge of this fact, examined the talesmen

called on the voir dire, and after making five challenges to the polls, challenged the array. The trial judge overruled the challenge to the array on the ground that no actual harm to the plaintiff was shown. Held, that the challenge to the array thus made should have been upheld. Vermont Box Co. v. Hanks (1917, Vt.) 102 Atl. 91.

The panel may be quashed when any of the members have been summoned at the instance of either party to the action. Co. Litt. 156 a; Peak v. State (1888, Sup. Ct.) 50 N. J. L. 179, 12 Atl. 701. Or when prejudice of the summoning or selecting officer is shown. People v. Felker (1886) 61 Mich. 114, 28 N. W. 83. Or when the panel is not summoned or selected in the manner required by statute. See People v. Borgstrom (1904) 178 N. Y. 254, 70 N. E. 780. Actual harm need not be shown. Peak v. State, supra. The proper method of attacking the panel is by a challenge to the array. Borrelli v. People (1897) 164 Ill. 549, 45 N. E. 1024. But it is well settled that a prior challenge to the polls is a waiver of any absolute right to challenge the array. Forsythe v. State (1833) 6 Oh. 19; Mueller v. Rebhan (1879) 94 Ill. 142; State v. Taylor (1896) 134 Mo. 109, 35 S. W. 92. And the courts have held strictly to this rule where the challenge to the array was based on a deviation from the statutory regulations for selecting or summoning the panel, being averse to overthrowing a decision because of a mere irregularity. Page v. Inhabitants (1843, Mass.) 7 Metc. 326; State v. Clark (1894) 121 Mo. 500, 26 S. W. 562; and see Bergman v. Hendrickson (1900) 106 Wis. 434, 82 N. W. 304. But the trial court may in its discretion allow a challenge to the array, after a challenge to the poll. Thompson, Trials (2d ed.) sec. 113; Cox v. People (1880) 80 N. Y. 500. And the intervention of a party in interest in the selection of the panel furnishes good reason for relaxing the strict rule. See McDonald v. Shaw (1700, Sup. Ct.) I N. J. L. 6; cf. People v. Felker, supra. The principal case held, in conformity with these principles, that once the trial court had decided in its discretion to consider the belated challenge to the array, the facts of the case should have caused it to sustain the challenge.

PRINCIPAL AND SURETY—DEFENSES OF SURETY—FRAUD UPON PRINCIPAL.—The plaintiff secured by fraud a stay bond from the defendant in a former action. On default by the principal he sued the surety on the bond, who sought to set up as a defense the fraud practiced upon the principal. Held, that the surety could not avail himself of such a defense before the principal had elected to avoid the contract, since the principal had the option to affirm the contract and sue for damages for the fraud.  $Ettlinger\ v.\ National\ Surety\ Co.\ (1917,\ N.\ Y.)$  117 N. E. 945.

Failure of consideration in the contract between the creditor and the principal is a good defense by the surety. Sawyer v. Chambers (1864, N. Y. Sup. Ct.) 43 Barb. 622; Gunnis v. Weigley (1886) 114 Pa. 191, 6 Atl. 465. If a surety contracts in ignorance of duress practiced upon the principal, he may plead this as a defense, since it materially increases his risk. Patterson v. Gibson (1888) 81 Ga. 802, 10 S. E. 9; Osborn v. Robbins (1867) 36 N. Y. 365. On similar grounds, if the contract of the principal is secured by fraud, the surety should not be bound. Putnam v. Schwyler (1875, N. Y. Sup. Ct.) 4 Hun 166; Bryant v. Crosby (1853) 36 Me. 562. If denied this defense the surety is of course entitled to indemnity from the principal, who must then look to the creditor in an action for the fraud. This involves a quite needless circuity of action. The court in the principal case declares that the surety cannot be allowed the defense without holding also that it would bar any further action by the principal. But this seems an unnecessary dilemma. Besides the injury to the principal, the fraud was a distinct injury to the surety, since it substantially increased the risk that he

would be called upon to pay. He should be released on this single ground, leaving creditor and principal to work out their rights between themselves just as if there had been no surety.

REMOVAL OF CAUSES—SUIT BROUGHT IN COURT OF STATE OF WHICH NEITHER PARTY WAS AN INHABITANT.—A citizen of one state sued a citizen of another state in a state court of a third state. *Held*, that the defendant might remove the cause to the federal court for the district within which the suit was pending. *M. Hohenberg & Co. v. Mobile Liners, Inc.* (1917, S. D. Ala.) 245 Fed. 169.

An alien sued a citizen of Pennsylvania in a state court of Ohio. *Held*, that the defendant might remove the cause to the federal court for the district of Ohio within which the suit was pending. *Keating v. Pennsylvania Co.* (1917, N. D. Oh.) 245 Fed. 155.

An assignee of an alien sued a citizen of New Jersey in a state court of New York. *Held*, that the defendant could not remove the cause to the federal court for the District of New Jersey. *Ostrom v. Edison* (1917, D. N. J.) 244 Fed. 228.

The existing confusion on this general subject has arisen from the decision in Ex parte Wisner (1905) 203 U. S. 449, 27 Sup. Ct. 150. A provision of the federal Judiciary Act of 1887, as amended in 1888 (substantially re-enacted in sec. 51 of the Judicial Code of 1911), forbade the bringing of any civil suit in a federal district court in any district other than that of which the defendant was an inhabitant, except that where jurisdiction was founded solely on diversity of citizenship, the suit might be brought in the district of residence of either plaintiff or defendant. It was held in the Wisner case that this limitation applied also to removal, and that a suit between citizens of different states could not be removed to a court in which it could not originally have been brought. Though modified in one respect by In re Moore (1907) 209 U. S. 490, 28 Sup. Ct. 585, and though its soundness has been doubted by lower federal courts, the Wisner case has never been overruled. The Hohenberg case supra is directly in conflict with that decision, which is not noticed in the opinion, and no other authorities are cited. Section 29 of the Judicial Code, dealing with the procedure on removal, provides expressly and exclusively for removal to the federal court for the district in which the suit is pending. From this section, and the decision in the Wisner case, it apparently results that when a citizen of one state sues a citizen of another in a state court of a third state, the suit cannot be removed at all. There is, however, some authority for disregarding the limitation apparently imposed by section 29, and allowing the defendant to remove to the federal court in the district in which he resides. See authorities on both sides collected in Eddy v. Chicago & N. W. Ry Co. (1915, W. D. Wis.) 226 Fed. 120, 126.

Where suit is brought in a state court by an alien against a citizen in a state of which the latter is not an inhabitant, a similar conflict has arisen, both on the question of removal to the federal court in the district where the suit is pending, and on the question of removal to the district of the defendant's residence. Authorities on the former question are collected in the Keating case, supra, and on the latter in the Ostrom case, supra. On the one hand some courts have assumed that the rule of the Wisner case should be extended to suits to which an alien is a party, and that since under section 51 an alien is not entitled to sue a citizen in the federal court of any district except that where the defendant resides, such a suit cannot be removed to the federal court of any other district. It then seems to follow from the provisions of section 29 that when the suit is brought in a court of a state where the defendant does not reside it is not removable at all. This was the practical result of the decision in

the Ostrom case, since, under the previous decisions of the District Court for the Southern District of New York, the case was not removable to that court. The view taken in the Keating case, however, is that the language of section 51 is wholly inapplicable to a case where an alien is a defendant, that an alien may be sued by a citizen in the federal court of any district where he may be found, and that if section 51 would not prevent his being sued by a citizen in the federal court of a given district, it will not prevent his being brought into the same court by the removal of a suit which he has first instituted in the state court. That an alien may be sued in the federal courts in whatever district he may be found was settled by In re Hohorst (1893) 150 U. S. 653, 14 Sup. Ct. 221, and Barrow S. S. Co. v. Kane (1898) 170 U. S. 100, 18 Sup. Ct. 526. The reasoning of the Keating case seems sufficient to distinguish Ex parte Wisner, and in view of the criticism which that case has received and the confusion it has caused, the courts would seem justified in limiting its doctrine as narrowly as possible. It is to be hoped that Congress or the Supreme Court will shortly clear up the uncertainty in which the whole subject is involved.

STATUTE OF FRAUDS—ORAL CONTRACT TO DEVISE—EFFECT OF PART PERFORMANCE.—The plaintiff and her stepfather in 1865 entered into an oral agreement with the intestate, whereby the latter agreed to adopt the plaintiff and to make her sole heir, in consideration of having the control and custody of her and obtaining her obedience and services as a daughter. The plaintiff fully performed, though she was never legally adopted, and no will was made. Prior to 1905 in California an agreement of this character was not required to be written. *Held*, that the plaintiff was the equitable owner of all the property left by the intestate. *Steinberger v. Young* (1917 Cal.) 165 Pac. 432.

The deceased in consideration of the plaintiff's care and affection orally agreed to devise and bequeath to her the bulk of his estate. He died intestate, leaving an estate of which about one-half was realty. Held, that the contract, though not within the statute of frauds as an agreement not to be performed within a year, was within the statute as an agreement for sale of realty, since the deceased might have performed by devising real estate; that the doctrine of part performance had no application, this being an action at law, and that recovery could be had only in a quasi-contractual action for the value of the services rendered; also, that the statute of limitations did not begin to run against such quasi-contractual action until the death of the deceased. Quirk v. Bank of Commerce & Trust Co. (1917, C. C. A. 6th) 244 Fed. 682.

The validity of contracts to bequeath or devise is discussed above in Com-MENTS, p. 542. As to the effect of the statute of frauds, Steinberger v. Young follows the former California rule, which was changed by statute in 1905. Roger v. Schlotterback (1914) 167 Cal. 35, 138 Pac. 728; see, 18 COLUMBIA L. REV. 95. The federal case is in accord with the more usual rule that the statute of frauds applies to a contract of this nature where part of the promisor's estate consists of realty. Some courts hold, however, that the equitable doctrine of part performance is applicable and is sufficient to take the case out of the statute where the promisee, relying upon a promise of payment by will, has rendered services of a special character or has otherwise performed in such a manner as to make it inequitable not to enforce the contract. Svanburg v. Fosseen (1899) 75 Minn. 350, 78 N. W. 4; Teske v. Dittberner (1903) 70 Neb. 544, 98 N. W. 57. This is opposed to the better reasoned rule stated in the leading English case, that part performance is sufficient only when the acts relied on are such as unequivocally point to the existence of a contract for the conveyance of real estate, such as the entering into possession thereof, and hence that the rendering of services does not constitute part performance sufficient to take the

case out of the statute. Maddison v. Alderson (1883, H. of L.) L. R. 8 App. Cas. 467; Grant v. Grant (1893) 63 Conn. 530, 29 Atl. 15; Grindling v. Reyht (1907) 149 Mich. 641, 113 N. W. 290, 15 L. R. A. (N. S.) 466, with note. In the absence of an express agreement to pay by will, recovery on a quantum meruit for services is limited by the statute of limitations to the services rendered within six years preceding the bringing of suit. Hoskins v. Saunders (1907) 80 Conn. 19, 66 Atl. 785. It seems clearly correct, however, to hold that since an express agreement to pay by will, even though unenforcible because of the statute of frauds, would have prevented any recovery upon a quantum meruit during the lifetime of the decedent, the statute of limitations does not in that case begin to run until death, and recovery may be had upon a quantum meruit for the whole value of the services rendered or support furnished. Schempp v. Beardsley (1910) 83 Conn. 34, 75 Atl. 141; Hull v. Thoms (1910) 82 Conn. 647, 74 Atl. 925. But see Banks v. Howard (1902) 117 Ga. 94, 97, 43 S. E. 438, 439.

Taxation—Federal Income Tax—Stock Dividends.—The plaintiff, as a stockholder in a corporation, received a stock dividend representing his share of \$1,500,000 of undistributed profits earned by the corporation before January I, 1913, and transferred, at the time of making such stock dividend, from surplus to capital account. Being compelled by the Collector of Internal Revenue to pay an income tax on the stock so received as equivalent to its par value in cash income, he sued the Collector to recover the amount so paid. Held, that under the Income Tax Law of October 3, 1913, such stock dividend was capital and not income, since the plaintiff's old and new stock taken together merely represented the same proportional interest in the same corporate assets which his old stock had previously represented. Towne v. Eisner (1918) 38 Sup. Ct. 158. See Comments, p. 553.

Torts—Labor Unions—Boycott of Materials Made in Non-Union Shop.—The plaintiff, who employed non-union men in his factory, sought an injunction to restrain the officers and agents of a carpenters' union from: (1) taking steps to compel the members to observe the rules of the union prohibiting them from working on materials made in non-union shops; (2) sending circulars to the plaintiff's prospective customers requesting them in making contracts to provide for the employment of union men and the use of union-made materials exclusively, with the suggestion that in this way labor troubles would be avoided; (3) inducing workmen in other trades to quit work on any building because non-union men were there employed in installing materials coming from non-union shops. Held, that these acts were lawful and that the complaint should be dismissed. Bossert v. Dhuy (1917, N. Y.) 117 N. E. 582. See Comments, p. 539.

Torts—Property Accidentally Cast on Land of Another—Unnecessary Damage in Removal.—The plaintiff's boats were carried away by a violent storm and left on the defendant's railroad tracks. The evidence showed that the defendant company had plenty of time to remove them itself without damage, or to permit the plaintiff to do so. Instead, the defendant's wrecking crew broke or sawed them up and burned them. Held, that the defendant was liable for the value of the boats. Louisville & N. R. R. Co. v. Joullian (1917, Miss.) 76 So. 769.

This decision is in accord with the weight of authority to the effect that an owner of land may remove chattels accidentally cast on his land provided he uses due care in doing so, but may not needlessly injure or destroy them, or

subject their owner to unnecessary expense in recovering them. Berry v. Carle (1825) 3 Me. 269; McKeesport Sawmill Co. v. Pennsylvania Co. (1903, C. C. W. D. Pa.) 122 Fed. 184. Still less may he convert them to his own use. Forster v. Juniata Bridge Co. (1851) 16 Pa. 393. The dictum in the case last cited that, after one on whose land property belonging to another is cast by a flood has notified the owner to remove the property, and the latter has neglected to do so, the former may rid himself of the incumbrance by casting it into the river, goes further than the authorities generally would seem to warrant. Even where chattels are found on another's land under circumstances furnishing much less excuse for their presence, the owner of the land is still bound to use such care in removing them as is consistent with the reasonable protection of his own interests. Cf. Mead v. Pollock (1900) 99 Ill. App. 151; Postal Telegraph-Cable Co. v. Gulf & S. I. R. R. Co. (1915) 110 Miss. 770, 70 So. 833. A railroad company would often be justified in taking more summary measures than an ordinary land owner, because of its duties to the public and the serious risks to which it is exposed by an obstruction on its tracks; and it has been said that the interests of the party menaced should be the first consideration; but, as pointed out in the same case, he should take such steps only as are reasonably necessary to free himself from danger, and the rule does not justify a willful and unnecessary disregard of the other party's interests. McKeesport v. Pennsylvania Co., supra. The principal case seems, therefore, a sound application of established principles to a somewhat unusual situation.

Trespass—Justification—Direction of County Engineer Locating Telephone Poles.—The defendant telephone company placed its poles upon the plaintiff's land, pursuant to directions of the county engineer, who by mistake located them outside the line of the highway. A statute relating to the placing of poles in public highways provided that "any new lines . . . shall be located by the engineer" (see 1527-s17, Iowa Supp. Code, 1913). Held, that the defendant was not a trespasser. Brammer v. Iowa Telephone Co. (1917, Ia.) 165 N. W. 117.

The court asserts two reasons for its conclusion: first, that the engineer's determination was, like decisions of quasi-judicial tribunals, not subject to collateral attack, and, secondly, that the defendant's situation was analogous to that of a military or administrative officer who is held immune from liability for infringing private rights in obedience to an order issued by competent authority. It is respectfully submitted that neither of these reasons is adequate. The statutory function of the engineer is to locate poles within the highway. His order as to property outside the highway is like a decision of a tribunal acting, through an innocent mistake, beyond its jurisdiction. Such an order is subject to collateral attack. Bradford v. Boozer (1903) 139 Ala. 502, 36 So. 716. If the statute be construed as giving the engineer authority to locate poles outside the highway, it is submitted that it would be unconstitutional, as it provides no hearing for a property owner whose land is thus taken, and no compensation. See Davis v. Commissioners (1896) 65 Minn. 310, 67 N. W. 997; Branson v. Gee (1894) 25 Oreg. 462, 36 Pac. 527. Since the engineer had no authority to direct poles to be located outside the highway, the analogies relied upon by the court are believed to be not in point. A sheriff executing a writ issued by a court without jurisdiction is liable for trespass. Huddleston v. Spear (1848) 8 Ark. 406; cf. Southern Bell T. & T. Co. v. Constantine (1894, C. C. A. 5th) 61 Fed. 61 (where, however, the highway commissioner acted within his jurisdiction, though erroneously). Likewise a military officer who seizes property in obedience to orders which his superior was not authorized to give is liable for the trespass. Bates v. Clark (1877) 95 U. S. 204; Little v. Barreine (1804, U. S.) 2 Cranch 170.

Waters and Watercourses—Obstruction by Natural Cause—Action for Failure to Remove.—A natural watercourse was obstructed at a point on the defendant's land by falling trees and accumulated debris due to natural causes. This obstruction, followed by heavy rains (not sufficiently unusual to constitute an "act of God"), caused the stream to overflow the lands of the plaintiff, an upper riparian owner. In an action for the resulting damage, the petition alleged that the defendant, though notified of the obstruction, had failed and refused to remove it, and had also refused the plaintiff's request for permission to enter and remove it at his own expense. Held, that on these facts the plaintiff was entitled to recover. Parrish v. Parrish (1917, Ga.) 94 S. E. 315.

Where the course of a natural stream is obstructed or altered by natural causes, the change in conditions may of course be either sudden or gradual. In the case of gradual changes it is almost a necessary result of the law of accretion that none of the property owners affected may restore pre-existing conditions without the consent of all others interested. This is especially obvious in cases of slow lateral movement of the channel. Holcomb v. Blair (1903, Ct. App.) 25 Ky. L. Rep. 974, 76 S. W. 843; but see contra, Gulf, etc., Ry. Co. v. Clark (1900, C. C. A. 8th) 101 Fed. 678 and dictum in Johnk v. Union Pac. R. R. Co. (1916) 99 Neb. 763, 766; 157 N. W. 918, 919. The same rule has been applied to the accumulation of sand or gravel banks in the bed of the stream. Withers v. Purchase (1889, Ch. D.) 60 L. T. N. S. 819; see also Rood v. Johnson (1853) 26 Vt. 64, 72. On the other hand, when there is a sudden change of channel, authorities are apparently agreed that the owner on whose land the diversion occurs may, if he so elects, restore the former conditions. Pierce v. Kinney (1869, N. Y. Sup. Ct.) 59 Barb. 56; Yazoo, etc., R. R. Co. v. Brown (1911) 99 Miss. 88, 54 So. 804. The existence of a similar privilege in the case of obstructions appears never to have been questioned. The landowner must act, however, before new rights have become fixed in reliance on the permanence of the new conditions. Woodbury v. Short (1845) 17 Vt. 387; Morningstar v. Young (1860) 2 Oh. Dec. (Reprint) 294; cf. Johnk v. Union Pac. R. R. Co., supra. The landowner has therefore the privilege in certain cases of restoring former conditions, but no authority has been found which recognizes any duty on him to do so, or any responsibility for the damage to his neighbor if he does not, and there are strong dicta and at least one decision to the contrary. Price v. Kinney, supra (gravel bank "chiefly produced by a flood"); see Jones v. Turner (1866, N. Y. Sup. Ct.) 46 Barb. 527, 534. On the remaining question whether an upper or lower riparian owner may enter on the land where the obstruction or diversion occurred, and do for himself what the owner of that land is under no duty to do, the authorities are meagre and not wholly in agreement. See Wholey v. Caldwell (1895) 108 Cal. 95, 41 Pac. 31 (change of channel-denied); Prescott v. Williams (1843, Mass.) 5 Met. 429 (accumulation of debris-allowed). But the recognition in the principal case of such a right on the plaintiff's part would not give him a cause of action for the mere refusal of a permission which the law would supply. His remedy would have been to exercise his privilege to enter and remove the obstruction, or if forcibly prevented, to sue for such damages as proximately resulted from the prevention, or seek an injunction against further interference, or both.

WORKMEN'S COMPENSATION ACT—"GOOD SAMARITAN" AS EMPLOYEE.—The driver of a coal cart, an employee of the defendant, being unable himself to release his cart, which had been mired in the road-side mud, called upon the plaintiff, a mere passerby, to assist him. While rendering the assistance thus requested, the plaintiff received a serious injury. *Held*, that he was an employee

of the defendant within the compensation act. State v. District Court (1917, Minn.) 165 N. W. 268.

An essential element of the relation of master and servant is the submission by the servant to the direction of the master. Labatt, Master and Servant, sec. 2. The relation is a contractual one, and to entitle one to the special benefits arising out of it, both at common law and under the various compensation acts, there must be a contract of employment, either express or implied. Atlantic, etc., R. R. Co. v. West (1905) 121 Ga. 641, 49 S. E. 711; Sibley v. State (1915) 89 Conn. 682, 96 Atl. 161. Hence, one who is injured while assisting an employee at his request is not compensated unless that employee had the apparent authority to create that contractual relation on behalf of his employer. Under ordinary circumstances, an employee has not this power. Flower v. Pennsylvania R. R. Co. (1871) 69 Pa. St. 210; Mickelson v. New East Tintic Co. (1900) 23 Utah, 42, 64 Pac. 463; Yazoo & M. V. R. Co. v. Stansberry (1910) 97 Miss. 831, 53 So. 389. In an emergency, however, when immediate action is required in the employer's interest, and there is no fellow-employee present and ready to assist, most courts recognize such a power by implication. Central Trust Co. of N. Y. v. Texas & St. L. Ry. Co. (1887, C. C. E. D. Mo.) 32 Fed. 448; Louisville & N. R. Co. v. Ginley (1897) 100 Tenn. 472, 45 S. W. 348; but see Blair v. Grand Rapids R. R. Co. (1886) 60 Mich. 124, 26 N. W. 855. And in such cases, the assistant may be a fellow servant, although he intends his services to be temporary and gratuitous. Johnson v. Ashland Water Co. (1888) 71 Wis. 553, 37 N. W. 823; Aga v. Harbach (1905) 127 Iowa 144, 102 N. W. 833. The decision in the principal case is, however, open to question, since it does not appear in the report whether the assistant had submitted to the directions of the driver. Granting, however, that the relation of master and servant did exist, recovery in the principal case was possible only because the Minnesota statute, unlike many compensation acts, does not bar casual employees from its operation, when the work in which they are engaged is in the usual course of the employer's business. State v. District Court (1915) 131 Minn. 352, 155 N. W. 103. See Thompson v. Twiss (1916) 90 Conn. 444, 449; 97 Atl. 328, 331.

WILLS—REVOCABILITY—EFFECT OF CONTRACT TO DEVISE.—The probate court admitted to probate as a will an instrument which was in form a deed, reciting a present consideration and conveying all the property the grantor should own at her death to her husband, with the proviso that "this is to take effect only in case of my death prior to that of my husband." Following the state practice permitting a person who has not contested a will in the probate court to do so by bill in chancery, the beneficiaries under a will later in date brought their bill to set aside the probate of the earlier instrument, a copy of which they incorporated in their bill. Held, that a demurrer to the bill was good, since the earlier will, being based upon a valuable consideration, was irrevocable; also that a court of equity would not act to set aside the probate, since it would then have to decree a trust in the husband's favor, and thus render its own action nugatory. Walker v. Yarbrough (1917, Ala.) 76 So. 390.

See Comments, p. 542.

WITNESSES—COMPETENCY—FORMER CONVICTION OF FELONY.—Upon the trial, in the United States District Court for the Eastern District of New York, of two defendants charged with conspiring to receive property stolen from "duly authorized depositories of United States mail matter" in violation of a federal statute, the prosecution offered the testimony of one Broder, who had formerly been sentenced for forgery in a state court of New York and had served a term therefor. This testimony was received over objection, and the defendants

having been convicted, its admission was assigned as error. Held, that the testimony of Broder was properly admitted. Vandevanter and McReynolds, JJ. dissenting. Rosen v. United States (1918) 38 Sup. Ct. 148.

At common law a witness was held incompetent to testify upon a showing that he had ever been convicted and sentenced for a crime, even that of petty larceny. Pendock v. Mackinder (1755, Eng. C. P.) Willes, 665. Official pardon, however, restored his civil rights in this particular as in others. Rex v. Celier (1680, K. B.) T. Raym. 369; The King v. Reilly (1787, K. B.) Leach, 509. In 1843, Lord Denman's Act was passed, growing out of a rising belief that valuable, sometimes essential, evidence was stifled by this technical rule, and providing that no person should thereafter be excluded from testifying because of a previous conviction for crime. 6 & 7 Vict. c. 85; 4 Chitty's Eng. St. (6th ed.) 531. This statute was the pattern for many later enacted in the United States and the Dominion. See I Wigmore, Evidence, sec. 488. At the present time the common law rule has been very generally abolished in the courts of the States. See, however, Berry v. Godwin (1916, Tex. Civ. App.) 188 S. W. 30. In United States v. Reid (1851, U. S.) 12 How. 361, 366, it was held that the competency of witnesses in criminal trials in the United States courts must be determined by the laws in force in the respective states when the Judiciary Act of 1789 was passed. No act of Congress has yet been passed to change this rule, which has been followed by the federal courts in cases some of which are of very recent date. See for example United States v. Gwynne (1914, E. D. Pa.) 209 Fed. 993; United States v. Hughes (1892, D. C., W. D. Pa.) 175 Fed. 238. See also Logan v. United States (1892) 144 U. S. 263, 298-303; 12 Sup. Ct. 617, 628-630. By the law of New York in 1789, which, under the rule of the Reid case, would have governed in the principal case, one convicted of forgery was disqualified as a witness. The court, however, declined to follow the Reid case, holding that in view of the general change during the last century in the law relative to the competency of witnesses, and the sound reasons on which this change has proceeded, "the dead hand of the common law rule of 1789" should no longer govern the determination of such questions. This decision finds some support in a previous case by which the authority of the Reid case was somewhat shaken, though it was by no means overruled. See Benson v. United States (1892) 146 U. S. 325, 3 Sup. Ct. 60. The result is commendable, but it may be doubted whether the court did not encroach somewhat on the legislative field in accomplishing it.

### **CURRENT DECISIONS**

ALIENS—NATURALIZATION—LIMITATION OF TIME FOR FILING PETITION.—In 1905 Morena declared his intention under the law then in force to become a citizen of the United States and in 1914 he filed in court his petition for citizenship. The Act of June 29, 1906, c. 3592, 34 St. 596 (Comp. St. 1916, sec. 4362) provides (sec. 4) that "not less than two years nor more than seven years after he has made such declaration of intention he shall make and file in duplicate a petition" for citizenship. The old law contained no limitation as to the maximum interval which might elapse between the declaration and the final petition. Held, that an alien who made his declaration before the act of 1906 was required to file his petition not more than seven years after the date of the act. United States v. Morena (1918) 38 Sup. Ct. 151.

This decision sets at rest a point upon which the decisions of the lower federal courts were in conflict.

ALIEN ENEMIES—RIGHT TO SUE—SUSPENSION OF SUIT BY PARTNERSHIP HAVING ALIEN ENEMY MEMBER.—Action was brought by the plaintiffs, a partnership, to recover money due from the defendant. The plaintiffs' firm consisted of six members, of whom one was an alien enemy, but it appeared in the liquidation of the firm as constituted at the outbreak of the war that he was indebted to the partnership in a larger amount than his share of the sum involved in the suit. A motion to stay prosecution of the suit was granted and the plaintiffs appealed. *Held*, that no stay should have been granted. *Speyer Bros. v. Rodriguez* (1917, C. A.), noted in Law Journal (English) Dec. 1, 1917, p. 430.

The opinion states that the defendant's contention would in effect condemn all British subjects who had the misfortune at the outbreak of war to have an alien enemy partner to stand out of all moneys due to the firm at that date for an indefinite time, even though the alien enemy's share of those debts was small and there was no fear that he would during the war be able to handle it or derive any immediate benefit from it. See (1918) 27 YALE LAW JOURNAL, 420.

Conflict of Laws—Effect in Neutral Countries of War Emergency Legislation of Belligerent Countries.—A German subject resident in Switzerland entered in 1900 into a contract of insurance with a French insurance company. In 1915 he removed to Germany, offering to pay in Switzerland the premium due. The French company refused to accept it on the ground that the French legislative decree of September 27, 1914, prohibited and declared void the performance of obligations contracted with and owing to or by subjects of Germany. The insured then brought an action in Switzerland to compel the French company to accept the premium. Held, that the action could be maintained, since the contract, having been concluded in Switzerland, was subject to Swiss law and the Swiss courts would not enforce in Switzerland war legislation of France, this being a matter of public and not of private law. In re Cie. Nationale (French) v. Biermann (German) (Supreme Court of Switzerland, Apr. 17, 1916) reported in (1917) 44 Clunet 306.

This is in accordance with general principles of continental law by which a state will not enforce provisions of the public law of foreign countries not made a part of the original contract. A fortiori, it would seem that the courts

of a state should not enforce special legislation of a belligerent country in a struggle in which their country is neutral.

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF SELECTIVE DRAFT ACT.—The plaintiff in error, convicted of failing to present himself for registration in violation of the "selective draft act" of May 18, 1917, challenged the validity of the act. *Held*, that the act was constitutional. *Arver v. United States* (1918) 38 Sup. Ct. 159.

For a brief discussion of previous decisions by less authoritative courts to the same effect, see (1917) 27 YALE LAW JOURNAL, 133. The opinion of the Supreme Court is chiefly devoted to the general question of the power of Congress to provide for compulsory military service, which is upheld in the most positive terms as within the power expressly given by Art. I, sec. 8, of the Constitution "to raise and support armies." The court also disposes summarily of various minor objections to special features of the act, most of which were also raised in the previous cases above referred to.

Constitutional Law—Due Process—Prohibiting Possession of Liquor for Personal Use.—A state statute (Idaho, Laws 1915, ch. 11) declares it unlawful for any person "to have in his possession any intoxicating liquors except as in this act provided." The defendant was arrested for having in his possession a bottle of whiskey for his own use. Contending that the statute violated the Fourteenth Amendment he sought by habeas corpus proceedings to obtain his discharge. The state court sustained the statute. The petitioner sued out a writ of error. Held, that the statute was constitutional. Crane v. Campbell (1917, U. S.) 38 Sup. Ct. 98.

Mr. Justice McReynolds's opinion states "that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge." The decision is one of first impression before the Supreme Court. There has been a conflict among state courts. See (1917) 27 YALE LAW JOURNAL, 286.

Contracts—Unilateral—Offer Irrevocable after Partial Acceptance.—A landowner appointed the plaintiff as his sole agent to sell certain land, and agreed to sell on certain terms. He gave notice of revocation to the plaintiff while the latter was in treaty with a buyer. Later, the buyer agreed to the owner's terms, but the owner refused to sell. Held, that the offer to the agent was irrevocable after he had spent time, effort, and money in carrying out the owner's desires, and that the owner must pay the specified commission. Braniff v. Blair (1917, Kan.) 165 Pac. 816.

This is an application of the rule that an offer may become irrevocable prior to complete acceptance, where the requested acceptance is to consist of a number of acts requiring an appreciable length of time and effort or expense. See Arthur L. Corbin, Offer and Acceptance, and Some of the Resulting Legal Relations (1917) 26 YALE LAW JOURNAL, 169, 191-196, citing cases in accord and contra.

DAMAGES—MITIGATION—Excessive Freight Charge Paid by Shipper and Collected from Customers.—The plaintiff lumber company paid excessive freight rates to the defendant carrier for transporting lumber and now seeks to recover the amount of such excess. The carrier contended that the plaintiff had suffered no damage because it had collected from its customers the amount of such excess freight rates. *Held*, that the defendant was liable for the difference between the reasonable rate and the excessive rate paid by

the plaintiff. Southern Pac. Co. v. Darnell-Tanzer Lumber Co. (Jan. 21, 1918) U. S. Sup. Ct., Oct. Term, No. 132.

The opinion by Mr. Justice Holmes contains the following: "The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. . . . Probably in the end the public pays the damages in most cases of compensated torts."

FEDERAL COURTS—JURISDICTION—FINALTY OF JUDGMENT OF C. C. A.—The plaintiff brought suit in a state court against the carrier to recover damages for injuries to an interstate shipment of live stock. The suit was removed to the federal court on the sole ground of diversity of citizenship, and judgment for the plaintiff was affirmed by the Circuit Court of Appeals. A writ of error was taken to the Supreme Court. Held, that though the suit might have been removed from the state court on the ground that it arose under the laws of the United States (the Carmack Amendment to the Interstate Commerce Act being involved), nevertheless the judgment of the Circuit Court of Appeals was final, since the sole ground for removal set forth in the petition was diversity of citizenship; and that the writ of error must consequently be dismissed. White, C. J., dissenting. Southern Pac. Co. v. Stewart (1917, U. S.) 38 Sup. Ct. 130.

Insurance (Accident)—Construction of Policy—Accident Inducing Tuberculosis.—The insured held an accident policy of insurance against bodily injury sustained "through accidental means directly, independently and exclusively of all other causes." An accidentally sprained wrist resulted in permanent disability because of latent tuberculosis in the insured's system. The insurance company contended that the plaintiff's injury was not within the terms of the policy. Held, that the insurance company was liable. Fidelity & Casualty Co. of N. Y. v. Mitchell (P. C.) [1917] A. C. 592.

The court argues that "the accident had a double effect—it sprained the tendons and it induced the tuberculous condition. These two things acted together . . . ; but while they are both ingredients of the disabled condition, there has been and is, on the true construction of the policy, only one cause, namely, the accident."

Insurance (Fire)—Avoidance of Policy by Fraudulent Proof of Loss.—In an action to recover for a total loss of insured merchandise the company's defense was that the over-valuation in the sworn proof of loss was fraudulent and avoided the policy under the usual provision against false swearing. The plaintiff had access to his ledger showing the actual value of the goods, but over-stated their value by 25% to 50%. The trial court found the loss to be less than one-half the amount stated in the proof of loss and rendered judgment for the plaintiff. Held, that the judgment was erroneous as this evidence conclusively established a willful and fraudulent over-valuation, which precluded any recovery. Dossett v. First Nat. Fire Ins. Co. (1917, Tenn.) 198 S. W. 889.

The cases are not in accord as to how great the disproportion must be between the value as found by the jury and that stated in the proof of loss to lead the court to declare the existence of fraud established. Richards, *Insurance* (3d ed.) 313. In the principal case, however, the extent of the unexplained discrepancy between the plaintiff's own ledger and the proof of loss would seem consistent only with bad faith.

INTERNATIONAL LAW—CESSION OF TERRITORY—EFFECT UPON NATIONALITY OF INHABITANTS.—The plaintiff was born in 1881 in Dobritch, then in Bulgaria. In 1902 he removed to France permanently. In 1913 under the treaty of Bucharest terminating the second Balkan war, Dobritch, by a rectification of frontiers, was ceded to Rumania. Subsequently he had received Rumanian passports. The defendant objected to the prosecution of the suit on the ground that the plaintiff was of Bulgarian nationality, hence an alien enemy. Held, that the action could not be maintained. Burgard v. Mair (Tribunal Civil de Saint Etienne, June 7, 1916) reported in (1917) 44 Clunet 193.

The opinion states that while birth in the territory conferred nationality, cession of the territory, being but a rectification of frontiers, did not change the nationality of those not actually domiciled in it, i. e., of those domiciled abroad. It would seem that had it involved the cession of a geographical province or of a state, instead of a small undefined portion of territory, it might have carried with it a change of nationality of those born in it, even though domiciled abroad. No other case presenting the same problem has been found in the reports or literature examined.

International Law—Military Occupation of Enemy Territory—Substitution of Authority of Occupant.—The defendant, who was arrested in a part of Russian Poland occupied by Germany, was tried in Germany. He claimed that he was held illegally, having been taken into Germany without extradition proceedings and without consent of the Russian authorities. Held, that his arrest and trial were lawful, because while occupied enemy territory remains enemy and does not become national territory by the occupation, the occupant exercises jurisdiction therein in matters of public law in substitution for the replaced authority of the original sovereign and this jurisdiction warrants the arrest of criminal offenders there and their trial in the national courts of the occupant without any necessity for extradition proceedings. Judgment IV. 407/15 (Supreme Court of Germany in Criminal Cases, July 26, 1915) reported in (1916) 21 Deutsche Juristenzeitung 134, also reported in (1917) 44 Clunet 260.

STATUTE OF FRAUDS—PART PERFORMANCE—PAYMENT OF RENT IN ADVANCE.—The defendant made a verbal agreement to grant a lease of a farm to the plaintiff. The latter, who had not taken possession of the farm, paid an installment of rent in advance. In an action for specific performance of the agreement the defendant pleaded the Statute of Frauds. *Held*, that the payment of rent without taking possession did not remove the case from the operation of the Statute. *Chaprione v. Lambert* (C. A.) [1917] 2 Ch. 356.

This is the first decision on the point in the English Court of Appeals and follows and approves *Thursly v. Eccles* (1900) 49 W. R. 281. It has, of course, been long settled that the mere payment of the purchase price is not a sufficient act of part performance to entitle the purchaser to specific performance of an oral contract.

TELEGRAPHS AND TELEPHONES—DISCRIMINATION—EXCHANGE OF SERVICES WITH RAILROAD.—In 1888 the defendant telegraph company contracted for an exchange of services with the plaintiff railroad company. The contract provided for two kinds of service by the telegraph company, "on-line" service, being the carrying of messages for the railroad company along the common line of the two companies, and "off-line" service, being the carrying of messages to points beyond the line of the railroad. The 1910 amendment to the Interstate Commerce Act brought telegraph companies within the operation of the

Act and forbad discrimination, with a proviso that nothing in the Act should prevent telegraph companies from entering into contracts with common carriers for the exchange of services. Thereafter the telegraph company refused to convey "off-line" messages at less than its rates to the general public. The plaintiff sought to compel the defendant to perform its contract. Held, that the contract was invalid as to "off-line service" at less than the rates to the public. Chicago G. W. R. R. Co. v. Postal Telegraph Cable Co. (1917, N. D. Ill.) 245 Fed. 592.

The opinion contains a careful review of the legislation and authorities bearing on the point. A contrary ruling was made in Baltimore & Ohio R. R. Co. v. Western U. T. Co. (1917, S. D., N. Y.) 241 Fed. 162,—a decision which is said in the principal case to have been affirmed by the Circuit Court of Appeals for the Second District.

TORTS-LABOR UNIONS-INJUNCTION AGAINST ATTEMPTING TO UNIONIZE MINE BY PEACEFUL MEANS.—The plaintiff, owner of a coal mine in West Virginia, asked an injunction to restrain the officers and agents of the United Mine Workers of America from taking steps to "unionize" the plaintiff's mine without its consent. The employees of the plaintiff were working under contracts permitting them to withdraw from the plaintiff's employ at any time, and on the understanding that if they joined the United Mine Workers they were to cease working for the plaintiff. The acts of the officers and agents of the union consisted in: (1) peacefully urging the plaintiff's employees to join or to agree to join the union; (2) getting those who agreed to join, but who had not formally joined, to remain at work and to conceal the fact that they had agreed to join; (3) certain acts described by the court as going beyond "mere persuasion" and amounting to "deception and abuse," "misrepresentation, deceptive statements, and threats of pecuniary loss," but not including intimidation or threats of physical injury. The jurisdiction of the federal court depended entirely upon diversity of citizenship. Held, that the acts of the defendants were illegal under the common law of West Virginia and should be enjoined. Brandeis, Holmes and Clarke, JJ., dissenting. Hitchman Coal & Coke Co. v. Mitchell (1917) 38 Sup. Ct. 65.

The decision reverses that of the United States Circuit Court of Appeals, reported in 214 Fed. 685, and with slight modifications restores that of the District Court, reported in 202 Fed. 512. A discussion of this case will appear next month.

Workmen's Compensation Act—Injury Aggravating Previously Existing Disease.—The claimant broke his leg bone while engaged in a hazardous occupation in the employ of the defendant. He was previously afflicted with congenital syphilis, and the accident so aggravated the disease that he became totally blind. Held, that the claimant was not entitled to compensation for permanent total disability due to loss of eyesight, but only to compensation for the period during which the leg was disabled. Borgsted v. Shults Bread Co. (1917, App. Div.) 167 N. Y. Supp. 647.

Two judges dissented, in spite of the statement of Woodward, J., for the majority that "the purpose of the Workmen's Compensation Law was not to abrogate the divine law that the 'sins of the fathers shall be visited upon the sons, even to the third and fourth generation.'"

Workmen's Compensation Act—Injuries "Arising Out of and in the Course of Employment"—Employee Injured while Asleer.—The claimant was employed as a driver. After working on his wagon for several hours in cold weather he came inside and sat down near the boiler to wait until an adjacent

elevator was available for certain work he was required to do. While so waiting he fell asleep and a spark or the heat from the boiler fire set fire to his clothes and caused the burns for which compensation was sought. The respondent contended that the injury did not arise out of and in the course of employment. Held, that the claimant was entitled to compensation. Richards v. Indianapolis Abattoir Co. (1917, Conn.) 102 Atl. 604.

A night watchman employed by the defendant took a seat near an open doorway on the second floor of the defendant's building, "dozed off" and, while asleep, fell through the doorway and was killed. His widow filed a claim under the Workmen's Compensation Act. An award in her favor was affirmed by the Appellate Division. Held, that the deceased's injury did not arise out of and in the course of his employment. Gifford v. T. G. Patterson, Inc. (1917, N. Y.) 117 N. E. 946.

The Connecticut opinion states that the accident happened while the employee was on duty at a place where he might reasonably be, and that the fact that he fell asleep was at most merely negligence, which under the Act did not defeat his claim. The lower New York court took a similar view of the night watchman's conduct (165 N. Y. Supp. 1043) but the Court of Appeals held that such a conclusion could not be justified because the watchman's conduct was directly contrary to the object of his employment.

Workmen's Compensation Act—"Personal Injury by Accident"—Disease.—The defendant furnished drinking water to the employees of his factory. The water became infected and the claimant thereby contracted typhoid fever and was temporarily disabled. The Minnesota Compensation Act provides for compensation for personal injury by accident, defining "accident" to be "an unexpected or unforseen event, happening suddenly or violently, . . . and producing at the time, injury to the physical structure of the body." Held, that the claimant's illness was not a personal injury by accident as defined in the statute. State v. District Court (1917, Minn.) 164 N. W. 810.

This case is noteworthy chiefly as calling attention to a commendable attempt in Minnesota to clear up by express statutory definition a question which has been left in doubt under other workmen's compensation acts. For a discussion of the general question with special reference to the Massachusetts act, see 27 YALE LAW JOURNAL, 144.

#### **BOOK REVIEWS**

Standards of American Legislation. By Ernst Freund. Published by the University of Chicago Press. 1917. pp. xx, 327.

In the words of the author this is "an essay of constructive criticism, and not a systematic treatise." After a review of modern tendencies toward social legislation and of the judicial attitude toward such tendencies, Professor Freund devotes several chapters to what may be termed the legal background of his problem. The common law, statutory enactments, state constitutional provisions, and judicial doctrines are each reviewed in turn to discover what they have to contribute to a constructive legislative policy, and in general their contributions are found to be negative and haphazard. In attempting such a broad survey the author must necessarily assume much upon the part of his readers. It is too much, however, to assume that the reader will bring to the book the detailed familiarity with common law and constitutional law requisite to a full appreciation of Chapters II to V. The discussion in this part of the book is often too much in the air. Here and elsewhere the author merely refers to an illustration the facts of which are in his own mind, without giving the reader a sufficient basis for an understanding of the illustration (see for example the comparison between procedural legislation in New York and Illinois, p. 261).

Chapter III has a somewhat misleading title and its parts do not seem to have been organized into a single whole. Chapter IV is a concrete discussion of the extent to which state constitutions have sought to lay down policies of legislation, and Chapter V gives a good review of the development to its present broad scope of due process and similar broad limitations. In one or two cases, as for example, with reference to truck legislation in Missouri (pp. 123-124), some change in statement would be justified by later decisions.

Although in places not sufficiently concrete to be clearly understood by the reader, Chapters I to V do make it clear that neither the common law, nor constitutions, nor decisions based on constitutions, nor all of these together, have given us a body of principles of legislation or materially aided in the development of such a body of principles (pp. 68-71, 167, 172, 214). It is equally clear from the author's discussion that such principles have not been developed by legislatures themselves.

Chapters I to V of this book really construct a background, and it is to Chapter VI on "the meaning of principle in legislation" that we must really look for the author's contribution to the subject under discussion. The author here lays down two principles of legislation: First, the principle of correlation. that is, the principle that all phases of a problem should be regarded in legislating upon it. For example, when the legislature came to increase the property rights of married women, it should under this principle have considered also what increased obligations ought properly to flow from the increase of rights. This is practically a statement that the legislature ought not to look at but one side of the question to be legislated upon. Second, the principle of standardization, which would seek to apply the same or a similar rule to conditions of the same general type wherever they are to be legislated upon. Legislation is not likely to deal at the same time with all the problems of a similar type, but if it did so, a somewhat uniform standard for all would at once appear desirable. With matters of a similar type dealt with piecemeal and at different times, different treatment often results not so much from intention as from want of

thought. To such conditions the author's principle of standardization is clearly applicable and as he says, similar legislative treatment of similar conditions is only to a limited extent produced by judicial applications of the "due process of law" and the "equal protection of the laws" clauses. The substance of these two principles is summed up by the author as follows:

"If correlation means more carefully measured justice, standardization serves to advance the other main objects of law, namely, certainty, objectivity, stability, and uniformity" (p. 248).

The truth of these principles, as of most general statements, may be acknowledged, but they do not help us very much. They amount to a statement that thought should be given to each new enactment in its relation to the rest of the statute book and to the common law, and it must be agreed that such thought is given much too infrequently. The author's discussion is valuable in calling attention to the need for such thought, but he himself seems somewhat doubtful of the value of his principles in the face of a concrete problem presented to the legislature.

With respect to the principle of correlation, the author looks too much upon a legislature as an impartial body seeking to find the best rule for the subject as a whole. As a matter of fact, legislation is the result of a play of interests, with first one interest and then another dominant, and the adjustment of the balance between interests, if it comes, is not likely to come at one time, but through legislation dealing with the same subject throughout a series of years. Legislation upon new subjects is piecemeal and experimental, and while more correlation of opposing interests and of comparable measures is possible, the practical limits of such correlation are more serious than Professor Freund seems to realize. These statements are not so true in private law as in public law, and it is noticeable that most of the author's illustrations of lack of correlation are drawn from the field of public law where the observance of his principle is most difficult.

Problems of standardization again must work themselves out through a series of years, from the first tentative and imperfect legislation in a new field to more perfect legislation, as experience and knowledge increase—the first imperfect legislation often being a necessary basis for the experience that is to produce a more perfect statute. However, this does not involve a denial of the duty of the lawmaker in each case to avail himself systematically of all available data. Absence of standardization, as the author indicates, is nowhere so apparent as in anti-trust legislation (p. 222), but those who saw an existing evil could hardly postpone for twenty-five years the devising of any remedy because of the non-existence of precise standards, with perhaps the realization that such precise standards would not develop even during the period of such delay; in spite of this, much can be said for the anti-trust legislation, ineffective as it seems, on the whole, to have been. And as Professor Freund suggests, the opinion of experts at any particular period constitutes a very poor basis for legislation, for experts change in their views from generation to generation, as knowledge upon any particular subject increases. It is not, therefore, to be concluded that legislation upon existing information should not be enacted to meet an existing evil. As the author suggests, the English factory acts would not have been enacted had the words of so-called experts been accepted as to what were proper standards (p. 249). So far as the principle of standardization insists upon the possession for purposes of legislation of all available information, and the study of the best methods of accomplishing a given result, it is thoroughly acceptable, but how can it aid in determining whether in a new field the thing sought by legislation is desirable or undesirable? Even if it could, these matters of general policy are mainly determined by the play of forces upon the legislature and not by scientific standards. This is recognized (pp. 257, 260, 272) but is perhaps not given sufficient weight. Here again public legislation of a general type is less likely to be standardized until the policy has been rather fully formulated through successive legislative steps. The old and well-established principles of common law are more likely to be standardized and the same is true of matters capable to some extent of mathematical statement. The administrative features of legislation are more apt to be standardized than the policy of legislation, and, as is suggested by the author, such standardization has taken place too infrequently. The subject of penalties in statutes, it may be agreed, is one which can be standardized, and difference in penalties for similar offenses is more often the result of absence of consideration than of definite thought upon the part of the legislature.

A failure to adopt definite standards is oftentimes due more to the courts than to the legislature. The Illinois general assembly, for example, some years ago passed a law requiring washrooms for workers in bituminous coal mines. The supreme court of the state held this unconstitutional on the ground that it was a special law granting a special privilege or immunity, in that coal miners were favored while persons in other occupations of a similar character were not accorded the right to have washrooms. In view of the fact that the court did not in any way determine what classes of occupations should be brought within the washroom legislation, the general assembly was left either to a specific enumeration, which might again be held improper because of not including all occupations to which the law should apply, or to the use of general terms which should leave to the court by interpretation a determination of the extent of the statutory requirements. This latter arrangement leaves to the employer in each case the determination under threat of penalty of whether or not he is within the terms of the statute, but it was the only alternative of the legislature if it were to act upon the subject at all, and the subsequent law, much more unsatisfactory from the standpoint of any legislative principle, was upheld by the state supreme court (People v. Solomon, 1914, 265 Ill. 28). In many cases in Illinois and other states the court has forced upon the legislature a vague and indefinite method of legislation which could be avoided were it not for improper judicial construction of constitutional provisions.

In the concluding chapters of the book under review the author discusses what he terms constructive factors in legislation, and devotes most of his attention to the courts and the legislatures. The courts he finds—correctly, it seems to the reviewer—not to have had much, if any, constructive influence in the development of proper legislative principles. In this connection it may be worth while to suggest that our constitutions form the one important body of codified law in this country. The Constitution of the United States, being somewhat brief, has presented a definite problem, and its interpretation has been worked out by the United States Supreme Court to results that, in general, may be termed satisfactory. The state constitutions, except in a few states, present a more elaborate effort at codification, and in this field judicial interpretation may be studied profitably to determine whether the courts have done much of a constructive character.

The reviewer has just completed the task of going systematically through the judicial construction of the constitution of Illinois, which is a fair example of the more detailed constitutions of the middle west. The constitution of Illinois came into effect in 1870 and for some forty-seven years the supreme court of this state has interpreted its various provisions. As a result of such interpretation it is not too much to say that the constitution to-day is less definite in substantially all of its parts than the language of the text would have seemed at the beginning to indicate. Upon almost every large problem which presented an alternative of construing the language to be definite and precise, or of construing it to be so indefinite and standardless as to leave the determination

in each particular case to the discretion of the court, the court seems to have chosen the latter alternative, so that in most important problems the legislature, when it comes to enact laws, has no guide as to what is constitutional and what unconstitutional, but must enter into a guessing contest with the court-the court, of course, having the last guess. Upon the basis of this particular experience, it appears to the reviewer that perhaps the most serious hazard to legislation in a state with a complicated constitution is the necessity under which the legislature labors in substantially all important legislation of guessing how the court is likely to act after the legislation has been enacted. What is referred to here is not the broad due process of law clause of the constitution, nor other limitations which are themselves broad and indefinable, but constitutional provisions which were intended to mean something specific-provisions into which, by judicial construction, such indefiniteness has been read that the application of the provision in each particular case comes to be a matter within the discretion of the court, without any standard by which the legislation may determine in advance what is and what is not within the limits of the constitution. What has just been referred to constitutes the real hazard of legislation. and a real bar oftentimes to the establishment of either proper correlation or proper standards of legislation, and to such constitutional difficulties the author has given entirely too little attention.

However, this book should be judged, not as a treatise upon the subject of legislation, but rather as what it purports to be, "an essay of constructive criticism." Within the limits set out, Professor Freund has produced a valuable work, and it is to be hoped that in the near future he will give us a book which deals not merely with the general aspects of the subject, but which will also seek to chart out something of the detailed difficulties, for after all it is the details rather than the general principles that constitute the real difficulties in the problem of state legislation to-day.

W. F. Dodd

Legislative Reference Bureau, State of Illinois

Jurisdiction and Practice of Federal Courts. By Charles P. Williams. Published by The F. H. Thomas Law Book Co., St. Louis. 1917. pp. xix, 586.

There are many treatises dealing especially with the jurisdiction and procedure (or practice) of the federal courts not adapted for the law student but intended entirely for the practitioner, e. g., Desty, Foster, Rose, Loveland, Montgomery; there are other treatises devoted largely to equity jurisdiction and practice, e. g., Street, Whitehouse, and Simkins's novel treatise on the questions of jurisdiction and practice arising in the prosecution of an equity suit from its filing to the decree of the court of last resort; also Simkins's A Federal Suit at Law, accorded similar treatment, both of which are highly useful in the student's hands but are of greater appeal to the practitioner. Nor is there lack of treatises on the subject intended for law students primarily: Curtis, Hughes and Simonton at once occur to the law teacher.

Curtis's lectures on federal jurisdiction were delivered in 1872-1873 to the students of Harvard Law School, and have a very pleasing style; some discussion of practice is included, but so old a discussion of this subject, no matter how valuable at the time, will not suffice for the present requirements. Curtis preferred to begin at the top of the federal judicial system and work down through the Supreme Court, Circuit Courts and District Courts; Hughes chose the other course and moves from the District Court upwards through the Circuit Court of Appeals and the Supreme Court along the channel through which the suit nor-

mally travels. Mr. Williams also prefers to work from the lower court to the higher and has the curent law school view of that matter with him.

It is clearly logical to begin with a perspective of the source and distribution of jurisdiction and the organization or scheme of courts, following with a study of each court in an upwardly progressive series. After an initial chapter of an introductory or ground-laying nature, Mr. Williams treats the District Court in its territorial aspects, such as venue, process, local and non-local actions; he then considers its jurisdiction as based on the federal question, diversity of citizenship, amount involved, and removals. Thereupon a pertinent treatment of the procedure at law and in equity follows; the criminal law and procedure, and admiralty and maritime jurisdiction and procedure, conclude the treatment of the District Courts.

The courts of appellate jurisdiction are treated together, and the decisions reviewable, as well as the procedure in law and equity on review, are discussed with careful attention. The volume closes with a study of the review of the decisions of the state court of last resort in the Supreme Court and the procedure on error or by *certiorari* incident thereto.

The plan of treatment is logical throughout, the discussion is crisp and suggestive, and the author neither shies at the points upon which the courts seem muddled, nor hesitates on occasion to express an opinion as to the correct rule in the matter. The book has the flavor of practice, but it is eminently fitted for the mature law school student. The author injects enough of the history of substantive and procedural matters to orient the reader properly—a course admittedly necessary in the case of the student of the subject, and highly desirable for the practitioner. Suggestive summaries are frequently introduced to illustrate the substantive law or procedure where complete treatment would involve a mass of detail, and the cases cited are numerous and apposite, making use of the latest decisions and rules of practice, and presenting a treatment thoroughly down to date. Although possibly a matter of opinion only, yet it seems that a discussion of bankruptcy would have answered a more general need than admiralty law and practice, inasmuch as in the author's view something had to be omitted.

The distribution of space in the book shows the tremendous importance of the District Courts in the federal judicial system under present statutes, but does not exaggerate that matter although seventy-five per cent. is thus used; the appellate courts use about twenty per cent. of the space, and the introductory chapter the remainder.

Much reading of cases and study of rules of procedure and of pleadings must supplement any handbook, and of course Mr. Williams has not pretended to make a volume which would dispense with that necessity. He does provide the student and practitioner with a highly useful tool, and his suggestive and envisaging manner of treatment gives the book a distinct place in the literature of the subject.

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## VALIDITY OF THE THEORY OF COMPENSATORY DAMAGES¹

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A slow evolution in the matter of compensatory damages has tended gradually to exclude the notion of penalty, which was first received in the law under the influence of the desire for vengeance. In its stead the view has been adopted that in the civil law, as distinguished from the criminal law, the sanction for a wrongful act—that is, for a tort or a breach of contract—should be so measured as merely to restore the person injured to his former position. This evolution began in the Roman law and has reached its full development only in modern legislation.

The theory appears simple. It has the technical imprint of a vigorous doctrine which is encountered in both the economic and the artistic ideas prevalent at the end of the eighteenth century and the beginning of the nineteenth. This order of thought is appropriate to the fine strength of the period of the empire. It is the criminal law, not the civil law, which is concerned with penal ideas and with the prevention in the future of wrongful acts. What, therefore, is the basis of the sanction of a wrongful act? If it is to obtain security from the wrongdoer, he could be condemned only if chargeable with a fault, thus taking into account the subjective point of view; whereas a sanction is by nature objective. It must seek to cure an injury, nothing more. What, indeed, may the injured person demand? His security requires merely that he be restored to the condition in which he would have been had the wrongful act not taken place.

¹Translated from the French by Dr. Edwin M. Borchard, Professor of Law in Yale University.

Let us assume that a man's house has been set on fire by the negligence of a neighbor. A new house will be built for the owner, or he will be given money compensation to cover the cost of rebuilding. Or let us assume that a contractor has not done certain work within the period agreed upon. He must pay a sum of money sufficient to make good both the loss caused by his delay, and the loss of benefit which would have been realized by his prompt completion of the work. That is sufficient.

This notion that the person injured may claim the equivalent of the damnum emergens and of the lucrum cessans is, so to speak, classic in the codes of Europe and of America. The French Civil Code² provides that "damages are due as a rule to the creditor for the loss which he has suffered and the gain of which he has been deprived." The Italian,² the Venezuelan,⁴ and the Dutch⁵ Civil Codes contain like provisions. The Spanish Civil Code is inspired by the same principle, providing⁸ that "the indemnity for an injury comprises not only the amount of the loss which has been sustained but also the amount of the profits of which the creditor has been deprived." The Portuguese Civil Code stipulates:⁷

"Indemnity may consist in the restitution of the thing or of the sum which constituted the principal object of the obligation, or in the restitution of that thing or sum and of the gain of which the creditor has been deprived in consequence of the nonperformance of a contract."

The Italian Civil Code likewise provides that reparation for an injury arising out of either the complete or the partial failure to perform an obligation must comprehend the harm done and the gain lost. The most recent codes embody the same principles. The Japanese Code⁸ provides that

"the claim for damages has as its object the reparation of the injury which results from nonperformance according to the ordinary course of events."

The German Civil Code⁹ provides that

"whoever is bound to make good an injury must restore the state of things which would have existed if the circumstances which gave rise to the obligation to make compensation had not occurred."

Further: "the injury to be made good also comprises lost profits."

² Art. 1149.	⁷ Art. 706.
* Art. 1227.	⁸ Art. 416.
⁴ Art. 1293.	° Art. 249.
Art. 1308.	¹⁰ Art. 252.
⁶ Art. 1106.	•

The revised Swiss Federal Code of Obligations includes the same principles and provides¹¹ that "when the creditor cannot obtain the performance of an obligation or can obtain only an imperfect performance, the debtor is bound to make good the resulting injury."

# The English law admits that

"where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." 12

When special provisions of a code deal with non-contractual injuries inflicted on another, the same principles are generally followed. Thus, the French Civil Code¹³ provides that "whoever by act or omission causes damage to another is obliged to make it good." This provision is embodied in the codes of many other countries.¹⁴

The principle of compensatory reparation is, therefore, an idea which has a strong foundation in modern law. When it is examined more closely, however, it will be observed that its force is not absolute, and that it encounters either practical obstacles, or else principles of a certain social utility which have not full validity but which, nevertheless, have their part to play in the complex combination which is presented by the solution of any social problem.

Ι

As a matter of fact it is not always possible to replace the creditor obligee in exactly the same position as if the wrongful act,—namely, the tort or the breach of contract,—had not occurred. When compensation is made in kind, the restored *res* is again exposed to the same chances of destruction as the original *res*. This is the case when a vessel which has collided with another by the latter's fault, is so repaired by the owner of the ship at fault as to permit it again to navigate.

But more often, either because it is impossible to restore the former state of things, as where a person is injured bodily, or in order to avoid a discussion with reference to the execution of a contract, compensation for the wrongful act is made in the form of a money indemnity. How is it possible to make the sum a true compensation

¹¹ Art. 97.

¹² Robinson v. Harman (1848) 1 Exch. 850, 855, per Parke, B.

¹⁸ Art. 1382.

¹⁴ Textually reproduced in Art. 1428 of the Dutch Civil Code, Art. 1151 of the Italian Civil Code, and Art. 1217 of the Venezuelan Civil Code. Art. 2314 of the Chilean Code and Art. 709 of the Japanese Civil Code contain similar provisions.

for the injury sustained? Here again the result may be attained if the only uncertain element is the duration of the injury. The court may order periodic payments which shall continue as long as injury is suffered. If an individual has been the victim of an accident and has been temporarily incapacitated, though the injury will ultimately leave no trace, it is easy to accord him a return which will terminate the day he resumes work. It is likewise easy to make good an injury of limited duration in the enjoyment of property.

The injury may be uncertain in its extent as well as in its duration. Occasionally it is possible to determine, in spite of variations of fact, what would have happened in the absence of the wrongful act. Thus, an accident may lead to disability to work, followed by periods of good health which are interrupted by relapses. We may a posteriori fix at the end of each year the indemnity which may be due.

But the measure of damages may be uncertain because even a posteriori it is not possible to determine exactly what would have happened in the absence of the wrongful act. When a person has been rendered incapable of work because of an accident, how can we foresee the business opportunities that he may have lost? He might have been offered an excellent position, but, in view of the accident, the offer will not have been made.

Two recently enacted codes have begun to take account of these difficulties. The Japanese Civil Code of April 28, 1896, provides: 15

"The claim for damages has as its object the reparation of the injury which results from nonperformance according to the ordinary course of events."

In the same spirit the German Civil Code of 1896 provides16 that

"the injury to be made good includes lost profit. Profit is deemed to have been lost when it might reasonably have been expected according to the natural course of events or according to the particular circumstances of the case, e. g., according to the preparations or provisions made."

These two articles express a reasonable idea which may be accepted in countries where statutes contain no provision on the matter. It is informed by a practical consideration of the probable in life as the equivalent of the certain.¹⁷ If a crop is destroyed before its maturity by the fault of a person, it is natural to presume that the crop, properly cared for, would have been harvested by its owner.

But if the general principle is admissible, it encounters serious difficulties in certain cases. In practice, life imposes the necessity of

¹⁵ Art. 416.

¹⁸ Art. 252.

¹⁷ A. Albinozzi, Studio sul danno non patrimoniale (3d ed.) 90.

considering as true that which is probable; but this entirely pragmatic opinion must yield before realities. Let us suppose that certain trees in a privately owned forest have been unlawfully cut down, but before damages are claimed, lightning causes the destruction of the entire forest so that the felled trees would have been and are unavoidably lost to their owner. May the owner bring an action against the original wrongdoer? The question may be posited in another form. To appreciate the existence or the extent of an injury, it is necessary to place one's self constructively at the time when it is inflicted, or when the magistrate, upon personal inspection, or the parties, by agreement, make an estimate of the injury. It appears logical always to yield to the lesson of facts. If the negligence of a person causes the loss of goods which at the moment of their destruction were worth a thousand francs, the owner of these goods may claim 1200 francs if it is established that at the time of judgment such an increase in the value of the goods has taken place as to justify the claim. Conversely, the person at fault will have to restore only 800 francs if it is proved that the market price of the goods declined to that extent after their destruction. The only inconvenience of this solution is that the injured person, in claiming his indemnity after the lapse of a period of time, prolongs the uncertainty of the wrongdoer's risks. But the wrongdoer may always offer the injured person the actual amount that has been lost. The danger, therefore, is minimal, and it is hardly profitable to discuss it at length.

In addition to the probable injury, there is the possible injury which might have resulted in consequence of a series of circumstances of which one may only assert that they might have occurred. By reason of some error or negligent act, let us say, a race-horse carried by a railroad does not arrive in time to take part in the race. In estimating the damages, must we take into account the prize which the horse might have won? Similarly, at the moment of the drawing of a lottery one of the numbers in the lottery is negligently missing: may the holder of that number claim damages, and how much shall they be? To give a reasonable solution to these difficulties we must, so far as possible, avoid two dangers. On the one hand, it is an exaggeration to assimilate the mere chance of winning a prize to a certainty or a probability. Indemnity should not be a matter of profit, else the injury will be sought after; this is, of course, contrary to the interests of society. On the other hand, is it not a somewhat crude policy to omit taking account of uncertain injuries? How many acts of man constitute merely a speculation upon the chance of gain!

A purely mathematical solution is conceivable. The table of probabilities might be placed under contribution, and this method of reaching precise results would be alluring to people who think it possible to deduce principles of law from rigorous calculations. But this method would be dangerous. Mathematics, of all sciences, is the least in con-

tact with the complex realities of life. To calculate chances is to render certain phenomena more apparent to the spirit, but not to fix their uncertain shapes.

The system of indemnity here encounters an impassable obstacle. The court may indemnify, but only by an act of the will: the court creates a reaction against the wrong instead of making it good.

French jurisprudence has chosen a more prudent course, and it may be said that it does not take cognizance of speculative injuries. Thus, with reference to a race-horse which was unduly over-weighted, it has been decided that

"there is in the outcome of races a certain unforeseen element, the winning or losing of a horse usually being not the result of a specific determined cause, but of a combination of diverse circumstances." ¹⁸

Perhaps this solution is too cautious, for it hardly attains its aim. This is merely acting as if the wrongful act had not occurred. To take account of only the certain injury is to take account of only the palpable injury. It would be better to renounce the idea of compensatory indemnity and to admit a moderate reaction against probable injuries.

These conclusions establish that the grant of an indemnity absolutely compensatory of the injury frequently encounters practical obstacles. These obstacles are not so numerous, however, because most codes provide that damages ought to comprehend nothing but the immediate and direct consequences of the nonperformance of an obligation.¹⁹ Thus, the legislatures have adopted an easy method of evading the appreciation of certain damages, and at bottom they have admitted that the injury ought in certain cases to have as its sanction a pecuniary compensation not adequate to the loss sustained.

ΙΙ

The principle of assigning to the victim of the wrong as adequate a compensation as possible encounters obstacles other than those of fact. Under some circumstances the social utility of the principle is contested.

The theory of indemnity is, after all, a special aspect of the equalizing concept. This theory simultaneously presents the strength and the weakness of that concept. It would appear to be as simple as the theory of equivalents. The measure of the rights of the injured party

¹⁸ Nancy (Dec. 10, 1912) Gazette du palais 1912, 2, 525; and similarly, Bordeaux (July 15, 1912) *ibid*. 1912, 2, 526.

¹⁹ Argentine Civ. Code, Art. 520; Chilean Civ. Code, Art. 1558; French Civ. Code, Art. 1151; Italian Civ. Code, Art. 1229; Mexican Civ. Code, Art. 1466; Portuguese Civ. Code, Art. 707; Spanish Civ. Code, Art. 1107.

will often be easy to determine, since it is fixed by a material element, namely, the damage done. On the other hand, the theory of indemnity corresponds to one of the primordial necessities of social existencethe necessity of security²⁰ conceived in its most simple form, that is, in the desire to maintain vested interests. When a right is recognized by law, it is best protected by enacting that if the right is violated, it will be re-established in its integrity, so that the wrongful act will, so to speak, be effaced. The possessor of the right then feels entire security in making use of his property. He knows that the value of the property is at least guaranteed against wrongful acts. He finds therein a cause of tranquillity and an inducement to economic activity. The system appears to be a compromise between the claims of the victim to obtain an exaggerated sum of money, and the desire of the person at fault to pay as little as possible. The judge in fixing the measure of damages seems to take the position of a reasonable third party; he satisfies the victim of the injury, who cannot demand more than he has lost, and his estimate is acceptable to the wrongdoer, who must bear the loss. Compensatory indemnity constitutes, therefore, a just measure of sanction. On the other hand, the theory of compensatory reparation has the weakness of all equalizing theories. These theories constitute an aspect of social life and often have a material aspect. They neglect the dynamic side, and consequently they do not constitute a forceful lever of social activity. This weakness, however, appears here without inconvenience; for even if the theory of indemnity does little to compel the person at fault to refrain from such wrongful acts, still it is recompensed by the penalty.

The indemnity, by the mere fact that it is a sanction, that it constitutes a reaction against the act committed, may sometimes deter repetitions. But that is not always true. The damage may be small, yet the fault may be great. This happens when there is an attempt whose effect is limited, or when the injury, being immaterial, hardly lends itself to a considerable compensation. But the penalty seems to make good this defect. If the wrongdoer is chargeable with a grave fault, the criminal law intervenes, having no aim other than to prevent a repetition of the wrong. It may proceed by way of general prevention (the theory of intimidation) or it may act upon the spirit of the wrongdoer himself (the theory of punishment).

The special purpose given to the indemnity and to the penalty is informed by a good analytic spirit, the past being effaced by the indemnity, the future being safeguarded by the punishment. But like all simple theories, these ideas do not embrace all variations of reality; the variations are fused into a uniform color. Upon reflection, it is

²⁰ See on this subject the present author's Notions fundamentales du droit privé, 63 et seq.; Analysis of Fundamental Notions, in Modern French Legal Philosophy, 347, 418 et seq.

clear that cases exist in which it is fitting that a civil court substitute for compensatory reparation a pecuniary penalty, under the name of punitive or exemplary damages.²¹

This institution is not a deduction from a single idea, but is rather the point of convergence of concurrent difficulties. Thus it happens that according to circumstances it may present greater or less force, because under various hypotheses it may call to its aid stronger or weaker governing ideas.

It must be admitted that at first glance the idea of punitive damages, that is, a penalty exceeding the harm done, appears shocking. It involves what might seem to be an unjust enrichment on the part of the victim. This objection would be decisive if a pecuniary penalty always constituted a complete reparation of the injury. But perhaps the injury cannot be compensated by a pecuniary indemnity and can give rise only to a counter payment (as when an individual is slandered without suffering any loss of credit, or when a person is subjected, by the death of a near relative, to mental suffering without any property loss); then the transition is insensible between the indemnity looking only to a compensation of the loss sustained, and that looking to a punishment of the wrongdoer.

It is easier to pass from one to the other when we perceive that the domains of penal and of civil law-which have been gradually distinguished in the course of civilization—are not absolutely separate categories, and that it is proper to establish intermediate zones. The penalty is a powerful instrument which must be used judiciously. In addition to the public penalty pronounced by the criminal courts, it is proper in some cases to establish a private penalty (punitive damages) pronounced by the civil courts, the imposition of which may be demanded only by the person injured. Acts affected with a private penalty thus appear as quasi crimes, placed in an intermediate zone between the jurisdiction of the civil law and that of the criminal law. It may have been observed that there is a certain correlation between the cases in which a private penalty is assessed and those characterized as criminal offenses. Indeed, the law at times pronounces a public penalty by reason of the grave consequences of an act,-as in the case of homicide or assault and battery; such acts are punishable whether intentional or due to gross negligence. sionally the law is concerned particularly with the intention of the defendant, and it punishes only if criminal intent is found. Thus, the taking of another's property is not usually punishable if the taker has made a mistake without wrongful intent.

Cases in which it is proper to impose a private penalty are sometimes those in which the act appears to involve an element of risk, as

ⁿ See Le Hugueney, L'idee de peine privée en droit contemporain (Paris, 1904).

in the case of a rash accusation; and sometimes those in which the defendant intended to injure, or at least was conscious of injuring, as in the case of defamation, seduction, or a violation of individual liberty.

These are, indeed, the principal cases in which the English law imposes a private penalty under the name of exemplary damages.22 These cases present examples of wrongful acts for which a public penalty would constitute a rather harsh measure; they are, nevertheless, acts which disturb the social order and individual security simultaneously. The difficulty of estimating the loss, combined with the desire of adjudging these acts to be serious, but not criminal, leads logically to a notion of private penalty. The benefit assigned to the person injured does not shock the legal sense, for we may fix with precision the point at which the benefit shall stop. Special reasons for imposing a private penalty may also exist when the wrongdoer has derived from his act a benefit greater than the injury inflicted. It is unjust for a wrongdoer to preserve even a part of such benefit. It is more equitable to grant it to the victim. It is good legal policy to solve the problem in this way in order that no advantage may ever be derived from wrongdoing. Particular reasons likewise exist when it becomes necessary for a loss to be borne by one of two litigants: thus, it is more reasonable to make the losing party pay court costs.

The reasons for imposing a private penalty would be weaker if we were dealing with an intentional injury which appeared scarcely to disturb the social order, or with an act having grave consequences, but which arose from only a slight fault. Here the concept of indemnity, looking to the restitution of conditions as they would have been had the wrongful act not occurred, is presented with such force as to be invulnerable to attack. Do the preceding arguments irrevocably indicate the principles according to which the rule of punitive damages must be applied rather than that of reparation? We think not. The evolution of institutions cannot be permanently arrested. They have a value only so far as they find support in the general psychological condition; and this condition has both permanent and temporary elements. It will require either a cruder civilization to extend the penal domain, or the creation of an altogether new inspiration in order that new theories may present themselves.

III

The notion of compensatory reparation, with the idea of private penalty superimposed, is threatened, on the other hand, by the principle

²² See Italian Penal Code, Art. 38: in case of attack upon a person's honor, the court may pronounce a pecuniary penalty beyond any damage sustained.

of reparation by way of forfeiture (liability without fault) which has been recognized under the statutes of numerous European countries, especially in the matter of workmen's compensation.

If we examine the numerous laws which have accorded an action for indemnity to every workman injured by an accident in the course of his employment, we shall establish, in addition to this grant of a right of action even in the absence of proof of fault on the part of the employer, another feature not less important, namely, a limitation imposed upon the claims of the workman.

It is at once evident that the indemnity assured to the workman—or to his family in case of a fatal accident—is considerably less than the loss sustained. According to French law,²³ a workman totally and permanently disabled may claim a compensation equal to two-thirds of his annual wage. If partially yet permanently disabled, he is entitled to a pension equal to half his former earning capacity. In case of an accident followed by death, a pension is granted to certain dependent heirs not exceeding a total of 60% of the annual wage of the victim.

In Italy,²⁴ the compensation in case of permanent total disability is equal to six times the annual earnings, but never less than 3000 lire; in case of partial disability, it is equal to six times the annual earning capacity, but not less than 500 lire. In case of death it is equal to five times the annual wage. In Belgium,²⁵ a workman permanently disabled is awarded an annual allowance of 50% of his annual wage. In case of death his dependents are given a sum representing a capitalized annuity equal to 30% of his earnings, calculated upon the basis of his age at death. In Spain,²⁶ a totally disabled workman is entitled to an indemnity equal to his wages for two years; this is reduced by one-fourth if he is able to take up another occupation. If the accident is fatal a sum equal at most to two years' earnings is granted.

It would be easy to continue this enumeration and to show that the statutes, either in order to avoid placing too heavy a charge upon employers, or else to encourage workmen to be careful, grant the victim of an accident a sum of money considerably less than his earnings, and generally less than the loss sustained, for the workman may have expected in time an increase in his wages. Not only do the new cases of liability created in the absence of fault on the part of the employer constitute attenuated hypotheses of liability, but the traditional theory of liability in case of fault is also greatly limited.

²³ Art. 3, law of Apr. 9, 1898.

²⁴ Art. 9, law of Mar. 17, 1898, amended June 29, 1903.

²⁵ Art. 4, law of Dec. 24, 1903.

^{*}Art. 4, law of Jan. 30, 1900.

The Belgian law provides clearly27

"Nothing herein derogates from the general rules of civil liability when the accident was intentionally caused by the employer. Except for this limitation, damages arising out of accidents to workmen can be collected from the employer only to the extent of the compensation fixed by the present law."

The same provision is to be found in German law.28

The French law of 1898²⁹ provides that "workmen and employees cannot avail themselves, in case of accident in the course of their employment, of any provisions other than those contained in the present law." These provisions constitute the tariff indicated above, which is always applicable except in case of the inexcusable fault of the employer,—a fact which permits of a larger indemnity not to exceed, however, the amount of the annual wage.³⁰ The Spanish statute³¹ seems likewise to exclude actions arising out of a fault established by the common law.

The Italian law³² provides that the ordinary civil responsibility can be invoked only if there has been "a penal conviction for the act which caused the accident," or, if the penal action is quashed, if the civil court determines the existence of facts which would have constituted a misdemeanor. In the same spirit the Swiss statute³³ provides that the judge is not bound by the legal maximum in case the corporal injury or death of the victim was caused by an act of the employer susceptible of being made the basis of a penal action.

The English Workmen's Compensation Act of August 6, 1897,³⁴ is more favorable to the workman, and provides that "when the injury was caused by the personal negligence or wilful act of the employer," the Act in no way affects the employer's civil liability, but the workman may, at his option, either claim compensation under the Act, or pursue his common-law remedies. The statutes of certain other countries—for instance, that of Russia of June 2, 1903,—contain no provisions on the matter.

To sum up, there appears to be in European legislation a marked tendency to admit in favor of the workman only a limited responsibility on the part of the employer, unless certain grave faults may be ascribed to the employer which give rise to a common-law liability.

²⁷ Art 22

^{**} Art. 135, law of June 30, 1900.

²³ Art. 2, amended Mar. 22, 1902.

³⁰ Art. 20.

³¹ Art. 16, law of Jan. 30, 1900.

²² Art. 22.

³³ Art. 6, law of June 25, 1881.

[&]quot;60 & 61 Vict. ch. 37, s. 2 (b).

These results are important from two points of view. First, the modern rules in cases of accidents to workmen embrace one of the most important causes of liability. Again, they correspond to a general tendency of modern law to mask questions of social responsibility either by adopting a general solution in the case of unfortunate events such as accidents and sickness, or by according to the victim in all cases a certain assistance based upon social solidarity. The ordinary liability exists only in case of grave fault. Thus, in legislation of an objective character, the subjective consideration of fault still retains a certain place. Considering the whole matter, we must conclude that the modern tendency often results indirectly in replacing compensatory reparation by a reparation admittedly incomplete. In contrast to the private penalty (punitive damages), where the sum granted exceeds the injury, in these cases the victim is allotted a sum smaller than the loss sustained.

#### IV

From the preceding pages, it will have been established that the acceptance in law of the principle of indemnity constituted an advance because it substituted for the ideas of vengeance—which often exceeded the purpose which law should have properly pursued—a sanction which, though milder, was usually sufficient to satisfy the victim and even to prevent a recurrence of the wrongful act.

It would, however, be wrong to believe that the general application of the idea of compensatory indemnity is a definite stage in the evolution of law. Because of the attractive notion that it takes account of all losses sustained, the theory of indemnity presupposes a knowledge of numerous facts arising out of the fault committed, and requires minute research, leading finally to certain impassable obstacles. On the other hand, it encounters limitations of an opposite kind. Subjective considerations have led, in the case of some grave faults where the damage is difficult to measure, to the resurrection of the private penalty. The psychological analysis has here resumed its control over the objective determination of the damage.

Moreover, other objective considerations have been substituted for the already objective point of view of the compensatory indemnity. It has been sought to accord assistance to every victim of certain social events, such as accidents to workmen. The principle of compensatory indemnity has been maintained only where grave fault exists; it thus assumes a certain subjective basis.

The person entitled to indemnity may, therefore, lay claim to a sum which is in some cases greater than the injury sustained, in other cases, smaller. Ought we to conclude that the concept of compensatory indemnity, assaulted from two opposite sides, is destined to dis-

appear? By no means. It is appropriate to remark that between cases in which compensatory reparation has been applied, and those in which some other system has penetrated, for example, the private penalty or indemnity by way of forfeiture (liability without fault), there is a broad line of division occupied by the category of cases in which we apply the idea of fault,—especially, fault characterized as grave or intentional.

But while the notion of grave fault often leads to an admission of a private penalty, it leads, on the other hand, in the case of accidents to workmen, to the retention of the idea of compensatory reparation. The notion of fault has not, therefore, a convergent action in the various cases, leading to the substitution of a general system for the older system.

It cannot be said that the future will see the complete reaffirmation of such a single system of civil sanction for wrongful acts. So far as we may rely upon the past to predict the future, we may assume that we shall witness a struggle of more material and ontological conceptions of compensatory reparation on the one hand, with more spiritual and teleological conceptions of severity with respect to fault on the other hand. The former by their apparent simplicity, the latter by their social utility, have such strength that it is doubtful whether any of them can ever be definitely conquered. It is curious to note that while recent writers treating of the basis of legal liability have preferred the objective theory of risk to the subjective theory of fault, subjective theories have been admitted with respect to the sanction for wrongful acts.

It seems, therefore, that, as on many other points of law, the question before us is not a question of principle but a question of delimitation. The theory of compensatory indemnity is sufficiently strong to survive, but too weak to rule alone.

Is it possible to fix the limit towards which the theory tends, and to fix a point at which it will remain stable after its diverse oscillations? This limit cannot be established once for all; we thus differ from what eighteenth century partisans of the school of natural law would have thought. It can only be said that the theory bears a close relation to the average social morality. Subjective considerations become less essential as the feeling that it is not necessary to commit faults grows more intense. If in any industry where the workmen's compensation legislation is applied, precautions ordinarily taken are sufficient to make faults exceptional, a statute establishing reparation by way of forfeiture (liability without fault) might command great authority or even be solely applicable, unless the desire to favor workmen leads to the imposition of heavy burdens of liability upon employers.

^{**} Cf. Tesseire, Essai d'une théorie generale sur le fondement de la responsabilité.

If attacks upon honor and the feelings are rare, we may have less reason to be concerned with private penalties (punitive damages). In other cases, however, they will be given a greater extension, unless, going beyond, we admit in such cases a wide application of public penalties, and decide that they are incompatible with private penalties. The law on the present subject appears to be in a state of flux between certain limits, and under the domination of a few theories rather complex in their application.

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### PARENTAGE

In the latter half of the seventeenth century there resided at Chilton Foliot in Wiltshire a gentleman called Lovelace Bigg. He owned the Manor House and much land at Chilton; he was in fact the squire of the parish. He had married Dorothy Wither, who was also a member of a distinguished county family in Wiltshire. They had six sons and six daughters; their eldest daughter, Mary, was born in 1687. The eldest son remained in Wiltshire and inherited the family estates. Another son, Dr. Walter Bigg, became Fellow and Warden of Winchester College. The third son, Thomas, came up to London, studied medicine, walked the hospitals and soon became a surgeon in good practice.

In London Thomas Bigg made the acquaintance of a young man named Charles Blackstone. His father was an apothecary in Newgate Street, but his family also came from Wiltshire, from the neighbourhood of Salisbury. Charles Blackstone himself was in business as a silk mercer in Cheapside; he was also a member of the Bowyer's Company and a citizen of London. In those days a tradesman, however worthy, was not as a rule on terms of equal friendship with members of the landed aristocracy. Nevertheless, when Mary Bigg came up to town to visit her brother, Thomas, she met at his house Charles Blackstone, who fell in love with her and eventually won her to be his bride. Like a true woman, she went to live with him over his shop in Cheapside. This was the more remarkable as her younger sister, Alethea, made a distinguished match by marrying Seymour Richmond, Esquire, the Recorder of the Borough of Wallingford in Berkshire: so that Mary's marriage was no doubt regarded as a mésalliance. Yet it had this advantage that, as in the somewhat similar case of John Shakespeare and Mary Arden, the children of Charles Blackstone and Mary Bigg inherited the industry, activity and business capacity of their father as well as the sweeter and purer nature of their more aristocratic mother.

Charles and Mary Blackstone had four children, the second of whom, John, died an infant. Charles, the eldest son, and Henry, the third son, were educated at Winchester School under the care of their

¹ A lecture delivered at Gresham College on February 21st, 1917, with considerable additions.

uncle, Dr. Bigg; they both became Fellows of New College, Oxford, and eventually took holy orders. The fourth and youngest son was William Blackstone, the author of the famous *Commentaries*. He was, as his brother-in-law James Clitherow remarks,²

"a Man, who without Fortune, Family Interest, or Connexions, raised himself by a diligent Attention to his Studies, even from his earliest Youth, and the strictest Sense of every moral and religious Duty, to a very eminent and honourable Office in his Profession."

William Blackstone was born in the house of his late father in Cheapside on July 10th, 1723. His father had died some months before he was born. His mother survived, but from his birth his uncle Thomas, the eminent surgeon, most kindly took care of him as well as of his brothers, and provided them all with a good education. This uncle subsequently, on the death of his elder brothers, succeeded to the family estates at Chilton, and was thus in a still better position to help his three surviving nephews. His sister Mary died in 1735, when William was about twelve years old.

#### EDUCATION

In 1730, when Blackstone was about seven years old, he was sent to school at the Charter-House. In 1735, he was admitted upon the foundation there by the nomination of Sir Robert Walpole, on the recommendation of Charles Wither, Esquire, of Hall in Hampshire, his cousin by the mother's side. At the age of fifteen he became head of the school. He obtained an exhibition from his school which enabled him to proceed to the university and on November 30th, 1738, he was entered as a commoner at Pembroke College, Oxford, and matriculated on the next day. About this time, also, he won a gold medal as a prize for a poem on Milton. In February, 1739, he was elected to one of Lady Holford's Exhibitions for Charter-House Scholars at Pembroke College. While at Oxford he devoted himself with ardour to the study of the Greek and Roman poets. In his spare time he translated many passages from these poets into English verse, and composed some original poetry; but these early efforts-fortunately, perhaps-have never been published. He also wrote some notes on Shakespeare which were published by Mr. Steevens in 1780 or 1781 in his edition of the plays. These notes show how well Blackstone understood the meaning, and appreciated the beauties, of his favourite poet.

² See his Preface prefixed to the edition of Blackstone's *Reports* (1781) ii. Any passages between quotation marks occurring in this account of Blackstone's life are cited from this preface, unless another reference is given.

#### AT THE MIDDLE TEMPLE

Eventually, however, he chose the law as his profession. He was entered as a student at the Middle Temple on November 20th, 1741, and began to read law with his usual application. The commencement of his legal studies was the occasion of his writing a poem (subsequently published by Dodsley in the 4th volume of his Miscellanies) entitled The Lawyer's Farewell to his Muse. After composing this pathetic adieu he gave up writing verses and devoted himself to Coke upon Littleton! He found time, however, in the twentieth year of his age to compile a short treatise on architecture—a science of which he was especially fond; this was never published.

Now it must be remembered that at this period legal education in England was at a very low ebb. Only Roman law-and very little of that—was taught at either university, while the Inns of Court in London, which were founded expressly for the study of the common law, did very little in the way of direct legal education. No one attempted to teach the principles of English law by means of regular oral lectures, and there were no readable text-books in which these principles were clearly stated and expounded. The course of study adopted by students of the Inns of Court who were willing to work was usually as follows. They began by entering the chambers of a conveyancer or the office of a solicitor, and busily copied deeds, writs, and other legal documents, the precise effect of which they seldom understood, though they thus learnt some details of the procedure of the courts. Next they studied in the chambers of a "special pleader" and struggled for two years or more with the mysteries of the art of pleading. Then, as soon as they were called to the Bar, they attended one of the superior courts at Westminster, watching the proceedings and often recording in their note books the arguments of counsel and the decisions of the learned judges. Young Blackstone probably pursued each of these three methods of acquiring legal knowledge; he certainly was regular in his attendance at the Court of King's Bench and worked industriously at his notes, some of which were afterwards published in his Reports.3

But Oxford had not forgotten him. In November, 1743, he was elected into the Society of All Souls College; and in the November following he spoke the Anniversary Speech in commemoration of Archbishop Chichele, the founder of that house, and was admitted actual fellow. He then began to divide his time between the university and London. He took chambers in the Temple, seriously studied law and diligently attended the courts. But at the end of each legal term he returned to Oxford, where he continued his academical studies.

^{*}The earliest of the cases printed in his Reports is dated Michaelmas Term, 1746, the very term in which he was called to the Bar.

He was always industrious and thorough, so at each seat of learning he speedily scored a success. He commenced Bachelor of Civil Law at Oxford on the 12th of June, 1745, and was called to the Bar at the Middle Temple on the 28th of November, 1746.

Like many other barristers both in the eighteenth and nineteenth centuries, he made his way very slowly in the years which immediately followed his call to the Bar. It is always an uphill fight. In spite of his reputation at college he attracted scant notice, made few friends, and acquired little practice. True, he was learned in the law; but this fact was as yet known to very few London attorneys. And a reputation for knowledge of law does not of itself bring many briefs to the chambers of a new-fledged barrister. Moreover, he had no great flow of eloquence, nor was his delivery graceful. Yet he gradually made the acquaintance of some eminent men in his profession who appreciated his abilities and understood his worth.

In 1749, on the resignation of his uncle, Seymour Richmond, he was elected Recorder of the Borough of Wallingford in Berkshire, and received the king's approbation on May 30th. Though only a small salary was attached to this appointment, it gave him a certain standing among his contemporaries at the Bar. But on the other hand, Oxford now made larger claims on his energy and time. In the same year, 1749, he was made Steward of the Manors belonging to All Souls and appointed Bursar of that College. And on April 26th, 1750, the university conferred upon him the degree of Doctor of the Civil Law; this made him a Member of Convocation.

Of course the great mistake which Blackstone made at this period of his life was his attempt to ride two horses at once. He still continued to reside in Oxford for almost half the year. "The Law," as has been often said, "is a jealous mistress;" and clients do not like "half-timers"! But Blackstone was in his heart "a don;" he loved Oxford better than the Temple. Moreover, he was a person of far greater importance in Oxford than at the Temple. In the university his scholastic successes were well known, and he had a recognized position as a fellow of one of the best colleges. He was warmly welcomed whenever he came back to All Souls, and in return he rendered much good service to that college. He never neglected his duties as fellow, steward and bursar. He found the accounts and muniments of the college in much disorder and at once made a thorough search for the missing deeds and account books; as soon as they were all discovered he instituted a new arrangement which his successors in office found most satisfactory. He composed a little treatise "in which he entered into the whole theory and elucidated every intricacy that might occur" in the keeping of college accounts, which was much appreciated by other bursars. Blackstone certainly possessed the faculty of exposition. Next he devoted himself to securing the completion of the Codrington Library-which is still the

pride of the college—"rectified several mistakes in the architecture and formed a new arrangement of the books under their respective classes." We can readily understand what a change it was for a man who was so highly esteemed in Oxford and who was fully conscious that such esteem was well-deserved to return to his empty chambers in the Temple and to sit in the back row of the Court of King's Bench, unrecognized and unemployed.

At last he could stand it no longer. In Michaelmas Term, after the long vacation of 1750, he ceased regularly to attend the courts at Westminster, though he still passed the greater portion of the year in London. But he found that the expenses thus incurred far exceeded the profits which he made in his profession. Hence, in the early part of the year 1753, he decided that at the first good opportunity he would abandon his chance of success at the Bar in London, and devote his whole time to an academical career. He could live very comfortably in college on his fellowship and stewardship, and on such small fees as he could obtain by practicing as a local barrister.

## LECTURES AT OXFORD

And a good opportunity soon occurred. In the early part of the year 1753, the Regius Professorship of the Civil Law (that is, of Roman Law) at Oxford became vacant, and Blackstone at once determined to apply for the post. The Honourable William Murray, then Solicitor General, strongly supported his application. The appointment lay with the Crown, that is, with the Prime Minister; and the Prime Minister at this time was Thomas Pelham Holles, Duke of Newcastle. I will narrate what followed in the words of Lord Campbell, who gives to Murray

"the credit of discovering and turning to public usefulness the genius of Blackstone as a jurist. The professorship of civil law in the University of Oxford being vacant, he recommended this extraordinary man, then quite unknown, as decidedly the fittest person to fill it. The Duke of Newcastle promised him the appointment; but, ever eager for a dirty job rather than for the public good, he thought it right to probe a little the political principles of the candidate, and to ascertain how far he could be relied upon as a party tool, and, more suo, he thus addressed Mr. Blackstone when presented to him: 'Sir, I can rely on your friend Mr. Murray's judgment as to your giving law-lectures in a good style, so as to benefit the students; and I dare say I may safely rely upon you, whenever anything in the political hemisphere is agitated in that University, you will, sir, exert

Afterwards Earl Mansfield and Chief Justice of England.

^{*2} Lives of the Chief Justices of England (1849) 378, 379. It will be observed that the Duke of Newcastle alludes to him as "Mr. Murray" simply. Murray was the fourth son of Lord Stormont and therefore declined the honour of knighthood when he was made Solicitor General, as he was already of higher rank.

yourself in our behalf.' The answer was, 'Your Grace may be assured that I will discharge my duty in giving law-lectures to the best of my poor abilities.' 'Ay, ay,' replied his Grace hastily, 'and your duty in the other branch, too.' Blackstone made a hesitating bow, and, a few days after, had the mortification to find, from the Gazette, that Jenner, utterly ignorant of law, civil, canon, and common, but considered the best electioneering agent in the whole University, was appointed to expound the Pandects, which he had never read, and could not construe.

"Murray behaved with spirit and judgment; for he advised Blackstone to settle at Oxford, and to read law-lectures to such students as were disposed to attend him. The plan had splendid success, and, happily, soon after suggested to the mind of Mr. Viner the establishment of a professorship for the Common Law of England in the University of Oxford. To this we owe the immortal Commentaries of Blackstone. . . ."

It was, of course, a most fortunate thing that the Duke of New-castle behaved as he did, otherwise Blackstone would have spent all the rest of his life wandering about in the catacombs of a defunct jurisprudence instead of expounding the principles and aiding in the development of a living and growing system of modern law. Still, the appointment of Dr. Jenner was a great disappointment to him. But he had already practically decided to leave London and return to Oxford. Murray and other friends strongly recommended this course; they advised him to settle in Oxford and to read law-lectures "on his own foundation" to all students who cared to attend them. This he decided to do.

And now Blackstone made a bold but a very wise decision. He determined to lecture on *English* law. This was a great innovation; no one had ever before dared to deliver such lectures in Oxford. And it was Blackstone's own idea. Many reasons no doubt contributed to his decision—one, that he did not care to enter into direct competition with Dr. Jenner, who succeeded in winning the appointment which Blackstone had failed to obtain—another, that he knew more of English law than of Roman law, and much preferred the former.

It is true that the writer of the life of Blackstone in the Dictionary of National Biography asserts that, after the Duke of Newcastle's treatment of Blackstone, Murray advised him to go to Oxford and read lectures "on English law." But I can find no authority for this statement. Lord Campbell does not mention English law. The writer in the Dictionary cites I Holliday, Life of Mansfield [1797] 88-89 as his authority. But Holliday says nothing of the sort. What I find on page 89 of his book is the following:

"Nothing less than love of science could, under these circumstances, have induced Mr. Murray and some other friends of Mr. Blackstone strongly to recommend and persuade him to sit down at Oxford, and to read law-lectures to such students as were disposed to attend him."

Hence, there is no ground for depriving Blackstone of the credit which he deserves for having originated the idea of teaching English law in a university which had hitherto bestowed attention only on civil and canon law. Indeed, his brother-in-law tells us that, previous to the summer of 1753, Blackstone had "planned, what he now began to execute, his Lectures on the Laws of England."

It was in Michaelmas Term, 1753, that Blackstone began to deliver lectures on English law in Oxford. These lectures, as his brother-in-law assures us—even at their commencement, "were attended by a very crowded Class of young men of the first Families, Characters, and Hopes," and this although the fee for attending the lectures was six guineas a year! Among his audience, I am glad to learn, were several students from our American colonies, which had not yet been severed from their mother-country by the folly of Lord North. Blackstone certainly was highly pleased with his pre-Vinerian audiences. On October 25th, 1758, in the Public Schools at Oxford, he proudly declared his

"satisfaction, by bearing open testimony: that in the very infancy of these studies among us, they were favoured with the most diligent attendance, and pursued with the most unwearied application, by those of the noblest birth and most ample patrimony: some of whom are still the ornaments of this seat of learning; and others at a greater distance continue doing honour to its institutions, by comparing our polity and laws with those of other kingdoms abroad, or exerting their senatorial abilities in the councils of the nation at home."

They must have been quite exceptional students!

On the conclusion of his course of lectures in each of the years 1756, 1757, and 1758, he published a précis of them, for the use of those who attended his class, under the title An Analysis of the Laws of England, "in which he reduced that intricate science to a clear method, intelligible to the youngest student." It is interesting to compare these analyses with the finished product of his labours—the Commentaries.

He also continued to do much work for the good of his college and his university. Within a few months of his return to Oxford in 1753 he was appointed Assessor of the Vice Chancellor's Court. In July, 1755, he was appointed one of the Delegates of the Clarendon Press—the press by which his *Commentaries* were subsequently printed and published—and there he instituted many necessary reforms. In 1758, he wrote a small treatise entitled *Considerations on Copyholders*, which is said to have contributed to the passing of an Act dealing with the county franchise.⁷

^o See p. xxxii of the original Discourse to which I refer on p. 607 post; cf. I Bl. Com. (1st ed.) 13.

^{&#}x27;31 Geo. II, ch. 14.

At the beginning of Michaelmas Term, 1756—with that strange vacillation which he always displayed in this matter—Blackstone, though he was very busy in Oxford, suddenly resumed his attendance in the Court of King's Bench in London, from which he had been absent nearly six years.⁸ And in the years 1757, 1758, and 1759, he attended the courts in London during two terms only—Michaelmas and Hilary—spending the rest of his year in Oxford. Perhaps, however, his object in constantly reappearing in London was to make himself acquainted with the most recent decisions, and so to improve his lectures.

#### THE VINERIAN PROFESSORSHIP

Now there was at the Middle Temple an eminent lawyer, Charles Viner, whom Blackstone must have known especially, as he was the son and heir of Charles Viner of Salisbury. He was admitted a student of the Middle Temple on November 27th, 1700, when he was 22 years old, but never called to the Bar. He devoted fifty years of his life to the preparation of a great work, entitled A General Abridgment of Law and Equity, alphabetically Digested under Proper Titles, with Notes and References. It was published between 1742 and 1753 in 22 thick volumes; a monument of enthusiastic industry.9 This Abridgment is denounced in the Dictionary of National Biography as "a vast and labyrinthine encyclopædia of legal lore ill-arranged and worse digested." But this censure is not wholly deserved. The Abridgment was and is a remarkable piece of work for one man to have accomplished, and even at the present day is useful for occasional reference.10 It was printed at the author's own house on paper manufactured for the purpose. Viner died at Aldershot on the 5th of June, 1756. By his will, dated December 29th, 1755, he left to the University of Oxford the copyright of his Abridgment, all copies of it remaining unsold, and a considerable amount of other property (valued at £12,000), in order to found a professorship of the common law of England and as many fellowships and scholarships in the same branch of learning as the bequest might be capable of supporting.

It has been frequently asserted, and was and is generally believed, that it was the success which attended Blackstone's lectures at Oxford which induced Viner to make this munificent bequest to the university, and that it was Viner's wish that Blackstone should be the first to

There is a gap in his *Reports* of nearly six years—the case of *The King v. Lord Montacute and others*, I W. Bl. 60, which was decided in Michaelmas Term, 1750, being immediately followed by the case of *Rolls v. Barnes* (p. 65) which is dated Michaelmas Term, 1756.

^{*}Two more volumes were subsequently published which contain an excellent alphabetical index.

¹⁰ See an excellent and interesting lecture, delivered by Professor A. V. Dicey on his retirement from the Vinerian Professorship on June 12th, 1909, which was subsequently printed in the NATIONAL REVIEW (December, 1909) 653.

hold the new professorship. Holliday, in his Life of Lord Mansfield (in continuation of the passage already quoted), states this positively:¹¹

"The plan was not only attended with profit and pleasure in the first instance, but soon afterwards happily suggested the idea to the mind of Mr. Viner to establish a real law-professorship in the university of Oxford; and who so proper to fill it with eclat, and add lustre to the Institution, as Mr. Blackstone . . ."!

Lord Campbell, as we have seen, 12 uses precisely the same phrase—that the "splendid success" of Blackstone's lectures

"soon after suggested to the mind of Mr. Viner the establishment of a professorship for the Common Law of England at the University of Oxford."

This may have been so. The dates at all events render it possible, as Blackstone's first lectures in English law were delivered in the autumn of 1753 and Viner's will is dated December 29th, 1755. But we must always remember that, when making such statements as this, Lord Campbell relied on tradition and legal gossip more than on research.

The statutes relating to Mr. Viner's foundation were confirmed by convocation on the 3d of July, 1758. The will provided that the professor was to be elected by a board consisting of the Chancellor of the University, the Lord Chief Justice of England, the Regius Professor of Civil Law, the Corpus Professor of Jurisprudence, and a person nominated on each occasion by All Souls College to act as elector. On the 20th of October, 1758, Blackstone was unanimously elected by these gentlemen the first Vinerian Professor at a salary of £200 a year. This appointment was no doubt largely due to the strong recommendation which he received from Lord Mansfield, who was now Chief Justice of England.¹³ It was his duty to read each year sixty lectures on the laws of England, and these were to be delivered in the English language.

On October 25th, 1758, Blackstone read in the Public Schools at Oxford an Introductory Discourse on the Study of the Law, which was published at the request of the Vice-Chancellor and heads of houses. It was in this Discourse—on his first appearance in public as Vinerian Professor—that Blackstone laid down two new and startling propositions, for the enunciation of which all Englishmen should be grateful to him:

(1) That English people should be taught the law of England and not exclusively the law of Rome; and

[&]quot;Life of Lord Mansfield, 89.

¹² Supra, p. 604.

¹⁸ He was sworn in as Chief Justice on November 8th, 1756, and created Baron Mansfield on the same day.

(2) That the law of England should be taught to all English people, and not merely to a section of them who wish to become professional lawyers.

#### He declared that

"if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions. For I think it an undeniable position, that a competent knowledge of the laws of the society in which we live is the proper accomplishment of every gentleman and scholar, and a highly useful, I had almost said an essential part of liberal and polite education." And yet "it has been the peculiar lot of our admirable system of laws, to be neglected, and even unknown, by all but one practical profession; though built upon the soundest foundations, and approved by the experience of ages."

I am the happy possessor of the original edition of this opening Discourse printed by the Clarendon Press, and published in November, 1758, a fact which shows what good order the lecturer had created in the University Press! This Introductory Discourse ultimately became in substance the first chapter of Blackstone's Commentaries; but with many differences—at all events in the later editions of that work. The copy which I possess is the verbatim report of an oral lecture delivered on a special occasion, in which the lecturer speaks of himself in the first person and alludes to Charles Viner as "our wise and munificent benefactor." These personal allusions are all omitted in the later editions of the Commentaries, and the oral address beginning with the words "Mr. Vice-Chancellor and Gentlemen of the University," is converted into a formal prefatory chapter.

And to us in England at this moment it is not uninteresting to note that Blackstone had a dim notion that the study of English law should, possibly, not be confined to English men but actually extended to English women! For in my original edition of the opening Discourse I find a learned note¹⁴ in which he quotes a writer of the fifteenth century, Bernardinus de Busti, who states in so many words that

"it does not appear to me unseemly that women should know law; for it is written concerning the wife of John Andreas, the commentator, that she was so learned in both the civil and the canon law that she dared to teach publicly in the schools. 'Nec videtur incongruum mulieres habere peritiam juris. Legitur enim de uxore Joannis Andreae glossatoris, quod tantam peritiam in utroque jure habuit, ut publice in scholis legere ausa sit." (Mariale, pt. iv, serm. 9.)

I think that this note, which was retained in all the early editions of the *Commentaries*, should be brought to the attention of Lord Buckmaster, who has just carried through the House of Lords a bill to enable women to become solicitors, a thing hitherto impossible in England.

¹⁴ p. xlv. Cf. 1 Bl. Com. (1st ed.) 21.

His Vinerian lectures speedily acquired so great a reputation that "a noble personage" who superintended the education of the then Prince of Wales, afterwards George III, requested Blackstone to come up to London to read them to the Prince. His engagements as professor at Oxford prevented his doing this, but he sent manuscript copies of many of them to his Royal Highness who, apparently, read them with pleasure; for when the lectures were returned, the Prince sent him "a handsome gratuity."

#### RETURN TO LONDON

But now Westminster Hall once more attempted to entice him to return. The allurement this time was certainly attractive. Before the end of the year 1758 he was pressed by Lord Chief Justice Willes and Mr. Justice (afterwards Earl) Bathurst to accept the honour of the Coif—that is to say, to become a serjeant-at-law. But it was an expensive business to be made a serjeant-at-law in those days. In addition to the cost of the patent, the new serjeant was expected to present to every judge of the three superior courts at Westminster a massive gold ring, inscribed with a sentimental motto; and the presentation was generally accompanied by prolonged festivities at the expense of the new serjeant. Moreover, by becoming a serjeant, Blackstone would have lost much of his practice as a junior counsel. Hence, he declined the tempting offer, and continued to lecture at Oxford.

But though Blackstone felt himself compelled to refuse this friendly offer, the flattering terms by which it was accompanied and the warm assurances given as to his prospects of success at the Bar, made a great impression on his mind. He now began to ask himself had he been wise in quitting London in 1753? Or, at all events, had he not now established a reputation by his lectures which would justly entitle him to expect some favourable notice at the Bar?

And here note the strange vicissitudes of Blackstone's career. In 1753 it was his failure at the Bar that induced him to return to Oxford and become a lecturer on law; and now it is his success as a lecturer at Oxford that induces him to return to London to try once more his chances at the Bar.

Eventually, in June, 1759, he took the decisive step. He took a set of chambers at No. 2, Brick Court, Middle Temple. He resigned the office of Assessor of the Vice-Chancellor's Court, and soon after the stewardship of All Souls College; and in Michaelmas Term, 1759, resumed regular attendance at Westminster, still continuing to pass some part of the year at Oxford, and to read his lectures there, at such times as did not interfere with the London terms. Toward the close of the year 1760 he was offered, but declined, the office of Chief Justice of the Court of Common Pleas in Ireland. He was now

getting into practice at Westminster Hall and had no desire to quit England for the sister island.

On February 5th, 1761, he was admitted a member of the Society of Antiquaries—in consequence, no doubt, of the edition of the *Great Charter*, and *Charter of the Forest* which he had published in November, 1759, and which showed him to be not only a great lawyer, but also an accurate antiquarian, and an able historian.

In the following month (March, 1761) he was elected Member of Parliament for Hindon, a pocket borough in Wiltshire not far from Salisbury. The result of his election to Parliament was that his practice at once increased. Hence, on May 5th, 1761, he married Sarah, the eldest surviving daughter of the late James Clitherow, Esquire, of Boston House in the County of Middlesex. This was speedily followed by another blessing; for on the very next day he was granted a patent of precedence as a king's counsel.

His marriage, of course, vacated his fellowship at All Souls. But Oxford would not let her favourite desert her without a further effort to retain his affections. On July 28th, 1761, he was appointed principal of New Inn Hall by the Earl of Westmoreland, who at that time was Chancellor of the University of Oxford. This appointment provided him with

"an agreeable Residence during the Time his Lectures required him to be in Oxford, and was attended with the additional pleasing Circumstance, that it gave him Rank, as the Head of a House in the University, and enabled him, by that Means, to continue to promote whatever occurred to him, that might be useful and beneficial to that learned Body."

And now came another strong temptation once more to give up the Bar and settle in Oxford. He had obtained a considerable amount of practice in Westminster Hall, but not so much as he had anticipated. He was beginning to find that it is difficult for a man, even though he is a king's counsel, to be in two places at once. And in those days Oxford was much further away from London than it is now, as railway trains were not yet invented. Under the Vinerian Statutes he had power, as professor, to appoint a deputy to read the lectures. But as soon as he attempted to exercise this power because he could not conveniently come up to Oxford to lecture in every term, an outcry arose. This was, indeed, complimentary to Blackstone, as it showed that Oxford desired to have him there in person. He pub-

¹⁵ It is to her brother, Mr. James Clitherow, that we are indebted for the carefully written *Life of Sir William Blackstone* which is prefixed to the first volume of his *Reports* published after his death in 1781. This biography is, indeed, the only source from which many details of his life have come down to us. And any passages which appear in this article between quotation marks are taken from this preface, unless another source is indicated.

lished a State of the Case for the Perusal of the Members of Convocation which convinced that body that he had power to appoint a deputy when occasion required. But he felt that it would not be proper for him to avail himself frequently of this power.

There is no doubt that when Blackstone accepted the Vinerian Professorship he had formed the design of settling in Oxford for life. He thought he saw his way to unite the professorship with the headship of one of the halls or smaller colleges, and to make it a school of English law in which the Vinerian fellows and scholars might live together under their professor. Mr. Viner's will very much favoured this plan. He had left his money for the purpose of

"endowing one or more Fellowship or Fellowships, and Scholarship or Scholarships in any College or Hall, in the said University, as to the Convocation shall be thought most proper for Students of the Common Law."

But this plain direction to establish them in some college or hall was eventually ignored. The scheme proposed by the delegates for carrying it into effect was rejected by convocation. This put an end to Blackstone's hope of establishing a society in Oxford for the study of the laws of England, and there was no longer the same inducement for him permanently to settle there. He continued, however, for a while regularly to deliver his Vinerian lectures.

I cannot refrain from mentioning one interesting fact. Among the auditors at Blackstone's lectures in the year 1763—though only for a short time—was a diminutive lad, strangely attired in the garb of a man of fashion. He was only 16 years old; yet he had, as the modern reader may be surprised to hear, already taken his degree as a Bachelor of Arts, and had just kept his first term at Lincoln's Inn. Such an early start was unusual, even in those days; it was due to his being the singularly precocious child of a pushing, ambitious father. His name was Jeremy Bentham. In later years he declared that Blackstone was a

"formal, precise and affected lecturer—just what you would expect from the character of his writings—cold, reserved and wary, exhibiting a frigid pride."

But remember that at this time Blackstone was D.C.L., M.P., F.S.A., K.C., a Recorder, and a Bencher of the Middle Temple as well as Principal of New Inn Hall, at Oxford; so that he had something to be proud of, and could not therefore be expected to welcome with effusion criticisms on his lectures tendered with assurance by the son of an attorney in the east end of London. Moreover, Blackstone had from his youth been somewhat diffident and reserved—characteristics which may easily be mistaken for unsociability and pride.

In the year 1766 Blackstone resigned both the Vinerian Professor-

ship and the headship of New Inn Hall. He felt that he could no longer discharge the duties of these offices consistently with his practice in London. He was thus finally detached from Oxford. And then, when he gave his whole mind to his work at the Bar, his success was rapid.

#### THE COMMENTARIES

But, before passing from the topic of Blackstone's Oxford lectures, I must deal briefly with the most important outcome of those lectures—his Commentaries on the Laws of England.

Blackstone always wrote his lectures before he delivered them, and he constantly edited and re-edited what he had written. The "manuscript of the lectures originally delivered by him," written in his own clear hand, is carefully preserved in four bound volumes in the library of the Law Society in Chancery Lane, London. Whether from the first he intended eventually to publish them as a legal treatise, may be doubted; but he tells us himself that certain passages which he published in his fourth volume in 1769 had been written at least fifteen years before. After his lectures at Oxford became famous, Blackstone discovered that many imperfect and incorrect copies of them had got into circulation, and a pirated edition of them was either published, or preparing for publication, in Ireland. Hence he determined to print a correct edition himself;

"he chose rather to submit his own errors to the world than to seem answerable for those of other men." 16

The first volume of the Commentaries appeared in November, 1765. It is a handsome quarto, well printed on excellent paper, with a generous margin. It is dedicated to Queen Charlotte, though I doubt if the royal lady ever read anything except the dedication to herself—unless possibly Blackstone's startling assertion that the Queen Regnant was entitled to claim for herself all the whalebone that could be found in the tail of any whale thrown up on our shores! The three other volumes appeared in the course of the next three years; and the public eagerly purchased the set of four handsome quarto volumes at the price of four guineas. A later edition, published in 1778, in four octavo volumes, was sold for £1. 10. 0. It is said that Blackstone realized no less than £16,000 by his Commentaries—a remuneration which, I believe, no writer ever received for a single law-book before or since.

There is a tradition at the Temple to which I cannot help referring in this connection. In 1768 Oliver Goldsmith came to live in the Middle Temple. He had just received for his play, *The Good-natured* 

¹⁶ These words are taken from the concluding sentence of the Preface to the first edition of the Commentaries.

Man, the sum of £500, which to him was wealth untold. He invested most of it in the purchase of a set of chambers on the second floor of No. 2, Brick Court, where he lived until his death in 1774. And the story goes that on the floor below him Blackstone was busy writing the last volume of his Commentaries, and was much disturbed by the "high jinks" going on above. We have this on the authority of the gentleman who succeeded Blackstone in the occupation of those chambers-namely, Mr. George Children, a Bencher of the Middle Temple and treasurer of that honourable society in 1804. His son told the story to Sir James Prior, who published it in his Life of Goldsmith in 1837. Candour, however, compels me to state that the records of the Middle Temple do not disclose the fact that the great Blackstone ever lived on that staircase at all. But this is not conclusive against the story; for Blackstone might very easily have been only a subtenant of the chambers on the first floor, and in that case they would be entered in the name of his landlord. But whether the composition of the Commentaries was or was not disturbed by the supper parties of the poet, there is no doubt that the work was, from the first day of its publication, an enormous success.

This is not the place in which to discuss Blackstone's doctrines as to sovereignty and the state or his theories as to the sources of law—still less, to examine into the accuracy of everything which he asserts to be fact. But I wish to state briefly what I conceive to be the three features of his work which deserve especial praise.

- (1) He addressed himself to Englishmen of all ranks and classes, and not to the legal profession or those who desire to enter it. He recognized that the law of England is not the private property of a professional class, but of the people of England as a whole. Hence he aspired to teach the principles of our law to laymen—with the result that his book received what was then regarded as the highest possible compliment a work can obtain: "no gentleman's library could be complete without it."
- (2) And, because he was addressing Englishmen of every rank and class, and not merely professional lawyers, he most properly devotes the bulk of his book to the definition of the rights and duties of an Englishman, and not to the legal procedure by which such rights are protected and such duties enforced. A state has been loosely defined¹⁷ as a political community which governs itself, and it governs itself by means of laws. A law is a rule of conduct which the state prescribes and enforces; it is prescribed by substantive law, and enforced by adjective law. In other words, substantive law deals with rights and duties, adjective law with remedies.

All English legal writers from the publication of The Doctor and the Student till Blackstone wrote his Commentaries had stated the law

[&]quot; See the present author's The Common Law, 951.

adjectively rather than substantively; that is to say, from their works the remedy can be ascertained more readily and easily than the precise nature and extent of the right infringed. They were not so much interested in the principles of English law as in the question, In what form of action ought a given plaintiff to sue? The principles were there, no doubt, rari mantes in gurgite vasto; but no one except a professional lawyer could readily discover them. Blackstone always endeavoured first to define each right—and, as a rule, he does define it clearly and accurately—leaving the remedy to follow as a corollary.

Blackstone has another merit. He does not mix up the history of law with the statement of the existing law. It is my experience that students are often greatly puzzled and misled by authors who do not keep history severely apart from the present law. No doubt it is sometimes necessary to know the history in order to understand the present law; and in such cases Blackstone gives us both, though keeping them separate and distinct. But, as a rule, he is content, and rightly content, to state only the law as it stood when he wrote.

(3) Lastly, the success of the book was largely due to the clearness and beauty of its style. Englishmen had been told all their lives that the principles of their law were excellent. But, when they attempted to discover those principles, they were repelled by the rugged obscurity and the disorderly and unscientific arrangement of the books which they were bidden to study. When, however, they came to read Blackstone's Commentaries they found, not only that the author's arrangement of his matter was excellent, but also that his style was surprisingly clear and even attractive. No doubt to us in the present day it occasionally savours of pomposity; but then we must remember that it was written in the days when Dr. Johnson ruled among the critics. The men of 1769 regarded Blackstone as a learned lawyer-nay, even as a great jurist. And yet to their astonishment they found that he was a charming writer, devoid of pedantry; they actually enjoyed reading his work. The lucidity of Blackstone's style was probably due in large measure to the fact that he had had experience in lecturing on law for twelve years or more before he published his Commentaries.

Lord Mansfield contrasted Blackstone's "pleasing and perspicuous style" with the "uncouth and crabbed" diction of Coke upon Littleton. And Lord Campbell declares in his Life of Lord Mansfield. 18

"After Bacon, Mr. Justice Blackstone was the first practising lawyer at the English bar who, in writing, paid the slightest attention to the selection or collocation of words."

Even Bentham, who differed so violently from Blackstone on many points of substance, could not help praising the style in which the

^{18 2} Lives of the Chief Justices, 566, n.

Commentaries are written. He describes it in a much-quoted passage thus:

"Correct, elegant, unembarrassed, ornamented, the style is such as could scarce fail to recommend a work still more vicious in point of matter to the multitude of readers. He it is, in short, who, first of all institutional writers, has taught Jurisprudence to speak the language of the Scholar and the Gentleman. . . . The merit to which, as much perhaps as to any, the work stands indebted for its reputation, is the enchanting harmony of its numbers."

But John Austin has not a good word to say, even for Blackstone's style. Take this passage, for example:

"For that rhetorical and prattling manner of his is not the manner which suited the matter in hand. It is not the manner of those classical Roman jurists who are always models of expression, though their meaning be never so faulty. It differs from their unaffected, yet apt and nervous style, as the tawdry and flimsy dress of a milliner's doll, from the graceful and imposing nakedness of a Grecian statue." 13

He must have sharp eyes who can discover in Austin's style any resemblance to the beauty of a Grecian statue, whether nude or draped!

#### JOHN WILKES

But, though the Commentaries brought Blackstone great reputation and some wealth, he soon discovered, as many authors have done before and since, that it is sometimes highly inconvenient for a member of Parliament to have published a book. It will be remembered that on January 19th, 1764, John Wilkes had been expelled from the House of Commons for having published No. 45 of The North Briton. Nevertheless, in the winter of 1768-1769 he was three times elected M.P. for Middlesex, and as many times expelled on the ground that he was incapable of sitting in the house in consequence of his expulsion in 1764. A fourth election then followed in which Colonel Henry Lawes Luttrell, with all the influence of the Court and the Fox family in his favour, obtained but 296 votes against 1,143 given for Wilkes. Nevertheless, the house declared that Luttrell had been duly elected.

Blackstone took part in the debate on this question, and in his speech he laid it down as clear law that, if a man had once been expelled from the House of Commons, he was incapable of re-entering it. As soon as he sat down, Grenville rose with a quiet smile and read from the Commentaries the list of matters which; according to that book, rendered a man incapable of sitting in the house; and this list did not include a prior expulsion! Blackstone was at the moment incapable of replying to this argumentum ad hominem, though in a

¹⁹ I Austin, Jurisp. (5th ed. 1885) 69.

long correspondence which ensued he maintained that he was right, and in the next edition of his book he included a previous expulsion among the causes of disqualification.

Blackstone was probably wrong in his contention, and for a while it was the custom among the friends of Wilkes at their dinners to propose and drink the toast of "The first edition of Dr. Blackstone's Commentaries on the Laws of England." He was also attacked with much asperity in a pamphlet supposed to have been written by a baronet who was a member of the House of Commons. To this Blackstone gave an early reply in print, in which he rebutted the charge of inconsistency brought against him. But this reply only served to bring down upon him a still fiercer master of invective. For Junius now took up the cudgels and published two severe attacks upon Blackstone in his Letters of July 29th and August 8th, 1769.

## DR. JOSEPH PRIESTLEY

There was another occasion in the same year on which poor Blackstone found that the publication of a great law-book may bring in its train unpalatable consequences. In the fourth volume of his *Com*mentaries he had dealt at some length with the criminal laws which were still in force against Roman Catholics and Dissenters,²⁰ and which he attempted to justify. This naturally provoked angry feelings among the Nonconformists. One passage ran as follows:

"The virulent declamations of peevish or opinionated men on topics so often refuted, and of which the preface to the liturgy is itself a perpetual refutation, can be calculated for no other purpose than merely to disturb the consciences, and poison the minds of the people."

This gave very great offence to the Dissenters, and speedily came forth their champion.

Dr. Joseph Priestley was a man of great scientific attainments. He is well known as the discoverer of oxygen, or, as he himself called it, dephlogisticated air; he had also on the suggestion of Dr. Franklin written *The History and Present State of Electricity* (London, 1767). He had been for six years a tutor of the Dissenting Academy at Warrington, which after many changes has become Manchester College, Oxford, a home of unfettered theology. When the fourth volume of the *Commentaries* appeared he was minister of Mill-hill Chapel, Leeds,²¹ and he speedily published a pamphlet, sixty pages in length, entitled

^{20 4} Bl. Com. (1st ed.) 50-54.

²¹ It will be remembered that Dr. Priestley subsequently (in 1804) emigrated to America, founded the Unitarian Church in Philadelphia, and lies buried in North-umberland on the banks of the Susquehanna.

"Remarks on some Paragraphs in the Fourth Volume of Dr. Blackstone's Commentaries on the Laws of England relating to the Dissenters.

"By Joseph Priestley, LL.D. F. R. S. 1769."

Dr. Priestley's reply to Blackstone was, as might be expected from a man of his ability and learning, forcible and even vehement. He tells his readers that he was

"the more ready to animadvert upon this writer, lest (as he is supposed to possess the confidence of the present ministry)²² his sentiments should be considered as a notification to Dissenters, in what light they are regarded by those who are in power; and it should be imagined that some design is formed to establish a system of civil and ecclesiastical tyranny. . . ."

He states the case for Nonconformity with great vigour.

To this sturdy protest Dr. Blackstone on September 2d, 1769, published a courteous reply—indeed, if we have regard to the tone in which controversies were usually conducted in the seventeenth century, it may be described as a *very* courteous reply. It will be sufficient to make a brief extract from the opening paragraphs.

"Dr. Priestley having published, in a very angry pamphlet, his Remarks on some Paragraphs in the fourth Volume of my Commentaries, I find myself called upon to take Notice of a Performance, to which an Author, of Reputation in the literary World, has very fairly subscribed his name. . . . I have always thought it more honourable to retract, than to persevere in an Error; and have neither Leisure, Inclination, nor Ability, to dip myself in Controversy of any kind, much less Theological Controversy. . . . Before I descend to Particulars, I must first of all correct a mistake, which Dr. Priestley seems to have fallen into,²³ by fancying that the offensive Passages in my Book were personally levelled at Him. Let me assure him, that they were written about fifteen years ago, before (I believe) he had ever appeared as an Author. And let me add, that, till his present Remarks, I never read any of his Productions, excepting his History of Electricity; from whence I conceived a very favourable Impression of his Talents, as a candid and ingenious Writer. How greatly my Opinion, with respect to the first of those Qualities, has been altered by his late Publication, I leave to himself to imagine."

But Blackstone had to admit that Priestley had detected some flaws in the passages to which he took objection, or, at all events, that those passages were obscurely written, and might easily convey a meaning which the writer did not intend. He complained that

"Dr. Priestley hath attributed to me the Adoption of those Principles, which I only meant to mention historically, as the Causes of the Laws which I condemn." He continues with great fairness:

²² Dr. Priestley had no doubt good grounds for this supposition, as Blackstone was offered the post of solicitor-general in the following year.

²² Pages 9, 10, 56, etc.

"I shall own very frankly, that (on reviewing this passage) I am convinced that it is somewhat incorrect and confused; and might lead a willing Critic to conclude, that a general Reflection was intended on the Spirit, the Doctrines, and the Practice of the body of our modern Dissenters. A reflection which I totally disapprove; being persuaded, that by far the greater part of those, who have now the misfortune to differ from us in their notions of ecclesiastical Government and public Worship, . . . are zealous in supporting those two great Objects of every good Citizen's care, the civil Liberties and the Peace of their Country. And so far am I from wishing to perpetuate or widen our unhappy Differences, that I shall make it my care, in every subsequent Edition of this Volume, so to rectify the Clause in question, as to render it more expressive of that Meaning which I here avow; and which, if read with a due Degree of Candour, might before have been easily discerned."

Dr. Priestley replied in an equally courteous tone in a letter which appeared in the St. James's Chronicle on Tuesday, Oct. 10th, 1769.

"To Dr. Blackstone.

SIR,

I Have just received your Reply to my Remarks on some Paragraphs in the Fourth Volume of your Commentaries; and I sincerely thank and esteem you for it. It is a genteel and liberal Answer to a Pamphlet written, as you candidly and justly Conjecture, in great Haste; and which, I frankly acknowledge, is not, in all Respects, such as I now wish it had been. . . . As angry as my Pamphlet appears to you, I do assure you, Sir, it never entered into my Head, that anything in your Commentaries was personally levelled at me. . . I conceived myself to be insulted in the injurious Representations you had given of the Principles and Practices of the Dissenters in general."

With this amende honorable the controversy closed. And Blackstone, in his subsequent editions, considerably modified the passages which had evoked it. Indeed, he did not hesitate to admit that Protestant Dissenters were no more injurious to the welfare of the state than Roman Catholics! In particular, he omitted from all subsequent editions the sentence set out on a preceding page as to "the virulent declamations of peevish or opinionated men."²⁴

²⁴ This controversy led Dr. Priestley to print another pamphlet, entitled The Principles and Conduct of the Dissenters, with respect to the Civil and Ecclesiastical Constitution of this Country. See the Memoirs of the Rev. Dr. Joseph Priestley (1809) 53, 54.

Dr. Odgers plans to treat of Blackstone's work as a judge, of his Reports, etc., in an essay to be published in a future issue of the JOURNAL.

# THE DEFEASANCE OF ESTATES ON CONDITION

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#### I. THE NATURE OF DEFEASANCE IN GENERAL

The operation and effect of the defeasance of an estate on condition are expressed by Littleton in these words:

"Then may the feoffor or his heires enter into such lands or tenements, and them in his former estate to have and hold, and the feoffee quite to ouste thereof. And it is called an estate upon condition because that the estate of the feoffee is defeasible, if the condition be not performed, &c."

"In the same manner it is if the lands be given in taile, or let for terme of life or of yeares, upon condition, &c."2

The defeasance as thus expressed is the abrupt termination and displacement of one estate by a physical act; and this act, subject to a few exceptions, clothes the person performing it with a former estate in the property.

Littleton's statement has stood the test of time, and its precision and adequacy are attested by the fact that the words in which modern decisions and text-books describe the operation of the defeasance do not vary in any essential respect from his own.³

It has always been admitted that when the interest conveyed is a freehold on condition—whether in fee, in tail, or for life, and whether the interest be corporeal or incorporeal—entry or its equivalent is necessary unless the person entitled to the benefit of the condition is himself in possession. In the case of interests such as reversions or remainders, rents or commons, which do not lie in livery and of which there can be no entry or possession, there must be a claim. Yet this claim is very much the same thing as entry. In the ordinary case it must be made upon the land. Thus Coke points out that in the case of an advowson, the claim must be made at the church. He illustrates as follows:

"As if a man grant an advowson to a man and his heirs upon condition that if the grantor, &c. pay 20 pound on such a day, &c. the state

¹ Co. Lit. 325. The first American edition of Coke upon Littleton (Phila. 1853) is referred to throughout the present article.

² Co. Lit. 326.

² Leake, Prop. in Land (2d ed.) 168; Gray, Perpetuities (3d ed.) s. 312; Tiffany, Real Prop. 180; Jenks, Dig. of Eng. Civil Law, s. 1052 n.

⁴ Co. Lit. 218a.

of the grantor shall cease and be utterly void, the grantee payeth the money, yet the state is not revested in the grantor before a claim, and that claim must be made at the church."

When the grant is a public one, or by a corporation, the enforcement must be representative.

"If the grant be a public one," says Mr. Justice Field in Schulenberg v. Harriman,6 "it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and judging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and, therefore an office-found was necessary to determine the estate, but, as said by this court in a late case,7 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings."

If to-day the maintenance of an action in the nature of ejectment without entry often takes the place of actual entry, certainly by this evolution—for the process of change from entry to suit is a natural one⁸—nothing has been lost on the score of formality.

The same agreement has not always existed as to the manner of termination of a lease for years on condition. Coke's declaration that "a lease for years may begin without ceremony, and so may end without ceremony" and hence that a "lease for yeares ipso facto by the breach of the condition without any entry was void," was taken quite literally by the older authorities, and the principle bade fair to be established that a leasehold on condition is defeasible in the same manner in which all estates on limitation are determinable, that is, by the mere

⁵ Ibid.

^{6 (1874) 21} Wall. 44, 63.

⁷ United States v. Repentigny (1866) 5 Wall. 211, 268.

The courts cleaving most to the formal rule ground their view on confession of entry involved in this action: Kenner v. American Contract Co. (1872, Ky.) 9 Bush, 202, 207, 208; Sioux City & St. Paul R. R. Co. v. Singer (1892) 49 Minn. 301, 307. Others are governed by statutory changes: Austin v. Cambridgeport (1838) 21 Pick. 215, 224; Cowell v. Springs Co. (1879) 100 U. S. 55, 58. Others have held that since the estate may begin without solemnity, livery of seisin having been abolished, so it may end without solemnity: Ritchie v. Kansas N. & D. Ry. Co. (1895) 55 Kan. 36, 55. But see Hammond v. Port R. & A. Ry. Co. (1880) 15 S. C. 11, 34; Preston v. Bosworth (1899) 153 Ind. 458; Mash v. Bloom (1907) 133 Wis. 646.

[°] Co. Lit. 214b. Cf. 206b, relied on in Rede v. Farr (1817) 6 M. & S. 121, to confute the literal reading of this passage.

happening of the contingency, in this case the breach of condition.¹⁰ But the practical considerations involved have won the battle over claims of theory, vulnerable as they were, and to-day the contrary is well established.

"In a long series of decisions the Courts have construed clauses of forfeiture in leases declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are void only at the option of the lessors."

If the earlier view had obtained the supremacy, any lessee of an estate on condition would be in a position to terminate the lease at his caprice, ¹² and many lessors might have been left remediless or have been put to other means to protect themselves.

One of the reasons given by Coke why entry or claim is necessary to enforce the forfeiture of a freehold on condition, could be applied with as much reason to terms of years on condition. This is that the "feoffor or grantor may waive the condition at his pleasure." Here is found the true rationale of the estate on condition. It is an estate defeasible upon the occurrence of a certain contingency at the option of the grantor or his heirs—and, in various jurisdictions, as a result of statute, his assigns. 14

¹⁰ Pennant's Case (1596) 3 Co. 64a.

Second Resolution in Manning's Case (1609) 8 Co. 94b; Wms. Saund. 441, 442; Leake, Prop. in Land (2d ed.) 170; Taylor, Landlord and Tenant, s. 492: "Upon the breach of such a condition in a lease for years, the lease became ipso facto void, and no subsequent recognition [even by the landlord, s. 412] could set it up again. Yet if the condition, in such case, was merely that the lessor might re-enter, the lease was voidable only, and might be affirmed by an acceptance of rent, if the lessor had notice of the breach at the time."

See Kenrick v. Smith (1844, Pa.) 7 Watts & S. 41, 47; Parmelee v. Oswego & S. R. R. Co. (1851) 6 N. Y. 74, 80; Beach v. Nixon (1853) 9 N. Y. 35.

[&]quot;Davenport v. The Queen (1877) 3 App. Cas. 115, 128; Clark v. Jones (1845, N. Y.) 1 Den. 516; Phelps v. Chesson (1851) 34 N. C. 194; Dermott v. Wallack (1863) 1 Wall. 61, 64, 65; Bowman v. Foot (1860) 29 Conn. 331; Cartwright v. Gardner (1850) 5 Cush. 273, 281, in which the change from the old to the modern rule is clearly stated. Sometimes as in Clark v. Jones, supra, it is said that the lease, while voidable as to the lessor, is void as to the lessee. If that were true the lessee would "have no title against any one." But the contrary is the case: Roberts v. Davey (1833) 4 B. & Ad. 664; Blyth v. Dennet (1853) 13 C. B. 178, 180; see also Porter v. Merrill (1878) 124 Mass. 534.

¹² "In this case, as to this proviso, it would be contrary to a universal principle of law, that a party shall never take advantage of his own wrong, if we were to hold that a lease, which in terms is a lease for twelve years, should be a lease determinable at the will and pleasure of the lessee; and that a lessee by not paying him rent should be at liberty to say that the lease is void."

Lord Ellenborough, C.J., in Rede v. Farr (1817) 6 M. & S. 121, 124. ¹³ Co. Lit. 218a.

[&]quot;By statute, rights of entry have been made assignable in England: see 8 and 9 Vict. ch. 106, s. 6; I Vict. ch. 26, 3; also in some states: see Hoyt v. Ketcham (1886) 54 Conn. 60; Southard v. Central R. R. Co. (1856) 26 N. J. L. 13, 21; De Peyster v. Michael (1852) 6 N. Y. 467, 506.

The lessor of an estate on condition in case of breach must, then, if he intends to enforce the forfeiture, show his election, either by notice or in some other manner.¹⁵ Thus, though the acts may differ by which different estates on condition are brought to an end,¹⁶ they are all subject to the one unifying rule that the act must be one moving from the creator of the interest or his qualified representative or successor.¹⁷

#### II. CONTRASTING PROCESSES

The enforcement of a forfeiture is distinguished from reverter on the determination of a determinable estate by this supervening act. A determinable estate will revert upon the happening of the contingency, and by that event alone. The reverter takes effect by the "intrinsic force of the limitation" by which the estate is created. Upon the happening of the contingency, as for instance upon the marriage of a widow to whom land is given during her widowhood, the grantor is seised in law without act or entry. The ending of the estate or interest is natural—it succumbs to the event; whereas, when an estate on condition is defeated after breach of the condition, it is destroyed by the deliberate act of its creator or his heir. But for this destruction it would have lived on.

The estate on condition is prematurely terminated by the enforcement of the forfeiture. There is only one other form of limitation known to the law (as distinguished from those acts such as tortious alienation, merger, and adverse possession which may destroy estates) by which an estate may be prematurely ended, and that is the executory limitation, whether in its character of executory devise or shifting use. The suggestion of violence done to the estate which is found in the words "premature termination," is borne out in the words employed by most writers who consider executory limitations, and by

¹⁸ Leake, *Prop. in Land* (2d ed.) 170, where the rule is stated without qualification. The same view seems dominant in Taylor, *Landlord and Tenant*, s. 492. In this country a forfeiture for breach of a condition in a lease is usually enforced by an action of ejectment or a summary possessory action. Taylor, op. cit. s. 298; Tiffany, *Real Prop.* 182.

¹⁶ See Moore v. Ullcoats Mining Co. [1908] 1 Ch. 575, 588.

¹⁷ Even in the case of a license subject to a condition it has been held that the license is not terminated by breach of the condition alone, but only upon notice given by the licensor. *Roberts v. Davey* (1832) 4 B. & Ad. 664, 672.

¹⁸ Leake, *Prop. in Land* (2d ed.) 162.

¹⁰ "Seisin in law is the seisin of the heir upon whom the estate in possession descends, or of the remainderman or reversioner whose estate has become the estate in possession by the determination of a precedent particular estate of free-hold, before such heir, remainderman, or reversioner, has made an actual entry upon the lands." Challis, Real Prop. (3d ed.) 234.

[&]quot;Condition defeats the estate, and all remainders depending upon it, and the party or his heir only shall have benefit of it; but limitation determines the estate, and the remainder continues upon it." 5 Vin. Abr. 63 pl. 12.

none more strikingly than Williams.²⁰ The executory limitation destroys the estate upon whose defeasance it takes effect quite as truly as the enforcement of the forfeiture destroys an estate on condition. Here also there is a manifestation of supervening force. But it is subjective, existing in contemplation of law. It is instantaneous, automatic—an execution, as it were, by a nicely timed electric shock. Not so the destruction of the estate on condition. There an opportunity exists for pardon, for waiver, even for license to offend, a passing and a forgiving of the breach which may save the offender whole.

The estate on condition continues in right until the entry, but for which it would continue until the utmost period of its direct or collateral limitation, as the case might be.21 In this it sharply contrasts with determinable estates and with estates subject to executory limitations. The possession of the tenant of a determinable estate, or an estate subject to executory limitation, originates in right, but becomes wrongful the moment the contingency occurs; for at that moment the estate, if determinable, has come to its natural end, or, if subject to executory limitation, has been abruptly cut off. If the particular estate is a term of years, the tenant holding over may be treated as a tenant by sufferance, and not a disseisor.²² Where a tenant pur autre vie holds over, his possession is usually deemed adverse.23 Where the grantor of an estate on condition makes entry for breach of the condition, he enters upon a rightful possession, and thereby cuts off or defeats an estate; when he enters upon one who has held over after his estate has determined, or has been cut off by executory limitation, he does not defeat an estate²⁴ but merely a wrongful possession. This is so whether the person holding over be regarded merely as a tenant by sufferance, or as a disseisor. The possession of each is tortious, though it may not give an action of trespass before entry;25 the relation of neither to the rightful owner gives him an estate.

The difference between entry to enforce a forfeiture and entry to acquire seisin in fact should also be observed. At common law a person having a freehold reversion or remainder is entitled to the possession by the determination of a precedent particular estate of freehold. But he is not clothed with the possession. He is seised in law

²⁰ Real Prop. (22d ed.) 383-385.

²¹ Brooke N. Cas. (March's Transl.) 44.

²² Co. Lit. 57b.

²² Doe d. Parker v. Gregory (1834) 2 A. & E. 14; Tiffany, Real Prop. 1011; cf. Doe d. Souter v. Hull (1822) 2 D. & R. 38.

²⁴ Even when the possession originates wrongfully, when one actually enters upon the land and ousts the freeholder, he does not acquire, by that act alone, an estate against the real owner. He has a "mere naked possession, unsupported by any right." Butler & Hargrave's note to Co. Lit. 239a; Leake, Prop. in Land (2d ed.) 40 et seq.

²⁵ Co. Lit. 57b, Butler & Hargrave's note to Co. Lit. 239a.

but not in fact.²⁸ To acquire seisin in fact he must make entry. The position of an heir of one who has died, seised in fact of a freehold estate, is similar. To acquire seisin in fact he must make entry, whether it be actual entry or entry in law.²⁷ The reversioner, remainderman or heir in such cases must perform an act—not for the purpose, however, of defeating an estate, for the estate is already in him. He has the immediate freehold. There is no abeyance of the freehold.²⁸ The estate was an asset in the hands of the heir, the ancestor having given a bond specifying the heirs, though the seisin was a seisin only in law.²⁹ So too, a seisin in law is sufficient to entitle the wife to dower, though it is not sufficient to entitle a husband to curtesy.³⁰

The rights of entry of disseisees, including the right of entry of a vested remainderman in consequence of a tortious alienation by the tenant of the particular estate (obsolete to-day because of statutes providing that one can convey no greater estate than he has), while they are not predicated upon a seisin in law, are predicated upon a contemporaneous estate, dormant though it be. A disseisee who makes entry before his right is barred by lapse of time may recover for a trespass committed after the disseisin and before he makes entry.³¹ But one who makes entry for condition broken cannot recover for a trespass committed before his entry.³² Again, even before statutes made it possible to devise after-acquired freehold estates, a disseisee might make a devise of lands which would be good if he later made entry.³³ In contrast with this, the grantor of a fee on condition has nothing which he can devise.³⁴

²⁶ "Now when his [the particular tenant's] interest is determined, the law supposes the premises to be vacant; (for if the particular tenant continues the possession after the estate ended, it would be a deforcement of the reversioner; which being a wrong on the tenant, the law will not presume;) and upon the determination, therefore, of the particular estate, does the title of entry of the reversioner arise; and the possession being thus supposed vacant, the law presumes it to be in him who has title to enter; and thus has he a seisin in law; for so is his seisin now, and now very properly, called." Watkins, Descents, 39.

Thallis, Real Prop. (3d ed.) 236; Watkins, Descents, 63.

²⁸ Leake, Prop. in Land (2d ed.) 33.

²⁹ Challis, Real Prop. (3d ed.) 237; Watkins, Descents, 47.

²⁰ Co. Lit. 31a; Borland's Lessee v. Marshall (1853) 2 Ohio St. 308.

It is a "well-known proposition of law that in an action of trespass the right to sue, as against the wrong-doer, relates back after entry to the time at which the right to enter accrued, so as to give a right of action for trespass intermediate in point of time between the date of the right to enter and that of the actual entry." Ocean Accident & Guarantee Corp. v. Ilford Gas Co. [1905] 2 K. B. 493, 497.

See also Barnet v. Guildford (1855) 11 Exch. 19; Emerson v. Thompson (1824) 2 Pick. 473; Marshall v. Eggleston (1898) 82 Ill. App. 52; Trubee v. Miller (1880) 48 Conn. 347; London v. Bear (1881) 84 N. C. 266.

²² Schulenburg v. Harriman (1874) 21 Wall. 44, 63, 64; United States v. Loughrey (1898) 172 U. S. 206; United States v. Tenn. & C. R. R. (1899) 176 U. S. 242.

ss I Wms. Saund. 402.

²⁴ Jarman, Wills (6th Eng. ed.) 81; Challis, Real Prop. (3d ed) 36; Upington

The right of entry on disseisin is sufficient to support contingent remainders, as is also the right of entry of a vested remainderman at common law for tortious alienation. In the latter case, the particular estate is in a sense at an end by the tortious conveyance itself.35 Though an entry by the next vested remainderman is necessary to enforce the forfeiture,36 the estate conveyed is not the tenant's old estate, but a new estate, a tortious interest.37 Still the old estate might be thought of as continuing to subsist in a manner. Thus, to use the words of Challis, this "forfeited estate" would "until entry continue to subsist and support the subsequent contingent remainders,"38 and it would continue for some other purposes.39 The entry or continual claim of the vested remainderman served to make this support perfect. His own and subsequent interests are placed in jeopardy by the wrong done to the seisin. The entry removes that jeopardy. How different the entry to enforce a forfeiture on breach of an express condition! That, as we shall see more in detail in the second section following, would, if efficacious at all, operate to destroy the particular estate and all interests depending on it, by substituting the old estate of the entryman.

But more need not be said to emphasize the fact that one who is seised in law, or one who is not seised at all but, being a disseisee or a next vested remainderman, has a right of entry, is in a position materially different from that of an entryman upon breach of condition. The first two made entry to establish a course of descent, or in this and other ways to perfect an estate already in themselves. The last makes entry to defeat an estate now in another, and to substitute therefor an estate once in himself. The rights thus exercised are materially different. The effects of their exercise are not the same. The ultimate consequences of the failure to exercise them, however, are at common law often identical. Alike in some respects, the entry for forfeiture and entry simply to complete or obtain a seisin are wholly unlike in others.

v. Corrigan (1896) 151 N. Y. 143, holding that upon a devise of the residue the right of entry remained in the devisor's heir. In Massachusetts and Kentucky it is held that the right of entry may be devised: Hayden v. Inhabitants of Stoughton (1827) 5 Pick. 528; Austin v. Cambridgeport (1838) 21 Pick. 215, 224.

^{**}Archer's Case (1597) I Co. 66b. When the particular tenant and a remainderman for life join in a tortious conveyance, both their estates are forfeited, "because herein the remainder is particeps injuria." Co. Lit. 251b.

³⁵ Fenn v. Smart (1810) 12 East, 444.

[&]quot; Challis, Real Prop. (3d ed.) 135.

²⁰ Ibid. If the first remainder is contingent, it is destroyed at once by the tortious alienation. Only contingent remainders subsequent to the first vested remainder are supported. Archer's Case, I Co. 66b.

[&]quot;But note, reader, that after the feoffment, the estate for life to some purpose had continuance; for all leases, charges, &c. made by the tenant for life shall stand during his life. . . ." Archer's Case, supra, I Co. 66b, 67a.

Finally, some of the differences between escheat and entry to enforce a forfeiture may be noticed. The lord has his title to the land by the failure of heirs. In that respect his rights compare with those of one to whom land reverts upon the ending of a determinable estate. It is a title by law. But to acquire full ownership, he must make entry or sue out a writ of escheat. In that respect his rights compare with those of one who enters to convert a seisin in law into a seisin in fact. Escheat, while it is a title by purchase, is much like descent, as Blackstone views it. But there is some difference.

"In order to complete this title by escheat," says Blackstone, "it is necessary that the lord perform an act of his own, by entering on the lands and tenements so escheated, or suing out a writ of escheat: on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred. It is, therefore, in some respects a title acquired by his own act, as well as by act of law."45

But an heir would not be barred by accepting rent from a stranger who usurped the possession. Such entry by the stranger and acceptance of rent by the heir might give him the very seisin in fact necessary to complete his title.⁴⁴

It is evident that acts similar to those which would merely amount to a waiver of breach of condition⁴⁵—and would not affect the right to enter for a continuing breach⁴⁶—may bar an escheat. In that respect an escheat varies from a condition. Escheat alone gives title, though it be an incomplete one. Breach of condition alone does not.

In Kitchin on Courts Leet we read that⁴⁷ "Where there is Lord and Tenant and the Tenant grants Rent-Charge, and dies without heir general or special, the Lord shall have the Land by Escheat but he shall hold it charged." But the enforcement of a forfeiture for breach of condition destroys all estates, encumbrances and charges made by the tenant of the estate on condition, subject to exceptions when the condition is one implied in law.⁴⁸

The grantee of a seigniory may enter for escheat. Thus in the little book on conveyancing by Perkins it is declared:

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* Challis, Real Prop. (3d ed.) 32.
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⁴ Perkins, Conv. s. 832.

² 2 Bl. Com. 245.

a Ibid.

[&]quot;See Watkins, Descents, 57, 59.

Goodright v. Davids (1778) Cowp. 803.

^{*}Doe v. Woodbridge (1829) 9 B. & C. 376; Doe v. Peck (1830) 1 B. & Ad. 428; Doe v. Jones (1850) 5 Exch. 498.

^{*} See Perkins, Conv. ss. 844, 845, and cf. s. 840, Co. Lit. 233b, 234a.

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"If lord and tenant be and the lord grant his seigniory for life unto a stranger, and the tenant attorn, and die without heir, and the grantee enters for escheat, he shall not have a greater estate in the tenancy than he had in the seigniory, because the tenancy cometh in lieu of the seigniory."⁴⁹

But no grantee, whether of seigniory or reversion, nor indeed a lord to whom a reversion has come by way of escheat⁵⁰ can enter for breach of condition.

"It is a rule of the common law, that none may take advantage of a condition in *deed* but parties and privies in right and representation, as the heirs of natural persons and the successors of politic persons; and that neither privies nor assignees in law, as lords by escheat; nor in deeds, as grantees of reversions; nor privies in estate, as one to whom the remainder is limited, shall take benefit of entry or re-entry by force of a condition."⁵¹

The right of entry on express condition, then, is not assignable with the reversion; neither does it escheat with the reversion. It was not an incident of tenure. There being a failure of heirs who could enforce the forfeiture, the right of entry perished. For was it not in this respect like "any other inheritance, that is not holden"? "Because they be not holden, [on failure of heirs] they perish and are extinct by act in law."⁵²

## III. DEFEASANCE AND TENURE

The enforcement of a forfeiture for breach of express condition does not depend on tenure. But estates on condition had their origin in relations of tenure. Thus, we are told by Butler and Hargrave that

"The doctrine of conditions is derived to us from the feudal law. The rents and services of the feudatory are mentioned by feudal writers as conditions annexed to his fief. If he neglected to pay his rent, or perform his service, the lord might resume the fief. But the payment of rent and the performance of feudal services were, for a long period of time, the only conditions that could be annexed to a fief. . . . Afterwards, when other conditions were introduced, the estates to which they were annexed, were ranked among improper fiefs. . . . Conditions of this last sort were called express, or conventionary conditions. By an application, in some respects very much forced, of the original principle of conditions, that, on the non-performance of them, the lord might resume his fief, conditional fees

⁴⁰ Perkins, Conv. s. 96.

[∞] Though he might enter to distrain. Lit. s. 348.

⁵¹ Southard v. The Central Railroad Co. (1856) 26 N. J. L. 13, 21; Shepp. Touch. 149.

^{12 3} Co. Inst. 21.

at common law, and some other modifications of landed property were introduced as estates upon condition. ³⁷⁵³

The services and duties of the tenure itself constitute a condition implied in tenure. The power to enforce a forfeiture for breach of them depends upon tenure.⁵⁴ After the statute *Quia Emptores*, a right of entry for breach of such conditions could not be reserved by one who conveyed the fee, just because he could not by such conveyance create a new sub-tenure, and the right to enter for breach of such condition remained with the lord of the fee. The situation as to express conditions was the reverse; the right to enter for breach of them the grantor could reserve, independently of tenure, and in consequence the statute *Quia Emptores* was no obstacle.⁵⁵ Again, the right of a remainderman to enter when the tenant of the particular estate made a tortious alienation of the seisin, this being the breach of a condition implied in the common law, did not, it would seem, (except as he might be said to represent the lord of the fee), depend on a tenure, but on privity of estate.

"Between the owner of the particular estate and the owner of the remainder . . . no tenure exists; . . . the particular tenant and the remainderman both hold their estates of the same chief lord as the grantor held before." 56

Such a tortious alienation by the particular tenant was, so to speak, a double sin, a sin against the tenure and a sin against the seisin. It was "a renunciation of the feudal connection" between the particular tenant and the lord of the fee. But it also "devested" the estate of the remainderman, which, if the right of entry was subsequently turned into a right of action, was "discontinued," but not destroyed.⁵⁷

After the statute Quia Emptores, when one conveyed a fee which might be a fee on condition, he did not subinfeudate. He literally substituted another for himself in the tenancy. The purchaser from him changed places with him, the lord remaining the same. If later the condition was broken and the feoffor entered to enforce the forfeiture, he undid what he had done by the feoffment, and resumed his old

²² Co. Lit. 2010 note (84).. For a judicial appraisal of Butler, see Heelis v. Blain (1864) 18 C. B. N. S. 90, 102.

Butler's note to Fearne, Contingent Remainders, 382.

Co. Lit. s. 325. Leake, Prop. in Land (2d ed.) 174.

⁵⁶ Williams, Real Prop. (22d ed.) 347.

^{57 &}quot;In accordance with the maxim that no one can qualify his own wrong, a tortious feofiment devested the whole fee simple out of the rightful owner or owners. It does not follow that the tortious feofiment was necessarily a feofiment in fee simple; and it might in fact be for a less estate. In such a case, the feoffee took only the less estate, but the whole fee simple was devested out of the rightful owner or owners, and such part of it as was not disposed of by the feofiment became vested in the feoffor by way of a tortious reversion upon the tortious particular estate created by the feoffment." Challis, Real Prop. (3d ed.) 405, and see 138, n.

estate and his old relation to the lord.⁵⁸ In Van Rensselaer v. Ball, Denio. J., said:⁵⁹

"I have been unable to find a single dictum or the slightest hint that such conditions . . . could only be attached to estates for life or years, or that a common law tenure between the parties, or a reversion in the grantors, were necessary to uphold them."

How utterly independent of tenure is the entry for breach is made plain by Littleton's illustration. As he puts it:

"For if a man letteth land to another for term of life by indenture, rendering to the lessor and to his heires a certain rent, and for default of payment a reentry, &c. if afterward the lessor by a deed granteth the reversion of the land to another in fee, and the tenant for terme of life attorne, &c. if the rent be after behind, the grantee of a reversion may distrein for the rent, because that the rent is incident to the reversion; but he may not enter into the land, and oust the tenant, as the lessor might have done, or his heirs, if the reversion had been continued in them &c. And in this case the entrie is taken away forever; for the grantee of the reversion cannot enter, causâ quâ suprà. And the lessor nor his heires cannot enter; for if the lessor might enter, then he ought to be in his former state &c. and this may [not] be, because he hath aliened from him the reversion."

Where, as in this illustration, the condition is annexed to a particular estate, a grant of the reversion destroys the right of entry at common law quite as effectually as would an attempted assignment of the right of entry itself; ont, however, because the previous relation of landlord and tenant is brought to an end, although that, of course, is true in the case supposed. The rule is the same when the grantor of an estate in fee simple conveys his interest to another. The conveyance destroys the right of entry, even though it be made by a grantor to his heir, who, but for the conveyance, would have been able to enforce a forfeiture.

⁵⁸ Gray, Perpetuities (3d ed.) s. 31.

^{59 (1859) 19} N. Y. 100, 102.

⁵⁰ s. 347. See also Perkins, Conv. s. 832.

^{et} The rule so far as estates for years and life estates were concerned was, of course, changed by Stat. 32 Henry VIII, ch. 34, which made it possible for the grantee of the reversion to take advantage of a condition.

[&]quot;When condition is once annexed to a particular estate, and after by other deed the reversion is granted by the maker of the condition, now the condition is gone." 5 Vin. Abr. "Condition" (I. d. 11); (2d ed.) 306.

²⁶ I Shepp. Touch. 157, 158, Lit. s. 325, Leake, Prop. in Land (2d ed.) 174.

²⁶ "Neither party to a conveyance which violates the rule of law can allege his own unlawful act for the purpose of securing an advantage to himself. The grantor of a right of entry cannot be heard to say that his deed was void, and that the right of entry still remains in him, because this would be to allow him to set up his own turpitude in engaging in a champertous transaction as the foundation of his claim. His deed is therefore effectual to estop him from setting up its invalidity as the ground of claiming a right of entry which he

# IV. THE EFFECT OF DEFEASANCE UPON THE ESTATE LINE

Whenever there is an entry to enforce the forfeiture of a freehold estate for breach of condition, the entire state line which was supported by the estate on condition, is broken down, and a former estate line is re-established.

For, as Littleton says, "then may the feoffor or his heires enter into such lands or tenements, and them in his former estate to have and hold." In the ordinary case, the feoffor or his heir is in of the feoffor's former estate as though the feoffor had never parted with it. And even in the exceptional case, in which the entry served to vest a former estate in another, or to give the entryman a legal estate where before he had an equitable, or a tenancy in tail after possibility of issue extinct where before he had a fee tail, at common law the entire estate on condition is broken down. And this would mean destruction of any future interests dependent on it for support.

had unlawfully conveyed. Nor can the grantee avail himself of the right of entry for a like reason. He cannot be permitted to set up a title which rests upon a conveyance which he has taken in contravention of the rules of law Both parties are therefore cut off from claiming any benefit of the condition. The grantor cannot aver the invalidity of his own deed, nor can the grantee rely on its validity. Both being participators in an unlawful transaction, neither can avail himself of it to establish a title in a court of law." Rice v. Boston & Worcester R. R. (1866) 12 Allen, 141, 144.

⁶⁵ When a man seised of land in right of his wife conveyed in fee on condition, and died, the heir might enter,

"but it is impossible for him to have the estate that the feoffor had at the time of the condition made. . . . And therefore when the heire hath entred for the condition broken and defeated the feoffment, his estate doth vanish, and presently the state is vested in the wife." Co. Lit. 202a.

Similarly an heir ex parte paterna would enter to enforce a breach for the benefit of an heir ex parte materna. Shepp. Touch. 150, concerning which Preston says:

"The first is heir to the person and the condition; the other is heir to the estate. The position is peculiar to grants in fee and is an anomaly.... It is a strange departure from principle, that one should enter when his entry is merely actum agere."

8, had made a feoffment in fee upon condition, and after had entred for the condition broken; in this case he had but an use when the feoffment was made, but now he shall be seised in of the whole state of the land . . . for by the feoffment in fee of Cestuy que use, the whole estate and right was vested out of the feoffees. And therefore of necessitie the feoffor must gain the whole estate by his entrie for the condition broken." Co. Lit. 202a.

The Statute I Rich. III, ch. I, here referred to, gave the cestui que use a direct power of conveying the legal estate. See Leake, Prop. in Land (2d ed.) 80. For a case after the Statute of Uses in which it was applied see Dyer 283a. It was "not positively repealed until 1863, when it had for ages been quite obsolete. . . This statute never had any extensive operation." Challis, Real Prop. (3d ed.) 386.

⁶⁴ Lit. s. 325.

er Co. Lit. 202a.

"The estates of both the parties," says Sheppard's Touchstone, "are so suspended [i. e., affected] by the condition that neither of them alone can well make any estate, or charge, of or upon the land: for the party that doth depart with the estate, and hath nothing but a possibility to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. And if he that hath the estate, grant or charge it, it will be subject to the condition still; for the condition doth always attend and wait upon the estate or thing whereunto it is annexed: so that although the same do pass through the hands of a hundred men, yet is it subject to the condition still . . . And when the condition is broken or performed, &c. the whole estate shall be defeated."

In order to grasp the full effect upon the estate line of the entry. something more is necessary. Here, if anywhere, the conception of each estate line as a distinct entity, or plane of ownership, dependent upon a particular seisin, becomes of importance. As Watkins says:

"A remainder is to commence when the particular estate is, from its very nature, to determine; it is, as it were, a continuance of the same estate; it is a part of the same whole... The particular estate and remainders are, in fact, (as the very terms imply), but one and the same estate." ⁸⁹

And this whole of which the particular estate and each remainder is but a part, may be thought of, as Pollock and Maitland conceive of it, as "an infinite quantity."

"Proprietary rights in land are, we may say, projected upon the plane of time. . . . The life-tenant's rights are a finite quantity; the fee-tenant's rights are an infinite, or potentially infinite, quantity." ⁷⁰

If A conveys to B for life on condition that he shall not marry C, B is seised. He represents the fee. His seisin is, so to speak, the root of the estate line.⁷¹ He is seised in representation of A who has the reversion in fee, and who is "in the seisin of the fee," but who is actually seised neither in fact nor in law, and who until a breach of the condition has not even a right to enter. What occurs when the

⁶⁸ Shepp. Touch. 120.

^{e3} Descents, 210. "The particular estates, and the ultimate remainder all together formed one tenure of the fee of the lord." Fearne, Cont. Rem. 298, Butler's note (2).

⁷⁰ 2 Poll. & Mait. Hist. Eng. Law (2d ed.) 10.

⁷¹ It is permissible to think of one estate being derived out of another. Thus, Challis speaks of the case "when a number of successive vested estates of free-hold are derived out of the same original estate." Real Prop. (3d ed.) 99. Or life estates and estates tail may all be thought of as parts of the absolute interest, which in one aspect is the fee, in another the seisin. "The particular estate and the remainder, to many intents and purposes, make but one estate in judgment of law." Co. Lit. 143a. See also Watkins, Descents, 36.

condition is broken and A re-enters? Immediately the seisin of B is destroyed and A becomes seised. His seisin is substituted for B's; it does not flow out of B's as it would if B's estate had terminated naturally. B's estate has become "as nothing from the first."

#### V. REMAINDERS

The same reasoning applies, but its exposition becomes more complex, when remainders are involved. Thus, to take an illustration from Fearne:

"It seems," he says, "that if an estate be granted to A, a widow for life, remainder to B in fee, on condition that A continues a widow; if A marries, the entry of the heir defeats the estate to A and to B also."⁷² For, as he says on the page just preceding, "the livery made upon the creation of the estates is defeated, and of course every estate then created is thereby annulled and gone."⁷³

The remainder of B depends upon and is supported by the particular estate in A. His is the root of B's interest which can take effect only in case the root is not destroyed, as it must be when the grantor or his heir enters, prematurely ending A's interest. Unlike a disseisin,⁷⁴ the effect of this entry is permanent. It absolutely destroys the estate line and if the former tenant of the particular estate again obtains title to the land, it must be as of a new estate.⁷⁵ It has been held that the remainderman has no relief in equity; he cannot compel the tenant for life to perform a condition.⁷⁶ Of course the cases must be distinguished where the so-called condition is held to create an equitable easement⁷⁷ or a trust,⁷⁸ for when this is so, the parties interested may generally secure its performance.

¹² Cont. Rem. 262. Apparently Fearne (his wording is unlike the similar illustration in Sanders, Uses, 157) intends a remainder which is not limited independently of the condition. Otherwise it would be impossible to reconcile what he says on p. 270. See also Leake, Prop. in Land (2d ed.) 173; Williams v. Angell (1862) 7 R. I. 145, 152.

⁷⁸ Ibid. 261. "And if a lease be made for life, the remainder in tail, on condition; in this case if the condition be broken, both the estates be avoided." Shepp. Touch. 155.

[&]quot;See Leake, Prop. in Land (2d ed.) 40 et seq.

⁷⁵ See Jones v. Carter (1846) 15 M. & W. 718.

¹⁶ Kinnersley v. Williamson (1870) 39 L. J. Ch. 788. The court said that it had no jurisdiction, the estates being all legal.

ⁿ Ayling v. Kramer (1882) 133 Mass. 12; Jewell v. Lee (1867) 14 Allen, 145; Fuller v. Arms (1873) 45 Vt. 400.

⁷⁸ West v. Biscoe (1825, Md.) 6 Harr. & J. 460; Tomlin v. Blunt (1888) 31 Ill. App. 234. See the extended consideration in Gray, Perpetuities (3d ed.) s. 282, n.

"But . . . though an entry made for breach of condition will destroy the remainder, yet the remainder is not void in its inception; and it is not destroyed by a breach of condition, unless an entry is made for the breach. If the person entitled to enter for the breach waives his right of entry, the particular estate continues in being; and upon its subsequent regular determination, the remainder will take effect."

These are Challis' words.79 He speaks of the remainder here as a remainder "limited to commence upon the defeasance of the particular estate," but it seems apparent from the part quoted above, and from his reference to Fearne and Preston,80 that while he may mean a remainder which the grantor or devisor intended to "commence" in possession upon the defeasance of the particular estate, he is thinking of a true remainder,—one, therefore, which may "commence" in interest before the natural termination of the particular estate. If the defeasance were a condition precedent to the vesting, the remainder would be void.81 In Fearne's illustration the remainder is vested from its creation, and as he says: "A remainder properly so called, cannot be limited to take effect upon a condition which is to defeat the particular estate."82 A contingency serving to determine an estate cannot also operate as condition subsequent.83 Neither Fearne nor Challis is speaking of a shifting use or a "shifting" executory devise-limitations which always take effect in derogation of a prior interest, whether it be fee or particular estate-but of a remainder dependent on a condition subsequent annexed to the preceding estate and in effect to the remainder; dependent not for its commencement, be it emphasized, but for its continuance. Leake says:

"At common law if the land be limited for a particular estate with remainders, subject to a condition, the re-entry defeats all the estates in remainder, as being dependent upon the seisin of the particular estate."

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¹⁰ Real Prop. (3d ed.) 82. See also Williams v. Angell (1862) 7 R. L. 152.

They are Fearne, Cont. Rem. 270; I Preston, Estates, 91.

a Butler & Hargrave's note to Co. Lit. 203b gives the reasons clearly.

⁶² Cont. Rem. 261, I Preston, Estates, 91. And see Plowd. 29a, Lit. s. 723.

⁸³ If a condition is annexed to a determinable estate, purporting to defeat the estate in the same manner which determines it by the original limitation,

[&]quot;as in the case of a gift to a man in tail, and if he die without heirs of his body, that then the donor and his heirs shall re-enter, [this] would be inoperative and therefore a void condition." Leake, *Prop. in Land* (2d ed.) 168.

"For if a gift in tail be made to a man and to the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall re-enter, this is a read condition.

[&]quot;For if a gift in tail be made to a man and to the heirs of his body, and it he die without heirs of his body, that then the donor and his heirs shall re-enter, this is a voyd condition; for when the issues fail, the estate determineth by the expresse limitation, and consequently the adding of the condition to defeat that which is determined by the limitation of the estate, is void." Co. Lit. 224b.

⁸⁴ Prop. in Land (2d ed.) 173, referring to Fearne, Cont. Rem. 261, 262, and 1 Sanders, Uses, 152.

Probably this is the truest way of putting it. For whatever the form in which the limitations are expressed, one common-law interest will not be affected by the condition unless all subsequent remainders are affected by it.

When the limitation of a particular estate is such that in order to secure the rent, it "merely gives an entry and retainer without defeating the particular estate," it is not a true condition, and the remainder would not be affected by the entry. So far from enforcing a forfeiture, such entry is either a holding of lands as a pledge until the rent is paid, or a taking of the profits in satisfaction of the rents. In equity it is the latter only. The distinction between a right of mere entry and retainer and a right of entry to enforce a forfeiture could not be more sharply emphasized than by the immediate juxtaposition of the sections on these subjects in Littleton. So Speaking of the right of mere entry and retainer, Coke, giving the pertinent passage from Littleton, says:

"'For in this case the feoffor shall have the land but in manner as for a distresse, until he be satisfied of the rent, &c.' By this it appeareth that the feoffor by his re-entry gaineth no estate of freehold, but an interest by the agreement of the parties to take the profits in the nature of a distresse."

If a remainder is limited over independently of a condition to which a particular estate is made subject—that is, without any reference to the condition—according to the better and more general opinion, the condition itself is repugnant and void.⁹⁰

"It is unreasonable," says Fearne, "that the grantor should defeat the estate in remainder, which he had absolutely granted away. Indeed it seems directly within the reason of the cases put by Littleton, that a man lease for life upon condition of re-entry for default of payment of rent, and the lessor afterwards grants his reversion, the lessor or his heirs cannot enter, because he hath aliened the reversion; so in

E See the criticism and distinction by Preston in his Shepp. Touch. 120.

ec Cruise, Dig. Tit. XXVIII, ch. 1, ss. 68, 70.

⁸⁷ Ibid. s. 69.

⁸⁸ ss. 326, 327, 328.

⁵⁰ Co. Lit. 203a. "This is so. though the condition be, that the feoffor, his heirs and assigns, may enter; and his interest goes to his executor. But he may maintain an ejectment. I Saund. II2. I Sid. 344, 345, T. Raym. 135, 158."—Butler and Hargrave's note (2) to Co. Lit. 203a.

When a condition is annexed to a preceding estate, and the remainder is limited to commence, substantively, on the determination of that estate, independently of the condition, the condition will be discharged, and the estate of the particular tenant become simple and absolute." I Preston, Estates, 91.

See Fearne, Cont. Rem. 270; Sanders, Uses, 155; Challis, Real Prop. (3d ed.) 81, 82; Leake, Prop. in Land (2d ed.) 173. Butler may have entertained a different view: see his note to Fearne, Cont. Rem. 383. And see Lit. s. 723; Williams v. Angell (1862) 7 R. I. 145.

the above case the lessor by limiting the remainder over absolutely, hath departed with the reversion, as much as if he had afterwards aliened it by another conveyance."91

It would follow that a condition annexed as well to any remainder except a remainder of the fee or a remainder immediately preceding a reversion, would be subject to the same considerations. If it is a remainder in fee or a remainder preceding a reversion, the condition, since it has its usual and normal operation and is not repugnant to any estate granted over, could be enforced.⁹² If the condition annexed to the remainder is broken before the particular estate determines, the forfeiture may none the less be enforced—by a claim at common law—but the enforcement has no effect on the particular estate.⁹³

It seems that the enforcement of the forfeiture of a remainder, vested or contingent, for breach of a condition subsequent, when operative at all, will have the same effect on subsequent common-law interests that entry for forfeiture of a particular estate in possession would have.

Assume that a condition is annexed to the first remainder alone, and that a second remainder is limited without reference to the condition. Assume that the condition is not broken until the first remainder becomes an estate vested in possession. Can its forfeiture be enforced, thus destroying the second remainder? It would seem not, since the subsequent remainder was limited over independently of the condition. The condition must be treated as repugnant and void.

On the other hand, where the second remainder is not limited independently of the condition annexed to the preceding remainder, where in other words it is subject to the same condition, the enforcement of the forfeiture of the first remainder, whether this takes place while it is still a remainder or after it becomes an estate in possession, will destroy that and the second remainder. Land is granted to A for life, remainder to B for life on condition subsequent that he continue to comply with stipulated requirements, remainder to C and his heirs on the condition that B continue to comply with the requirements aforesaid. Before A dies, B commits a breach and the grantor makes claim. Has C any interest remaining?

Would it be overbold to suggest that the following rule, though apparently it has not been clearly formulated by any authority, is a necessary corollary from what has been said? To wit: In order that the forfeiture of a remainder for breach of condition may be enforced,

¹¹ Fearne, Cont. Rem. 270. Lit. s. 723 is here ignored by Fearne.

²² See Shepp. Touch. (ed. by Preston) 120.

Shepp. Touch. (ed. by Preston) 121. "A condition may be annexed to a remainder without affecting the prior estates." Id. 155. See also Shepp. Touch. (8th ed. by Atheling) 155, n. (i).

all subsequent remainders as well must be made subject to the condition. Either this must be admitted or the doctrine that a condition fails when it would defeat a remainder not limited in reference to it must be abandoned.

It is true that, generally speaking, the failure of a prior remainder to take effect will not prevent a subsequent remainder from taking effect. The first estate is considered "only as a preceding limitation, and not as a preceding condition, to give effect to the subsequent limitation."94 When there is a clearly expressed intent to the contrary, the rule seems otherwise.95 It is also true that the contingency affecting the vesting of a prior estate has no effect on a subsequent remainder vested or contingent unless it is intended to have some effect.96 But these admitted rules do not confute the proposition that a remainder, however remote, which is subject to a condition affecting a preceding interest or interests will be defeated by the enforcement of a forfeiture. In such a case the grantor or devisor intends that the remainder shall be affected by the condition. After the formidable arguments and opinions in Egerton v. Brownlow, buttressed as that case is, it should be regarded as fundamental that a condition subsequent can be annexed even to a contingent remainder, and operate to defeat it before it has become a vested interest.

"I know, by the authorities which have been referred to," said Lord St. Leonards in that case, "that conditions which were intended to defeat an estate have defeated an estate in contingency just as much as a vested estate." 97

In In re Viscount Exmouth the court said: "Such contingent limitations in the way of defeasances are, in my view, subject to all the rules which apply to conditions subsequent."98

Williams v. Jones (1901) 166 N. Y. 522, 537. This language is like that in Fearne, Cont. Rem. 508, and see 233 et seq.; Goodright v. Cornish (1693) 1 Salk. 226; Jarman, Wills (6th Eng. ed.) 718 et seq.; Theobald, Wills (7th ed.) 700.

[&]quot;This doctrine of acceleration, however, . . . is applied in promotion of the presumed intention of the testator, and not in defeat of his intention. And when it is the evident intention of the testator that the remainder should not take effect till the expiration of the life of the prior donee, the remainder will not be accelerated." Blatchford v. Newberry (1880) 99 Ill. 11, 48. See Reeves, Rcal Prop. 1193, 1194.

^{**}Fearne, Cont. Rem. 233 et seq.; Ranken v. Janes (1896) I N. Y. App. Div. 272. But the contingency affecting the prior interest may prima facie apply to the whole series of limitations. See Theobold, Wills (7th ed.) 578, and cases cited.

⁸⁷ (1853) 4 H. L. Cas. 1, 208; In re Greenwood [1903] 1 Ch. 749; Gingrich v. Gingrich (1896) 146 Ind. 227; Kelso v. Lorillard (1881) 85 N. Y. 177, 184. And see Edwards v. Hammond (1694) 3 Lev. 132.

²⁸ (1882) 23 Ch. D. 158, 164. A remainder may also be made determinable on a contingency which may happen before the particular estate determines: Lambarde v. Peach (1859) 4 Drew. 553, 559, 560; Re Muggeridge's Trusts (1860, Eng. Chanc.) 1 Johns. 625.

#### VI. REMAINDERS BY WAY OF DEVISE

It may be that in a will a condition can be annexed to the particular estate only and a forfeiture be enforced without affecting the remainder. Leake alone among modern text-writers expressly embraces this doctrine—in the semi-obscurity of a foot note—99 though it must be said at once that if others reprobate the rule, they do so perhaps inferentially.

The authority for the proposition is the case of Warren v. Lee¹⁰⁰ decided about 1555, some ten years after the Statute of Wills.

"And it seems," said the court in that case, "that the remainder is not destroyed by the entry, but the heir shall have only an estate for the life of the wife [to whom the husband had devised for life on condition that she should provide for and educate their eldest son until he attained the age of 21, remainder to the second son in tail]; for there is a difference between this remainder made by will, and a remainder created by deed and livery; for in the last case the entry defeats the livery; but it is not so in a will, for a remainder by will is good, although the particular estate was never good; as if to a monk, &c.¹⁰¹ And the law in this case shall be taken in the same manner as if the devisor had expressly reserved an entry and retainer during the life of the wife; and such tempering and qualifying of the penalty

[&]quot; Prop. in Land (2d ed.) 173 n. (k); also in 1st ed. 231 n. (b).

^{100 (1555) 2} Dyer, 126b, 127b.

¹⁰¹ Perk. Conv. ss. 567, 568 where such limitations by wills and conveyances at common law are sharply distinguished. To the same effect is the comment of Preston in his Shepp. Touch. 435:

[&]quot;The reason given . . . is, that a monk is civiliter mortuus, and that the effect is the same as if the devise had been to a person who had died in the lifetime of the testator."—Lomas v. Wright (1833) 2 Myl. & K. 769, 779.

The doctrine involved in such a limitation by will has come to be recognized as that of acceleration: Jarman, Wills (6th Eng. ed.) 718, citing Perk. s. 567.

[&]quot;In the case of a devise to a person for life with remainder in fee, where the tenant for life is incapable of taking or is not in rerum natura, the remainder is valid and (if vested) will be accelerated."—Theobald, Wills (7th ed.) citing Perk. ss. 566, 567, and Year Book 9 Henry VI, fo. 24b.

Is it sufficiently established that the doctrine of acceleration of the vested remainder on avoidance of the particular estate applies only to wills? The decided cases, while they seem confined to wills, do not expressly remark any difference between wills and deeds, and apparently some of the judges may entertain an opinion that there is no difference. See Jull v. Jacobs (1876) 3 Ch. D. 703, 711, 712; Key v. Weathersbee (1894) 43 S. C. 414, 424, 425; Lainson v. Lainson (1853) 18 Beav. 1; Dracus v. Crump (1846, Ky.) 6 B. Mon. 363. Modern texts, such as those of Williams, Challis, Leake, and Washburn, pass over the question. Some state the law of acceleration in such terms as to include remainders by deed as well as by devise: Tiffany, Real Prop. 304. See also Fearne, Cont. Rem. 308, Cruise, Dig. Tit. XVI, ch. IV, ss. 17, 18. Lord Hardwicke in Avelyn v. Ward (1750) I Ves. Sr. 420, said that he knew

[&]quot;no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate so as to leave a proper remainder, or to defeat an

shall not altogether defeat the estate, &c. as Litt. (§. 327) says of re-entry and retainer until, &c. which is only in lieu of distress or pledge, &c."

The decision is not mentioned in Fearne, Coke upon Littleton, or Challis, the other leading texts in which, if anywhere, we might expect to find an authoritative recognition of it.102 The reference to the case in Sheppard's Touchstone at page 120 is ambiguous. Preston so treats it. Why then have such writers given the decision a wide berth? Have they scouted the decision as a piece of unwarranted judicial legislation? The case, literally taken, would convert an unqualified condition in a devise—at least where there are remainders—into a mere entry and retainer, which both Littleton and Coke treated as something absolutely different.103

It may be that the explanation is in part to be found in a feeling that the decision is not to be reconciled with the many cases in which it has

absolute fee before by a conditional limitation; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place.' But see Lord Stafford's Case (1610) 8 Co. 75, and Crabb, Real Prop. 639.

No authoritative and apposite discussion of the doctrine of seisin involved in the distinction has been found. A devise gives seisin in deed to the remainderman in such a case. Livery of seisin to a termor for years confers the seisin upon the vested remainderman (Lit. s. 60) who takes an immediate vested estate.

It "is not a remainder strictly so called; for the lease for years does not interfere with or affect the limitation of the freehold title."-Leake, Prop. in Land (2d ed.) 231.

It is "a present estate subject to the term."—3 Jenks, Dig. of Eng. Civil Law,

654.

"Livery of seisin may be given and received by attorney. But the authority to give or receive livery must be by deed."—Cruise, Dig. Tit. XXXII, ch. IV, s. 14. See Lit. s. 66; Co. Lit. 51b, 52a.

"A man being absent cannot take a freehold by a livery, but by his attorney being lawfully authorised to receive livery by deed, unlesse the feoffment be made by deed, and then the livery to one [under certain circumstances] in the name of both is good."—Co. Lit. 49b.

But could the person to whom livery of a particular estate void in law had been made be regarded as in the position of a bailiff of the remainderman (Williams, Real Prop., 22d ed., 348) as in the case of a lessee for years? He would take no interest in the land. And since he would have no authority by deed to receive livery of seisin in behalf of the remainderman, could the livery to him as attorney be of any effect? It might be said to-day-and no doubt some courts would say-that livery of seisin having been abolished or become obsolete, there is no reason why the doctrine of acceleration of a vested remainder on avoidance of the particular estate should not apply to deeds as well as to wills. Deeds to-day by statute, independently of the Statute of Uses, frequently give seisin in fact.

102 And it may be added that there is no mention of it or of the rule involved, in Cruise, Dig., in Williams, in Crabb, in Halsbury, Laws of Eng., Jenks, Dig. of Eng. Civil Law, Jarman, Wills,-except in an addendum to the 6th Eng. ed. by the editor, Sweet, who cites it merely in the statement that a devise may be subject to a condition.

108 Lit. ss. 325, 327; Co. Lit. 202a, 203a, and Butler and Hargrave's note (3); Crabb, Real Prop. s. 2193; Cruise, Dig. Tit. XXVIII, ch. I, ss. 68, 69, 70.

been held that devises by way of remainder are subject to the same incidents as common law remainders.

"Under the Statute of Uses and Wills," says Professor Gray (he too makes no mention of Warren v. Lee) "remainders created by way of use or by devise had all the incidents of remainders created by common law, but under those statutes future estates could be created which were not remainders and which could take effect without regard to any preceding estate." 104

Perhaps not a few have been influenced by certain considerations such as the time of the case, which was the formative period of the executory devise. In any event, it is of interest to note that as recently as 1870, in the case of *Kinnersley v. Williamson*, 105 it was declared by counsel and not denied by the court—though the point was not passed upon—that an entry by the heir for breach of a condition annexed to a particular estate created by devise would defeat the remainders.

#### VII. INDEPENDENT LIMITATIONS

Whenever a freehold limitation arises independently of a preceding estate, if of the shifting type, it will operate to defeat the preceding estate; if of the springing type, it will take effect regardless of the fact that a forfeiture of a preceding estate has been enforced. Shifting uses and executory devises that shift the seisin are thus more than independent of preceding estates; by their supervention they destroy the preceding estates. Springing uses and executory devises of a like character are totally independent of the seisin of preceding interests, whether such preceding interests are created with them at the same time, or are afterwards substituted as the result of an entry to enforce a forfeiture. Indeed, they may be said to operate in destruction of such substituted estates in the same manner as a shifting use or a shifting executory devise does.¹⁰⁶

Obviously, the practical consequences of this independence of preceding limitations are of the first importance. It is an independence which unfetters the hands of any one who would create a future free-hold, and, provided he is careful not to give his limitations the form

¹⁰⁴ Perpetuities, s. 919, and see generally ss. 918, 926; also Leake, Prop. in Land (2d ed.) 257; Doe v. Scudamore (1800) 2 B. & P. 289, Purefoy v. Rogers (ca. 1683) 2 Wms. Saund. 380, 382. See Challis, Real Prop. (3d ed.) 171, 172.

^{105 39} L. J. Ch. 788.

¹⁰⁸ And therefore like the operation of a springing use on a resulting use. "The springing use thus operates upon the resulting use in the same manner as a shifting use does upon the preceding limitation, and does not operate by way of remainder." Leake, *Prop. in Land* (2d ed.) 254.

of remainders, ¹⁰⁷ makes it possible for him to annex a condition to any interest present or future without jeopardizing other future interests, and without subjecting such interests to the condition. A can devise to B and his heirs upon condition subsequent, and he can provide that upon an entirely distinct contingency thereafter occurring the property shall go to C and his heirs. ¹⁰⁸ Or he can convey to uses in the same way. ¹⁰⁹ If the condition is broken, there may be an entry and enforcement of the forfeiture. If later the second contingency occurs, C becomes seised in fee. In each case, what the testator or grantor had intended has occurred.

Substantially the same freedom is possible in the creation of terms of years in futuro by tenant in fee simple or fee tail. We may have limitations of terms of years in the form of remainders. But they are not true remainders. They are not parts of one estate created by livery or its modern equivalent and dependent on the particular estate for support. They are "related in the order of their enjoyment" by no imperative rule of the common law but "only by the terms of the contract or contracts that create them." In holding that a limitation in form a remainder for years depending on an estate for years cannot be a remainder, it was said in Corbet v. Stone¹¹⁰ that

"A lease for years operates by way of contract, and therefore the particular estate and the remainder estate [so called] operate as two distinct estates grounded upon several contracts; but it is true, such a remainder may be of a freehold, as upon an estate for life, . . . and then in law the particular estate, and the remainder, is but one estate in law, and is created by livery."

A may give a series of leases of the same land creating all of them at different times or at the same time. The latter only would be possible if they were deemed remainders. If then A gives a series of leases, the first to B for five years, then to C for five years, then to D for five years, the grants to C and D are "not remainders, but grants

¹⁰⁷ "It is a well-known rule . . . that no limitation capable of taking effect as a contingent remainder shall, if created inter vivos, be held to be a springing use under the Statute of Uses, or, if created by will, be held to be an executory devise under the Statute of Wills or the Wills Act, 1837." White v. Summers [1908] 2 Ch. 256, 262.

See also Doe v. Scudamore (1800) 2 B. & P. 289; Hawes v. Hawes (1880) 14 Ch. D. 614. See the comment on Simonds v. Simonds (1908) 199 Mass. 552, in Gray, Perpetuities, ss. 918-926.

¹⁰⁸ As to the untrammeled nature of executory devises see Challis, Rea. Prop. (2d ed.) 169 et seq. See Jarman's definition, Wills (6th Eng. ed.) 1432.

^{1№} See Rogers v. Eagle Fire Co. (1832, N. Y.) 9 Wend. 611; Roe v. Tranmer (1757) 2 Wils. C. P. 75; Davies v. Speed (1692) 2 Salk. 675.

^{110 (}ca. 1678) T. Raym. 140, 151.

[&]quot;If a man makes a lease for years to begin at Michaelmas next ensuing, it is good." Barwick's Case (1597) 5 Co. 93b, 94b.

¹¹² Co. Lit. 143a; Leake, Prop. in Land (2d ed.) 231.

to commence in futuro, independent of the preceding grant or grants."118

It follows that each of the leases may be subject to conditions the enforcement of which will destroy the interest in question without affecting the other interests. And although the leases in futuro be limited without reference to the conditions annexed to preceding leases, such conditions would be enforceable. They do not prejudice the later leases, hence they could not be deemed repugnant; and since the Statute of 32 Henry VIII, ch. 34, it is possible for the grantee of the reversion to avail himself of the conditions annexed to leases for years (as for life).

Excepting the rule against perpetuities, there is only one important restriction upon this broad freedom in the creation of leaseholds in futuro subject to conditions. The rule that a life estate is greater than any term of years is of such potency that at common law if a lessee attempts to grant his term to A for life, with remainders over, A will take the entire term. 114 Conditions annexed to the so-called remainders could therefore have no operation. Only conditions annexed to the limitation for A's life would be of any effect. If forfeiture were enforced, the grantor would be in of his original term unaffected by the terms in futuro.

But it is quite possible that a different rule will come to obtain in the United States,¹¹⁵ for at present there seems to be practically no American authority on the matter.¹¹⁶ Our courts for the most part have been untrammeled in their dealing with future limitations of chattels personal; they have held that interests for life with limitations in futuro can be created by deed as well as by will.¹¹⁷ A similar attitude

¹¹⁸ Gray, Perpetuities (3d ed.) ss. 71, 321.

estate and interest to another, habendum to him and his assigns immediately after the death of the grantor... the case was ruled, and adjudged, that the habendum was void, and the premises of the grant good to make the entire term pass to the grantee immediately."—Lilley v. Whitney (1568) Dyer 272a. See Welcden v. Elkington (1578) Plowd. 516, 519, 520.

See Leake, *Prop. in Land* (2d ed.) 232. But the termor may effectively grant his leasehold to be held after the death of a stranger to whom no interest is given. It is not presumed that the stranger will not die within the term. *Rayman v. Gold* (ca. 1592) Sir Francis Moore, 635. See Gray, *Perpetuities*, s. 810.

Moreover, "to get out of the literal authority of old cases, an ingenious distinction was invented: a remainder might be limited for the residue of the years; but not for the residue of the term." Lord Mansfield in Wright v. Cartwright (1757) Burr. 282.

¹¹⁵ Gray, Perpetuities, ss. 71b, 816.

¹¹⁶ In Culbreth v. Smith (1888) 69 Md. 450, the court was strongly of the opinion that a life interest could be created by deed in any leasehold estate, with limitations over. See Gray, Perpetuities, s. 71 n.

¹¹⁷ Duke v. Dyches (1848, S. C.) 2 Strobh. Eq. 353 n.; Brummet v. Barber (1834, S. C.) 2 Hill, 543; Gray, Perpetuities, ss. 78, 92, 854.

toward chattels real would insure a similarly fortunate result. Ever since Manning's Case¹¹⁸ it has been held that a bequest of a term to one for life, remainder over, would achieve its purpose. There would seem to be no reason why such limitations by way of will,—and by deed if they should be sustained,—could not be subjected to conditions with freedom and certainty of result.¹¹⁹

¹¹⁸ (1610) 8 Co. 94b; Cotton v. Heath (1638) 1 Rolle Abr. 612, pl. 3, translated in 5 Gray, Cases on Prop. (2d ed.) 117.

in 5 Gray, Cases on Prop. (2d ed.) 117.

¹¹⁹ See the covenants, etc., of the lessees in Wright v. Cartwright (1757) 1

Burr. 282. In Manning's Case, supra, it was said: "This devise is but of a chattel [real] . . . and which may vest and revest at the pleasure of the devisor, without any prejudice to any."

## GIFTS OF CHOSES IN ACTION

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Is a consideration necessary to make effective the assignment of a chose in action? This is a question which has aroused some interest of late years.¹ The recent discussion of the nature of the assignment of choses in action by Professor Cook and Professor Williston in the Harvard Law Review² should serve to reawaken that interest. It has stimulated the writer to offer certain suggestions on the subject.

By making effective the assignment is meant the acquisition by the assignee of rights not subject to the control of the assignor. So far as the debtor is concerned, the defense of want of consideration in the assignment is not one that he can make, except so far as the want of consideration may prevent the assignee from giving an effective discharge of the obligation.³

It is universally admitted that *choses* in action were originally unassignable.⁴ There is general accord in agreeing that the doctrine of agency furnished the first escape from this unsatisfactory position.⁵ The assignor gave to his assignee a power of attorney which enabled the assignee to sue in the name of the assignor. So long as the assignor offered no obstruction to the use of his name, the assignee required no relief and was entitled to no relief in equity.⁶

¹ Edward Jenks, Consideration and the Assignment of Choses in Action (1900) 16 Law Quar. Rev. 241; W. R. Anson, Assignment of Choses in Action (1901) 17 Law Quar. Rev. 90; Geo. P. Costigan, Jr., Gifts Inter Vivos of Choses in Action (1911) 27 Law Quar. Rev. 326. See article by Walter W. Cook entitled, The Alienability of Choses in Action (1916) 29 Harv. L. Rev. 816, 821.

² Walter W. Cook, The Alienability of Choses in Action (1916) 29 Harv. L. Rev. 816; Samuel Williston, Is the Right of an Assignee of a Chose in Action Legal or Equitable? (1916) 30 Harv. L. Rev. 97; Walter W. Cook, The Alienability of Choses in Action: A Reply to Professor Williston (1917) 30 Harv. L. Rev. 449.

³ Walker v. Bradford Old Bank (1884) 12 Q. B. D. 511; W. R. Anson, Assignment of Choses in Action (1901) 17 Law Quar. Rev. 90, 93.

^{&#}x27;2 Pollock & Maitland, Hist. Eng. Law (2d ed.) 226; Pollock, Principles of Contract (5th ed.) App. Note F; Ames, Lectures on Legal History, 210.

⁸ See Ames, Lectures, 213, Pollock & Maitland, 226.

⁶ Hammond v. Messenger (1838) 9 Sim. 327; cases cited in note, Ames, Cases on Trusts (2d ed.) 60. It is probable, however, that equity would give relief in cases where the power of attorney was not effective at law to enable the assignee to recover in the assignor's name, as where either the assignor or the debtor had died before suit brought. See W. T. Barbour, The History of Contract in Early English Equity, in 4 Oxford Studies in Social and Legal History (edited by Vinogradoff) 108.

In case the assignor objected to the use of his name by the assignee it seems altogether unlikely that equity would aid the assignee except where the assignment was made for a consideration. If a consideration was given, however, equity would permit the assignee to enforce his claim against the debtor by bill in equity. This was true only where the consideration was valid at law. An extreme fear of maintenance led to the view that no consideration, other than an assignment in satisfaction of an existing debt, was valid at law.

Such was the state of the law in the time of Lord Keeper Bridgman, 10 but by the time of Lord Hardwicke it was decided that an assignment for valuable consideration, even though not in consideration of an existing debt, would be sustained in equity. 11 Lord Hardwicke was apparently willing to go still further.

Thus, he is reported as saying in Snelgrave v. Bayly¹² that "the testator might have assigned this bond, and though he had done it voluntarily, this court would have maintained it against himself, or any person claiming under him." But this dictum did not represent, so far as the writer can discover, the law at the time it was made, and in Edward v. Jones¹⁴ the opposite was decided.

The statement must be read, however, in the light of the question in the case, which was: To whom did the surplus result upon the assignment for a consideration by a husband of a wife's choses in action upon trusts which left a surplus undisposed of, the husband's or the wife's administratrix? It is obvious that this statement may have been made with reference to the validity of this assignment as against the debtor. In this sense, it is unquestionably correct. In the sense of its validity as against the assignor, its correctness is more than doubtful.

It should be noted that Mr. Jenks does not distinguish between the validity of a gratuitous assignment as against the debtor and as against the assignor. See comment to this effect by Anson, Assignment of Choses in Action, 17 Law Quar. Rev. 90, 93.

⁷ See Hil. 37 Hen. VI, 13, pl. 3, cited in Pollock, Contracts, App. Note F, and in Ames, Lectures, p. 213, n., in which it appears that the court of chancery acted on an opinion of the justices to the effect that an assignment of debts, not in satisfaction of an existing debt, was not consideration for a bond, by decreeing the bond to be delivered up.

See Wald's Pollock on Contracts (3d ed. by Williston) 279.

See Ames, Lectures, 213. Maintenance was, of course, a defense open to the debtor.

¹⁰ See Freeman, 145, c. 185. Sir Orlando Bridgman was Lord Keeper from 1667 to 1672.

¹¹ Row v. Dawson (1749) I Ves. 331.

¹² (1744) Ridg. t. Hardw. 202, 204.

¹³ Mr. Jenks quotes this statement from Lord Carteret v. Paschal (1733) 3 P. Wms. 197, 199, in support of the proposition that a consideration is not necessary in the assignment of a chose in action: "It was admitted on all sides, that if a man in his own right be entitled to a bond, or other chose in action, he may assign it without any consideration." Consideration and the Assignment of Choses in Action, 16 Law Quar. Rev. 241, 242.

¹⁴ (1836) 1 Myl. & C. 226.

If the assignee of a *chose* in action gets a power of attorney, the right that he gets is *prima facie* revocable by his principal. If he gives a consideration for the assignment it may well be held that it is inequitable for the assignor to revoke it. Following this, to save their jurisdiction over *choses* in action, the courts of law have apparently recognized as irrevocable those assignments which the courts of equity had held to be irrevocable. So far as either courts of law or of equity recognized the irrevocable quality of the assignment, they gave legal effect to the non-representative character contemplated by the parties.

If the assignment is gratuitous, however, it is difficult to see anything inequitable in the revocation of the power of attorney created by it. 16 Yet it is undeniable that many gratuitous assignments are enforced against the assignor or his representatives in equity. Is this because equity in such cases prevents the assignor from revoking the rights of representation he has created, or because equity recognizes, for reasons of its own, the non-representative character of the assignee's position?

As is well known, Mr. Ames took the former view.¹⁷ The doctrine being limited in all jurisdictions to *choses* in action evidenced by a written instrument, the assignment being accomplished by a delivery of the instrument, he took the following distinction: The power, even though gratuitous, is irrevocable where coupled with an interest.

There being on this theory no logical distinction between gifts *intervivos* and *causa mortis*, he was compelled to disapprove of the distinction taken between such gifts in the English cases.¹⁸

To the present writer there are several objections to this view which together justify a search for another explanation.

First, this is not the conscious view of the courts.¹⁰ This objection, though possibly of little weight when you assume that as a matter of accurate analysis a *chose* in action is, in its nature, unassignable, except so far as an assignment creates representative rights in the assignee, becomes significant when it is perceived that the assumption is unsound.²⁰

Second, it seems a strained application of the doctrine of a power coupled with an interest. By assumption, the chose in action is not assignable. No interest in it passes by the assignment. What interest is it that accompanies the giving of the power of attorney? The title

¹⁵ See article by Professor Cook, 29 HARV. L. REV. 816, 822.

¹⁶ German v. Yates (1915) 32 T. L. R. 52.

¹⁷ See Ames Cases on Trusts (2d ed.) notes pp. 139, 145, 155. See an exposition of Mr. Ames' views by Geo. P. Costigan, Jr. 27 LAW QUAR. REV. 326.

¹⁸ Ames, Cases on Trusts (2d ed.) 145, note.

¹⁹ See statement by Mr. Costigan to this effect with regard to the English cases, 27 Law Quar. Rev. 326, 329. It is believed that the same is true of the American courts

²⁰ See Professor Cook's article 29 HARV. L. REV. 816.

to the paper evidencing the *chose* in action? But that is merely an evidential document. It is not the *chose* in action with respect to which the power was given. It is believed to be a novel application of the "power of attorney coupled with an interest" to hold that the power may relate to one thing, while the interest is in another thing.²¹

Third, it furnishes no clue to the distinction which exists in the English cases between gifts inter vivos and causa mortis.

The writer believes that this distinction furnishes the clue to the law of gifts of *choses* in action. The explanation of the validity of such gifts is found *not* in any principle of agency, but in the law of donatio mortis causa.

Bracton²² and Swinburne²³ wrote of gifts causa mortis, but the report of no case in the English common-law or equity courts before the eighteenth century, so far as discovered, refers to such a gift. Shortly after the opening of that century the donatio mortis causa found its way into the reports, its validity was sustained, and a judicial definition was formulated.²⁴

n According to Mr. Ames, this interest could be created either by delivery of the instrument evidencing the *chose* or by deed of gift: Cases on Trusts (2d ed.) 155, n. If the interest is an interest in the instrument evidencing the obligation, it is difficult to see how the interest is created by delivery of a deed of assignment of the obligation. It is conceivable that the grantor might intend the deed to operate as a transfer of the title to the instrument regardless of the effect of the transfer upon the title to the obligation, but it is believed that such an intent is so unusual that it can not be presumed.

Mr. Costigan in 27 Law Quar. Rev. 326, 338, says, with reference to the desirability of applying the theory of Professor Ames in the English courts:

"To be sure, under the English cases about power coupled with an interest, it would be difficult to find an interest sufficiently great in these gift-assignment cases to meet the test heretofore applied where a power is sought to be made irrevocable by being coupled with an interest, and hence the doctrine of Professor Ames probably will not appeal very strongly to the English judges; but because of the public policy favouring the alienability of those choses in action that are not essentially personal, a special test of irrevocability might well be applied to the power implied on an assignment of a legal chose."

the power implied on an assignment of a legal chose."

He appends to this statement at the word "judges" the following note: "But see Lord Atkinson's opinion in Frith v. Frith [1906] A. C. 254, 260, where an irrevocable power is referred to as authority 'given to a particular individual to do a particular thing, the doing of which conferred a benefit upon him, the authority ceasing when the benefit was reaped.' Professor Ames's doctrine could rest on that definition."

The difficulty with the suggestion is that the definition is as applicable to an assignment of a *chose* in action not evidenced by a written instrument, as to an assignment of one that is, and therefore the suggestion raises the question of the basis of the distinction between gifts of such *choses* in action. Ames, *Cases on Trusts* (2d ed.) 163.

²² I (Twiss ed.) 475.

² Wills, Pt. I, sec. VII.

²⁴ The early cases are *Hedges v. Hedges* (1708) Prec. Ch. 269, 2 Eq. Cas. Abr. 573; *Jones v. Selby* (1710) Prec. Ch. 300, 2 Eq. Cas. Abr. 573; *Drury v. Smith* 

The sudden influx of cases under this head leads one to suspect a newly discovered need. The need is easily found. The Statute of Frauds, recently passed, had put an end to informal wills by its provisions regulating nuncupative wills.²⁵ But it was still attempted to make informal death-bed gifts, and the disappointed legatees sought relief. They discovered the applicability of the *donatio mortis causa* to their needs and obtained the indorsement of the courts to that application.²⁸

The earliest cases on the subject of gifts causa mortis involved the validity of gifts of goods and chattels. In them it was repeatedly intimated that delivery was necessary to make the gift effective.²⁷ This view resulted in its being held that this new form of gift, in spite of its resemblance to a legacy, could not be applied to choses in action even though the chose in action was evidenced by a written instrument which was in fact delivered. Thus, when a note not payable to bearer was delivered as a gift causa mortis, it was declared that it

(1717) I P. Wms. 404, 2 Eq. Cas. Abr. 575; Lawson v. Lawson (1718) I P. Wms. 441, 2 Eq. Cas. Abr. 575; Thompson v. Hodgson (1727) 2 Str. 777; Miller v. Miller (1735) 3 P. Wms. 356, 2 Eq. Cas. Abr. 575. In a memorandum note to the report of Drury v. Smith, the case of Smith v. Casen (Dec. 8, 1718) is referred to.

²⁵ 29 Car. II, c. 3, secs. 19, 20, 21.

²⁶ The relationship of cause and effect between the Statute of Frauds and gifts causa mortis, through perhaps not generally recognized, has occasionally been noted:

[&]quot;Before the Statute of Frauds, 29 Car. 2 c. 3, s. 19, 20, 21, parol expressions of an intention to give in the event of death, even though, not being accompanied by delivery, insufficient to constitute a donatio mortis causa, might have been valid as a nuncupative will. The earliest cases in our courts of law or equity on the subject of these donations are subsequent to that act." Note to Walter v. Hodge (1818) 2 Swanst. 92, 101.

[&]quot;The commencement of the cases upon this head seems to have been the effect of that part of the *English* statute of frauds, which relates to nuncupative wills, and a struggle to support, in courts of equity, claims, which, but for that statute, would have been brought forward in the spiritual courts." Raymond v. Sellick (1835) 10 Conn. 480, 485.

"There is a close and perceptible analogy between those testamentary discretizations by made of most to the contract of the cont

[&]quot;There is a close and perceptible analogy between those testamentary dispositions by word of mouth to which our law gives the name of nuncupative wills and the death-bed gift or donatio causa mortis. We borrow these two kinds of transfer from the Roman jurisprudence, but without those safeguards against fraud and error, at the outset, which surrounded them in the age of Justinian. . . Scarcely was the nuncupative will securely locked in the iron grasp of the Statute of Frauds, before this donation for posthumous effect of Roman paternity sprung up in its place. Chancery protection was invoked for these gifts, and not in vain, early in the eighteenth century; and in 1708, or about thirty years from the date of Charles II's enactment, we find the gift causa mortis defined in nearly the precise terms of a nuncupative will. One might almost believe that the Chancery lawyers of England were trying to circumvent Parliament by finding a place for the oral will under a new and assumed name." James Schouler, Oral Wills and Death-Bed Gifts (1886) 2 LAW QUAR REV. 444, 447-

^{**} Hedges v. Hedges, Prec. Ch. 269, 2 Eq. Cas. Abr. 573; Drury v. Smith, 1 P. Wms. 404.

"was merely a chose en action and must still be sued in the name of the executors, that cannot take effect as a donatio mortis causa, in as much as no property therein could pass by the delivery."²⁸

It is not difficult to perceive that delivery was insisted upon in order to distinguish this gift from a legacy. This appears clearly in the case of Ward v. Turner,²⁰ where Lord Hardwicke made an elaborate examination of the law of gifts causa mortis. He referred to the three classes of gifts causa mortis recognized by writers on the civil law, and concluded that delivery was required in only one of them. But on comparison with the statement of Swinburne and the cases in the Court of Chancery, he came to the conclusion "that the civil law has been received in England in respect to such donations only so far as attended with delivery." In consequence he held that an attempted gift causa mortis of certain South Sea annuities by the delivery of the receipts for them was ineffective, saying,

"I am of opinion it would be most dangerous to allow this donation mortis causa from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance; and if these annuities are called choses in action, there is less reason to allow of it in this case than in any other chose in action; because stocks and annuities are capable of a transfer of the legal property by act of parliament which might be done easily; and if the intestate had such an aversion to make a will as supposed, he might have transferred to Mosely; consequently this is merely legatory, and amounts to a nuncupative will, and contrary to the stat. of frauds, and would introduce a greater breach on that law than was ever yet made; for if you take away the necessity of delivery of the thing given, it remains merely nuncupative."81

How then did *choses* in action come to be deemed capable of gift causa mortis? It is believed that it was somewhat as follows. Lord Hardwicke held in Snellgrove v. Bailey,³² decided in 1744, that a bond might be the subject of gift causa mortis. This was in full recognition, apparently, of the fact that the bond was evidence merely of a chose in action.³³ But it was made, evidently without any careful examina-

²⁸ Miller v. Miller (1735) 3 P. Wms. 356, 2 Eq. Cas. Abr. 575, 22 Eng. Reprint, 484.

²⁰ Ward v. Turner (1752) 1 Dick. 170, 2 Ves. 431 (the latter is the more complete report).

⁸⁰ 2 Ves. 431, 441.

^{81 2} Ves. 431, 443.

^{22 3} Atk. 214.

Professor Ames says, in referring to the distinction taken in Edwards v. Jones, I Myl. & C. 226 (see n. 14, supra) between gifts of choses in action inter vivos and causa mortis: "This distinction between a gift inter vivos and a donatio mortis causa, it is safe to say, was not contemplated by Lord Hardwicke in Snellgrove v. Bailey." Ames, Cases on Trusts (2d ed.) 145 n. Still it appears

tion by the Lord Chancellor himself of the limits within which gifts mortis causa should be sustained. Eight years later in the case of Ward v. Turner, being convinced upon a careful consideration of the law of gifts causa mortis, that delivery was an essential element, he held that South Sea annuities could not be given causa mortis by the delivery of the receipts for the same. He apparently recognized that the principles upon which his decision was founded were applicable to choses in action generally. He made an attempt, however, to preserve a consistency between the case at hand and Snellgrove v. Bailey by distinguishing the latter case upon the ground that the chose in action there involved was a specialty. He said:

"If I went too far in that case, it is not a reason I should go farther: and I chuse to stop there. But I am of opinion that decree was right, and differs from this case; for though it is true, that a bond, which is specialty, is a chose in action, and its principal value consists in the thing in action, yet some property is conveyed by the delivery; for the property is vested; and to this degree that the law-books say, the person to whom this specialty is given, may cancel, burn, and destroy it; the consequence of which is, that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a profert in Cur."38

This distinction harks back to two early conceptions. First, that there can be no transfer of rights without a transfer of a thing.³⁷ Second, that in the case of a bond, the document is itself the obligation.³⁸

from the report of the case in Ridgeway, Snelgrave v. Bayly (1744) Ridg. t. Hardwicke, 202, that the attorney general, who appeared on behalf of the defendant—the claimant under the gift—, had been directed by the Lord Chancellor to search for precedents on the question: Whether a bond or other chose in action may be granted by way of donatio mortis causa? The precedents produced by the attorney general were Lawson v. Lawson, I P. Wms. 441, and Jones v. Selby, Prec. Ch. 300. These were cases expressly decided upon the law of gifts causa mortis. Hence, it appears that the question involved was as to the validity of a gift causa mortis and the authorities relied upon were cases involving the validity of such gifts. There might have been a more satisfactory consideration of the question had Miller v. Miller (1735) 3 P. Wms. 356, been called to the attention of the Lord Chancellor in this case as it was in Ward v. Turner.

³⁴ Supra, n. 29.

ss It is interesting to note that, although it has long been held in England that choses in action may be given causa mortis by delivery of the evidence thereof, the influence of the decision in Ward v. Turner has kept the general rule from being applied to shares of stock. See Moore v. Moore (1874) L. R. 18 Eq. 474; In re Weston, L. R. [1902] 1 Ch. 680.

²⁶ Ward v. Turner, 2 Ves. 431, 442.

^{*7 2} Pollock & Maitland, 84, 180, 226.

^{*2} Pollock & Maitland, 227; Wald's Pollock on Contracts (3d ed. by Williston) 875; 2 Street, Foundations of Legal Liability, 9.

The first conception is still potent in the law of gifts inter vivos. The distinction taken by Lord Hardwicke between the case of a bond and other choses in action shows that, though he recognizes that delivery is essential to distinguish a donatio mortis causa from a legacy, he is applying it in the sense in which it is applied in gifts inter vivos, i. e., a manual tradition of the thing in which rights were being transferred. A bond could be the subject of a gift causa mortis only because the document which was the obligation could be delivered. So long as this view was taken, it was impossible to extend the donatio causa mortis to cover gifts of choses in action in general, even though the authority of Snellgrove v. Bailey continued to be recognized. Hence, when the question of the validity of a donatio causa mortis of a bond and the mortgage securing it came before Sir John Leach, V.C., he said:

"The case of a Bond I consider to be an exception, and not a rule. Property may pass without writing, either as a donatio mortis causâ, or by a nuncupative Will, according to the forms required by the Statute. The distinction between a donatio mortis causâ, and a nuncupative Will is, that the first is claimed against the Executor, and the other, from the Executor. Where delivery will not execute a complete gift inter vivos, it cannot create a donatio mortis causâ, because it will not prevent the property from vesting in the Executors; and, as a Court of Equity will not, inter vivos, compel a Party to complete his gift, so it will not compel the Executor to complete the gift of his Testator. The delivery of a Mortgage Deed cannot pass the property inter vivos; first, because the action for the money must still be in the name of the Donor; and secondly, because the Mortgagor is not compellable to pay the money without having back the mortgaged Estate, which can only pass by the Deed of the Mortgagee; and no Court would compel the Donor to complete his gift by executing such a Deed."40

But when the case came before Lord Eldon on appeal, he declared that the reasoning of the Vice-Chancellor was at fault in that it proceeded upon the assumption that in the case of a gift of a *chose* in action *donatio mortis causa*, equity was called upon to make effective, as against the donor, a gift which is not complete at law. He held that the claim was not against the donor, that the title is not complete until the donor's death, and the question is therefore not what equity will compel the donor to do, but, what claim it will enforce against his representatives.⁴¹

The significance of the holding that the investiture of title is not synchronous with the delivery, but is complete only upon the death of donor, is two-fold.

²⁰ Cochrane v. Moore (1890) 25 Q. B. D. 57. See especially the opinion of Lord Esher, M. R.

⁴ Duffield v. Elwes (1823) 1 Sim. & St. 239, 244. ⁴ Duffield v. Elwes (1827) 1 Bligh N. S. 497.

First: It makes clear the difference between a transfer of rights and a transfer of things. It also constitutes, so far as choses in action are concerned, an acceptance of the principle that the requirements of delivery in gifts causa mortis are satisfied by the delivery not of the thing in which the rights are transferred—the chose in action—, but of the evidence of the thing, the written instrument in which the chose in action is expressed. This renders the delivery competent to accomplish more completely its real end, i. e., to supply a substitute for the Statute of Frauds.

Second: It clearly indicates the underlying causes for the development by equity of this new species of gift. It is attempting to carry out the will of the donor as against his personal representatives. In doing this the absence of consideration is not a bar to the action of the court in aiding the donee of the chose in action once it has found a formal substitute for the Statute of Frauds.

It will be perceived from the above that there is a sharp limit to gifts of choses in action causa mortis. Choses in action not evidenced by a written instrument cannot be so given. Nor it is believed that those which are evidenced by a written instrument can be given by deed. This would be regarded as a testamentary disposition and subject to the provisions of the Statutes of Frauds.⁴²

It may also be seen that the principles upon which gifts causa mortis are sustained are inapplicable to gifts inter vivos. The donee cannot urge that he is asking the court to carry out the intention of the donor as against those whom he has not desired to benefit. Besides, there is a well-defined law of gifts inter vivos in the law courts. By that law delivery means a manual tradition of the thing in which rights are being transferred.

In the face of such a definition of delivery, it is difficult to conceive of a gift *inter vivos* of a *chose* in action; and accordingly it was held in *Edwards v. Jones*⁴⁴ that a gift *inter vivos* of a *chose* in action represented by a bond was not binding upon the executor of the donor, at least to the extent of preventing him from keeping as against the donee money collected from the debtor.

In the case of the gift causa mortis, it had been held that the gift was effective to pass the property, but that it passed not upon the

[&]quot;Now it is perfectly true that there may be donationes mortis causa of policies and bonds and other documents evidencing the title to choses in action; but speaking broadly, the subjects of donationes mortis causa must be things the title to which, passes by delivery. Where, as in the present case, there is no change of possession operating as an immediate transfer, the court cannot allow the doctrine of donatio mortis causa to be applicable. If we decided otherwise we should, in effect, be enabling persons to drive a coach and four through the Wills Act." Lord Bowen, In re Hughes (1888) 36 Wkly. Rep. 821.

Cochrane v. Moore, n. 39, supra.

⁴¹ Myl. & C. 226.

delivery, but upon the death of the donor.⁴⁵ The English courts of equity were not averse to voluntary transfers, but they did not see their way clear to holding that the gift of a *chose* in action by delivery of a document representing it constituted a transfer. Treating the attempted gift as creating a power of attorney, they found no equity in the position of the donee to justify their denying to the donor the benefits of its revocability.

The donee almost succeeded, however, in securing effective relief. The recognition of voluntary trusts in Ex parte  $Pye^{46}$  furnished the opportunity. Encouraged by the facts of that case, disappointed donees of choses in action began asking that their defective gifts be construed as declarations of trust. For some time they succeeded, and the whole law of gifts was threatened with upheaval.⁴⁷

But it was finally decided that no man should be held as a trustee who had intended and attempted to make merely a gift.⁴⁸

This defeat was not altogether complete, however, for while an attempt to give will not be construed as a declaration of trust, an attempt to create a trust will not be defeated merely because a perfect transfer has not been made to the intended trustee.⁴⁹ This seems to be merely an application of the principle that equity will not allow an intended trust to fail for want of a properly constituted trustee.⁵⁰

Although, as has been indicated, there is a wide difference between the legal effect of the delivery in gifts causa mortis and inter vivos, the formal requirements are similar. If one wishes to give a horse causa mortis, he must make delivery in the same manner as though he were going to make a gift inter vivos. Hence, it has often been said that there is no difference between gifts inter vivos and causa mortis so far as delivery is concerned.⁵¹ It is easy to assume that the statement applies to the legal effect as well as to formal requirements (and undoubtedly the statement has been made not infrequently with that

⁴⁸ Thornton, Gifts and Advancements, 23; 15 Halsbury, 431.

^{40 (1811) 18} Vesey, 140.

⁴¹ Morgan v. Malleson (1870) L. R. 10 Eq. 475; Richardson v. Richardson (1867) L. R. 3 Eq. 636.

⁴⁸ Richards v. Delbridge (1874) L. R. 18 Eq. 11.

Fortescue v. Barnett (1834) 3 Myl. & K. 36; In re Patrick [1891] 1 Ch. 82. See article by Sir W. R. Anson, 17 Law Quar. Rev. 90.

[∞] Perry, Trusts (5th ed.) sec. 38.

⁸¹ In Noble v. Smith (1806, N. Y.) 2 Johns. 52, 56, C. J. Kent stated a delivery was essential to a gift in gifts inter vivos and causa mortis. In Ewing v. Ewing (1830, Va.) 2 Leigh, 337, 341, Carr, J., stated that with respect to delivery, gifts causa mortis "stand precisely on the same ground as a gift inter vivos."

Green, J., said, p. 344: "The only difference between the donation causa mortis and inter vivos, is, that the latter is absolute and unconditional, the other is in contemplation of death, and therefore subject to the implied condition, that the thing is to be restored if the donor recovers; but to give a right to the donee, the gift must be perfected alike in both cases, by delivery."

thought in mind), and to conclude that if *choses* in action may be given *causa mortis* they may be given *inter vivos*. This conclusion was reached in this country in two early decisions which have since become leading cases.⁵² Following these cases it has been held almost universally by the American courts that gifts may be made of *choses* in action by delivery of a paper evidencing such *chose* in action.⁵³

Mr. Ames said:

"If a chose in action is not in the form of a common law or mercantile specialty, so that there is no document to pass by delivery or deed, a gift of it by the obligee is so far operative as a power of attorney, that the obligor cannot set up the gratuitous character of the assignment against the donee. . . . It seems to be conceded, however, that the donor may revoke the power of attorney. The reason for this concession is not obvious." 54

It is believed that the foregoing pages explain the reasons for the concession. As a legal power of attorney, the assignment of a parol chose in action by gift is revocable. Its gratuitous character prevents the assignee from securing equitable relief against a revocation. It cannot be supported upon the grounds hitherto discussed because it lacks the essential quality of "deliverability."

As has been indicated, the history of the law of gifts causa mortis of choses in action precludes the acceptance of a deed of gift as a substitute for delivery.⁵⁵ Since the law in America with respect to gifts inter vivos of choses in action is founded upon the authority of the English cases relating to donationes mortis causa, it might well be held that a deed is not acceptable as a substitute for delivery even in such gifts.⁵⁶

²² The cases referred to are Grover v. Grover (1837, Mass.) 24 Pick. 261, and Elam v. Keen (1833, Va.) 4 Leigh, 333.

The proposition is too well established to require citation of authorities. Many of the cases are cited in Ames, Cases on Trusts (2d ed.) 162, n. 4.

Through a similar process of reasoning it has been held in many of the courts of this country that title passes upon delivery in the case of a gift causa mortis. Basket v. Hassell (1882) 107 U. S. 602. See an excellent discussion in Hatcher v. Buford (1895) 60 Ark. 169, 174.

[&]quot;Ames, Cases on Trusts (2d ed.) 163, n.

writing required for a testamentary disposition, but without such delivery the words of the donor are unavailing to constitute a gift... A written instrument may be available for designating the property intended to be given, as well as to show the intention of the donor, but by itself it no more establishes the gift than would the same words orally delivered by the donor." Knight v. Tripp (1898) 121 Cal. 674, 678, 679.

"As a gift causa mortis, it is not aided by the execution of the written instrument except so far as that may contribute to greater certainty in the proofs.

[&]quot;As a gift causa mortis, it is not aided by the execution of the written instrument, except so far as that may contribute to greater certainty in the proofs. Such gifts cannot be effected by formal instruments of conveyance or assignment. They are manifested by, and take their effect from, delivery." McGrath v. Reynolds (1875) 116 Mass. 566, 568.

Allen-West Commission Co. v. Grumbles (1904) 129 Fed. 287.

On the other hand, the same lack of comprehension of the nature of delivery in gifts mortis causa whereby our courts failed to distinguish between gifts inter vivos and causa mortis of choses in action, has not infrequently resulted in the holding that since a gift of chattels may be made by deed, a gift of choses in action may be made the same way and, since choses in action may be given by deed inter vivos, they may be given by deed causa mortis.⁵⁷

To sum up: Choses in action were originally inalienable. This rule was evaded by giving to the assignee a power of attorney. The power of attorney was revocable. Where a consideration was given, equity denied to the assignor the benefit of this legal quality by permitting the assignee to enforce his claim against the obligor in equity. law courts, to save their jurisdiction, followed the lead of equity. But the lead of equity went no further than assignments for a consideration, for in an assignment without consideration the assignor was a volunteer, and equity would not deny him the benefits of the revocability of the legal right created. Equity was, however, busily enforcing one class of gifts, the donatio mortis causa. This was due to its desire to assist legatees who had been disappointed because their gifts failed to comply with the Statute of Frauds. To preserve the appearance of consistency with the statute, equity insisted upon delivery of the gift. So long as delivery was regarded as operating to transfer title to the thing delivered, choses in action could not be given in this way. Eventually delivery was held not to transfer title. This made

⁵⁷ "The authorities which were cited on the argument, and others which are scattered through the reports, generally declare that delivery of the chattels or securities is necessary to establish a gift causa mortis.

See 20 Cyc. 1234, 1235, and cases cited n. 25, p. 1235.

Mr. Ames was of the opinion that a deed of gift should be as effective as a delivery: Cases on Trusts (2d ed.) 145, 155, 163. If such a deed should be construed to apply to the chose in action alone, and not to the written evidence of it, might not such a holding result in the separation of the ownership of the chose in action and the written evidence of it? This was the situation cited by him in his criticism of the holding of the English courts that a gift inter vivos by delivery of a chose in action is revocable. Op. cit. 145.

[&]quot;This, however, is not because the gift is made causa mortis, but because the rule is supposed to apply to all gifts. Tradition or some equivalent seems to have been necessary at common law, to pass chattels by gift. But it has always been competent to transfer them by writing, which is less ambiguous than parol delivery, and there can be no doubt of that at the present day,— delivery under writings being chiefly necessary to avoid questions with third persons, but not between the parties. And the unwillingness of the early courts to sustain gifts causa mortis of choses in action, arose from the fact that no legal transfer could be made of them at all, because they only represented rights but were not themselves intrinsically valuable. Since the equitable doctrine has prevailed that they can be assigned by delivery, they are placed with all other chattels, as subject to gift; and the same rules have been enforced. But no doubt ever existed as to their being transferable by writing so as to vest the beneficial title in the assignee, and the questions have been in all cases, not whether they could be, but whether they had been transferred in that way." Ellis v. Secor (1875) 31 Mich. 185, 188.

possible the holding that the requirement of delivery was satisfied by delivery of the written instrument evidencing an obligation. Under this holding it became possible to make gifts causa mortis of choses in action. It still remained impossible to give choses in action inter vivos, a different view of delivery prevailing in gifts inter vivos. The distinction between the delivery in the two cases was not perceived in the early American cases, with the result that choses in action which were susceptible of gift causa mortis were held capable of being given inter vivos. But delivery being an essential requirement of a gift causa mortis, gifts can be made only of those choses in action which are susceptible of delivery. Gifts of parol choses in action are revocable at the option of the donor.

[Ed. Note.-Granting all that the learned author has said concerning the history of the law relating to gifts of choses in action, it seems to the editor doubtful whether he gives sufficient weight to the modern law, especially that of the United States. With the growing recognition that there are no reasons of logic or of policy for not allowing choses in action (with certain exceptions) to be transferred as freely as interests in chattels, it was to be expected that the tendency would be for the courts to recognize in both cases the same formalities as sufficient to bring about a transfer. Consequently, decisions that choses in action may be assigned by deed as well as by delivery of the tangible evidence of their existence merely reflect the change in the point of view of our courts. Although these decisions depart from older ideas, they are in no wise unsound. When once this change of view has taken place, it is not hard for courts to hold that gifts as well as transfers for value of choses in action may be made by deed without delivery of the tangible evidence of their existence. The final step is taken when it is held that an irrevocable gift of a "parol" chose in action, i. e., a chose in action not evidenced by any writing, may be made by deed.

For discussion and authorities dealing with the matter from this standpoint see: 2 Kent, Com. 439; Driscoll v. Driscoll (1904) 143 Cal. 528, 77 Pac. 471 (statutory); Sanborn v. Goodhue (1853) 28 N. H. 48; De Caumont v. Bogert (1885, N. Y. Sup. Ct.) 36 Hun, 382; Matson v. Abbey (1894) 141 N. Y. 179, 36 N. E. 11; Bond v. Bunting (1875) 78 Pa. St. 210. Of course if the gift of the "parol" chose in action is not by deed, it is revocable. Re Richardson (1883) 30 Ch. Div. 396. A recent California case has, however, held that a valid gift of a chose in action may be made by a writing not under seal, apparently for the reason that in California a seal is no longer necessary to the validity of a deed. Burkett v. Doty (1917, Cal.) 167 Pac. 518, discussed in (1917) 27 YALE LAW JOURNAL, 269. To-day courts are asking not whether choses in action can be assigned, but whether restraints on their alienation are valid. Portuguese-American Bank v. Welles (1916) 242 U. S. 7, 37 Sup. Ct. 3, commented upon in (1917) 26 YALE LAW JOURNAL, 304.]

# UNIFORM INTERSTATE ENFORCEMENT OF VESTED RIGHTS¹

### JOHN K. BEACH

Supreme Court of Errors of the State of Connecticut

Professor Beale divides current doctrine on the conflict of laws into three classes, which necessarily grade into one another: statutory, international, and territorial. Of the last named he says that it

"asserts that no law can exist as such except the law of the land; but that it is a principle of every civilized law that vested rights shall be protected, and therefore that in each country it is sought to find out what rights have arisen anywhere, and to recognize them, applying in all else the law of the land to every question."²

And treating of the historical development of this theory he says:

"Instead of the Dutch theory of comity, the common law has worked out indigenously a theory of vested rights, which serves the same purpose, that is, the desire to reach a just result, and is not subject to the objections which can be urged against the doctrine of comity. . . . Story accepted and developed this theory, which from his time has been the accepted theory in the English and American courts."

And on another page: "The English and American judges have most consistently followed this theory."

I do not attempt to criticise Professor Beale's classification or definitions, but do dispute his statement that the American courts have adopted the territorial theory of the conflict of laws, instead of the Dutch theory of comity.

The term vested right is used throughout this paper in the limited sense of an existing cause of action for money damages, which would, if prosecuted in the jurisdiction where the cause of action arose, result in a judgment for the plaintiff.

Under any theory of international jurisprudence some vested rights are enforced, and it is possible, therefore, to make a showing in favor of the proposition that Story, for example, was a territorialist, by emphasizing what he says about vested rights and ignoring what he says about comity; and by a like process of selection, that the Supreme

¹ The terms "conflict of laws" and "private international law" are used interchangeably, although the former phrase is in common use in this country in its literal sense as applied to the many cases in which a federal and a state law conflict. See the current indices of U. S. Reports.

² I Treatise on the Conflict of Laws, pt. 1, p. 63.

^{*} Beale, 105.

Beale, 101.

Court has accepted the territorial theory.⁵ Nevertheless, every lawyer knows that in this country some vested rights are, as between the several states, protected by the Federal Constitution; some, when the lex loci and the lex fori are in substantial accord, are enforced upon so-called principles of comity: and others are not enforced at all, for the supposed reason that to do so would violate the public policy of the forum.

I believe that the uniform interstate enforcement of vested rights is bound to come, not only as a matter of justice, but as a logical corollary of the national unity of the several states; but I am sure that no useful progress in theory or in practice can be made without recognizing existing conditions; and when Professor Beale says that American courts from the time of Story have consistently accepted the territorial theory as he defines it, he furnishes a justification for a brief statement of what Professor Sumner used to call "the hard facts."

Of course, Story rejected all theories of the automatic extraterritoriality of law, because they were not consistent with Anglo-American definitions of sovereignty and of law. Nevertheless he accepted the theory then prevalent that the enforcement of a foreign right necessarily involved the extra-territorial operation, within the forum, of the foreign law which created it, and took refuge in the Dutch theory of accounting for the occasional extra-territorial operation of the foreign law as the result of an act of comity on the part of the sovereign in whose court the foreign right was sought to be enforced. His second chapter dealing with "The general maxims of international jurisprudence" is a defense of that theory and not a departure from it; and he sums up his conclusions in the final section of that chapter beginning with the familiar words

"There is then not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another."

Surely this is the language of an adherent of the "statutory" theory, which "supposes two independent laws, effective at the same time and

^{*}See Mr. Justice Holmes' opinion in Slater v. Mexican Nat. R. R. Co. (1904) 194 U. S. 120, and the dissenting opinion in Hilton v. Guyot (1895) 159 U. S. 112

^{*}Penal laws do not create private rights: Huntington v. Attrill (1892) 146 U. S. 657, and as between the several states it is impossible to imagine a "right" based on a transaction abhorrent to generally accepted canons of morality. In some states the rules of procedure may modify the remedy given by the lex loci; and many difficult questions must arise with reference to workmen's compensation acts.

⁷Story, sec. 38.

place," and not that of a territorialist. At any rate, such has been the actual influence and effect of his doctrine upon the course of American decisions.

Story's short formula, expressing his distinctive theory of the particular way in which comity operated, was adopted verbatim by the Supreme Court after he became an associate justice:

"'In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered, and ascertained in the same way, and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided.'"

This conception of the wholesale tacit adoption of foreign law, although not infrequently quoted with approval, never took a strong hold on the judicial or professional imagination of this country. Upon the theory of treating that as done which ought to have been done, it might be possible for courts to assume the tacit adoption of foreign law by a personal sovereign of unlimited powers whose will, no matter how expressed, was law. But it is hard to assume the tacit adoption of law by a modern legislature.

Moreover, the whole process described in Story's formula is one of judicial assumption, and that being so, it was apparent to the courts and the profession that Story was attempting in this particular class of cases to give the color of legislation to the very thing which courts are accustomed to regard as a purely judicial function.

In other words, the attempt was made to cover up the inherent infirmities of the doctrine of comity¹¹ by assuming an antecedent

⁸ Beale, 63.

Bank of Augusta v. Earle (1839) 13 Peters, 519, 589, citing Story, 37.

¹⁰ B. & O. R. R. v. Glenn (1867) 28 Md. 287, 321; Thompson v. Waters (1872)
25 Mich. 214, 224; Hysinger v. Supreme Lodge (1890) 42 Mo. App. 627, 637;
Gooch v. Faucett (1898) 122 N. C. 270, 273; Commonwealth v. Kuntzmann (1862) 41 Pa. St. 429, 437.

[&]quot;"Comity is a pretext for the evasion of the consequences of a strictly territorial law. After the notion of such a law is denied, it would be idle to combat it, for it becomes unnecessary. But it may not be amiss to observe that in its obscured and little defined concept, interest, courtesy anl reciprocity, ideas so important for the history of law, play a part. In another place we have dealt with these ideas, giving our opinion with respect thereto. The name of science cannot be given to them, nor can a practical and useful system be based upon them. They authorize simply concessions ungoverned by rule, the supposed independence of a state consisting in an adjustment of its conduct to that followed by other states, resulting ultimately in a real isolation between the people of the different countries, and in making of comity and reciprocity a system of reprisal, instead of a furtherance of juridical relations."—A. S. DeBustamente, quoted in Lorenzen, Cases on the Conflict of Laws, 15.

The result in Hilton v. Guyot, 159 U. S. 113, indicates that the criticism is not wholly unjustifiable.

wholesale adoption of foreign laws (with certain exceptions): and thus to lay a foundation for the hypothesis that the courts do not permit the foreign law to operate by exercising comity in the particular case, but that the permission having already been given by the comity of the nation, the courts are bound to allow the foreign law to operate within the forum.

According to this hypothesis, comity is nothing more than the reason why the state has tacitly adopted foreign law. There is an air of plausibility about the formula until it is tested by applying it to a case of first impression, when it becomes at once apparent that the court is not bound to assume the adoption of the particular foreign law in question, unless first satisfied that it is not repugnant to the policy of the forum. Since all judicial precedent is created by the decision of cases of first impression, it follows that so far as foreign law has already been "tacitly" adopted, it has been so adopted by the courts in the attempt to administer justice in cases to which no existing rule of decision was precisely applicable.

Professor Beale and Mr. Wharton, in explaining but not advocating the doctrine of comity, have attempted to justify Story's distinction between national comity and the comity of the courts. Professor Beale says:

"According to this theory, the territorial law alone has controlling force, but in some cases, out of comity or enlightened self-interest, the territorial sovereign allows the personal law to prevail. This, it will be seen, is only the reason for a *sovereign's* adopting a certain rule of law; the *courts* do not exercise comity and are as much bound by the legislative power as by any other portion of the law." 12

One difficulty with this statement is that the legislative will cannot be manifested to the courts except by statute; then it is the statute which prevails, and not the personal law. Wharton falls a little deeper into the same difficulty: although affirming that the courts do not exercise comity in the particular case, he admits that the rule of comity has been established, in part, by judicial precedent.

"It is not the comity of the court in the particular case but the general comity of the sovereign as declared by legislation or judicial precedent, establishing a uniform ruling, which may properly be regarded as a basis of the recognition and application of a foreign law."¹³

Both of these explanations are inadequate because they refer to comity as if it were an extinct emotion of the sovereign which had already exhausted itself in shaping the law of the forum; and because they ignore the fact that the doctrine of comity must be dealt with in its

¹² Beale, 102.

¹⁸ Wharton (3d ed.) 1a.

practical application as a living principle for determining whether foreign rights shall or shall not be enforced in a given case.

If it were possible to assume that all foreign laws, as soon as they became such, were automatically adopted by the state, then it might be said that the courts could not exercise comity in a given case. But the moment the necessary exception of laws repugnant to the policy of the forum is made, the question whether a foreign law has or has not been tacitly adopted—that is to say, the question whether it is or is not repugnant to the policy of the forum—is necessarily referred to the court in which the question arises. And assuming that the issue thus presented is a debatable one, it seems clear that the court cannot decide it without assuming authority to exercise or withhold the comity of the state, and thus exercising a discretion which, though judicial in form, is legislative in character.

Practically, the court does not ask itself whether the foreign law in question has been adopted by the state. It simply decides for itself whether or not the foreign law is so repugnant to the policy of the forum that it ought not to be allowed, ex comitate, to operate there. The actual result has been that the enforcement of foreign rights in this country depends on comity exercised by the courts, or, to put it more tersely, upon judicial discretion.

The latest compilations of current law recognizes the existence of this condition.

"Each sovereignty determines for itself the extent to which it will apply the doctrine of comity. And in the absence of legislative provision its exercise in admitting or restraining the application of the laws of another country must rest in sound judicial discretion, controlled by the circumstances of the case."

"Comity, being voluntary and not obligatory, rests in the discretion of the tribunals of the forum, governed by certain more or less widely recognized rules." ¹⁵

A few citations to the same effect are added in the notes,18 but no

^{14 12} Corp. Jur. 437-8.

¹⁵ R. C. L. 910.

¹⁸ "But, as the laws of foreign countries are not admitted ex proprio vigore, but only ex comitate, the judicial power will exercise a discretion with respect to the laws they may be called upon to sanction."—Parker, C.J., Blanchard v. Russell (1816) 13 Mass. 1, 6.

[&]quot;The exercise of comity in admitting or restraining the application of the laws of another country must rest on sound judicial discretion, dictated by the circumstances of the case."—Edgerly v. Bush (1880) 81 N. Y. 199, 204.

[&]quot;Comity, being voluntary and not obligatory, cannot supersede all discretion on the subject."—Gooch v. Faucett (1898) 122 N. C. 270, 272.

[&]quot;Courts of each state must, at least, in the absence of positive law, determine how far comity requires the enforcement of foreign contracts."—Flagg v. Baldwin (1884) 38 N. J. Eq. 219, 224.

[&]quot;The extent to which comity will be extended being very much a matter of judicial policy to be determined within reasonable limitations by each state for itself."—International Harvester Co. v. McAdam (1910) 142 Wis. 114, 119.

more authoritative statement of the current American doctrine is needed than an excerpt from a recent opinion by Mr. Chief Justice White:

"It is elementary that the right to enforce a foreign contract in another foreign country could alone rest upon the general principles of comity. But elementary as is the rule of comity, it is equally rudimentary that an independent state under that principle will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or, in other words, violate the public policy of the state where the enforcement of the foreign contract is sought. It is, moreover, axiomatic that the existence of the described conditions preventing the enforcement in a given case does not exclusively depend upon legislation, but may result from judicial consideration of the subject . . . "17

This quotation is made at length because it happens to embody three closely related propositions generally accepted by our courts which, taken together, form a real stumbling-block in the path of our interstate jurisprudence. They are, first, that the enforcement of a foreign right involves the extra-territorial operation, within the forum, of the foreign law which created it. Second, that in the absence of legislation, judicial comity (which means judicial discretion) is the basis of the enforcement of foreign rights. Third, that the public policy of the forum may be violated by the enforcement of a vested right which has arisen out of a transaction carried to completion in another state.

The first point is not clearly brought out in words, but is necessarily involved in the doctrine of comity, which was invented to explain the extra-territorial operation of foreign law. The second is expressed in the statement that in the absence of legislation, the conditions preventing the enforcement of a foreign right (that is, the conditions under which comity will not be exercised) are to be determined by judicial consideration. The third is involved in the character of the action which was to recover a debt arising from the purchase and sale of cotton futures for the defendant's account, the underlying contract being valid in New York where it was made and performed.

Undoubtedly the "rudimentary" principle that courts will not enforce foreign contracts when to do so would violate the policy of the forum, is the commonly accepted doctrine in this country.

But the point to which attention is now directed is the underlying assumption that in certain cases the policy of the forum may be violated by enforcing a vested contractual right to recover damages, or a debt, simply because the policy of the forum differs from the policy of the state where the cause of action arose, in respect of some debatable question of internal policy, such as the propriety of permitting dealings in cotton futures, or speculations in stocks on margin, or stipula-

¹⁷ Bond v. Hume (1916) 243 U. S. 15, 21.

tions exempting telegraph companies from liability for negligence in the transmission and delivery of unrepeated telegrams, or in respect of any other of the many questions of internal policy concerning which the forty-eight states of this Union are not in unanimous agreement.

The same rule is applied to prevent the enforcement of vested rights acquired otherwise than by contract. "If the statute creating the right is against the policy of the law of the neighboring State, that is a sufficient reason for refusing to enforce the right there." 18

Let us put aside for a moment the theory of the extra-territoriality of law, and examine this doctrine that the policy of the forum may be violated by the enforcement of a cause of action for money damages validly created by the law of another state.

We must admit that extreme cases might be imagined in which the mere enforcement of a foreign right would be an offense against good morals. But such cases cannot arise among the several states of the United States. Their differences relate to the minor morals of expediency, and to debatable questions of internal policy. It would be an intolerable affectation of superior virtue for the courts of one state to pretend that the mere enforcement of a right validly created by the law of a sister state "would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law," or would be of such evil example as to corrupt the jury or the public.

No doubt every court prefers the law of its own state, but as between this Union of states forming one nation, the only tolerable assumption must be that the laws of each state are well adapted to do justice and promote morality within their respective limits; and the full faith and credit clause of the Federal Constitution has embodied that assumption in the supreme law of the land. It seems clear that the mere enforcement of a cause of action which has arisen under the laws of a sister state cannot offend public morals.

What is it, then, which prevents the interstate enforcement of a very considerable class of state-created rights that are not only just, but ethically inoffensive? Not the policy of the forum alone, for the policy of a state cannot exist as such outside of its own limits. If the state of Texas, for example, should enact a statute making all contracts for the future sale and delivery of cotton illegal, it must necessarily be construed to apply only to contracts made, or to be performed in whole or in part, in Texas. Her sovereignty cannot be offended by a speculation in cotton futures entered into and carried out in New York. And for the same reason—to wit, that it does not purport to operate outside of the state,—a New York statute authorizing transactions in cotton futures could not properly be held contrary to the policy of Texas. The different internal policies of the two states cannot conflict,

¹⁸ Howarth v. Lombard (1900) 570, 573.

because neither intrudes upon the territory of the other. If we succeed in keeping the doctrine of extra-territoriality of law out of sight, this is self-evident.

Now, if we add to these considerations the proposition that by the common consent of mankind, rights and obligations arising out of a foreign transaction ought to be ascertained and enforced according to the law of the place where they arose, it is apparent that the policy of the forum cannot, with any regard for logic or general principles of justice, be said to be violated either by the enforcement of a vested right created by the law of a sister state, or by the fact that the law which created it differs, in respect of some debatable question of internal policy, from the corresponding law of the forum.

But the moment we inject the fiction of the extra-territorial operation of law, as law, into the discussion, the real reason for refusing to do justice in this class of cases appears. An entirely new question confronts the court which is quite independent of the merits of the controversy: is it consistent with the policy of the forum to permit the foreign law in question to operate there? Thus, if A. sues B. in the courts of Texas for a debt arising out of a transaction in cotton futures carried out in New York, the fiction that the court is asked to permit the law of New York to operate within the state of Texas requires a comparison of the laws of the two states to see whether the public policy of Texas will permit the New York law to operate there. So if A., as administrator, sues B. in a Connecticut court for the wrongful death of his decedent to recover the damages, to which he has become entitled under a Massachusetts statute, A.'s action may be defeated on the ground that "comity does not require that we enforce the statute of a foreign jurisdiction which is so manifestly contrary to the public policy of our law."19

Conversely, the fiction of the extra-territorial operation of the foreign law may result in the creation of a right which did not exist when the action was brought; and the argument in favor of creating a right which does not exist is just as logical as that in favor of refusing to enforce a right which does exist. Thus, in Fox v. Postal Telegraph Co.²⁰ a telegram was sent from New York to Chicago under a stipulation exempting the defendant from liability for negligence in transmission. The stipulation was valid in New York where made, and valid in Illinois where the negligence occurred. Yet when suit was brought in Wisconsin, where such stipulations were illegal, the court held that public policy would not permit the law of New York or of Illinois to operate in Wisconsin; and in order to prevent a sup-

(1909) 138 Wis. 648.

¹⁹ Cristilly v. Warner (1913) 87 Conn. 461, 466; Howarth v. Lombard (1900) 175 Mass. 570, 573.

posed violation of the policy of the forum, it created and enforced a right to damages to which the actual transaction had not given rise.

The manifest injustice (so far as private interests are concerned) of this large class of decisions is aggravated by the fact that the doctrine of the ex comitate extra-territorial operation of law, as law, is entirely discredited by modern scholarship. Even the editors of Story have long ago abandoned it.²¹ I think it may be said that no modern North American authority on the science of private international law advocates it. The distinction between the territorial law and the transitory right created by it is universally recognized by English and North American writers.

To sum it all up, the almost unbelievable condition of fact is that in one hundred and thirty years, this Union of states bound together into one nation "as members of one great political family," has not established a more satisfactory basis for the interstate enforcement of private rights than a rule of imperfect obligation, based upon a discredited fiction, which necessarily breeds inconsistency and conflict of decision, 22 and in a large class of cases creates a purely imaginary conflict between the policy of the forum and the enforcement of just and ethically correct vested rights.

It must not be supposed that I am criticizing the courts. On the contrary, the defects pointed out are the necessary and logical consequences of a doctrine which was imposed on the courts of this country by the commanding influence of Story and of the Supreme Court of the United States. My object is to direct attention to the condition of fact in the hope that some effort may be made to better it.

Assuming that the thing to be desired is the uniform interstate enforcement of vested private rights, two possible directions suggest themselves in which progress toward that end may be made.

First, by a logically complete application of the full faith and credit

²¹ Thus, Redfield (6th ed.) 36 says:

[&]quot;The courts in referring to the law of the foreign state in order to give the proper force and interpretation to the contract or relation and the consequent duties and obligations, cannot be said to act from comity, any more than they could be said to refer to a dictionary of a foreign language from comity, when such reference is indispensable to the proper understanding of the terms in which the contract is expressed."

Bigelow (8th ed.) 38 puts the same idea more compactly:

[&]quot;In applying the French law, the court does not allow it to operate in America but only recognizes the fact that it did operate in France."

²² See, by way of illustration merely, the conflicting decisions relating to the Massachusetts variation of Lord Campbell's Act. Pro: Boston & M. R. R. v. Hurd (1901) 108 Fed. 116; Malloy v. American Hide and Leather Co. (1906) 148 Fed. 482; Hill v. Boston & M. R. R. (1914) 77 N. H. 151.

Contra: Adams v. Fitchburg R. R. (1894) 67 Vt. 76; O'Reilly v. N. Y. & N. E. R. R. (1889) 16 R. I. 388; Cristilly v. Warner (1913) 87 Conn. 461.

clause of the Constitution, based upon the principle that the essential nature and real foundation of a cause of action are not changed by recovering judgment on it.²³

Huntington v. Attrill²⁴ holds that penal statutes in the international sense include only those which deal with offenses against the state; and by necessary implication it holds that causes of action based on judgments founded on statutes dealing with private rights and remedies are constitutionally enforceable, so far as the remedy is one which the courts of the forum can give. If the full faith and credit clause has any mandatory force, this must be so. Otherwise the judgments of courts of competent jurisdiction of one state would have no effect in another state, except as a matter of comity or judicial discretion. Take, for example, the case of Cristilly v. Warner,²⁵ and suppose that the plaintiff administrator had caught the defendant in Massachusetts and obtained a judgment against him there before bringing his suit in Connecticut; would not our courts have been bound to give full faith and credit to the judgment?

If so, it must be because the several states have, by ratifying the Constitution, surrendered their sovereign right of refusing to "exercise comity" in the case of actions based on judgments of the courts of sister states. Surely the Constitution expresses the real and controlling "policy" of the states in this regard, and since the essential character and real foundation of a cause of action are not changed by recovering judgment on it, it cannot logically and reasonably be said that it is in accord with the policy of the forum to enforce a given cause of action after judgment has been recovered on it, and yet contrary to its policy to enforce the same cause of action before judgment has been recovered on it.

The evidential conclusiveness of the judgment, the fiction of the merger of the original cause of action, and the implied new promise, are of no consequence in controlling or evading the sovereign policy of a state. As pointed out in the cases cited, courts to which a foreign judgment is presented for affirmative action look through these technicalities and ascertain the essential character of the underlying cause of action.

²² "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise to pay it, do not preclude a court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim,) from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."—Wisconsin v. Pelican Ins. Co. (1887) 127 U. S. 265, 292.

^{24 (1892) 146} U. S. 657, 671; supra, n. 6.

²⁸ Supra, n. 19.

In this connection it is interesting to note that Mr. Chief Justice White, in his opinion in Bond v. Hume,²⁸ refers, not once but twice, to what he significantly calls "the duty of the courts of that state under the Constitution to give effect to a contract validly made in another state."²⁷ These words have no apparent direct relation to the decision of the case, and it must be admitted that their suggestion of constitutional obligation is not easily reconciled with that part of the opinion already quoted. Nevertheless, they necessarily foreshadow the possible announcement of a rule of constitutional law which would conform our interstate jurisprudence to the fact of national unity.

The other possible way of accomplishing the desired result is by carrying Story's formula one step further than he did. In attempting to improve on the Dutch theory of comity, Story got so far as to assume the tacit adoption of foreign laws by the state, and thus to suggest that they operated thereafter as rules of municipal law. The suggestion was necessarily imperfect, because it could not be carried to its logical conclusion without abandoning the theory of the extraterritoriality of law. And that, Story did not have the courage to do. Consequently, the law of the forum on any given subject consisted, according to the Storyan formula, of the local law surrounded by an indeterminate number of foreign laws relating to the same subject. The local law operated continuously and generally upon local transactions, and the foreign laws operated intermittently and occasionally upon transactions carried on in other states. For all practical purposes the result was to engraft upon the general rule of the local law a number of specially applicable exceptions for particular cases. In the light of the present development of international jurisprudence, it is apparent that these exceptions might as well have been grouped together and their aggregate operation stated in the form of one general exception possessing the qualities of continuity and generality. For if the courts have power to assume the tacit adoption by the state of an indeterminate number of foreign laws (not repugnant to the policy of the forum), they also have power to assume the tacit adoption by the state of one general rule of municipal law to the effect that rights and obligations arising out of a foreign transaction should be ascertained and enforced (so far as their enforcement is not repugnant to the policy of the forum), according to the law of the state where they arose.28 No doubt the statement of the rule may be improved upon, but no doubt such is in substance the rule of

²⁸ Supra, n. 17.

²⁷ The italics are those of the present writer.

²⁸ The occasional difficulty of determining *situs* is inherent, and is not increased or diminished by any form of stating the underlying rule of decision.

civilization and right which our courts try to live up to, except when the fiction of the extra-territoriality of law compels a miscarriage of justice. Some of the reasons why the enforcement of vested rights created by the law of one state cannot reasonably be said to violate the internal policy of a sister state have been given. My suggestion is that the time has come when Story's formula ought to be restated so as to carry it to its logical conclusion, and at the same time to avoid the purely imaginary conflict between the enforcement of vested rights and the policy of the forum, a conflict which is a reproach to our interstate jurisprudence.

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### "THE DEAD HAND OF THE COMMON LAW"

In the November number of this Journal¹ there appeared a very suggestive article by Mr. Justice Young of the Supreme Court of New Hampshire entitled "The Law as an Expression of Community Ideals and the Lawmaking Function of Courts." The essential soundness of the fundamental doctrine therein maintained,2 substantially indi-

^{1 (1917) 27} YALE LAW JOURNAL, I.

² That the views of the present writer are in essential harmony with those of Mr. Justice Young is made fully apparent in "The Law and the Judges" (January, 1914) 3 YALE REVIEW, 234. One or two minor differences may be indicated in passing. The law is indeed an expression of community ideals; but this truth is in no wise dependent upon the fiction that the community is an "entity with a mind of its own," a so-called "general mind." (27 YALE LAW JOURNAL 15.) Such a fiction is to be avoided. Again, the rules adopted by a community do not always "limit individual freedom of action." (Ibid. 7, 8.) They may amount to a grant of such freedom. Suppose I tell my neighbor that he may walk across my lawn. If he exercises this privilege I will have no right against him. The legal declaration of his privilege and of my no-right is as

cated by the title, has been admitted by many jurists,⁸ in spite of some disapproval and dogmatic assertion to the contrary.⁴ In their actual decisions, the courts daily demonstrate its soundness, and not infrequently a written opinion makes an express admission indicating a consciousness of the court's function as a lawgiver.

In Rosen v. United States,⁵ decided January 7, 1918, the Supreme Court held that a witness was not disqualified by the fact that he had

much a rule of law as was the previously applicable rule that he should not walk across my lawn.

*Austin, 2 Jurisprudence (3d ed.) 655 denounced "The childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing . . . from eternity."

Sir Henry Maine (Ancient Law, 3d Am. ed., ch. 2, p. 31) says: "The fact that the old rule has been repealed, and that a new one has replaced it, eludes us, because we are not in the habit of throwing into precise language the legal formulas which were derived from precedents, so that a change in their tenor is not unusually detected, unless it is violent or glaring. I shall not now pause to consider at length the causes which have led English lawyers to acquiesce in these curious anomalies. Probably it will be found that originally it was the received doctrine that somewhere, in nubibus or in gremio magistratuum, there existed a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances."

Professor Theodore W. Dwight in his introduction to Maine's Ancient Law (3d Am. ed., p. xi) said: "Sometimes fiction affects the law without consciousness on the part of the judge. Instances of this are given by Mr. Maine. At other times, the judiciary cover their intent to alter the law with a thin and transparent veil of fiction."

"The whole of the rules of equity, and nine-tenths of the rules of common law, have in fact been made by the judges." Mellish, L.J. in Allen v. Jackson (1875) I Ch. D. 399, 405.

For similar statements, with application in particular instances, see Bohlen, Cases on Torts, 185, note 3; Terry, Leading Principles of Anglo-American Law, secs. 10, 11; 3 Bentham, Works, 223; Rafael Altamira, 1 Cont. Leg. Hist. Series, 699; Pomeroy, Equity Jurisp. sec. 69; Baldwin, American Judiciary, pp. 73-77; I Street, Foundations of Legal Liability, 498; Lefroy, Judge-made Law (1904) 20 LAW QUART. REV. 399.

'Lord Kenyon was seldom a conscious innovator. In Ellah v. Leigh (1794) 5 T. R. 682, he said: "I do not think that the courts ought to change the law, so as to adapt it to the fashion of the times." Again, in Bauerman v. Radenius (1798) 7 T. R. 668, he said: "It is my wish and my comfort to stand super antiquas vias: I cannot legislate; but by my industry I can discover what my predecessors have done and I will servilely tread in their steps." That he was not always so "servile" is indicated in Goodisson v. Nunn (1792) 4 T. R. 761, where he went squarely contra to the former cases, saying: "The old cases cited by the plaintiff's counsel have been accurately stated; but the determinations in them outrage common sense."

Bentham, while fully admitting its existence, lost no opportunity of sneering at "judge-made law" (e. g. 3 Works, 223, 280-283; 5 id. 374 n.), a term greatly liked by Austin, but one which he would not adopt because Bentham had made it "smack of disrespect." (Austin, op. cit. 549.)

³⁸ Sup. Ct. 163, discussed in 27 YALE LAW JOURNAL 573.

been convicted of forgery. There is no doubt that such a conviction was formerly a disqualification at common law and by the law applicable in the Federal courts. No Federal statute has ever specifically changed this former rule. Further, in 1851, the court held that the competency of witnesses in criminal trials in the United States courts must be determined by the rules of evidence which were in force in the respective states when the Judiciary Act of 1789 was passed.6 After showing that the states have now all departed from this former rule of disqualification, either by statute or by judicial decision, and that such departure is based upon sound policy, Mr. Justice Clarke says: "we conclude that the dead hand of the common-law rule of 1789 should no longer be applied." It may be surprising to some to see the common law referred to as a "dead hand" and to see it deliberately disregarded by our highest court; but the fact is that the living hand of the present judge does not write like the dead hand of the judges of 1789 or 1851. It may be regarded as a sign of the times that only two justices dissented in this case.

In the recent case of Bowman v. Secular Society, where the preexisting rules of law were obviously abandoned by the English House of Lords, only one judge was so conservative as to dissent. Lord Finlay, L. C. dissented, saying: "It can never be the duty of a court of law to begin by inquiring what is the spirit of the age and in supposed conformity with it to decide what the law is." Of this dissenting opinion Sir Frederick Pollocks says that it "has no worse fault than that of being a century out of date."

In Southern Pacific Co. v. Jensen, Mr. Justice Holmes said: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." This statement indicates the limits of judicial legislation within which the courts usually stay. The judge will not ordinarily lag much behind the mores of society in its forward march; but he dare not advance much ahead of them either. At least, he dare

[&]quot;United States v. Reid (1851, U. S.) 12 How. 361.

⁷[1917] A. C. 406. This case holds that it is not illegal to give money for the promulgation of doctrines opposed to Christianity. It will doubtless be pleasing to the shade of Thomas Jefferson, who spoke with indignation of "the most remarkable instance of judicial legislation that has ever occurred in English jurisprudence, or perhaps in any other. It is that of the adoption in mass of the whole code of another nation and its incorporation into the legitimate system, by usurpation of the judges alone." He was referring to the supposed attempt of various judges to make Christianity and the Bible a part of the common law. See his preface to Jefferson's Reports (Va.).

⁸³³ LAW QUART. REV. 302.

^{9 (1917) 37} Sup. Ct. 524, discussed in 27 YALE LAW JOURNAL 255.

¹⁰ It may be noted that it is by motions such as these that the most thoroughgoing changes are effected; it is they that make law look fantastic when it is "a century out of date."

not lay down a new rule in direct conflict with the prevailing opinion of the community. Thus, in the case of *Union Trust Co. v. Grosman*, where it appeared that the legislature of Texas had not yet empowered a married woman to bind herself to pay the debts of her husband, Mr. Justice Holmes said: "If the statutes have not gone so far as to enable a woman to bind her separate property or herself in order to secure her husband's debts, they prohibit it, and no argument can make it clearer that the policy of that state is opposed to such an obligation. It does not help at all to point out the steps in emancipation that have been taken, and to argue prophetically that the rest is to come. We have no concern with the future. It has not come yet."

This language indicates that in the particular case the court thought that the time had not come for judicial legislation. The mores of Texas in respect to the status of married women would not justify it. In Rosen v. United States and in Bowman v. Secular Society it was otherwise.

That the law of the present is what the judges would now decide and not what they have decided in the past has been clearly stated by Mr. Justice Holmes. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." In Hansen v. Grand Trunk Ry., 12 the Supreme Court of New Hampshire, in a case where it became necessary to determine the law of Ontario, said: "The question to be determined as a fact by the trial judge is not wholly what has been held in some earlier Canadian cases, but what would be held if the present suit had been brought in that jurisdiction." This is the very same determination that must be made in cases involving the law of the local jurisdiction. Of course, we know very well that the past decisions of the courts will generally have a controlling weight in making this determination. In such cases the "dead hand" prevails because the living hand follows the copy.

It has been argued that judicial legislation is much inferior to parliamentary legislation in that it must always operate retroactively, while the latter may and generally does operate only in futuro.¹³ When a judge lays down a new rule he does so for the purpose of determining the legal result of a past transaction, and a plausible claim of injustice can be made where a party to the action is penalized by virtue of a rule never previously formulated. Even if injustice may occasionally be done, assuming some non-existent (or at least undemonstrable) absolute and eternal standard by which to judge, such supposed injustice is largely unavoidable in human administration. Parliamentary (as well as judicial) legislation has never been and cannot

¹¹ (1917) 38 Sup. Ct. 181.

^{2 (1917,} N. H.) 102 Atl. 625.

¹⁸ See Austin, op. cit. 673; 5 Bentham, Works, 477.

be made so clear that he who runs may read—much less understand. We must be content that our action shall be judged in accordance with a statute the very existence of which may have been unknown to us and in accordance with a meaning that is to be determined ex post facto by the judge. Who can be regarded as blameworthy for not knowing what laws have been enacted by the numerous and industrious legislatures? We cannot take time enough to read the mighty statute books and we cannot rely upon their indexes.

Even if statutes could be kept few enough to be known and clear enough to be understood, they must ever fail to determine multitudes of cases arising for decision. Only an omniscient legislator can provide in advance for all future cases. That parliamentary legislation is best that is founded upon and a codification of the previous "interstitial" and "molecular" legislation of the courts. 16

A very large part of legislation must always be ex post facto and it is this sort of judicial legislation that gives satisfaction. In spite of occasional outcry, it works. It may sometimes be difficult to decide a concrete case after it has occurred, but it is far easier than to decide it in advance in the form of a general rule. By this process we get better law, law more nearly in harmony with prevailing custom and desire and with the justice of the present day. A litigant is less likely to be surprised and pained by a decision based upon rules thus established than he is by decisions based upon statutes. Judicial rules, in new cases as well as in old cases, are drawn from the mores of society as the judges know them; and they are stated anew in each case with specific reference to a case the facts of which are historically complete. The litigant will not be greatly surprised at the mores, because his daily life is ordered by them and he has helped, generally unconsciously, to make them.

The change and growth of law by such judicial action can never be avoided. In this respect it is immaterial to what sort of tribunal the judicial function is delegated. It may be called a court of law or of equity or of admiralty, a merchants' court or a board of arbitration.

[&]quot;The French legal historian, Brissaud, in I Cont. Leg. Hist. Series, 299, says: "One fact is universally recognized and inevitable, namely, that the application of the law by the judiciary furnishes a thousand opportunities to modify the rule of law, and that sometimes the judge even succeeds in paralyzing the will of the legislator." See also Baldwin, American Judiciary, 83, 84; 3 Bentham, Works, 280-283; Austin, op. cit. 678.

¹⁵ Austin (op. cit. 686) thus quotes Lord Mansfield: "Cases of law depend upon occasions which give rise to them. All occasions do not arise at once. A statute very seldom can take in all cases. Therefore the common law that works itself pure by rules drawn from the fountains of justice, is superior to an act of parliament."

¹⁶ Austin (op. cit. 681) says: "The judiciary law is, as it were, the nucleus around which the statute law is formed."

In all alike the judicial function is legislative as well, and with nothing less would we be content.

A. L. C.

## TESTAMENTARY POWERS OF APPOINTMENT AND THE DOCTRINE OF INCORPORATION BY REFERENCE

Can a will be so drawn as to provide that a power of appointment created by it may be effectively exercised by a person who does not survive the testator? This unusual and complex problem was presented to the New York Court of Appeals in *In re Fowles' Will* (1918, N. Y.) 118 N. E. 611.¹

In contemplation of sailing on the Lusitania Mr. and Mrs. Fowles executed their several wills. By his will Mr. Fowles made his wife donee of a power of appointment and provided: "In the event that my said wife and myself should die simultaneously or under such circumstances as to render it difficult or impossible to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my will and any and all of its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife." Mrs. Fowles by her will attempted to exercise the power of appointment. Husband and wife were lost at sea May 7, 1915, with the destruction of the ill-fated vessel. There was nothing to show that either survived the other. Hence the question arose whether the attempt by Mrs. Fowles to exercise the power was effective.

Two rules of law were claimed to stand in the way: (1) the principle that a power created by will lapses if the donee of the power dies before the donor's will becomes operative by his death; and (2) the rule (in force in New York and Connecticut) which forbids a testator to incorporate by reference extrinsic documents testamentary in character and not executed by the testator in accordance with the statutory formalities. All of the judges admitted the validity and applicability of the first principle. But a majority of the court held that Mr. Fowles had expressed by the provision above quoted the intention to avoid the consequences of a lapse of the power, and that such intention should be given effect by incorporating into his will those terms of Mrs. Fowles' will by which she attempted to exercise the power.

¹ The case in the lower courts is reported in *In re Fowles' Will* (1916, Surr.) 95 Misc. 48, 158 N. Y. Supp. 456; *In re Fowles' Will* (1917, App. Div.) 163 N. Y. Supp. 873.

² Authorities are cited in the opinion.

^{*}For an analysis and criticism of the New York cases see article by Stewart Chaplin, *Incorporation by Reference* (1902) 2 COLUMBIA L. REV. 148; also Comment in (1904) 14 YALE LAW JOURNAL 226.

In speaking of the rule against incorporation by reference, Cardozo, J.,

If Mr. Fowles, at the time of executing his will, knew how his wife was exercising the power of appointment,⁵ then in reality the expression of her wish was adopted by him as a part of his testamentary scheme. It was in fact, if not in name, incorporated by reference into his will. The difference between this situation and that of a power to be executed after the testator's death is that here the testator has an intention which, though expressed only in Mrs. Fowles' will, might be actually included in his own. Whereas in the case of a power to be executed after the testator's death in accordance with the donee's discretion, the testator either has no present intention, or his intention is so unsettled that he wishes the ultimate disposition of the property to be made pursuant to the donee's discretion in the light of events which may happen after his death.⁶

The opinion in the Fowles case apparently declares it to be immaterial whether or not the wife's will was in existence when the testator made his will. Consequently, to avoid the effect of a lapse of the power of appointment the donor need only provide in his own will that in case the donee dies first he gives the property as to which he has created the power to the persons in whose favor the donee attempted to exercise it. The rule thus announced is therefore broader than the usual rule permitting incorporation by reference, which insists that the document to be incorporated must be an existing document. A testator may not leave a legacy to such legatees as he shall name

delivering the opinion of the majority, said: "It is a rule designed as a safe-guard against fraud and mistake. In the nature of things there must be exceptions to its apparent generality. . . . There is here no opportunity for fraud or mistake. There is no chance of foisting upon this testator a document which fails to declare his purpose. . . . The execution of a power does not violate the rule against incorporation. It can make no difference for that purpose whether the execution is authorized in advance or made valid by relation. There is no greater impairment in the one case than in the other of the principle of integrity and completeness of testamentary expression."

⁵ It is practically certain that he did know, because on April 29, 1915, he and his wife went to the office of their attorneys and gave instructions in each other's presence about drafting their respective wills, which were executed the following day before common witnesses and in each other's presence.

⁶Even if the donee makes his will executing the power before the donor's death and survives the donor but an instant, this discretion is theoretically exercised, as his will speaks as of the moment of his death. See *Hirsh v. Bucki* (1914, Sup. Ct.) 162 N. Y. App. Div. 659.

""He has not limited his wife to any particular will. Once identify the document as her will; it then becomes his own. He authorizes her to act, and confirms her action. . . . For the purpose of the rule against incorporation the substance of the situation is thus the same as it always is when a will creates a power."

⁸ Theobald, Wills (7th ed.) 65. Many of the authorities assert that the document not only must be an existing document but also must be described as such. Gardner, Wills (2d ed.) 38.

in a future list. This is because a future list would lack the statutory formalities of execution prescribed for wills as a protection against fraud, and because testamentary capacity is tested as of the date of the execution of the will. If the testator may change his will by incorporating a document which he thereafter prepared, there would be no evidence of the testator's condition, or of possible undue influence, at the time the document was made.

If then the testator may not incorporate his own future list, may he leave a legacy to such legatees as his wife shall name in a future list to be prepared by her? It seems certain that the courts would answer in the negative. Should the rule be different if the wife's list is executed as her will? The Fowles case recognizes that the rule against incorporation by reference is a product of judicial construction which is not to be pressed to "a dryly logical extreme," and that the court in each case is to look to the substance, considering the reason of the rule and the evil it aims to remedy. The opinion states that the objections which led the New York courts to reject the doctrine of incorporation do not obtain in the case of such a power of appointment because "there is here no chance of foisting upon the testator a document which fails to declare his purpose." But is this true? It is submitted that opportunity for fraud and imposition, though not so great as in the case of an unattested list, still remains. On the one hand, if the testator expects the power to be exercised in a certain way, the donee of the power may, for example, represent that he has executed or will execute a will in conformity with the testator's intentions, when in fact he has made or thereafter makes a different will. Again, the donee after making a will in conformity with the donor's intention may subsequently change it, either without the donor's knowledge or with his consent procured by undue influence or while he was incompetent. And there is no way of testing the donor's condition at the time when the change is made in the donee's will. On the other hand, if the testator intends to leave the exercise of the power entirely to the donee's discretion, what reason is there for permitting another who does not survive the testator to make his will for him? If the other's judgment is better than the testator's, the testator may procure it and by reference to the donee's existing will adopt and include it in his own. In allowing him to adopt any future will which the donee may make it is believed that the court carried the doctrine of incorporation beyond previous decisions and possibly beyond the necessities of sound policy. The actual decision, of course, related to incorporating a will which was in fact an existing document, although not referred to as such.

It is true that the law permits a testator to avoid the lapsing of a legacy by making a substitutionary gift,—as, for example, a legacy to

See In re Goods of Smart [1902] P. 238.

B, but if B dies before the testator then to B's executor. Under such a provision B's executor takes the legacy for the benefit of B's creditors, next of kin or residuary legatee. This is true even though B's will was executed after the original testator's. Hence this line of cases would appear to violate the usual rule of incorporation by reference, for clearly the original testator's disposition is ascertained by referring to the legatee's will and this was not an existing document when the testator made his will. And it may be forcefully argued that if the lapse of a legacy may thus be avoided, the lapse of a power of appointment should be similarly avoidable if the testator inserts a provision giving the property to those persons in whose favor the donee attempted to exercise the power.

The cases do not indicate that such substitutionary gifts have ever been considered as inconsistent with the rule of incorporation by reference. There are, indeed, certain differences. In the case of substitutionary gifts, the legacy is subject to the legatee's debts, which is not true in cases of real incorporation.¹³ Furthermore, the legatee's will is an independent act—a non-testamentary act so far as regards the original testator's will.¹⁴ In this respect it differs from an attempt to exercise a power of appointment or to prepare a future list of legatees to be incorporated into the original testator's will. Whether such differences are enough to differentiate the substitutionary cases from cases incorporating by reference the future will of a donee of a power when the donee predeceases the donor, is a question upon which, not unnaturally, judges may entertain divergent views—as they did in the Fowles case.

It was thought by the majority that Matter of Piffard¹⁵ was decisive of the Fowles case. But as pointed out in the dissenting opinion of McLaughlin, J., there is this difference: In the Piffard case the testator survived the donee and made two codicils thereafter. The donee's will which was incorporated was therefore an existing document, not subject to change, at the time when the testator's will was

¹⁰ Long v. Watkinson (1852) 17 Beav. 471; In re Greenwood [1912] 1 Ch. 392; Theobald, Wills (7th ed.) 347.

¹¹ In re Valdez's Trusts (1888) 40 Ch. D. 159.

¹² In *In re Fowles' Will* this principle was applied to certain legacies given by Mr. Fowles to his wife, the above quoted provision that she should be deemed to have survived him being construed as a gift by implication to her executors.

¹⁸ Not infrequently statutes have been enacted to prevent the lapsing of legacies. Under such statutes it is usually held that the legacy does not form part of the estate of the deceased legatee but passes directly to the legatee substituted by the statute. See Rood, Wills, secs. 673–675. Cf. sec. 33 of English Wills Act and arguments of counsel in In re Greenwood [1912] I Ch. 392.

¹⁴ Many non-testamentary future acts may determine in fact the legatees to take under the testator's will—as a gift to such person as my son may marry, or to those who shall be the testator's partner's at the time of his death. Stubbs v. Sargon (1838) 3 Myl. & C. 507.

^{15 (1888) 111} N. Y. 410, 18 N. E. 718.

republished by the execution of the codicils.¹⁶ Further, in the *Piffard* case the testator directed the money to be paid over to the executors of the donee. It therefore came within the rule of substitutionary gifts already discussed.

### THE NATURE OF MASSACHUSETTS BUSINESS TRUSTS

The growth of the law is not in the hands of legislators and judges alone; sometimes indeed legislators and judges find themselves at a loss before new legal creations of the profession.

The Massachusetts corporation laws formerly failed to provide for real estate corporations. In Boston the deficiency was met by creating a trust: the beneficial interest in the trust property was divided into transferable shares; the shares, like shares of stock in a corporation, were ordinarily transferable only on the books of the trustees; as with a corporation, too, dividends were declarable from time to time; the deed of trust generally provided for some control of trust and trustees by the shareholders in meeting, and for the continuance of the association beyond the death of its members; contracts and correspondence were made to stipulate that trustees should not be individually liable, and, latterly, that shareholders too, should be free from liability, and the trust fund alone be looked to.1 Apparently before the courts realized the consequences of the new departure they had held it legal;2 from then on it proved to offer the business man so many of the advantages and so few of the unpleasantnesses usual to corporations³ that it has been extended to other fields than dealing in real estateto manufacturing, for instance—and employed beyond the borders of the home state.

What this new creature is, is something of a problem. It was speedily held, wherever real control was in the shareholders rather than the trustees, to be a trust "which created not a trust, but a partnership;" and partnerships with transferable shares were decided to be legal in Massachusetts. It was laid down, as it so often is, that

¹⁶ The same was true in *Condit v. DeHart* (1898, Sup. Ct.) 62 N. J. L. 78, 40

¹Cf. Werner, J., in Hibbs v. Brown (1907) 190 N. Y. 167, 196, 82 N. E. 1108, 1118, as to the possible invalidity of a similar clause in bonds of a joint stock company.

² Compare the language of Holmes, J., in *Phillips v. Blatchford* (1884) 137 Mass. 510, 512, with that of Knowlton, C.J., in *Hussey v. Arnold* (1904) 185 Mass. 202, 205, 70 N. E. 87, 88.

^{*}Cf. Hussey v. Arnold, supra, p. 203, and the cases on this subject, passim.

^{&#}x27;Hoadley v. County Comrs. (1870) 105 Mass. 519; cf. Williams v. Milton (1913) 215 Mass. 1, 102 N. E. 355. In Case and Comment, August, 1917, S. R. Wrightington advocates cutting out of these trusts the control by the share-holders: small investors do not demand such control; their chance of changing trustees through decree of court is as good as that of minority holders in a corporation to change directors; the large investors who demand control—who

there was no form of organization intermediate between a corporation and a partnership;⁵ provisions as to place of taxation of partnerships have been held applicable to these trusts;⁶ a franchise tax sought to be levied on them by the legislature as if on a corporation has been held unconstitutional.⁷ But in the association's relations to its creditors the partnership side is much in the shadow in favor of the trust. On contract claims neither the shareholder "partners" nor, where the stipulation has been made part of the contract, the trustees, are liable individually or collectively at law;⁸ nor can the trust property be subjected to any lien by attachment, either at law or in equity, in a personal action against the trustee.⁹ There remains only a bill in equity to satisfy the claim out of the trust property.¹⁰

would make up the majority holders in a corporation—can be made the trustees; the details of the work can be turned over to a small executive committee. See also that author's *The Law of Unincorporated Associations and Similar Relations*. The present comment is devoted chiefly to those of the trusts which verge on "partnerships."

⁵Ricker v. American Loan & Trust Co. (1885) 140 Mass. 346, 348, 5 N. E. 284, 286. But what do words avail in the long run against facts? In Attorney Genl. v. New York, N. H. & H. R. R. Co. (1908) 198 Mass. 413, 429, 84 N. E. 737, 743, occurs the following: "All who have a proprietary interest in it [such a trust fund] have rights of property as individual owners, subject to such restraints upon the management and use of it as are legally imposed by the contracts under which it is held. They are equitable tenants in common." So courts speak of directors of a corporation as agents, trustees, and what-not: a part-truth in each epithet. It must be clear on thought, that shareholders in an association whose status is still vague, of necessity possess interests as yet incapable of exact definition.

- ⁶ Ricker v. American Loan & Trust Co., supra.
- ⁷ Gleason v. McKay (1883) 134 Mass. 419.
- ⁸ See Hussey v. Arnold, supra, 203. But where the trustees commit a tort in the course of the business, or make a contract into which the stipulation is not read, personal liability would attach, as with any other trustees. See Frost v. Thompson (1914) 219 Mass. 360, 365; 106 N. E. 1009, 1010.
  - * Hussey v. Arnold, supra.

¹⁰ See Frost v. Thompson, supra, 369. If the trustee makes himself personally liable on obligations incurred in transaction of the trust business, the creditor may proceed either at law against the trustee or in equity to secure to himself the benefit of the indemnity-or, apparently, of the exoneration-due the trustee from the estate, or both. Mason v. Pomeroy (1890) 151 Mass. 164, 24 N. E. 202. Whether the creditor's rights against the estate depend on a net balance being due the trustee, as assumed in Dowse v. Gorton (H. of L.) [1891] A. C. 190, or are independent of such balance, as held in Wylly v. Collins (1851) 9 Ga. 223, and Manderson's Appeal (1886) 113 Pa. St. 631, 6 Atl. 893, Massachusetts has refrained from deciding. A special provision in the deed of trust may provide for the appointment of a managing committee or single officer with authority to contract obligations in the name of the association of shareholders; on such an obligation the remedy is apparently a suit in equity against all the shareholders as partners bound by their agent, or to have the debt as a firm debt satisfied out of the firm assets. See Frost v. Thompson, supra, 369. Perhaps a provision against shareholders' liability would in such case be held void so far as

As appears from consideration of a late case which turns on that point, Dana v. Treasurer and Receiver General, 11 the partnership theory likewise fails to cover to satisfaction the decisions on the nature of the shares of beneficial interest. Of course one object of the attorneys framing these associations has been to give to the shares the character of personal property: at least so far as to make them more readily transferable and avoid the attaching of dower interests. But mere declarations to that effect are not decisive; 12 as to trusts holding realty only, the attempt seems likely, for a while, to meet with little success: equitable interests in foreign realty have been held, even as to a succession tax, to be foreign real estate. 13 What, then, where the trust property is partly real and partly personal? Partnership realty will be treated as personalty so far as, and only so far as, is necessary to pay firm debts. 14

In the Dana case a testatrix had died domiciled in Massachusetts. Part of her estate consisted of shares in one of these trusts, the property being a factory, goods, and materials in New Hampshire. The question arose as to the lawfulness of a succession tax at her domicil on "so much of the interest as represented foreign realty." It was held, despite the partnership rule, that where the trust provided for ultimate conversion of the whole property into personalty for distribution, and where the beneficial interest in the realty and personalty together was represented by blanket transferable shares, the whole was a single fund, and must be treated as converted into personalty from the begining, so that a succession tax levied in the state of the decedent's domicil was valid.

Practical stumbling-blocks would lie in the way of applying the ordinary partnership rule to such a case as this: here the association persists beyond the death of individual members.¹⁵ Exactly how

repugnant to the officer's authority and power to bind. If a shareholder has to pay, he may recover contribution from either his fellows or their estates. Phillips v. Blatchford, supra, note 2.

¹¹ (1917, Mass.) 116 N. E. 941. Further discussion of the problem of the Massachusetts trust may be found in an article in (1918) 12 ILL. L. Rev. 482, and in Sears, *Trust Estates as Business Companies*.

¹² See Bartlett v. Gill (1915, D. Mass.) 221 Fed. 476, 484.

¹⁵ Walker v. Treasurer & Recvr. Genl. (1915) 221 Mass. 600, 109 N. E. 647. But as to a succession tax there is a fair distinction, taken below in the text, between succession to a simple equitable interest in foreign realty, and to a share in such interest to which title can be acquired only by book-transfer; which latter again can be compelled only by the courts of the domicile of the trustees and, so to speak, of the trust. The distinction was, however, not taken in Bartlett v. Gill, supra.

¹⁴ Wilcox v. Wilcox (1866, Mass.) 13 Allen, 252.

¹⁵ This may be expressly provided for in either an ordinary partnership or a joint stock company, as well. For a discussion of the theory, and of the position of a partner's executor before his assent, see Holmes, J., in *Phillips v. Blatchford*, supra, 514, 515; and Wills v. Murray (1850) 4 Exch. 843, 868.

much of the trust realty would be needed to settle the trust debts at the moment of any member's death? As to how great a fraction of a decedent's shares would an order of the court be needed to a sale, as of realty? Only burdensome and difficult accounting could give an answer. There have been indications of a readiness to cut the knot by holding the share to be wholly realty, regardless of mixed character of the trust property.16 Surely the solution in the principal case is saner, if only because it more nearly satisfies the need in the community, which this trust-partnership was called into being to fill. But the decision is rested on no very convincing foundation. It is, to be sure, gratifying to find in the reasoning no trace of any theory that an equitable interest is a mere chose in action.¹⁷ But the conclusion that solely because trust property is "one fund from the beginning" and is ultimately to be converted into personalty, it must from the beginning be treated as converted out and out into personal property seems none too well warranted, despite the early English cases. 18 Equitable conversion is a fiction, and a rather violent one; it should be used only where necessary, with every presumption against it, and with eyes open to its fictitious nature.19 It is justifiable as giving effect to the intention of a testator or settlor with regard to a fund under his disposal at the time.19

In a Massachusetts trust each original contributor to the trust capital may perhaps be looked on as a settlor as to whatever amount he contributed; the trust deed would then fix all the settlements on the same terms for all shares. Remains still, however, the question of when the conversion is to be deemed effected. The settlors have fixed a definite time for its actual occurrence: the winding up of the trust. It may indeed be conceded that ample reasons of convenience offer for dating any conversion from the trust's beginning; what is difficult to see is wherein these reasons hold with more force to a mixed fund than to one made up wholly of realty.

In this same connection there is a further difficulty with the reasoning of the court. The *situs* of the trust property was New Hampshire. It may be the decision will not be questioned there.²⁰ But if it is, the

¹⁶ So the court in the principal case, p. 944, interprets Bartlett v. Gill, supra; referring, it would seem, to pp. 481, 482.

[&]quot;Contrast Langdell (1877) Summary of Equity Pleading, 90: "What is called . . . an equitable estate is in truth only a personal claim against the real owner," with Rugg, C.J., in Peabody v. Treasurer & Recvr. Genl. (1913) 215 Mass. 129, 131; 102 N. E. 435, 436, referring to shareholders in a trust: "Their rights constitute not choses in action, but a substantial property right."

¹⁸ Ripley v. Waterworth (1802, Eng. Ch.) 7 Vesey, 425; Fletcher v. Ashburner (1779, Rolls Ct.) 1 Bro. C. C. 497.

¹⁹ Yerkes v. Yerkes (1901) 200 Pa. St. 419, 50 Atl. 186; and see for a discussion of the nature of the doctrine Comments (1917) 26 Yale Law Journal, 783.

²⁰ As was the case in *Re Vanuxem's Estate* (1905) 212 Pa. St. 315, 61 Atl. 876.

courts of the situs are not bound by the judgment here rendered; they are free to rule as they see fit on the effect of an instrument purporting to work equitable conversion, and to regulate succession accordingly ²¹ The Massachusetts decision might be supported as an attempt, in the absence of cases on the point in New Hampshire, to fix upon the common law rule which that state would in all likelihood apply; but unfortunately for the hypothesis, New Hampshire law is nowhere mentioned. It does not seem wise to place a decision needlessly on a ground which may lead, even in a collateral matter, to direct, impotent conflict with the courts of another jurisdiction.

And there was here no need to appeal to the doctrine of equitable conversion. The likeness between these corporation-substitutes and true corporations is striking, and has been made use of by the courts. The *situs* of shares in a corporation for purposes of an inheritance tax is at the domicil of the corporation;²² so that of shares in such a trust was similarly held to be at the domicil and place of business of the trustees, though the holder of the shares be domiciled elsewhere, and though the certificates be not within the jurisdiction.²³ So also for purposes of administration, shares in the trust like those in a corporation have their *situs* under the Massachusetts law at what we might call the domicil of the trust, though the trust property lie outside the commonwealth.²⁴

Scanty though the cases are, it is believed that this analogy is more than superficial. It might well be extended. More and more the fictitious entity idea of the corporation is losing ground in fact and theory; largely in consequence, the one-time distinctions between the

²¹ Clarke v. Clarke (1900) 178 U. S. 186, 20 Sup. Ct. 873.

²² Greves v. Shaw (1899) 173 Mass. 205, 53 N. E. 372; Matter of Bronson (1896) 150 N. Y. 1, 9; 44 N. E. 707, 709. The ground for this seems to be that the law of a corporation's creation can make its shares descendable in any way and under any conditions it may please. On the "situs" of shares of stock generally, see Comments (1917) 26 Yale Law Journal, 403; (1917) 17 Columbia L. Rev. 151.

²² Peabody v. Treasurer & Recvr. Genl., supra. Though the main ground of this decision is probably that what was sought to be taxed was "an equitable interest in tangible property within the Commonwealth," the court expressly refers to the corporation analogy, on p. 131.

²⁴ Kennedy v. Hodges (1913) 215 Mass. 112, 102 N. E. 432. Administration was referred partly to the book-transfer clause discussed above, note 13, and partly to the corporation analogy. It cannot be held to have been on the ground that the property in the shares was where the certificates were found, as held in Simpson v. Jersey City Contracting Co. (1900) 165 N. Y. 193, 58 N. E. 896, for the court expressly refused to admit administration of shares of a foreign corporation whose certificates were within their jurisdiction. See, in harmony, Winslow v. Fletcher (1886) 53 Conn. 390, 4 Atl. 250.

corporation and the corporation-substitute are fading out,²⁵ and should. Shares in a joint stock company, like those in a corporation, have been held personalty without inquiry into the nature of the property held by the company;²⁶ and the present trust-partnership, where legal ownership of the trust property is not direct, but through a trustee, seems if anything closer to the corporation than is a joint stock company.

To be sure, while the present vicious system of double taxation continues to be applied against corporation shares, the business man has some reason to refrain from over-great rejoicing at too close assimilation of these trust interests with the stock of corporations. Ready transferability may come too dear when it means tax-bleeding at both ends. But as yet the developments along this line are free from objection: they cover only inheritance taxes. Such taxes being levied on the privilege of taking by succession or by will, may legitimately be imposed on any property by each state which takes part in conferring that privilege as to that property. Surely the state of the trust "domicil" takes such part: it alone can force legal title to be vested in the legatee by compelling the trustees to transfer the shares on their books.27 So in the principal case, while the course of reasoning may not be wholly satisfying, the outcome is. Collection of the tax is just; a step has been taken toward making the trust shares freely transferable as personalty.

Meanwhile one may indulge a harmless, pious hope that in the time of the judges who will make of the Massachusetts trust a cleanly

²⁵ Cf. Eliot v. Freeman (1911) 220 U. S. 178, 31 Sup. Ct. 360. There the Federal Corporation Tax Law, 1909, though it covered statutory joint stock companies, was held not applicable to a real estate trust, not organized under a statute. The court did seem to consider the New York joint stock company practically a corporation, opposing it to "joint stock associations at common law." Yet it may well be doubted whether the real estate trust would not have fallen within the law, had organization under a statute been necessary to it. The tax law itself shows the present tendency to lump all corporation-like bodies. See also Comments (1917) 27 Yale Law Journal, 248, on the waxing liability of stockholders for corporate indebtedness; and Comments, ibid. 104, on the desirability of looking behind the fictional entity to determine the enemy alien character of a corporation.

²⁶ Beal v. Carpenter (1916, C. C. A. 8th) 235 Fed. 273.

The transfer v. Miller (1903) 188 U. S. 189, 205, 23 Sup. Ct. 277, 278: "If the transfer . . . necessarily depends upon and involves the law of New York for its exercize, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax." In that case power over the debtor, the Trust Company, was held sufficient to justify New York in taxing the transfer by will of a deposit, although the decedent was domiciled in Illinois and the transfer tax there had included the New York deposit. The whole course of argument in Mr. Justice Holmes's opinion applies to the situation in the text. Indeed not only logic, but policy, stands far less strongly against double taxation in the matter of succession than elsewhere.

shaped, intelligible thing, will live a generation of legislators who understand the economics of taxation.

### ALIENS UNDER THE SELECTIVE DRAFT ACT

The enforcement of the Selective Service Act of May 18, 1917,1 has given rise to some interesting questions of statutory construction, international law and administrative law. These questions arise out of those provisions of the Act under which certain federal courts have held liable to military service non-declarent aliens who have not properly claimed exemption on the ground of alienage. Section 2 excludes non-declarant aliens from liability to military service under the draft, which is to "take place . . . under such regulations as the President may prescribe not inconsistent with the terms of this Act;" section 5, after requiring all male "persons" within specified ages, including, therefore, non-declarant aliens, to register, provides that "all persons so registered shall be and remain subject to draft . . . unless exempted or excused therefrom as in this Act provided;" section 4, after giving the local and district boards "power to hear and determine . . . all questions of exemption," subject to rules "prescribed by the President," provides that "the decisions of such district boards shall be final," subject to modification "by the President," under rules to be prescribed. The Presidential rules for the exemption of aliens provide that they must file claim for exemption within seven days after notice to appear before the local board, and must support the claim with affidavits within ten days thereafter.

The question of statutory construction involves the possible inconsistency between the absolute exemption of aliens under section 2, and the conditional exemption of registrants under section 5 and under the Presidential regulations authorized by the Act. Failure to comply with the conditions prescribed by the regulations was held by the United States District Court of Montana not to forfeit the absolute immunity of aliens under section 2, apparently on the ground that regulations making exemption conditional would be "inconsistent with the terms of the Act." Ex parte Beck (1917, D. Mont.) 245 Fed. 967. Two other United States District Courts, however, found no such inconsistency, reasoning that inasmuch as Congress had the power to authorize the drafting of aliens into military service, it could make the grant of the exemption from service subject to reasonable conditions. United States v. Finley (1917, S. D. N. Y.) 245 Fed. 871; Ex parte Hutflis (1917, W. D. N. Y.) 245 Fed. 798. An analogous privilege, they held, is the exemption from jury service, which must be claimed. There is, of course, a presumption against inconsistency in the inter-

¹ U. S. Comp. St. Supp. 1917, pp. 61-69.

pretation of the clauses of a statute,2 and words expressive of a particular intention,3 like a proviso,4 have been deemed to narrow the effect of words expressive of a general intention. But the cardinal purpose of all interpretation is to ascertain the true intent of the legislature, and rules of construction and interpretation are subordinate to this purpose. So, the application of particular provisions is not to be extended beyond the general scope and object of a statute, nor contrary to the spirit and reason thereof.⁵ It would seem that the principal purpose of Congress was to exclude aliens from the draft, a provision which as to them was made unconditional in section 2. In providing for registration, however, as incidental to carrying out the draft, aliens were not excluded. To give preponderating and exclusive effect to the detailed procedural provisions for claiming exemption is to make conditional by incidental machinery that which has substantively been made expressly unconditional, presumably on grounds of public policy. In view of the exclusion of aliens under section 2, it cannot be said that dependency, for example, and alienage are of equal weight as grounds of exemption under section 5.

This construction would also seem most consistent with the rule of international law on the subject. While municipal courts would be bound by the statute even if it violated international law,6 the Supreme Court would probably so construe it as not to violate the law of nations "if any other possible construction remains." On the ground that the denial of political rights and privileges involves an exemption from political duties, the majority of countries have by their

² Black, Construction and Interpretation of the Laws, 98.

^{*}Stockett v. Bird (1862) 18 Md. 484; Long v. Culp (1875) 14 Kan. 412. See Bishop, Written Laws and Their Interpretation, sec. 65.

^{*}Farmers' Bank v. Hale (1874) 59 N. Y. 53. Beal, Cardinal Rules of Legal Interpretation (2d ed.) 265 et seq. Sutherland, Statutes and Statutory Construction, sec. 221.

bWhere only a particular class of persons was designed to be affected, the generality of the language employed would not have the effect of including a single individual not belonging to that class. United States v. Saunders (1874, U. S.) 22 Wall. 492. So in Rector, etc. of Holy Trinity Church v. United States (1891) 143 U. S. 457, 12 Sup. Ct. 511, the prohibition against the admission of "any" foreigners under contract to perform "labor or service of any kind" was held not to apply to a clergyman under contract to enter the service of a church as its rector. See also Reiche v. Smythe (1871) 13 Wall. 162, in which singing birds were held not to be "live animals" within the meaning of a revenue act of Congress. See also United States v. Dickson (1841, U. S.) 15 Pet. 141; Sutherland, op. cit. sec. 218; 1 Kent, Com. 463, note b.

⁶ Mortensen v. Peters (1906) 14 Scots L. T. R. 227; Evans, Leading Cases on International Law, 16.

⁷ Marshall, C.J., in Murray v. The Charming Betsy (1804, U. S.) 2 Cranch 64, 118. See as to Great Britain, The Annapolis (1861, Eng. Adm.) 30 L. J. P. & M. 201; 4 L. T. Rep. N. S. 417.

municipal legislation,8 by treaties9 and by practice on diplomatic request10 asserted and accepted the rule that non-declarant aliens are exempt from compulsory military service in national armies, although not exempt from militia and police duty in emergencies. Under its general power of expelling undesirable aliens, Congress may, of course, order the expulsion of aliens unwilling to serve11 and neutral aliens have a privilege and right to leave the country unmolested.12 The peculiar nature of international law as creating obligations only between states, although for the eventual benefit of citizens, is illustrated by the fact that the individual alien cannot successfully assert in a municipal court his privilege of exemption from military duty under international law, the court being bound solely by the statute.13 Equally futile would be the alien's appeal on this ground to the Department of State. The alien's Government, however, may demand his release from the American army on the ground that his compulsory service violates international law, for his State is bound neither by a municipal statute14 nor by a municipal judicial decision of the highest court15 of a foreign country which is contrary to international law. The State complained against cannot set up its municipal statute or court decision as a bar to an international claim arising

² See H. T. Kingsbury, in *Proceedings of the American Soc. of Int. Law*, 1911, p. 219. See also Bluntschli, *Das moderne Völkerrecht der civilisirten Staten* (3d ed.) sec. 391.

⁹ The United States has concluded such treaties with Argentina, Costa Rica, Haiti, Italy, Nicaragua, Paraguay, Servia, Spain and Switzerland.

¹⁶ See quotations from notes and instructions in 4 Moore, Digest of International Law, 51-65. See also Borchard, Diplomatic Protection of Citizens Abroad, 64 et seq. The rule has been insisted upon by the United States, subject to slight qualifications during and immediately after the Civil War, when we undertook to draft declarants.

¹¹ Borchard, op. cit. 48 et seq. By the Act of March 3, 1863 (12 U. S. St. at L. 731) declarants who had exercised the voting privilege were made subject to the draft. The British and French governments protested and demanded the release from service of their subjects, whereupon the United States gave such declarants the option of serving or leaving the country within 65 days. I Hallack, Int. Law (Baker's 3d ed.) 558. The bill pending before Congress which directs the expulsion of aliens, subjects of our associates in the war, who are unwilling to serve, may by its example operate hereafter to the great disadvantage of American citizens abroad. It is opposed by the Department of State, which has already concluded with Great Britain, and is now negotiating with others of our co-belligerents, treaties granting a reciprocal privilege to draft subjects of the contracting parties.

¹² Mr. Madison, Sec'y. of State, to Mr. Pichon, French chargé, May 20, 1803, 4 Moore, op. cit. 52.

¹³ The principle is made clearer by the positive provision of section 2 of the Selective Draft Act drafting declarants, who legally are still aliens. Borchard, op. cit. 566, 567.

¹⁴ Mr. Bayard, Sec'y of State, to Mr. King, Oct. 13, 1886, 2 Moore, op. cit. 4. ¹⁵ Borchard, op. cit. 342 and authorities there cited.

out of a violation of a binding rule of international law. The alien, therefore, even when held for service by municipal law, has still available the extraordinary remedy of appeal for diplomatic protection to his national government.¹⁶

As a matter of administrative law, the draft boards have the same status as immigration boards, whose findings of fact are "final," even as to the question of alienage, on condition, however, that the board acted within its jurisdiction and that the petitioner had a fair hearing and opportunity to present his evidence.¹⁷ It was therefore properly held in Angelus v. Sullivan (1917, C. C. A. 2d) 246 Fed. 56, 62, and in United States v. Heyburn (1917, E. D. Pa.) 245 Fed. 360, that the finding of the draft board on the fact of alienage was conclusive. But where the facts are not in dispute, the application of the statute is a mere question of law, which is subject to review by the courts.18 The District Court for the Southern New York District would seem, therefore, to have been in error19 in considering itself bound by the "decision" of the draft board, the only question in dispute having been the application of sections 2 and 5 of the Act to the particular facts, which were not in dispute. Habeas corpus after detention²⁰ or certiorari.21 but not injunction to restrain the draft boards from certifying the complainant,22 is the appropriate remedy to try the legality of the action of the military authorities in the enforcement of the draft act.

## NOTES SIGNED IN A REPRESENTATIVE CAPACITY: HAS THE NEGOTIABLE INSTRUMENTS LAW CHANGED THE FORMER RULES?

Before the passage of the Negotiable Instruments Law it was generally held that such words as "agent," "trustee," or "president" after the signature on a bill or note, whether or not followed by the name of the person, organization or corporation represented, were prima facie mere descriptio personae and did not make the instrument in form the obligation of the principal, or furnish constructive notice

³⁶ It is understood that the Department of State has already granted the requests of various countries for the release of their nationals.

¹⁷ See United States v. Sing Tuck (1904) 194 U. S. 161, 24 Sup. Ct. 621; United States v. Ju Toy (1905) 198 U. S. 253, 25 Sup. Ct. 644.

¹⁸ Cf. Gonzalez v. Williams (1904) 192 U. S. 1, 24 Sup. Ct. 177.

¹⁹ In United States v. Finley, supra.

²⁰ See Ex parte Bollman (1807, U. S.) 4 Cranch 75, 114, 125; United States v. McBratney (1881) 104 U. S. 621, 624; Chin Yow v. United States (1908) 208 U. S. 8, 28 Sup. Ct. 201. But see United States v. Heyburn, supra.

²¹ See Angelus v. Sullivan, supra, at p. 63.

²² Ibid. p. 64, on the ground that courts of equity limit their relief to the protection of property rights. See also In re Sawyer (1888) 124 U. S. 200, 210, 8 Sup. Ct. 482, 487.

of an intent to bind the principal rather than the individual signer.¹ Authorities were in conflict on the question whether extrinsic evidence could be introduced to show such an intent together with actual notice thereof to the holder at the time he took the instrument, and thus relieve the signer of personal liability if in fact authorized to bind the principal; but the tendency of the later authorities was to allow such evidence.²

Section 20 of the Negotiable Instruments Law deals with this subject as follows:

"Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."

In considering whether this section has changed the preëxisting law two questions are suggested by recent decisions. The first arises where the word "agent" or the like after the signature stands alone, and the name of the principal does not otherwise appear. Such a case seems to come squarely within the last clause of the section. Was this clause intended to furnish an exclusive and exhaustive test of personal liability in the cases to which it refers? Or to put the question more broadly, not limiting it to this clause alone, was the law on this point completely codified so that the question of liability must be determined solely by reference to the statute? At least one court is apparently of opinion that both these questions must be answered in the affirmative. and that one who signed as "secretary" or "agent" without further disclosure must be held personally by the express language of section 20.3 Simplicity and uniformity, two of the principal objects of codification, would be served by such a construction. On the other hand the language of the clause is not as explicit as might have been expected had this been the intention. It does not declare, as it easily might

¹ Taft v. Brewster (1812, N. Y. Sup. Ct.) 9 Johns. 334; First Nat. Bank v. Wallis (1896) 150 N. Y. 455, 44 N. E. 1038; Burlingame v. Brewster (1875) 79 Ill. 515, 22 Am. Rep. 177; Davis v. England (1886) 141 Mass. 587, 6 N. E. 731. See also Leadbitter v. Farrow (1816, K. B.) 5 M. & S. 345, 348, per Lord Ellenborough, C.J., and cases collected in 7 Cent. Dig., Bills & Notes, secs. 260–262.

² Kean v. Davis (1847, Ct. Err.) 21 N. J. L. 683; Metcalf v. Williams (1881) 104 U. S. 93; Schmittler v. Simon (1889) 114 N. Y. 176, 21 N. E. 162; Keidan v. Winegar (1893) 95 Mich. 430, 54 N. W. 901; Pack v. White (1880) 78 Ky. 243, 244 (semble); contra, Collins v. Buckeye State Ins. Co. (1867) 17 Oh. St. 215; Tannatt v. Rocky Mt. Nat. Bank (1871) 1 Colo. 278; San Bernadino Nat. Bank v. Anderson (1893, Cal.) 32 Pac. 168; Davis v. England, supra.

² See Daniel v. Glidden (1905) 38 Wash. 556, 563-564; 80 Pac. 811, 813, and Citizens Nat'l. Bank v. Ariss (1912) 68 Wash. 448, 451; 123 Pac. 593, 594.

have done, that in the case described the signer shall be liable, but only that "the mere addition" of certain words "does not exempt him." From this it may be argued that the statute merely excluded one possible ground of exemption (which was never held sufficient at common law) but left untouched the question whether extrinsic evidence of mutual understanding, or of intention on one side and knowledge on the other, might not change the liability.

The courts which admitted such evidence before the statute have very generally reached the same result under the act, but have shown some reluctance to place it on any ground involving the conclusion that the entire subject is not covered and controlled by the act. The New York Court of Appeals avoided this difficulty by construing the word "disclosing" in section 20 as referring equally to a disclosure on the face of the instrument and one shown by extrinsic evidence.5 In the recent case of G. C. Riordan & Co. v. Thornsbury (1917, Ky.) 198 S. W. 920, a note intended to be the obligation of a church was signed by five individuals, with the word "trustee" after each signature, but with nothing in the instrument to disclose the principal. The court argued that the act itself distinguishes between the rights of the original payee or a holder not in due course on the one hand, and those of a holder in due course on the other, and referred specifically to section 58, which provides that "in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable." From this the court concluded that while, after negotiation to a holder in due course, the last part of section 20 would impose an absolute liability on the signer, as between the original parties the rule so laid down was only prima facie, and extrinsic evidence was admissible to show a contrary understanding.

Such decisions seem to strain the words of section 20 by finding in a mere negation of one defense a general and affirmative imposition of liability, and then to strain the act again in order to find in the same section or elsewhere something to create an exception in cases where extrinsic evidence would have been admissible before the act. On the whole it seems doubtful if the framers of the act intended to change the rule followed in so many jurisdictions, which admitted extrinsic evidence as against any party affected with notice of the facts; but the real reason for this doubt is believed to be that the language of section 20 does not go far enough to manifest or effectuate such an intention. It is therefore more satisfactory to interpret the clause in question just as it reads, as excluding any defense based merely

⁴ This was the view taken in *Phelps v. Weber* (1913, Ct. Err.) 84 N. J. L. 630, 87 Atl. 469, and *Birmingham Iron Foundry v. Regnery* (1907) 33 Pa. Super. Ct. 54.

⁶ Megowan v. Peterson (1902) 173 N. Y. 1; 65 N. E. 738.

on the addition of such words as "agent" or "trustee" after the signature, and to recognize that the act is silent on the admissibility or effect of any other evidence to avoid personal liability, thus necessarily leaving the law of each state on that point as it stood before the act was passed.⁶

A more interesting question is presented by a late Tennessee decision. As already indicated, the common law in most jurisdictions made little distinction between "agent" and "agent of X" after the signature, treating both, in the absence of extrinsic evidence, or in cases where such evidence was not admitted, as mere descriptio personae. To find in the instrument itself an intention to contract for the principal, something more was necessary, such as the name of the principal as promisor in the body of the instrument, or some phrase before or after the signature which was more than "a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation." The agent "must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent."

Whatever justification this rule may once have had, in days when it was more or less customary to add to a man's name for more complete identification some word descriptive of his station or occupation, it would seem to serve little purpose today except to defeat intention. If we could disregard precedent and rely solely on present day customs and natural inferences, it is hard to see in most cases any reason why a man should sign a note as "agent of X," or "president of the Y Co.," unless he intended thereby to contract in behalf of X or of the Y Co. But the common law rule which denied any such inference was firmly entrenched. Has section 20 of the Negotiable Instruments Law changed this rule? If so, it was done with little, if any, general discussion or realization of its effect.

In the Tennessee case referred to, a note was signed by certain individuals, in fact trustees of a church and authorized to contract for the church, with the words "trustees A. M. E. Zion Church" after their names. The court held, practically without discussion, that the Negotiable Instruments Law had changed the former rule, that the words quoted were, within the meaning of section 20, "words indicating that he signs for or on behalf of a principal," and that by the express terms of the section the church was liable and the individuals

See note 4, supra.

¹Tucker Mfg. Co. v. Fairbanks (1867) 98 Mass. 101, 104. See also Kean v. Davis, supra (note 2), at p. 685, and other cases cited above. Cf. Roney's Adm'r. v. Winter (1861) 37 Ala. 277, and cases cited.

^{*}See Saul v. Southern Seating & Cab. Co. (1909) 6 Ga. App. 843, 846; 65 S. E. 1065, 1067.

were not. Wilson v. Clinton Chapel African M. E. Zion Church (1917, Tenn.) 198 S. W. 244. Here is no question of extrinsic evidence, but of the interpretation of the instrument on its face, necessarily affecting all parties, including holders for value without notice. The same result had been reached by the Massachusetts court in a similar case without extended argument.⁹

If the first clause of section 20, on which these decisions turned, were to be considered alone, it would seem that the test imposed by the statute, namely whether the words sufficiently indicate an intention to sign "for or on behalf of" a principal, was the same test which the common law sought to apply, and that if the common law was unduly exacting in its application of this test, there is still nothing in the words of this clause to change the direction of the inquiry, or avoid the authority of the common law decisions. But a comparison of the two clauses of section 20 furnishes a new argument, which, though not fully stated, was plainly indicated as the ground of the Massachusetts decision,10 and doubtless explains the conclusion which the Tennessee court seems to have regarded as obvious. It is a natural inference from a reading of the whole section that its two clauses are intended to mark the dividing line; that in cases on one side of the line the individual, if duly authorized, is exempted from liability, while in cases on the other side he is not exempted,—at least on the face of the instrument. But the cases in which he is not exempted are only those in which the principal is not disclosed. Where the principal is disclosed, then, it may be argued that the framers of the act must have intended the case to come within the first clause. Forms of signature like that in the Tennessee case, or like "agent of X" or "president of the Y Co.," furnish perhaps the commonest class of cases in which the question of liability as between principal and representative arises, and the one most open to doubt on principle. If this class of cases is not within the first clause, we must conclude that the section carefully provides for cases on both sides of this debatable ground, and those on which little question would arise, but leaves the debatable ground itself untouched. As suggested in the first part of this discussion, the

⁹ Jump v. Sparling (1914) 218 Mass. 324, 105 N. E. 878.

¹⁰ The language of the Massachusetts opinion, after quoting the words of the section, is as follows:

[&]quot;These words plainly imply that if the person signing a promissory note adds to his signature words describing himself an agent or as occupying some representative position which at the same time discloses the name of the principal, he shall be exempted from personal liability, while if he omits the name of the principal, although adding words of agency, he will be held liable personally and the words of agency will be treated simply as descriptio personae. In this respect the common-law rule of this commonwealth whereby agents bind themselves by a form of signing a note such as the one at bar, even though acting with authority, Haverhill Ins. Co. v. Newhall, I Allen, 130, is abrogated. The agent now relieves himself from liability by a form of signature whereby he is described as agent of a disclosed principal."

assumption that the act specifically covers every case that may arise should not be pressed too far; but that such an obvious gap was left in its provisions on a subject with which in this section it unquestionably undertook to deal, is not a conclusion to be readily accepted.

On the other hand the opposite conclusion is not free from difficulty. If the framers of the act, or the legislatures which adopted it, intended to change a rule of the common law so well established as that now under consideration, their purpose could easily have been expressed more clearly; and it is somewhat significant that in the vigorous criticism to which the draft of the act was subjected by at least one eminent authority before its general adoption, and the equally vigorous defense, this point passed wholly without comment.¹¹

The fact seems to be that the framers of the act, intentionally or otherwise, rather dodged the question, by language open to two constructions neither of which is wholly convincing, and that the Massachusetts and Tennessee courts, intentionally or otherwise, have seized the opportunity thus afforded to substitute a more rational rule for one which had ceased to be in harmony with present day conditions and common sense. The law sometimes improves by inadvertence, and this may be such a case.

#### MISREPRESENTATION BY SILENCE

Is the seller of chattels who knows that the subject-matter of the sale is materially defective, and who nevertheless sells to a buyer who purchases in belief that the goods are what they appear to be-the defect being latent-guilty of misrepresentation or "fraud," so that the buyer may sue in tort for deceit or at least "rescind the contract"? This problem is presented by the recent case of Salmonson v. Horswill (1917, So. Dak.) 164 N. W. 973, in which the defendant, when sued for the purchase price of a span of mules, set up as a defense the "fraud and deceit" of the plaintiff and that "on discovering such fraud she rescinded the contract." At the trial the evidence showed that the plaintiff expressly refused to warrant the mules as sound and that, "when inquiry was made of him in relation to the physical condition of the mules, he not only refused to express any opinion thereon, but told defendant that she might try the mules and ascertain their condition," which the defendant did. The trial court also found that "at least one of the mules was to the knowledge of the plaintiff, afflicted with a disease known as the heaves, and that the disease in question

¹¹ See articles by James Barr Ames in (1900, 1901) 14 HARV. L. REV. 241, 442; (1903) 16 *ibid*. 255; by Lyman Denison Brewster in (1900) 10 YALE LAW JOURNAL 84; (1901) 15 HARV. L. REV. 26; by Charles L. McKeehan in (1902) 41 AM. L. REG. (N. S.) 437, 499, 561.

was "latent in its nature." Upon these facts the Supreme Court of South Dakota affirmed a judgment for the defendant, on the ground that "if a party conceals a fact material to the transaction, and peculiarly within his own knowledge, knowing that the other party acts upon the presumption that no such fact exists, it is as much of a fraud as if the existence of such fact were expressly denied, or the reverse of it expressly stated."

At the outset it must be noted that a full discussion of the problem of silence or omission to speak requires a consideration of its effect: (1) in actions at law for breach of contract; (2) in actions in equity for specific performance; (3) in actions at law for deceit; (4) in actions relating to the privilege and power of "self-help," i. e., the recovery of the article delivered without the aid of judicial proceedings; (5) in actions at law for restitution, which may be either (a) actions to recover the specific article or (b) actions to recover the value of the articles (general assumpsit or trover); or (6) in actions in equity for recovery of the specific article. It is entirely possible and not infrequently the case that facts which entitle a person to one form of relief are not enough to give him a right to others. For example, in a jurisdiction which follows the rule established in Derry v. Peek,1 an innocent misrepresentation will not give rise to an action of tort for deceit, but may without inconsistency be held to be a ground for refusing specific performance or for granting specific restitution either at law or in equity.

The present discussion will be devoted chiefly to a consideration of omissions to disclose so-called latent defects in articles sold, so far as such omission relates to the common law action for deceit or to defenses to common law actions for breach of contract—the latter being the situation presented in the principal case. *Omission* here is used in the sense of an intentional omission to disclose and therefore implies that the one "omitting" knew of the fact not revealed. "Latent" signifies that the defect was one which ordinary diligence in inspecting the article would fail to reveal.

It is well settled in a number of jurisdictions that the intentional omission of the seller of a chattel to disclose a latent and material defect known to him and unknown to the buyer will give the latter, if he buys believing the object to be what it appears to be, either an action for deceit or a defense to an action for the purchase price. In one of the cases usually cited for this proposition this is put on the ground that "in every such case the very sale is equivalent to a representation that the thing is, as far as the vendor knows, what it appears to be, and does impose upon the vendor the duty of correcting any such delusion into which he has led the vendee by offering to sell him for a valuable price, what he knows or believes to be, and which is really valueless, or

^{1 (1889,} H. of L.) 14 App. Cas. 337.

of essentially different and less value than it appears to be and is taken to be by the vendee, and without which belief he would not have made the purchase, and this well known to the vendor." In the very case, however, in which these words were uttered, a careful reading of the facts will disclose that the defendant was not merely silent but made certain statements concerning the article without telling the whole truth. In cases of this kind, the half truth uttered may be—as it was in the case from which the above quotation is taken,—the plainest kind of misrepresentation, i. e., omission of part makes the residue false.3 Many others of the cases which are supposed to establish the rule stated above will be found to involve similar situations. When all these have been eliminated, however, there will be found to remain a residuum of authority in this country in favor of the rule as stated.

The case in Vermont above referred to relied upon the English case of Hill v. Gray,4 decided by Lord Ellenborough—a decision which, while never specifically overruled, is now very generally regarded as wrongly decided on its facts.5 Apparently the English law is not that laid down in Hill v. Gray, but just the contrary, and some American authorities agree with the English view.6 To sustain an action of tort for deceit we must of course find a misrepresentation of some existing fact or thing, or of a past event. It seems clear that to remain silent where according to ordinary business usage disclosure would be made, may well be held to be a misrepresentation. This is, to be sure, a vague test and business standards have undoubtedly changed for the better, or at least there is a growing tendency on the part of many courts to treat non-disclosure in such situations as misrepresentation. Frequently, moreover, one may fairly say that under the circumstances of the particular case silence amounts to a representation that the seller has no knowledge or belief as to the existence or non-existence of the fact in question, i. e., the misrepresentation is as to the seller's state of mind.7 In the principal case it is, however, even on this basis not easy to find in fact a misrepresentation, for the seller expressly refused to warrant the property and when asked about the physical condition of

² Per Redfield, C.J., in Paddock v. Strobridge (1857) 29 Vt. 470.

This is well put by Tennyson:

[&]quot;A lie which is half the truth is ever the blackest of lies,

For a lie which is all a lie may be met and fought with outright,

But a lie which is part of truth is a harder matter to fight."

^{4 (1816,} N. P.) 1 Starkie, 434.

⁶ See remarks of Jervis, C.J., in Keates v. Earl of Cadogan (1851) 10 C. B. 591, 600, and of Lord Chelmsford, L.C., in Peek v. Gurney (1873) L. R. 6 H. L. 377, 390.

^o Ward v. Hobbs (1877, C. A.) 3 Q. B. D. 150, s. c. on appeal (1878, H. of L.) 4 App. Cas. 13; Morris v. Thompson (1877) 85 III. 16.

⁷ This is not always noticed in discussions of cases involving statements of so-called "opinion" and "statements of law." Here very frequently there is a misrepresentation as to the speaker's state of mind.

the mules refused to make any statement and told the buyer to investigate for herself, which she in fact did. It may perhaps be argued that in spite of this the seller by his silence impliedly represented that so far as he knew or believed there were no material defects of the kind which actually existed. If so, there was an intentional misrepresentation by the plaintiff of his own state of mind which, if relied upon by the buyer to his damage, would give rise to an action of deceit.8

The decision in the principal case, however, may be supported without accepting the view of the court that there was in fact a misrepresentation. It is held by some courts that even though in a particular case there is no misrepresentation and an action for deceit cannot be supported, there may nevertheless be sufficient "fraud" to permit "rescission," i. e., to furnish a defense to an action for the purchase price. Thus it is held by some courts that a mere promise to pay for goods purchased is not a representation that the promisor honestly intends to keep his promise, and that therefore an action for deceit cannot be sustained merely by proof that the promisor intended all the time never to pay for the goods.9 The same courts hold, however, that the dishonest intention of the buyer in such a case is a sufficient ground for "rescission." In such cases, therefore, the "rescission" is not based upon misrepresentation, but upon dishonesty which falls short of it. Similarly in the principal case the dishonesty of the seller—for dishonesty it clearly is—may, in spite of the fact that we conclude that under the circumstances silence was not in fact a misrepresentation, be held to afford a basis for restoring the status quo. We may be willing to do that and yet be unwilling to hold the dishonest seller liable for all damages which the buyer may incur by reason of the error which the seller has dishonestly permitted him to make. We must of course beware of setting up moral standards too far in advance of those prevailing among the members of the business community. We must also be careful not to protect one who has, upon a fair construction of the bargain, assumed the risk of things being as he believes them to be and who wishes to be relieved of a bad bargain upon discovery that his judgment was not as good as he thought it to be.11

W. W. C.

⁸ In Ward v. Hobbs (1878, H. of L.) 4 App. Cas. 13, the Lord Chancellor (Earl Cairns), in an action for damages based on facts very much like those in the principal case, held that there was no such "implied representation," although expressly recognizing that a representation of the kind alleged would be actionable if made.

⁹ Donovan v. Clifford (1917) 225 Mass. 435, 114 N. E. 681.

¹⁰ Watson v. Silsby (1896) 166 Mass. 57, 43 N. E. 1117; Phinney v. Friedman (1916) 224 Mass. 531, 113 N. E. 285.

¹¹ For a discussion of the whole question from the point of view of "assumption of risk," see the dissenting opinion of Holmes, J., in *Nash v. Minn. Title Ins. Co.* (1895) 163 Mass. 574, 40 N. E. 1039.

# RECENT CASE NOTES

ALIENS—EXEMPTION OF NON-DECLARANT ALIENS FROM DRAFT—STATUTORY CONSTRUCTION—ADMINISTRATIVE LAW.—The petitioner, a non-declarant alien, having failed to file his claim for exemption under the Selective Draft Act within the time allowed by the regulations, was certified for military service by a local draft board, and sued out a writ of habeas corpus, on the ground of alienage, to obtain his release from military custody. Held, (1) that the writ would issue, the petitioner being absolutely excluded from service under the Act and not merely conditionally subject to exemption; and (2) that as the draft board, an administrative board with quasi-judicial functions, had acted in excess of its jurisdiction, its decision was void. Ex parte Beck (1917, D. Mont.) 245 Fed. 967. Contra, on the first point, United States v. Finley (1917, S. D. N. Y.) 245 Fed. 871; Ex parte Hutflis (1917, W. D. N. Y.) 245 Fed. 708.

The complainant, alleging that he was a non-declarant alien, asked an injunction restraining the military authorities from certifying him for military service, the local and district boards having found on the facts adversely to his claim of alienage. *Held*, that in the absence of a denial of due process in the hearing of his claim for exemption, the finding of the district board was final. *Angelus v. Sullivan* (1917, C. C. A. 2d) 246 Fed. 54. See COMMENTS, p. 683.

BILLS AND NOTES—NOTE SIGNED IN REPRESENTATIVE CAPACITY—EFFECT OF DISCLOSING PRINCIPAL.—The trustees of a church gave a note to A, reading "we promise to pay," etc., and signed by the trustees in their own names, with the words "trustees A. M. E. Zion Church" after their signatures. The note was endorsed in blank by A. The plaintiff, a subsequent holder, sued both the church and the trustees as individuals. Held, that under section 20 of the Negotiable Instruments Law, since the principal was disclosed, the note was on its face the obligation of the church, and the individual defendants were not liable if in fact authorized to bind the church. Wilson v. Clinton Chapel Afr. M. E. Zion Church (1917, Tenn.) 198 S. W. 244. See Comments, p. 686.

BILLS AND NOTES—NOTE SIGNED IN REPRESENTATIVE CAPACITY—EXTRINSIC EVIDENCE OF INTENTION.—The defendants, in fact trustees of a church and authorized to bind the church, gave a note to the plaintiff, reading "we promise to pay," etc., and signed by the defendants in their own names, with the word "trustee" after each name. There was nothing else on the face of the instrument to indicate that it was other than the personal note of the signers. The plaintiff sued the defendants personally on the note. Held, that under the Negotiable Instruments Law the defendants were entitled to show by extrinsic evidence, as a defense against personal liability, that the note was given and accepted as the note of the church, and not of the individual signers. G. C. Riordan & Co. v. Thornsbury (1917, Ky.) 198 S. W. 920. See Comments, p. 686.

CARRIERS—REASONABLE REGULATIONS AS TO PASSENGERS—"LADIES FIRST."—A special car belonging to the defendant stopped in front of a crowd of factory hands. An inspector of the defendant, who was in charge of the car, stood at the steps and directed that women should be allowed to get on first. The plaintiff disobeyed this direction and mounted the steps, whereupon the inspector

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kicked him off. Held, that the order of the inspector was a reasonable regulation, and that in the absence of unnecessary violence the plaintiff had no right to damages. Garricott v. New York State Rys. (Feb. 26, 1918, N. Y.) 9 Rochester-Syracuse Daily Record, No. 55.

The women in this case, having presented themselves for carriage, had become passengers and were entitled to protection by the carrier. Davey v. Greenfield, etc. Ry. Co. (1900) 177 Mass. 106, 58 N. E. 172. A carrier has power to make binding regulations in regard to the admission of passengers to its cars, provided such regulations are reasonable. Baltimore & O. R. R. Co. v. Carr (1889) 71 Md. 135, 17 Atl. 1052. The question of reasonableness is sometimes treated as one of fact for the jury. Morris, etc. R. R. Co. v. Ayres (1862) 29 N. J. L. 393. In New York, however, it is for the court to determine. Vedder v. Fellows (1859) 20 N. Y. 126; Avery v. New York Central, etc. R. R. Co. (1890) 121 N. Y. 31, 24 N. E. 20. The fact that in the principal case the regulation was made by a subordinate official does not invalidate it. Commonwealth v. Power (1844, Mass.) 7 Metc. 596 (superintendent of depot). Nor should the fact that it was made for a special occasion only. Regulations separating passengers according to sex and giving special privileges to women have often been sustained. Peck v. New York Central, etc. R. R. Co. (1877) 70 N. Y. 587; Bass v. Chicago, etc. R. R. Co. (1874) 36 Wis. 450. In the present case the court holds that the inspector's order "Ladies first" was reasonable, because "in the struggling and pushing crowd, women were at a disadvantage in gaining entrance to the car and in protecting themselves." No authorities are cited, and there is no reference to the recent extension in New York of the voting franchise to women.

Constitutional Law—Interstate Commerce—Newspapers Containing Cigarette Advertisements.—A Kansas statute made it unlawful for any person to sell, give away, or advertise cigarettes in Kansas (Kan. Laws, 1917, ch. 166, secs. 1 and 2). The plaintiff, a Missouri corporation, published in Missouri a newspaper which was distributed throughout Kansas by mail and otherwise, containing advertisements of cigarettes made and kept for sale outside of Kansas. *Held*, that interference under authority of the state statute with this distribution was unconstitutional and would be enjoined. *Post Printing and Pub. Co. v. Brewster* (1917, D. Kan.) 246 Fed. 321.

Tobacco and cigarettes are of course articles of interstate commerce and as such have been held to be protected from state statutes regulating their importation. McGregor v. Cone (1898) 104 Ia. 465, 73 N. W. 1041; Austin v. Tennessee (1900) 179 U. S. 343, 21 Sup. Ct. 132. And there is no federal legislation to remove or lessen this protection, as is done in the case of intoxicating liquors by the Wilson and the Webb-Kenyon Acts (26 U. S. St. at L. 313; 37 U. S. St. at L. 699). In holding that newspapers also are subjects of interstate commerce, within the constitutional provision relating to such commerce, the principal case follows Preston v. Finley (1896, C. C. W. D. Tex.) 72 Fed. 850. And on principle the delivery to subscribers within a state of newspapers published in another state would seem to be clearly interstate commerce, and as such not in itself a proper subject of state regulation. It would not follow, however, that such newspapers could be used with impunity for the promotion of objects made unlawful by a valid state law. If, therefore, the advertisements in the principal case had related to cigarettes manufactured or sold in Kansas in violation of state law, it would seem that Kansas under its police power could prohibit the circulation of such advertisements, whether printed in the state or brought in from outside, just as it could prohibit the circulation of libelous or obscene publications or lottery advertisements. If on

the other hand the newspaper had been published in Kansas, though advertising cigarettes to be sold in interstate commerce, or if the question had related to local sales of the newspapers not in original packages, it is possible that the state police power might have justified the prohibition. Cf. Delameter v. South Dakota (1907) 205 U. S. 93, 27 Sup. Ct. 447; State v. J. P. Bass Pub. Co. (1908) 104 Me. 288, 71 Atl. 894; State v. Delaye (1915) 193 Ala. 500, 68 So. 993; State v. Davis (1915, W. Va.) 87 S. E. 262. In the Delameter case, on the authority of which the other three cases were decided, the Wilson Act was expressly relied on, and the case is distinguished in the principal case as depending on the effect of that Act. No doubt the change in national policy evidenced by the Wilson Act materially influenced the decision in the Delameter case, but it is difficult to see how the reasoning in the last part of the opinion, on which the case finally turned, gained any direct assistance from the Act. In the principal case, however, since both the distribution of the newspapers to subscribers and the sales of cigarettes which the advertisements tended to promote were interstate commerce, there was nothing done or contemplated within the state on which its police power could be exercised without a direct interference with interstate commerce. This would seem to be the true ground for distinguishing the Delameter case.

Contracts—Installment Contracts—Non-Payment of Price of First Installment as Entire Breach.—The plaintiff agreed to sell and deliver to the defendant certain picture films. One film was to be delivered each month and payment therefor was to be within thirty days. The defendant failed to make the first payment on the day, and two days later the plaintiff sued for damages, alleging the defendant's breach and his own election to terminate the contract. The trial court found that there was a refusal to pay, unaccompanied by any repudiation, but there was no finding as to any of the other surrounding circumstances from which the materiality of the breach could be determined. Held, that there was no showing of such a breach as justified the plaintiff in renouncing the contract, and that the plaintiff was entitled to judgment for the sum due and unpaid but not for damages as for an entire breach. Helgar Corp. v. Warner's Features, Inc. (1918, N. Y.) 58 N. Y. L. J. 1780.

The case was governed by section 45 of the Uniform Sales Act as adopted in New York, which provides that "it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract." This makes the question one of fact to be determined, as it should be, in each case separately on its merits. The courts have generally, however, attempted to lay down a rule apparently capable of mechanical application. Thus the English courts have said that mere nonpayment of the price is not vital unless accompanied by repudiation. Freeth v. Burr (1874) L. R. 9 C. P. 208; Mersey Steel and Iron Co. v. Naylor (1884, H. of L.) 9 App. Cas. 434. The soundness of this rule was seriously doubted by Sir Frederick Pollock. Wald's Pollock, Contracts (Williston's ed.) 330. In the United States the courts have generally declared non-payment in such cases to be always vital, without reference to the circumstances accompanying it, contenting themselves with some such general proposition as "In the contracts of merchants, time is of essence." See Williston, Sales, sec. 467. In the present case the court very sensibly disregards such a "general statement," and refuses to lay down a mechanical rule making failure to pay on time always equivalent to an entire breach. Upon delivery of the films and the arrival of the day of payment the buyer became the plaintiff's debtor for the agreed price then payable. Upon non-payment, the plaintiff has a right to damages caused by the non-payment. But in the absence of a showing as to the seriousness of the damage suffered by him, or as to the probability of further breaches by the defendant, the plaintiff is not privileged to refuse further deliveries, and has no right to damages based on the assumption of further non-performance by the defendant. The rule should be the same even where the Sales Act has not been adopted.

CRIMINAL LAW—INSANITY—EFFECT OF INSANITY AT TIME OF TRIAL.—The defendant, who was not represented by counsel, was convicted of an assault with intent to rape. Later a lawyer was secured, who moved for a new trial, alleging that the defendant was insane at the time of trial. The trial court offered to submit the question of present insanity to a jury, under a code section relating to insanity supervening after conviction, but declined to hear evidence to show that the defendant was insane when tried as a ground for granting a new trial on the original indictment. Held, that the trial court should have heard and considered the evidence, and if it appeared that the defendant was insane when tried, should have granted a new trial. Gardner v. State (1917, Tex.) 198 S. W. 312.

As suggested by the court, reversal of the first trial was warranted by an objection more fundamental than that of newly discovered evidence, namely, that the insanity of the appellant avoided the former proceedings. Nor, it would seem, does the objection really depend on the fact that he could not be held to know of his insanity so as to plead it as a defense. It is elementary that a man cannot legally be tried, or convicted, or sentenced, while in a state of insanity. I Bishop, Criminal Law, sec. 396; I Wharton, Criminal Law, sec. 58 et seq. Where the question of present insanity is raised before trial, the usual procedure is to present the question to the trial jury. Frith's Case (1790) 22 How. St. Tr. 307. But other procedure may be adopted in the discretion of the court. See Freeman v. People (1847, N. Y. Sup. Ct.) 4 Den. 9. It is for the court to determine whether there is sufficient evidence to warrant submission of the question to the jury. Spann v. State (1872) 47 Ga. 549. And the determination of this question is not reviewable on appeal. Webber v. Commonwealth (1888) 119 Pa. 223. The question of present insanity may be raised at any stage of the trial, and the court must receive any evidence offered but may dispose of the issue as it sees fit. State v. Reed (1889) 41 La. Ann. 581. The approved course seems to be to submit the special issue with the general issue to the jury. The instant case is novel in that it appears to be the first in which the question of insanity at the time of trial was not raised until later. But there are cases holding that where it appears after trial that the defendant was deaf and dumb, or intoxicated, and therefore incapable of understanding the proceedings, the trial will be set aside. Regina v. Berry (1876, Cr. Cas. Res.) 1 Q. B. D. 447; Taffe v. State (1861) 23 Ark. 34.

Damages—Breach of Contract—Damages Resulting from Death of Wife.—In consideration of one dollar deducted monthly from the plaintiff's wages, the defendant company agreed to provide him and his family with medical attention. The plaintiff's wife having become ill, the plaintiff sent for the company's doctor. He refused to attend her. The plaintiff brought an action for breach of contract, and, alleging that he could not afford to engage another doctor, claimed damages for the death of his wife. Held, on demurrer, that the plaintiff had a cause of action. Owens v. Atlantic Coast Lumber Corp. (1917, S. C.) 94 S. E. 15.

A husband has by the common law a legal right to the society and services of his wife. Schouler, Husband and Wife, sec. 143. He may maintain an action for an injury to this right. Kelly v. New York, N. H. & H. R. R. Co. (1897) 168 Mass. 308, 46 N. E. 1063; Birmingham Southern Ry. Co. v. Lintner (1904) 141 Ala. 420, 38 So. 363. The husband's right to recover for loss of consortium has been denied, however, since the enactment of legislation enlarging the rights of married women. Bolger v. Boston El. Ry. Co. (1910) 205 Mass. 420, 91 N. E. 389. But the common law right of recovery was always limited to damages accruing before the wife's death. Baker v. Bolton (1808, N. P.) I Camp. 493. In the absence of statute, damages resulting solely from the death are not an element of recovery. Hyatt v. Adams (1867) 16 Mich. 180; Covington Street Ry. Co. v. Packer (1872, Ky.) 9 Bush, 455. The English courts have qualified this general rule and have held that where the conduct of the tort-feasor resulting in the death of the plaintiff's wife constitutes also a breach of a contract duty to the husband, and the death is not therefore an essential part of his cause of action, damages resulting from the death will be permitted as an element of recovery. Jackson v. Watson (C. A.) [1909] 2 K. B. 193. The American authorities, however, are opposed to such a distinction, and hold that the general rule is as well applicable to actions of contract as to actions of tort. Sheerlag v. Kelley (1908) 200 Mass. 232, 86 N. E. 293; Duncan v. St. Luke's Hospital (1906) 113 App. Div. 68, 98 N. Y. Supp. 867, affirmed 192 N. Y. 580, 85 N. E. 1109. The principal case was an action on the contract. It would seem, therefore, that although there did exist in favor of the husband a cause of action, his damages, according to the American authorities, were merely nominal, unless it should appear that actual damages were suffered prior to the wife's death.

Deeds — Delivery in Escrow — Revocation — Statute of Frauds. — The plaintiffs entered into an oral agreement to exchange land with the defendants, M. and P. Both deeds were to be deposited with the other defendant, an attorney, who was to deliver the deeds to the respective grantees after examining titles. M. and P. did so deposit their deed, but later instructed the attorney not to deliver it. The plaintiffs' deed was not deposited until after this instruction had been given. The plaintiffs sued to compel a delivery. Held, that as there was no written contract or memorandum to satisfy the statute of frauds, the depositary in escrow could not be compelled to deliver the deed. McLain v. Healy (1917, Wash.) 168 Pac. I.

The rule announced in the principal case, which practically overrules the case of Manning v. Foster (1908) 49 Wash. 541, 96 Pac. 233, and follows a still earlier case, makes clear the position of the state of Washington on this point. This view has been supported by text-books and by a few recent cases. I Devlin, Deeds (3d ed.) sec. 313; Campbell v. Thomas (1877) 42 Wis. 437; Clark v. Campbell (1901) 23 Utah 569, 65 Pac. 496; Holland v. McCarthy (1916) 173 Cal. 597, 160 Pac. 1069. Though rules concerning delivery in escrow were developed at an early date in our law, there was no suggestion of this rule until the case of Fitch v. Bunch (1866) 30 Cal. 208. It is apparently based upon the idea that the rights and powers created by a deposit in escrow depend wholly upon contract. See Campbell v. Thomas, supra. Such a rule puts an unfortunate limitation upon the utility of the conditional delivery of conveyances. In many cases, at least, it is the intention in a delivery in escrow, and is essential to its purpose, that it be irrevocable. Fine v. Lasater (1913) 110 Ark. 425, 161 S. W. 1147. Indeed, it is the very nature of an escrow that, as to the grantor, the transaction is entirely executed. The delivery of a deed in escrow creates in the grantee of the deed a legal power to obtain title to

the realty by mere performance of the condition of the escrow. (1913) 23 YALE LAW JOURNAL, 33; and see Farley v. Palmer (1870) 20 Oh. St. 223, 225. If this is the correct analysis of the nature of an escrow it is apparent that the section of the Statute of Frauds relating to contracts has no application. If the Statute applies at all it must be by virtue of the section which relates to the conveyance of interests in land. The physical act of handing over a deed, either to the grantee or to a third person, may always be explained by oral testimony to show whether or not intended as a "delivery" at all. Why not, then, to show whether it was a conditional or an unconditional delivery? If it appears that the grantor by the delivery intended to create a legal power in the grantee to obtain title by performing a condition, that is, intended to create an escrow, why should not effect be given to that intent? If the delivery was absolute, the grantee is vested with all the rights, powers, etc., which make up title; if the delivery was in escrow, he is vested with the power to acquire title. There seems no more reason to apply the Statute of Frauds to one conveyance than to the other. The question remains whether a delivery in escrow had in fact taken place in the principal case. It may be doubted whether the grantor defendants intended the delivery of their deed to the attorney to operate as an escrow until the other parties had made a similar delivery. But if they did, it is submitted, effect should have been given to it. To require an enforcible executory contract in addition to a conditional delivery goes a long way toward abolishing the doctrine of escrows. See Tiffany, Conditional Delivery of Deeds (1914) 14 Columbia L. Rev. 380, 398 et seq.

EVIDENCE — DYING DECLARATIONS — "MURDERED" AS AN EXPRESSION OF OPINION.—In a homicide trial the state offered in evidence the testimony of a witness who swore that the deceased made a dying declaration to the witness to the effect that the defendant "murdered" him. The trial court admitted the evidence. Held, that this was error as it was a mere expression of opinion by the dying man involving a conclusion of law. Pilcher v. The State (1917, Ala.) 77 So. 75.

The statement, "He killed me" satisfies the requirements for a dying declaration and is admissible everywhere as a statement of a fact. Parker v. State (1914) 10 Ala. App. 53, 65 So. 90. The fact is the belief of the deceased that he met his death at the hands of the defendant. But when anything beyond this is involved in the statement some courts exclude it as an expression of an opinion. Jones v. Commonwealth (1898, Ky.) 46 S. W. 217 ("shot me for nothing"); State v. Sale (1902) 119 Ia. 1, 92 N. W. 680 (the deceased "was to blame"); Berry v. State (1897) 63 Ark. 382, 38 S. W. 1038 (the whiskey was "poisoned"). A larger number of courts, though with considerable hesitation, have admitted such statements. State v. Lee (1900) 58 S. C. 335, 36 S. E. 706 ("killed me for nothing"); Gerald v. State (1901) 128 Ala. 6, 29 So. 614 ("killed me for nothing"); Powers v. State (1897) 74 Miss. 777, 21 So. 657 ("killed me without cause"); Shenkenberger v. State (1900) 154 Ind. 630, 57 N. E. 519 ("poisoned by my mother-in-law"); State v. Gile (1894) 8 Wash. 12, 35 Pac. 417 ("butchered" by the doctors). It is believed that these difficulties follow from too close an application of the opinion rule, the object of which is to require witnesses to place the facts in detail before the jury, leaving the latter to draw the necessary inferences. Where the declarant is dead it is impossible to obtain from him any more detailed facts to guide the jury in drawing such inferences. As Professor Wigmore declares, "Some of the rulings, in their pedantic technicality, would be a scandal to any system of evidence supposed to be based on reason and common sense." Wigmore, Evidence, sec. 1447. From a technical viewpoint the word "murdered" is a conclusion of mixed law

and fact rather than purely an expression of opinion. Cf. (1917) 27 YALE LAW JOURNAL, 277. But in popular usage it is at least predominantly a statement of a fact. The deceased simply meant that he was killed by what appeared to be the deliberate act of the defendant, and his statement should not be interpreted as an attempt to give a legal opinion with respect to degrees of homicide. Once the fact is established that the homicide was the act of the defendant, other evidence is nearly always available bearing on the issues which determine its legal classification. Since the statement bears directly on the most fundamental issue of fact in the case, and the one most difficult to prove by any other evidence, it seems pure technicality to allow so slight an admixture of anything but fact to exclude it. In accordance with this view, such a statement was admitted in State v. Mace (1896) 118 N. C. 1244, 24 S. E. 798. Cf. State v. Baldwin (1890) 79 Ia. 714, 45 N. W. 297. The principal case seems an unfortunate example of a tendency from which the criminal law is now happily freeing itself.

Fraud—Misrepresentation by Silence—Rescission.—In an action for the purchase price of a span of mules, the buyer's defense was that he had rescinded the contract because of the fraud and deceit of the seller. The trial court found that the plaintiff when he sold the mules refused specifically either to warrant their soundness or to make any statement as to their condition, but told the defendant to examine them for herself. The defendant's examination failed to reveal that one of the mules was suffering from a disease which the trial court deemed a latent and material defect. At the time of the sale the seller knew of the existence of this disease. Immediately on discovery of the disease the buyer offered to return the mules to the seller. *Held*, that the seller was not entitled to recover the purchase price. *Salmonson v. Horswill* (1917, S. D.) 164 N. W. 973. See Comments, p. 691.

LIBEL AND SLANDER—MALICE IN FACT AND LAW—COMPENSATORY AND PUNITIVE DAMAGES.—In an action for libel and slander the trial court made certain detached statements from which the jury might well have inferred that the amount of the damage was within the discretion of the jury and was dependent upon the malice involved. Then the court correctly stated the Connecticut rule which gives as compensatory damages the equivalent of injuries received, and as punitive damages the expenses of the suit less taxable costs. *Held*, that there was error in the first part of the instructions, as the effect of malice in fact on compensatory damages should have been expressly limited to the actual effect of such malice in increasing the plaintiff's suffering. *Craney v. Donovan* (1917, Conn.) 102 Atl. 640.

In actions of libel and slander two kinds of malice are recognized, malice in law and malice in fact. Coleman v. MacLennan (1908) 78 Kan. 711, 98 Pac. 281; Sullivan v. McCafferty (1917, Me.) 102 Atl. 324. Malice in law is a so-called presumption of law which finds malice in the utterance of the words without legal justification. Tim v. Hawes (1916, N. Y. App. T.) 97 Misc. 30, 160 N. Y. Supp. 1096. This is a confusing fiction which really means that no malice is required to sustain the action. Jeremiah Smith, Surviving Fictions (1917) 27 YALE LAW JOURNAL, 147, 156. If the plaintiff rests his case here, he is entitled to compensatory damages. Haines v. Schultz (1888, Sup. Ct.) 50 N. J. L. 481, 14 Atl. 488. A majority of the states award punitive damages in case malice in fact, or actual ill-will, is shown. Cohalan v. New York Press Co. (1914) 212 N. Y. 344, 106 N. E. 115. In these states the absence of actual malice has been held inadmissible to affect the amount of compensatory damages. Garrison v. Robin-

son (1911, Ct. Err.) 81 N. J. L. 497, 79 Atl. 278. But in some states no punitive damages are allowed, and there actual malice has been admitted, not as a ground for an arbitrary increase of compensatory damages, but in order to find the exact amount of the damage inflicted, since the plaintiff may in a particular case suffer greater distress by knowing that the words were spoken maliciously. Burt v. Advertiser N. Co. (1891) 154 Mass. 238, 28 N. E. 1; see also Odgers, Libel and Slander (5th ed.) 398. This doctrine, if properly safeguarded, appears sound on principle, but it is open to some practical objections. It is believed that in many cases the plaintiff would actually suffer less from knowing that the words were spoken from prejudice and ill-will rather than from sober conviction, and it is likely that in every such case the jury would award really punitive damages under the guise of compensation. This objection, however, is less forcible in a state which allows punitive damages, whether or not such damages are limited as they are in Connecticut, and granting that there is a real relation between malice and the amount of the damage suffered, the principal case seems logical in holding, in effect, that this element should not be excluded in measuring the compensation, merely because a further allowance may be made by way of punitive damages.

MARRIAGE AND DIVORCE—CEREMONY INVALID BECAUSE OF EXISTING IMPEDIMENT—COMMON LAW MARRIAGE ON REMOVAL OF IMPEDIMENT.—Believing her prior marriage in Russia to have been invalid, the defendant contracted a second with the petitioner; early in the course of their fourteen years' cohabitation as husband and wife, the defendant's first husband died. The second husband later sought annulment on the ground that the first marriage had been valid and subsisting at the time the second was celebrated. Held, among other reasons for sustaining the second marriage (1) that if the parties entered on the marriage in ignorance of an existing impediment, and cohabitated matrimonially both before and after the impediment was removed, they in law became husband and wife at once on its removal; and (2) that even if the second marriage was meretricious at the start, a new consent to a common law marriage would be found from continued cohabitation and declarations of the parties that they were husband and wife, after the removal of the impediment. Schaffer v. Krestovnikow (1917, N. J. Ch.) 102 Atl. 246.

The holding on the first point amounts to a declaration that a common law marriage exists under the circumstances stated. The essence of common law marriage is an agreement between the parties,-mutual consent in some manner to the relation of husband and wife. Bishop, Marriage, Div. and Sep. (6th ed.) sec. 218. Habit and repute are only evidence from which such agreement is inferred or presumed. Ibid., sec. 434. In a case like the present the mutual consent to enter upon the marriage relation was clearly without effect when given: an impediment existed. After the impediment's removal no such consent was ever expressed, nor is there reason to presume it; persons who believe themselves married do not consent to enter on marriage. The "continuing consent" sometimes spoken of, so far as it means consent to enter on the relation, is wholly a fiction. To common law marriage, then, if the principal case is sound, the only agreement necessary is to be-not to become-husband and wife. This is also the necessary result of a previous New Jersey case, in which the marriage was held to become valid on the removal of the impediment, whether or not the parties knew of the removal. Robinson v. Robinson (1914, Ch.) 83 N. J. Eq. 150, 90 Atl. 311. This view has not always been taken. In Collins v. Voorhees (1890, Ct. Err.) 47 N. J. Eq. 555, 22 Atl. 1054, the court met the problem with cold logic: consent to cohabitation which followed a ceremony could, until something further appeared, be referred only to that ceremony; if

the ceremony was without effect, there was no marriage. Accord, Cartwright v. McGown (1887) 121 Ill. 388, 12 N. E. 737. In both the cases last cited, however, one of the parties was lacking in good faith at the outset, and Collins v. Voorhees has since been distinguished on that ground. Robinson v. Robinson, supra. But the real ground of the Robinson case, as of the principal case, seems to be that the ruling consideration is not logic, but a public policy which favors sustaining marriage whenever possible. This principle has been applied elsewhere to cases in which one or even both of the parties knew of the impediment at the beginning of the cohabitation. Yates v. Houston (1848) 3 Tex. 433, 450; De Thoren v. Attorney General (1876, H. of L.) 1 App. Cas. 686; The Breadalbane Case (1867) L. R. 1 H. L. Sc. 182. See also dissenting opinion in Collins v. Voorhees, supra, 47 N. J. Eq. 315, 20 Atl. 676. The holding on the second point in the principal case indicates a readiness, not perhaps to overrule Collins v. Voorhees in terms, but practically to abandon the distinction based on good faith at the outset, by finding a new consent on evidence hardly differing from that held insufficient in the earlier case. Since society is interested primarily in the marriage status—in the contract only as a definite entry upon that status there seems to be no sound reason why, in states which recognize common law marriages, consent to be, rather than to become, husband and wife should not in all cases be sufficient to constitute the relation.

Sales—Statement That Goods Had Been Shipped—Whether or Not a "Warranty."—The plaintiff sold a carload of apples to the defendant, and stated in a letter which was held to be a part of the contract that the apples had been shipped "yesterday." The plaintiff believed this statement to be true, but in fact the plaintiff's vendors, who were to make the shipment, did not forward the apples to the defendant until the next day. The defendant refused to accept the apples resting his refusal on the unfounded claim that they did not come up to the agreed weight. In an action for the price the defendant relied on the fact the apples were not shipped at the time stated. Held, that the defense must fail, both because the statement in question was made merely to identify the particular shipment, and the delay was an immaterial variation which gave no privilege of rejecting the goods, and because, if available at all, this objection was waived by failure to assert it immediately on learning the facts. DeHoff v. Aspegren (1917, App. T.) 166 N. Y. Supp. 1019.

In the case of a charter party a statement in the contract that the ship had sailed "three weeks ago" has been held to be a warranty and not a mere representation. Ollive v. Booker (1847) 1 Exch. 416; accord, Oppenheim v. Fraser (1876, Q. B. Div.) 34 L. T. Rep. N. S. 524 ("now at Rangoon"). A warranty has been defined, in effect, as a statement descriptive of the subject-matter or of some material incident, such as the time or place of shipment, equivalent to an express condition precedent, so that if found to be untrue in fact, it justifies the other party in repudiating the entire contract. See Norrington v. Wright (1885) 115 U. S. 188, 203; 6 Sup. Ct. 12, 14, and cases above cited. Whether such a statement is to be regarded as a warranty or a mere representation is treated as a question of construction, depending on the court's judgment of the materiality of the statement. In cases involving so-called "implied conditions" it is generally declared that time is presumptively of the essence in all mercantile contracts. See for example Norrington v. Wright, supra; Salmon v. Boykin (1887) 66 Md. 541, 7 Atl. 701. It is obvious that this rule, followed blindly, would often produce unjust results. In most of the cases decided under it, however, the delay was in fact substantial and serious; and it is to be hoped that the law will eventually reject the artificial theory of implied "conditions" where no condition is expressed, and treat the defense as depending simply on the seriousness of the breach. See Williston, Sales, sec. 453, and compare the discussion of Helgar Corp. v. Warner's Features, Inc. (1918, N. Y.) 58 N. Y. L. J. 1780, on page 697 of this number. But such an equitable doctrine is hardly applicable to the case of express conditions. The intent should therefore be very clear before an ambiguous phrase is construed as equivalent to such a condition. Indeed since the notion of a "warranty" as virtually amounting to an express condition has been chiefly confined to insurance and maritime contracts, the courts might well decline to extend it any further. The result in the principal case is therefore to be commended, though the decision would be more satisfactory had it been rested squarely on the first ground.

Taxation—Inheritance and Transfer Taxes—Shareholders' Interest in Massachusetts Business Trust.—The testator died domiciled in Massachusetts; part of the estate consisted of shares in a business trust whose trustees were also domiciled there; the trust property was a factory and materials situated in New Hampshire. Objection was made to the assessment of the Massachusetts succession tax on so much of the shares "as constituted an equitable interest in foreign real estate." Held, that where the trust fund was ultimately to be converted into personalty for distribution, and where it from the beginning consisted of mixed realty and personalty, it must be treated as converted into personalty from the beginning, so that a succession tax at the domicile of the decedent shareholder was valid. Dana v. Treasurer & Recur. Genl. (1917, Mass.) 116 N. E. 941. See Comments, p. 677.

TORTS—INDUCING BREACH OF CONTRACT—ENGAGEMENT TO MARRY.—The defendants maliciously, and for the purpose of advancing their own pecuniary interests, induced the plaintiff's fiancé to break his engagement with her. *Held*, that these facts gave the plaintiff no right of action. *Homan v. Hall* (1917, Neb.) 165 N. W. 881.

Authorities in point are scarce and unsatisfactory. The court relies chiefly on a passage in Cooley, which in turn cites no authority. Cooley, Torts (2d ed.) 277. The leading case for the doctrine that inducing a breach of contract may constitute a tort is Lumley v. Gye (1853, Q. B.) 2 E. & B. 216. There are dicta in English cases, containing elaborate discussions of this doctrine, which ridicule the idea of recovery in a case like the principal case. Allen v. Flood (1897, H. of L.) [1898] A. C. 1, 35; Glamorgan Coal Co. v. South Wales Miners' Federation (C. A.) [1903] 2 K. B. 545, 577; National Phonograph Co. v. Edison Bell Cons. Phonograph Co. (1906, Ch. D.) [1908] 1 Ch. 335, 350. Finally, there is an American case denying recovery, which also based its decision on the passage in Cooley. Leonard v. Whetstone (1903) 34 Ind. App. 383, 68 N. E. 197. The doctrine of Lumley v. Gye has been accepted by the United States Supreme Court and by most of our states, with some statutory modifications. Angle v. Chicago, St. Paul, etc., Ry. Co. (1893) 151 U. S. 1, 14 Sup. Ct. 240, and cases collected in note, Ann. Cas. 1916 E. 608. At first the doctrine was applied only to labor contracts, but the present tendency is to extend its scope. Moody v. Perley (1915, N. H.) 95 Atl. 1047. With reference to actions for interfering with engagements of marriage, it is submitted that there is room for analysis and differentiation with regard to the motives of the defendant and the relationship between the persons concerned. The allowance of the action must ultimately rest on considerations of policy. While it is conceivable that recovery against parents or near relatives acting in good faith from disinterested motives ought to be denied on the ground of privilege, it is difficult to see why recovery should not be allowed against persons standing in no such relation and

actuated by malice or self-interest. Compare the discussion of privilege and motive in tort actions in (1917) 27 YALE LAW JOURNAL, 263.

TRUSTS—RESULTING TRUSTS—Indirect Partial Payment by Wife for Land Conveyed to Husband.—The defendant wife inherited from her father a specific portion of an estate. She did not actually receive the land, but the value thereof was credited to her husband on a purchase of land from the estate by him and in his name. Held, that there was a resulting trust in the land in favor of the wife for a proportionate undivided interest. Hinshaw v. Russell (1917) 280 Ill. 235, 117 N. E. 406.

The general rule is that where two or more pay the consideration and the conveyance is taken in the name of only one, a resulting trust is created in favor of the others pro tanto. Barrows v. Bohan (1874) 41 Conn. 278; Moultrie v. Wright (1908) 154 Cal. 520, 98 Pac. 257; 1 Perry, Trusts (6th ed.) sec. 126. Though the wife paid no money actually in the principal case, the analogy seems close enough to warrant the extension of the general rule to such cases. As regards the relationship, there is a presumption of a gift where one pays for a conveyance to another whom he is under a duty to support. Dyer v. Dyer (1788, Exch.) 2 Cox Ch. 92; Bailey v. Dobbins (1903) 67 Neb. 548, 93 N. W. 687. But where the conveyance is to the husband and payment is made by the wife, this presumption does not apply. Silling v. Todd (1911) 112 Va. 802, 72 S. E. 682; In re Mahin's Estate (1913) 161 Ia. 459, 143 N. W. 420. While the conclusion in the principal case seems sound, the language of the opinion leaves much to be desired. For example, the court quotes with apparent approval: "This trust arises, not from a contract or agreement of the parties, but from their acts," and "Its very name implies that it is independent of any contract, and is raised by the law itself upon a particular state of facts." Strictly speaking a resulting trust of the kind under consideration is based upon a presumption that the one furnishing the consideration for the conveyance intended that the property should be held for him. This presumption may be rebutted by evidence showing that this was not the intention. H. F. Stone, Resulting Trusts and the Statute of Frauds (1906) 6 COLUMBIA L. REV. 326, 330. Much confusion has proceeded from a failure to distinguish clearly between such trusts, based on assumed intention, and constructive trusts, created by the law regardless of intention. The principal case helps little to clear up this confusion.

WILLS—Incorporation by Reference—Preventing Lapse of Power of Appointment by Incorporating Donee's Will.—The testator's will gave his wife a power of appointment and provided that in case they should die in a common disaster his will should be construed on the assumption that she survived him. The wife executed a will at the same time, attempting to exercise the power. Husband and wife were lost at sea with the Lusitania. Held, that the property passed under the husband's will to the person in whose favor the wife had attempted to exercise the power, her will being incorporated by reference into his. Crane, McLaughlin and Cuddeback, JJ., dissenting. In re Fowles' Will (1918, N. Y.) 118 N. E. 611. See Comments, p. 673.

WILLS—LEGACIES CONDITIONED ON NOT CONTESTING WILL—WAIVER OF FOR-FEITURE.—A will created a trust for the testator's children and directed that if any child should contest the probate or operation of the will, the provision for such child should be void and his share should pass to the other children. All the children appealed from the order of probate on the ground that the testator was of unsound mind. Later they abandoned this contention and stipulated that the only question to be decided was one concerning the construction of a certain part of the will. In a later suit by the trustee to obtain a declaration of the validity of the trust and a construction of the will, the children requested that the trust be carried out. Held, that in the absence of evidence of probable cause for the contest the beneficial provisions for the children were forfeited, that such forfeiture could not be waived, and that the property in the hands of the trustee must be distributed as intestate estate. South Norwalk Trust Co. v. St. John (1917) 92 Conn. 168, 101 Atl. 961.

Testators frequently try to prevent litigation by directing a forfeiture of the interest of any beneficiary who shall contest the will. The validity of such a provision appears not to have been previously determined in Connecticut. Nor are the authorities elsewhere very numerous or entirely consistent. Rood, Wills, secs. 616-622. Generally American courts have enforced such conditions without regard to whether there is a gift over of the forfeited legacy or devise. Estate of Hite (1909) 155 Cal. 436, 101 Pac. 443; but see Matter of Wall (1912, N. Y. Surr.) 76 Misc. 106, 136 N. Y. Supp. 452. Of course a suit to obtain a construction of the will does not violate the ordinary forfeiture clause. Black v. Herring (1894) 79 Md. 146, 28 Atl. 1063. But a contest as to testamentary capacity, undue influence, or the formal execution of the will clearly falls within the literal terms of the condition. Nevertheless a substantial conflict of authority exists whether a forfeiture should be enforced when such contest is carried on in good faith and on reasonable grounds. The principal case adopts the argument that to give effect to the condition under such circumstances would tend to intrench fraud and undue influence, and would be contrary to a sound public policy. Friend's Estate (1904) 209 Pa. St. 442, 58 Atl. 853, 68 L. R. A. 447, accord; Estate of Miller (1909) 156 Cal. 119, 103 Pac. 842, contra. But as the record contained no evidence whether the contest was begun in good faith and with probable cause, the actual decision was in favor of forfeiture. In holding further that such forfeiture could not be waived, the court expressly refused to follow a Tennessee decision directly in point. Williams v. Williams (1885, Tenn.) 15 Lea, 438. No other case has been found raising precisely this question.

It may be suggested, however, that not only on the question of waiver, but with regard to the effect of the forfeiture clause itself, the case called for further analysis. The question of waiver would seem to depend on whether the provision for forfeiture is to be construed as a common law condition subsequent, like a condition for re-entry, which would require some action on the part of the testator's heirs to enforce the forfeiture, and hence, it would seem, could be waived, or as a limitation on the estate created which, if it took effect at all, would be self-executing. In the principal case the language of the forfeiture provision seems most consistent with a limitation attached to each child's share by way of executory devise to the other children. But the evident general intent of the testator would require that if more than one child contested the will, each one so contesting should not only forfeit his original interest, but should be excluded from any share in the executory devise. What is to happen, then, when all the children join in the contest? Failure of an executory devise does not necessarily mean that the prior estate continues. Doe v. Eyre (1848, Exch. Ch.) 5 C. B. 713; Robinson v. Wood (1858) 27 L. J. Ch. 726; O'Mahoney v. Burdett (1874) L. R. 7 H. L. 388. Where the property is realty and the prior estate is in fee, the doctrine supported by the authorities just cited is perhaps open to criticism, but in other cases there seems no reason to doubt that the testator could make a limitation by which the interests first given would be ipso facto terminated by the happening of the condition, whether or not the gift over

could take effect. See Gray, Perpetuities (3d ed.) secs. 250, 78. This was in substance, if not in terms, the construction adopted by the Connecticut court. The result, however, was to give to the children as heirs, in fee simple and free of any trust or future limitation, the same property which they had forfeited as equitable legatees subject to gifts over on failure of issue. It may be conceded that the testator apparently did not consider the possibility of all the children contesting; but it seems more in accord with his probable general intent to conclude that the forfeiture was not to take effect unless there was some child qualified, by refraining from contest, to receive the gift over. It is suggested that this result could be accomplished, independently of any waiver, and in strict accord with legal principles, by holding that the estates first given were to be cut short only by the operation of the executory devises, and that since an express or implied condition of all the executory devises had failed, the prior estates continued. Cf. Harrison v. Foreman (1800, Ch.) 5 Ves. 207; Jackson v. Noble (1838, Ch.) 5 Keen 590; Hodgson v. Halford (1878, Eng. V. C.) 11 Ch. D. 959; Drummond's Ex'r. v. Drummond (1875, Ch.) 26 N. J. Eq. 234.

Workmen's Compensation Act—Conflict of Laws—Foreign Contract of Employment.—A workman employed in New York for labor within that state was subsequently sent to work in Connecticut pursuant to a special arrangement as to wages entered into with his employer at the latter's New York office. Nothing was said about compensation in case of injury. The workman was injured at his work in Connecticut. *Held*, that the Connecticut Workmen's Compensation Act was applicable. *Banks v. Albert D. Howlett Co.* (1918, Conn.) 102 Atl. 822.

This case presents a complication of two vexed questions, both of which would be avoided under the tort rule of construction of workmen's compensation acts, adopted in Gould's Case (1913) 215 Mass. 480, 102 N. E. 693. The first relates to the rule applicable to a contract where a place of performance distinct from the place of making is contemplated. In applying the rule of the place of performance, the principal case follows the established Connecticut doctrine. Chillingworth v. Eastern etc. Co. (1895) 66 Conn. 306, 33 Atl. 1009. The second question involves the choice between two possibly applicable compensation statutes, where an employment transcends state lines. In those jurisdictions where the contract theory of these statutes is adopted, the authorities are uniform in applying the statute of the forum to extra-territorial injuries arising under domestic contracts. Post v. Burger (1916) 216 N. Y. 544, 111 N. E. 351; Kennerson v. Thames Towboat Co. (1915) 89 Conn. 367, 94 Atl. 372; Rounsaville v. Central Ry. Co. (1915, Sup. Ct.) 87 N. J. L. 371, 94 Atl. 392; Grinnell v. Wilkinson (1916, R. I.) 98 Atl. 106. The inverse case of local injuries arising under foreign contracts has given rise to three divergent lines of decisions. Sometimes the lex loci contractus has been consistently held to govern, and the foreign statute applied. Schweitzer v. Hamburg-American Line (1912, N. Y. Trial T.) 78 Misc. 448, 138 N. Y. Supp. 944. See Kennerson v. Thames Towboat Co., supra. In one state it is held that the sending of the employee across state lines without dissent expressed pursuant to the terms of the compensation act of the new place of employment, creates a new contractual or quasi-contractual relationship, governed by the law of the latter place. American Radiator Co. v. Rogge (1914, Sup. Ct.) 86 N. J. L. 436, 92 Atl. 85, 94 Atl. 85. Other courts, while admitting that the foreign statute would be controlling if applicable, have resorted to the theory last mentioned, when the lex loci contractus happened not to possess an applicable statute. Douthwright v. Champlin (1917) 91 Conn. 524, 100 Atl. 97. By basing its decision on the finding of a real novation at the beginning of the work in Connecticut, the

principal case consistently adheres to the contract theory of its Compensation Act. Its intimation that the conclusion reached must be limited to such a situation of fact appears to involve a repudiation of American Radiator Co. v. Rogge, supra, which nevertheless is cited in the opinion with apparent approval. It also leaves Douthwright v. Champlin, supra, little ground for support. Manifestly the absence of a statute applicable to the contract in its inception has no tendency to show an intention to assume a new contractual relationship from the mere transit across state lines. To ascribe such a result is of course merely a verbal subterfuge for a plain switch to the tort theory of the local act. If the failure to express dissent from the latter is an expression of assent to its provisions, this can follow only from the already established premise that the act is applicable to all employment, irrespective of origin, within the limits of the state. Such applicability, however, can be established only on the theory that the statute enunciates a rule of policy applicable territorially after the manner of the law of torts. For a discussion of Douthwright v. Champlin, supra, see (1917) 27 YALE LAW JOURNAL, 113.

Workmen's Compensation Act—Injury Due to Third Person's Fault—Subrogation of Employer to Rights of Employee.—An employee sustained an injury in the course of his employment due to the negligence of one not his employer. He filed a claim under the Workmen's Compensation Act, accompanied, as required by the Act, by an assignment of any claims against third persons. After allowance of his claim but before payment of the award, he brought this action against the third person responsible for the injury. While the action was pending, the defendant, through the Workmen's Compensation Commission, settled with the employer under the assignment. Thereafter the plaintiff applied to the Commission to withdraw his claim against the employer, and was allowed to do so. Held, that the assignment became effective when executed, and even if it could be avoided by withdrawal of the claim without the employer's consent, the defendant, having paid the assignee while the assignment was in effect, was protected by such payment against further liability. Sabatino v. Crimmins Const. Co. (1918, N. Y. Trial T.) 168 N. Y. Supp. 495.

Except in a few states, the statutory right to compensation given to an injured employee by the workmen's compensation acts does not in itself either impair or add to his common law rights against third persons. Lester v. Otis Elevator Co. (1915, N. Y.) 169 App. Div. 613, 155 N. Y. Supp. 524. He has an election of remedies, but having chosen one, cannot assert the other. Turnquist v. Hannon (1914) 219 Mass. 560, 563; 107 N. E. 443, 444; Miller v. New York Ry. Co. (1916, N. Y.) 171 App. Div. 316, 157 N. Y. Supp. 200; but see Houlihan v. Sulzberger & Sons Co. (1917, Ill.) 118 N. E. 429. And where he has elected to proceed against the employer, the latter has not, in the absence of express statutory provision, any recourse against the real tort-feasor. Inter-State Tel. Co. v. Public Service Elec. Co. (1914, Sup. Ct.) 86 N. J. L. 26, 90 Atl. 1062. In New York and a few other states there are express provisions by which an employer who is compelled to pay is allowed recourse against the person actually at fault. See Sandek v. Milwaukee Elec. Ry. & Lt. Co. (1916) 163 Wis. 109, 157 N. W. 579; Grand Rapids Lumber Co. v. Blair (1916) 190 Mich. 518, 157 N. W. 29; Otis Elevator Co. v. Miller (1917, C. C. A. 8th) 240 Fed. 376. The time when this statutory right becomes fixed in the employer depends, of course, on the differing phraseology of the statutes. The decision in the principal case seems a sound construction of the statute governing the case. A subsequent amendment has dispensed with the requirement of an assignment executed by the claimant, providing that "the awarding of compensation shall operate as an assignment of the cause of action." The statutes of a few other

states go still further. The Illinois act, for example, in cases where all parties have accepted the act, limits the employee to his claim for compensation against the employer, transferring to the latter, without any election by the employee, the common law rights of the employee against third persons, to the extent necessary to reimburse the employer. For a recent case construing and upholding these provisions, see Friebel v. Chicago City Ry. Co. (1917, Ill.) 117 N. E. 467. See also Matheson v. Minneapolis St. Ry. Co. (1914) 126 Minn. 286, 148 N. W. 71, accord, and cf. Peet v. Mills (1913) 76 Wash. 437, 136 Pac. 685.

### **CURRENT DECISIONS**

ALIENS—NATIONALITY—EXPATRIATION.—The petitioner, a French citizen, born in 1878, had completed his active military service in France. By law he automatically passed into the reserve army in 1902 and into the territorial army in 1912. In 1903 he removed to Switzerland and became naturalized there in 1909, without having obtained the consent of the French Government. The French law provides that such consent is necessary for expatriation up to the time a Frenchman passes into the territorial army. The petitioner was called into the French army in 1915, and claimed to be no longer a French citizen on the ground that at least after 1912, when by law he passed into the territorial army, governmental consent to expatriation became unnecessary. Held, that his expatriation was void ab initio and that the defect was not cured by the fact that after 1912 he could have expatriated himself by naturalization abroad without the French Government's consent. In re Coutarel (Tribunal Civil des Sables d'Olonne, May 30, 1916), reported in (1917) 44 Clunet, 188.

Bankruptcy—Preferences—Recording Within Four Months' Period.—As security for a contemporaneous loan the debtor executed a mortgage upon his stock of merchandise at Macon, Georgia, on February 16, 1914. The mortgage was not recorded until August 20, 1914, at a time when the mortgagee knew of the debtor's insolvency. The following day an involuntary petition in bankruptcy was filed against the debtor. Recording was not fraudulently delayed and prior thereto no other liens were fixed upon the property. The local statute (Ga. Code 1910, sec. 3260) imposed the requirements of recording only in favor of a creditor who fixes a lien upon the property before the recording takes place. The trustee in bankruptcy sought to avoid the mortgage as a preferential transfer by virtue of sections 60b and 47a of the Bankruptcy Act, as amended. Held, that the mortgage was valid, since no one concerned in the distribution of the estate held rights superior to the mortgage prior to its record. Martin v. Commercial Nat. Bank (1918) 38 Sup. Ct. 176.

While previous decisions of the Supreme Court had foreshadowed this decision, it is satisfactory to have the precise point determined by the court of final authority.

Conflict of Laws—Jurisdiction For Divorce.—A German subject had married a French woman in France in 1911, where the matrimonial domicile was located. On the outbreak of war, he deserted her to join the armies of Germany. The woman brought an action for divorce in France. According to the law of Germany and of France, she became a German subject by marriage. The court appeared uncertain whether the case should be governed by the Hague Convention of June 12, 1902 (in force in Germany but abrogated in France), and whether under that Convention jurisdiction in divorce was concurrent between the courts of the country of nationality and those of the domicile or was vested solely in the national courts, provided the law of the nationality excluded the jurisdiction of the courts of the matrimonial domicile. Held, that the French courts of the place where the marriage was celebrated and of the matrimonial domicile would assume jurisdiction (without examining whether the German law excludes the jurisdiction of the courts of the matrimonial domicile, or whether there were courts in Germany competent

to entertain an action for divorce when the wife was domiciled and resident abroad), since otherwise under existing war conditions the woman would find herself without access to competent judges and would suffer a denial of justice. Hamacher v. Duval (Civil Tribunal of Boulogne, March 19, 1915), reported in (1917) 44 CLUNET, 179.

Constitutional Law—Due Process of Law—Error of Trial Court.—In an action of ejectment brought in a federal district court, the trial judge received in evidence, as tending to establish title in the plaintiff, the records of certain previous suits resulting in judicial sales of tracts of land belonging to the predecessors in title of the present defendant. The plaintiff claimed title through these proceedings. Upon appeal to the Supreme Court of the United States, the defendant contended that the premises in question were not involved in the previous suits, and also that the defendant was not bound by the decrees in those suits, and that the admission of such incompetent evidence and the rendering of judgment for the plaintiff on the strength of it were such error as to amount to a violation of the defendant's rights under the "due process clause" of the Fifth Amendment. Held, that, whether or not the evidence was incompetent, "error of a trial judge in admitting evidence or entering judgment after a full hearing does not constitute a denial of due process of law." Jones v. Buffalo Creek Coal & Coke Co. (1917, U. S.) 38 Sup. Ct. 121.

It is to be noted that the trial court here was a federal court. For a discussion of denial of due process under the Fourteenth Amendment by errors of a state court, see (1917) 27 YALE LAW JOURNAL, 121. The fact that this case comes up under the Fifth Amendment should not, without more, differentiate it, since, in respect to what constitutes due process, the two amendments should be interpreted identically. Taylor, Due Process of Law, sec. 123; Twining v. New Jersey (1908) 211 U. S. 78, 101; 29 Sup. Ct. 14, 20.

CONTRACTS—EFFECT OF "WAR CLAUSE" PROVIDING FOR SUSPENSION IN TIME OF WAR.—In a contract for the sale and delivery of merchandise, concluded prior to the outbreak of war, there was a clause providing that the vendor had the privilege of suspending delivery if war should break out, and, after a certain period, of terminating the entire contract. In an action for failure to make deliveries, the defendant, relying on this clause, alleged the fact that war had supervened. The plaintiff replied that the defendant's refusal to carry out the contract was prompted by business reasons. Held, that the clause was valid and that the defendant's motive in cancelling the contract was immaterial. Milne & Co. v. Phosphates Tunisiens (Court of Paris, 3d Chamber, July 27, 1916), reported in (1917) 44 Clunet, 167.

A similar contract containing the "war clause" above mentioned was concluded after the outbreak of war. The vendor, relying upon the clause, broke the contract. Held, that the condition provided for in the "war clause" was inoperative, inasmuch as the war actually prevailed when the contract was made. Doughty Sons and Richardson v. Phosphates Tunsiens (Court of Paris, 3d Chamber, July 27, 1916), reported in (1917) 44 Clunet, 171.

For a discussion of a recent American case involving a somewhat analogous contract see (1918) 27 YALE LAW JOURNAL, 408.

Corporations—Prohibition Against Practicing Law—Furnishing Attorney to Draft Will.—Section 280 of the New York Penal Law makes it unlawful for a corporation to practice law or "to furnish attorneys or counsel or to render legal services of any kind in actions or proceedings of any nature or in

any other way or manner." The defendant trust company advertised that it would give advice concerning the making of wills and the appointment of executors. When an application was made for such advice, a clerk of the defendant summoned by telephone an attorney retained by the defendant, who drafted a will for the customer, making the defendant executor. No charge was made to the customer for this service. Held, that the defendant was guilty of a violation of the statute. People v. People's Trust Co. (1917, App. Div.) 167 N. Y. Supp. 767.

The statute is prolix and blindly drawn and the meaning of the words above quoted is obscured rather than aided by reading them in their context. Some parts of the section would seem to indicate that it referred only to services or advice in connection with suits or proceedings before courts or other tribunals. Other provisions, however, tend to support the broader interpretation which the court gave to the section. As applied to the particular case the statute at first sight may appear somewhat drastic. It was obvious, however, that the inducement to the defendant to make such an arrangement was the hope or expectation of being named as executor in return for its courtesy to the customer, and the court justifies the prohibition on the ground that the situation thus created did not conduce to the undivided allegiance which a client should receive from his attorney.

EVIDENCE—ADMISSIONS—TRANSFER OF PROPERTY AS ADMISSION OF LIABILITY.— The plaintiff sued for personal injuries caused by the negligence of the driver of the defendant's jitney. The defendant claimed that the driver at the time was on "a frolic of his own," and was not acting within the scope of his employment in driving over the route where the accident happened. The plaintiff brought out by cross-examination of the defendant that he transferred his property to his wife immediately after the accident. Held, that the evidence was admissible as evidence of the defendant's consciousness that he was legally liable. Chaufty v. DeVries (1918, R. I.) 102 Atl. 612.

As indicated by the cases cited in the opinion, there is a conflict of authority on the admissibility of such evidence. It is true that a transfer of property might be made without any consciousness of liability, as for example, simply to avoid the inconvenience of having the property tied up during a threatened suit. But on the other hand, the defendant has an opportunity to explain his conduct, and while the court should no doubt proceed with caution, and each case should be considered on its own facts, it would seem that in many cases such evidence might have sufficient probative value to justify its admission under proper instructions. For a discussion of the admissibility of verbal admissions of liability see (1917) 27 YALE LAW JOURNAL, 277.

INTERNATIONAL LAW—TRADING WITH THE ENEMY.—Section 1 of the German legislative decree of Sept. 30, 1914, forbids payments to Great Britain or her colonies, directly or indirectly. The defendant, a partner (nationality not stated) of a firm in Punta Arenas, Chile, while resident in Germany, directed his firm in Chile by telegram to pay a debt owed by the firm to a British creditor. Held, that the defendant in Germany in effect directed the transfer of a part of his partnership funds located in Chile, to Great Britain, and hence was guilty of violating the decree mentioned. In re Elkan, reported in (1917) 44 CLUNET, 255, from an account of the case tried in the court of first instance (probably Amtsgericht) of Berlin, given in the Frankfurter Zeitung of June 19, 1916.

The prosecution contended that the decree prohibited any act which might increase the national resources of Great Britain, and that the prohibition

extended to all persons within the territorial jurisdiction of Germany, whether nationals or aliens, neutral or enemy; and that the legislative decree applied not only to the transfer of money from Germany, but from any foreign country as well. The defense contended that German legislation could not prohibit valid legal relations between two foreign countries or the fulfillment of obligations contracted by subjects of foreign states not to be performed in Germany. The court took the view that one element of the offense, the direction to pay, had taken place within the jurisdiction of Germany, and that this sufficed to bring the defendant within the penalty fixed by the decree.

LIMITATION OF ACTIONS—SET-OFF OF BARRED DEBT BY ADMINISTRATOR AGAINST DISTRIBUTEE.—The intestate at the time of her death had a claim against her son which was barred by the statute of limitations. One of the distributees brought suit to settle the estate, contending that the debt should be charged against the son's distributive share. Held, that the barred debt was not properly the subject of set-off against the son's share of the estate. Luscher v. Security Trust Co. (1918, Ky.) 199 S. W. 613.

By this decision Kentucky is added to the growing list of states which refuse to permit the share of a legatee or distributee to be reduced by a statute-barred debt—contrary to the English decisions and those of certain American courts. For a discussion of the subject see (1916) 26 YALE LAW JOURNAL, 236.

NEGLIGENCE—LIABILITY OF MANUFACTURER TO THIRD PARTIES—FAILURE TO WARN OF DETERIORATION OF PRODUCT.—The defendant manufactured a food product for infants and invalids which he knew or should have known was likely to deteriorate by time or manner of keeping after leaving his hands. The infant plaintiff's mother purchased a can of the food from a retailer to whom the defendant had sold it. The plaintiff was injured by eating the food, which had deteriorated. Held, that the defendant was chargeable with negligence in failing to affix to the package the date of manufacture and the time during which the ingredients might safely be used, or the manner in which they should be handled and preserved to prevent deterioration. Rosenbusch v. Ambrosia Milk Corporation (1917, N. Y. App. Div.) 168 N. Y. Supp. 505.

This is an interesting and novel, but it is believed a sound, extension of the principles upon which manufacturers are held liable in tort to remote vendees or consumers of the manufactured product. See (1917) 27 YALE LAW JOURNAL, 281.

Negligence—Proximate Cause—Voluntary Intervention of Plaintiff's Intestate.—The defendant's driver left its horse untied near a railroad platform. The horse wandered on to the platform and fell. The station master, the plaintiff's intestate, helped the horse to its feet and led him off the platform but did not tie him. The horse wandered back upon the platform and again fell. In attempting a second time to raise the horse the station master received injuries which proved fatal. A judgment dismissing the complaint was affirmed by the Appellate Division. Held, that the intervention of the deceased did not prevent the defendant's negligence from being the proximate cause of the accident and that the case should have been submitted to the jury. Chase and Cuddeback, JJ., dissenting. Donnelly v. H. C. & A. I. Piercy Contracting Co. (1918, N. Y.) 118 N. E. 605.

On the general subject of liability to volunteers, see (1918) 27 YALE LAW JOURNAL, 415.

PATENTS—RESTRAINT OF TRADE—PRICE RESTRICTIONS ON RESALE OF PATENTED ARTICLE.—The principal complainant was the owner of certain patents, under which it manufactured graphophones, records, etc.; the other complainant was its selling agent. The complainants undertook to control the resale prices of the principal complainant's products through contracts made by the selling agent with all purchasers of the products, by which such purchasers agreed to maintain the resale prices established from time to time by the complainants. The respondent, having signed such a contract, resold at less than the established prices goods purchased under the contract. The complainants sued in a federal District Court for an injunction against further violations of the resale provisions of the contract. Held, that the price-fixing contract relied on was void and unenforcible. Holmes and Van Devanter, JJ., dissenting. Boston Store of Chicago v. American Graphophone Company (March 4, 1918) U. S. Sup. Ct. Oct. Term, No. 363.

The actual decision adds little to what had been settled by prior cases, but the opinion is interesting for its review and interpretation of the previous decisions, and for the very broad statement of the rules which it deduces from them. On the general subject see (1917) 27 YALE LAW JOURNAL, 288, and other references there given; also (1918) 27 ibid. 397. Mr. Justice Holmes persists in the dissent which he has registered in all the resale cases. Mr. Justice Brandeis, on the other hand, filed a brief concurring opinion, stating that whether such contracts should be permitted was an economic question, which should be decided by consideration of industrial and commercial facts, rather than established legal principles; that his personal views on the question were not in accord with those of the majority; but that he considered the law as settled for the court by the series of previous decisions relied on by the majority. Besides pointing out that a remedy had already been sought through application to Congress (evidently referring to a pending bill for which he himself, before his appointment to the bench, was one of the sponsors) he further intimated that relief might possibly be given by the Federal Trade Commission.

PLEDGES—Loss of Lien—Surrender of Bill of Lading by Pledgee on Acceptance of Draft.—The petitioner discounted a time bill drawn by a consignor of goods upon the consignee, the bill of lading being attached to the bill of exchange. The bill was duly accepted by the consignee and the bill of lading was surrendered to him. The acceptor and the drawer of the bill both became insolvent, and the former returned to the latter the specific goods in question in part satisfaction of general claims due the latter. Held, that by surrendering the bill of lading to the consignee upon acceptance of the bill of exchange, the petitioner lost his lien upon the specific goods and had no equitable lien thereon in case they were returned to the consignor. Helburn Thompson Co. v. All Americas Merc. Corp. (1917, App. Div.) 167 N. Y. Supp. 711.

The result of this decision is that the consignor is now in possession of both the goods and the price. There is no injustice in this, however, for the equity of the petitioner is no stronger than that of any other creditor of the consignor. He surrendered his lien by delivery of the bill of lading, as was contemplated originally. Thereafter he has no more interest in these goods than in any other goods of the consignee which might have been applied on the latter's indebtedness to the consignor.

PRACTICE—DECLARATORY JUDGMENTS—POWER TO DECLARE RIGHTS WITHOUT GRANTING OTHER RELIEF.—The petitioner was the devisee under the will of her father of certain real estate, devised to her, "her heirs and assigns forever." The

testator by his will ordered and directed that the devisee should at her expense provide for the maintenance and support of her two brothers during their natural lives. The petitioner sought to have the court declare, under a statute of 1915 giving "any person claiming a right cognizable in a court of equity, under a deed, will, or other written instrument [the privilege of applying] for the determination of any question of construction thereof," that she was seized in fee simple of the land, free from any charge thereon arising out of the direction to support her brothers. She asked for no other relief. Held, that the petitioner was entitled to obtain a declaration of her rights under the will, even though not incidental to a request for equitable relief, as the statute was not meant to be merely declaratory of existing law, but to be remedial. In re Ungaro's Will (1917, N. J. Ch.) 102 Atl. 244.

This appears to be one of the few American cases in which a departure has been recognized from the orthodox view that the aid of a court for the purpose of construction or for the purpose of declaring rights cannot be invoked in the absence of any concomitant request for coercive relief. An article by Professor Borchard, of the Yale School of Law, on the subject of declaratory judgments from the point of view of comparative law will be published in an early number of the Yale Law Journal.

Public Service Companies—Requirement of Unprofitable Service—Due Process of Law.—After a proper hearing, the New York Public Service Commission ordered the plaintiff in error, a gas company, to extend its mains so as to supply a thriving district located a mile and a half beyond its nearest mains but within the territory included in its franchise. The company claimed that the order was confiscatory, and in violation of the Fourteenth Amendment, since the extension, in itself, would not yield a fair return, though it was not claimed that the general business of the company would not continue profitable. Held, that no constitutional right of the plaintiff in error was violated by the order. People ex. rel. New York & Queens Gas Co. v. McCall (1917) 38 Sup. Ct. 122.

The soundness of the decision itself is hardly open to controversy. The language of the court, however, to the effect that public service companies may not "pick and choose," serving only the most profitable portions of the territory covered by their franchises, and leaving the rest without service, obscures the real issue, which is not between the company and the applicants for service, but between the different portions of the community. It would be more accurate to say that within reasonable limits, for the good of the whole community, one portion must often pay temporarily, and sometimes permanently, a part of the cost of serving the rest. Unless the company could thus shift the burden, the requirement of the unprofitable service would be clearly confiscatory. The application of the principle depends, of course, on questions of fact, of reasonableness, and of balance of public benefit,—typically the sort of questions which public service commissions are created to determine

## **BOOK REVIEWS**

The Law of Conversion. By Renzo D. Bowers. Published by Little, Brown & Co., Boston. 1917. pp. 1x, 583.

No book can please all men; it would seem praise enough to most to say that they do one thing well. Mr. Bowers has arranged his book more handily for reference than has any other legal author whose work we have seen—no slight advantage in a work intended primarily for the practitioner. His table of contents is remarkably clear and full; his digesting is reasonably accurate; he cites American decisions plentifully and, in the main, to the point. If in his treatment he does not give us the benefit of that study of legal history which proved to him that his subject was "of rather ancient origin," it may be he makes up for that by industry in collecting the cases in this country

The thought of a book on the law of conversion was a happy one. It is a vexed and troublesome field, both in its what and in its why. It is well worth careful treatment as a unit. And we agree with Mr. Bowers that the principles involved have become no less distinct and definite because modern procedure has merged trover with the simple civil action; our regret is rather that those principles have become no more distinct and definite by reason of his book. It is many years now since Bishop hazarded his view that one desirable feature of a text-book was to grapple with difficulties, "to overcome them if it can, and to state the result, either that the principle is so and so, or that the author cannot ascertain what it is." Co-ordination, clean presentation of difficulties, reasoned solution of them, are strikingly rare in Mr. Bowers' treatise. But when in the future the true work on the law of conversion appears, its author will have found much of the drudging material-collection done for him in advance; meanwhile the present volume will serve the practicing lawyer as a ready guide to the authorities.

KARL N. LLEWELLYN

A Treatise on the Law of Inheritance Taxation. By Lafayette B. Gleason and Alexander Otis. Published by Matthew Bender & Co., Albany. 1917. pp. lviii, 836.

Law-books do not as a rule present striking points of individuality. This treatise is, however, somewhat of an innovation in several ways. For one thing, the absence of footnotes gives the pages an appearance unfamiliar to one accustomed to the ordinary law-book. The absence of notes does not indicate an omission of the citation of authorities; these are simply inserted in the text at the places where the note-figures would normally appear. This innovation is clearly an improvement in the matter of eliminating the eye-strain involved in transferring the attention from the middle to the bottom of the page and back again; on the other hand, it tends to some extent to break the continuity of the text. It will be interesting to observe how this feature is received by the legal profession.

Another point of departure from the traditional form of a law-book appears in the table of cases. Instead of being arranged in a single alphabetical list, it is split up into thirty-seven different alphabets arranged by jurisdictions, beginning with New York and ending with the United States and England.

Such an arrangement is no doubt useful from the standpoint of one interested primarily in a particular state, but it might cause considerable inconvenience to a lawyer looking for a particular case with which he is familiar by name and subject-matter, but not by jurisdiction beyond the fact that it was a western case.

Apart from such marks of individuality in the matter of form, this treatise would attract attention by the clearness and simplicity of its style and by frequent evidence that consideration has been given to the economic as well as to the legal principles involved in the subject. The general outline of the work is logical and appears to be carefully worked out in detail. To anyone interested in inheritance taxes, whether as lawyer or as layman, this treatise forms an important addition to the literature of the subject.

W. H. McClenon

WASHINGTON, D. C.

Joseph H. Choate: New Englander, New Yorker, Lawyer, Ambassador. By Theron G. Strong. Published by Dodd, Mead & Co., New York. 1917. pp. xvii, 390.

The author of this biography was well qualified for the work that he undertook. Himself of legal lineage, of New England stock, and of high standing at the New York Bar, he had already trained his pen when writing his reminiscences. In his Landmarks of a Lawyer's Lifetime he has preserved for posterity a record of the appearance and peculiarities of the noted New York lawyers of his day.

The book which he has now published was written with the approval of his subject, who gave him much material. Not the least valuable of this is the sketch of the Choate family with its record of the simple intellectual life characteristic of the aristocracy of New England until it was supplanted by the plutocracy of the twentieth century. Much of the book was evidently written while Mr. Choate was living. This is apparent in the chapter describing him as a lawyer; this speaks as if he were alive (p. 135), and it contains the only error that the reviewer has been able to discover, a reference to Rufus Choate as the uncle of Joseph. That was the general belief of the bar, and consequently the reference must have been written before the author secured the information contained in an earlier chapter as to the degree of kinship. The author's modesty has made him omit something which would have increased the value of the book to the student of history,—the addition of notes to his accounts of the various trials, with references to the descriptions of the opposing counsel contained in his Landmarks of a Lawyer's Lifetime.

The narrative is clear and full of interesting quotations from speeches and cross-examinations. There is a refreshing absence of those letters which are the filling and the bane of most biographies. The book is written in that perfect taste which is the concomitant of high breeding. The eulogy is discriminating and nowhere exaggerated, and the limitations of the hero are stated with justice in language that can offend no one. The arrangement is not chronological, but the incidents are skillfully grouped in the different phases of the career of that great advocate. For as an advocate, Joseph H. Choate was great: greater than any of his time. He usually avoided a retainer in criminal cases, and with the exception of the contempt proceeding before Judge Smyth, he never, so far as the reviewer has been able to ascertain, appeared in any except those which affected the validity of combinations of capital or the culpability of corporations; the case which decided the unconstitutionality of the federal income tax

of 1804 was the most important legal decision of his time, and none since the creation of the Supreme Court of the United States was won against greater obstacles. No one ever succeeded in so many cases involving such large sums of money. None ever possessed a style of oratory so suited to advocacy. None exemplified with such perfection the truth of the maxim that the greatest art is that which conceals its existence. He was a great master of rhetoric, but this only his keenest observers realized. So great was his mastery that until he had passed middle age, his contemporaries did not appreciate the depth and the range of his knowledge of the law-the full extent of his capacity to argue successfully a proposition that was purely legal. It was formerly the custom to speak of him as a great jury lawyer—as he surely was—but to speak in a manner which implied that he was nothing more. Others who argued ore rotundo, who made a parade of learning, who used long and sonorous sentences, were then believed to be in the argument of legal doctrines his superiors. The judges who listened to these men praised their oratory and rhetoric, but the decision was usually in Choate's favor. All that he did seemed easy to those who had not tried it. He knew the truth of Aristotle's statement that ornament distracts attention from argument and often puts the hearers upon their guard. Burke's speeches in the trial of Warren Hastings are still read with admiration; those of Law are forgotten. But Burke so antagonized his audiences that he received a vote of censure from the House of Commons which retained him, while Law won the case. He resembled Scarlett more than any other barrister; but in the style of the English advocate, simplicity usually approached homeliness, while Choate's choice of words and the structure of his sentences had a distinction, although it was never strained or condescending. The gravity of his themes was usually lightened by a humor which never descended to a jest, that was unappropriate, and his arguments were at times driven home by strokes of sarcasm which never excited sympathy for the victim by a descent into vituperation. In this respect he excelled Lysias, the only one of the Greek and Roman orators with whom he can properly be compared.

There was no declamation in his delivery. Although his voice was pitched to the key of the hall, his tones resembled those which he used in conversation. There was no pose in his attitude or gestures. He often spoke with one hand in his pocket, and it was amusing to see how the goslings of the bar would imitate him in this respect. Yet he could be dramatic. In the case of Hynes v. McDermott which Mr. Strong describes, he began his argument by putting his hands on the shoulders of the two boys for whom he appeared and telling the jury that he relied upon them to overcome the oratory of his distinguished opponent, William A. Beach, who in truth was a great declamatory rhetorician.

He has often been compared to his great kinsman Rufus Choate, but there was little similarity between them. Rufus ransacked literature for illustrations and the poets for quotations. In the Dalton divorce case he referred to the parting of Aeneas and Dido. It has even been said that he quoted Cicero in the original to Boston jurors. Only in Boston could a man dare do this. The effect of his eloquence was often swept away by the plain talk of his rival at the Massachusetts Bar, Jeremiah Mason, who would begin his reply: "Now that my brother Choate has ceased gyrating, I will proceed to state to you a few points." Joseph H. Choate quoted nothing to a jury from an author with whom they were not familiar, and he usually confined himself to the Bible, Shakespeare, and Mother Goose. When preparing his defense in the breach of promise case of Martinez v. del Valle he borrowed a report of the Dalton trial from Surrogate Arnold, but soon threw it aside. Such ornate rhetoric could not serve him as a model.

There was no appearance of study in his arguments and they never smelled

of the lamp, yet they were the product of hard labor. He freely used clerks and junior counsel to collect authorities upon questions of law with which he was familiar. When the decision depended upon the application of a doctrine of law that was new to him, he carefully studied all of the opinions. His arguments were rarely written, but they were carefully constructed in his mind, and he enjoyed discussing them with others, and it was a great treat to younger lawyers when he honored them by such a rehearsal. In his legal argument which will be longest remembered, that against the validity of the income tax, his opening had the appearance of being extemporaneous in its allusions to the argument of Mr. Carter to whom he replied. One of his junior counsel had, however, suggested in a consultation that there was much in Thackeray's essay on Thunder and Small Beer that could be applied to Carter's rhetoric. The writer of this review has heard him in what was supposed to be an informal speech at a reception after his appointment to the Ambassadorship include a reference containing compliments to an older member of the bar whom he had expected to be present but who stayed away.

His greatness was limited to advocacy. He initiated no reforms in the administration of justice, and many of those adopted in his time met with his opposition. In vision of the future, he was not ahead of his class and his contemporaries. If he had been, he might have been less successful. As a politician he was an amateur. Although he never aspired to the bench, as do most of the great advocates in England but is rarely the case of those in this country and in France, he wished to follow the example of Rufus Choate, his senior partner and kinsman, by serving a term in the Senate of the United States. He was probably the only man in the State of New York who would not have been made ridiculous by the fiasco of his senatorial campaign. He did not lead his ticket when he ran for the State Constitutional Convention. His career as President of the Convention was creditable but not extraordinary. His political speeches were not remarkable. He was surpassed by several of his contemporaries in the class of oratory which the rhetoricians term epideiktic-that which seeks not to convince but to instruct and entertain the audience, that in which Isocrates was first amongst the ancients, and of which the greatest American exponents have been Webster and Everett. He discharged the duties of ambassador to the Court of St. James as well as, perhaps a little better than Lowell and Phelps who preceded him. But as an advocate in the courts, he was supreme.

ROGER FOSTER

NEW YORK CITY

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- The Atlantic Port Differentials. By John B. Daish. Published by W. H. Lowdermilk & Co., Washington. 1918. pp. xix, 524.
- Cases on Future Interests and Illegal Conditions and Restraints. By Albert M. Kales. Published by the West Pub. Co., St. Paul. 1917. pp. xxvi, 1455.
- Decisions of the United States Courts Involving Copyright, 1914-1917. Compiled by Richard C. De Wolf. Published by the Library of Congress, Copyright Office, Washington. 1918. pp. ix, 605.
- Guide to the Law and Legal Literature of Argentina, Brazil and Chile. By Edwin M. Borchard. Published by the Library of Congress, Washington. 1917. pp. 523.
- The Law and Practice in Bankruptcy under the National Bankruptcy Act of 1898. By William M. Collier. 11th edition by Frank B. Gilbert. Published by Matthew Bender & Co., Albany. 1917. pp. cxxvi, 1671.
- An Outline Sketch of English Constitutional History. By George Burton Adams. Published by Yale University Press, New Haven. 1918. pp. 208.
- Roman Law in the Modern World. By Charles Phineas Sherman. (Vol. I, History of Roman Law and its Descent into English, French, German, Italian, Spanish and other Modern Law. pp. xxvii, 413. Vol. II, Manual of Roman Law Illustrated by Anglo-American Law and the Modern Codes. pp. xxxii, 496. Vol. III, Subject-Guides to the Texts of Roman Law, to the Modern Codes and Legal Literature, and Index. pp. vii, 315.) Published by The Boston Book Co., Boston. 1917.
- A Treatise on the Law of Inheritance Taxation. By Lafayette B. Gleason and Alexander Otis. Published by Matthew Bender & Co., Albany. 1917. pp. lviii, 836.
- A Treatise on the Law of Personal Property. (Fifth Edition.) By James Schouler. Published by Matthew Bender & Co., Albany. 1918. pp. xci, 886.
- A Treatise on the Power of Taxation, State and Federal, in the United States. By Frederick N. Judson. Published by The F. H. Thomas Law Book Co., St. Louis. 1917. pp. xxx, 1144.

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### TORTS AND DELICTS

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"In the course of some twenty years' experience, I have found that, historical accidents apart, the differences between large portions of French and English Law are little greater than is necessarily incident to the expression of the legal concepts of one country in the language of another." The words quoted are contained in the recent Report of the Judicial Adviser of the Sultan of Egypt, Sir William Brunyate.¹ They will serve as a text for this article. To say that French and English law (or large portions of them) are fundamentally the same is to say that all the systems of law which govern the civilized peoples of the earth are fundamentally the same. More and more the civil law of Rome and the common law of England in one or other of their phases extend their influence into every corner of the world. The science of jurisprudence, so far as it pursues the comparative method, occupies itself in effect with a comparison of these two systems. If beneath the superficial differences which make each of them largely unintelligible to those who have been wholly trained to the other, there exists an essential unity, it is well that the surface should be removed so that the bedrock underlying the two systems may be made manifest. In this crisis of the world's history any process of inquiry directed to the discovery of a unity in the diversity of national institutions may be thought to contribute in some measure to bringing the nations more closely together. In the following pages I shall examine that branch of law which deals with civil wrongs in the two systems, and try to find whether and how far the fundamental resemblance which is alleged to exist between the civil law and the common law manifests itself in this particular field of inquiry.

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¹39 Jour. Soc. Comp. Leg. N. S. 281.

The common-lawyer who by choice or necessity pays attention to a codified system of civil law finds much to surprise Him, and nothing more surprising than the scantiness of this branch of the law. The Code Napoléon under the caption Des délits et des quasi-délits contains but five articles. The Civil Code of the Province of Quebec reduces the five to three and adds one more peculiar to itself. Though the more modern codes are somewhat fuller, their statement of the principles of liability for civil wrongs is still insignificant in comparison with the space devoted to obligations arising from contract. In the German Code the subject of Illicit Acts (Unerlaubte Handlungen) occupies but one title extending to thirty-one articles. In the Swiss Code des Obligations the chapter Des obligations resultant d'actes illicites is even shorter (arts. 41 to 61). Evidently in each of these cases the code concerns itself merely with a summary statement of general principles. The development of the subject must be looked for in the great collections of decided cases which in one form or another are a distinguishing feature of the civil law system. The collections known as Les Pandectes Françaises and the Répertoire of Dalloz may be cited as examples. They consist in an immense accumulation of what the common-lawyer calls headnotes. The substance of the decision is given, and where necessary, an epitome of the facts; and it is seldom that the practitioner thinks it incumbent upon him to go behind them to the original report from which they are abstracted. Such collections as these contain what is called the "jurisprudence." They are cited not as authoritative (for no authority attaches to previous decisions), but as an indication of the course of decision or the custom of the court which may be expected to determine the decision in a later case. In civil law jurisdictions it is customary to distinguish jurisprudence and doctrine, the latter being the principles inculcated in scientific treatises on law. When the two are in accord the law may be regarded as substantially settled. When they differ the judge may follow whichever he pleases, though naturally his inclination is toward the former rather than the latter. Together, they play the part in civil law jurisdictions which decisions do in the common law, and particularly so when the articles of the code merely express a few general principles, as in the matter of civil wrongs. In such a case it is permitted and inevitable for the civilian to go to the decisions and the text-books for the detailed application of his system, just as the common-lawyer goes to his cases, always with this difference, however, that while for the one the sources which he consults are persuasive merely, for the other they are, within certain tolerably well-settled limits, conclusive.

### THE DEFINITION OF TORT AND DELICT

The definition of a tort may be said to have baffled the text-book writers not so much on account of the inherent difficulty of the concep-

tion as because of the implication of the conception in questions of jurisdiction. It is a creation of the common law, a fact which rules out on the one side personal rights created by equity, and on the other, rights created by ecclesiastical or admiralty law.2 Further, it is usual to exclude from the definition most if not all of the rights and duties arising out of family relations—that is, as regards the immediate parties.3 Again, a tort is usually defined negatively in such terms as to distinguish it from breach of contract, and sometimes also from the breach of duties, vaguely described as quasi-contractual. Perhaps none of the text-books succeeds in introducing all of these limitations into its definition. Bigelow speaks of a tort as a "breach of duty established by municipal law for which a suit for damages can be maintained: or, conversely, the infringement of a private right, or a public as a private right, established by municipal law"4-a definition wide enough, on the face of it, to include breach of contract. Salmond, who says that a tort is "a civil wrong for which the remedy is an action for damages, and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation,"5 fails to exclude breaches of duties created by status; while Jenks, in stating a tort to be "a breach of duty (other than a contractual or quasi-contractual duty) creating an obligation, and giving rise to an action for damages," may be thought to offer a definition more proper to a work on jurisprudence than to supply a faithful index to a conception which, as limited in the common law, is the peculiar historical product of that system.

A definition such as that of Mr. Jenks would be more completely at home in a codified system of civil law. The French Code, however, which has served as a model to most of the codes of the last century, while prodigal in abstractions and definitions, rather leaves the content of the word délit to be inferred than expressly states it. "Obligations," it seems, "arise from contracts, quasi-contracts, offences (délits) quasi-offences (quasi-délits) and from the operation of the law solely." Such is the language of the Quebec Code, which puts into express words the implications of its prototype. But when we come to the chapter which deals with offences and quasi-offences, we find no attempt to distinguish them or to indicate the nature of the distinction. It has been thought that the distinction intended is between the direct liability of the wrongdoer for his own culpable acts and omissions,

Pollock, The Law of Torts (9th ed.) 5-6.

^{*} Ibid. 3.

Bigelow, The Law of Torts (7th ed.) 30. The author's use of the phrase "rights established by municipal law" excludes "consensual rights." Ibid. 8.

Salmond, The Law of Torts (4th ed.) 7.

⁶ Jenks, Dig. of Eng. Civil Law, art. 722.

⁷ Art. 983.

and the vicarious liability which arises from his responsibility for persons and things within his control. Such a distinction is vaguely suggested by the language of the Roman law. But the consensus of opinion of commentators upon the French Code points to the difference between delicts and quasi-delicts as consisting rather in the intentional or unintentional character of the act or omission which constitutes the wrong. When the wrongful act or omission is accompanied by intention it is a delict. When the wrongful act or omission is accompanied by negligence it is a quasi-delict. This line of cleavage, which seems to have originated with Pothier, has nothing to commend it, and has been rejected with reason by the more modern codes which speak merely of actes illicites—unerlaubte Handlungen, without seeking to distinguish between faults of intention and faults of negligence.

#### ESSENTIAL ELEMENTS IN THE CONCEPTION OF TORT AND DELICT

By essential elements I understand those things which make "tort" or which make "delict" what it is within the limits assigned to it in the legal system to which it belongs, in other words the things which define it positively, not negatively. Thus, a tort being already defined as a creation of the common law, it is not an essential element in a tort that it is not the violation of an equitable right, any more than it is an essential element in a tort that it is not a steam-roller or a bunch of grapes. But it is of the essence of a tort that it consists in an act or omission, and it is of the essence of a tort that the act or omission be wrongful, i. e., actionable at law. Even within these limits a distinction may be drawn between what is essential to tort or delict quà tort or delict-i. e., as defined by a positive system of law, and what is essential to the underlying conception, of which the positive rule may be a more or less imperfect reflection. By pursuing the method of analysis we shall perhaps find that what legally is essential, or stated as essential, jurisprudentially is unessential; and thus by discarding what is merely superficial and unnecessary, alay bare the bedrock of fundamental and necessary truth—the thing in itself—which is essential to every legal system, at all events to every system which has reached a degree of development consonant with the facts of modern

According to Professor Salmond:

"In general, though subject to important exceptions, a tort consists in some act done by the defendant whereby he has wilfully or negligently caused some form of harm to the plaintiff. That is to say, liability for a tort is commonly based on the co-existence of two conditions:—

(a) Damage suffered by the plaintiff from the act of the defendant;

⁸2 Baudry-Lacantinerie, Précis de droit civil (7th ed.) pars. 1346-7.

[°] Traité des obligations, par. 116.

(b) Wrongful intent or culpable negligence on the part of the defendant."10

Retaining this analysis, but expressing it in three terms in place of two, the essential elements in tort may be stated as:

- (a) An act or omission;
- (b) Some form of damage;
- (c) Wrongful intent or culpable negligence.

But important exceptions are admitted. The last term in the series, in particular, excludes any reference to the cases of absolute liability which form an important chapter in the common law. The second term in the analysis, too, may be criticised. If damage means damage appreciable in money, certainly acts may be tortious without causing damage. Many, perhaps most, tortious acts do not leave their victim one cent worse off than he was before. A trespass to land is in most cases attended by no damage whatever, and the same may be said of many cases of libel and slander. Upon the whole, it seems that the requirement of damage in relation to tort simply implies that a tort is an invasion of a right; and it is this, not damage, which should find a place in an examination of the essential elements of a tort.

The writers on the French law say that the terms délit and quasidélit (they may be treated as one for the purpose of analysis) imply:

- 1. An unlawful act;
- 2. Damage;
- 3. Fault.11

Radically the result is the same as that arrived at by Professor Salmond for English law, but here again the same, or similar, difficulties accompany the analysis. With reference to the second element in particular the commentators dispute whether the damage must be material or may be merely moral. The prevailing opinion is that in certain cases (such as defamation) moral damage is enough.¹² This means, in fact, that damage (in the sense of material damage) is not in French law any more than in the common law a necessary incident. In one system as in the other, the essence of the wrong is the invasion of a right, giving rise to a consequent right of action. In some cases I can sue you with good effect only if I can prove pecuniary detriment. In other cases this is unnecessary. Damage therefore is not a necessary part of the analysis of tort or delict in general, though it is a necessary element in some torts or delicts, those namely, in which—to use the language of the common law—damage is "of the gist of

¹⁰ Op. cit. 8.

¹¹2 Baudry-Lacantinerie, op cit. par. 1348.

¹² 2 Planiol, Traité élémentaire de droit civil (7th ed.) par. 868; 1 Sourdat, Traité général de la responsabilité (5th ed.) par. 33.

the action." The essential thing, then, is not the damage, but the unlawful character of the act. This established, an action lies; and the question of damage is postponed to a later stage, when it is taken into consideration as an element in appreciating the amount of the reparation.

Two terms in the analysis remain, the act or omission, and the wrongful intent or culpable negligence, as Professor Salmond puts it; or the unlawful act and the fault, as the French writers have it. Perhaps these terms will also be found to require some further elucidation. Neither presentation is completely satisfactory.

To take the French formula first, the accumulation of the terms "unlawful act" and "fault" seems a redundancy. If the act is unlawful for me to do it is imputable to me as a fault. If the act is not unlawful it cannot be a fault in me to do it. Salmond's analysis avoids this tautology. He speaks not of an unlawful act, but of an act merely, and in this he is correct. In itself the act or omission is without legal significance. Regarded merely as an event, the killing of a man is no more a matter of legal interest than is the killing of a horse. But the event is the material basis of the right or liability. As such it must occupy the first place in the analysis. This established as fundamental, the next question is: Does the law impute the act or omission as a fault? or, to vary the phrase, does it condemn it as an invasion of a private right? If yes, the act (or omission) is tortious, if no, it is innocent. So the three terms of the analysis are found on examination to reduce themselves to two: first, the act or omission; second, the wrongful character of the act or omission. These are essential and at the same time exhaustive. As often happens in such inquiries the final conclusion is scarcely distinguishable from the first impression.

Salmond introduces an unnecessary element into the analysis by postulating wrongful intention or culpable negligence. It is true that his definition of tort which forms the starting point of the analysis is professedly subject to important exceptions. But it seems undesirable to analyze a tort in terms which exclude the admitted cases of absolute liability to be found in the civil law as well as in the common law. The essential thing is that the law condemns the act or omission. The consideration why it does so is secondary. This is the question to which attention must next be directed.

### THE RATIONAL OR MORAL BASIS OF TORT OR DELICT

If the law condemns certain acts as tortious or delictual it does so not without reason. The reason may be moral or it may be historical. Speaking broadly, one may say that the law of torts or delicts at a given time will reflect the moral standards of the time, will approximate to them, so far as the nature of law permits. In order that a defendant

may be held liable to a plaintiff in an action founded on tort or delict, the defendant must have invaded some legal right of the plaintiff, i. e., have been guilty of a breach of a duty owed to him. If we ask what right, what duty, the answer in most cases ultimately rests upon the moral law. But there are other cases in which the moral element is wanting. The common law furnishes many examples. I am guilty of trespass if I walk across your land without causing damage, believing for good reasons that the land is mine. I am guilty of conversion if in good faith I handle your goods as owner. Again, liability under workmen's compensation acts has no necessary relation to the moral guilt or innocence of the employer. Yet in all these cases if morality does not pronounce against the defendant, still it does not come to his aid by protesting against the law which condemns him; and in the last case it may be said that an employer may well owe a moral duty to his employee, and a moral duty fit to be expressed as a legal duty, although the duty alleged is not easily referable to any traditional legal formula. Such cases as these tend to blur the outline of the conception of tort or delict, but on the whole it is true to say that those acts and those only are tortious or delictual which morality reprehends and therefore law condemns.

But the law is not commensurate with morality. It would be going too far to say that an immoral act which causes me damage is actionable.18 The transition from the rule of morality to the particular legal situation is too abrupt. The mind seeks a middle term in a rule of But it is the peculiar weakness of this branch of law that the middle terms are rather conspicuously wanting. In the common law their place was taken by the forms of action which have left their indelible impress on the substantive law; hence the queer irrational entanglements of the common law of slander, libel, malicious prosecution, etc. Indeed the efforts which have been made by text-writers and juristically minded judges to reduce the law of torts to a few general principles have failed to leave their mark upon the course of judicial decision. What is asked in a given case is not: Does the plaintiff complain of a violation of a right in which the law protects him-right to personal freedom-right to reputation-right to property? but: Has he established what is necessary to constitute an action for false imprisonment—for libel—for trespass to goods? In the common law, then, the middle terms are present, but they consist not in the statement of general principles, i. e., rules of law, but in the formulation of causes of action. The process by which the moral right is converted into the legal right is tortuous and intricate. Moral rights, it is to be feared, often die by the way and fail to find admis-

¹³ The German Code seems to go this length when the injury is wilful (vorsätzlich). B.G.B. art. 826. Cf. Swiss Code des Obligations, art. 41, cited below.

sion to the legal forum. An instance may be cited in the action of deceit. If you intentionally deceive me and I act to my detriment I may sue you for damages. If you carelessly mislead me, I may not. Yet there is no more reason to distinguish between intention and negligence in this case than in any other sphere of liability.

If the common law errs in one direction by particularization of causes of action, the civil law perhaps incurs the opposite reproach of failing in precision. The language of the Code Napoléon seems designed to annex the whole field of morality to the domain of law. Article 1382 declares that "Any act by which a person causes damage to another binds the person by whose fault the damage occurred to repair such damage;" and article 1383 adds: "Every one is liable for the damage which he does, not only by his wilful acts but also by his negligence or imprudence." The same generality of expression appears in the Swiss Code des Obligations, which declares in article 41: "He who causes in an unlawful manner a damage to another, whether intentionally or by negligence or imprudence, is bound to make it good;" and "He who intentionally causes damage to another by acts contrary to morality is equally bound to make it good." No one who has had the smallest experience of the administration of the law in a civil law jurisdiction can have failed to remark the all-embracing character of these and similar articles. To the common-lawyer it often seems that the civil law casts its net too wide, that the very elect can scarcely escape its meshes. I am answerable for my faults.—Granted. -But when am I in fault? One is almost tempted to say that I am in fault whenever you can get a judge—or a jury, when the trial is by jury—to disapprove of my conduct. If you fix a quarrel on a man and go on quarrelling with him, it will be strange if before long it cannot be said with some show of reason that there are faults on both sides. From this it follows that charges of fault are easily advanced and not very easily resisted. The antidote for this unwholesome vagueness is the fact, too often overlooked, that every private wrong is the invasion of a private right. If the defendant is in fault, it must be because he has violated the plaintiff's right.¹⁴ The Japanese Code

¹⁴ Planiol, amongst French writers, lays proper emphasis on this point. Thus he says, 2 op. cit. par. 863:

[&]quot;La faute est un manquement à une obligation préexistante, dont la loi ordonne la réparation quand il a causé un dommage à autrui;" and again (par. 865): "On dit à tout moment qu'une personne est tenue de ses fautes 'en vertu de l'art. 1382.' Cela est vrai dans un certain sens, car c'est cet article qui oblige l'auteur de la faute à en réparer les conséquences; mais ce texte n'a que la valeur d'une sanction: il est, pour les obligations légales, ce qu'est l'art. 1142 pour les obligations conventionelles; il en garantit l'exécution, en réprimant toute contravention par la nécessité d'indemniser celui qui en souffre; par lui-même, il ne contient aucune obligation particulière. Il nous dit que celui qui a causé à autrui un dommage par sa faute est obligé de le réparer, mais il ne nous dit pas, et ne pouvait pas le dire, quand l'auteur du dommage sera en faute; c'est au juge à l'apprécier; or il n'y a de faute concevable que s'il y avait antérieurement obligation d'agir ou de s'abtenir."

is quite as general in its terms as the French Code, but seems more than the other to direct the mind to the essential question. By article 709, "A person who has intentionally or negligently violated the right of another is bound to compensate any damages resulting in consequence." The real question, then, is not whether the defendant has acted badly (this is what we usually understand by being in fault) but whether he has violated any right of the plaintiff.

WHAT RIGHTS BEING VIOLATED GIVE RISE TO AN ACTION IN TORT?

How, then, are we to determine the category of rights from whose violation an action ex delicto arises? The French Code is so entirely silent on this subject that Professor Planiol, the author of an excellent commentary on the code, finds himself obliged, just as a commonlawyer in like case, to seek inspiration from the decisions of the courts. They lead him to the conclusion that the law imposes on every person the following duties (thereby guaranteeing the corresponding rights):

- I. To abstain from all violence to things or persons;
- 2. To abstain from all fraud, that is, from any act designed to deceive another;
- 3. To abstain from every act which demands a certain strength or skill which one does not possess in the desired degree;
- 4. To exercise a sufficient superintendence over dangerous things which one possesses, or over persons of whom one has the care.

"Of these obligations," Planiol continues, "the first two are absolute; violence and fraud are condemned in themselves, and those who employ them are necessarily in fault and responsible. Corresponding with them is the group of delicts properly so called [in French law] i. e., intentional injuries caused dolo. In the two last cases the person responsible has not acted dolo but merely culpa: his conduct involves a certain appreciation, because the fault committed is susceptible of degrees. . . . When an act is not specially prohibited by a text of the law it cannot be unlawful (and this is necessary to constitute the fault) except on the condition of falling within one of these categories." 15

Here then we have—inductively determined—the mesne principles which Planiol formulates as rules of law. But the doubt must arise whether they are rules of law. If the individual case does not make law, neither can a generalization from many decisions make law. It seems a radical defect in the civil law system that the rule of law scarcely admits of formulation except as lex scripta. When the statute limits itself to a vague general statement, the whole law in that particular field remains vague and general. It is scarcely possi-

^{15 2} Planiol, op. cit. par. 865.

ble to read the considérants which, according to the practice of the French courts and of the courts of the Province of Quebec, constitute the logical process which concludes in the judgment of the court, without feeling that the "considerations" which move the court often hardly fall within the field of law at all. Unimpeachable moral sentiments, maxims of the utmost vagueness-and then the conclusion. Similar methods might lead to an opposite result with equal justification. The fact is that in law as in private conduct, abstract principles have little value in themselves. They are too remote from fact. They become useful in being made applicable to the situations in which men find themselves. The strength of the common law consists in its having been able to solidify into the law the fluid conceptions of morality. Its weakness lies in the fact that the rule of law is often irrational. The apparently cynical remark that no common-lawyer ever confounded law with morality is in fact a most penetrating comment on the system, expressing at once its strength and its weakness. The law of torts is rich in illustrations of the truth of the criticism.

The merits and the demerits of the civil law are the precise opposite of these. It is the boast of the civilians that their system claims allegiance non ratione imperii sed imperio rationis. Certainly, in comparison with the common law it is logical and coherent, and no civilian judge need ever tamely follow the previous determinations of any court if they seem to his trained intelligence irrational or unjust. But it has the defect of its qualities, and this lies principally, as it seems at all events to the writer, in the absence in this particular field of law, of those mesne principles in which morality incarnates itself as law, which are in fact the very flesh and blood and bones of a legal system. The nineteenth century was an era of codification—the codification of the civil law. The twentieth century, if the writer may venture a prophecy, will also be an era of codification—the codification of the common law, but of a common law illuminated, systematized, and rationalized by all that the civil law, its secular rival, has to teach it. The task remains to be undertaken. No less labor than went to the making of the German Code must be brought to bear upon it. If a judgment may be founded upon the English experience of such partial codifications as the Bills of Exchange Act of 1882 and the Sale of Goods Act of 1893, a rationalized and codified version of the common law promises no less for the development in this century of the legal systems of the world than was effected in the last century by the codification of the civil law of France. In realizing this great future for the common law, the law schools of this continent may play a decisive part.

# THE DUTY OF A DIRECTOR PURCHASING SHARES OF STOCK

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It is true enough that "the life of the law has not been logic: it has been experience." Occasionally, however, one encounters a legal problem to which the judicial reactions when guided only by intuitions and prejudices have not been as nearly unanimous as they were, for example, in support of the rule of *Price v. Neal.*² Such a situation seems to exist with respect to whether or not a director of a corporation for profit negotiating with a stockholder for the purchase of the latter's shares owes him a duty to disclose, unsolicited, all material facts bearing upon their value which the former may have learned while a director.

Much has been written upon this theme.³ Indeed, the state of the legal literature of the subject precludes exhaustive analysis of the cases.⁴ It may be stated, however, that those who have written have affirmed the existence of the duty, and have put it upon the ground that the director sustains a fiduciary relation to the individual stockholder with respect to the shares of the latter. Yet, the current of

¹ Holmes, The Common Law, 1.

² (1762) 3 Burr. 1354; see Ames, The Doctrine of Price v. Neal (1891) 4 HARV. L. Rev. 297; Lectures on Legal History, 270; Wigmore, A Summary of Quasi-Contracts (1891) 25 Am. LAW. Rev. 695, 706; Keener, Quasi-Contracts, 154-8; Woodward, Quasi-Contracts, ch. V.; U. S. Bank v. Bank of Georgia (1825) 10 Wheat. 333, 355, per Mr. Justice Story; Dedham Nat. Bank v. Everett Nat. Bank (1901) 177 Mass. 392, 395, per Holmes, J. In this instance a perfectly well-settled rule has puzzled courts and commentators alike in the effort to find an analytical basis for it.

^{*}W. W. Thornton, The Trust Relation between Corporate Officers and Stockholders Buying of, or Selling their Stock to Them (1908) 67 Cent. L. Jour. 452; Wilgus, Purchase of Shares of Corporation by a Director from a Shareholder (1910) 8 Mich. L. Rev. 267—elaborately reviewing the then extant cases; A. H. Bigelow, The Relation of Directors of a Corporation to Individual Stockholders (1915) 81 Cent. L. Jour. 256; N. C. Collier, Liabilities of Directors and of Trustees to Beneficial Owners Compared (1912) 74 Cent. L. Jour. 360; 1 Story, Equity Jurisp. (12th ed.) 225; 3 Thompson, Corporations, s. 4034; Taylor, Private Corporations, 692, n.; Purdy's Beach, Private Corporations, s. 737 a; Elliott, Private Corporations, s. 502.

⁴ To make such an analysis, except as to cases decided since 1910 and referred to in note 5, *infra*, would indeed be a work of supererogation in view of Professor Wilgus' article.

actual adjudication shows that their efforts have not yet produced more than a contrariety of judicial opinion.5

It is felt that, quite properly, perhaps, the proponents of the affirmative have intuitively assumed the existence of the fiduciary relation in question,6 and that the judges who have supported the negative, finding that their intuitions were otherwise, have rejected it as a premise.7 To be sure, there has been some effort to support the affirmative by means of principles to which further reference will be made. But the impression of the writer is that the position has been assumed on practical grounds, and rejected on like grounds; and that the supporting reasons have been props rather than foundations. However this may be, it is quite evident that the reasons which have been adduced in favor of the rule have not been convincing to those in whose view the

It was affirmed in Steinfeld v. Nielsen (original hearing) supra, Black v. Simpson (1913) 94 S. C. 312, 77 S. E. 1023, semble; Dawson v. National Life Ins. Co. (1916) 176 Iowa, 362, 157 N. W. 929, L. R. A. 1916 E, 878; Jacquith v. Mason (1916) 99 Nebr. 509, 156 N. W. 1041.

"The adoption of this rule is essential to check and stop the many frauds [sic] that are daily perpetrated by corporate officers upon the stockholders of their companies. Equity and good conscience require it." Thornton, op. cit. 67

CENT. L. JOUR. 452, 457.
"That the director may take advantage of his position to secure the profits that all have won, offends the moral sense; no shareholder expects to be so treated by the director he selects; no director would urge his friends to select him for that reason; that the law yet allows him to do this, does more to discourage legitimate investment in corporate shares than almost anything else, and allows the fiction of the corporate entity to obstruct instead of advance justice." Wilgus, op. cit. Mich. L. Rev. 267, 297.
"The debate as to whether technically a fiduciary relation exists may . . . . go

on, but a knowledge of the law is not required to enable one to appreciate the moral wrong perpetrated by a corporate officer in profiting by the ignorance of a stockholder by means of knowledge acquired by virtue of his position." Ladd,

J., in Dawson v. National Life Ins. Co. 176 Iowa, 362, 375.

The following are believed to be fair examples of the expression of this view. "It will not do to make the principle generally applicable to purchases by directors of the stock of their corporations.

"As to stocks which have a . . . market value, parties generally sell and buy

them, with reference to this . . . value . .

"As to such stock, would it do to make the purchase of it by a director. exception, and to say, that the parties dealt with reference to the real condition of the corporation and the supposed real value of the stock, founded on a . . . supposed knowledge of its affairs? Plainly it would not; and plainly in such case, the application of the principle of equity would be unreasonable.' land, J., in Carpenter v. Danforth (1868, N. Y.) 52 Barb. 581, 586.

"The contrary view would place directors in a most invidious position, as they could not buy or sell shares without disclosing negotiations [to sell the undertaking], a premature disclosure of which might well be against the best interests of the company." Swinfen Eady, J., in *Percival v. Wright* [1902] 2 Ch. 421, 426.

⁵ The existence of the fiduciary relation in question was denied in the following cases decided since 1910: Bawden v. Taylor (1912) 254 Ill. 464, 98 N. E. 941; Bacon v. Soule (1912) 19 Cal. App. 428, 126 Pac. 384; Steinfeld v. Nielsen (1914) 15 Ariz. 424, 139 Pac. 888, correcting, on rehearing (1909) 12 Ariz. 381, 100 Pac. 1094; Allen v. Hyatt (1914, Jud. Com. Privy Council) 17 Dom. L. R. 7, affirming 8 Dom. L. R. 79-special relation recognized; Gadsden v. Bennetto (1912) 5 Dom. L. R. 529, reversed, 23 Manitoba, 33, 9 Dom. L. R. 719, on ground of actual fraud; Show v. Cole Mfg. Co. (1915) 132 Tenn. 210, 177 S. W. 479, L. R. A. 1916 B, 706; Haverland v. Lane (1916) 89 Wash. 557, 154 Pac. 1118.

practical aspects of the problem have suggested a negative answer. In this state of affairs it seems appropriate to apply analytical methods to the question and, though conscious of an intuitive preference for the affirmative rule, to endeavor to support that rule by reasons which may at least make the opposite result more difficult. A principle that is vindicated by logic is on that account more likely of acceptance than one which stands upon "felt necessities" alone—especially when all do not "feel" alike.

Is a director actually sub modo a trustee for each individual stockholder with respect to the latter's shares? It is submitted that the capacity of the stockholder to sue the directors in a proper case and, subject to certain restrictions, to restrain or redress a wrong against the corporation which incidentally affects the value of his shares does not establish such a relation. For in such cases his interests are derivative—he suffers through the corporation; while here the director's conduct does not affect the corporate assets in any way. Again, in those cases, all stockholders suffer alike; in these, none but the vendor of the shares can complain. So far, then, naught is established beyond obligations of the director to the corporation as such, that may be enforced by a single stockholder.

Is it, then, correct to assert at this point (as many have done) that the corporate personality—fictional or real, as one pleases—should be disregarded, and that the fiduciary relation which is admitted to exist between the directors and the corporation should as a result inure to the benefit of the individual stockholders, as the human beings screened behind the artificial entity?¹⁰

It is believed that the solution of the problem must ultimately be worked out by disregarding the corporate "fiction;" but this particular application of the expedient is doubted. In the first place, it brings us no further on the way than to show that the director's agency which, as between him and the corporation, constitutes the particular fiduciary relation now sought to be extended to the stockholders, 12 exists in rela-

^{*}Robinson v. Smith (1832, N. Y.) 3 Paige, 222; Scott v. De Peyster (1832, N. Y.) 1 Edw. 513; Hodges v. New England Screw Co. (1850) 1 R. I. 312; Dodge v. Woolsey (1855, N. Y.) 18 How. 331.

⁹ See discussion of this point in Commissioners of Tippecanoe Co. v. Reynolds (1873) 44 Ind. 509, 516 et seq. This decision—a leading case on its side of the question—has been justly criticized; but the particular reasoning of Worden, J., therein, now referred to, is believed to be sound.

¹⁰ Walsham v. Stainton (1863) I De G. J. & S. 678; Oliver v. Oliver (1903) II8 Ga. 362, 367; Dawson v. National Life Ins. Co., supra.

[&]quot;The inherently abstract idea of an artificial personality in the modern idea of a corporation, seems to form the ground of all this difficulty." Bigelow, op. cit. 81 Cent. L. Jour. 256, 261. See excerpt from Professor Wilgus' article supra, n. 6; also passages quoted post, n. 12.

¹¹ Dawson v. National Life Ins. Co. 176 Iowa, 362, 387; Von Au v. Magenheimer (1908) 126 N. Y. App. Div. 257; Walsham v. Stainton, supra.

tion to the whole body of the stockholders. The agent's real principal, if the juristic person be ignored, is a collection of individuals. This objection has apparently been felt by some supporters of the rule under discussion, and they seem to urge in reply that the emerging collection of individuals may be treated as a partnership, or at the least as a joint undertaking. So treating the association, its affairs are found to be controlled by a few managers who sustain fiduciary relations to each individual associate.¹²

In the second place, however, the opponents of the rule have asserted that it is not enough to show a fiduciary relation as between the individual stockholders and the directors, but that it must also appear that the relation exists with respect to the shares owned by the former and that this is not the case.¹³ In other words, they say that the confidence reposed by the stockholders in the directors relates to the management of the business of the association and not to the separate affairs of particular members of it. If this point is sound, its validity as an objection to the rule is open to argument, but the expediency of questioning its soundness, if by such means it can be obviated, would seem to be apparent.

The two objections which have been mentioned are those usually put forward in opposition to the rule. It is believed, however, that there is another possible objection. The established principle is that the

¹² See the cases cited supra, n. II; Oliver v. Oliver, supra; Wilgus, op. cit. MICH. L. REV.

[&]quot;Whether the corporation be treated as an enlarged and amplified form of partnership and the director as managing partner, or whether he is called an agent or trustee elected by the stockholders to represent them in the management of the concern, he occupies a fiduciary position . . . " Lamar, J., in Oliver v. Oliver. 118 Ga. 362, 360.

v. Oliver, 118 Ga. 362, 369.

"The fiduciary obligation is to the stockholders in a body. Why not to the component parts represented by the shares? . . .

[&]quot;Had that imaginary legal entity known as the corporation been regarded for the moment merely as an association of individuals investing different sums in a common enterprise, with the design of accomplishing specified purposes through those selected as directors, it would not have been so difficult to have understood the relation of confidence existing between director and shareholder." Ladd, J., in Dawson v. National Life Ins. Co. 176 Iowa, 362, 376, 390, supra.

¹³ This seems to be the real or ultimate ground of decision in Carpenter v. Danforth, 52 Barb. 581, supra, and Commissioners v. Reynolds, 44 Ind. 509, supra,—the leading cases.

[&]quot;There is, therefore, a certain trust relation between the shareholders and the directors of a corporation; but the trust put in the directors usually extends, and I must assume that in this case it extended only to the management of the general affairs of the corporation, with a view to dividends of profits... The directors are not trustees for the sale of the stock of the corporation... I think it will be found, in most of the cases referred to by the counsel, that it appeared, or that it was assumed, that the trust, or trust relation, extended to the subject of the dealing, or contract in question.... I think that the sale or transaction, or its subject, is not so far connected with, or the subject of the trust, or trust relation which is admitted to exist, as to subject the director to ... the principle of equity..." Sutherland, J., in Carpenter v. Danforth, 52 Barb. 581, 584-6. Italics are the present writer's. See similar remarks of Worden, J., in Commissioners v. Reynolds, 44 Ind. 509, 516.

existence of the corporation as a distinct entity is not to be ignored unless some paramount policy requires, or unless unconscionable results will follow its recognition in a particular case. The prevention of actual fraud is, of course, good ground for disregarding the corporate entity. But to do so on the principles thus far developed is to furnish a predicate for constructive fraud. This seems to be at least an exceptional use of the expedient of ignoring the corporate fiction. It is believed that the reasons for disregarding the corporate personality must exist independently; they must be actually present, concealed only by the corporate screen, so that its removal will reveal them. In the present case the removal of the screen results in creation rather than revelation.

It is believed that the true reason for the rule under discussion may be discovered without turning the corporation into a quasi-partnership, and in the first instance, without looking behind or through the corporate entity, but rather by looking directly at the corporate organization as it actually exists. The opposing arguments which have been mentioned have premised the proposition that a director is an agent.¹⁷

This proposition is inaccurate and in a sense untrue. Powers, duties and liabilities like those of an agent are cast upon the board of directors, it is true; but in almost all instances this devolution is the result of the important fact that directors are officers.

An officer is not merely one kind of agent or trustee. His representative authority is irrecusable—it springs from the law itself; the

¹⁴ Salomon v. Salomon & Co. Ltd. [1897] A. C. 22; Jackson v. Hooper (1909) 16 N. J. Eq. 592; U. S. v. Milwaukee Refrig. Trans. Co. (1905) 142 Fed. 247; Bank v. Trebein (1898) 59 Ohio St. 316; State v. Standard Oil Co. (1892) 49 Ohio St. 137; People v. North River Sugar Ref. Co. (1890) 121 N. Y. 582. Deference to the "fiction theory" would perhaps dictate another phrasing of the rule, such as that set forth in the opinion of Minshall, J., in State v. Standard Oil Co.:

[&]quot;The general proposition that a corporation is to be regarded as a legal entity... is a mere fiction, existing only in idea.... It has been introduced for the convenience of the company... but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored...." 49 Ohio St. 137, 177, 179.

As to the fundamental nature of a corporation, see the article by Professor Wesley N. Hohfeld on *Nature of Stockholders' Individual Liability for Corporation Debts* (1909) 9 COLUMBIA L. REV. 285, footnote 289-290.

Whether we say that the entity is to be regarded unless reasons for ignoring it appear, or that it is to be ignored unless the facts show occasion for its use as a legal fiction, the question as to what shall be the occasion for its use or its rejection remains open.

¹⁵ U. S. v. Milwaukee Refrig. Trans. Co. 142 Fed. 247, supra; Bank v. Trebein, 59 Ohio St. 316, supra; Brundred v. Rice (1892) 49 Ohio St. 540; Montgomery Web Co. v. Deinelt (1890) 133 Pa. St. 585; Linn Timber Co. v. U. S. (1915) 236 U. S. 574.

¹⁶ Cf. Salomon v. Salomon & Co. Ltd. [1897] A. C. 22, supra.

¹⁷ See supra, notes 11, 12 and 13.

powers of the agent or trustee are consensual. The agent is his principal's alter ego within the scope of his authority; the officer is, in reality, the principal itself, pro hac vice. The officer, whether public or corporate, is one in whom the law vests power to determine the public or corporate action in an independent capacity.¹⁸

An office is a thing of which legal title can be predicated.¹⁹ Not so with an agency. Not so, either, with a trusteeship, which results from a qualified legal title, but is not itself a subject of title. Aside from the mere name, what, then, is there of substance in an office that it should be capable of being held in possession and susceptible to a right to possession? Manifestly, no more than a group of inherent and independent powers.²⁰ These, however, vest in the officer for the benefit of others, not for his own benefit. Accordingly, the officer is in a real sense a trustee of his official powers.²¹

The trust relation thus established is to be sure an imperfect one. It lays the foundation of few if any rights cognizable in a court of equity and hence it may at once be conceded to lack the essential characteristics of a technical trust. But it is a trust *sub modo* and it satisfies every element of a perfect trust save one.

The identity of the cestui que trustent sub modo of the powers of the directors of a private corporation depends upon the particular power in question. In many, perhaps most instances, the corporate "person" itself is regarded as the one to which the obligation is due.²² In several if not all of these instances, it is believed that the prevailing conception is inaccurate save in a qualified sense. We need not stop to consider the general question thus suggested in all its broader aspects; a single power will suffice for present purposes. Let us take the power to declare dividends. It is certainly not to be exercised for the benefit of

¹⁸ Hoyt v. Thompson (1859) 19 N. Y. 207, 216, per Comstock, J.; People v. Powell (1911) 201 N. Y. 194; Charlestown Boot & Shoe Co. v. Dunsmore (1880) 60 N. H. 85; Automatic Self-Cleaning Filter Co. v. Cunninghame [1906] 2 Ch. 34. See article by W. P. Rogers, Corporations (1915) 60 Ohio L. Bull. 201, 47 Chic. L. News, 382.

While no modern American case has been found which expressly establishes this point, those involving questions of extraordinary remedies are full of such expressions as "the question of title to an office" and "possession of an office." See People v. Police Commissioners (1903) 174 N. Y. 450, the reasoning in which is applied to the case of a director of a private corporation in People v. Powell, 201 N. Y. 194, supra. It is believed that, in the sense in which the terms "title" and "possession" are herein used, their employment in such connections is correct.

20 Opinion of the Indges (1822 Me.) 3 Green, 481: Matter of Hathaway

²⁰ Opinion of the Judges (1822, Me.) 3 Greenl. 481; Matter of Hathaway (1877) 71 N. Y. 238, 243; 2 Bl. Com. 36.

²² "It appears that, of the various powers which are given to them [directors] they are, in the strictest sense, trustees." Anon., The Fiduciary Position of Directors, 80 L. T. 299, 300. Italics are the present writer's.

²² See supra, notes 8, 12 and 13. The cases declaring the existence of a trust relation between the directors and the corporation as such are, of course, numerous.

the corporation as a distinct person, for when a dividend is once declared the corporation owes it to the entitled stockholders in severalty.23 In this situation the corporation cannot be thought of as a fiction representing the associated members. Suppose we disregard the corporate personality: what human beings are behind the screen when the corporation is subject to suit for dividends? It cannot be the stockholders, for they are the potential plaintiffs, and it would not do to say that they are about to sue themselves. Is it not the directors, who are the real persons in default? Indeed, it is believed to be a sound principle that whenever corporate conduct is in question and the character of the management and control of a corporation is consequently drawn in issue, the human beings discovered behind the fiction of corporate personality are more likely to be the managers than the members.24 It has frequently been somewhat carelessly assumed that to ignore the fiction means to recognize the stockholders as the real parties in interest; but obviously this is not always true, and the most recent cases recognize the exceptions.

If the power to declare dividends is not to be exercised for the benefit of the corporation it must exist for the benefit of the stockholders; and inasmuch as they do not appear here as the constitutents of the juristic person who is their theoretical adversary, they must be cestuis que trustent sub modo in their several and individual capacities. Therefore, in at least this one instance, the directors are fiduciaries of the individual stockholders.

Of course the power under discussion is discretionary and save in exceptional cases its exercise cannot be controlled by compulsory process.²⁵ Yet at the least, the income of the corporation and the enhance-

^{**}Hence the rule that dividends belong to the owner of the share at the time they are declared. Cates v. Consolidated Realty Co. (1914) 25 Cal. App. 531, 144 Pac. 301; Redhead v. Iowa Nat. Bank (1905) 127 Iowa, 572, 103 N. W. 796; Price v. Morning Star Mining Co. (1900) 83 Mo. App. 470; Tepfer v. Ideal Gas & Elec. Fix. Co. (1908) 58 Misc. 396, 109 N. Y. Supp. 664; Wallin v. Johnson City Lumber & Mfg. Co. (1916, Tenn.) 188 S. W. 577, L. R. A. 1917 B, 325. The fixation of the identity of those who are entitled to dividends as of a certain date demonstrates that their rights are several, and not enjoyed as members of the corporate body. Indeed, they are creditors of the corporation. Beers v. Bridgeport Spring Co. (1875) 42 Conn. 17; King v. Paterson I. H. R. R. Co. (1861) 29 N. J. L. 304. Cf. Ford v. Easthampton Rubber Thread Co. (1893) 158 Mass. 84; McLaran v. Crescent Planing Mill Co. (1906) 117 Mo. App. 49.

²⁴ See Daimler Co. v. Continental Tyre & Rubber Co. [1916] 2 A. C. 307, 340, per Lord Parker of Waddington; Fritz Schulz Co. v. Rainier (1917) 166 N. Y. Supp. 567; Purchase v. Atlantic Safe Deposit Co. (1913) 81 N. J. Eq. 344, 346; Wilson v. U. S. (1911) 221 U. S. 361, 376.

^{**}Pratt v. Pratt, Reed & Co. (1866) 33 Conn. 466; Williams v. Telegraph Co. (1883) 93 N. Y. 162; McNab v. McNab & Harlin Mfg. Co. (1891, N. Y.) 62 Hun, 18. Cf. Scott v. Eagle Fire Ins. Co. (1838, N. Y.) 7 Paige, 203; Crichton v. Webb Press Co. (1904) 113 La. 167; Blanchard v. Prudential Ins. Co. (1911) 78 N. J. Eq. 471.

ment of the value of its property beyond the aggregate par value of its shares, constitute assets which the directors can turn into only a limited number of possible channels. Dividends; surplus and reserve; extensions, betterments and advertising: these are the options which are offered. The choice of the first results in direct pecuniary benefit to stockholders as individuals; that of the second adds to the funds of the corporation as such, and if that entity be diregarded, to the assets of the stockholders as a body, and so-at least indirectly-to the value of all the shares and of each of them representing interests in the corporate assets; that of the third makes an investment of funds that might otherwise have been distributed among the stockholders, with a view to larger distributions in the future. Such a power of umpirage between the stockholders as distributees and the same persons as substantial co-owners would seem, clearly enough, to be one in which the latter as individuals have a beneficial interest.28 Even if we regard the individual stockholder as distinct from all the stockholders as a body, we arrive at the same result; for a trustee of powers which may be exercised for the benefit of either of two is a fiduciary as to both.27

The relation thus established is one which affects the shares belonging to the stockholder. Indeed, his investment has been made upon the faith of the beneficial exercise of the power. Many statutes use the phrase "for profit" or its equivalent to distinguish business companies from charitable corporations. The real meaning of such words is suggested by the paraphrase "for the purpose of securing dividends to its stockholders;" for the power to distribute profits, rather than the capacity to reap them, is the distinguishing characteristic of a business company.²⁸ Hence it appears that the securing of profits to the stockholders as investors is in law as well as in common understanding of the essence of the corporate purpose. Manifestly, also, it is an essential element in the concept of property involved in a share of stock.²⁹ Therefore the fiduciary relation between the directors and the individual stockholders, growing out of the official powers of the former, is one that exists in respect of the shares of the latter.

[&]quot;The directors and managing officers occupy the position of quasi trustees towards the stockholders... with respect to their shares of stock. Since the stockholders own these shares, and since the value thereof and all their rights connected therewith, are affected by the conduct of the directors, a trust relation plainly exists between the stockholders and the directors, which is concerned with and confined to the shares of stock held by the stockholders..." 3 Pomeroy, Eq. Jurisp. (3d ed.) s. 1090; cited with approval in Oliver v. Oliver, 118 Ga. 362, and in Dawson v. National Life Ins. Co. 176 Iowa, 362, 378.

[&]quot;E. g., the situation of a trustee when the equitable estate is divided between a tenant for life and a remainderman. See Perry, Trusts, ch. XVIII.

²⁸ See Clark & Marshall, Private Corporations, s. 33; Snyder v. Chamber of Commerce (1895) 53 Ohio St. 1.

²⁹ Angell & Ames, Corporations, s. 557; Taylor, Private Corporations, s. 567.

It is unnecessary to look further, for with this point granted, the duty to disclose follows upon easily applied principles.³⁰ It is believed that similar fiduciary relations might be established as growing out of other powers of the directors, or as following upon principles slightly different from the power to direct the application of the profits. The method of approach which has been employed is chosen because it seems to offer the most obvious demonstration of the character of the relations between stockholders and directors, rather than with the thought that it is the only one available.

The assumption seems correct that some such fiduciary relation must be established in order to support the rule that the director must disclose facts known to him which affect the value of the shares when negotiating with a stockholder for their purchase. Without it, there would be no more foundation for the duty to disclose unsolicited information to a stockholder than there would be for such a duty on the part of a director selling his own shares to an outsider. If a seller understands that the buyer is in a position to know more about the value of the subject of sale than he does, there is nothing morally or

²⁰ It is believed that the reasoning of the cases which reject the rule contended for goes astray at this point. See *supra*, n. 13.

[&]quot;The directors of a corporation stand in a relation similar to that of trustees for the shareholders. . . . Their action affects the whole body of shareholders, beneficially or injuriously, in respect to dividends upon, or the value of, their stock

stock.
"But stock in a corporation held by an individual is his own private property... over which neither the corporation nor its officers have any control..." Worden, J., in Commissioners v. Reynolds, 44 Ind. 506, 514, 515.

It would seem that the leading decisions concede the principle that if a fiduciary relation exists, either (1) respecting the sale itself or (2) respecting the subject of the sale, the trustee is required to make disclosure; and that they effectively dispose of the first point by demonstrating that the relation between directors and stockholders does not concern the actual transaction of selling shares; but that they do not deal with the bearing of the fiduciary relation upon the shares themselves as the subject of the transaction.

On the other hand, the opinion of Lamar, J., in Oliver v. Oliver, supra, seems to place the stress where it belongs, and while not pursuing the analysis to the degree attempted in this paper, appears convincing upon the point now under consideration:

[&]quot;If, then, any sort of trustees, they are necessarily subject to the obligations and restrictions which inhere in that relation, as to any property entrusted to them. . . . How is it possible in principle to draw the line and say that while trustee for some purposes, he is not for others immediately connected therewith?" 118 Ga. 362, 369, 370.

The following, from the opinion of Ladd, J., in Dawson v. National Life Ins. Co., supra, is also suggestive of correct principles:

[&]quot;Though the stockholders have no legal title to the property, ... their shares represent integral parts of the whole, the proportional shares of the dividend declared or to be declared, and of the net assets upon dissolution. ... To say, then, that a director ... owes nothing to the shareholders, as such, is in effect declaring that, though acting as trustee of the entity, he is under no obligation with respect to its component parts. ..." 176 Iowa, 362, 377.

legally wrong, according to present-day standards, in laying upon him the burden of making inquiry of the buyer, and in declaring that he assumes the risk involved in his own silence. The only element that can change the result is the existence of a fiduciary relation. It is hoped that the considerations which have been presented will at least be suggestive of reasons which may be employed to meet the apparent demand for an analytical basis for such a relation, and thereby to vindicate and secure adoption for the rule which grows out of it.

# BUDGETARY PROCEDURE IN ITS RELATION TO REPRESENTATIVE GOVERNMENT

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There are few terms in political nomenclature which have been used with such indefiniteness of meaning as has the word "budget." Frequently it is employed to designate the general appropriation act by which provision is made for the expenditure needs of a government for the next fiscal period. At other times it is used to indicate the revenue program presented by the executive for meeting the demands that are to be made upon the public treasury. In a third sense, it is applied to the material presented by the executive to the legislature for its information and guidance in determining its general financial program for the next fiscal year. It is in this third sense that the term will be employed in this paper.

Under all systems of public financial administration the legislature or fund-granting organ of government is supplied by the executive with a certain amount of financial information. In order, however, that the documents in which this is furnished may be said, collectively, to constitute a budget, it is necessary that the information which they contain should cover certain points, and that taken together they should be made to serve as a basis for a general financial program for the next ensuing fiscal period. When, then, a budgetary procedure is said to be employed by a state, it is meant that the following features appear in its system of financial administration:

First, that the legislature is furnished by the executive with the information needed by it for the intelligent performance of its function as the policy-determining organ of the government.

Second, that the legislature is aided by having presented to it a financial program framed by the executive, for the wisdom of which he assumes personal and political responsibility.

Third, that the legislature accepts the executive program thus presented to it as a working basis for its own action.

If this third feature were absent it might be possible for a state to have a budget without having its finances administered according to a system of budgetary procedure.¹

¹ This was the situation in the United States in 1913 when President Taft submitted to Congress what could properly be termed a budget, but to which that self-sufficient and independently minded body paid no attention.

The United States operates without a budget, and, indeed, without any approach to a budgetary procedure. Congress does not obtain from the executive the information which it is entitled to have and which is indispensable if intelligent and wise financial legislation is to be enacted. The estimates which are submitted are but a mechanical compilation of the requests from the several spending services, each of which is bent upon obtaining for itself all that is possible from the public purse. That is, before submission to Congress, their requests have been subjected to no central supervision in order to see that their items are reasonable in amount, or that when aggregated they bear a proper relation to one another, and in their grand total are proportioned to the estimated or possible financial resources of the government as determined by a program of revenue legislation. The Secretary of the Treasury thus plays the part merely of an agent of transmission, and the President plays no part whatsoever, the only functions which Congress has seen fit to impose upon him in the premises being that in case it appears that there will be a deficit, he shall "advise the Congress how in his judgment the estimated appropriations could with least injury to the public service be reduced so as to bring the appropriations within the estimated revenues." This provision dates only from 1909, and it may be said that the presidents have not seen fit to pay any attention to the obligation thus imposed upon them. The reason for this undoubtedly is that they have seen the futility of making such recommendations, well knowing that Congress would attach no value to them, and that in fact, despite their legislative declaration, they would not welcome them. For the same reason, no President has made use of his constitutional right and duty to "give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient," in order to present a formulated and comprehensive financial program for congressional consideration.

Not only has Congress failed to provide for the keeping and submission to itself by the executive of the fiscal information which is indispensable to intelligent legislation, and shown in an unequivocal manner that it will not receive with cordiality a fiscal program prepared by the executive, but it has not organized itself in such a manner as to centralize responsibility in a budget committee of its own creation with jurisdiction over revenue measures as well as over acts carrying appropriations. It has not even placed appropriations within the control of a single committee, but has distributed this power among eight or more separate committees.

The failure of the United States to develop a budget or to employ budgetary methods is a remarkable fact. Even if it were not true that, alone among all the modern constitutional states of the world, the United States attempts to administer its finances without co-operation between the executive and legislative branches of the government, the advantages of a budget prepared by the executive are so obvious that I

shall not take time to enumerate them. That eminent investigator, Sherlock Holmes, is reported to have said, on one occasion, to his friend Dr. Watson, by way of rebuking his incredulity: "Exclude the impossible and whatever remains is possible, however improbable." This sapient remark has its application here. It would seem almost incredible that Congress should have refused to avail itself of the executive assistance it might have in matters of financial policy, but that it is possible, however improbable, the facts declare. What is the explanation of this condition of affairs?

Until recently we in this country have been so fortunately circumstanced that it has not been imperatively necessary for us to administer our finances with economy and efficiency. It has been so easy to obtain public funds without oppressively burdening the people that we have not been compelled to determine with scrupulous care just what expenditures shall be authorized, or to guard vigilantly the spending services in the use by them of the amounts placed at their disposal. But this condition of affairs no longer exists. Even before the entrance of the United States into the present Great War, the need for better methods of financial administration had become evident not only in the national government but in the states and cities and other administrative areas. And now that the expenditure of vast amounts is demanded for the prosecution of the war and the giving of aid to our allies, this need has become an imperative one. Though we may trust that the war itself will not long continue, not only will it leave an inheritance of a greatly increased public debt which will impose for many years a large fixed charge upon our public revenues, but there will doubtless result a permanent widening of the sphere of governmental action both in supervision and control of private industries, and in actual administration and operation. Increased demands upon the public purse will be inevitable.

There is no danger that the greater importance of proper systems of financial administration will not be recognized by those who exercise political influence in this country, nor do I think that the technical merits of budgetary methods will be denied. It is, however, none the less certain that the movement for the introduction in this country of true budgetary methods will not be an unresisted one. The opposition to it already shown in many influential quarters sufficiently evidences this. This opposition, shortly stated, is founded upon the proposition that the budget system is not compatible with the general character of our system of constitutional government, or more specifically, that its use would tend to disturb that relation or balance between the executive and legislative branches of the government which American political philosophy has held to be indispensable to a proper protection of the liberties and interests of the people. And thus I am led to the real point which I wish to discuss in this paper—which, indeed, goes to the very heart of the whole problem not only of public financial administration but of popular government itself; namely, what are the respective parts that, in any system of representative rule, it is desirable or feasible that the executive and legislative branches of government should play, and what light is thus thrown upon the question as to the best manner in which the financial program of the state may best be framed and executed? Or, reversing the terms, the question is: what light do the practical necessities of efficient financial administration throw upon the general question as to the functions which it is feasible or desirable, in a representative democracy, for the legislative and executive branches respectively to perform?

As regards generally the proper functions in a popular government of the elected representative body, it is perhaps unfortunate that it should be known simply as "the legislature," for the result has been unduly to emphasize its lawmaking function and to obscure the other important functions which it should perform. Indeed, there is good ground for holding that it is not necessary, in order that true popular government be realized, that the representative body should be primarily legislative at all, at least in the sense of formulating and initiating the policies to be adopted by the state; but that the essential purposes for which it exists are secured when it operates as the organ for giving the final sanction to the policies which are submitted to it by the executive, and for holding all administrative officials to a strict political accountability for the manner in which they have exercised the powers entrusted to them, and when, in addition, it has served as the central organ through which the public will is made known and its censure, when necessary, applied to those in public authority.

John Stuart Mill in his essay on Representative Government, published in 1861, has a remarkable chapter entitled Of the Proper Functions of Representative Bodies. After pointing out that there is a radical distinction between controlling the business of government and actually doing it, and that the latter is a task which no numerous assembly should attempt to perform, Mill goes on to say that

"it is equally true . . . that a numerous assembly is as little fitted for the direct business of legislation as for that of administration."

"The proper duty of a representative assembly in regard to matters of administration," he continues, "is not to decide them by its own vote, but to take care that the persons who have to decide them shall be the proper persons."

# And again he says:

"Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust, or fulfill it in a manner which conflicts with the deliberate sense of the nation, to

expel them from office, and either expressly or virtually appoint their successors. . . . This," he declares, "is surely ample power, and security enough for the liberty of the nation."

Mill goes on to point out, however, that

"the Parliament has an office, not inferior even to this in importance; to be at once the nation's Committee of Grievances, and its Congress of Opinions: an arena in which not only the general opinion of the nation, but that of every section of it, and as far as possible of every eminent individual whom it contains, can produce itself in full light and challenge discussion."

And Mill concludes this remarkable chapter by saying:

"Nothing but the restriction of the function of representative bodies within these rational limits, will enable the benefits of popular control to be enjoyed in conjunction with the no less important requisites (growing ever more important as human affairs increase in scale and in complexity) of skilled legislation and administration."

It is a striking tribute to Mill's political genius that the development of representative government in Great Britain has followed the lines indicated by him, until by the end of the nineteenth century the British Parliament had come to function almost precisely as he had indicated it should do.

Thus in England we have a government which without weakening the executive energy, or indeed abolishing the form of monarchy, has carried to its highest and most successful degree the art and practice of representative government. Efficiency in executive action and efficiency in administration have there been secured without a sacrifice of the essential requirements of popular government. By successive steps, though not always without revolutionary action, the autocratic and personal powers of the king were diminished, and executive authority brought under the control of the representatives of the people in Parliament assembled. But guided by what would appear to be political intuition rather than by reasoned connection, the English Commons has never attempted (unless we except certain years under the Commonwealth) either to lessen the executive powers of the government or itself to exercise them. The distinction between executive and legislative power was not lost sight of, and the House of Commons has sought to bring the exercise of executive authority under its control and supervision, but not to weaken it. It is one of the most striking facts of English constitutional history that along with the development of popular government and a constantly increasing authority and prestige of the elected branch of the Parliament has gone an increase rather than a decrease in the legal powers of the executive-powers which even in times of peace have been constantly added to, so that it is correct to say that by legal definition and establishment the powers

of the English crown are to-day more extensive than they were in the times of the Tudors or Stuarts. Indeed, there are few constitutional monarchs in the world whose legal powers are equally extensive. Correlative to this has been the policy of the Parliament, consistently pursued, to refuse itself to exercise functions essentially executive in character. Thus it may be doubted whether there can be found in the world a popularly elected legislative body which keeps itself so free as does the British House of Commons from the exercise of executive functions. It is equally true that nowhere else can a government be found in which those who possess and exercise executive or administrative powers are held to such strict legal and political responsibility for the manner in which and the discretion with which they execute the functions of their several offices. Functionally, executive and legislative powers are kept distinct in the British Government; in operation, they work in harmony and co-ordination.

Under the British system the nominally legislative body has not only refrained from itself attempting the exercise of functions logically belonging to the executive, but it has also been content to entrust the chiefs of that branch of the government with the task of formulating the general public policies which are to be the subject of legislative discussion—and chief among these public policies are, of course, those connected with the raising of revenues and the placing of supplies at the disposal of the crown.

Just what weight should be given in the legislature to the proposals of the executive contained in the estimates is, of course, a matter of great importance. Indeed upon this, more than upon any other one point, the actual character of the constitutional government which a state is to have may be said to depend.

In England, the financial proposals of the executive are practically controlling upon the legislature. By a self-denying ordinance which has been continuously in force for more than two hundred years, the House of Commons has declared that it

"will, receive no petition for any sum relating to public service, or proceed upon any motion for a grant or charge upon the public revenue, whether payable out of the consolidated fund or out of money to be provided by Parliament, unless recommended by the Crown."

This still leaves it within the power of the Commons to reject or reduce items of expenditure recommended by the executive, but in fact, so strictly does the party system operate that the entire financial program of the ministry is always adopted without substantial change, and indeed without discussion of many of its proposals. And as regards revenue measures, so certain is it that executive proposals will receive legislative approval, that their provisions are put into force immediately after they are made public in the so-called "budget speech" of the Chancellor of the Exchequer. The legality of this practice hav-

ing been denied a few years ago in the courts, a permanent act of Parliament was passed specifically legalizing the practice.

In Canada there is the constitutional provision in its fundamental act of government—the British North America Act of 1867—that

"it shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address or bill for the appropriation of any part of the public revenue or of any tax or impost, to any purpose that has not been first recommended to that House by message of the Governor General in the session in which such vote, resolution, address, or bill is proposed." (Sec. 54.)

In Canada, as in England, the party system operates to secure the almost certain and unchanged adoption by the Parliament of the budget proposals of the ministry.

In the constitution of the Commonwealth of Australia there is a provision similar to the one quoted from the British North America Act.

In constitutional monarchies like Prussia and Japan the budgetary proposals have an almost overwhelming weight in the legislatures, but this is due not to the working of party government, but to the constitutionally dominating powers of the executive.

In France and Italy the budgetary system exists, but though accepted as a working basis, the financial proposals of the executive are freely amended—and, it may be observed, with most unfortunate results. Indeed, the testimony of experience the world over is that a popularly elected legislative chamber cannot be trusted to practice due economy in the matter of authorizing expenditures from the public purse. The wisdom, therefore, of the standing order of the British House of Commons which has been quoted, and of the provisions of the Australian Commonwealth and of the British North America Act cannot be impeached.

The writer is not prepared to say that the United States should adopt en grosse the parliamentary system of Great Britain. Nor is he ready to propose that Congress should be given the power to expel the executive from office—although it may be said parenthetically that this power is in fact possessed in Great Britain by the electorate rather than by the Commons, for it has been many years since a British ministry has been obliged to resign because of a failure to obtain parliamentary support for its policies. What does appear plainly is that the English system is far superior to ours so far as its representative body submits to executive direction, and so far as it compels that executive to supply it with the information which is needed in order that it may not only pass an intelligent opinion upon the measures presented to it, but give publicity to their acts and pass judgment upon the economy, efficiency and honesty with which the affairs of the government have been administered.

These propositions have a direct and important bearing upon matters of financial policy, for as must plainly appear, it is especially within this field that the fund-raising and fund-appropriating and policy-determining body is in need of information and advice which only the executive is competent to give. It is unfortunate that the proper use of executive information and advice has been prevented in this country through a mistaken interpretation of what is known as the principle of "separation of powers,"—force being given to it in political practice which is not inherent in it as a constitutional doctrine.

As a constitutional doctrine, the theory holds that a people can be made secure in their private and public rights only if the exercise of executive, judicial and legislative powers are vested in different organs of government, each as free as possible from legal control by the others. As a matter of political practice, however, it is indispensable that these three great branches of the government should operate in harmony and co-operation; and it is especially important as regards the executive and the legislature that there should be no jealousy by one of the power and influence of the other, so long as constitutional limits are not overstepped or endangered.

By a process of historical development the operation of the British Government has been brought, as we have seen, to that happy condition in which the executive and legislative powers, though never confused, are exercised in almost complete harmony and resulting efficiency. In the United States this result has not been secured and there still persists on the part of Congress a jealousy of the power and influence of the President which has prevented Congress from encouraging or even permitting the development of executive practices which, if employed, would not only greatly increase administrative efficiency, but would put Congress itself in a more satisfactory position to exercise its functions as an organ of legislation and as a board of supervision and control of the administrative services.

If we consider the subject wholly from the standpoint of conserving to Congress its full influence and power as the policy-forming and supervising organ of government, it is clear that in matters of finance Congress is of right entitled to demand that the executive shall give it the following information:

- 1. An accurate and intelligent statement of the condition of the public treasury.
- 2. An estimate of the revenues to be received by the state from existing sources of income.
- 3. A statement of the expenditures of the last-completed or immediately preceding fiscal year, and an estimate of the expenditures that will probably be made during the current year.
- 4. A statement of expenditure needs for the government during the next fiscal period.

The character and content of these exhibits deserve more specific description. The statement as to the condition of the Treasury now submitted to Congress shows little more than the actual cash on hand. To be adequate, it should be upon an accrual basis, and should clearly exhibit the status of all trust and other special funds, including the funds which each appropriation creates. It is also highly desirable that the showing thus made as of the date of the ending of the last fiscal year should be accompanied by comparative tables showing the corresponding totals for one or more of the years immediately preceding. The probable condition of the Treasury at the close of the current year should also be exhibited, as well as the Treasury situation to be expected at the close of the coming fiscal year in the light of the estimates and expenditures and receipts for that year. There are some accountants who hold that this Treasury balance sheet should also show the property assets in the way of buildings, supplies on hand, etc., but it is the opinion of the writer, for reasons that have already been given, that no useful purpose would thereby be served. However, as will later be pointed out in connection with the statements of expenditures, capital outlay and fixed charges should be distinguished from current expenses and the value and amount of materials on hand at the opening and close of the fiscal year should be indicated.

In the statement of revenues should appear in parallel columns the revenues for a series of years including those estimated for the current and the coming year. So far as possible, all distinct sources of revenue should be indicated in one table, and in another table the same revenues should be given according to organization units. Care should be taken to include "reimbursable" items and proceeds from the sale of material, and all miscellaneous receipts from fees, rents, charges for services rendered, etc.

The adequate presentation to Congress of expenditures is a more difficult matter than is the preparation and submission of revenue statements. These statements of expenditures are required in order that Congress may accurately estimate the needs for the coming year, and that it may determine the economy and efficiency with which past operations of the government have been conducted. By determining this matter of administrative economy and efficiency, Congress is enabled to fix administrative responsibility, and incidentally to limit appropriations for the future to sums which, while sufficient, will prevent wasteful and extravagant expenditures.

For the purpose both of oversight of the administration and of making financial provision for the next fiscal year, it is, therefore, indispensable that expenditures should be reported in five different forms, namely, according to (1) funds, upon which chargeable; (2) character—i. e., capital outlay, fixed charges, and current expenses; (3) organization units; (4) activities—i. e., pieces of work done or distinct

services rendered; and (5) objects—i. e., materials or personal services purchased.

Only when expenditures are thus reported is it possible for the fundgranting and directing authority to determine what returns have been obtained from the expenditures previously authorized, what each department, bureau or other governmental establishment has actually cost for maintenance and operation, and what expense each particular piece of work done for the government has entailed.

It need not be pointed out that returns such as those indicated above cannot possibly be made unless the several spending services maintain uniform and appropriate accounts, including cost-accounts. the present time, except in a few instances, no such classified expenditure accounts are kept, nor is there any approach to uniformity of presentation where they are kept. In general, such accounts as are kept indicate little more than the disbursements made by the various disbursing officers, and the Treasurer of the United States does not even make a report of disbursements according to appropriation accounts, although this information is of course recorded upon his books. Furthermore, there are no reports made by the various auditors, nor any comprehensive statements of audited items such as are made by the Auditor General in Canada and the Comptroller and Auditor General in Great Britain. If, then, Congress is to obtain the information concerning expenditures which it is entitled to have, it is necessary that a statute provide that proper basic accounts be kept in all the services of the government and that the annual reports should be based upon them.

The fourth set of facts, as previously enumerated, to which Congress is entitled is a statement from the administrative services of their financial needs for the coming year. As to classification, there can be no doubt that it should be according to organization units and that each appropriation head should be adequately itemized.

In the immediately preceding paragraphs a description has been given of the kinds or classes of informational data which should be supplied to Congress. We turn now to the question whether the book of estimates in which this information is contained should be a mere mechanical compilation of the data supplied by the several government services, or whether before being sent to Congress these requests should be submitted to a central official who shall be authorized to revise them, and to transmit them to Congress as his own estimates—that is, as estimates for whose correctness and wisdom he is personally and politically responsible.

In any system of financial administration, the need for a revision and co-ordination of the original estimates of various bureaus and departments is due to two facts—one of knowledge, and the other psychological, as characteristic of human nature itself. As regards the matter of knowledge, it is clear that the heads of the several subdivisions of the administrative service cannot be expected to have exact information concerning the needs of services other than their own, or of the government as a whole. As regards the psychological or subjective element, it is but natural and, indeed, laudable that each head of the bureau should emphasize the value of the services which he directs, should seek to increase its scope and importance, and therefore be disposed to ask for corresponding financial support. Thus, it is to be expected that he will ask for all that he can possibly hope to get without regard to the demands of the other services.

In the United States, only the President could effectively exercise this revisionary power. The only other official to be thought of in this connection would be the Secretary of the Treasury, but if the authority were vested in him it would inevitably become merely a matter of form, the real discretion being exercised by the President. This would necessarily result from the official relation in which the Secretary of the Treasury, as well as the heads of the other great executive departments, stand toward the President, and from the fact—which has earlier been pointed out—that it is always possible for the President, through his constitutional powers of appointment to and dismissal from office, to secure members of his Cabinet who are in accord with his policies.

It is clear that there would be no constitutional objection to the development or express statutory authorization of such a system in this country. Indeed it is doubtful whether statutory authorization to the President to revise the estimates would be needed. Even the repeal of existing statutes would not be essential, as the episode of the Taft administration showed, except to prevent the expense of preparing the estimates according to the old forms for submission by the Secretary of the Treasury directly to Congress. As a practical matter, however, it would be necessary for Congress to provide a corps of officials organized as a budget bureau or bureau of administrative control for collecting and compiling the material which the President would need in order to prepare for Congress the various informational documents which have been described.

That the introduction of budgetary methods would result in a considerable increase in the political influence and prestige of the President cannot be doubted; and that the estimates as thus revised and submitted would have a weight which would make it less easy than it now is for Congress to depart from them, is also reasonably certain. The question before the American people reduces itself to this: Is there really any objection to giving the President a greater influence than he now exerts in matters of financial legislation? Or, if there is an objection, is it of a character sufficiently serious to warrant our foregoing the advantages which might be obtained?

All persons who understand the principles of public financial administration and who are also able to view the matter without

personal or political bias, will have no hesitation in answering that the advantages certain to accrue from subjecting the departmental estimates to presidential revision should be secured. And there are few students of the science of government and of the American constitutional system who see any disadvantages that would result from an increase in the President's power and influence in matters of financial administration.

In fact, the upholders of the existing systems are obliged to draw back their arguments into their last trenches of defense and to assert that it is inconsistent with the idea of representative government to which American political philosophy stands committed, that the representatives of the people in Congress assembled should divide with the executive the responsibility for the public policies, financial or other, which are to be adopted.

The hollow character of such an argument is, however, apparent. In the first place the President is elected by and is as much a representative of the people as are the members of the legislature. In one sense, indeed, he is a truer representative than they, for he alone is the choice of and represents the interests of the whole people, while the members of Congress each represents but a relatively small constituency. But even if this were so, and if, arguendo, it were to be conceded that the will of the people should find utterance exclusively in the resolutions and enactments of Congress, it still would not follow that it would be inconsistent with the fundamental principles of republican or representative government to permit the executive to make recommendations which can have no legal force until adopted by the legislative body.

Stripped then of all sophistries, and leaving aside the matter of unreasoning conservatism, the only explanation why Congress has been unwilling that the estimates should be submitted and revised by the President (or by an official responsible to him), is that it has not wished to increase his political influence. The certainty of economy and efficiency in the administration of the affairs of the nation has been insufficient to overcome that unwillingness.

# COLLECTIVE ACTS AS DISTINGUISHED FROM CONTRACTS¹

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Ι

# NATURE OF THE QUESTION

For a long time it has been a dogma admitted by the jurists of all countries that a contract alone could create consensual legal relations between individuals, in the absence of an express provision of the law assimilating, by way of exception, a unilateral act to a contract. On the other hand, it has been admitted with equal unanimity that whenever several concurrent declarations of will occur, a contract exists If the unilateral act produces legal effects in the domain of public law the reason was said to be that it emanates from a person invested with public power; but even in the matter of public law, when the public power does not appear in the foreground, a contract alone can create consensual legal relations; and in this field also there is a contract whenever there is a concurrence of will.

In the course of the last twenty-five years a double evolution has taken place in ideas and facts; the facts have acted on the ideas and the ideas on the facts. The question has been asked what was the value in law of this notion of public power which, under the persisting influence of Roman conceptions, has for centuries been declared to be an indispensable and intangible postulate. It was recognized that this notion was neither more indispensable nor more intangible than many others which had long been so considered. It was further recognized that in order to understand how a unilateral act emanating from governments or their agents can produce legal effects, it is useless to admit the postulate of public power, and that its creative force is not explained through the hypothesis of an imperium, but solely through the conformity of the act to the objective law of the social group in which it occurs. If a unilateral declaration of will which conforms to the objective law may of itself produce a legal effect in the domain of public law, there is no reason why the same should not be true in the domain of private law.

We have thus been led to inquire whether there are not in private law many acts, hitherto considered as contractual, which in reality are

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¹Translated from the French by Ernest G. Lorenzen, Professor of Law in Yale University.

only unilateral acts, and to which in consequence the ordinary law of contracts should not be applied.

On the other hand, numerous cases have appeared in the domain of public law, internal as well as international, where there is a concurrence of wills and where nevertheless one has a distinct feeling that there is no contract. For example, in countries in which legislation proceeds from the concurrence of the wills of two chambers or of such chambers and a chief magistrate, it cannot be said that there is a contract between the chambers or between the parliament and the chief magistrate. It is likewise clearly seen that the official acts of a corporate agency are not per se contracts. Finally, in certain acts based perhaps upon agreement, such as the appointment of a public officer, or the granting of a franchise for a public service, one may see this less clearly, but the impression certainly is that it would be taking a false view to see therein contracts of the classical and professional type.

The observations made in the domain of public law have led naturally to the inquiry whether in private law also there were not many cases in which there exists a concurrence of wills, and in which nevertheless it cannot be said that there is a contract in the traditional and civilian sense of the word. We were forced to recognize that such was the case. But the habit was so strong, the tradition had become so deeply encrusted in our minds, that it was impossible for a while—at least in France—to discard the notion of a contract. We desired to maintain the thing and the word, but we added to the word epithets which, although we did not see it, were inconsistent with it. We spoke of contracts of adhesion, of collective contracts—expressions which contain a contradiction in adjecto.

Facts and ideas progress, however, notwithstanding the opposition of jurists adhering to tradition, and the time has come for us to recognize that in the domain of private law as in that of public law there is a series of cases in which, although there is a concurrence of wills, it cannot be said that there is a contract. It does not suffice, however, for us to arrive at a negative conclusion. We must find a positive solution. The thing is not easy. The difficulties have arisen from the fact that we have tried to put into a single category all the cases in which there is a concurrence of wills without the existence of a contract.

If we proceed to a more thorough analysis we perceive that a distinction must be made between the cases in which the concurrence of wills is only the sum total of unilateral declarations of wills, and those in which the legal relation is created by the unilateral will of the parties. In this case alone the expression collective act (in German, Gesammtakt), the word designating a plurality of unilateral acts, should be used.

In certain cases, on the other hand, there is clearly a concurrence of

wills, a bilateral act, an agreement, if you like; but there is no contract. We have here a juridical act of a specific nature which is neither a contract nor a unilateral act. Jellinek and Triepel have given it the name of *Vereinbarung*, of which the French and English word "union" is the literal translation and which I propose to accept.

It is not my intention to study and to analyze all the instances in public and private law in which the collective act or union appears. That would far exceed the dimensions of an article for this JOURNAL. I shall content myself with studying the collective act and the union in the domain of private law, taking two characteristic examples—the formation of associations and the collective labor agreement.²

II

#### THE TRADITIONAL NOTION OF A CONTRACT

The principal point is to determine exactly what a contract is. Not-withstanding the controversies which exist on the point, the thing is not very difficult. We must not forget that the contract is a creation of the Roman law which accords with a juridical system that is essentially subjective and individualistic. The Roman conception of a contract is materalized in the form of a *stipulatio*, a mold into which every contract could be put.

Gaius has told us: "Verbis obligatio contrahitur ex interrogatione et responsu, cum quid dari fierive nobis stipulamur." Verbis obligatio fit ex interrogatione et responsione velut: Dari spondes? Spondeo.

The question has been much studied in Italy, especially by Borsi, L'atto amministrativo complesso, in 20 Studi senesi (1902); Donato-Donati, Atto complesso, in 12 Archivio juridico (1903).

² For twenty-five years the question has given rise to an extensive literature in Germany and in Italy. I regret to say that the same is not true in France. I believe the great German jurist Gierke was the first to show that it was a complete mistake to see a contract in the constitutive act of an association or corporation—Gierke, Die Genossenschaftstheorie (1887) 133. Jellinek has shown that there are many cases in public law in which there is a concurrence of wills without the existence of a contract. He considers that there is in this case a juridical act possessing a specific characteristic which distinguishes it from the unilateral act and the contractual act, a juridical act which he calls Vereinbarung.—Jellinek, System der öffentlichen subjektiven Rechte (1892) 193, 194. In 1899, Triepel developed and made more specific this distinction between contract and Vereinbarung. He saw in Vereinbarung the basis of objective international law.—Triepel, Völkerrecht und Länderrecht (1899). A complete bibliography will be found in the thesis of Gleitsmann, Vereinbarung und Gesammtakt (Halle, 1900).

In France the question has been studied but little. See, however, Bézin, Exposé des doctrines allemandes et italiennes sur l'acte complexe, in Recueil de législation de Toulouse (1905) 289; Hauriou, Principes de droit public (2d ed. 1916) 136 et seq.

^{*}Digest XLI, 7, 1, § 7; Institutes III, 15.

This form shows clearly two wills which are manifested outwardly—two declarations of will, to use the modern expression, two wills which have come into contact. There are two individuals who knowingly agree and bind themselves, one stating that he stipulates, that is, that he wills to become a creditor, the other stating that he promises, that is, that he wills to become a debtor.⁴ The one who wills to become creditor does so because he thinks that the other wills to become debtor; the other who wills to become debtor does so because he knows that the other wills to become creditor. The two wills concur but each has its own objects and aims.

Thus there is formed a legal tie between two persons whose situation and interests are opposed: one is bound to effect a certain "prestation" or "performance" with respect to the other, who in turn has the power to demand that performance.

A juridical act is a contract only if it can enter into the mold of such a contract as the *stipulatio*. I want to say that a contract exists only if the clauses of a juridical act, however complex we may assume them to be, may enter into the framework of one or more *stipulationes*. If they do not, something other than a contract exists: it may be an agreement, but it is not a contract.

This Roman conception of a contract has been transmitted to the modern law through the agency of the great Romanists of the Middle Ages and of the Renaissance, by the great French jurists of the seventeenth and eighteenth centuries, and especially by Pothier. It is to-day expressed in all the codes of Europe and America.

Pothier defined a contract as an agreement by which the two parties reciprocally (or only one of them) promise and bind themselves with respect to the other to give him something. Virtually the same definition may be found in the Code Napoléon: "A contract is an agreement by which one or several persons bind themselves with respect to another or several others to give, to do, or not to do a certain thing." The German Civil Code does not give a definition, properly so called, of a contract (Vertrag). But it clearly appears from different articles that it has maintained intact the traditional Roman notion of a contract. It should be noted in the first place that the German Code uses the word Vertrag only when the question concerns the creation, extinction, or assignment of an obligation. When the question concerns the

[&]quot;By the term 'creditors' is meant not only those who have loaned money, but all to whom something is owing for any reason." Digest of Justinian, L. 16, 11. Similarly in modern continental law the party obligated is called debtor and the party entitled to a "performance" is called creditor.—[Translator.]

⁵Prestation—in German, Leistung—is the general term describing an act or forbearance which one person is entitled to claim from the other by reason of an obligatory relation existing between them. Schuster translates the term by the word "performance:" The Principles of German Civil Law, 137.—[Translator.]

⁶Art. 1101.

creation or assignment of a right in a res it uses the word Einigung. The German Civil Code says: "A contract is concluded by the acceptance of an offer . . ." And in another place: "For the creation of an obligation by juristic act, and for any alteration of the substance of an obligation, a contract between the parties is necessary, unless it is otherwise provided by law." Thus a contract exists only when an offer has been accepted with the object of creating an obligatory relationship—that is, a relationship of creditor and debtor between the offeror and the acceptor.

The same conception is clearly formulated in the codes of the New World. I shall refer to only three by way of example. The Civil Code of the Argentine Republic, drafted between 1868 and 1870 by the eminent Argentine jurist Dalmacio Velez-Sassfield, contains a clear expression of the traditional notion of a contract. It is placed under the title: Obligations which Arise out of Contracts. The characteristic of a contract is thus the creation of an obligation between the contracting parties. The agreement is formed by the offer of one of the parties and its acceptance by the other.9 In the Civil Code of Louisiana there is a definition of contract copied from that of the Code Napoléon:10 "A contract is an agreement, by which one person obligates himself to another, to give, to do or permit, or not to do something, expressed or implied by such agreement." An almost identical definition is found in the Civil Code of Georgia:11 "A contract is an agreement between two or more parties for the doing or not doing of some specified thing."

Such is the notion of a contract which is unanimously admitted by the civilians of all countries. It would serve no good object to reproduce the different definitions given, all of which turn on the same point, and I shall content myself with citing a passage borrowed from the classical work of Aubry and Rau, the reputation of which is universal: "An agreement is the accord between two or more persons with respect to an object of juridical interest. The agreement which has for its object the formation of an obligation is called more particularly a contract. The agreement is the genus; the contract, the species."

A contract is therefore a juridical act whose specific character is clearly determined. It is created by the declarations of will proceeding from two individuals or two groups of individuals and implying a preliminary accord. Each of these declarations of will has an object of its own; each has an aim of its own because it is determined by the

⁷ Art. 151.

⁸ Art. 305.

^{*} Argentine Civil Code, arts. 1171, 1172, 1178.

¹⁰ Art. 1761.

^{11 (}Adopted Aug. 15, 1910) art. 4216.

¹² 4 Cours de droit civil français, 283.

other. The act as a whole has for its object the creation of a situation uniting two persons or two groups of persons between whom exists the relation of creditor and debtor.¹³ In the situation which arises from a contract there are always two persons and only two persons—or two groups of persons. All the persons of the same group are in the same situation with respect to those of the other group, and each person or each group of persons is in a different situation and has opposing interests, one being creditor, the other being debtor, each having so willed.

Finally, a contract is an accord entered into between two persons having for their object the creation of an obligation at the expense of one—the debtor, and for the benefit of the other—the creditor.

The notion of obligation and that of contract are thus intimately related. An obligation may arise otherwise than from a contract. A contract is the cause and the obligation the effect. But it is none the less true that an act which does not have for its object the creation of an obligation is not a contract. For this reason the Code Napoléon and other codes include under the title of Contracts or Obligations Arising from Agreement in General, dispositions relating to obligations and to contracts. This is certainly a bad method, but the explanation is historical and discloses the intimate relation existing between the notions of contract and obligation.

The above being established, it follows that there may be a concurrence of wills without there being a contract; that no contract exists when there are several declarations of wills which have the same object; that there is no contract, although there is an agreement, whenever the object of the parties is the creation of a situation which does not constitute a relationship of creditor and debtor.

What have we then when there is no contract? I shall try to show this. But it matters little: the principal thing is to assert that there is no contract and that the application of the ordinary law of contracts in such a case would involve a false view which would lead to grave mistakes.

# III

PLURALITY OF UNILATERAL DECLARATIONS OF WILL—THE ASSOCIATION

Practical modern needs and the great development of commerce and industry have given rise to juridical formations which are called corporations (sociétés anonymes) and associations. They have essentially the same characteristics: the uniting of capital and labor for the attainment of a certain end, which we assume to be lawful, in conformity to a rule accepted by the members and constituting what are called the articles of association.

¹⁸ See note 4, supra.

French law, in consequence of historical circumstances which we need not here explain, distinguishes clearly between corporations and associations according to a criterion which is in reality a purely formal one. A corporation is a uniting of capital and labor for the attainment of a purpose lucrative to its members. An association is the union of capital and labor for the attainment of a non-lucrative purpose for the benefit of its members or for the benefit of persons who are not members of the association.¹⁴

I shall take as an example the association as just defined. The French legislator who has neglected to make even a superficial analysis of this act has seen therein a contract and has stated in the aforesaid text that the association should be governed by the general principles of law applicable to contracts and obligations. This is clearly an error which will lead to regrettable consequences. In order to show this we must distinguish between the preparatory period and the formation, properly so called, of the association.

During the preparatory period those who promote the association agree upon the manner in which it shall be created, on the contributions of each of them and upon the role which each is to play in the association. That true contracts are thus made cannot be doubted. There are agreements, accords between persons who intend to bind themselves one to another.

These agreements may also contain stipulations for the benefit of others which are valid as the condition of a contract which the parties have made on their own behalf, and which have such force as the laws of most countries attribute to them, such laws differing somewhat in detail.

The above are contracts according to the traditional conception and they have the traditional force. But none of these acts, however definite and developed we may assume it to be, constitutes an association. So long as there are only these acts there is no association as yet, and even the effects of these acts are subordinate to the suspensive or resolutory condition, according to the intention of the parties, that the association shall be formed. The formation of the association is therefore distinct from such acts and is an entirely different thing.

When the above understanding has been reached the promotors of the association make an appeal to the public. On the day and at the hour announced the persons responding to the appeal assemble. The promotors have drawn up articles of association—rules and provisions of a general nature which contain five things: First, the object of the association; second, its name; third, its home office; fourth, the composition of the organization which is to administer its affairs; and fifth, nearly always, the amount of the annual contributions which are to be paid by the members. These propositions are discussed at the

¹⁴ French Law of July 1, 1901, art. 1.

meeting; the proposed rules are then adopted and the articles are approved.

The association is thus formed and it includes as members all those who have approved the articles. That is the constitutive act.

That there is a concurrence of wills is unquestionable; that there is a plurality of declarations of concurring wills, there is no doubt. But certainly there is no contract.

In the first place, there has been no contact between the different wills that approved the articles of association. One of them has not made an offer to another which has been accepted. The different persons who were found in the hall did not in reality enter into relations one with another. They have not exchanged promises with the object of creating between themselves an obligation, a relationship of creditor and debtor. One of them has not willed to bind himself, influenced by the will of the other to become creditor, and vice versa. On the contrary, all these persons intended the same thing: the formation of an association according to the articles which they have approved. All these declarations of will have been determined by the same end, namely, the one which the articles that have been approved give to the association.

After the association is formed, does there exist an individual relationship of creditor and debtor between its members? Not at all. There is a permanent situation, regulated by the articles of association, which are really a law for the group—a law which applies not only to the members, not only to the agencies of the association, but also to third parties who enter into relations with these agencies.

The articles are the permanent law governing the members so long as they remain in the association. They impose obligations, the most usual of which is that of paying an annual contribution. A member may be regarded in this respect as the debtor of the association, which in turn is his creditor. But if the relation of creditor and debtor exists between the association and its members, it by no means arises from a contract between the members of the association, which is anterior to the approval of the articles, since the association did not exist at that time. Moreover, if the member is a debtor of the association, he has become debtor by virtue of law. He is in a situation analogous to that of a taxpayer, the amount of whose debt may be increased by law in spite of himself. The amount of the contribution may be increased by the majority in conformity to the articles, and the dissenting members will have to submit to this act of the majority just as the taxpayer must submit to an increase of taxes determined by the law. This could not be so if there was a contract.

The articles apply to the members, who may be placed under what is really a penal law—a disciplinary law. They may actually inflict punishments and establish an agency of the association which, like a real court, shall pronounce them. The member can do nothing which

constitutes a direct or an indirect injury to the aims of the association, which interferes with its activity, or stains its reputation. Every act of this kind constitutes a disciplinary infraction which the articles may provide against and punish by a fine or by exclusion from the association. The last constitutes the gravest punishment that can be inflicted. There are numerous associations in which this is done. We have thus a penal or disciplinary régime which leads us far away from a contract; a well-defined juridical act which creates a relationship of creditor and debtor between two juristic subjects.

The articles also apply to third parties. All dealings with third parties in the name of the association are governed by the articles, which may be invoked by those parties just as they may be invoked against them. These articles determine the capacity and the powers of the agencies of the association, and if the latter have done acts beyond their authority, the nullity of those acts may be invoked by the third parties just as it may be invoked against them.

The articles of association determine its object. Its agencies can act only in conformity with its object; every act done in violation of this object is null and void. Moreover, this nullity, which has as its basis the articles of association, may be invoked against third parties as well as by them.

May we say that the validity of a contract with third parties may be determined by another contract? This would be absolutely contradictory to the notion of a contract itself: a contract can change the legal relations only of the contracting parties. On the contrary, everything is explained and becomes luminously clear if we understand that the approval of the articles has been equivalent to the voluntary establishment of a law which is to govern the life of a new group.

Thus there arises the question indicated at the beginning of this article. Does this concurrence of wills which forms the association constitute a juridical act of a specific nature which distinguishes it at the same time from a contractual act and from a unilateral act? Is it a *Vereinbarung*—a union? I do not think so and I believe that there is simply a plurality of unilateral declarations of will, a plurality of unilateral acts; the validity of those acts is recognized by law because they are aimed at a lawful object. This results from the analysis which precedes.

Because of the celebrity of its author, I cannot pass by in silence Gierke's view according to which the constitutive act of an association has a specific character which distinguishes it from a contract and from a unilateral act. Gierke teaches that the constitutive act of an association is not simply a plurality of unilateral declarations of wills, because these wills do not remain isolated without contact among themselves, but on the contrary they all contribute to a common end and become fused in a common life. There is no contract because a contract contrasts two opposite wills—two wills which are bound by an agreement

but which preserve their autonomy and play opposite roles in the situation which arises from the contract. In the present case, however, the wills are associated and are by no means opposed one to the other; they co-operate toward the same object; they tend to be merged and to be lost in a single new will which is the will of the association that has been formed.

"The act whereby the group is formed," writes Gierke, "is not a contract but a unilateral collective act which has no parallel in the law pertaining to the individual. The word contract of association is as inexact as regards the formation of a group as it is for the organization of a state or of a church and it can be accepted no more in private law than in public law. It is the will of the collective being in the process of formation which is developing and taking on form in order to assert itself in the constitutive act. In consequence the development of an association from its conception to its complete formation must be considered as one act. The innumerable individual acts which take place are comprehended as non-autonomous elements in the collective act, set in motion by a single centre. In consequence this collective act is already corporate action." 15

It is impossible for me to follow the German jurist upon this ground. This is not the place to discuss the celebrated question of the juridical personality of collective bodies, a theory of which the Berlin professor has made himself the apostle. It must suffice to say that this conception of a purely metaphysical nature must in my opinion be rejected from every truly scientific theory of the law. It is the persistence of the scholastic concepts of substance and entities which are without value and of which jurisprudence should be rid once for all.

Gierke's negative proposition, "The act whereby the group is formed is not a contract," is fully established. I believe I have proved it. But we must not go further. A jurist should affirm nothing beyond what he finds in reality. In the present case we see as a matter of fact a certain number of individuals who approve articles because they desire to pursue in common a lawful object in conformity to those articles. It is neither a contract nor a *Vereinbarung*. There are several unilateral declarations of will which create objective law for a group pursuing an object recognized as lawful by the law of a given country.

## IV

#### THE COLLECTIVE LABOR CONTRACT

The term "collective labor contract" has been used to describe the arrangements that have been brought about by the necessity of finding a solution for the conflicts which have arisen in all countries between

¹⁵ Gierke, Die Genossenschaftstheorie (1887) 135.

labor and capital. The expression is bad. The two words contract and collective are contradictory, and the act which is thus designated is neither a contract nor a labor contract. That there is a concurrence of wills is unquestionable. It must even be admitted that there is an agreement, a fact which distinguishes it from the case considered above. But it must be unquestionably denied that there is a contract.

We use the term collective labor contract to describe the arrangement commonly entered into between representatives of capital and labor in a certain trade for the purpose of preventing or putting an end to a strike; an arrangement regulating the conditions upon which workmen in the trade shall thereafter be hired—such conditions, for example, as the hours of labor and the scale of wages. In simpler terms: the collective labor contract is an agreement which determines the *law* according to which individual labor contracts in a given trade shall be concluded.

By way of example, we may consider the arrangement entered into on February 7th, 1913, between the employers' association of bakers of Bordeaux and the bakers' labor union, fixing the daily wages and the conditions upon which employees might be dismissed by their employers; or, to take another example, the arrangement entered into in Paris on October 4th, 1917, between the association of employers in the artificial flower and feather industry, and the corresponding labor union. This arrangement determined the conditions for the application of the English week, and compensation for the higher cost of living.

We cannot fail to see that these acts constitute an agreement. The representatives of the employers and those of the employees in the trade have entered into contact; an accord has taken place. But this agreement is not a contract. It is not a contract whether considered in itself or from the point of view of the situation which arises therefrom. In a contract each contracting party wills a different thing and aims at a different object. In the present case both parties will the same thing: the creation of a general, permanent rule, of a law which shall henceforth control the conditions of work in their trade. The parties have the same object in view, namely, to avoid a conflict or to resolve one which has arisen between the employers and employees of a particular trade and to establish the law for their future relations.

As to the situation which arises from the collective labor contract, is it possible to see therein upon any basis whatever a relationship of creditor and debtor, an obligatory relationship between one person who is under a duty to render a certain performance and another who has the right to demand it? There is simply a general, permanent rule, a law according to which the individual contracts in the trade shall be made, each of the contracting parties having the power to rescind an agreement which may have been entered into contrary to the rule established by the collective contract.

The jurists adhering to tradition have indeed been obliged to

recognize that the collective contract did not give rise to true obligations between the contracting groups, and that if obligations did arise they resulted from the duty of the employers and employees to conclude individual labor contracts in conformity with the general rules established by the collective act. But these jurists have been considerably embarrassed to explain how these obligations could arise.

At first they have tried to explain the matter as a stipulation for the benefit of others which is provided for by Article 1121 of the Code Napoléon and in similar provisions of many other codes. It may be lawfully stipulated in a contract that the debtor, in addition to what he promises to the other contracting party, shall render a certain performance for the benefit of a third party, and even for the benefit of a person who shall be determined subsequently by an act which is quite independent of the will of the contracting parties. But in order that there may be a stipulation for the benefit of another it is necessary that a promise for the benefit of a third party be made and consented to in fact. In the collective contract there is nothing of the The contracting unions do not agree that one of them shall render a certain performance to a third party, whether determined or not. A general, permanent rule has been established by which the individual contracts in the trade shall be regulated between employees and employers, between workmen and capitalists. However much we may search, no trace of a contract for the benefit of another can be found.

They have been obliged to admit the foregoing facts. They have then wanted to bring in the idea of mandate. The learned members of the Société des études législatives proceeded thus in 1907, when they tried to draft a law on the subject of collective labor contracts.16 In this mandate, however, the mandataries are the union and the association; the mandants are the individuals who comprise the union and the association at the time the collective agreement is made. Under these conditions the terms of the agreement are binding neither upon the employees nor upon the employers who were not respectively members of the union and of the association at the time of the agreement, nor upon those who withdraw therefrom subsequently, because in so retiring, they revoke the supposed mandate which they have given to their organizations. One might as well say, then, that the collective contract is without effect because the employers who are members of the association may always hire workmen who are not members of the union upon conditions which seem best to them, and because the employers merely have to withdraw from the association in order to be able to make such contracts as they please. A collective contract thus understood is a nonentity.

¹⁶ Bulletin de la société des études législatives, 1907, pp. 180, 505; Report of M. Colson and discussion, ibid. p. 532 et seq.; ibid. 1908, p. 82 et seq.

This leads us to the conclusion, that what is called a collective labor contract is a very specific juridical category which is neither a plurality of unilateral acts nor a contract in the proper sense of the word. There is a concurrence of wills; there is an agreement between two groups which preserve their autonomy. But there is no contract because the object and the aim of the declarations of will are the same for all parties. Their wills have not as their object the creation of a situation of creditor and debtor; the object is to establish a general, permanent rule according to which labor contracts in the trade are to be made. These wills are determined by the same aim—to regulate or to prevent a conflict between employers and employees.

The collective labor contract is an agreement or law regulating the relations of two social classes. It is by no means a contract giving rise to special, concrete and temporary obligations between two juristic subjects. It is a law establishing permanent relationships between two social groups, the legal rule according to which the individual contracts between members of these two groups are to be concluded. Just as the articles of association are the law for a group, in the same way the clauses of a collective contract are the law which governs the relations between two social groups.

On July 29, 1913, the French Chamber of Deputies approved a bill on the subject of the collective contract which is based directly upon these ideas. The text wrongly retains the expression "contract," although the title of the law is "The collective labor agreement." In article I, section 2, it is correctly stated that this agreement "determines the conditions which individual labor contracts must satisfy." The bill stipulates that all members of the groups that are parties to the collective labor agreement or that subsequently assent thereto are bound by it, provided they have not resigned from the group within the space of a week. Each group that is a party to a collective labor agreement made for an indeterminate duration may at any moment denounce it. This is logical, inasmuch as a law should always be subject to modification—even a law by agreement. But the law permits each member of a group that is a party to a collective labor agreement, unless he has surrendered such privilege, to free himself from the obligations resulting from that agreement by withdrawing from the group of which he was a member at the time the agreement was entered into; and he cannot surrender for a period of more than five years this privilege of freeing himself from an agreement which is in operation.

The provisions of the law do not well agree with the general notion of a collective labor agreement. We see therein a persistence of the individualistic conception of a contract of which the legislator has not been able to free himself completely and which threatens, if the law is definitely approved in these terms, to compromise its effectiveness. On the other hand, it was evidently with some difficulty that the legislator could be made to admit that the members of contracting unions

could not by withdrawing from the union always get rid of the law which the collective contract had created.

The truth is that although collective labor contracts have multiplied, especially since the war began, the time has not yet come for legislative action. We have here an institution which is still in the process of formation and is far from its complete development. The working classes have not yet acquired a definite juridical structure; in each trade, such strong and widespread labor unions and employees' associations do not exist that they may be regarded as identical with the trade; the laborers and employers outside such unions and associations may not be considered as negligible quantities.

I believe that many of the European countries—and especially France—are tending toward this social state. Far from being arrested by the war, the evolution has rather been accentuated and has become more distinct. The employers' associations have a well-established organization in many trades. The evolution has perhaps advanced less so far as the labor unions are concerned, but that does not prevent the effectiveness and the sanction of the collective labor contract. Its provisions have for their special object the protection of the workman so far as salary and the maximum of daily work are concerned. When the employers' association has accepted the provisions of a collective labor contract, if this association constitutes in fact the organized trade, the agreement really becomes the law of the trade, and every workman, even if not a member of the union, should be able to invoke the application of that law.

V

## CONCLUSIONS

The analysis which I have just made of the collective labor contract may be made with respect to many acts of private and public law which are agreements but not contracts, which do not create a relationship of obligations at all, but form the conditions for the application of a law to certain persons, or establish a rule of law in the substantive sense. In private law marriage is an act of this kind. It is not a contract strictly speaking. It is an agreement which is the condition for the application to the husband and wife of the law concerning the status of married people. In public law the appointment of public officers is an act of the same kind. It is difficult to say that there is no agreement between the state which appoints and the officer who is appointed; but this agreement is not a contract. The relationship of creditor and debtor is not created between the state and the public officer. A juristic situation is created; and the appointment is the condition for the application to the public officer who is appointed of the law concerning the public office in question.

The same juridical phenomenon appears in public law in the granting of a franchise for a public service. An understanding, an agreement, is made between the state or municipality and the grantee, and this understanding constitutes the law which governs the operation of the public service in question. We would be outside of the actual facts, we would arrive at consequences that are absolutely untenable, if we should see in the granting of a franchise for a public service a contract and apply the ordinary law thereto. The difficulties and controversies which have arisen in France during the war between cities and corporations which hold franchises for public services have for their cause in great measure this mistake in the point of view.

In international law many treaties have the same character. Their object is by no means the creation of reciprocal obligations between the contracting states, but the establishment of a law regulating international relations in a permanent manner—a law which is very fragile, it is true, as the terrible events which the world is witnessing is showing only too plainly. But a crime never proves that the criminal law does not exist. The crimes of Germany do not prove that there are no laws founded upon international treaties or laws which are binding upon states.

At the beginning of this study I put the following questions: Are there cases where there is a concurrence of wills without a contract? In the cases where there is a concurrence of wills without a contract, is there a juridical act of a specific character which is neither a unilateral act nor a contractual act?

To the first question I answer: Yes, there are numerous acts where there is a concurrence of wills without a contract. The second question I answer by making a distinction. Frequently in connection with a concurrence of wills there is by no means a true juridical act; there is simply a plurality of unilateral declarations, a number of unilateral acts. We may call this concurrence of unilateral acts a collective act, a Gesammtakt according to the German expression. But it must be clearly understood that there are simply a number of unilateral acts, the sum total of which are the conditions for the creation of a certain legal situation and especially for the creation of a collective group and of the law which governs it.

In the other cases, on the contrary, the concurrence of wills does constitute an agreement, but the agreement is not a contract. There the concurrence of wills forms a specific juridical act which is neither a unilateral act nor a contractual act. It is what the Germans call *Vereinbarung* and which I propose to call *union*. A typical example is the collective labor agreement, as I have tried to show. Such an agreement really constitutes a law which regulates the relations of two or more groups. In other cases the act of union is the condition for the application of a general law to certain persons, as husband and

wife, or public officers; or it constitutes the law governing the franchise for a public service; or it establishes a rule of international law. The application of the union in public law as well as in private law is therefore wide, and it is bound to grow with the general movement which I have elsewhere tried to put into relief, 17 which has become accentuated during the war, and which develops the law governing modern associations more and more in a socialistic and objective manner.

¹⁷ See my two works, Les transformations générales du droit privé depuis le code Napoléon (Paris, 1912) and Les transformations du droit public (Paris, 1913).

# SPANISH COURTS

# LAYTON B. REGISTER of the Philadelphia Bar

Fortunately for one desiring to learn something of the Spanish judiciary, there are two or three great outstanding laws that cover the subject most minutely. Even the dress of the judge and officers of the court and the manner of addressing the court are made matters of law. The Organic Law, as it is called, is that of June 23, 1870. It is a veritable code, containing 932 articles. Of course many important modifications have taken place since that time, but the law of 1870 still remains the basic law.

#### TUDICIAL CLASSIFICATIONS

We may for convenience take the measure of the judicial organization in two directions. We may examine its geographical arrangement over the face of the national territory; and we may take its measure vertically, that is to say, hierarchically.

After seven centuries of war, the Moors were driven from Spain and the numerous Christian kingdoms became united under Ferdinand and Isabella. With administrative modernization the delimitations of the older monarchies survived in the provinces. Old and New Castille, Catalonia, Aragón, León, Navarre, Seville, Granada, Valencia, Murcia, Jaén, Galicia, the Basque Provinces, Asturias, Córdoba,—these names take us back to medieval history. In 1833 the older provinces were for better administration divided into forty-nine new provinces, each taking its name from its leading city. For judicial purposes, the provinces were subdivided into partidos (a Spanish term which I shall be forced to retain). About five hundred there were in all, and these again were divided into municipalities.¹

When we come to construct the judicial hierarchy composing the so-called "ordinary" jurisdiction upon these political divisions, we find within each municipality at least one justice of the peace² and one municipal court.³ Within the partido there is a tribunal of first instance having a civil⁴ and a criminal side.⁵ This last grade of court is of course recognizable as the court of similar name in France⁶

¹ Terminos municipales.

^{*} Juzgado municipal.

^{*} Tribunal municipal.

^{*}Jueces de primera instancia.

⁵ Juzgado de instrucción.

^{*}Tribunal de première instance.

and as our own county courts. They are the busy courts of first resort, where all civil and commercial cases of any consequence are first heard. Above them come the courts of appeal.⁷ There are in all fifteen of these courts and the jurisdiction of each covers what is termed a district,⁸ composed of one or more of the provinces. Above the courts of appeal is the Supreme Court.⁹

The "ordinary" jurisdiction, whose arrangement of courts has just been outlined, is that which applies the common law, that is, the law applicable alike to all classes of persons throughout the realm. Such law is found in the civil and criminal codes. But there are also special bodies of law governing particular classes of persons, as for example administrative law, commercial law, industrial law, to which I might add ecclesiastical and military law. The application of such special bodies of law constitutes the so-called "exceptional" jurisdiction, and there were periods of Spanish history when each possessed its court or courts. To-day, much as our common-law courts are given equity jurisdiction, the ordinary jurisdiction has been impressed with the care of administrative and commercial cases. Industrial law and courts are of very recent growth. The military and ecclesiastical jurisdictions lie outside the purposes of this article.

Let us now examine the ordinary and exceptional jurisdictions, bearing in mind the geographical and hierarchical divisions already noted.

#### COURTS OF THE ORDINARY JURISDICTION

# a. Justice of the Peace

A justice of the peace sits in each municipality.¹⁰ His jurisdiction is very limited. To him falls what is called the "conciliatory jurisdiction."¹¹ With few exceptions, the commencement of all actions has to be preceded by an effort at conciliation. The parties appear before the justice of the peace, who endeavors to effect a compromise.¹² The judges who hear a case which has not first been through the conciliatory jurisdiction of the justice of the peace are subject to penalty; the regularity of the action, however, remains unaffected.

Some voluntary or ex parte jurisdiction falls to the justice of the peace when there is no court of first instance in the locality and the matter necessitates local action. Finally, one of his functions is

⁷ Audiencias.

⁸ Distrito.

^o Tribunal Supremo.

¹⁰ Law of Sept. 15, 1870, Art. 12; Royal Order, Sept. 30, 1870, Art. V; Law of Aug. 5, 1907, Arts. 1, 16.

¹¹ Conciliación.

²² Ley de Enjuiciamiento Civil (Code of Civil Procedure), Arts. 460 et seq.

the execution of certain preliminary acts relating to the conservation of the property of deceased persons.¹³

# b. Municipal Courts

In none of these cases are the functions of the justice of the peace truly judicial. He has practically no contentious or contested jurisdiction. The lowest truly judicial functions of the nation are exercised by the municipal courts. These are composed of three judges, and there are one or more courts to each municipality. The municipal court hears both civil and criminal cases, and in addition we are to remember that the civil or ordinary courts in Spain exercise commercial jurisdiction.

On its civil side its procedure is oral. All cases involving sums not exceeding 500 pesetas¹⁴ come before it in first resort. This is enlarged to 1,500 pesetas in special enumerated cases involving (1) innkeepers and guests; (2) carriers and passengers; (3) emigration agents and emigrants; (4) captain and crew; and (5) transactions at recognized fairs.¹⁵

On its criminal side this court hears in first resort all infractions known as *faltas*, or finable offenses such as, roughly speaking, constitute our misdemeanors.¹⁶

The decisions of both the justices of the peace and the municipal courts are appealable to the courts of first instance.

# c. Courts of First Instance

The Spanish Province, as I have already described, is divided into what are known as partidos, and most of these have at least one court of first instance.¹⁷ The Organic Law of 1870 provided in each partido what was called a tribunal de partido, composed of three judges, which were to have both civil and criminal jurisdiction throughout the partido; each partido was to be divided into two circumscriptions¹⁸ having an examining or committing magistrate.¹⁹ This provision was never carried out for financial reasons. The Royal Order of Sept. 30, 1870, authorized the continuance of the older courts of first instance. In place of district examining judges, judges of the courts of first instance are now designated for this duty.

¹² Primeras providencias á prevención.

¹⁴ In normal times before the present war the peseta was worth about 17 cents.

¹⁵ Law, Aug. 5, 1907, Art. 18.

¹⁸ Ley de Enjuiciamiento Criminal (Code of Criminal Procedure), Art. 14.

¹⁷ Tribunal de primera instancia.

¹⁸ Circunscripciones.

[&]quot; Juez de instrucción.

The civil affairs of the courts of first instance are either contentious or non-contentious.20 The non-contentious jurisdiction consists of uncontested or ex parte acts, and includes categories both civil and criminal. The contentious jurisdiction comprises contested causes and includes all civil and commercial actions which, involving above 500 pesetas or exceptionally above 1,500 pesetas, can not be brought before the municipal courts. The procedure is entirely written and differs according as the contested sum is less than 3,000 pesetas, when it is known as that of the "lesser value," or more than that sum, when it is termed that of the "greater value."21 In second resort it hears appeals from the decisions of the justices of the peace and municipal courts.

Spanish criminal jurisdiction is determined by the gravity of the punishment fitted to the crime charged. The existence of three grades of original criminal jurisdiction marks a contrast from our own system. Small finable offenses-fallas-are settled by the municipal courts. Above this grade of offense jurisdiction again divides, part going for first hearing to the courts of first instance and part to the courts of appeal. There are three grades of punishments: those denominated (a) "light," (b) "correctional," and (c) "afflictive."22 "Light" punishments are applied to faltas; "correctional" and "afflictive" to delitos. Such of those crimes denominated delitos as are punishable by "correctional" penalties are first heard in the courts of first instance; such as are punishable by "afflictive" penalties go directly to the next higher grade of justice, the courts of appeal.

From the municipal courts appeals may be taken in cases involving faltas.23 The duty of making the preliminary investigation into the evidence of guilt is delegated to the judges of first instance, who thus become the committing magistrates.24 In this respect they perform the functions of our magistrates and grand juries. They have also to decide questions of criminal jurisdiction, and the law provides appeals from their decisions on all those matters.25

#### d. Court Officers

Before going into the structure of the courts of appeal and their functions, let me give a brief description of the officialdom met with around the courts. The task is the easier in that they are in a general way duplicated throughout all the grades of the ordinary jurisdiction.

²⁰ Contencioso or voluntaria.

²¹ Menor cuantía, mayor cuantía. See Ley de Enjuiciamiento Civil, Arts. 483, 484.

22 (a) penas leves; (b) correccionales; (c) aflictivas; Penal Code, Art. 26.

²³ Law of Aug. 29, 1893, Art. 11.

²⁴ Jueces de instrucción. Ley de Enjuiciamiento Criminal, Art. 14, (2); Ley, Aug. 29, 1893, Art. 11.

²⁵ Ley orgánica, Art. 276.

In the first place, in Spain the judicial career is a specially prepared career. The law student who says that he is going to become a judge is not presumptuous, as one might think, for in Spain one studies especially for that career, inscribes as a candidate and competes in special examinations for the bench. Once admitted he holds his position for life (save in the case of the lowest grades) and occupies a very well-defined station in the judicial hierarchy, up which he may climb with time and ability and compliance with the minute regulations found in the Organic Law of 1870 and its supplements.

Every court and every division of a court has a secretary.²⁶ His qualifications for office are roughly the same as those of a judge, so that he is and deserves to be a highly respected official. He is guardian of the records of the cases; he takes the evidence down in writing, a special period for the taking of testimony being accorded the parties before the case comes to trial, so that the judges, at least in civil cases, deal only with a written record and the arguments of counsel. He countersigns all judgments and orders of the court; fixes the dates for acts of procedure; gives certified copies when authorized to do so.

A librarian²⁷ is made custodian of the records, wherever the volume of litigation warrants it. He also has charge of the law library attached to the court, if there is one.

A process server²⁸ is employed by each court or division of a court to serve all papers outside the court buildings.

The Spanish tipstave²⁹ keeps order in the court room and about the halls of the court house, marshals the witnesses in criminal cases, and acts as aid to the judges and secretaries. He is by all odds the gentleman whom the observer of Spanish court life needs to humor by ceremonious treatment, cigarettes and other minor benefits. If duly impressed with your importance, you will be accorded every possible courtesy, even privilege. If, on the other hand, he is unduly impressed with his own importance, it will be wiser, for purposes of observation, to move to another jurisdiction.

The Spanish bar recognizes the English differentiation between the barrister and solicitor. It is composed in the first place of those who plead, the advocates.³⁰ Each court of appeal has its Order of Advocates,³¹ with minute regulations as to admission and conduct. Admission hangs chiefly upon a legal degree and an oath taken before a court of appeal or a court of first instance. Of course all the law

²⁸ Secretario.

²⁷ Archivero.

²⁸ Oficial de sala; he corresponds to the French huissier.

²⁰ Alguacil.

^{*} Abogados; generically called letrados.

⁸¹ Colegio de abogados.

schools are state institutions, so that there is no place for a separate bar examination. A chief purpose of the Order of Advocates is to distribute practice as equitably as possible among its active members, an advantageous but delicate duty.

The Spanish solicitor³² never pleads, but engineers the prosecution of a legal action from its inception until its conclusion. The solicitors are also organized into an order³³ with rules of admission and discipline sanctioned by the state. If the aspirant to the career of solicitor has a legal degree, he need pass no examination for admission to the order; if he has no such degree, he is required to pass a special examination which deals chiefly with the art or science of procedure. Of course the exercise of the profession of advocate is not compatible with that of solicitor. One must elect to be one or the other. Like our notaries, he is obliged to give security to the government for the correct and honest performance of his functions.

Every court has one or several special attorneys attached to it representing exclusively the interests of the government. Not only in criminal trials, when he acts as prosecutor, but even in civil actions, the interests of society as a whole are jealously guarded through the intervention of a special attorney. He is called the *fiscal*. The whole body of these special attorneys³⁴ is carefully organized, from the *fiscal* of the Supreme Court, who corresponds roughly to our attorney general, to the modest *fiscal* attached to the justice of the peace. Immediately under the *fiscal* of the Supreme Court is an assistant³⁵ and eight state's attorneys,³⁶ and each of the courts of appeal possesses a similar organization, the number of attorneys varying according to the importance of the jurisdiction.

# e. Court of Appeal

With this digression, let us return to the court of appeal and look at its structure in detail.

It is composed of three divisions. Two of these are judicial, one civil, the other criminal;³⁷ the third is a governing or executive division.³⁸ To expedite business, the two judicial divisions may be subdivided into chambers (as is the case in Madrid and Barcelona). Each has a president justice³⁹ and at least four other justices, while

^{*} Procurador.

³³ Colegio de procuradores.

³⁴ Called the ministerio público or fiscalía.

^{*} Teniente-fiscal.

^{*} Abogados fiscales.

^{*} Sala de lo civil; sala de lo criminal.

[™] Sala de gobierno.

The courts of appeal and the Supreme Court are composed of justices, magistrados; courts of lower grade are composed of judges, jueces.

a president justice presides over the court as a whole. The president justices and the *fiscal* form the third or executive division. This last distributes the business of the court, exercises disciplinary powers, and even takes part in the appointment of judges to the lower courts.⁴⁰

The civil division of the court of appeal hears appeals from the courts of first instance. The criminal jurisdiction of the provincial courts of appeal⁴¹ is original and appellate.⁴² It takes original cognizance of all crimes known as *delitos* to which attach "afflictive" punishments. The Penal Code mentions sixteen of such punishments ranging downwards from the death penalty.⁴³ These sixteen punishments are again classified into nine gravest, requiring a jury⁴⁴ to try the facts, and seven lighter, which are applied without the "judges of the facts,"⁴⁵ as the jury is often termed.

The use of the jury in Spain is very limited. It is not surprising not to find it functioning in civil cases; but it is, in fact, employed only in the gravest crimes.⁴⁶ The magical Anglo-Saxon number 12 has been imported into Spain, but the verdict is declared by a majority.⁴⁷ As a court of second resort the *Audiencia* hears appeals from the courts of first instance.⁴⁸

Lev Orgánica, Tit. I, ch. IV; Tit. XIII, ch. I.

The criminal division of the court of appeal is to-day known as the Provincial Court of Appeal (Audiencia provincial). The Organic Law of 1870 provided for fifteen courts of appeal, each having a criminal division known as the Criminal Division of the Court of Appeal (Sala de lo Criminal de la Audiencia Territorial). In 1882 judicial reforms were effected. The fifteen criminal divisions of the courts of appeal were retained and in addition independent criminal courts of appeal (audiencias de lo criminal) were provided in the capital of each province and in certain other cities, in all to the number of 95. The requirements of these reforms exceeded the nation's purse, and by a Royal Decree of July 16, 1892, forty-six of these were suppressed, leaving a criminal section to each of the fifteen older courts of appeal, and thirty-four of the newer criminal courts of appeal, one in the capital of each province. It was again found necessary to retrench, and by a Royal Decree of Aug. 29, 1893, the thirty-fourth special criminal courts of appeal were abolished and their jurisdiction turned back to the old criminal division of the court of appeal, which assumed the name of Provincial Court of Appeal (Audiencia provincial). Thus, by a sort of evolution in a circle, this grade of Spanish criminal jurisdiction has practically returned to the state to which it was brought by the reforms of the Organic Law of 1870.

⁴Ley Orgánica, Art. 276; Ley Adicional, Oct. 14, 1882, Art. 4; Decreto, Aug. 29, 1893, Art. 2.

⁴⁸ Art. 26.

[&]quot;Jurado.

[&]quot;Jueces del hecho as contrasted with the jueces del derecho

[&]quot;Specifically mentioned in the Jury Law, Apr. 20, 1888, Arts. 4 and 5.

⁴⁷ Id. Art. 35.

[&]quot;Ley Orgánica, Art. 276.

#### f. Supreme Court

The Supreme Court was created in 1812 by the Cortes of Cádiz, and it has passed through important modifications since that date. It consists of a president justice, and four divisions, one for civil appeals having nine justices and a president, one for criminal appeals having a president and eight justices, one for administrative cases in first and last resort, and finally the so-called executive division like the division of similar name in the courts of appeal, composed of the four president justices and the fiscal or attorney general.⁴⁹ The Supreme Court of Spain pronounces final judgments. It is therefore in a true sense the court of last resort. Appeals are not always remanded for a rehearing before the courts of appeal, as is the procedure of the French Court of Cassation. The third chamber deals exclusively with administrative cases, that is, cases involving relations between the state and private citizens.

#### EXCEPTIONAL JURISDICTIONS

The exceptional jurisdictions are, in addition to the military and ecclesiastical, with which I shall not deal, the commercial, the administrative and the industrial.

#### a. Commercial

Spain, like most other European countries save England, has a Commercial Code⁵¹ and a special commercial procedure.⁵² But there are no special commercial courts to-day as in France. That does not mean that Spain's commercial law has not had an independent and important development. In the seventh century the first uniform and germanic code, which was given to Spain by the Visigoths,⁵² declared that

"If merchants from foreign ports have any lawsuit amongst themselves, no judge of our land shall judge it, but they shall answer according to their own laws and before their own judges."54

In the thirteenth century maritime customs of the port of Barcelona were reduced to writing and became one of the earliest and most influential of the maritime codes.⁵⁵ By the eighteenth century the

⁴⁹ Ley Orgánica, Art. 63; Royal Decree, Jan. 20, 1875; Royal Decree, Aug. 29, 1893; Ley, April 5, 1904.

⁵⁰ Sala de lo contencioso-administrativo.

⁵¹ Two, 1829 and 1885.

⁵² Book III, part II, Ley de Enjuiciamiento Civil.

⁵³ Fuero Juzgo.

⁵⁴ Id. Tit. III, Law II.

⁵⁵ Libro del Consulado del Mar.

Ordinances of Bilbao⁵⁶ became the accepted commercial law of the kingdom. They spread to the New World and became the basis of the modern commercial codes of Latin America; in 1829 they were used as the basis of the first Spanish Commercial Code. In 1885 the present Commercial Code was adopted.

Spain had a medieval consular jurisdiction similar to that of France, and it lasted until the Commercial Code of 1829 organized the commercial courts. Due to abuses they were abolished in 1868, and this form of exceptional jurisdiction passed to the civil or ordinary courts, where it remains to-day. The conferring of this exceptional jurisdiction upon the ordinary judges may be likened to the conferring of equity powers upon common-law judges. The same court applies two systems of law and two procedures.

#### b. Administrative

Administrative jurisdiction has not had a uniform history in Spain. When the Supreme Court received a new organization by the Organic Law of 1870, its fourth division⁵⁷ was devoted to the trial of administrative actions. It was the sole administrative court of the nation. A Royal Decree of January 20, 1875, again brought into being the Council of State.⁵⁸ This, like the French Council of State, took over all administrative cases and the fourth division of the Supreme Court disappeared. This condition lasted until a law of September 13, 1888, abolished the judicial functions of the Council of State and created special, independent administrative courts.⁵⁹ But they in turn passed away under a law of April 5, 1904, when a special division of the Supreme Court⁶⁰ reassumed jurisdiction.

### c. Industrial

With the adoption of workmen's compensation acts in Spain a new jurisdiction was created, that of the industrial courts.⁶¹

In the chief city of each partido, whenever industrial activity warrants it, the government establishes an industrial court upon petition of the employers and employees.  62  A court is composed (a) of a president judge drawn from the court of first instance; (b) three members, unlearned in the law, and an alternate, being employees chosen from a list made up by the employers; and (c) three members,

⁵⁶ Ordenanzas de Bilbao.

⁵⁷ Sala de recursos contra la administración.

sa Consejo de Estado.

⁵⁰ Tribunales contenciosos.

[∞] Sala de lo contencioso-administrativo.

a Tribunales industriales. Law, May 19, 1908; Royal Decree, Oct. 20, 1908.

⁶² Law, May 19, 1908, Art. 1.

also unlearned in the law, and an alternate, being employers chosen from a list made up by the employees. Pleadings may be conducted without either advocate or solicitor. Jurisdiction has been granted over all questions arising out of accidents to workmen under the workmen's compensation laws, and, in addition, to all questions between employer and employee. arising upon the contract of hire of services. Rehearings are first had before an enlarged court composed of seven members named by each side. Appeals are then taken to the courts of appeal, which have power to quash the decision and remand the case.

es Id. Art 3.

[∞] Id. Art. 28.

⁶⁴ Id. Art. 4.

⁶⁷ Id. Art. 30.

⁶⁵ Id. Art. 6.

# PRIVILEGES OF LABOR UNIONS IN THE STRUGGLE FOR LIFE

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One of the most deplorable effects of the world war is that the attention of the community is of necessity largely diverted from matters of domestic policy which deserve and ordinarily receive careful consideration. In times of peace, for example, a decision of the United States Supreme Court dealing with important phases of the relation between capital and labor arouses wide discussion, not only among lawyers but also among the people at large. Things being as they are, two recent decisions of that court involving these problems have gone comparatively unnoticed by all but members of the legal profession.1 and indeed the latter have not given them the attention they deserve and normally would receive. The cases referred to are Hitchman Coal & Coke Co. v. Mitchell2 and Eagle Glass & Manufacturing Co. v. Rowe,3 dealing with alleged attempts of labor unions to "unionize" the mines and factories concerned. In the belief that these decisions and-what is of much greater importance-the grounds upon which they are based, ought to receive far wider attention than has thus far been given them, it is proposed to examine them somewhat carefully.

As the two cases are very much alike and substantially the same conclusion was reached in both, only the facts and decision in the case of the *Hitchman Coal & Coke Co.* will be given in detail. In order fully to appreciate the scope of the decision in that case, however, it will be necessary to state the facts somewhat at length. They were as follows:

The Hitchman Coal & Coke Co., the plaintiff, was the owner of a coal mine in West Virginia. The defendants were the chief executive officers of the United Mine Workers of America and of its local

¹ See, however, the editorial on *Breaking the Labor Truce*, New Republic (Dec. 22, 1917) 197.

² (4917) 38 Sup. Ct. 65.

^{* (1917) 38} Sup. Ct. 80.

In the principal case one of the witnesses for the defense testified as follows: "There is a difference between unionizing a mine and unionizing the employés in a mine; unionizing the employés is having the men join the organization; unionizing a mine is creating joint relations between the employers and employés; a mine cannot be unionized unless the employer enters into contractual relations with the union; it is not the policy or purpose of the United Mine Workers as an organization to coerce a man into doing a thing against his will; this distinction between unionizing a mine and unionizing the employés of a mine has existed since the organization came about, and this method of unionizing a mine existed in 1906 and 1907." 38 Sup. Ct. 65, 79.

branches which had "jurisdiction" over the territory within which the plaintiff's mine was situated. The defendants were sued as individuals and as officers. Prior to April 16, 1906, the mine was operated as a "union" mine under agreement with the United Mine Workers of America. After being closed because of a strike, the mine was reopened as a "non-union" or, as Mr. Justice Brandeis puts it, a "closed non-union" mine. When the men returned to work they were told orally—quoting now from the statement of Mr. Justice Pitney, who wrote the opinion of the majority of the court in the principal case—

"that they could come back, but not as members of the United Mine Workers of America; that thenceforward the mine would be run non-union, and the company would deal with each man individually. They assented to this, and returned to work on a non-union basis. Mr. Pickett, the mine superintendent, had charge of employing the men, then and afterwards, and to each one who applied for employment he explained the conditions, which were that while the company paid the wages demanded by the union and as much as anybody else, the mine was run non-union and would continue so to run; that the company would not recognize the United Mine Workers of America; that if any man wanted to become a member of that union he was at liberty to do so; but he could not be a member of it and remain in the employ of the Hitchman Company; that if he worked for the company he would have to work as a non-union man. To this each man employed gave his assent, understanding that while he worked for the company he must keep out of the union."

In a note the learned judge adds: "About two months after the restraining order was issued in this case the plaintiff company began the practice of requiring applicants for work to sign employment cards in the following terms:

"I am employed by and work for the Hitchman Coal & Coke Company

⁵ 38 Sup. Ct. 65, 68. The italics are the present writer's.

As the agreements with the men were oral, it is difficult to say just what they were. Mr. Justice Brandeis in the dissenting opinion states the matter as follows:

[&]quot;Thereafter persons applying for work were required as a condition of obtaining employment to agree that they would not, while in the service of the company, be a member of the union, and if they joined the union would withdraw from the company's employ."

with the express understanding that I am not a member of the United Mine Workers of America and will not become so while an employe of the Hitchman Coal & Coke Company; that the Hitchman Coal & Coke Company is run non-union and agrees with me that it will run non-union while I am in its employ. If at any time I am employed by the Hitchman Coal & Coke Company I want to become connected with the United Mine Workers of America or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company I will not make any efforts amongst its employes to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read.'

[&]quot;Prior to that time, the agreement rested in oral understanding merely, and is sufficiently indicated in the following excerpts from the testimony of the mine superintendent as to what he told the men applying for employment:

"I also told them that any man who wanted to be a proper to the superior of the superior of

[&]quot;I also told them that any man who wanted to become a member of the United Mine Workers—that that was his business—but he could not be a member of the United Mine Workers and be affiliated with the United Mine Workers and be under the employ of the Hitchman Coal & Coke Company, or be under

The company brought the present suit to enjoin the defendants from efforts which, it alleged, were being made to "unionize" the mine illegally and "without its consent."6 The suit was brought in the United States Circuit (now District) Court for the Northern District of West Virginia. The District Judge granted a restraining order on the filing of the bill, continued it as a temporary injunction and later refused to modify it.7 After a hearing on the merits a decree was entered for a perpetual injunction substantially in the same terms as the original restraining order.8 This decree was reversed by a unanimous decision of the Circuit Court of Appeals.9 The case then came before the United States Supreme Court on writ of certiorari. That court, speaking through Mr. Justice Pitney, reversed the decree of the Circuit Court of Appeals, modified the decree of the District Court and affirmed it as modified. Mr. Justice Brandeis read a dissenting opinion, in which Mr. Justice Holmes and Mr. Justice Clarke concurred.

The evidence and record in the case were voluminous, filling nearly 8,000 pages. No acts or threats of picketing or of physical violence were proved, and those parts of the injunction issued by the District Court which restrained acts of that character were therefore eliminated by the Supreme Court.

The acts of the defendants on which the decision was based seem to have been as follows:

the jurisdiction of the United Mine Workers; that the mine was run non-union so far as the United Mine Workers of America were concerned.

"Q. You mean you made every man understand that while h

You mean you made every man understand that while he worked for the Hitchman Company he must keep out of the union?

"'A. Yes, sir; or at least they said they understood it."

It is possible to take the view that the oral agreements, as distinguished from the later written contracts, amounted to nothing more than a notice to the men that they would be discharged if they joined the union. This apparently was the view taken of the facts by the Circuit Court of Appeals. (1914) 214 Fed. 685, 714-715.

It may not be without interest to note that the bill alleged that the men "agreed not to join the union or to become members of the union and to work for the plaintiff as non-union men." (1909) 172 Fed. 963, 964. The original preliminary injunction was issued on affidavits supporting these allegations and on motion to modify was continued on the assumption of its truthfulness. In his opinion refusing to modify the injunction Dayton, District Judge, said: "They [the men] have contracted . . . that they will not join this particular union." 172 Fed. 963, 968. The evidence at the hearing, however, showed merely the situation above described, i. e., at most an oral agreement to withdraw from the plaintiffs' employment if the employee joined the union. After the agreements were put into writing, the contract clearly was, not to keep out of the union but merely to withdraw from plaintiff's employment if the employee at any time joined or "wanted to become connected with" the union.

^{7 (1909) 172} Fed. 963.

^{8 (1912) 202} Fed. 512.

^{9 (1914) 214} Fed. 685.

About July 1, 1907, three of the defendants submitted a proposal for the unionization of the mine to the general manager of the plaintiff. This was refused by the board of directors of the plaintiff. In September of the same year another of the defendants was sent by the union to organize all the mines in the district. He spent over a month in the vicinity of plaintiff's mines, interviewing employees of the plaintiff, making abusive remarks concerning the plaintiff's superintendent, and arguing that ultimately the wages paid by the plaintiff would be reduced if the mines were not unionized. He succeeded in getting a number of the plaintiff's employees to agree to join the union, but kept the names of those who had done so secret, probably—although this does not appear in the evidence—with the object of being able to call a strike suddenly when he had sufficient names. The decree as approved by the majority of the Supreme Court in substance enjoined the defendants from:

"(I) Interfering or attempting to interfere with plaintiff's employés for the purpose of unionizing plaintiff's mine without its consent, by representing or causing to be represented to any of plaintiff's employés, or to any person who might become an employé of plaintiff, that such person will suffer or is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, by reason of plaintiff not recognizing the union, or because plaintiff runs a non-union mine; (2) Interfering or attempting to interfere with plaintiff's employés for the purpose of unionizing the mine without plaintiff's consent, and in aid of such purpose knowingly and willfully bringing about the breaking by plaintiff's employés of contracts of service known at the time to exist with plaintiff's present and future employés; (3) Knowingly and willfully enticing plaintiff's employés, present or future, to leave plaintiff's service on the ground that plaintiff does not recognize the United Mine Workers of America or runs a non-union mine, etc.; (4) Interfering or attempting to interfere with plaintiff's employés so as knowingly and willfully to bring about the breaking by plaintiff's employés, present and future, of their contracts of service, known to the defendants to exist, and especially from knowingly and willfully enticing such employés, present or future, to leave plaintiff's service without plaintiff's consent; (5) Trespassing on or entering upon the grounds and premises of plaintiff or its mine for the purpose of interfering therewith or hindering or obstructing its business, or with the purpose of compelling or inducing, by threats, intimidation, violent or abusive language, or persuasion, any of plaintiff's employés to refuse or fail to perform their duties as such; and (6) Compelling or inducing or attempting to compel or induce, by threats, intimidation, or abusive or violent language, any of plaintiff's employés to leave its service or fail to refuse to perform their duties as such employés, or compelling or attempting to compel by like means any person desiring to seek employment in plaintiff's mine and works from so accepting employment, therein."10

¹⁰ 38 Sup. Ct. 65, 76. Mr. Justice Brandeis's statement of the terms of the injunction is not, apparently, identical with that of the majority. His version is given below in a discussion of the scope of the injunction.

As the jurisdiction of the federal court was based solely upon diversity of citizenship, the decision had to be reached under the law of West Virginia. As that state had no statute which governed the matter, the decision involved a determination of the common law of West Virginia upon the question at issue.11 When the facts in the only West Virginia case12 cited by Mr. Justice Pitney in support of his views are compared with those in the case in hand, it appears that there was in fact no decision in that state upon which the federal court could rely as a precedent actually in point. Indeed, it seems that there was no case in any state involving facts substantially identical with that before the court. In other words, the court had to "find" the law applicable to a new case. 13 In spite of this, the opinion of the majority of the court does not reveal that the question for decision is actually a novel one. Following the prevailing fashion in judicial opinions, it proceeds to its conclusions chiefly by a process of deductive reasoning from apparently fixed premises supposed to be established by prior cases. The fact that in the last analysis the decision really turns upon notions of policy entertained-more or less consciously or unconsciously—by the members of the court is thus thrown into the background. Where policy is mentioned, it is rather as a justification for existing law than as a basis for a new rule. Perhaps the reason why judges so often adopt this form of reasoning is that suggested by Mr. Justice Holmes in the following passage from his well-known essay upon Privilege, Malice and Intent:

"Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be distinctions of degree."

The same learned judge has, however, cautioned us as follows against the dangers involved in this "illusion of mathematical certainty:"

"In numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified. It is on the question of what shall amount to a justification, and more especially

¹¹ "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It is always the law of some state." Mr. Justice Oliver Wendell Holmes, in Southern Pacific Co. v. Jensen (1917) 37 Sup. Ct. 524, 531.

¹² Thacker Coal Co. v. Burke (1906) 59 W. Va. 253.

¹⁸ Some of the cases supposed to be in point will be discussed later, either in the text or in the notes.

^{14 (1894) 8} HARV. L. REV. 1, 7.

on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defense

is ready."15
"The danger is that such considerations should have their weight . . as unconscious prejudice or half conscious inclination. measure them justly needs not only the highest powers of a judge and a training which the practice of the law does not insure, but also a freedom from prepossessions which is very hard to attain. It seems to me desirable that the work should be done with express recognition of its nature. The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies."¹⁶

When the learned justice from whom we have just quoted says that the question at issue cannot be settled "merely by logic," we must not misunderstand him. The settlement of any legal question must of course be reached by logical processes. The error which the learned writer apparently had in mind consists, at least in some instances, in the assumption without sufficient consideration of certain alleged general principles or broad rules of law and then arguing from them by means of reasoning purely deductive in form. In many cases a more careful examination of the supposed principles or rules will show that they are stated so broadly as to go so far beyond existing decisions that they cannot be regarded as representing existing law,168 or else they are so vague as to be useless in reaching a conclusion.17 In other cases the principles or rules stated may fairly

¹⁵ Dissenting opinion in Vegelahn v. Guntner (1896) 167 Mass. 92, 105-106.

^{16 (1894) 8} HARV. L. REV. 1, 9.

¹⁶a Compare the following passage from a discussion by my colleague, Prof.

Arthur L. Corbin, in (1914) 3 YALE REVIEW N. S. 239:

[&]quot;The supposed pre-existing rule is a mere assumption of the court. According to Professor Sumner's expressive dictum, you can get out of a major premise all you put into it. The supposed general rule is an inductive conclusion on the part of the judge from preceding individual instances. His decision of the case is a new instance which later judges and theorists will use as the basis of a new induction. In all cases the judge must construct his own major premise, and this he does not find an easy matter. Who can tell to-day just how far a combination of laborers may lawfully go in attempting to secure higher wages? . . . Cases involving these questions cannot be decided merely by constructing a syllogism."

¹⁷ Compare Prof. Jeremiah Smith's discussion of The Use of Maxims in Jurisprudence (1895) 9 HARV. L. REV. 13; and the same learned author's more recent discussion of Surviving Fictions (1917-1918) 27 YALE LAW JOURNAL, 147 and 317.

be regarded as representing existing law accurately, if they are properly interpreted, but as stated they contain ambiguous terms which in the argument that follows are not always used in the same sense. In both cases the difficulty is not so much in trying to solve the problem "merely by logic," but in trying to solve it by false logic. The best corrective for the first form of error consists in a more careful analysis of prior cases coupled with a clearer conception of just what the function of judges in deciding cases really is. For the second form of error the only cure is the study of that despised subject "Analytical Jurisprudence," i. e., of the terms of art used by the legal profession—such as right, duty, etc.—and of the fundamental conceptions which those terms are supposed to represent.

In criticising the prevailing fashion in judicial opinions it is of course not meant to argue that we ought to give up the attempt to reduce our law to a system and to state it so far as possible in terms of general principles and rules. It is obvious that this must be done if we are to study our law scientifically. It is equally obvious that deductive logic has an indispensable place among methods of legal reasoning. We must, however, be sure that our syllogisms are soundly constructed. This they cannot be if ambiguous terms are used without definition, as they frequently—one may almost say, usually—are, not only in cases of the kind under consideration but in legal reasoning generally.¹⁹

The foregoing observations have been made at this point for the reason that the opinion of the majority in the principal case seems to the present writer to illustrate in many ways these defects in judicial reasoning and so to leave the careful reader unconvinced of its soundness. The extent to which this criticism is true could be shown fully only by a careful examination of the whole opinion—obviously an impossible undertaking within the space at hand. The analysis of typical portions of the opinion will, it is hoped, serve to illustrate what is meant.

After setting forth the facts of the case, Mr. Justice Pitney argues as follows:

¹⁸ An interesting and instructive example of this is found in a recent Pennsylvania case, discussed by Prof. Wesley N. Hohfeld in (1917) 27 YALE LAW JOURNAL, 66 under the title of Faulty Analysis in Easement and License Cases.

^{19 &}quot;As our law develops it becomes more and more important to give definiteness to its phraseology; discriminations multiply, new situations and complications of fact arise, and the old outfit of ideas, discriminations, and phrases has to be carefully revised. Law is not so unlike all other subjects of human contemplation that clearness of thought will not help us powerfully in grasping it. If terms in common legal use are used exactly, it is well to know it; if they are used inexactly, it is well to know that, and to remark just how they are used." Prof. James Bradley Thayer, Preliminary Treatise on Evidence (1898) 190. The italics are the present writer's.

"What are the legal consequences of the facts that have been detailed?

"(1) That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing non-membership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to 'run union' were a sufficient explanation of its resolve to run 'non-union,' if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of 'collective bargaining,' it is not bargaining at all, in any just sense, unless it is voluntary on both sides. (2) The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. (3) In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. (4) This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. Adair v. United States, 208 U. S. 161, 174; Coppage v. Kansas, 236 U. S. 1, 14. In the present case, needless to say, there is no act of legislation to which defendants may resort for justification.

"(5) Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employés, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. (6) That the employment was 'at will,' and terminable by either party at any time, is of no consequence. [Citing and quoting from Truax v. Raich (1915) 239 U. S. 33, 38.]

"(7) In short, plaintiff was and is entitled to the good will of its employée precisely as a marghent is entitled to the good will of its

"(7) In short, plaintiff was and is entitled to the good will of its employés, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. (8) The value of the relation lies in the reasonable probability that by properly treating its employés, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations. . . . 20

"(9) The right of action for persuading an employé to leave his employer is universally recognized—nowhere more clearly than in West Virginia—and it rests upon fundamental principles of general application, not upon the English statute of laborers. Thacker Coal

The learned justice here cited the following cases: Brennan v. United Hatters (1906) 73 N. J. L. 729, 749; Brown v. Honiss (1907) 74 N. J. L. 501, 514, et seq.; Jersey City Printing Co. v. Cassidy (1902) 63 N. J. Eq. 759, 767; Walker v. Cronin (1871) 107 Mass. 555, 565-566; Moran v. Dunphy (1901) 177 Mass. 485, and cases there cited; L. D. Willcutt & Sons Co. v. Driscoll (1908) 200 Mass. 110, 117, etc.

Co. v. Burke, 59 W. Va. 253, 255; Walker v. Cronin, 107 Mass. 555, 567; Angle v. Chicago, St. Paul, etc. Railway, 151 U. S. 1, 13; Noice, Adm'x v. Brown, 39 N. J. L. 569, 572."21

In the sentence numbered (1), the word right is used obviously as a synonym for the word liberty in the sentence numbered (2). Both mean that the plaintiff had a legal privilege22 or liberty to employ non-union men, i. e., that in the absence of a contract so to do, he was under no duty to the defendants—or any one else—to employ union men; and that the men on their part had privileges to form unions if they saw fit. To this simple proposition all, including the defendants, would assent. It is, however, obvious that such a statement tells us absolutely nothing about the rights of the plaintiff in the narrow or strict sense of the word, i. e., when it is used as the correlative of duty. That a privilege may exist without an accompanying right is obvious. Suppose A., owner and possessor of a chattel, tells B. that he may take the chattel if he can do so, but that A. will do all he can to stop B. The permission thus given by A. to B. has as its consequence the destruction of B.'s duty to refrain from taking the chattel and confers upon him the privilege of taking it. It does not, however, give B. a right (in the strict sense) to take it, i. e., it does not place A. under a duty to let B. take it. A. accordingly commits no legal wrong in resisting B.'s efforts to take it. On the other hand, where an easement of way over a piece of land exists, the one having the easement has not only privileges but also rights. A complete analysis will show, indeed, that he has a complex aggregate of rights, privileges, powers and immunities.23 Nothing is of course more com-

²² In Prof. Wesley N. Hohfeld's now well known discussion of *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LAW JOURNAL, 16, the following scheme of fundamental jural relations is presented:

Jural	{ right	privilege	power	immunity
Opposites	{ no-right	duty	disability	Iiability
Jural	{ right { duty	privilege	power	immunity
Correlatives		no-right	liability	disability

It is reproduced here for the convenience of those readers who may not be familiar with it. The discussion which follows is a concrete application of the conceptions and terminology of that scheme to the opinion of the majority of the court in the case in hand.

²¹ 38 Sup. Ct. 65, 72-73. The sentences have been numbered by the present writer for convenient reference.

The what follows the word privilege will be used in preference to liberty. Which one is used is not of great importance, provided it is given a definite meaning and is used throughout a given discussion in that meaning alone. Compare the discussion of the easement and license cases by Professor Hohfeld already referred to, note 18, supra. The one having the easement, for example, has inter alia a right against the owner of the servient estate that he shall not prevent him from entering upon and crossing the land in the specified way. He

mon than the failure to distinguish clearly between these two meanings of the word right as ordinarily used. It is plain that one cannot construct a sound argument by slipping unconsciously from one meaning to the other, yet this is just what the learned justice seems to do, for in the sentence numbered (3) he has clearly left the field of legal privileges with their corresponding no-rights and has (apparently without realizing it) passed into that of rights in the strict sense with their corresponding duties. The assertion now is, in essence, that certain persons are under certain duties to refrain from certain acts which will disturb the parties "in the enjoyment of the benefits of any lawful agreement they may make." To this proposition also, if properly interpreted, we shall assent-although it does not, as seems to be supposed by the learned justice, follow from the propositions concerning privileges. However, it must at once be noted that it does not follow that, because some acts of interference with the enjoyment of the benefits of a lawful agreement are unlawful, all acts of interference are necessarily prohibited. Here as elsewhere it is established by the decisions that interferences with the situation resulting from the making of lawful contracts are at times justifiable and lawful.24 In other words, the proposition of the learned judge, if it is to be an accurate statement of the law, must be interpreted merely as stating that parties are "entitled to be protected by the law in the enjoyment of the benefits resulting from lawful agreements" only to a limited, not to an unlimited, extent. Thus interpreted, however, the proposition, while true, leaves unsolved the real problem: What forms of interference are forbidden and what are permitted?

In the sentence numbered (4), in the phrase "constitutional rights of personal liberty and private property," the learned justice uses rights in still a third sense. In the cases cited it was held that under the federal constitution there exist certain immunities from governmental power, i. e., that the governments in our system, both federal and state, are under legal (constitutional) disabilities (lack legal power) to make laws which will deprive employers of the privileges

has a *power* to transfer the easement of way by transferring the estate to which it is appurtenant. He has an *immunity* from having his *rights, privileges* and *powers* destroyed either by the action of the owner of the servient estate or by that of other persons generally.

²⁴ As an illustration, consider the following single example from a multitude which come to mind. In *Pickett v. Walsh* (1906) 192 Mass. 572, 78 N. E. 753 a union of masons struck, *i. e.*, combined to refuse to lay bricks, in order to get the work of "pointing" the mortar after the bricks were laid. This necessarily resulted in the discharge of the "pointers," *i. e.*, of men who made a specialty of pointing. The "pointers" brought an action to enjoin the masons from carrying out their plan. The action of the masons was held justified on the ground that their object was to secure work for themselves. To the same effect is *National Protective Association v. Cumming* (1902) 170 N. Y. 315, 63 N. E. 369.

before referred to of employing non-union men if they so choose, or employees of their *privileges* of working for the employers without joining a union. *Right* here means, therefore, neither *right* in the strict sense of a claim against others that they shall act or refrain from acting, nor *privilege* to act without violation of *duty*.²⁵

In these three sentences, therefore, the learned author of the opinion has, apparently without being conscious of it, dealt with: (1) privilege—"no-right" relations; (2) right—duty relations; (3) immunity—disability relations. Clearly from propositions concerning any one of these, no inferences can be drawn concerning the others by any logical process which is merely deductive, although the existence of one set of relations may in some cases furnish a strong reason for recognizing the existence of the other set as a matter of policy.²⁶

If now in the sentence numbered (5) we substitute for the word right the word privilege where clearly that is the meaning, we have the following: "Plaintiff, having in the exercise of its undoubted privileges established a working agreement between it and its employés, is entitled [i. e., has a right in the strict sense] to be protected in the enjoyment of the resulting status, as in any other legal right." Here also it is at once obvious that the right (claim) to

²⁵ In all cases dealing with the constitutionality of legislative action, we are obviously discussing the legal powers and disabilities of governments and the correlative liabilities and immunities of the individual. While it is customary also to speak of the constitutional rights of the individual, the legal relations chiefly involved fall into the "power-liability" and "immunity-disability" groups. Of course if a given law is unconstitutional because of the lack of power to enact it on the part of the governmental body in question, a further consequence is that, for example, certain rights or privileges (or both) of the persons concerned are not abolished with a consequent substitution of "no-rights" and duties in their place. It follows, of course, that as against persons who claim to act for the government in enforcing the supposed law, the persons in the group concerned have rights in the strict sense, giving rise to actions for damages or to actions for specific relief (replevin, injunction, etc.) Here, as in most cases, a complete analysis of the jural relations involved reveals a complex aggregate. Obviously, however, it does not follow by necessary or merely logical inference that the persons thus protected by the constitution have rights (in the strict sense) against persons not acting on behalf of the government, that the latter shall not so act as to deprive them of the benefits of the freedom of action thus guaranteed by the constitution.

²⁶ The statement in the text must not be misunderstood. When we decide, for example, that as against B., A. has a certain *privilege*, we of course necessarily ("merely by logic") conclude that B. has a "no-right" against A. with reference to the same matter. These statements are merely different ways of saying the same thing. What is meant in the text is simply that we cannot by mere logical inference go from A.'s rights to A.'s privileges, etc.

To what does the phrase "any other legal right" refer? To "resulting status"? That can hardly be, for "resulting status" seems to be a name for the state of facts brought about by the making of the lawful agreements of employment. If, on the other hand, it refers back to the word "rights" used at the

protection of the resulting "status" is a different thing from the privilege to enter into the relations giving rise to the (so-called) status. The existence of the right (claim) has not been proved merely by showing the existence of the privileges to create the "status," i. e., the former cannot be deduced from the latter "merely by [deductive] logic." Sound policy may dictate that the privilege to enter into the relations in question be accompanied by and, so to speak, protected by a right, or rights, not to have the resulting "status" interfered with in certain ways. Whether it does so dictate can be determined only by a discussion of the real questions of policy involved.

So far, therefore, as the learned justice meant to say that the right of the plaintiff to protection necessarily followed as a matter of mere logical inference from the privilege to make the agreements referred to, the reasoning is clearly fallacious. The fallacy of the kind of reasoning here criticized appears clearly if one examines concrete cases. For example, in the recent case of Homan v. Hall²⁸ the defendants, for purposes which need not here be stated, induced plaintiff's fiancé to break his engagement with her. It was held that these facts gave the plaintiff no right of action. Clearly, however, on Mr. Justice Pitney's reasoning, plaintiff necessarily had a cause of action. The argument would run: "Plaintiff, having in the exercise of her undoubted rights entered into an engagement to marry with her fiancé with the full assent of the latter, is entitled to be protected in the enjoyment of the resulting status as in any other legal right."²⁹

If, on the other hand, all that the learned justice means by the proposition in question is that good policy demands that such a right to protection be given, it is clear that thus far nothing has been proved and that we are at last face to face with the real question at issue: "Against what kinds of acts ought protection as a matter of policy to be given?" It is obvious without discussion that the resulting status cannot be absolutely protected from interference, for otherwise no one could ever offer employment to anyone who was already employed by another. Such acts of interference, however, must necessarily be recognized as lawful where the one offering employment to

opening of the sentence, it means privilege. So interpreted, however, the sentence does not help the argument of the learned judge, for privileges are protected by refusing legal redress when asked for by the person against whom the privilege is asserted, and are not protected, i. e., vindicated, by affirmative action of the court. For the latter a genuine right is necessary.

^{28 (1917,} Nebr.) 165 N. W. 881.

The result in the case just cited may perhaps be criticised on the grounds given in the note in (1918) 27 YALE LAW JOURNAL, 704, viz., that the grounds for defendants' actions were not such as to justify them in doing what they did. That other grounds would clearly justify such interference, however, is clear, as the writer of the note points out.

another's employees does so for the purpose of securing their services for himself.³⁰

Returning to our discussion of Mr. Justice Pitney's opinion: In the sentence numbered (6) we are confronted with the proposition that the right to protection referred to is not merely a right that the breach of lawful contracts with employees shall not be induced by the defendants, for it is stated that the fact that the employment is "at will" (i. e., that it is no breach of contract for the employees to leave the plaintiff's employment) "is of no consequence." According to this, the question is not of securing to the employer the benefits of a contract lawfully entered into, but of protecting him from having defendants entice away employees who are privileged to leave at any time. The case cited for this proposition, 31 however, held simply that a provision in the Arizona constitution requiring an employer of more than five persons to employ not less than eighty per cent American citizens violated the Fourteenth Amendment, in that it deprived the non-citizen employee of the equal protection of the laws. In other words, this case established that an employee, even though employed only "at will," enjoys a constitutional immunity, even though not a citizen, from having destroyed by state action his privilege of working for whom he will. It also held by necessary inference that the employer on his part enjoys a similar immunity so far as the destruction by state action of his privilege of employing non-citizens is concerned. In the course of its opinion the court did, however, utter the dictum that "by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will."32 Of course it is; if any act is legally "unjustified" is is actionable. But what is unjustified interference? Is all interference unjustified? That is the question at issue. Once more we are confronted with the real problem of the case, but thus far have met with no real discussion of it.

The sentences numbered (7) and (8) contain assertions which are unsupported either by what has gone before or by the citation of cases in point. At most, they suggest an analogy and present a brief argument for giving to the employer some protection. They do not in any way, however, serve to suggest how far that protection shall go.³³ In that numbered (9) we are told "the right of action for

³⁰ It is assumed that the employees are not under contract to remain. The authorities on this question are given below in note 43.

³¹ Truax v. Raich (1915) 239 U. S. 33, 44, 36 Sup. Ct. 7. Cf. the discussion in note 25, supra.

^{22 239} U. S. 33, 44.

²⁵ The analogy to the merchant's right to the good-will of his customers is interesting, but it serves as an example to illustrate that protection from interference is not absolute. By setting up a rival store I may draw away all the merchant's customers and commit no legal wrong. In other words, it is only

persuading an employé to leave his employer is universally recognized —nowhere more clearly than in West Virginia."34 If this broad assertion means that it is always actionable to persuade servants or employees, not bound by contract to remain, to leave an existing employment, its incorrectness seems obvious. Is there authority for the proposition that A. may not entice away B.'s servant by offering him higher wages, provided of course that the servant is not bound by contract to remain? Business men are doing such things every day. Do they thus render themselves liable to damages?35 this general statement needs to be qualified so as to read: "The right of action for wrongfully (or unlawfully, or unjustifiably) persuading an employé to leave his employer is universally recognized." So are all the other rights of action for unlawful acts. Putting the matter shortly: either the broad assertion made is untrue, or else it merely states that an unlawful action is actionable. In either case it does not bring the solution of our problem any nearer.

The cases cited in support of the proposition just criticized of course do not uphold it. In *Thacker Coal Co. v. Burke*³⁶—the only West Virginia case cited—the supreme court of that state decided merely that a declaration which alleged that the enticing of the servants was "wilful, wrongful and malicious" and "without justifiable cause" was not bad on demurrer. The other cases cited—discussed in the note below³⁷—all equally fail to establish anything more than that if one without lawful excuse or justification persuades employees to leave their employer, his act is wrongful.

In the passage quoted, therefore, neither by the citation of binding precedents and the logical application of settled rules of law, nor by

from unjustified interference that the merchant is protected, and in the last analysis the decision of that question must necessarily be based upon notions of economic and social policy.

³⁴ The italics are the present writer's.

ss See discussion infra, p. 749 and the authorities cited in note 43, post.

^{36 (1906) 59} W. Va. 253.

[&]quot;Walker v. Cronin (1871) 107 Mass. 555, covers only cases where the acts are done "unlawfully" and "without justifiable cause." Angle v. Chicago, St. Paul, &c. Ry. (1894) 151 U. S. I, is not at all in point and contains the merest dictum (p. 13) to the effect that "It has been repeatedly held that if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer." (The italics are the present writer's.) Noice, Adm'x. v. Brown (1877) 39 N. J. L. 569 was an action on the case for the seduction of the plaintiff's daughter, stated in one count as an enticement of a servant from the employment of the master. The exact form of the declaration is not given but apparently both counts disclosed the real nature of the cause of action, and whatever is said about servants generally seems clearly to be purely by way of dictum. In addition, if the declaration was in the usual form, as presumably it was, it contained words alleging a wrongful enticement.

an adequate discussion of the social and economic problem involved, is any real progress made toward the solution of the question at issue, viz., Was there any justification or excuse for the defendants' acts, which admittedly were damaging the plaintiff financially by disturbing the relations existing between it and its employees? In effect Mr. Justice Pitney admits this, for in the following paragraph he says: "We turn now to the matters set up by way of justification or excuse for defendant's interference with the situation existing at the defendant's mine." There can of course be no justification or excuse for unlawful acts. Unless, therefore, the learned justice is prepared to say that there can be no justification for acts which interfere with the status resulting from the making of lawful agreements, this is in effect an admission that these acts were not necessarily unlawful simply because they interfered with "the situation at the plaintiff's mine." From what follows it is difficult to say just what view the learned justice did entertain upon the question. At points he seems to argue that there can be no justification, relying apparently upon the argument contained in that portion of the opinion already analyzed. For example, after stating some of the alleged grounds of justification, he says: "It is a sufficient answer, in law, to repeat that plaintiff had a legal and constitutional right to exclude union men from its employ."38 Here again we find repeated the same confusion of thought already pointed out. Translating this passage into what the present writer believes to be a more accurate terminology, it reads: "It is a sufficient answer in law, to repeat that plaintiff had a legal privilege to exclude union men from its employ and a constitutional immunity from having this privilege abolished." Stated in this way, it is at once obvious that instead of being a "sufficient answer, in law," it is no answer at all, as it tells us absolutely nothing about the rights (in the strict sense) of the plaintiff as against the defendants.39

The time-honored and perfectly useless maxim, Sic utere tuo ut alienum non laedas, is brought into play by the learned justice, as follows:

"The familiar maxim, 'Sic utere tuo ut alienum non laedas'—literally translated, 'So use your own property as not to injure that of another person,' but by more proper interpretation, 'so as not to injure the rights of another' (Broom's Leg. Max. [8th ed.] 289)—applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one in using it is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it. And a

⁸⁸ 38 Sup. Ct. 65, 73. The italics are the present writer's.

This error is repeated again in the following passage: "it may be worth while to say, in addition: . . . [that] plaintiff was in the reasonable exercise of its rights [privileges] in excluding union men from its employ . . ." 38 Sup. Ct. 65, 73.

most familiar application is the action for enticing an employé, in which it never was a justification that defendant wished to retain for himself the services of the employé. I Black. Com. 429; 3 Id. 142."40

Accepting the learned justice's "more proper interpretation" of the maxim, it amounts simply to saying that if you "injure," i. e., violate, another's rights, you commit a legal wrong. One is tempted to quote the remark of Sir Frederic Pollock, made with reference to a similar statement: "We do not need the House of Lords to tell us that whoever unlawfully interferes with his neighbor commits an unlawful act; we desire to have it made clear what kind of conduct is unlawful and what is not."

Attention must in passing be called to the remarkable statement contained in the passage just quoted, to the effect that it "never was a justification (for enticing away an employé) that defendant wished to retain for himself the services of the employé." The authority cited for this is—what? Blackstone. Now whether this ever was law or not, it certainly is not the law of to-day and has not been law for a long time, except in cases where the employee is under a legal duty to remain. If it were the law, it would, as previously pointed

^{40 38} Sup. Ct. 65, 73.

a Pollock, Torts (10th ed., 1916) 342.

^{c2} 1 Bl. Com. 429; 3 id. 142.

While possibly this may once have been the law, it is somewhat difficult to prove it from the cases. Two of the decisions usually relied upon are Hart v. Aldridge (1774) Cowp. 54, and Blake v. Lanyon (1795) 6 T. R. 221. In Hart v. Aldridge the jury found that the defendant persuaded the employees who were working by the piece to leave unfinished a piece of work which they had begun—clearly a breach of contract if, as the court thought, the contract was bilateral. Lord Mansfield, in delivering the opinion of the court, said: "He [the defendant] knowingly enticed him to leave it unfinished." In Blake v. Lanyon the same state of facts existed, the court saying: "A person who contracts with another to do certain work for him is the servant of that other till the work is finished." Many of the cases often cited for the proposition in question relate to the seduction of daughters or the enticing away of minor sons—cases which obviously must be decided on grounds of their own, in spite of the tendency of our law in the past to confuse them with those relating to servants or employees.

[&]quot;Recent applications of the law laid down in the two cases referred to in note 42 are found in De Francesco v. Barnum (1890) 63 L. T. 514 and Fred Wilkins v. Weaver [1915] 2 Ch. 322, in both of which the defendant enticed the employee away during the period for which the latter had contracted to work for the plaintiff. The latter case seems open to criticism, as it allowed an action although the employment of the servant by the defendant was only after the servant had definitely left the employment of the plaintiff. Admitting that this breach of contract by the servant was actionable, is it justifiable to treat the broken contract as still in existence? Should we not admit the legal power, though not the privilege, of the servant to break such a contractual obligation and that when broken the primary contractual obligation ceases to exist and there takes its place a secondary obligation to pay damages? If so,—and such a rule seems especially sensible as applied to contracts for personal services—

out, be constantly violated by the business community. Moreover, a careful reading of Blackstone will, it is believed, make it clear that he was writing only of the case where the servant was under contract to remain, 45 whereas Mr. Justice Pitney is applying his language to a situation in which the employees were privileged to leave at any time.

Looking back over the discussion down to this point, we find:
(a) that no precedents have been cited which fairly cover the case in hand—enticing away, for the purposes defendants had in view, employees who were not under contract to remain; (b) that no adequate discussion of the social and economic problems involved has been presented. What discussion there is has been merely incidental to an exposition of supposedly established law. Nevertheless the conclusion has somehow already been reached that the acts of the defendants were unlawful.

In the next important passage of the opinion Mr. Justice Pitney stands upon firmer ground. The plaintiff's employees had gone to work on the understanding that the mine was to be run "non-union." With reference to the conduct of the defendants in getting the men secretly to agree to join the union and to remain at work after having so agreed, the learned justice says:

"True, it is suggested that under the existing contract an employé was not called upon to leave plaintiff's employ until he actually joined the union and that the evidence shows only an attempt by Hughes to induce the men to agree to join, but no attempt to induce them to violate their contract by failing to withdraw from plaintiff's employment after actually joining. But in a court of equity, which looks to the substance and essence of things and disregards matters of form and technical nicety, it is sufficient to say that to induce men to agree to join is but a mode of inducing them to join, and that when defendants 'had sixty men who had signed up or agreed to join the organization at Hitchman,' and were 'going to shut the mine down as soon as they got a few more men,' the sixty were for practical pur-

the defendant did not in any way induce a breach of contract by the servant. That can be argued only if we assume that after the breach by the servant the primary obligation of the contract still existed. The present writer has seen a reference to a note in The Law Journal (London) of February 23, 1918, referring to a recent decision in the Winchester County Court in the case of Best v. Place "reported in our current County Courts Reporter Supplement, p. 12" where substantial damages were given against a defendant who enticed a servant (a farm laborer and expert thatcher) to leave his employer without notice, although the employment was only by the week. Here again, however, there was a breach of contract induced by the defendant.

The modern law on the subject is laid down by Lord Kenyon in Nichols v. Martyn (1799) 2 Esp. 731: "To induce a servant to leave his master's service at the expiration of the time for which the servant had hired himself, although the servant had no intention at the time of quitting his master's services [is] not the subject of an action." This was followed in Boston Glass Manufactory v. Binney (1827, Mass.) 4 Pick. 425.

See the passages cited in note 42, supra.

poses, and therefore in the sight of equity, already members of the union, and it needed no formal ritual or taking of an oath to constitute them such; their uniting with the union in the plan to subvert the system of employment at the Hitchman mine, to which they had voluntarily agreed and upon which their employer and their fellow employés were relying, was sufficient."46

To this Mr. Justice Brandeis in the dissenting opinion replies that there could be no breach of this contract by the men until they had formally joined the union.⁴⁷ Here obviously two views of the fair meaning of the language of the agreement are possible.⁴⁸ Much may be said in favor of that of the majority of the court, when we consider the surrounding circumstances.⁴⁹ Assuming that meaning to be the correct one, the defendants clearly were guilty of inducing repeated breaches of contract by the employees for which no adequate remedy at law existed.⁵⁰ So far, then, as the injunction granted is supported by this part of the opinion, it seems to be in accordance with what may be regarded as settled legal principles.⁵¹

This brings us to a consideration of the remarkable scope of the injunction as approved by the Supreme Court. The decree contained the usual injunction against threats, intimidation, force or violence,

^{48 38} Sup. Ct. 65, 74.

^{47 38} Sup. Ct. 65, 80.

⁴⁸ See note 5, supra.

The real object of the agreement seems to have been to exclude from the plaintiff's employment men affiliated with the union. It is clear that one pledged to join the union falls within the class the employer intended to exclude, and the language of the oral agreement is at least susceptible of the interpretation given it by Mr. Justice Pitney.

⁵⁰ It would be difficult, indeed impossible, to say what the pecuniary loss would be. Probably only nominal damages could be had at law for the breach of contract by each employee; yet from plaintiff's point of view the actual injury resulting from having in its employ a large number of union men would be very serious.

⁵¹ To explain what the present writer means by "settled legal principles" would require an essay by itself, so no attempt has been made to do so in detail. The question has to do with the degree of difference between the state of facts before the court and states of fact passed upon in previous decisions. If this difference be sufficiently great, the case cannot fairly be regarded as covered by the previous cases. If on the other hand the difference is sufficiently small, so that no reason of policy can fairly be said to exist for differentiating the present situation from those previously passed upon, we may fairly regard the case in hand as governed by "settled legal principles." The chief practical difference is, that in the one case the court has for the first time to pass upon the policy of a decision one way or the other, while in the other it has previous determinations as to the policy to rely upon. Inasmuch, however, as the court may in any case refuse to follow the past adjudications, ultimately the function of the court in both cases is the same. Cf. "The Dead Hand of the Common Law," (1918) 27 YALE LAW JOURNAL, 668, discussing the case of Rosen v. United States (1918) 38 Sup. Ct. 148, in which the court refused to follow the "settled legal principles" established by the earlier cases.

against picketing, and against inducing breaches of employee's contracts or trespassing upon plaintiff's property. As previously stated, the portions which enjoined picketing and acts of physical violence were eliminated by the Supreme Court, as no acts or threats of acts of that character had been shown. The portions of the decree which were approved, however, not only deserve but demand detailed consideration.

One paragraph enjoins the defendants from

"representing ['for the purpose of unionizing plaintiff's mine without plaintiff's consent'] . . . to any of plaintiff's employés or to any person who might become an employé of plaintiff, that such person . . . is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, . . . representing . . . to such employé . . . that such loss or trouble . . . may come by reason of plaintiff not recognizing the United Mine Workers of America, or because plaintiff runs a non-union mine." 152

This, be it noted, does not merely protect the "status" resulting from the making of "lawful agreements" by the plaintiff with its employees. Defendants are not to make the forbidden representations to "any person who might become an employé of the plaintiff." Apparently this portion of the injunction is based upon the notion expounded by some judges that employers have a "right to a free flow of labor." In the whole opinion of the majority of the court there is no discussion of the "free flow of labor" doctrine, and no attempt to justify any such sweeping prohibition. Noteworthy also is the character of the prohibited representations. The defendants are not to represent "that such person . . . is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff,

⁵² The present writer is following here the statement of the form of the injunction as given in the dissenting opinion of Mr. Justice Brandeis. It should be compared with the statement of Mr. Justice Pitney, *supra*, p. 782, as there are some differences in detail. The italics here and in the following paragraphs are the present writer's.

Two of the leading cases setting forth the doctrine of the employer's right to a "free flow of labor" are Jersey City Printing Co. v. Cassidy (1902) 63 N. J. Eq. 759, and L. D. Willcutt & Sons Co. v. Driscoll (1908) 200 Mass. 110. It is not always clearly recognized that this general, or generic, form of statement does not enable us to decide a given case raising a novel set of facts. There is clearly no right of an employer to an absolutely free flow of labor, for if there were, no modern labor union could exist for any length of time. Loring, J., in the recent case of Haverhill Strand Theater v. Gillen (1918, Mass.) 118 N. E. 671, puts the doctrine as follows: "The right to the free flow of labor is not an absolute right; it is limited by the right [privilege] of employees to combine for purposes which in the eye of the law justify interference with the plaintiff's right to a free flow of labor." This is an accurate statement except for the last few words. The law does not justify an "interference with a right." It does justify interferences with certain states of fact and thereby settles that the rights of the plaintiff are not as extensive as he claims.

... by reason of plaintiff not recognizing the United Mine Workers of America, or because plaintiff runs a non-union mine." Apparently statements to persons contemplating, or who might at any time in the future contemplate, entering plaintiff's employment, to the effect that they were likely to lose financially in the long run and have "some trouble" because of the non-union character of the plaintiff's mine, would be forbidden if made "for the purpose of unionizing plaintiff's mine without its consent." If we are to judge from the decree and not merely from the opinion, it is clear that the court is holding that almost any acts of labor unions done for the purpose of unionizing an employer's business without his consent, are illegal, even where the members of the union are not and never have been employees of the employer concerned. That this is the actual scope of the decision will appear more clearly as we examine the other portions of the injunction.

Another paragraph of the injunction enjoins the defendants from "...knowingly and willfully enticing ['for the purpose of unionizing plaintiff's mine, without plaintiff's consent'] plaintiff's employés present or future ... to leave plaintiff's service, giving or assigning ... as a reason ... for leaving of plaintiff's service, that plaintiff does not recognize the United Mine Workers of America, or that plaintiff runs a non-union mine."

This prevents the labor union from peacefully inducing employees to exercise their legal privileges (given them by their contract of employment) to leave their employment at any time—always, of course, provided that the union in inducing them to leave is acting "for the purpose of unionizing" the plaintiff's business without his consent. The forms of persuasion forbidden here seem to include peaceful argument that employees ought not to remain at work for an employer who manages a non-union mine. This portion of the injunction is based upon the first part of Mr. Justice Pitney's argument which is analyzed in detail above. As was pointed out, the opinion was not in any way a demonstration that all acts of this character are illegal.

Another sweeping prohibition is contained in that portion of the decree which enjoins the defendants from "... knowingly and willfully enticing plaintiff's employés, present or future... to leave plaintiff's service without plaintiff's consent, against plaintiff's will and to plaintiff's injury."

This of course merely strengthens the protection given to the "status" created by the plaintiff's exercise of his privilege to employ non-union men. It effectually prevents the union from using any means, however peaceful, to induce employees to leave a non-union employer, even though thereby no breaches of contract are brought about. It is sought to lend additional strength to this stringent prohibition by adding that defendants are enjoined from

"... interfering in any manner whatsoever, either by ... persuasion or entreaty, with any person in the employ of plaintiff who has contracted with and is in the actual service of plaintiff to ... induce him to quit the service of plaintiff ... or assisting or abetting in any manner his doing so."

To sum up: The injunction prohibits in substance the following conduct on the part of the defendants:

- (1) Inducing plaintiff's employees to break their contracts of service:
- (2) Inducing by any means plaintiff's employees to leave, even though by their contracts of employment they are privileged to leave at any time;
- (3) Persuading persons "who might become employees" of the plaintiff not to do so, by representing to them that they are "likely to suffer some loss or trouble" if they do, because of the non-union character of plaintiff's mine.

The first part seems justified under existing precedents and would probably be regarded by nearly every one as in accord with sound policy. But, be it noted, as applied to this case it would merely prevent the union from inducing plaintiff's employees to remain at work after they had joined the union. To induce them to leave the plaintiff's service after they had joined the union would be merely to induce them to keep, not to break, their contracts.

The remaining portions of the injunction taken as a whole seem to go far beyond any existing precedents in placing upon the activities of labor unions limitations which ought to be imposed only after the most careful consideration of the results of so doing. Mr. Justice Pitney seeks at one point to justify these limitations in a general way by the statement that "the defendants' acts cannot be justified by any analogy to competition in trade. They are not competitors in trade."

The reply to this was given long ago by Mr. Justice Holmes, as follows:

"I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly 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." 54

The real question therefore in each new case always is as to the limits to be placed upon each of the parties in the "free struggle for life." Where the situation involved is a novel one, this is, of course, purely a problem of economic and social policy, conceal it how we will.

⁵⁴ Dissenting opinion in Vegelahn v. Guntner (1896) 167 Mass. 92, 107.

In another portion of the opinion, for the detailed discussion of which space is lacking, Mr. Justice Pitney places much emphasis upon alleged acts of "misrepresentation, deceptive statements, and threats of pecuniary loss" made to persons who were not yet but who might become employees of the plaintiff. Assuming the truth of the allegations as to these acts-and there was much evidence to support them—we may well hold such methods of carrying on the economic struggle between employer and employee unjustifiable and so enjoin them. It does not follow that other methods not involving these things are illegal and should also be enjoined. It should also be noted that "threats of pecuniary loss" seems to imply something quite different from and more serious than the thing enjoined, viz., "representing . . . that such person will suffer or is likely to suffer some loss or trouble in . . . entering the employment of plaintiff by reason of plaintiff not recognizing the union, or because plaintiff runs a nonunion mine." This includes far more, apparently, than threats of (i. e., threats to inflict) pecuniary loss.

In the last analysis the decision in a novel situation such as that presented in the principal case must turn upon the notions of policy which the judges who are deciding the case may entertain. Although the present writer has rather definite convictions that in the principal case the minority are more nearly right upon most points than the majority, it is not his purpose to undertake to answer these questions of policy at the present time. His sole object is to show how inadequately the real point at issue is dealt with in the opinion of the majority and to suggest that the policy of the decision must be re-examined before it can be accepted as sound law. Whether our courts will show themselves competent to settle rightly the questions of policy involved is perhaps doubtful. If not, we have our legislative bodies to fall back upon. In making our decision, we shall have to bear in mind that if we do not give organized labor a fair chance to assert itself in competition with organized capital in this "free struggle for life," the only alternative will be a larger and larger measure of direct governmental interference in fixing wages and conditions of employment.55 On the other hand if we do give to the unions the free hand they ask, we may find it necessary by statute to surround them with legal regulations as to conditions of membership.

so This of course is what has been going on in Australia. See The Judicial Regulation of Industrial Conditions by W. Jethro Brown (1918) 27 YALE LAW JOURNAL, 427. Minimum wage laws, the Adamson Law, and similar legislation suggest the possibility of greater developments along this line in our own country. Undoubtedly the experiences we are now going through in the great war will have much effect upon our notions of what it is feasible for the government to undertake in the way of the regulation of matters heretofore regarded as "private" and exempt from governmental interference. The recent program of the British Labor Party is perhaps another sign of the times.

etc., which may not be altogether acceptable.⁵⁶ Which method will in the long run prove most conducive to the welfare of the community is, as stated above, a question with the answer to which the present writer is not at this time primarily concerned.

What I mean to suggest is that it may be that if we are to give the unions as free a hand as the minority in the case before us are willing to grant them, we shall need to regulate by statute the conditions of admission to the union and of exclusion from it. It seems clear that we cannot permit the unions to acquire a substantial monopoly of furnishing labor in a given line without at the same time providing by legal regulation of some kind that the union is open on fair terms to all alike. To do otherwise would in the end result in state recognition of the power of voluntary associations of workers to exclude from working at their trade reputable workmen who might for some unsubstantial reason be refused admission to the union. In discussions of the whole question this has too often been overlooked, or at least regarded as of slight importance.

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#### MORATORY LEGISLATION BY CONGRESS

An Act recently passed by Congress and signed by the President on March 8th, known as the Soldiers' and Sailors' Civil Relief Act, is of great and immediate interest to the profession. Its aim is to protect persons in military service from certain hardships which may result from their absence and their inability to look after their business interests at home.

The Act contains six Articles. Article I (entitled "General Provisions") defines who are "persons in military service," and certain other terms of the Act and provides that the Act is applicable "to the United States, the several states and territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, and to proceedings commenced in any court therein." It provides further that certain relief granted under the Act may be given also with respect to sureties, guarantors, indorsers, and other persons liable upon the contract or liability in question.

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The principal provisions of Article 2 (entitled "General Relief") are the following:

- I. Before a judgment by default is entered in any court the plaintiff shall file an affidavit stating that the defendant is not in military service. In the absence of such an affidavit no judgment is to be entered without first securing an order of court directing such entry; and no such order shall be made if the defendant is in military service until after the court shall have appointed an attorney to represent him. Unless it appears that the defendant is not in military service the court may require as a condition before judgment is entered that the plaintiff file a bond to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment, should the judgment be thereafter set aside. It will be seen that the provisions of this Article affect all judgments by default in any court whether the defendant is in military service or not.
- 2. Judgments rendered against any person in military service during the period of such service or within thirty days thereafter may be opened not later than ninety days after the termination of such service if it appear that the defendant was prejudiced by reason of his military service in making his defense to such action or proceeding.
- 3. Any action or proceeding commenced in any court by or against a person in military service during the period of such service or within sixty days thereafter shall be stayed on application of such person or some person on his behalf, or may be stayed in the discretion of the court on its own motion, unless the ability of the plaintiff to prosecute the action or of the defendant to conduct his defense is not materially affected by reason of his military service.
- 4. In an action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the execution of any judgment or order entered against such person may be stayed and any attachment or garnishment of property, money, or debts in the hands of another may be vacated or stayed, unless the ability of the defendant to comply with the judgment or order is not materially affected by reason of his military service.
- 5. The period of military service is not to be included in computing any period limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators or assigns, whether such cause of action shall have accrued prior to or during the period of such service.

Article 3 of the Act deals with "Rents, Installment Contracts, Mortgages."

1. It forbids eviction or distress in respect of any premises the rental of which does not exceed \$50 per month, and which are occupied

chiefly for dwelling purposes by the wife, children or other dependents of a person in military service, except upon leave of court. The court may stay proceedings for not longer than three months, and shall do so on application, unless the ability of the tenant to pay the agreed rent is not materially affected by reason of such military service, or it may make such other order as may seem just. The Secretary of War or the Secretary of the Navy is empowered to order an allotment of the pay of a person in military service, in reasonable proportion, to discharge the rent.

- 2. Parties to whom a deposit or an installment of the purchase price has been paid under a contract contemplating the purchase of real or personal property by persons who after such date of payment have entered military service, are prohibited from rescinding or terminating the contract or resuming possession of the property for non-payment of any installment falling due during the period of such service, except by action in a court of competent jurisdiction. Upon the hearing of such an action the court may order the re-payment of prior installments or deposits or any part thereof as a condition of terminating the contract and resuming possession of the property, or in its discretion may, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, order a stay of proceedings, unless in the opinion of the court the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service; or it may make such other disposition of the case as may be equitable to conserve the interests of all parties.
- 3. With respect to obligations originating prior to the date of the approval of the Act which are secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service, it is provided that in any proceeding commenced in any court during the period of military service to enforce such obligation, arising out of non-payment of any sum due thereunder or out of any other breach of the terms thereof, occurring prior to or during the period of such service, the court, after hearing, in its discretion may on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service, (a) stay the proceedings or (b) make such other disposition of the case as may be equitable to conserve the interests of all parties. No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court.

The provisions of Article 4 (entitled "Insurance") aim to protect persons in the military service who shall apply for the benefits of this Act against the lapsing of any policy or policies of insurance which they may carry not exceeding in each case a face value of \$5000.

The provisions of Article 5 (entitled "Taxes and Public Lands") aim to protect the rights which persons in military service may have in any public lands and to protect such persons against the consequences resulting from the non-payment of taxes or assessments falling due during the period of military service in respect of real property owned and occupied for dwelling or business purposes by a person in military service or his dependents.

Article 6 (entitled "Administrative Remedies") lays down, as the title indicates, various administrative remedies.

The outbreak of the war gave such a shock to the financial systems of the various belligerent countries in Europe that they found it necessary to declare immediately moratoriums extending for specified times the period within which payments might be made. Such a moratorium was put into effect in England by proclamation on August 2, 1914, and was confirmed by what is known as the Postponement of Payments Act, which was passed by Parliament on the following day. The Act conferred authority on the King to postpone the payment of all contract obligations and provided that it was to remain in force for a period of six months. No such legislation was required in this country after its entry into the war because our financial system had already adapted itself to the new conditions created by the war.

Special legislation was required, however, to meet the needs of those entering the military service. Laws aiming to protect their interests were passed in Europe promptly after the outbreak of the war. In Germany such a law was passed on August 4, 1914; in France, on August 5, 1914; and in England, on August 31, 1914. The English Act, which is known as the Courts Emergency Powers Act, was amended twice in 1916 and again in 1917. In this country it has required a much longer time to enact the necessary legislation in behalf of our men in the military service. Maryland was one of the first states to realize the need of prompt action and it passed the necessary legislation at the special session of its legislature in 1917. It was almost a year after the declaration of war before the Congress of the United States took the matter in hand. By providing a very comprehensive statute on the subject, it has made further state legislation with reference to the matter unnecessary.

In the Soldiers' and Sailors' Civil Relief Act we have a striking instance of Congressional action based upon the constitutional power to declare war, to support armies, to maintain a navy, and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

The Act is a vast improvement upon the English model and is a fine piece of legislation, both as regards substance and legislative draftsmanship.

### CAN A SOLDIER UNDER AGE MAKE A VALID WILL?

When a nation is in arms questions which have been thought only of academic interest may become of large practical moment. The age at which a soldier or sailor attains testamentary capacity is an instance in point, for the armies and navies of the warring nations contain many boys under 21. A recent English case involved the will of an infant officer of the British army who attempted to dispose of £1,000,000 over which he had a testamentary power of appointment. He was killed in action, while still an infant, and his will was admitted to probate as a soldier's will under section II of the Wills Act of 1837. Section 7 of the Act declares that no will made by any person under 21 years of age shall be valid; sections 9 and 10 prescribe the formalities for executing wills; and section II reads: "Provided always and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." Questions arising as to the validity of the attempted exercise of the power of appointment, the case came before the Chancery Division. It was held that so long as the probate stood unrevoked the testamentary power of appointment was validly exercised; but the learned judge expressed the opinion that the practice of admitting to probate wills of infant soldiers was not justified by the Wills Act and that if the question should come before the Court of Appeals it would be necessary under existing legislation to declare such wills invalid. Re Wernher (1918, Ch. D.) 117 L. T. Rep. (N. S.) 801.

The age at which a person shall be deemed to have legal capacity to make a will depends upon the provisions of the statute governing the making of wills. American statutes closely follow those of England—either the Statute of Frauds of 1676 or the present Wills Act of 1837. The tendency of modern legislation has been to advance the age of testamentary capacity and many of the American states now place it at 21, as does section 7 of the Wills Act. Likewise many of the American statutes have provisions favoring the wills of soldiers and sailors and corresponding to section 11 of the Wills Act. The English decisions therefore will be of value in helping to solve under American statutes the problem whether a soldier under age can make a valid will.

¹ See I Schouler, Wills (5th ed.) secs. 39-43; Rood, Wills, sec. 126 et seq.

² See I Schouler, op. cit. sec. 365 et seq.; Rood, op. cit. sec. 238.

The opinion of Justice Younger in the principal case contains so admirable a review of the origin and history of the special favor which the law shows to soldiers and sailors in the making of wills that it would be useless to attempt to add to it.3 But a summary of his argument may be of interest to American readers. Prior to the Statute of Frauds no formality of execution, nor even a writing, was required for the testamentary disposition of personal estate, and testamentary capacity was deemed to exist at the age of 14 for males and 12 for females. When the Statute of Frauds introduced certain forms and solemnities into the making of wills of personalty it was thought expedient to reserve—as was done by section 234—their former privileges to soldiers in actual military service and to sailors at sea, because their peculiar circumstances rendered it more difficult for them to observe the forms required of testators in ordinary circumstances. The Statute of Frauds contained no provision as to the age required for testamentary capacity and the reservation by section 23 of the soldier's privilege did not lower the age at which he was competent to make a will. It simply did away with the formalities of execution.⁵ With this survey of the earlier law, it seems clear that section II of the Wills Act does not affect the capacity to make a willthe age of capacity being fixed at 21 years by section 7, just as before that Act it had been fixed at 14 years for males by the established common-law rule, unchanged by the Statute of Frauds-but reserves merely the privilege of disregarding formalities of execution, just as did section 23 of the Statute of Frauds. And this is made the clearer by reason of the form of section II which is that of a proviso following sections 9 and 10 which deal with the formalities of execution. Moreover, it is to be noticed that the privilege reserved extends only to the soldier who is in actual military service. When he returns to civil life it ceases. Now if the reservation were intended to confer capacity to make a will regardless of age how extraordinary it would be to withdraw it when the soldier returns to civil life, and thus leave him unable, until he should reach majority, to alter or revoke by a later will his military will.

The court's argument demonstrates beyond question the soundness of its interpretation of the statute. Yet the English text writers have

^{*}The special testamentary privilege extended to soldiers and sailors was borrowed by the common law from the civil law. 2 Justinian, Institutes, Title 11. See Drummond v. Parish (1843, Eng.) 3 Curt. Eccl. Rep. 522, 531; also Leathers v. Greenacre (1866) 53 Me. 561, 570.

^{&#}x27;Section 23 reads: "Provided always: That notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he or they might have done before the making of this Act."

⁵ This was the construction placed upon the privilege under the civil law. See Swinburne, Wills, 61.

^{&#}x27;I Jarman, Wills (6th ed.) 102; Theobald, Wills (7th ed.) 56.

been accustomed to assert that soldiers in actual military service and sailors at sea may make wills of personalty at the age of 14, and it has been the practice of the English courts of probate to admit to probate the wills of soldier-infants. But, as Justice Younger points out, this rule and this practice originated in a case in which probate was granted on *ex parte* motion and without any adequate consideration.⁷

American text writers have been strangely silent on the subject. No discussion of the problem has been found in any of them. There is, however, one American decision which supports the view of Mr. Justice Younger.⁸ It is believed that in this country as well as in England additional legislation will be necessary if soldiers or sailors are to have testamentary capacity at an earlier age than civilians.

## WHAT IS COMMERCE?

It has been suggested in two legal periodicals and held in two recent cases that interstate transportation of property by the owner for purely personal use is not interstate commerce. United States v. Mitchell (1917, S. D. W. Va.) 245 Fed. 601. But inasmuch as there are at least two decisions squarely contra and apparently none in accord, and inasmuch as the solution of the question goes to the very root of the whole commerce clause of the Constitution, the problem seems to be doubly worthy of consideration.

What, then, is commerce, or rather what is commerce in the sense in which that term is used in the Constitution? The specific aspect of this question as it arose in the principal case was whether the owner of intoxicants who personally carries the same from one state to another, not for purposes of trade but for personal use, is transporting intoxicants in interstate commerce. The court held that such a transaction is not interstate commerce for the reason that the term commerce "necessarily connotes" a business transaction. But does the term commerce, in the sense in which it is used in the Constitution, "necessarily connote" a so-called "commercial" transaction? It was argued in the leading case on interstate commerce that commerce was limited to traffic, but Mr. Chief Justice Marshall, speaking for the court, irrefutably answered the argument with the observation that "this [limitation] would restrict a general term, applicable to many

⁷Re Farquhar (1846) 4 Notes of C. 651; see also Re M'Murdo (1867) L. R. 1 P. & D. 540; Goods of Hiscock [1901] P. 78.

⁸ Goodell v. Pike (1867) 40 Vt. 319.

^{1 (1903) 3} COLUMBIA L. REV. 411; (1898) 12 HARV. L. REV. 353.

² The other case, from the Northern District of West Virginia, is unreported. ³ State v. Holleyman (1899) 55 S. C. 207, 33 S. E. 366; Alexander v. State (1910) 3 Okla. Cr. 478, 106 Pac. 988.

objects, to one of its significations."4 If, then, as the Supreme Court has repeatedly held, the term "commerce" as used in the Constitution "is a term of the largest import," and cannot be restricted "to one of its significations," it becomes important to ascertain what the "largest import" of the term is-what "its significations" are. According to the best authorities the word commerce has two principal "significations": (1) business intercourse, and (2) social or personal intercourse.7 Moreover, this latter signification was the more widely developed in the early use of the word commerce and has ever since been quite common.8 Furthermore, it may be appropriately observed that the word commerce comes from the Latin word commercium which, like its English derivative, has a double and very comprehensive meaning: (1) commercial intercourse, (2) non-commercial intercourse.9 For example, the Romans spoke of a social exchange of letters as commerce (commercium), 10 and, in fact the word commerce is still used to convey that meaning or similar meanings.11 The derivative word commercial, however, has been confined to only "one of the significations" of the root word commerce, viz., to business transactions, and doubtless it is partly to this conception that the holding in the principal case must be attributed. But the power given to Congress was to "regulate commerce," not to "regulate commercial transactions." Therefore, to use again the language of Mr. Chief Justice Marshall, the holding in the principal case, if correct, would "restrict a general term, applicable to many objects, to one of its significations,"-such a restriction the great expounder of the Constitution held could not be made.

Such being the "large import" of the term, the next important question is whether in giving Congress the power to regulate interstate commerce the broad purpose—the evil sought to be remedied—is necessarily confined to purely business or so-called "commercial" transactions. "It is a matter of public history that the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation.¹² Hence, the principal purpose of the commerce clause was to prevent interference by a state with the free interstate

^{*}Gibbons v. Ogden (1824, U. S.) 9 Wheat. 1, 189. Italics in the quotation are the writer's.

⁵ Welton v. State of Missouri (1875) 91 U. S. 275, 280.

⁶ Gibbons v. Ogden, supra.

⁷ See Century Dictionary and Encyclopedia, and Webster's New International Dictionary.

^{*} See Webster's New International Dictionary.

⁹ See Harper's Latin Dictionary.

¹⁰ Id. See, also, Seneca, Epistolae, 38, 1.

¹¹ See, e. g., Emerson, Friendship; and Century Dictionary.

¹² County of Mobile v. Kimball (1880) 102 U. S. 691, 697.

transportation of persons or property. Does not this purpose, then, cover transactions like that in the principal case? It is difficult to see why it does not, for if such interstate transportation is not interstate commerce then one wishing to transport his own property for personal use from, say, New York to San Francisco might be subjected to all sorts of "conflicting and discriminating state legislation." For instance, suppose that A has a pleasure car which he never uses for "commercial" purposes and he wishes to drive it from New York to San Francisco for purely pleasure purposes. Could each state tax him for the mere privilege of crossing the state line? Or could the interlying states put prohibitive taxes on the flask of brandy which he carries in his pocket for the purpose of use in case of accident? It would seem clear that such transactions fall within the general purpose of the commerce clause and, hence, constitute interstate commerce.

Perhaps the most satisfactory judicial exposition of the term is the one recently quoted with approval by the United States Supreme Court in *International Textbook Co. v. Pigg.*¹³ Said the court:

"Importation into one state from another is the indispensable element, the test of interstate commerce, and every negotiation, contract, trade and dealing . . . which contemplates and causes such importation whether it be of goods, persons or information is a transaction of interstate commerce."

The omitted words are, "between citizens of different states," but it seems quite clear that diverse citizenship has nothing to do with commerce. And, besides, the Supreme Court has recently held that transportation by the owner for himself, i. e., transportation not "between citizens of different states" may be commerce. In other words, as it was more concisely expressed by the United States Supreme Court in Railroad Co. v. Husen, "transportation is essential to commerce or rather is commerce itself," i. e., commerce in the constitutional sense is simply transportation (including transit and transmission) of persons or things. Moreover, this conception of the term commerce, viz., as simply transportation of persons or things, seems to be carried out by the unbroken current of Supreme Court decisions. Thus, Mr. Justice Holmes, speaking for the United States Supreme Court, has said: "Transportation for others as an independent business is commerce irrespective of the purpose to sell or retain the goods

¹⁸ (1910) 217 U. S. 91, 30 Sup. Ct. 481. The quotation is from Butler Shoe Co. v. United States Co., 156 Fed. 1.

¹⁴ The Pipe Line Cases (1914) 234 U. S. 548, 34 Sup. Ct. 956.

¹⁸ (1877) 95 U. S. 465, 470.

¹⁸ Hanley v. Kansas City, etc. Co. (1903) 187 U. S. 617, 619; 23 Sup. Ct. 214, 215.

which the owner may entertain with regard to them. . . ." It is true that the learned justice says transportation for others is commerce, irrespective of the purpose, but the case was a case dealing with transportation for others, and a judge usually, and wisely, confines his language as nearly as possible to the facts of the case. Besides, the same learned justice, speaking for the same court, has subsequently held that the fact that the transportation is by and for the owner of the thing transported (i. e., the fact that it is transportation not for others) does not prevent the transportation from being interstate commerce. Hence, it would seem to follow that interstate transportation is interstate commerce, irrespective of the purpose of the transportation or of the person for whom the person or thing is transported.

Furthermore, apart from Congressional legislation, such as now exists, ¹⁸ it is settled law that a state cannot prevent a person from importing (through another) intoxicants for his own personal use, the reason being that such importation is interstate commerce. ¹⁰ But if the principal case is correct the state could without such congressional legislation prevent him from *personally* importing it into the state. In other words, if the principal case is correct, then what is admittedly commerce if done by an agent ceases to be commerce if done by the principal himself. But such a conclusion seems absurd, for certainly the essential nature of the transaction is the same whether it is done by the principal himself or by his paid agent.

In accord with the view herein expressed is the well-reasoned opinion of the Supreme Court of South Carolina in a case in which the facts were substantially the same as in the principal case but the conclusion reached was squarely contra. In that case²⁰ the defendants had purchased liquor in North Carolina and had transported it in their own buggy into South Carolina, for their own personal use. The court held that the transportation was interstate commerce, though it was transportation by the owner for his own non-commercial use. The only other case squarely in point seems to be Alexander v. State.²¹ There, too, the accused had personally carried liquor into the state for his personal use, but the court did not hesitate to hold the transportation interstate commerce, although it was, as in the principal case, a transportation by the owner for a non-commercial purpose.

Text-writers, as a rule, have wholly ignored the precise point raised in the principal case and do not cite either of the two cases last con-

¹⁷ The Pipe Line Cases, supra.

¹⁸ See Comment, The Webb-Kenyon Act and Interstate Commerce (1917) 26 Yale Law Journal, 399.

¹⁹ Vance v. W. A. Vandercook (1898) 170 U. S. 438, 18 Sup. Ct. 674.

²⁰ State v. Holleyman, supra.

²¹ Supra, note 3.

sidered. But upon principal and such authority as there is, it is submitted that the distinction taken in the principal case and suggested in the above-mentioned periodicals cannot be supported; that it is not practical to draw any distinction between transportation by the owner for so-called "commercial" and transportation by the owner for so-called "non-commercial" purposes; that each is commerce in the constitutional sense; that to hold so does violence neither to language nor to legal principle, but rather gives full effect to the "largest import" of the term commerce, enables Congress to regulate evils which would seem to fall clearly within the general purpose of the commerce clause, and finally, while effectuating complete justice, avoids the adoption of a wholly impractical and unnecessary limitation to a just and practical general rule.

T. P. H.

# THE ACT OF STATE DOCTRINE APPLIED TO ACTS OF MEXICAN REVOLUTIONISTS

The United States Supreme Court in two recent decisions has made an interesting application of the Act of State doctrine. Oetjen v. Central Leather Co. (1918) 38 Sup. Ct. 309; Ricaud v. American Metal Co. (1918) 38 Sup. Ct. 312. Both cases arose out of the acts of a military commander of the Constitutionalist Army in Mexico. In the first case personal property of a Mexican citizen had been seized for non-payment of a military contribution duly levied, and in the second case personal property claimed to have been owned by an American corporation had been seized on military requisition. In both cases, the property was sold by the military commander to an American citizen, who brought it into the United States, and suit for the recovery of the property was instituted—in the first case, by the American assignee of the original Mexican owner, and in the second case, by the alleged original American owner. The court was asked to decide upon the conflicting claims of title of two American citizens.

The lower court in the first case¹ decided that by the seizure and sale of the military commander title passed to the defendants, on the ground that war existed, that the contribution was properly levied under the laws of war, and that a sale of an inhabitant's property, for failure to pay the contribution assessed against him, was valid. That is, the court examined the legality of the seizure and sale according to the rules of international law.

The United States Supreme Court proceeded on an entirely different theory. It refused to examine the legality of the seizure and sale. It

¹ O'Neill and Oetjen v. Central Leather Co. (1915, Ct. Err.) 87 N. J. L. 552, 94 Atl. 789.

turned its attention solely to the character of the authorities making the seizure and sale, and finding, in both cases, that the political department of our Government had since recognized, first, the *de facto* and subsequently, the *de jure* character of the Government on behalf of whose armies the seizures and sales were made, it declined to re-examine or sit in judgment upon the acts of a foreign government carried out within its own territory; and this, notwithstanding the fact that the property thus sold was brought into the United States and the conflict of title arose between two American citizens. Redress of grievances by reason of such acts of a foreign government, said the court, must be sought in the courts of that government or through diplomatic channels.

A decision of the United States District Court for the District of California in the unreported case of Union Fertilizer Co. v. Atchison, Topeka and Santa Fé Railroad Co. (March, 1917) seems to have been at variance with these conclusions. A concession granted by Diaz in 1911 to one S. to gather guano from certain islands off Lower California was cancelled in 1914 and granted to A. by a Constitutionalist Governor then exercising military authority in the region. A. brought the guano to the United States and sold it to the plaintiff, billing it to the plaintiff on the defendant railroad. S., the original concessionaire, demanded and obtained the guano from the railroad, claiming to be the true owner, and this title the defendant set up in an action by the plaintiff for recovery of the value of the guano. The court held that the Constitutionalist authorities could take private property only for immediate military needs, which necessity in this case was not shown, and that the concession of S. was a vested right which the Constitutionalists could not disturb. It is submitted that, however valid this complaint might be if advanced by the political department of our Government, an American court, as held in the principal cases by the Supreme Court, should not have passed upon the validity of the acts of the Constitutionalist authorities, nor assumed to examine a question of title to an interest in Mexican realty.2

The same principle which induces the courts to refrain from drawing into question or passing upon acts of the political department of our

² Moreover, the decision is open to the further objection that, on common law principles, S. could not have brought an action for the guano in question against A or those claiming under him, on the ground that a disseizee cannot sue his disseizor or those claiming under him for the disseizor's wrongful acts with respect to the property or for anything taken from the land so long as the disseizin continues. The disseizee in such case must either first regain possession by legal action or otherwise, and then bring his action for injury to the property or for the personalty removed therefrom, or recover for those injuries as an incident to his action to regain possession. He cannot sue the disseizor for the tort independently until he has come into possession. Avery v. Spicer (1916) 90 Conn. 576, 581, 98 Atl. 135, and other cases there cited.

own government acting within its jurisdiction⁸ would a fortiori exempt from similar examination the acts of a foreign government acting within its jurisdiction,⁴ even though such acts affect the property of American citizens in its territory. The reason for the rule in the first case is based upon the inconvenience that would result from the courts interfering with the acts of the political department when acting within its jurisdiction. That reason is fortified in the case of acts of a foreign government by the fact that a re-examination of such acts in municipal courts would "imperil the amicable relations between governments" and by the further fact that individual recourse is not barred, but is merely directed to be sought in other quarters, namely, in the courts of the foreign country or through a diplomatic claim instituted on behalf of the citizen by the foreign office of his own government.

This immunity from re-examination of Acts of State of a foreign government extends to acts of legislation⁵ and executive acts,⁶ but is predicated upon their operation having been confined within the proper limits of the jurisdiction of that government.⁷ Still, while it would be impossible to justify acts committed under authority of State A. in State B. contrary to the laws of State B., judicial cognizance of such acts in State B. can be taken collaterally only, and only so far as they affect private rights, and not directly, when they involve an assumption of jurisdiction over State A. or its property. Convenience and

^{*}In the field of foreign relations, see Foster v, Neilson (1829, U. S.) 2 Pet. 253, 307; Williams v. Suffolk Ins. Co. (1839, U. S.) 13 Pet. 415, 420; In re Cooper (1891) 143 U. S. 472, 499; 12 Sup. Ct. 453. In England see West Rand Central Gold Mining Co. v. The King [1905] 2 K. B. 391.

⁴Underhill v. Hernandez (1897) 168 U. S. 250, 253; 18 Sup. Ct. 83; American Banana Co. v. United Fruit Co. (1909) 213 U. S. 347, 359; 29 Sup. Ct. 511.

^{**}Carr v. Fracis Times & Co. (H. of L.) [1902] A. C. 176, 180. No such immunity from re-examination extends to the legislation of one state in the courts of another state of the United States, nowithstanding the "full faith and credit" requirement of the Constitution for the "public acts" of sister states. Of course, this matter is independent of the question of enforcement of a foreign statute, which is not required by international or interstate law. See articles by Judge J. K. Beach in (1918) 27 YALE LAW JOURNAL, 656, and by Henry Schofield in (1908) 3 ILL. L. REV. 65.

⁶ American Banana Co. v. United Fruit Co., supra.

⁷ See Dobree v. Napier (1836, Eng. C. P.) 2 Bing. N. C. 781 (acts on the high sea under authority of Queen of Portugal, when not in violation of international law, held not justiciable in English courts). In Reg. v. Lesley (1860) 29 L. J. M. C. 97, an act done under the authority of a foreign state (Chile) on the high seas by an English vessel, contrary to English law, did not escape judicial condemnation in England, because Chilean law had no extraterritorial effect on an English ship outside Chilean waters. See also Vavasseur v. Krupp (1878, C. A.) 9 Ch. D. 359, where it was said that infringement of a patent in England could not be justified by alleging that it was done under authority of a foreign sovereign.

comity among nations operate to exempt foreign sovereigns and their property from the jurisdiction of municipal courts.8

An exception to the general rule that the legality of the acts of a foreign government (apart from those committed within the territory of the forum contrary to local law) will not be examined in judicial proceedings, is to be noted in the case of prize captures made under authority of a foreign state but in violation of the neutrality of the state into which the prize is brought. As was said by Justice Story in The Santissima Trinidad:0

"In each case, . . . the illegality of the capture is the same; in each, the duty of the neutral is equally strong to assert its own rights, and to preserve its own good faith, and to take from the wrongdoer the property he has unjustly acquired, and reinstate the other party in his title and possession which have been tortiously divested."10

When we come to the judgments of foreign courts, however, we find that recognition of such judgments is not treated as obligatory but is based on the doctrine of comity and is qualified by the universal rule that the court rendering the judgment shall have had jurisdiction in the international sense.11

Had the plaintiffs in the instant cases been able to proceed in tort in this country against the individuals who committed the alleged wrong, they would still have had to show that the act was unlawful in the place where committed, i. e., Mexico,12 even if the defendants could not have pleaded the Act of State to escape personal liability.13

Although the acts of seizure by the military commanders were committed before their revolution became successful, their acts from the beginning of the revolution are considered as those of the government

⁸ Vavasseur v. Krupp, supra. In The Parlement Belge (1880, C. A.) 5 P. D. 197, the Court of Appeal held that when a foreign sovereign claims property as the public property of his state, that declaration cannot be inquired into. 9 (1822, U. S.) 7 Wheat. 283, 351.

¹⁰ See also The Estrella (1819, U. S.) 4 Wheat. 298, 308; The Steamship

Appam (1917) 243 U. S. 124, 154; 37 Sup. Ct. 337, 342.

11 So in Rose v. Himely (1808, U. S.) 4 Cranch. 241, the Supreme Court disregarded the judgment of a San Domingan court, because founded on a jurisdiction acquired by seizure of an American vessel in the open sea. A sale made under that judgment was held insufficient to divest the title of the American owner. Had the court had jurisdiction, the judgment of condemnation would have been regarded as conclusive on all the world. See paper of Mr. Justice Kennedy, To what extent should judicial action by courts of a foreign nation be recognized? in (1904) Official Report of the Universal Congress of Lawyers and Jurists, St. Louis, 1905, p. 186.

¹² Slater v. Mexican National R. R. Co. (1904) 194 U. S. 120, 126; 24 Sup. Ct. 581, 583. American Banana Co. v. United Fruit Co., supra. Phillips v. Eyre (1870, Ex. Ch.) L. R. 6 Q. B. I, 28; Carr v. Fracis Times & Co. (H. of L.) [1902] A. C. 176, 180.

They could, of course, have successfully made this defense. See Underhill v. Hernandez, supra.

ultimately created through their efforts, on the theory that the revolution represented *ab initio* a changing national will, crystallizing in the final successful result.¹⁴

The Department of State, of course, may diplomatically contest the validity or legality of the acts of the Carranza commanders and assert the liability of Mexico for any acts deemed to have been unlawful according to Mexican or international law. With respect to the claim of plaintiff Oetjen, it will be recalled that he derived it, with his alleged title, by assignment from a Mexican citizen. His claim, therefore, would seem to be barred by the rule that the "right" of governmental interposition cannot be created by the assignment of a claim by a foreigner to a citizen and that the Department of State will not espouse a "nationalized" claim which came into American hands after it had accrued.15 This rule would not, of course, affect the claim of the American Metal Co., which appears to have had title to the property at the time it was requisitioned. The receipt of General Pereyra should be presented to the Mexican authorities in Mexico.16 On the merits, from the meager evidence disclosed by the opinions of the Supreme Court, it would seem that the contribution in the Oetjen case and the requisition in Ricaud v. The American Co. were properly levied according to the rules of international law.

E. M. B.

THE RELATION OF THE LAW OF THE DOMICIL TO THE CAPACITY OF A
MARRIED WOMAN TO MAKE A PERSONAL CONTRACT

Louisiana abides by the rule that a married woman's capacity1 to

Williams v. Bruffy (1878) 96 U. S. 176; Bolivar Railway Co. (Gt. Brit.) v. Venezuela, Feb. 17, 1903, Ralston's Venezuelan Arbitrations, 388, 394.

of Citizens Abroad, 661. The rule has frequently been enforced by international commissions. Borchard, op. cit. 662, note 2.

¹⁶ Under the treaty of 1831 with Mexico, this requisition might have been regarded by the United States as a forced loan, from which American citizens were deemed to be exempt. Mr. Fish, Secretary of State, to Mr. Foster, Aug. 15, 1873, 6 Moore, Digest of Int. Law, 916. The United States-Mexican commissions of 1839, 1849 (domestic) and 1868 (until Thornton became umpire), considered forced loans illegal, and made awards in favor of the claimants. Thornton held them to be legal, provided they were equally distributed amongst all the inhabitants, without discrimination. See Borchard, op. cit. 269-270. But this treaty was abrogated by notice from Mexico in 1881.

¹It is as well to attempt definition before proceeding. "Capacity" is used in this comment to mean the sum of personal qualifications to which the law attaches power to make a normal contract—one not void for illegality, etc. Or, to illustrate without defining, when a given person cannot make a contract which an ordinary person could, capacity is involved. Married women at common law present the striking example. And such partial survivals of their old disabilities as the law may have left, though perhaps not strictly within the above

enter into a personal contract is fixed by the law of her domicil,² and this idea of a personal law, whether of domicil or of nationality, which tails after the person whithersoever he or she may wander, prevails throughout the Continent of Europe.³ Not so in the United States. Here the almost universal rule is that such capacity in a married woman is determined as to each individual contract by the law of the place of making.⁴ The reasons for following the American rule in America are clear and cogent. With a multitude of divergent local laws on capacity in states between which intercourse is ever increasing; with no mark of garb or tongue to signal to outsiders the state of any person's domicil; with ready, accurate advice on the law of a foreign jurisdiction almost impossible to obtain—decidedly commercial expediency calls for the application of the law of the place of contracting.⁵ And apparently that law governs, as it should, the capacity of infants as well.⁶

definition—to become surety for one's husband's debt, for instance—are treated by the courts and will be treated here as relating to capacity.

"Personal contract" is used to exclude contracts so relating to real estate that the law of the *situs* enters into consideration. Nor are marriage contracts here discussed, as the questions of policy involved in them differ materially from those playing upon commercial contracts.

² Garnier v. Poydras (1839) 13 La. 177; and see Baer Bros. v. Terry (1902) 108 La. 597, 32 So. 353.

*Story, Conflict of Laws, sec. 51 ff. And see Prof. E. G. Lorenzen, Conflict of Laws as to Bills and Notes (1917) 1 MINN. L. Rev. 10, 15-18, and notes, where the question of capacity is treated at length. Prof. Lorenzen shows, however, that each of the countries discussed by him applies the lex loci contractus to contracts made on its own soil. Such an inconsistent exception, to protect the local citizen, is an interesting and rather amusing parallel to the action of our own courts in dodging the application of the lex loci when domicil and forum are one. See infra.

'The rule is stated in greater detail in (1910) 26 L. R. A. (N. S.) 764, where a valuable discussion of the problem will be found, and where, as in *ibid*. 774 and (1902) 57 L. R. A. 513, the authorities are accurately outlined. It is important to keep clearly separate the nature and extent of the obligation (assuming an obligation to exist), which are governed by the "law of the contract;" and the *prior* question of capacity in the parties, on which depends the creation of any obligation at all.

This reasoning applies to the original, typical, and common case where the parties contract in each other's presence; it is of little force where the contract is made by correspondence. In the latter case, however, it does not seem that any reason can be assigned for choosing one law rather than another, which outweighs the value of uniformity of rule on transactions of one kind. Indeed the occasional difficulty in determining what a person's domicil is, speaks in favor of the place of making. Nor does there appear good reason in policy why a woman should be unable to do by letter or by agent what she can do by taking her person where she sends the letter. And so the cases. Milliken v. Pratt (1878) 125 Mass. 374 (letter); Bell v. Packard (1879) 69 Me. 105 (letter); Chemical Natl. Bk. v. Kellogg (1905) 183 N. Y. 92, 75 N. E. 1103 (agent). For further discussion see n. 11.

^o Story, op. cit. sec. 103; Phoenix Mut. Life Ins. Co. v. Simons (1893, K. C. App.) 52 Mo. App. 357, 362. Thompson v. Ketcham (1811, N. Y. Sup. Ct.) 8

But there are cases which seem to hold capacity to be determined, as is the extent of the obligation, by the "law of the contract." These same cases fix as the "law of the contract" that law with a view to which the parties made their agreement. Thus the contractors' intention would be permitted to determine what system of law fixed their capacity to contract. This result has been criticised, and, we think, with reason. For the concepts of contractual capacity on the one hand, and of the realization of individual intention on the other, can hardly stand together. It requires existing contractual capacity to give effect to the parties' intention; that capacity must, by some system of law, be conferred in advance of the contracting; whence, then, are the parties to derive the power which this rule gives them to choose for

Johns 190, is often relied on to this effect. There the law of the domicil was not considered; an infant's capacity to contract was held by Chancellor Kent to be governed by the law of the place of making, but apparently because the parties intended no other law to govern their contract. The law has not in general followed the Chancellor in this way of reasoning; there are indications, though none too free from doubt, that he himself later adopted Story's sounder view. See 2 Kent, Commentaries, *233 n., *458, *459 n.

⁷Robinson v. Queen (1889) 87 Tenn. 445, 448, 11 S. W. 38; Mayer v. Roche (1909, Ct. Er.) 77 N. J. L. 681, 682, 75 Atl. 235; International Harvester Co. v. McAdam (1910) 142 Wis. 114, 119, 124 N. W. 1042; so also apparently Thompson v. Ketcham, supra.

⁸ Except Robinson v. Queen, which declares the law of the place of performance to govern validity, obligation and capacity. The court there relies in some strange fashion on Story, sec. 241, citing but taking no heed of its essential complement, sec. 103, where capacity is said to be governed "by the law of the place where the contract is made or the act done." First Natl. Bk. of Geneva v. Shaw (1902) 109 Tenn. 237, 70 S. W. 807, without mention of the earlier case, repeats much of its language, but quotes further and more carefully from Story, and apparently shifts to the generally accepted view. In each case, as in the International Harvester Case, and Thompson v. Ketcham, supra, place of making and place of performance were one, and a determination of which governed capacity not therefore necessary to the decision. Basilea v. Spagnuolo (1910, Sup. Ct.) 80 N. J. L. 88, 77 Atl. 531, leaves it somewhat doubtful whether the presumption of intention rule of Mayer v. Roche, supra, still governs capacity to contract in New Jersey, or whether it is the law of the place of making.

In Baum v. Birchall (1892) 150 Pa. St. 164, 24 Atl. 620, the capacity of a married woman was said to be governed by the law of the place of performance. The use of authority was hopelessly loose. Moreover, the place of performance coincided with that of making, and the contract had to do with realty there situate. Dulin v. McCaw (1894) 39 W. Va. 721, 20 S. E. 681, suggests an alternative rule, taken from Wharton, Conflict of Laws, secs. 102, 104: that law should govern by which capacity would be enlarged.

^o The choice must probably be limited to those systems of law which have some reasonable connection with the transaction: the place of making, of performance, of the parties' domicil or citizenship, the situs of the property involved, or, it may be, of the flag. Cf. the cases summarized by Prof. J. H. Beale, Jr. (1909) 23 Harv. L. Rev. 102-103.

^{10 (1910) 26} L. R. A. (N. S.) 764 ff.

themselves a law which shall at once invest them with capacity and their contract with validity?¹¹

But whatever the law which governs capacity in a given case,—whether the law of the place of making as such, or the "law of the contract" above discussed,—if that governing law declares a woman capable, her contract's validity so far as concerns capacity will be everywhere upheld, save only where forum and domicil coincide; and so, where that law declares her incapable, will the validity of that contract be everywhere denied, without exception.¹²

The exception to the first, the active half, of this rule, is but one phase of the great common exception of conflict of laws: no forum will lend its aid to enforce a right, contractual or otherwise, whose enforcement runs counter to what that forum believes vital to its own policy and interest. Against such considerations, say the courts, "comity" cannot prevail.¹³ It will be observed that the language is

seems to weaken the above argument. There a married woman's capacity to become surety on a note was held determined by the place where her contract was made; her contract in turn was said to be made where the instrument was negotiated in accordance with her intent. It not being shown that she intended the negotiation in a jurisdiction where married women had capacity, the note was held unenforceable against her. The weakness of the decision lay in measuring the extent of the agent's power to bind not by the authority which he apparently had, but by that which the court held to have been given him in fact. In Chemical Natl. Bk. v. Kellogg, supra, n. 5, Vann, J., following much in the path of his own dissent in the earlier case, reached the opposite result on facts not distinguishable, and brought the law on the point into harmony with the ordinary rules of agency. But cf. Basilea v. Spagnuolo, supra, n. 8.

But that a woman should be able at her own choice to project herself into capacity abroad: to do by agent (or by letter) a thing which the jurisdiction within whose bounds she remains denies her capacity to do, is believed to be a real inconsistency, one inherent in any attempt to apply a territorial theory of law to transactions extending beyond the borders of a single state. Cf. Freeman's Appeal (1897) 68 Conn. 533, 37 Atl. 420, where territorialism is applied in logical perfection, and resultant absurdity. Criticism of the case has been free. See First Natl. Bk. of Chicago v. Mitchell (1899, C. C. A. 2nd) 92 Fed. 565. Yet it is submitted that the fault lies not with a court which applied with rare intellectual honesty a theory to which all our courts do homage, but in the theory itself. This is one of the many points on which the nationalist theory, as presented, for example, by Kahn (1898) 39 Iherings Jahrbuecher, 1; (1899) 40 ibid. 1, furnishes a more satisfactory explanation.

¹² See authorities cited below. This rule, and all the generalizations in this comment, are believed applicable equally to contracts void and to contracts voidable for reasons of capacity. Cf. note 6, as to infants' contracts; and the cases in states where married women's contracts are voidable only: Armstrong v. Best (1893) 112 N. C. 59, 17 S. E. 14; Wood v. Wheeler (1892) 111 N. C. 231, 16 S. E. 418; First Natl. Bk. of Geneva v. Shaw, supra, n. 8.

¹³ In the case of foreign judgments, on the other hand, "comity" does decidedly prevail, and this whether or no the judgment be an American one which the full faith and credit clause forces the court to respect. There seems to be no pressing reason why the law of a foreign state should meet less respect when

elastic. Under the strain toward certainty in the conflict of laws, "comity" has slowly, steadily shifted from a matter of each forum's whim of the moment toward a growing body of rules which take ever more definite shape. Of this there is an occasional indication in the phrasing of opinions. Enforcement of foreign-acquired rights "from comity, not of strict right," will sometimes be replaced by their enforcement "as matter of right, by . . . universal comity." There is indeed still tough enough pulling ahead in the state-individualistic stump-field. Yet in our capacity cases we may expect the policy and interest of the forum to take on considerable proportions before they will bar enforcement.

The mere fact that the contract would have been invalid for want of capacity if made under the forum's local rule will of course not be enough; 16 else no rights not acquired in accordance with local law could ever hope for recognition. Nor will the additional fact suffice, that the defendant has since making the contract and before suit become a resident of the forum, and thus come within its protection; nor the fact that enforcement is sought out of property lying within the state. 17

it fixes a primary right by general provision, than when it fixes a secondary right by determination of an individual case; although the argument for acknowledging the latter is made somewhat stronger by our policy of avoiding double litigation. This whole question—the present meaning and the inadequacy of "comity" as the basis for recognition of foreign law—is cogently treated by Judge John K. Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE LAW JOURNAL, 656.

¹⁴ Holmes v. Reynolds (1883) 55 Vt. 39, 41.

¹⁶ International Harvester Co. v. McAdam, supra, n. 7, at p. 125.

¹⁶ Robinson v. Queen, supra, n. 7; Wood v. Wheeler, supra, n. 12; Merrielles v. State Bk. of Keokuk (1893) 5 Tex. Civ. App. 483, 24 S. W. 564. In practically all such cases the domicil, place of making, and place of performance have coincided; the decisions serve therefore in this connection only to point a limit beyond which the forum will not insist on its local policy. Hayden v. Stone (1880) 13 R. I. 106, which seems contra to the proposition in the text, was explained away in Brown v. Browning (1886) 15 R. I. 422, 424, 7 Atl. 403, as referring solely to the remedy. See note 17.

[&]quot;Meier v. Bruce" (1917, Ida.) 168 Pac. 5. And so Louisiana, too, treats rights validly acquired by what she considers the governing law. Baer Bros. v. Terry, supra, n. 2. But it must be noted that courts have denied relief on a wholly different ground: that their law gave no remedy that was fitting. See for example Ruhe v. Buck (1894) 124 Mo. 178, 27 S. W. 412, where the question and the authorities are ably treated on both sides; the case there turned on whether a married woman of Dakota, where the obligation was contracted and payable, and where her status was as that of a feme sole for purposes of contract and suit, should in an attachment proceeding before the Missouri court be treated as sole or coverte; if the former, the attachment would have been valid; see also Brown v. Browning, supra, n. 16, and see Bank of Louisiana v. Williams (1872) 46 Miss. 618, 629. Contra, Gibson v. Sublett (1885) 82 Ky. 596. The problem is delicate and perplexing; though sometimes inseparably interwoven with that of the forum's policy, it cannot here be discussed. See (1902) 57 L. R. A. 520.

It is only when the defendant was domiciled in the forum, at the time of making the contract,18 and the local law gives her no capacity to make such a contract, that the forum is likely to feel that the protection of one of its own citizens is involved; in such circumstances it may well be ready to find in the local restriction of capacity a limit beyond which it will refuse the enforcement sought; and with some reason, for concededly such restriction is intended largely to protect the persons affected. In these cases the forum is the domicil; the local law applied is the law of the domicil; the cases may therefore seem offhand to lend color to a confusing10 theory that the law of the domicil as such governs a married woman's capacity to make a personal contract. Such is hardly the true bearing of the decisions.20 Refusal of enforcement is solely in the forum's character as forum, protecting its own citizens at home by its laws intended for their protection; and not at all in its character as domicil, as competent to fix everywhere a woman's capacity to enter, in another state, into a contract valid generally.

This is shown in many ways. To begin with, the very cases which refuse enforcement often grant expressly that the contract is good elsewhere, naming in particular, as a rule, the place of making.²¹ When suit is brought in a third jurisdiction, either there is not even inquiry made as to the domicil's law on capacity,²² or it is held not to govern.²³ And if it did in truth govern, a contract would necessarily be good—when capacity was the only issue—whenever the party in question was capable by the law of her domicil, although incapable by the law of the place of contracting.²⁴ Even in the courts of the domicil the opposite

¹⁸ And, it may be suggested, is still so domiciled at the time of suit; else the duty of protection might well be held to have ceased.

¹⁹ Such a theory need not be articulate in order to confuse. Cf. the undue stressing of the law of domicil in the principal case, discussed below.

²⁰ Cases in this field involve so many elements in such varied combination: domicil, place of making, of performance, forum, intention of parties, etc.—that they must be read with care and cited with caution. It is rather startling, for instance, to find Armstrong v. Best, supra, n. 12, though one of the clearer opinions, cited in its own headnote as holding that "as to capacity of the contracting party the law of the domicil prevails;" and cited in the International Harvester Case, supra, n. 7, at p. 124, as going "upon the obviously erroneous theory that the law of the forum, as to capacity of the parties to contract, governs"—when in fact it advances neither proposition, but accepts the law of the place of making, subject to the exception explained in the text.

²¹ Armstrong v. Best, supra, n. 12, at p. 62; First Natl. Bk. of Geneva v. Shaw, supra, n. 8, at p. 241; cf. even Freeman's Appeal, supra, n. 11, at p. 541.

² Union Natl. Bk. of Chicago v. Chapman, supra, n. 11.

²² Connecticut Mut. Life Ins. Co. v. Westervelt (1879) 52 Conn. 586 (forum at the place of performance).

²⁴ And so the Louisiana rule. Cf. Garnier v. Poydras, supra, n. 2, which does not even discuss whether the transaction would have been valid under the local law of Louisiana; and see Roberts v. Wilkinson (1850) 5 La. Ann. 369, 373.

is held.²⁵ Thus it is evident that the domiciliary law of a married woman's capacity to make a personal contract has in the conflict of laws in the United States practically no meaning; that it is applied only in the courts of the domicil itself; and applied there never to create or enforce rights not recognized essewhere, but only to give a protection purely local against the enforcement of rights good abroad, rights created despite the law of the domicil.

Even in this form the rule must undergo further narrowing. It has been shown that the domicil's application of its own law on the point is based on policy. What if its policy has changed between the making of the contract and the bringing of the suit? In the leading case in this whole subject, Milliken v. Pratt,26 the Massachusetts court under those circumstances applied the normal conflict of laws rule: the law of the place of making. It may be that this case goes "to the verge of the law;"27 yet there seems to be every reason to follow it thither, as has been done.28 How far each state will go, it must of course settle for itself.29 It is certain that New Jersey has gone far beyond Milliken v. Pratt. Her position has been that only the sweeping married women's disability of the common law was a rule of policy; once they are admitted to contract at all, subject only to legislative direction as to what contracts they shall or shall not have power to make, the rule of policy has been abrogated in favor of a rule of discretion; and the fact that a sister state differs from New Jersey in the exercise of that discretion, is no reason to refuse enforcement, even against a New Jersey citizen, of a contract validly made under the capacity laws of that sister state.30 A similar leaning has been shown in the federal courts. Sitting in Indiana, the court in Bowles v. Field31—approved in First National Bank v. Mitchell32—enforced a contract valid where made, but void for want of capacity by the law of Indiana, where the defendant had all along been domiciled.

²³ Nichols and Shepard Co. v. Marshall (1899) 108 Ia. 518, 79 N. W. 282; the forum as forum merely enforces or refuses to enforce; it never creates.

²⁶ (1878) 125 Mass. 374.

²⁷ Holmes, J., in *Union Trust Co. of Chicago v. Grosman*, discussed below. Cf. the language in *Armstrong v. Best, supra*, at p. 62.

²⁸ Phoenix Mut. Life Ins. Co. v. Simons, supra, n. 6. Holmes v. Reynolds, supra, n. 14, adopts the whole reasoning of the Massachusetts court; but there the woman appears not to have been domiciled in the forum. Contra, Freeman's Appeal, supra, n. 11.

²⁰ And for this reason it is probably true, as stated in (1910) 26 L. R. A. (N. S.) 775, that "decisions of the courts of other jurisdictions on this point have rather less than the ordinary value of foreign decisions as precedents."

No So the reasoning in *Thompson v. Taylor* (1901, Ct. Er.) 66 N. J. L. 253, 49 Atl. 544. This is still law in New Jersey, with the usual reservation of an attempt to perpetrate a fraud on the law of the state. *Mayer v. Roche, supra*, n. 7.

^{si} (1897, C. C. D. Ind.) 78 Fed. 742; and on rehearing (1897) 83 Fed. 886, from which opinion, at p. 887, the language in the text is taken.

the conflict in public policy between the two states be irreconcilable, the court felt it ought to be governed by "the more liberal policy indicated by the act of Congress abolishing common law disabilities of married women in the District of Columbia."

But these federal cases must, as regards policy, be considered no longer precedents in view of the decision of the United States Supreme Court in Union Trust Co. v. Grosman (1917) 38 Sup. Ct. 147. A woman domiciled, as the plaintiff apparently knew, in Texas, signed a guaranty of her husband's note, while she was temporarily in Chicago. The plaintiff brought its suit in a federal court in Texas, and appealed from an adverse decision of the Circuit Court of Appeals.³³ Under the Illinois local law such a guaranty by a married woman was assumed to be valid: under the Texas local law it was held to be void. Supreme Court held the guaranty unenforceable against the woman or her separate property, in a court administering Texas law. It was admitted that the question presented would be a different one if suit had been brought in Illinois or in a third jurisdiction,—there is, indeed, no reason to doubt that a decision enforcing the contract in any state or federal court outside the domicil would be upheld. further expressly distinguished cases allowing enforcement—although the contract would not have been good under the local law-where the defendant was not a citizen of the forum whom its laws were intended to protect;34 and distinguished Milliken v. Pratt35 on the ground that there, although the defendant was a local citizen, the forum's policy had changed before the bringing of the suit. There is therefore nothing in the reasoning, nor is there anything in the language of the court in contradiction with the analysis urged above. The case falls within the exception: that the domestic policy of the forum may forbid enforcement of a foreign acquired right.36

³² Supra, n. II; this case was reversed (1901) 180 U. S. 471, 21 Sup. Ct. 418, without discussion of the validity of its reasoning, on the ground that Freeman's Appeal, supra, note II, had adjudicated the subject matter of the suit.

^{33 (1916,} C. C. A. 5th) 228 Fed. 610.

[&]quot;It is one thing for a court to decline to be an instrument for depriving citizens belonging to the jurisdiction of their property in ways not intended by the law that governs them, another to deny its offices to enforce obligations good by the lex domicilii and the lex loci contractus against women that the local laws have no duty to protect." (First italics ours.) It will be observed that the court here—as elsewhere in the opinion—avoids passing on the problem presented to the third, disinterested jurisdiction when the law of the place of making conflicts, as to a party's capacity, with the law of the domicil. Here as elsewhere the opinion squints toward preferring the latter, but apparently without consideration of the cases on the point; for which see nn. 22, 23.

²⁵ Supra, n. 26. And it may be noted that Chief Justice Gray in that case, at p. 383, himself provided for such a distinction. Cf. Ruhe v. Buck, supra, n. 17, at p. 188.

²⁰ And this cause is now res judicata in any other forum. "The precise matter in issue—the liability of Mrs." in this case, Grosman, "notwithstanding

But it is undeniable that the tone of the decision is colored by distinct stress on the law of the domicil as such; a stress believed to be not in consonance with the language and decisions of the American cases on the subject. These latter are meagerly noted in the opinion, very meagerly.³⁷ The only federal case clearly in point, for instance, Bowles v. Field,³⁸ is overlooked. This is the more regrettable as the policy there announced must be regarded as reversed by the principal case: federal courts sitting in the domicil may no longer, in deciding whether policy forbids enforcement within a state of contracts made while abroad by married women domiciled in the state, look for guidance to "the liberal policy indicated by Congress;" they must accept as the governing policy the local law of the state in which they sit. If this means a wider application of the "policy of the forum" exception, it is to that extent unfortunate for the sorely needed development of the conflict of laws.

To sum up: on its exact facts the decision in the principal case is clearly sustainable. But extension of the influence of the law of the domicil as such, suggested in the opinion, seems improbable, and is not to be desired. For the rule that, subject to the one exception noted, the law of the place of contracting governs a married woman's capacity to make a personal contract is too firmly established in America, and for too good reason.

#### MUNICIPAL FUEL YARDS

It is hardly open to question, even by the staunchest of conservatives, that socialistic legislation increases apace; in fact the conservatives may be the first to concede that advance in order to sound a note of alarm against its threatened inroads. Such legislation, either anti-capitalistic or paternalistic, is moreover, receiving to-day more moderate treatment than during our earlier history at the hands of our highest tribunal. That mace of conservatism, the Fourteenth Amendment, is less often swung than heretofore to strike down the work of state legislatures as denying due process of law to the people, and this tendency is recently illustrated in the case of *Jones v. City of Portland* (1918) 38 Sup. Ct. 112. The decision therein is especially timely in these days of coal shortage and the consequent drastic federal action we have just experienced, for it answers the question as to whether a municipality may be constitutionally empowered to operate a fuel yard.

her coverture at the time the guaranty was signed"—has been "adjudicated against the bank in the courts of" Texas. Mitchell v. First Natl. Bk. of Chicago (1901) 180 U. S. 471, and 483, 21 Sup. Ct. 418, and 422. The plaintiff's mistake lay in its choice of forum.

²⁷ Of cases in this field there are cited six; and of these, one from Louisiana.
²⁸ Supra. n. 31.

If the operation of such a plant by the city for the benefit of its citizens is a public purpose, a tax may properly be levied to establish and conduct the industry exactly as it may be to pave, sprinkle and light the streets or to operate a waterworks. If the purpose is not public, as for example, to run a municipal cigar stand or, referring to an actual case, a plumbing supply store, at ax upon the aggrieved public for the purpose is a taking of property without due process of law. In the Portland case the Supreme Court of the United States sustained the Supreme Court of Maine which had twice upheld unanimously the act in controversy here. A city may sell fuel to its people.

It is worth noting that this was no emergency measure to meet wartime conditions. The state statute was passed in 1903, the city ordinance in 1913, the Maine Supreme Court first upheld its validity in April, 1914, and the decision of that court in the principal case was rendered in February, 1915.

With the economic wisdom or unwisdom of government ownership this comment has primarily nothing to do. 10 Nevertheless it is not to be overlooked that the outcome of particular cases, especially border line cases, will be greatly influenced by just this consideration. Indeed, who shall say that the unanimous decision of our Federal Supreme Court in the principal case may not have been encouraged by a temperature of something less than the governmentally requested 68

¹ Delphi v. Evans (1871) 36 Ind. 90, 96, 10 Am. Rep. 12, 17; Williamsport v. Commonwealth (1877) 84 Pa. St. 487, 493, 24 Am. Rep. 208, 212.

² Maydwell v. Louisville (1903) 116 Ky. 885, 888, 76 S. W. 1091, 1092.

³ Crawfordsville v. Braden (1891) 130 Ind. 149, 28 N. E. 849.

^{&#}x27;I Cooley, Taxation (3rd ed.) 217.

⁵ Keen v. Waycross (1897) 101 Ga. 588, 591, 29 S. E. 42, 43.

⁶ Citizens Saving & Loan Assn. v. Topeka (1874, U. S.) 20 Wall. 655.

⁷Laughlin v. Portland (1914) 111 Me. 486, 90 Atl. 318; Jones v. Portland (1915) 113 Me. 123, 93 Atl. 41.

⁸ Maine Rev. St. (1903) ch. 4, sec. 87.

^oAs indicating the unexpected turn which these decisions have given the law, it may be observed that such recent works as those following laid it down without criticism or doubt that a city could not enter the fuel business: 3 Dillon, Mun. Corp. (5th ed.) sec. 1292; 4 McQuillin, Mun. Corp. sec. 1809; Gray, Limitation of Taxing Power, sec. 246. The authors based these positive statements of the law on two mere advisory opinions of the Massachusetts Supreme Court and on one case in Michigan not squarely deciding the point. Opinion of the Justices (1892) 155 Mass. 598, 30 N. E. 1142 and (1903) 182 Mass. 605, 66 N. E. 25; Baker v. Grand Rapids (1906) 142 Mich. 687, 106 N. W. 208.

¹⁰ A considerable literature is ranged vigorously on both sides of the question. See, Douglas Knoop, Principles and Methods of Municipal Trading, London, 1912; Lord Avebury, On Municipal and National Trading, London, 1907; Robert P. Porter, Dangers of Municipal Trading, London, 1907; Bernard Shaw, The Common Sense of Municipal Trading, London, 1908; Municipal Industries of Glasgow (1895) 9 Quar. Jour. Econ. 188; Municipal Ownership in Great Britain (1906) 14 Jour. Pol. Econ. 257; Municipal Socialism in Scotland (1889) 1 Jurid. Rev. 33.

degrees in the justices' own apartments, or a rapidly dwindling bin of coal in the regions below? Perhaps the legislation in question would not have been upheld if it had been contested a few years ago when economic conditions in the coal industry were not brought so forcibly to public attention. Certainly it would not have been upheld very many years ago.

But in the legal aspect some effort will be directed toward finding the where and why of the rather irregular fenceline between the fields of public and private enterprise,—irregular because courts have set single fence posts according to different surveys of this whole section of the law. Despite the irregularity, however, the cases are susceptible of a rather rough classification which will be undertaken herein.

In proceeding to enquire what kinds of enterprise a state or municipality may enter, no more than passing mention need be made of a first type, the purely governmental functions, and the provision of facilities for their exercise. It is perfectly clear that governments must perform the former and provide the latter, and equally clear that taxes may be levied for these purposes.

A second type of governmental enterprise may be called the police regulation type, and is illustrated by the liquor dispensary cases. ¹¹ Under the police power as a protection to the public, liquor selling may be stringently regulated. The sale of liquor by the state is an alternative to intensive regulation, and a means to the same end. The state's object in selling liquor is not to quench thirst at reasonable rates, but, in the interest of health and morals, to control and check public consumption. Perhaps for our purpose, municipal milk stations should be classed with liquor dispensaries. If so, it is because public health is likewise the primary objective there. The governmental action is aimed at providing pure milk to people who otherwise would get an unsanitary product from dealers who sold cheap. ¹² Reasonableness of price is incidental. The principal case hardly falls in this class.

A third type of governmental enterprise may be called the free supply type. There are some things regarded as necessary or valuable to society which either would not be supplied at all by private business

¹¹ See Freund, *Police Power*, sec. 218, where the statutes of South Carolina and three other states are discussed.

¹² On police regulation of milk distribution see (1916) 26 YALE LAW JOURNAL, 67. The element of purity is frequently brought into cases of municipal water supply. See *Lumbard v. Stearns* (1849 Mass.) 4 Cush. 60, 62; *Smith v. Nashville* (1890) 88 Tenn. 464, 469, 12 S. W. 924, 925. It was also introduced by block and tackle methods to support a Georgia town in selling ice. *Holton v. Camilla* (1910) 134 Ga. 560, 567, 68 S. E. 472, 476. *Cf. State v. Thompson* (1912) 149 Wis. 488, 521, 137 N. W. 20, 33 and *Union Ice & Coal Co. v. Ruston* (1914) 135 La. 898, 918, 66 So. 262, 269. The element of safety, also falling under this head of police power, was used in a decision upholding a city's right to supply individuals with electric illumination,—easily supportable on

firms, or would be so indifferently supplied,¹⁸ or would necessarily cost so much, that a substantial part of the population would be inadequately served or would go without altogether, if the government did not go into the business and offer a free supply. Examples are plentiful. Free public schools, hospitals, libraries, art galleries, parks and playgrounds have long been accepted as proper governmental activities.¹⁴ Service entirely without charge, though common in this class of activities, is obviously not essential. On exactly the same principles, service might be and sometimes is furnished, not free, but at cost or less than cost.

The net result in most instances is to charge on the public generally the cost or part of the cost of serving each individual. The emphasis in this class is, therefore, not on the immediate benefit to the individual served, but on the interest of the community at large in having such service rendered to each individual. Hence in some instances, such as the public schools and the fire department, service is not only furnished free but its acceptance is made compulsory. How far the principles governing this class of activities can be invoked to justify the fuel yard decision will be discussed below.

There remains a long list of public necessities, including food, fuel, clothing, water, light, transportation, mechanical power, etc., as to which the public necessity does not require that the enjoyment of service be compulsory, or that service be free at public expense, or even that it be provided at less than a reasonable commercial rate. It requires only that these necessities be available to all at reasonable prices.

Now under free competition in business, both prices and service to all comers are supposed by the judges to look after themselves for the most part. The reason why Smith, the grocer, will charge about the same price for brick butter or dried prunes as does his competitor up the street, is found in this very word competitor. When competition brings reasonable prices for necessities and service to all (and when public control is not necessary for adequate police regulation, as in our second class) the government has no need to regulate. And the government has even less interest in regulating or controlling the sale of luxuries. There is no great public good to come from requiring that poodle dogs and diamond tiaras be sold at reasonable rates to all comers.

But public interest is aroused when the business in question deals with the necessities of life, and when competitive conditions do not exist, so that there is no natural stimulus to serve all and keep prices

other grounds as discussed below. Crawfordsville v. Braden (1891) 130 Ind. 149, 159, 28 N. E. 849, 852.

¹² See Perry v. Keene (1876) 56 N. H. 514, 533 (highways).

¹⁴I Cooley, Taxation (3rd ed.) pp. 198 and 205; Attorney Genl. v. Burrell (1875) 31 Mich. 25, 31; Salisbury Land & Improvement Co. v. Commonwealth (1913) 215 Mass. 371, 374, 102 N. E. 619, 621.

within bounds. It is then that the business is said to be affected with a public interest. It becomes a "public calling." The proprietors are required by law, instead of as a natural outcome of competition, to serve all comers, and at rates which may be fixed by the government. History illustrates this. In our early law many of the most ordinary private occupations, as we now view them, were held to be affected in this way. The law of public callings included the surgeon, the blacksmith and the tailor and included them probably because of (1) the public necessity of their services and (2) the then scarcity of such persons in most communities. They are no longer included among our public callings because, although the comparative necessity continues that the public be thus served, there is no general scarcity now: there exists no virtual monopoly in those callings. 17

But though conditions have changed, the test remains the same for public regulation of rates, and service to all comers, despite the reliance in many difficult cases on other auxiliary arguments, which only serve to confuse the issue, and which have been conscripted to support faltering opinions.¹⁸

Allnutt v. Inglis (1810 K. B.)
 12 East 527; Munn v. Illinois (1876) 94 U.
 S. 113; Zanesville v. Z. Gas Lt. Co. (1889) 47 Oh. St. 1, 33, 23 N. E. 55, 60;
 State v. Edwards (1893) 86 Me. 102, 105, 29 Atl. 947; Cotting v. Kansas City
 Stk. Yds. Co. (1897 C. C. D. Kan.) 82 Fed. 850, 852.

¹⁶ Wyman, Public Service Corp., sec. 6-8.

¹⁷ Other callings, once classified as public, have remained in that class, through the law's conservatism, or on the principle of stare decisis, though if the question were new they might not now be so classified. See Laughlin v. Portland, supra, note 7, at p. 491, and cases there cited. The innkeeper is perhaps another example. See Freund, Police Power, sec. 388.

¹⁸ Sometimes considerable emphasis is placed upon "holding out" to do business with the public generally. This element may be important to the decision of a particular case but it should not be misunderstood. If holding out were a determining factor, the exquisite example of a public enterprise would be the cheap clothing store whose proprietor holds forth on the sidewalk urging all comers to buy at tremendous bargains. But once it has been settled that an industry is in the public class, holding out becomes important to determine whether the particular individual concerned is conducting the business on a public basis. Carriers are generally in public service but there are private carriers as well, who do not hold out to serve all and who, therefore, are not subject to public regulation. Another point is often raised in cases both of regulation and of governmental operation, namely, the necessity of legislative act. During the anthracite strike in Pennsylvania in 1902, agitation for governmental intervention was opposed by this argument, that there had been no legislation. (1902) 36 Am. L. Rev. 916, 917. In the case of cities, whose powers are confessedly limited, this may be a deciding factor. Spaulding v. Peabody (1891) 153 Mass. 129, 26 N. E. 421. But this should not be thought to determine whether a business is or is not public. The validity of a statute (to be decided by the courts) depends upon whether the enterprise which is the subject of the legislation is in fact a public enterprise. To say that the statute makes the subject public is to say that the legislation validates itself,-the old process of lifting by bootstraps. This lack of clearness,—the failure to cut sharply

Now another way of securing reasonable prices to the public, besides fixing the charges of private firms, is for the government to embark in the business itself; and this gives us a fourth class of governmental activities. Municipal light and water plants are common. And the City of Cleveland chose this means to provide its people with a threecent car fare. Hence it is that the question of what business a government may itself operate to secure reasonable rates and non-discriminating service is closely related to the question of what business it may regulate for the same purpose. These tests of public necessity and virtual monopoly have been generally applied to cases of governmental control and seem nearly always to be present and applicable as well to cases of governmental operation. As used in the cases, the phrase "public necessity" is self-explanatory; not so the phrase "virtual monopoly," upon whose application certain limitations have been more or less generally recognized.

The first limitation enters in connection with the element of time. That may be a monopoly to-day which was not yesterday, and the con-

between the questions of whether legislation is necessary before the court will act and whether the business is public so that legislation would be valid if enacted,-is to be observed in the following cases both of control and governmental operation. Keen v. Waycross (1897) 101 Ga. 588, 591, 29 S. E. 42, 43 (city entering the plumbing supply business); Mobile v. Yuille (1841) 3 Ala. 137, 142-143, 36 Am. Dec. 441, 446 (regulation of the price of bread); Delaware Lack. & Wn. R. R. v. Central Stk. Yds. & Trans. Co. (1889) 45 N. J. Eq. 50, 62, 17 Atl. 146, 151 (bill to require Hoboken stock yards to serve all comers, particularly complainant; no statute; dismissed). Note, however, the clearer discussion of this point in the dissenting opinion of Dixon, J. in the case last cited, on rehearing (1890) 46 N. J. Eq. 280, 19 Atl. 185. And see American Live Stk. Com. Co. v. Chicago Live Stk. Exch. (1892) 143 Ill. 210, 238, 239, 32 N. E. 274, 282 (membership in exchange not open to all comers), where the usual necessity for a statute was explained by remarking the practical difficulty of placing on the courts the first determination of whether a particular business is public. Cf. Spaulding v. Lowell (1839 Mass.) 23 Pick, 71. In one practical way legislation does make that public which was private before. There is a strong presumption that legislation is valid, rebuttable only by a very clear case. Perry v. Keene (1876) 56 N. H. 514, 534. Within this presumptive belt between what the judges themselves think about the matter and what they would concede to be a possible view of other reasonable men, the legislature does settle finally that an enterprise is public.

¹⁹ See Burlington v. Beasley (1876) 94 U. S. 310, 314; Opinion of the Justices (1892) 155 Mass. 598, 30 N. E. 1142; Wyman, Pub. Service Corp. sec. 218, note 1.

²⁰ State v. Thompson, supra, note 12, at p. 521; Crawfordsville v. Braden, supra, note 3; State v. Toledo (1891) 48 Oh. St. 112, 26 N. E. 1061. The virtual identity of the two questions—what business a government may regulate and what it may operate—when the only public object to be secured by government operation is service to all at reasonable commercial rates, is, however, often obscured by confusing these cases with those involving other distinct classes of governmental activities, such as those discussed above, which are justified on quite different grounds.

verse is equally true.21 Where there is something of permanence about the monopolistic condition, the case is clear enough, but it is not so clear where a mere temporary emergency exists, say, a monopoly because of a one season crop failure, a transportation congestion, or a strike at the source of supply. The Opinion of the Justices²² which has been noticed as opposing municipal dealing in fuel, even under legislative authority, expressly differentiated between ordinary and emergency conditions. It conditionally seemed to approve municipal action in the latter case. On the other hand, though the Portland case, by authorizing the sale of fuel in season and out of season, might seem to go much further, it has been thought by a writer in one periodical not to authorize mere emergency sales.23 There is no question but that conditions for the public become urgently serious in brief emergencies. Governmental interference, however, may be almost as serious as the emergency; and when emergency is the reason for governmental interference, it should likewise be the reason judicially assigned for sustaining municipal action. No effort should be made to crowd the business into the field of those affected with a public interest by decisions which in terms would justify permanent control, where only temporary relief is needed. Emergency action, limited by the extent of the emergency, may perhaps constitute a fifth class of permitted governmental activities.24 But as a test of public callings, with all the broad legal consequences that follow from that classifica-

¹¹ The conditions which justified the decisions in the grain elevator cases were said to have been developing over a period of 20 years. Munn v. Illinois, supra, note 15, at pages 131-132. It has been suggested that conditions are pursuing a contrary tendency in cases under the mill acts. Laughlin v. Portland (1914) 111 Me. 486, 491-492, 90 Atl. 318, 320. The importance of this observation lies in the fact that there is no need for precedent to establish a public use. Munn v. Illinois, supra (regulation); Sun Printing & Publ. Assn. v. New York (1896) 8 N. Y. App. Div. 230, 40 N. Y. Supp. 607 (municipal ownership). And conversely (though to a lesser degree because of the doctrine of stare decisis) the fact that there is precedent, particularly old precedent, should not settle that a business is public now. Compare the cases of the surgeon, the tailor and the blacksmith referred to above.

²² (1903) 182 Mass. 605, 610, 66 N. E. 25, 26.

²³ (1918) 86 CENT. L. JOUR. 21, 22.

²⁴ Obviously no attempted classification in a growing subject can claim to be complete and final. No such claim is made for the classification in the text. It may be worth while noting, however, that there are municipal or state activities which are purely incidental and which, if undertaken independently, might not be justified. They may be incidental in one of two ways. First, they may be an appropriate aid to accomplishing a proper governmental undertaking, as for example, the operation of a quarry in connection with the paving of streets. See, Schneider v. Menasha (1903) 118 Wis. 298, 95 N. W. 94. Second, they may utilize a by-product of a governmental industry. Cf. Holton v. Camilla, supra, note 12, with the language of Lumpkin, P. J. in Keen v. Waycross, supra, note 5. A city might sell coke from a municipal gas works.

tion, we conclude that "virtual monopoly" in the legal usage must be something more than an obviously temporary monopoly.

Another and most important qualification is that monopoly must be an inherent tendency of the business. There may chance to be but one clothing store in a town; clothing is a comparative necessity, at least in most latitudes where the due process clause of the American Constitution can be invoked; but the clothing business is not because of this circumstance made subject to price regulation nor to the serve-all-comers rule,—that is, it is not made a public calling,—for there is nothing about the clothing business itself to make free competition difficult.²⁵ Potential competition may be almost as effective a check as actual competition.

This requirement of an inherent tendency in the business,—often expressed by saying that it must be a "natural monopoly,"—has an important application to another kind of monopoly which is familiar to-day and popularly hated, that of combination. In a field wherein competition is readily possible (at least in theory) and wherein the monopoly is solely the result of the action of one or more powerful corporations in buying out competitors, or controlling the market by the use of unfair methods or any of the various modern devices for stifling competition,—in other words where it is a purely artificial monopoly,—the industry does not thereby become clothed with a public interest.²⁶ The remedy is to be sought by breaking up the monopoly.²⁷

conversely, a hundred hotels in a great commercial center do not take the innkeeper out of his legal classification, nor does a choice of several railroad lines between some cities make railroad transportation a private calling. An inherent tendency to monopoly in a business usually results in a generality of that monopoly. But how far generality may be regarded as a test of virtual monopoly is not apparent. The rule of the grain elevator cases, first applied in Munn v. Illinois, supra, note 15, and Budd v. New York (1892) 143 U. S. 517, 12 Sup. Ct. 468, to the strategically important grain ports, was later extended on the authority of those cases to small towns in North Dakota. Brass v. No. Dakota (1894) 153 U. S. 391, 14 Sup. Ct. 857, affirming State v. Brass (1892) 2 N. D. 482, 52 N. W. 408. But, in the state court decision, the Chief Justice, while yielding to the majority, observed that perhaps the rule applicable to the large centers should not be applied to cases wherein the facts were so different. His view is persuasive. Classification within a particular industry seems reasonable.

²⁶ This limitation has been so generally accepted and observed that express decisions on the point are few. See, however, Ladd v. Southern Cotton Press & Mfg. Co. (1880) 53 Tex. 172, 189; American Live Stk. Com. Co. v. Live Stk. Exch., supra, note 18, at p. 236-237. It is implied in the many references in the authorities to "natural" and "legal" monopoly.

⁷⁷ It does not follow that in certain lines of business where an existing tendency to monopoly is now popularly attributed to artificial combination, we may not yet recognize that the tendency is, in fact, inherent in the economic and geographical conditions affecting the business and, abandoning the effort to

Monopoly must then, we conclude, where it is to serve as a test, be (I) reasonably permanent, (2) inherently characteristic of the business, and (3) not merely the result of artificial methods of combination or of stifling competition. Such a monopoly, plus a public necessity, must, it would seem, be present to permit either governmental fixation of prices or governmental serve-all-comers regulation, or governmental operation solely as a means to these ends.

What then of the principal case, wherein the city of Portland was authorized to sell fuel to its inhabitants? In which of our four classes must we find room for this latest addition to the list of lawful municipal We have seen that it clearly is not within either of the first two classes. Is it then to be placed in class three or class four? The chief distinction between the two is that, in the former class, the public interest in the general enjoyment of some service or commodity of public necessity or advantage is thought to require that it be furnished not merely at a reasonable commercial rate, but on still more favorable terms,-either without charge or on better than a business basis; while in the latter class all that is deemed necessary to the public interest is a reasonable commercial rate. In class three, therefore, there need be no monopolistic element. The freest commercial competition will not, at least for any length of time, maintain prices at a level that does not allow a business profit. In class four, on the contrary, it is at least the present theory of our law that free competition will result in reasonable commercial rates; if these are all the situation demands, the monopoly element must be present to require or justify governmental action.

The opinion of the Supreme Court is not illuminating. It emphasizes the great weight to be given in such cases to the opinions of the state courts, quotes at some length from the first Maine decision in which the ordinance in question was upheld,²⁸ and concludes by comparing the furnishing of heat with the furnishing of light and water, and the furnishing of coal for heating with the furnishing of natural gas for the same purpose.²⁹ By the analogies relied on, it seems therefore to treat the case as one of "public calling," coming within our class four. That "heat is as indispensable to the health and comfort of the people as is light or water" may be conceded. But the statement, in effect, that it makes no difference by what means or systems heat is furnished is not so readily to be accepted. The business of furnishing water, electric light, or gas—whether natural or artificial and whether for light or for heat—is a public calling because the necessary

restore competition by legal compulsion, substitute governmental regulation under the law of public callings or the alternative remedy of government operation. The packing house, for example, may follow in the footsteps of the grain elevator.

²⁸ Laughlin v. Portland, supra, note 7.

²⁹ State v. Toledo (1891) 48 Oh. St. 112, 26 N. E. 1061.

machinery for distribution through the public streets makes free competition impracticable. Not only is the duplication of such systems economically wasteful, resulting in higher rather than lower charges to the public, but recognizing this, the public authorities generally refuse to grant the necessary permission for such duplication. There results not only a natural, but in most cases a legal monopoly.³⁰

It is true also, as pointed out in the Laughlin case, that a purpose may be public though no governmental permission for the use of the streets is had or needed. But, if applied to "public callings," this merely proves that the monopolistic element need not always be supplied in the same way. It does not answer the objection that, to bring the case of the fuel yard within the same principle as the electric light or water or natural gas company, that element must in some way be supplied. The Laughlin case, in a passage not quoted by the Supreme Court,31 finds the monopoly element in the alleged existence of "monopolistic combinations" controlling "the mining, transportation and distribution of coal." That monopoly artificially maintained by combination will not satisfy the test of a public calling has already been pointed out. But furthermore, the legislation in question was not directed at mining or transportation; it dealt only with retail distribution. It would not be difficult to argue that the mining of coal, or at least of anthracite coal, if that may be treated as a distinct commodity for which there is no really equivalent substitute, is under present conditions, not merely by artificial combination, but by the inherent tendency of natural and economic conditions, a virtual monopoly;32 but if so there is no magic in a municipal coal yard as a remedy for this condition.33 Neither the Maine court nor the federal Supreme Court specifically declared that a monopoly of the business of selling coal at retail existed in Portland, or even that there was ground to infer or presume the existence of such a monopoly; still less, that any conditions were shown or suggested which would create an inherent tendency to such monopoly, or place it beyond the reach of state laws against artificial combination. Retail coal yards may not spring up quite as easily on every street corner as retail groceries or drug-stores or clothing stores; but there are no practical requirements of locality or equipment or even of large capital which would seem to place the business outside the operation of the usual laws of competition.34

²⁰ State v. Thompson, supra, note 12, at p. 521; Crawfordsville v. Braden, supra, note 3; Zanesville v. Gas Light Co., supra, note 15.

³¹ Laughlin v. Portland, supra, at p. 499.

³² See (1902) 14 Green Bag, 514 and 570; Freund, *Police Power*, sec. 373, note 4. Cf. State v. Loomis (1893) 115 Mo. 307, 320, 22 S. W. 350, 353; Millett v. People (1886) 117 Ill. 294, 303, 7 N. E. 631, 635:

²³ See Opinion of the Justices (1903) 182 Mass. 605, 610, 66 N. E. 25.

⁸⁴ It must not be overlooked that the Maine court limited its discussion of monopoly to a consideration of the economic conditions in the coal industry,

The opinion in the Laughlin case seems finally to rest on inadequacy of supply, with a recurrence to the analogy of the water company. The cause of the inadequacy is declared to be immaterial. But the cause is clearly material in determining whether the proposed remedy has any reasonable relation to the object by which it is sought to be justified. A public water supply furnishes a real remedy for the inadequacy of private supply. No attempt is made to show us how a municipal fuel yard will increase the supply of coal.³⁵

It is believed that a much stronger case could be made out for the legislation in question by invoking the underlying principle of class three, rather than of class four; and that a public hospital furnishes a better analogy, though less speciously apparent, than a natural gas company. The public hospital is maintained, not primarily for the well-to-do, who would secure reasonably adequate medical care without it, but because there is a large section of the public, especially in large cities, who could not or would not afford such care without public assistance. So it might not unreasonably be contended and believed that there is a considerable section of the public, made up of the poorer classes in northern cities, who are not in fact under commercial conditions adequately supplied with coal in winter weather at prices they can afford to pay. Those who live from hand to mouth nearly always pay most for everything they buy. The poor buy coal in small quantities, which it hardly pays the dealer to handle, except at prices aggregating much more per ton than the more prosperous consumer is obliged to pay. Nor is it wholly a question of inability to pay a fair commercial price for the quantity purchased. between class three and class four may not always be clear cut. So far as the poor are concerned, especially in times of shortage, competition partially breaks down, because the basket trade is hardly worth competing for. Thus though there may be no monopoly, though competition, actual and potential, may sufficiently regulate the price to the well-to-do, and ensure them service, it may fail entirely to protect the poor man who wants but a hodful or two of coal. Indeed it is competition, in another aspect, from which he suffers; he cannot compete with the prosperous charge customer for even his little share of the supply available.

A statute or an ordinance, then, that sought to ensure the poor an unfailing supply of coal in such quantities as they could or would afford to buy, even at prices that would yield a fair business profit, might perhaps be justified, if reasonably adapted to the end in view. Such a case would be on the border-line between class three and class

although both the statute and the ordinance in question specifically provided for the sale of wood as well. The latter business is, if anything, even less monopolistic than the retail selling of coal.

²⁵ Cf. Opinion of the Justices, supra, note 33, and dissenting opinion of Loring, J.

four, obtaining some support from the principles of each. The legislation in the instant case, considered as a provision for the poor, came even more directly within the principles of class three, since it provided for sale at cost, or in other words, at less than a reasonable commercial rate.

The objection to the legislation, and to the implications of the opinions in which it was sustained, is that neither statute nor ordinance was limited to any particular class of trade, nor was any such limitation imposed by the decisions. To require an investigation of the financial ability of each customer might be impracticable; but this would not be necessary. By restricting the business to sales in small quantities, the only need which, it would seem, could justify the legislation, would be amply provided for, and the practical effect of this restriction would adjust the remedy to the disease as closely as can be expected in practical legislation.

It does not follow that even without such a restriction either statute or ordinance should have been held wholly invalid. decisive question might well be what action the city had actually taken or proposed to take under the ordinance. In spite of popular language, constitutional decisions do not deal with the abstract validity of statutes, but with the legality of action taken or proposed in reliance on the statute for authority or justification. If the actual operation of the municipal yard had been governed by the considerations above suggested, the taxpayers' objections might well be overruled, even though the language of both statute and ordinance might go much further than the case actually presented, and beyond what the court could properly approve. But if it appeared that under the authority of these enactments the city had entered without restriction into the business of supplying at cost all the coal requirements of the community, domestic and industrial, for rich and poor, in small quantities and in large, another case would be presented. It is believed that the subject must have further consideration, and that distinctions must be observed of which there is no hint in the opinion under discussion, before the law can be considered as settled, or the real meaning and effect of the Supreme Court's decision can be measured. There is little doubt, however, that the tendency of the times is toward a considerable extension of governmental activities in the line of socalled social legislation, and that there may be worse shocks in store for the conservatives than any they have suffered from the judicial approval of municipal coal yards.36

²⁰ For a recent review of the principal case, see, Is Government Merchandising Constitutional? (1918) 52 Am. L. Rev. 215. Other discussions of the same general subject and of related cases not here considered will be found in (1915) 15 COLUMBIA L. REV. 179; (1914) 2 VA. L. REV. 152; (1913) 12 MICH. L. REV. 132; (1903) 16 HARV. L. REV. 584; (1891) 5 HARV. L. REV. 30; (1873) 21 Am. L. REG. 493, note.

## RECENT CASE NOTES

Boundaries—Interstate River—Effect of Avulsion.—The boundary between Arkansas and Tennessee was fixed by treaties and statutes as "the middle of the Mississippi River." Between 1823 and 1876 the channel had gradually shifted toward the Tennessee side. In 1876 by a sudden avulsion the river formed a new channel and the old river bed thereafter gradually filled in and became dry ground. The State of Arkansas brought an original suit in the United States Supreme Court against the State of Tennessee to determine the location of the boundary line between them. Held, that the boundary line was the center of the channel of navigation as it existed just prior to the avulsion. Arkansas v. Tennessee (1918, U. S.) 38 Sup. Ct. 301.

In declaring that a boundary designated as the "middle" of a river means, as applied to a navigable stream separating states, the center of the channel, the court follows the accepted rule of international law and its own earlier decisions. Iowa v. Illinois (1892) 147 U. S. 1, 13 Sup. Ct. 239. A similar rule prevails generally in boundary controversies between private riparian owners. Miller v. Mann (1882) 55 Vt. 475. A gradual shifting of the channel by erosion and accretion is held to change the boundary. Nebraska v. Iowa (1891) 143 U. S. 359, 12 Sup. Ct. 396; Pack v. Stepp (1908) 33 Ky. L. Rep. 677, 110 S. W. 887. But upon a sudden shifting by avulsion, the boundary remains fixed at its former line. Philadelphia Co. v. Stimson (1911) 223 U. S. 605, 32 Sup. Ct. 340. Tennessee contended that the above rules did not apply to the particular circumstances of this case, and that the reappearance of the land which constituted the bed of the river immediately before the avulsion reestablished the original boundary as it was, not merely before the avulsion, but before the previous gradual shifting by erosin and accretion had occurred. This contention had been sustained by its own courts. State v. Muncie Pulp Co. (1907) 119 Tenn. 47, 104 S. W. 437 [overruled in Cissna v. Tennessee (1918, U. S.) 38 Sup. Ct. 306, on the authority of the principal case]. In rejecting this contention and holding that an avulsion permanently fixes the boundary as it stood when the avulsion occurred, the case is clearly sound. See, in accord, Winneman v. Reeves (1917, C, C. A. 5th) 245 Fed. 254.

Conflict of Laws—Capacity—Contracts of Married Women.—A married woman domiciled, as the plaintiff apparently knew, in Texas signed, while she was temporarily in Chicago, a guaranty of her husband's note to the plaintiff. Suit was brought on the guaranty in a federal court in Texas. It was assumed that if the wife's domicil had been in Illinois, the guaranty there signed would have been valid under Illinois law. Held, that the law of Texas, denying a married woman capacity to make such a contract, rendered this contract unenforceable in a court administering Texas law, on the ground that it would be against the policy of the jurisdiction to enforce there a contract of the forbidden type entered into by a woman domiciled in the state, while she was temporarily in another state which allowed such contracts. Union Trust Co. of Chicago v. Grosman (1918) 38 Sup. Ct. 147. See Comments, p. 816.

CONSTITUTIONAL LAW—TAXATION—MUNICIPAL FUEL YARD AS PUBLIC PUR-POSE.—Under the authority of a legislative act and a city ordinance, the City of Portland, Maine, proceeded to establish a municipal yard for the purpose of supplying "wood, coal and fuel" to its inhabitants at cost. The plaintiffs, citizens and taxpayers of Portland, sought an injunction on the ground that municipal dealing in fuel was not a public purpose and that taxation to equip and maintain such an enterprise was a taking of property without due process of law. The Supreme Court of Maine upheld the statute and the plaintiffs appealed to the Supreme Court of the United States. Held, that municipal sale of fuel under such an ordinance might properly be considered a public purpose, and taxpayers' rights under the due process clause of the Fourteenth Amendment were not violated by a levy for that purpose. Jones v. City of Portland (1918) 38 Sup. Ct. 112. See Comments, p. 824.

Copyrights—Publisher's Contract—Implied Condition in Respect to Competing Books.—The plaintiff was author of Foster's "Federal Practice." The defendant contracted, on a royalty basis, to publish, advertise, and promote the sale of this book for a term of years. During the term the defendant published and advertised Byrne's "Federal Criminal Procedure," the preface to which stated that a comprehensive treatment of the subject was needed and that theretofore the law could be ascertained only by searching the statutes and decisions. The plaintiff alleged that these statements were false and that his book fully covered the subject. He sought an injunction against the defendant's advertising and promoting the sale of this competing book. The defendant moved to dismiss the complaint. Held, that the plaintiff was entitled to equitable relief. Foster v. Callaghan & Co. (1918, U. S. D. C., S. D. N. Y.) 58 N. Y. L. J. 1479.

The conclusion arrived at by the court is founded on an implied condition in the contract that the publisher would not compete with the author by making false statements which depreciated the value of the book and tended to affect its sale adversely. The question is one of construction of a special kind of contract,one granting to the publisher an exclusive privilege which the author has by reason of his copyright. The relationship between author and publisher is a personal one. In re McBride & Co. (1904 D. C. S. D. N. Y.) 132 Fed. 285. It has been held to be a joint adventure. Stevens v. Benning (1855) 6 De G. M. & G. 223; Reade v. Bentley (1858, V. C.) 4 Jur. N. S. 82, 27 L. J. Ch. 254. As such, the joint adventurers owe to each other the utmost good faith and scrupulous honesty. Selwynn & Co. v. Waller (1914) 212 N. Y. 507, 106 N. E. 321. The relation is, therefore, confidential and it is reasonable that the law should deem that a condition against unfair competition should have been within the contemplation of the parties. Cf. Tuck & Sons v. Prieste (1887, C. A.) 19 Q. B. Div. 629, 635. A somewhat similar construction has been put on a contract whereby the owner of a copyright granted a producer the privilege of dramatizing and producing. Harper Bros. v. Klaw (1916, S. D. N. Y.) 232 Fed. 609; Pulte v. Derby (1852, C. C. D. Oh.) Fed. Cas. 11465, 5 McLean 328. The principal case, however, seems to be limited to competition by false statements. This would seem a reasonable construction.

COURTS-MARTIAL—JURISDICTION—PREFERENCE OVER FEDERAL COURT TO TRY SOLDIER FOR MURDER.—Subsequent to the declaration of war against Germany, a United States soldier killed a policeman in Newport, Ky. He was committed to the county jail and was indicted for murder, his captain and major consenting to let the civil court take jurisdiction. Habeas corpus proceedings were instituted and the commanding officer of the brigade demanded that the prisoner be delivered to the military authorities for trial by court-martial. Held, that the jurisdiction of the military authorities was superior to that of the civil authorities. Ex parte King (1917, E. D. Ky.) 246 Fed. 868.

In time of peace no soldier can be tried by a court-martial for murder or rape committed within the United States. This is expressly provided by Article 92 of the present Articles of War, enacted August 29, 1916. See 39 St. at L. ch. 418, sec. 3. Under prior legislation courts-martial were not without jurisdiction to deal with capital crimes as acts prejudicial to good order and military discipline, but the military authorities, except in time of war, were obliged to surrender the accused, upon application being duly made, for trial by the civil courts. See Ex parte Mason (1882) 105 U. S. 696; In re Stubbs (1905, C. C. D. Wash.) 133 Fed. 1012; Grafton v. United States (1907) 206 U. S. 333, 27 Sup. Ct. 749. A similar preference (with certain exceptions) is given to civil tribunals under Article 74 of the present Articles of War. But such preference is limited to times of peace. In time of war courts-martial as well as civil courts have jurisdiction over crimes committed by soldiers. In such a case, should the tribunal which first takes jurisdiction be allowed to keep it on the basis of comity, or must the civil authorities yield to the military and surrender the accused for trial by court-martial? The principal case is the first decision which squarely answers that the civil authorities must surrender the soldier, if demanded, to his officers. It is believed that the decision is sound. The court intimates that there is a question under the existing Articles of War whether the jurisdiction of the military tribunals is not exclusive in time of war. If such is the true interpretation of the statute it would doubtless be constitutional. See dictum in Coleman v. Tennessee (1879) 97 U. S. 509, 514. But the court preferred to decide the case merely on the ground that in time of war courts-martial are entitled to priority if the offender is demanded for military trial.

DECEIT—STATEMENT OF VALUE AS FRAUDULENT REPRESENTATION.—The defendants induced the plaintiff to allow them to exchange her property for a farm which they said they knew to be worth \$30,000. The defendants knew the value to be much less as they had been unsuccessful in trying to sell it for a smaller sum. It was contended that the statement as to value was a mere expression of opinion and so not actionable. Held, that the plaintiff could recover in an action of deceit. Southern Trust Co. v. Lucas (1917, C. C. A. 8th) 245 Fed. 286.

The courts usually construe statements of the value of property to be mere expressions of opinion and not statements of fact. Hecht v. Metzler (1807) 14 Utah 408, 48 Pac. 37; Gustafson v. Rustemeyer (1898) 70 Conn. 125, 39 Atl. 104. The actual value of the property is of course a fact. Pratt v. Allegan Circuit Judge (1913) 177 Mich. 558, 143 N. W. 890. But an expression of opinion also states a fact, namely, the belief of the speaker that the land is worth a certain amount. Where both parties have equal means of knowledge an action usually will not lie for an alleged misrepresentation of the actual value, the courts holding that the speaker is merely expressing his opinion and that the other party is not entitled to rely upon it. Clark v. Rice (1906) 127 Wis. 451, 106 N. W. 231; Lilienthal v. Suffolk Brewing Co. (1891) 154 Mass. 185, 28 N. E. 151. But if the statement of belief is knowingly false and the circumstances are such as to justify reliance upon it as an honest statement of the speaker's true opinion, it may be a misrepresentation of an essential fact and the basis of an action for deceit. Olston v. Oregon Water Power Co. (1908) 52 Oreg. 343, 96 Pac. 1095; Crompton v. Beedle (1910) 83 Vt. 287, 75 Atl. 331. In the principal case the court found as a fact that confidential relations had been established, from which the conclusion properly followed that the defendants were liable for misleading the plaintiff.

EVIDENCE—CHARACTER OF DEFENDANT—PRESUMPTION OF GOOD CHARACTER.—In a criminal trial in a federal District Court, no evidence as to the character of the defendant having been introduced, the judge refused to charge the jury that the accused was presumed to be a person of good character and that this pre-

sumption should be considered as evidence in his favor. Held, that the court rightly refused to give the requested charge. McKenna, J. dissenting. Greer v. United States (1918) 38 Sup. Ct. 209.

It is elementary that in a criminal case the prosecution cannot attack the character of the accused unless he himself introduces evidence in support of his good character. 4 Chamberlayne, Evidence, secs. 3275, 3277; I Wigmore, Evidence, secs. 56-58. No inference of bad character may be drawn from the prisoner's failure to introduce evidence of good character. State v. Dockstader (1876) 42 Ia. 436; State v. O'Neal (1847) 29 N. C. 251. Some courts have held that the defence is entitled to a statement that there is a presumption of good character. Goggans v. Monroe (1860) 31 Ga. 331; Stephens v. State (1886) 20 Tex. App. 255. But in these cases the prosecution had attacked the character of the accused in addressing the jury. A larger number of state courts have held that there is no presumption of good character. Danner v. State (1875) 54 Ala. 127; Addison v. People (1901) 193 Ill. 405, 62 N. E. 235. The lower federal courts were in conflict on the subject. See Price v. United States (1914, C. C. A. 8th) 218 Fed. 149, L. R. A. 1915 D, 1070; Mullen v. United States (1901, C. C. A. 6th) 106 Fed. 892. The principal case is the first decision of the United States Supreme Court upon the question, and in refusing to recognize the presumption it reaches a sound conclusion. Such a presumption, if recognized, should clearly be rebuttable; a conclusive presumption of good character in criminal cases would be absurd. But under the established rule above stated, in regard to the admissibility of character evidence, the accused could as a practical matter make the presumption irrebuttable, by refusing to present any character evidence and simply relying on the presumption. The rule which puts it wholly in the hands of the defendant whether or not to open the question, and denies any adverse inference from his silence, gives him quite sufficient advantage on this issue, without raising any affirmative presumption in his favor. The courts which have supported such a presumption have apparently confused it with the "presumption of innocence" doctrine. See 2 Chamberlayne, Evidence, sec. 1168.

Husband and Wife—Estate by Entireties—Limitation over to Heirs of One.—A deed named a husband and wife as grantees "of the second part." The grant and habendum were "to the party of the second part, her heirs and assigns." Held, that under the deed the husband took an estate by entirety with the wife for his life with right of survivorship, and that "to the estate of the wife there was added a limitation over to her heirs, so that the plaintiff as her heir took in fee the entire estate, with right of possession after the death of" the husband. Kimble v. Mayor, etc., of Newark (1917, N. J. Ct. Err.) 102 Atl. 637.

At common law a deed to A and B jointly and to the heirs of B was regarded as creating a good jointure, with a life estate in A and a fee simple in B. Co. Litt. sec. 285; Sprinkle v. Spainhour (1098) 149 N. C. 223, 62 S. E. 910. Though the language is not entirely clear, this was apparently the view adopted in the principal case, substituting, of course, an estate by entireties for a joint tenancy. But the courts in deciding these cases have given A, upon B's death, the entire estate for life, B's heirs getting no enjoyment of the estate until A's death. Den v. Hardenbergh (1828, Sup. Ct.) 10 N. J. L. 42; Breed v. Osborne (1873) 113 Mass. 318; Sprinkle v. Spainhour, supra. In effect, therefore, the courts have treated such deeds as creating a joint life estate in A and B, with a remainder in fee to B and his heirs, rather than as creating a present fee in B. Apparently, in calling B's estate a present fee, the courts have been influenced by the rule that a life estate followed by a remainder in fee in the same person merges to form a present fee simple. But the case of joint estates forms a logical exception to this rule, and particularly in the case of estates by entireties; for

there, under the common law idea of the unity of husband and wife, they might be regarded as constituting, in a limited sense, a distinct legal person, so that a life estate in the husband and wife would not merge with a remainder in either one alone. Cf. Den v. Hardenbergh, supra; Town of Corinth v. Emery (1891) 63 Vt. 505, 22 Atl. 618; Bomar v. Mullins (1851, S. C.) 4 Rich. Eq. 80.

International Law—Act of State—Acts of Mexican Revolutionary Authorities before Recognition.—General Villa, as a military commander of the Constitutionalist Army of Carranza, who later was recognized by the United States as head of the *de facto* and subsequently of the *de jure* government of Mexico, levied a military contribution on the inhabitants of Torreon, Mexico, a city under the military occupation of his forces. M., one of the citizens, an adherent of Huerta, fled the city, and failed to pay the assessment imposed upon him at a meeting of the inhabitants to carry out Villa's levy. To satisfy this assessment, Villa ordered the seizure of a quantity of hides belonging to M., and sold them in Mexico to an American corporation, by whom they were brought to the United States and sold to the defendant. The plaintiff, an American citizen, was the assignee of M., the original owner, and brought suit in replevin to recover the hides. *Held*, that the action could not be maintained. *Oetjen v. Central Leather Co.* (1918) 38 Sup. Ct. 309.

General Pereyra, as a commanding officer of the Constitutionalist Army of Carranza, requisitioned certain lead bullion from the Penoles Mining Co., a Mexican corporation, giving a receipt therefor with promise to pay "on the triumph of the revolution." General Pereyra sold the bullion to the defendant, R., who sold it to the defendant B., the proceeds being used by the General for the supply of his troops. It appears that some months prior to the requisitioning of the bullion, the Mexican corporation had sold it to the plaintiff, an American corporation, which, on the bullion being brought into the United States, enjoined the Collector of Customs from delivering the bullion to any of the defendants, claiming title to be in the plaintiff. Held, that a United States Court could not question the defendants' title acquired in Mexico. Ricaud et al. v. The American Metal Co. Ltd. (1918) 38 Sup. Ct. 312.

See Comments, p. 812.

International Law-Nationality-Statelessness.-K., an Austrian subject born in 1860, settled in France in 1885, where he married and had children, who were conceded to be French. He had not obtained from the Austrian authorities any permission to expatriate himself, which according to Austrian law was required in the case of Austrians liable to military service. K. offered no evidence of any release from this Austrian military obligation. In 1890 he returned temporarily to Austria, to be baptized. In 1909 he had, as an Austrian subject, applied for French naturalization, which was refused. In the early part of the present war, he rendered some technical service to the French armies. K.'s property having been sequestrated in France on the ground that he was an enemy (Austrian) alien, he applied for its release from sequestration on the ground that he had lost his Austrian nationality by reason of his long residence in France without intent to return to Austria. Held, that the application should be denied on the ground that it had not been proved that by Austrian law the applicant had lost Austrian nationality, or that he had no intent to return to Austria. Kornfeld v. The Attorney General, Tribunal Civil de la Seine (1st Chamber), June 20, 1916, reported in (1917) 44 CLUNET, 638.

The applicant in this case, not having acquired French nationality, sought to show that he was in a position of "statelessness" or *Heimatlos*. This condition arises when one loses his original or acquired nationality without obtaining any other. Two such cases have recently come before the British courts, and like

the French court in the instant case, they demanded the most convincing evidence, not only that the petitioner had technically lost his original nationality, but that he was not in a privileged position to reclaim it. In the case of Exparte Weber (C. A.) [1916] 1 K. B. 280; (H. of L.) [1916] 1 A. C. 421, 425, the applicant was born in Germany in 1883, left Germany in 1898 for South America, and since 1901 had lived continuously in England. By the German law of 1870, sec. 21, ten years' uninterrupted residence abroad, and by the law of July 22, 1913, sec. 26, failure to obtain a decision on his liability to military service up to his thirty-first year, effected expatriation. The applicant came within these provisions. He was interned in England, at the age of 32, as an alien enemy, and applied for a writ of habeas corpus, alleging that he had lost German nationality, and as he had not acquired any other, that he was a person without nationality. It was objected by the Court of Appeal and by the House of Lords that while the letter of the law would seem to have expatriated him, he had not shown that he could not be claimed for military service on his return to Germany; and furthermore, by the law of 1913 it appeared that he could reacquire German nationality on privileged terms; hence they concluded that the German tie was not so completely severed that he could be considered as released from German nationality. See also The King v. Superintendent of Vine Street Police Station [1916] 1 K. B. 268, 277. In Simon v. Phillips (K. B. Div. 1916) 114 L. T. Rep. N. S. 460, Simon was born in Coburg, Germany, in 1869, emigrated to the United States in 1887, obtained a discharge from German nationality in 1891, became naturalized in the United States in 1894, and on the outbreak of the war had been employed for many years in London. There was no evidence that he had ever returned to Germany. In 1915, he was refused registration in the American Consulate on the ground that the presumption of expatriation from the United States under the Act of March 2, 1907, had arisen against him by reason of his long residence in England. He claimed, therefore, to be a person without nationality. It was held that he had not proved that his nationality of origin had not reverted or that he had entirely lost his right to be readmitted thereto. In France, it was recently held that a person claiming to have become expatriated from Germany by ten years' uninterrupted absence, according to the law of 1870, had to meet the burden of proving that he had during the ten year period never set foot in Germany. Aronsohn v. Attorney General, Tribunal de la Seine, Nov. 13, 1916, reported in (1917) 44 Cluner, 645. These decisions would tend to show a decided indisposition to admit a status of "statelessness," at least with respect to the circumstances of these cases, and to show that the rule with respect to nationality of origin is applied analogously to that of domicile of origin. See Field, Outlines of an International Code (2d ed.) 130. This principle, however, can hardly be considered a recognized rule of international law. By the United States Act of March 2, 1907, "statelessness" has been made possible by the fact that the presumption of expatriation which arises as a consequence of the residence of a naturalized citizen in his native country for two years or in any other country for five years does not necessarily confer his old nationality upon him, as is the case in the municipal law of some countries; and by the provision in section 3 that "any American woman who marries a foreigner shall take the nationality of her husband," apparently disregarding the fact that the law of his country may not confer his nationality upon her, as is the case in Brazil and some other countries.

INTERNATIONAL LAW—PRIZE—NEUTRAL VESSEL CARRYING CONTRABAND.—A neutral (Norwegian) vessel was chartered to German dealers in fish, under circumstances from which the owner may be presumed to have known that his ship was to carry fish from Norway to Germany. The vessel was captured by

a British cruiser while on the way to Germany with a cargo of fish, which was conditional contraband. The German Government had taken over by requisition all food supplies, which fact was generally known. *Held*, that the neutral ship was liable to condemnation as prize. *The Hakan* (1917, P. C.) 117 L. T. Rep. N. S. 619.

Prior to the Napoleonic Wars it was the general practice, adopted in England, to condemn neutral vessels carrying contraband. The Mercurius (1799, Eng. Adm.) 1 C. Rob. 288, note; The Bermuda (1865, U. S.) 3 Wall. 514, 555. This rule was relaxed in The Neutralitet (1801, Eng. Adm.) 3 C. Rob. 295, by Lord Stowell, who held the neutral ship non-confiscable unless the owner of the ship was also the owner of some of the contraband cargo, or the ship had sailed with false papers, or it appeared that the owners had in fact knowledge of the noxious character of the cargo. For cases illustrating respectively these three exceptions to the more liberal rule, see The Jonge Tobias (1799, Eng. Adm.) 1 C. Rob. 329; The Ringende Jacob (1798, Eng. Adm.) 1 C. Rob. 89; The Neutralitet, supra. They are all in reality based on the inference of the knowledge of the shipowner of the trade of his ship, and therefore on his "taking hostile part against the country of the captors" and "mixing in the war." The Bermuda, supra. The prize regulations of various countries by which a certain proportion of contraband on a vessel infects the vessel itself (summarized by Sir Samuel Evans, President of The Admiralty Division, in the decision in the principal case below, reported in [1916] P. 266, 278-280), and article 40 of the Declaration of London, adopted by British Orders in Council of August 20 and October 29, 1914, according to which "a vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo," merely afford a practical test in aid of the inference of knowledge on the part of the shipowner, an irrebuttable inference in England and the United States, but rebuttable, it seems, in Holland and Italy by proof of actual ignorance of the nature of the cargo. In the instant case the Judicial Committee of the Privy Council found that the circumstances clearly created a presumption of knowledge on the part of the shipowners, whereas the court below considered it unnecessary to go behind the test afforded by the fact that more than half (indeed the whole) of the cargo was contra-

Interstate Commerce—Transfortation of Property by Owner for Personal Use.—The defendant purchased a quart of intoxicating liquor in Kentucky and carried it into West Virginia, intending it for his own personal use. An Act of Congress declares it unlawful for anyone "to cause intoxicating liquors to be transported in interstate commerce" into any state, the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes. Held, that defendant was not guilty for a violation of the Act, his transportation of liquor for personal use not amounting to "interstate commerce." United States v. Mitchell (1917, S. D. W. Va.) 245 Fed. 601.

See Comments, p. 808.

Maintenance—Defenses—Successful Prosecution of Maintained Action.—The plaintiff promoted a prize competition which required an entrance fee of three guineas. The defendants, newspaper publishers, through their columns invited competitors to bring actions to recover their entrance fees on the ground that the money had been obtained by fraudulent misrepresentation, the defendants offering to pay the legal expenses of such actions. A number of the competitors thereupon joined together and two actions, maintained by the defendants, were successfully brought against the plaintiff. The plaintiff brought suit, charging

maintenance. Held, that the defendants were liable unless they had an interest in the maintained actions or acted from motives of charity. Neville v. London Express Newspaper Ltd. (1918, C. A.) 117 L. T. Rep. N. S. 598.

The rigid doctrine of maintenance of the early common law has been greatly modified and relaxed in England by modern decisions. British Cash & Parcel Conveyors v. Lawson Store Service Co. (C. A.) [1908] 1 K. B. 1006; Fitzroy v. Cave. (C. A.) [1905] 2 K. B. 364. The general rule is that an action for damages will lie at the suit of the party aggrieved. Harris v. Brisco (1886, C. A.) 17 Q. B. D. 504. And it is well settled in England that it is immaterial that the maintained action was successful, the objectionable ingredient of maintenance being the stirring up of actions which would not otherwise be brought. Oram v. Hutt (C. A.) [1914] 1 Ch. 98. But there are various well recognized exceptions, as when the maintainer acts from motives of charity, neighborly spirit, or personal financial interest. Alabaster v. Harness (C. A.) [1895] I Q. B. 339. In fact maintenance now seems to be confined to the officious intermeddling of a stranger for the purpose of stirring up strife and continuing litigation. British, etc. Conveyors v. Lawson, etc., Co., supra; cf. Thompson v. Marshall (1860) 36 Ala. 504. In the United States, in some jurisdictions, the doctrine of maintenance is deemed to be wholly unsuited to the social and political system and so has not been adopted as part of the common law. Mathewson v. Fitch (1863) 22 Cal. 86; Richardson v. Rowland (1873) 40 Conn. 565; Duke v. Harper (1876) 2 Mo. App. 1. Where the offense exists at all there has been a great modification of the harsher features of the law. See Gilman v. Jones (1888) 87 Ala. 691; Newkirk v. Cone (1857) 18 Ill. 449. Yet, though the cases in modern times are rare, the doctrine of maintenance is a living doctrine and the action is one which in a fit case the courts of this day in most states will support. The principal case appears to have all the necessary elements of the action and to be correctly decided. If the newspaper had in any way encouraged the public to participate in the competition it would have been justified in advising its readers of the truth and of their privilege of bringing suit, but it went entirely too far in offering to pay the expenses of such suits regardless of the financial ability of the aggrieved competitors to vindicate their rights at their own expense.

Monopolies—Sherman Act.—Suit by Stockholder to Set Aside Deed of Corporate Property for Alleged Monopolistic Design of Purchaser.—Suit was brought by minority stockholders of a mining corporation, which had sold and conveyed all its property to the defendant corporation, to have the deed set aside on the ground that the defendant was acquiring the property with the intention of securing a monopoly of the copper mining industry in violation of the Sherman Anti-Trust Act. Held, that the sale could not be attacked by the complainants on this ground. Geddes v. Anaconda Copper Mining Co. (1917, C. C. A. 9th) 245 Fed. 225.

It has become well settled that the mere fact that a plaintiff corporation is a monopoly will not preclude it from recovering the purchase price of goods sold on contracts otherwise legal, even though some benefit incidentally results in favor of a wrongdoer. Connolly v. Union Sewer Pipe Co. (1902) 184 U. S. 540, 22 Sup. Ct. 431; Wilder Mfg. Co. v. Corn Products Ref. Co. (1915) 236 U. S. 165, 35 Sup. Ct. 398. Nor will it prevent suit for wrongful destruction of property. Louisville & N. R. R. Co. v. Burley Tobacco Society (1912) 147 Ky. 22, 143 S. W. 1040. But no recovery will be allowed on contracts inherently illegal, as being in direct furtherance of a purpose forbidden by the Anti-Trust Act. Continental Wall Paper Co. v. Louis Voight & Sons Co. (1909) 212 U. S. 227, 29 Sup. Ct. 280. The court relies for its decision on the case of Wilder

Mfg. Co. v. Corn Products Ref. Co., supra. It is submitted that the instant case is distinguishable in that, under the allegations of the bill, the transaction asked to be set aside was itself one of the very steps by which the defendant was attempting to create its monopoly, and was therefore inherently illegal, and in direct violation of the Act. It seems clear, therefore, that had this been a suit by the present defendant to enforce the contract of sale, no recovery would have been permitted, under the doctrine of the Continental Wall Paper case, supra. Cf. Brent v. Gay (1912) 149 Ky. 615, 149 S. W. 915. There is an obvious distinction, however, between a case in which the guilty party asks the aid of the court in carrying out his illegal purpose, and one in which the other party, however innocent of any participation in the illegal purpose, seeks to take advantage of the alleged violation of the Act as a ground for setting aside in a court of equity, for his own private benefit, an executed transaction. Even where it is shown that special damage to the complainant will result from a violation of the Act, it has recently been held that under the Sherman Act, as distinguished from the Clayton Act, a private person cannot maintain a suit for an injunction, the remedies under the Act being limited to those expressly provided by the statute. Paine Lumber Co. v. Neal (1917) 244 U. S. 459, 37 Sup. Ct. 718. The Clayton Act (Act Oct. 15, 1914, ch. 323, sec. 16; 38 U. S. St. at L. 737) has since given to any person threatened with special injury by a violation of the anti-trust laws a right to relief by injunction. The principal case, like the Paine Lumber Co. case, arose before the passage of the Clayton Act, though decided after it. But the Clayton Act would hardly have aided the complainants, since under the doctrine of the Paine Lumber Co. case, equitable relief at the suit of private persons would be strictly limited to that specifically provided, or in other words, to relief by injunction.

Purchase for Value—Power of Thief to Pass Title—Moneys of Foreign Countries.—The plaintiffs sued the defendant for the alleged conversion of foreign moneys purchased by the defendant banker from the plaintiffs' employee who had embezzled them from the plaintiffs. *Held*, that the defendant acquired a valid title to the moneys. *Brown et al. v. Perera* (1918, N. Y. Sup. Ct., referee's decision) 58 N. Y. L. J. 1751.

On grounds of policy the possessor of money of the realm, even though he has stolen it and so has no title to it himself, has a legal power to give title to any one who takes it bona fide in a business transaction. This is not because money has no earmark, but, in the words of Lord Mansfield, "the true reason is upon account of the currency of it: it cannot be recovered after it has passed in currency." Miller v. Race (1758, K. B.) 1 Burr. 452, 457. So a five-pound gold piece purchased from a thief by a dealer in coins may be recovered by the owner because it was not passed as currency. Moss v. Hancock (Q. B. Div.) [1899] 2 Q. B. III. Is the desirability of having foreign money pass freely so great as to justify applying the same rule to it? Considering the actual use of foreign coins in border states, the volume of foreign exchange business transacted in New York, and the desirability of facilitating and safeguarding commercial transactions, the court held that foreign money should be considered the same as domestic money in respect to the possessor's power to pass title. No precise authorities were cited, but the court relied upon the analogy of the negotiability of bills and notes payable in foreign money. It is submitted, however, that such instruments are negotiable in spite of, rather than because of, being expressed as payable in foreign money. They are really payable in domestic money of an amount determined by the current rate of exchange. See Norton, Bills and Notes (3d ed.) 46. Nevertheless, on grounds of policy the decision is believed to be commendable, though it is perhaps doubtful whether previous authorities fully sustain it. See Thompson v. Sloan (1840, N. Y. Sup. Ct.) 23 Wend. 71, 74 (dictum: "It is not pretended that coins current in Canada are, therefore, so in this state"); see also Picker v. London etc. Banking Co. (1887, C. A.) 18 Q. B. D. 515 (Prussian bonds). It would seem that the actual decision in the principal case might have been rested upon the ground that the plaintiffs' agent had apparent authority to deal with the defendant as he did. See Mechem, Agency, sec. 1723; Columbia Mill Co. v. Nat'l Bank (1893) 52 Minn. 224, 53 N. W. 1061; Fifth Ave. Bank v. Forty Second St. etc. R. R. Co. (1893) 137 N. Y. 231, 33 N. E. 378.

Specific Performance—Contract to Sell Stock—Uncertainty of Value.—The defendant contracted to transfer to the plaintiff ten shares of certain stock in consideration for legal services. In a suit for specific performance of the contract the evidence placed the value of the stock over a wide range. From the evidence a jury would have been warranted in finding the value, although such a finding might have been to the prejudice of either party. *Held*, that the plaintiff was entitled to specific performance. *Hubbard v. George* (1918, W. Va.) 94 S. E. 974.

The court decided this case under the principle that specific performance of stock transfer contracts will be decreed where the value of the stock is not easily ascertainable. Hogg v. McGuffin (1910) 67 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491, and note; Baker Co. v. United States Fire Apparatus Co. (1916, Del.) 97 Atl. 613. But it is believed that the principal case presents too broad an application of this rule, and that the better view is expressed in Baker Co. v. United States, etc. Co., supra in which the rule is strictly construed to apply only where the value cannot be ascertained by computation, or by any sufficiently certain estimate. See also Baumhoff v. St. Louis & K. R. Co. (1907) 205 Mo. 248, 104 S. W. 5; Hills v. McMunn (1908) 232 Ill. 488, 83 N. E. 963. Specific performance should not be decreed where there merely is a wide variation or uncertainty of opinion on market value, for in such a case the jury can arrive at a reasonably fair estimate. Clements v. Sherwood-Dunn (1905, N. Y.) 108 App. Div. 327, 95 N. Y. Supp. 766; Moulton v. Warren Mfg. Co. (1900) 81 Minn. 259; 83 N. W. 1082. The objection that a finding of value might be prejudicial to one party or the other is untenable, since that element is here involved to no greater extent than in other cases where juries assess damages. The recognition of a general principle that mere uncertainty and difficulty in ascertaining damage may alone give a basis for specific performance would be plainly inexpedient, and there seems to be no special reason for applying such a principle in the case of stock transfer contracts while denying its application to other contracts.

TAXATION—INHERITANCE AND TRANSFER TAXES—ALLEGED CONFLICT OF STATE STATUTE WITH TREATY.—A naturalized citizen of the United States, of Danish origin, left certain legacies to subjects and residents of Denmark. An Iowa statute imposed a higher inheritance tax on legacies to non-resident aliens than on legacies to residents of Iowa. A treaty of the United States with Denmark provided that "no higher or other duties, charges, or taxes of any kind, shall be levied in the territories . . . of either party, upon any personal property, money [etc.] of their respective citizens or subjects, on the removal of the same from their territories . . . either upon the inheritance of such property, money [etc.] . . . or otherwise, than are or shall be payable in each state upon the same, when removed by a citizen or subject of such state respectively." The executor of the estate having paid the tax and charged it in his accounts, a non-resident legatee opposed the charges on the ground that the statute of Iowa

was in conflict with the treaty between the United States and Denmark. Held, that the statute was not in conflict with the treaty. Peterson et al. v. State of Iowa (1917) 38 Sup. Ct. 109; accord, with respect to a similar treaty with Sweden, Duus v. Brown (1917) 38 Sup. Ct. 111.

The only question involved was whether the discrimination as to legatees imposed by the statute was a violation of the provisions of the treaty guarding against certain discriminations. It is beyond doubt that the treaty would be controlling over a conflicting state statute. Ware v. Hylton (1796, U. S.) 3 Dall. 199; Chirac v. Chirac (1817, U. S.) 2 Wheat 259. The treaties under examination, however, looked to the testator or living owner of the property, and sought to guard against any tax discrimination against him or his property, by reason of his alienage. Such discrimination against the alien owner of property (known as the droit d'aubaine and droit de détraction) was customary in the eighteenth and first half of the nineteenth centuries, and was only gradually removed, partly by statute and partly by treaty. Bernheim, History of the Law of Aliens (New York, 1885) 7 et seq.; Borchard, Diplomatic Protection of Citizens Abroad, 34 et seq. The Iowa statute imposed no higher tax on aliens or on their property in Iowa, but merely provided that non-resident alien legatees of property in Iowa, without regard to the residence or citizenship of the testator, should pay a higher death duty than resident legatees, and this discrimination the treaty did not cover. Frederickson v. Louisiana (1859, U. S.) 23 How. 445. The testators in the principal cases were citizens of Iowa, and nothing in the treaties contemplated an interference with the privilege of Iowa to legislate with respect to the disposition of property by her own citizens. No right of property arises in the alien non-resident legatee until the inheritance tax (especially when it involves the property of a deceased citizen) is paid. United States v. Perkins (1896) 163 U. S. 625, 16 Sup. Ct. 1073.

Trading with the Enemy—Effect of War on Contract of Agency.—Article 4 of the French law of April 4, 1915, prohibits under penalty any commercial transaction or agreement with an enemy. On January 14, 1915, the defendant, a neutral resident in Paris, entered into an agreement with his old employers, a German firm in Germany, to represent their interests in France, for which he was to receive one-half the salary he had received before the war. It was not shown that there had been any intercourse with the enemy firm after April 4, 1915, but the defendant had carried out the duties of his agency before the Alien Property Custodian (who had taken over the property of the employers) until June 1915, and apparently had paid himself from his principal's resources the agreed salary. Held, that by continuing to execute the agreement after April 4, 1915, he had violated the prohibitions of the statute. State v. Assal, Trib. Correctional de la Seine, March 28, 1916, reported in (1917) 44 Clunet, 593.

The French statute governing trading with the enemy appears to be more severe than that of England or the United States. Prior to the Act of April 4, 1915, penalizing commercial intercourse with the enemy, such transactions had merely been prohibited and declared void (decree of September 27, 1914). The French court in the instant case, however, did not so characterize the agreement of January 14, 1915. By the common law, such intercourse is prohibited by the outbreak of war. But the execution of contracts of agency entered into when such contracts were lawful, i. e., before the war, is not prohibited, even after the outbreak of war, provided it involves no payments to or intercourse with persons in the enemy country. Both the English and the United States Trading with the Enemy Acts contemplate the continuation of the business of alien enemies through agents appointed before the outbreak of the war, although all profits realized must be paid to the Alien Property Custodian, who may take

control of the business. See Tingley v. Müller (C. A.) [1917] 2 Ch. 144. By the weight of authority, the agent appointed before the war (i. e. before such an appointment became illegal) may continue to perform his duties under the agency, (unless abrogated by act of the parties) provided no intercourse with any one in the enemy country is thereby required. See the leading cases of New York Life Insurance Co. v. Davis (1877) 95 U. S. 425, and Williams v. Paine (1898) 169 U. S. 55, 18 Sup. Ct. 279. The decisions of several state courts have held that an agency was terminated by the outbreak of war. Blackwell v. Willard (1871) 65 N. C. 555; Howell v. Gordon (1869) 40 Ga. 302. And this will generally be the case where the nature of the agency is such that constant communication between principal and agent is essential to its operation, or that its continuation may be deemed inequitable to either party. Cocks v. Izard (1871, C. C. D. La.) Fed. Cas. 2934.

WILLS—ATTESTATION—NECESSITY THAT WITNESSES SEE SIGNATURE.—A type-written will offered for probate bore the signature of the testator and of three persons under whose names was appended the word "witnesses." They testified that they signed their names at the testator's request without knowing the character of the paper or the purpose of their signatures; and that they saw no writing upon the paper except their own signatures after they had successively signed. The statute (Gen. St. 1902, sec. 293) requires a will to be "in writing, subscribed by the testator, and attested by three witnesses, each of them subscribing in his presence." Held, that the will was not validly attested. Pope v. Rogers (1917, Conn.) 102 Atl. 583.

This case raises the question whether attesting witnesses must see the testator's signature. Under a statute which requires that the testator make or acknowledge his signature in the presence of witnesses, the witnesses must actually see the signature. In re Mackay's Will (1888) 110 N. Y. 611, 18 N. E. 433; Ilot v. Genge (1844, Eng. P. C.) 8 Jur. 323. But the Statute of Frauds and many American statutes, like that of Connecticut, merely require the writing to be signed by the testator and "attested" by subscribing witnesses. Under such statutes the testator need not expressly acknowledge his signature; it is enough if he acknowledges the instrument as his. White v. Trustees of British Museum (1829, C. P.) 6 Bing. 310; Gould v. Theological Seminary (1901) 189 Ill. 282, 59 N. E. 536; In re Dougherty's Estate (1912) 168 Mich. 281, 134 N. W. 24. The three cases last cited held also that the witnesses need not even see the testator's signature. But there is weighty authority contra. Nunn v. Ehlert (1914) 218 Mass. 471, 106 N. E. 163. And it is submitted that the latter view is supported by the stronger argument, for the very purpose of attestation is to require witnesses to the fact that the formalities required by the statute have been complied with. Of course under either view the testator's signature must have been made before the witnesses subscribe. Limbach v. Bolin (1916) 169 Ky. 204, 183 S. W. 405; but see In re Silva's Estate (1915) 169 Cal. 116, 145 Pac. 1015 (where the order of signing was held immaterial since all the signatures were affixed as part of a single transaction). The difficulty is in the proof of this fact when the signature is not visible to the witnesses. Where there is a perfect attestation clause, a proper execution is presumptively established. Gould v. Theological Seminary, supra; McCurdy v. Weall (1886) 42 N. J. Eq. 333, 7 Atl. 566. Perhaps also a statement to witnesses that the paper presented to them is a will justifies an inference of fact that it has been already signed by the testator. But under the facts of the principal case, it is submitted that no such inference would arise, so that the decision is clearly right under either view as to necessity that the witness see the signature.

Wills—Testamentary Capacity—Will of Soldier Under Age.—The testator, while an infant but an officer in the British army on active service, made his will. He was killed in action, while still an infant, and his will was admitted to probate as a soldier's will under section 11 of the Wills Act of 1837. Section 7 of the Act declares that no will made by any person under 21 years of age shall be valid; sections 9 and 10 deal with the formalities of executing wills; and section 11 reads: "Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." Questions arose as to the validity of a power of appointment attempted to be exercised by the testator's will. Held, that so long as the probate stood the testamentary power of appointment was validly exercised, with a dictum that the Wills Act makes an infant, even though a soldier, incapable of making a will. Re Wernher (1918, Ch. D.) 117 L. T. Rep. N. S. 801.

See Comments, p. 806.

## CURRENT DECISIONS

ADMIRALTY—SEAMEN'S WAGES—ADVANCES IN FOREIGN PORT BY FOREIGN VESSEL.—The libelants were seamen who signed in France for two years' service on a British ship, receiving an advance of a half-month's wages, which was legal under British law. When the vessel reached New York, the seamen, being afraid of submarines, abandoned their contract and, a demand for half their wages having been refused, libeled the vessel, claiming full wages and contending that the advance payment made in France was void under the Seamen's Act (U. S. Comp. St. 1916, secs. 8322-3). Held, that the libelants were not entitled to recover, as they had already received more than half of their wages in advance and such advances were legal payments. The Belgier (1917, S. D. N. Y.) 246 Fed. 966.

The federal statute has been held to forbid advances by foreign ships in American ports and by American ships in foreign ports. Patterson v. Bark Eudora (1903) 190 U. S. 169, 23 Sup. Ct. 821; The Rhine (1917, E. D. N. Y.) 244 Fed. 833. One case has held that it forbids advances to alien seamen by a foreign ship in a foreign port. The Imberhorne (1917, S. D. Ala.) 240 Fed. 830. It is believed that the principal case makes a more reasonable construction of the statute in excluding such a case from its application.

CONFLICT OF LAWS-JURISDICTION FOR DIVORCE-SUIT BETWEEN ALIENS IN France.—An action for divorce was brought by a Russian woman against her Russian husband in the French courts. In accordance with the requirements of Russian law (one of the parties having been a Roman Catholic and the other a member of the Orthodox Russian Church), they had been married in Paris by a Russian clergyman; and they had also had a marriage ceremony performed by a French civil officer. By the Russian law, a divorce between people whose marriage was required to be celebrated before a Russian clergyman must likewise be pronounced by a Russian clergyman. Held, on a plea to the jurisdiction of the French court, that the court had no jurisdiction, inasmuch as the parties were governed by their national (Russian) law, which was their personal statute. The court added that a treaty of 1874 between Russia and France giving the citizens of either contracting party full access to the courts of the other had no application to the case, and that the French civil courts could neither enforce the provisions of the Russian law requiring Russian religious authorities to pronounce a divorce, nor enforce the French law in substitution for the Russian law. Stankiewicz v. Stankiewicz, Court of Paris, Jan. 26, 1914, reported in (1917) 44 CLUNET, 602.

This decision may be contrasted with another, also involving the marriage status of aliens. The marriage of two British subjects, celebrated in France, was annulled by a British court. On application in France for an exequatur validating and decreeing the registration of the British judgment, it was held that the judgment should be enforced in France. Sassoon v. Sassoon, Tribunal Civil de la Seine, December 13, 1916, reported in (1917) 44 CLUNET, 614.

CONTEMPT—DIRECT CONTEMPTS—LETTER MAILED TO JUDGE.—While an appeal from a decree denying probate of a will was pending before the Prerogative Court of New Jersey, the proponent of the will mailed a letter to the Ordinary in which he abused opposing counsel and the trial judge, disparaged a witness and protested that he would agree to donate whatever he might receive under the will, if it were probated, to any charitable institution the Ordinary might

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select. Held, that the proponent was guilty of a direct contempt. In re Merrill (1917, N. J. Prerog.) 102 Atl. 400.

The case is interesting for the learned opinion of the Ordinary on the subject of contempts and on the jurisdiction of the Prerogative Court to punish them.

Contempt—Direct Contempts—Refusal by Draft Board to Give Up Court Room.—The respondent, chairman of a local draft board, was using the vice chancellor's courtroom for the physical examination of men drafted for military service, when he was informed that the vice chancellor wanted the room for the hearing of a case. The respondent declined to give up the room that day, and, although he had an hour's intermission at noon, failed to communicate with the vice chancellor. *Held*, that the respondent was guilty of contempt facie curiae. In re Schmidt (1917, N. J. Ch.) 102 Atl. 264.

The court was careful to point out that there was no conflict of authority between the state court of chancery and the federal exemption board. There were other rooms in the court house which could have been used by the board. In view of the respondent's protests of respect for the court, no punishment was inflicted.

Constitutional Law—Due Process—Lien upon Saloon Premises under Dramshop Act.—The defendant owned a building which he rented to a tenant for a saloon. In a prior suit the plaintiff had recovered a judgment by default against the tenant for injury to her means of support by reason of intoxicating liquor furnished to her husband at the tenant's saloon. The Dramshop Act (Ill. Rev. Stat. ch. 43, sec. 10) declared that such a judgment should be a lien upon the premises wherein the liquor was sold if the owner had rented them for the purpose of the sale of intoxicating liquor. The present suit was brought to subject the defendant's building to the lien of the judgment obtained against his tenant. The defendant contended that the enforcement of this lien would deprive him of property without due process, since the judgment had been rendered without notice to him or opportunity to defend. Held, that the lien was enforceable and the statute, thus applied, constitutional. Eiger v. Garrity (1918) 38 Sup. Ct. 298.

The court reasons that the statute in effect makes the tenant the lessor's agent, and that through this agency, voluntarily assumed by renting for saloon purposes, the landlord becomes a participant in the sales and responsible for their consequences. This is the first time the federal Supreme Court has passed upon the question. For decisions by state courts sustaining such statutes, see cases cited in Garrity v. Eiger (1916) 272 Ill. 127, 111 N. E. 735.

Constitutional Law—Due Process of Law—Validity of Legislation Prohibiting "Trading Stamps."—A statute of Wisconsin forbade the issuing of "trading stamps" in connection with the sale of goods, subject to the exception that sellers might issue tickets redeemable only in cash for amounts stated on the faces thereof. A number of "trading stamp" firms brought actions against the appropriate state officer, asking the court to prevent the enforcement of the statute on the ground that it deprived them of liberty and property without due process of law. Held, that the statute was valid. Sperry & Hutchinson Co. v. Weigle (1917, Wis.) 166 N. W. 54.

The opinion calls attention to the great conflict of authority upon the point at issue, the tendency of the cases in the state courts until recently being to hold similar laws invalid. The decision in favor of the law is put on the sensible ground that the view of the legislature that "trading stamp" schemes are injurious to legitimate business is at least a reasonable one and hence that

the requirements of due process are satisfied. In this the court followed recent cases in the United States Supreme Court which upheld prohibitory taxes upon "trading stamps." Rast v. Van Deman & Lewis Co. (1916) 240 U. S. 342, 36 Sup. Ct. 370; Tanner v. Little (1916) 240 U. S. 369, 36 Sup. Ct. 379.

Contracts—Bond to Secure Material-Men—Grocer Supplying Contractor Food for Laborers.—The defendant, as surety for a contractor, gave the bond required by federal statute (Comp. St. 1916, sec. 6923) to insure payment to persons supplying "labor or materials in the prosecution of" government work. The work was the dredging of a portion of the St. Mary's river so remote from any settlement that the contractor was obliged to furnish his laborers board, for which a deduction was made from their wages. The complainant sold provisions to the contractor on credit. Held, that the complainant was entitled to recover payment under the bond. McKenna, Pitney and McReynolds, JJ. dissenting. Brogan v. National Surety Co. (1918) 38 Sup. Ct. 250.

Previous decisions of the Supreme Court had given a liberal construction to the statute and to bonds given thereunder but none had gone quite so far as the present case. Dicta opposed to the decision may be found in the authorities cited in the opinion of the Circuit Court of Appeals, which the present decision reversed. See National Surety Co. v. United States (1916, C. C. A. 6th) 228 Fed. 577. But under the peculiar facts of the case, the contract being performed "in a wilderness," it is believed that food might properly be deemed material used in the construction of the work.

CRIMINAL LAW—BRIBERY IN NATIONAL ELECTIONS—LIABILITY UNDER FEDERAL STATUTES.—The defendants were indicted under section 19 of the federal Criminal Code (35 U. S. St. at L. 1092; Comp. St. 1916, sec. 10183) which denounces a conspiracy "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States." The indictments were based on alleged conspiracies to bribe voters in a national election. Held, that the conspiracies described were not within the statute. United States v. Bathgate (1918) 38 Sup. Ct. 269.

This decision both follows and supplements *United States v. Gradwell* (1916) 243 U. S. 476, 37 Sup. Ct. 407, discussed in (1917) 27 YALE LAW JOURNAL, 137, in which it was held that similar conspiracies were not indictable under section 37 of the federal Criminal Code as conspiracies "to defraud the United States." The same arguments from legislative history which determined the *Gradwell* case, leading to the conclusion that Congress had intended to leave the regulation of such elections to the states, were held to be applicable here.

EMINENT DOMAIN—Power of Condemnor to Abandon Proceedings after Award.—The plaintiff water company, acting under statutory powers conferring upon it the power to acquire land by eminent domain proceedings, instituted proceedings before the county commissioners for the condemnation of the defendant's property. After a hearing the commissioners filed their award assessing the defendant's damages and ordering the company to make payment. Thereafter the company, which had never taken possession of the premises, delivered to the defendant "a written notice of so-called abandonment and surrender" of the proceedings and the property. The defendant disregarded this notice and filed with the commissioners a petition asking them to issue a warrant of distress against the company to compel payment of the award. The company then filed a bill in equity asking that the defendant be restrained from further proceedings. Held, that the company did not have the

power to abandon the proceedings after the award of damages had been made by the commissioners. York Shore Water Co. v. Card (1917, Me.) 102 Atl. 321.

The court in its opinion recognizes that its decision is not in accord with the rule prevailing in the majority of jurisdictions, but rightly says that so much depends upon the statutory system of each state that precedents in another state are not necessarily of value. The decision is based upon the view that under the Maine system "the award of the county commissioners stood as a judgment until and unless it was appealed from." The making of the award therefore imposed a duty upon the company to pay the sum awarded, a duty which it had no power to destroy except by securing a reversal on appeal.

EVIDENCE—DYING DECLARATIONS—OPINION RULE.—At a trial for murder the following statement was admitted, "O Lord, what a pity for Frank McNeal to shoot a poor boy like me for nothing." *Held*, that the statement was inadmissible, as it was at most an exclamation of self pity. *McNeal v. State* (1917, Miss.) 76 So. 625.

The leading text-writers are in conflict over the question whether dying declarations containing expressions of opinion should be admitted. 4 Chamberlayne, Evidence, sec. 2852; 2 Wigmore, Evidence, sec. 1447. The Mississippi Supreme Court has held admissible such declarations as "killed me without any cause" and "killed him without cause." House v. State (1897) 74 Miss. 777, 21 So. 657; Jackson v. State (1908) 94 Miss. 107, 48 So. 3. The court declared that it would not extend the doctrine of these cases. For a discussion of another recent case on the subject, see (1918) 27 YALE LAW JOURNAL, 700.

Insurance—Accident—Death by Submarine.—The defendant issued a policy insuring the holder against injury caused "by external, violent, and accidental means." Injuries "from fire-arms of any kind or from explosives" were expressly excluded. The insured sailed for England in 1915 on the Arabic, and this vessel was torpedoed and sunk by a German submarine. Later the body of the insured was found, wearing a life preserver, the death having been caused by drowning. Held, that the beneficiary could recover on the policy. Woods v. Standard Acc. Ins. Co. (1918, Wis.) 166 N. W. 20.

The sinking of the vessel was of course an intentional act, although, by reason of the Act of State doctrine, neither the crew of the submarine nor the rulers of Germany could be held liable for it in a municipal court. See Comments, supra, p. 812. Nevertheless, the death may properly be held to be due to an accident of the sea as we have come to regard it. The court considers the explosion of the torpedo as a remote cause of the death and hence holds the exclusion clause of the policy not applicable. In construing a policy like this it is proper to apply a much narrower rule of causation than would be applied in the law relating to crimes or torts.

WILLS—REPUBLICATION BY CODICIL—EFFECT ON LAPSED LEGACY.—The testatrix bequeathed \$10 to her daughter. After the daughter's death a codicil was executed modifying another bequest but making no reference to the lapsed legacy. By statute lineal descendants of a legatee who predeceases the testator take the bequest given to such legatee (Cal. Civ. Code, sec. 1310). Another section of the Code (sec. 1307) gives a pretermitted heir, unless his omission appears by the will to have been intentional, a share in the estate such as he would have taken in case of intestacy. The son of the deceased daughter claimed as pretermitted heir of the testatrix. Held, that the son was entitled to share in the estate as a pretermitted heir, because republication of the will made void the legacy to the daughter then deceased, and section 1310 applied.

only to lapsed and not to void legacies. Shaw and Sloss, JJ., dissenting. In re Matthews' Estate (1917, Cal.). 169 Pac. 233.

Under similar statutes the prevailing view allows the descendant of a legatee dead when the will was made to take the bequest. Lewis v. Corbin (1907) 195 Mass. 520, 81 N. E. 248; contra, Lindsay v. Pleasants (1846) 39 N. C. 320. But even if one accepts the minority view as to the construction of such statutes, it is difficult to support the court's application of the doctrine of republication in the principal case. This doctrine should be applied to effectuate not to defeat the testator's intentions. See Izard v. Hurst (1697, Ir. Ch.) 2 Freem. 223 (adeemed legacy not revived); Gurney v. Gurney (1855, Eng. V. C.) 3 Drew. 208 (legacy to witness not rendered void); In re McCaulcy's Estate (1903) 138 Cal. 432, 71 Pac. 512 (legacy to charity not made illegal).

Workmen's Compensation Act—Who is an Employee—Officer of Corporation.—The claimant received \$50 per week for his services as secretary-treasurer of respondent corporation as well as salesman and collector of its accounts. He sustained an injury while acting in the latter capacity. He was also one of the three stockholders of the corporation. *Held*, that the mere fact that he was an officer and stockholder did not exclude him from the benefits of the Workmen's Compensation Act. *In re Raynes* (1917, Ind.) 118 N. E. 387.

On a somewhat similar state of facts the New York Court of Appeals held that the majority stockholder and president of a corporation, whose salary was \$70 per week, was not an employee within the meaning of the Workmen's Compensation Act. Bowne v. S. W. Bowne & Co. (1917) 221 N. Y. 28, 116 N. E. 364, discussed in 27 YALE LAW JOURNAL, 284. The principal case approves but distinguishes this decision. The court declares that there is no single decisive test which can be applied to the problem as to what sort of employee is entitled to compensation. The solution depends on a consideration of all the facts in each particular case, regard being had to the purposes of the legislation.

## **BOOK REVIEWS**

The Law Relating to Trading with the Enemy, together with a Consideration of the Civil Rights and Disabilities of Alien Enemies and of the Effect of War on Contracts with Alien Enemies. By Charles Henry Huberich. Published by Baker, Voorhis & Co., New York. 1918. pp. xxxii, 485.

No branch of international law in time of war is more important to the lawyer and the private individual than the rules governing the effect of war on private rights, privileges, powers and immunities. The complexity of modern business has induced a vast extension of the provisions of the common law governing commercial intercourse with the enemy.

The United States Trading with the Enemy Act, embodying many of these extensions, was approved October 6, 1917. The preface of the work under review is dated February 1, 1918, so that it would appear that this exhaustive and comprehensive commentary on the act was prepared in less than four months. The thoroughness of treatment, notwithstanding the speed of preparation, is doubtless to be ascribed to the erudition of the author and his scientific training. This type of work, an analytical commentary of the provisions of a statute, by word, phrase, clause and sentence, is less familiar to the legal profession in America than it is in Europe, where the author's long residence doubtless impressed upon him the practical utility to the practitioner of commentaries on complex statutes.

Our Trading with the Enemy Act, founded on that of England of 1914, is in large part a codification of rules of the common law prohibiting commercial intercourse with the enemy. The modifications in the common law which the English act and its later amendments introduced were founded on modern experience of the ramifications of international business. In October, 1917, the original English act had been in operation three years and had in that time received considerable judicial construction. The English precedent has also been the prototype of similar legislation and coincidental construction in the colonies. The legal materials thus afforded and the vast field of judicial interpretation under the reign of the common law (which, in the United States, prevailed prior to October 6, 1917) are drawn upon by the author in his elucidation of the provisions of the Trading with the Enemy Act of October 6, 1917. Several important topics not included within, but closely related to the statute and frequently arising in litigation under it, such as the effect of war on contracts, enemy aliens as plaintiffs and defendants, internment of enemies, the status of enemy heirs, and numerous others, are left by the act to be governed by the common law. These topics the author has discussed in what appeared to be an appropriate place in the commentary, and while logical arrangement has thus occasionally been sacrificed, no serious impediment to the use of the book thereby has been discovered.

The introduction includes an account of the Paris Economic Conference, in the resolutions of which some of the more drastic restrictions upon commercial intercourse with the enemy and his interests and affiliations had their inspiration. It also includes a discussion of the rules of international law relating to intercourse with the enemy, apart from statute, the effect of war on private persons and property, and the war legislation on trading with the enemy of the more important belligerents in the present war. Then follows an exhaustive commentary on the sections of the federal act of October 6, 1917. The author's method is to subsume under each section, analyzed into its constituent words

and phrases, the decisions of the courts under the common law and since 1914, (quoting from important decisions at considerable length and paraphrasing others), the opinions of writers (of whom there have been several who have discussed the English law on the effects of war on private business, e. g., Baty, Page, Phillipson, Scott and Trotter) and the author's own conclusions. We do not find references to the British Statutory Rules and Orders giving administrative interpretation to many provisions of the British act. The appendix contains the Presidential Order of October 12, 1917, the several British proclamations and acts now in force, the Canadian Consolidated Orders of May 2, 1916, and the latest Australian and South African acts with their amendments. Tests made in various parts of the book have satisfied the reviewer as to the accuracy of the discussion and as to the correctness of the evaluation of particular judicial decisions in their contributions to a particular doctrine, e. g., contracts of agency, the confiscation of private debts, life insurance contracts, the suspension of the running of statutes of limitation. A comprehensive index completes a work which should prove of inestimable value in the interpretation of the complicated rules of our municipal law relating to intercourse with the enemy and the effect of war on private legal relations.

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A Treatise on the Law of Personal Property. Fifth edition. By James Schouler. Published by Matthew Bender & Co., Albany. 1918. pp. xci, 886.

The fundamentals of a large part of the law of personal property are here presented in a simple and direct style. This division of the law, once neglected as being of minor importance, has now greatly developed in order to meet the needs of the modern industrial system. The author, recognizing the spacial limitations of a single-volume treatise, has necessarily omitted much detail. The contents have been chosen with great discretion and the author has succeeded well in his aim to present "principles and not details." He has the faculty of setting forth the essential elements and of recognizing the difficult problems involved. Even with the careful discrimination exercised the restrictions of space could not be entirely overcome, and he has not attempted to treat of gift, sale or bailment. The citation of authorities is by no means complete, and it is not intended that the work shall dispense with the necessity for further reference on the subject.

In the short chapter on the conflict of laws relating to personal property there is nothing added to the learning on the subject and there is no more clear nor concise statement of principles than can be found in any one of a number of available sources. The very brevity of the chapter would make it of slight use in the preparation of a case, while as a bibliography it is neither complete nor particularly enlightening. Because of the impossibility of presenting a satisfactory treatment of the conflict of laws in so small a space, it might have been better had the author merely supplied a comprehensive bibliography of this difficult subject.

The classification of personal property into corporeal chattels personal and incorporeal chattels personal, so strongly emphasized, is to be commended; yet were there an analytical discussion of the constituent elements of ownership with a lucid explanation of rights in rem and rights in personam, the reader would have a more substantial basis for the solution of such subsequent difficulties as the alienability of choses in action and the nature of a corporation shareholder's interest.

While the work is more the result of industry in stating a number of practical rules deduced from a corresponding number of leading cases than the scientific production of an analytical mind, the author has, through his insistence upon certain fundamental classifications and distinctions, developed a treatise that will prove no small aid in the acquisition of accurate concepts. And it is in this that the chief value of the work lies—as a first reference to ascertain elementary concepts and distinctions, and the larger problems involved in the various subjects embraced in the term "personal property." The many users of the prior editions of this work will find increased value in the present edition.

A Treatise on the Power of Taxation, State and Federal, in the United States.

Second edition. By Frederick N. Judson. Published by The F. H. Thomas
Law Book Co., St. Louis. 1917. pp. xxviii, 1144.

This work is a revision of the edition of 1902. There has been no change in the chapter headings or in the general arrangement of the text, but much new material has been added, including a synopsis of the tax laws of the several states and the texts of the federal tax laws, together with the war revenue measures of 1917. The whole volume has been thoroughly revised by including the decisions of the Supreme Court of the United States rendered since the first edition.

The aim of the book is "to show the limitations of the taxing power of the State and Federal Government, so far as these limitations have been declared and expounded by the Supreme Court of the United States." These decisions show the boundary lines of the taxing power where it has thus been called into question. What the states and the federal government are now taxing appears from the matter in the appendix. Since Mr. Judson is writing the text-book primarily for lawyers he does not discuss the economic or social aspects of taxation.

Seventeen of the nineteen chapters of the book deal with limitations on the taxing power of the states growing out of their constitutional relations to the federal government. Chapters XVII and XIX treat of the taxing power of Congress and of the enforcement of limitations upon federal taxation. About one-half of the book deals with the application of the limitations of the provisions of the first section of the Fourteenth Amendment to state taxation. This is a striking illustration of the rapid expansion of the Fourteenth Amendment as an instrument of federal control over state activity. No discussion of state powers, whether of taxation or otherwise, is complete without full consideration of the limitations placed upon them by "due process of law" and "equal protection of the laws." Since the first edition of this book the Supreme Court of the United States has handed down about five hundred opinions variously limiting and interpreting state action. Since a large number of these deal with questions of taxation, the need for a restatement of the case law such as Mr. Judson has made is evident.

This edition makes its appearance at a time when the problem of taxation is one of the great questions of the day. It gives to the legal profession and to the legislator a practical handbook on the powers of taxation with full references to the leading and most recent decisions defining and interpreting them. It will be welcomed by the practitioner as an authoritative presentation of one of the most complex problems of law and government.

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## HINDU LAW AND ITS INFLUENCE

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In the world-wide changes which will follow the Great War no permanent settlement can be hoped for or achieved which does not take into account the aspirations and dormant power of the teeming millions of the East. For too long a time we have accepted the opinion of those who hold that there can never be unity of thought and action between the Orient and the Occident; that "East is East, and West is West, and never the twain shall meet," instead of resolutely endeavoring to create a mutual and more sympathetic understanding. There are many modern and progressive ideas which Orientals must ultimately accept from us, but in order to arouse and foster a receptive spirit we must first recognize their high mental capacity and pay our tribute to that ancient wisdom which led the way from barbarism to settled government, and established the reign of law. When Britons roamed their forests clad in garments of skin and Teutonic tribes were concerned with little save war and tumult, the East had its legal systems, which were at once the product and the proof of a high civilization.1 Of these the most notable was that of the Brahmins, which regulated a vast territory and, with later additions, still governs the family relations of over two hundred millions of people.2 Its

¹ These consisted of the Code of Hammurabi, the Levitical laws, and the Code of Manu. In ancient Egypt

[&]quot;as almost all serious disputes arose either about land and water, or about the impaired efficiency or contentment of this or that cultivator—there being nothing else to quarrel about—justice was administered by the chief man of the district, well acquainted with local custom . . . Hence Egypt never felt the need of a general code of law." J. L. Myres, The Dawn of History, 72.

²Various widely conflicting dates have been assigned for the compilation known as the *Manava Dharma Sastra*, or Laws of Manu. Gibelin in I *Etudes* 

study is the one great avenue to a knowledge of Eastern thought, showing us both its strength and weakness, and revealing our indebtedness to ancient Aryan customs and a great religious caste for many important legal institutions.

Like the laws of Hummurabi and of Moses, all Hindu jurisprudence is held to be the revealed will of the Omnipotent.3 Thus to the Creator is ascribed the formation of the constitution and the division of the people into four great classes. "From the mouth of Brahma proceeded the Brahmanas," the highest or priestly caste, together with the Vedas or sacred books which it was their duty to expound; "from his arms Kshtriyas sprung," second in rank, charged with the duty of bearing arms and the defense of the faithful; "from his thigh Vaisyas," esteemed third in honor and intrusted with the economic duties of commerce and of agriculture; last and lowliest "from his foot Sudras were produced," to perform servile attendance upon the higher orders; all of these "with their females." Members of the three first castes, being of the fair-skinned Aryan stock, were entitled to participate in all Vedic worship and sacrifices; to the Kshtriyas was allowed the Rakshasa,* or marriage by capture, which was imitated by the Romans in their rape of the Sabines, but the swarthy Sudras, composed of the alien peoples who had been conquered in the descent from the northern mountains to the southern plains, were excluded from intermarriage with members of the higher castes, and from all sacred worship whatsoever. Dire was the penalty if one overheard even by accident a Brahmin chanting his devotions.⁵ Each class acknowledged

sur le droit civil des Hindous, x, says that after transmission from age to age by oral tradition, they were reduced to writing in the thirteenth century before our era; this is also the opinion of Sir William Jones. Schlegel places the antiquity of the code at about ten centuries before Christ; Professor Wilson thinks it appeared about the end of the third or commencement of the second century B. C., while other authorities give it a later date. There is, however, a consensus of opinion that the Book of Manu embodies many Hindu customs dating back to remote times, and Vrihaspati declares that it expresses "the whole sense of the Veda." Other works attributed to various ancient sages were added to that of Manu, and form the Institutes of the Sacred Law which were accepted by the British Government after the conquest as authoritative and to be followed in all matters in which Hindus were concerned. Some changes have since been made, notably in criminal law, civil procedure, evidence and contracts, but the old laws and customs regulating family relations, etc., are still in force. See Bryce, Studies in History and Jurisprudence, 97-113.

³ I Colebrooke, Digest of Hindu Law (3d ed.) 12, n.

'This form of marriage is now obsolete, and would in the present day be dealt with by the criminal law. Trevelyan, *Hindu Law*, 52.

⁶ Should a Sudra dare raise his eyes to an Aryan woman, the law declared that he might be slain or mutilated. If he listened to a recitation of the Vedic texts, his ears were to be filled with molten lac or tin; if he repeated the sacred words his tongue was to be cut out; if he remembered them, "his body shall be split in twain." Fraser, A Literary History of India, 153, citing Gautama, xii, 6.

the superiority of the one above it; "Kshatras bowed to holy Brahmans, and Vaisyas to the Kshatras bowed,"6 while the penalty of illicit marriages between members of a higher order and those of a lower one was loss of status to the offspring, this giving rise to a multitude of new and inferior castes. "Those races," declares Manu, "which originate in the confusion of the castes, and have been described according to their fathers and mothers, may be known by their occupations." As a gardener protects his choice varieties from admixture with inferior strains, so the Brahmins sought to maintain untainted their class distinctions. Travel beyond "the sacrificial country" into foreign lands was forbidden to the three first castes8 in order to prevent the contaminating influence of alien thought and of pollution through mere contact with men outside the pale, who were considered as unclean and degraded. "He commits sin through his feet who travels to the country of the Kalingas."9 In vain the Buddhists strove to break through these great barriers which separated race from race and caste from caste, upon which the Aryans relied for the continuation of their power. "No pride of conquering race, or pride of white-skinned birth could run higher than it did in India two thousand years ago."10

Such was the organization of the great Brahminic stronghold, self-centered and exclusive, foredoomed to decay because it shut out all new light and barred the path to progress. At one time there was grave danger that its doctrine of the divine distinction of classes would dominate the West, for it was accepted by both the founders of Greece and of Rome. The latter placed the plebeians, conquered and alien, in exactly the same position as the Indian Sudras. They had no political rights, were forbidden to intermarry with patricians, and were denied the jus sacrum. Had the plebs been contented to accept this abasement as the will of Heaven their position would have remained as hopeless as that of the Sudras, but they rejected the idea that God

⁶ The Ramayana (transl. by Romesh C. Dutt) bk. 1, pt. 1.

[&]quot;The caste system in the present day very largely turns on occupation, and the tendency is to form smaller and smaller endogamous groups . . . Below the high castes there is an immense array of lower castes. The census enumerates over 2300 minor castes." Holderness, Peoples & Problems of India, 96-99.

⁸ The Sudra in quest of a living might adopt any country as his own. 5 Sacred Books of the East, 33.

^o Ibid. 260. "Down to to-day no Brahman can dwell among the nations of the West without risk of forfeiting his social rank, or without being obliged to perform costly and irksome penances on his return home." Fraser, 156.

¹⁰ Fraser, 153.

¹¹ I Maynz, Cours de droit Romain, 21.

¹² "The religion of Rome was intimately connected with the civil polity... The mere fact of birth in one of the familiae forming part of a gens gave admittance to a sacred circle which was closed to all besides." Sandars, The Institutes of Justinian (8th ed.) x.

had ordained some to be born to perpetual power and others to everlasting subjection. They came to look upon class distinction as a very human institution, and as such, subject to criticism and to change. After a long and bitter struggle their contentions prevailed and doors were opened for the advancement of the ambitious. During the feudal period the struggle to maintain distinctions of rank was renewed throughout Europe, and we still have the caste of royalty, as well as legislative bodies whose members owe their privileges to the accident of birth, but the Eastern doctrine of divine appointment has been replaced in the West by the maxim vox populi, vox dei.

The Hindu sages were not unmindful of the fact that superior station, coupled with great power, ever go hand in hand with oppression and injustice, but these evils they believed had been overcome, and the rights of the humblest protected by divine care, for

"God, having created the four classes, had not yet completed his work; but, in addition to it, lest the royal and military class should become insupportable through their power and ferocity, he produced the transcendent body of law; since law is the king of kings, far more powerful and rigid than they; nothing can be mightier than law, by whose aid, as by that of the highest monarch, even the weak may prevail over the strong." ¹³

In these Sacred Institutions man is revealed as a lost soul and all his efforts here are to be directed to his future redemption. He has been cast down from Heaven and must strive to regain his place on High. Without thought of personal pleasure or power or glory, every moment of his earthly life must be centered on this great aim, which is his debt here below. Only, because one span of human existence is too short, it is impossible to pay it in full. But what a man cannot accomplish in his lifetime, his descendants by the continuity of their sacrifices may achieve for him after death, and three generations are necessary to attain this desired end. The prayers and offerings of those left behind assist him in his upward progression, and lead him at last to immortality. "As the suspended water-pot matures the pippala tree, so a father, a grandfather, and a great-grandfather cherish a son from the moment of his birth." No principle has so

¹³ Gloss of Sancara on the Veda (transl. by Sir William Jones), cited in I Colebrooke, Digest of Hindu Law, xiv.

[&]quot;I Gibelin, xxi. "The Hindu law imposes upon a son and grandson the duty of paying the debts of his father and paternal grandfather from whom he has not separated, provided they have not been incurred for immoral or illegal purposes, or are barred by the law of limitation. As, according to Hindu ideas a man and his three male paternal ancestors are the same person in different bodies, there would be a similar liability to pay the debts of a great-grandfather, but by a special rule of limitation the liability does not extend beyond the grandson." Trevelyan, 294, citing, I Colebrooke, Digest, 267, 334.

¹⁵ Digest of Hindu Law, bk. 5, ch. 2, § 80.

affected the progress of the East as this strange doctrine inculcated by the Brahmins under supposed divine inspiration. To ensure the necessary male descendants to assist in the salvation of ancestors it became necessary to encourage child marriages, to sanction the legal fiction that a son adopted was a real son, and to legalize polygamy.

The same cause, however, led to a nobler result—the elevation of marriage to a sacrament, and its recognition as the union of two persons for the purpose of carrying out the divine mission. The great epic of Rama, treasured and revered by each successive generation of Hindus, gives a delightfully vivid account of the Brahminic rites.¹⁶ These were most impressive: the bridal couple stood within the sacred ring, the father gave away the bride, the holy water was sprinkled upon "the blest and wedded pair." Then the future consorts verbally plighted their troth, holy texts were recited, hand in hand they walked around the sacred fire, and on taking the seventh step they became husband and wife. To western ears there is a familiar sound in the words spoken by Janak as he gave his daughter to Rama to be "of his weal and woe partaker," to be cherished by him "in joy and sorrow," and to remain steadfast to him unto death. Then, as with us, there was a wedding feast to which kinsmen and friends were invited, gifts were bestowed, "bright Gandharvas skilled in music waked the sweet celestial song," and flowers were thrown upon the happy pair. There is evidence that these marriage rites were transmitted through Greece to Rome, for a passage in the Digest of Justinian shows that at one time the acceptance of the bride by water and by fire was customary.¹⁷ On the fifth day after the birth of a child the rite of purification was performed. A woman took the babe in her arms, and followed by all the occupants of the house, walked several times around the fire which burned on the altar—a practice which was also adopted by the Greeks. In both nations, from the tenth to the twelfth day in India and between the seventh and the tenth day in Greece, they proceeded with the same solemnity to give a name to the child in the presence of friends and kinsmen. The father's declaration was accompanied by a sacrifice, followed by a feast.¹⁸ All this is very like our modern ceremonies of baptism and christening.

If there was no male issue, woeful was the result, for "heaven is not for him who leaves no male progeny.' Enemies therefore pronounce this curse, 'May they be childless, and become evil spirits!'" For this reason Manu decreed that "a barren wife may be superseded

¹⁶ Ramayana, bk. I, pt. vi. See also Digest of Hindu Law, bk. 4, ch. 4, §§ 166, 174, 175.

[&]quot;Virgini in hortos deductae die nuptiarum priusquam ad eum transiret et priusquam aqua et igne acciperetur id est nuptiae celebrantur . . . obtulit dicem aureos dono. Dig. leg. 66, 1, de don. int. vir et ux.

¹⁸ I Gibelin, 51.

¹⁹ Digest of Hindu Law, bk. 5, ch. 4, § 311.

by another in the eighth year; she whose children are all dead, in the tenth; she who brings forth only daughters, in the eleventh."20 It was only upon such failure of the heir so necessary to future salvation that in the early days the husband of a virtuous woman was allowed to take a second wife, for the first Hindu lawgiver expressly ordains "let not a man contract another marriage, unless he do so on the loss of his wife or son,"21 but "'let mutual fidelity continue till death:' this, in few words, may be considered as the supreme law between husband and wife."22 Later sages recognized plural marriages, which are still lawful,23 and a Hindu may at his pleasure marry any number of wives, although he has a wife or wives living, but the ardent desire of the early Brahmins to foster monogamy is shown by their provision for the relief of childless persons by the recognition of twelve different kinds of sons, and their eager acceptance of the fiction that a son adopted becomes as a real son, and his funeral offerings are just as efficacious for salvation.24 Certain conditions were prescribed for its validity.25 The child adopted must not be of another primary caste, nor of the female sex, nor have been marked for his own family through the ceremony of tonsure, nor be an only son,20 since in the latter case he was charged with the obligation of rescuing his own ancestors, nor could a woman take to herself a child in adoption. The ceremony of initiation was public and sacramental. "He who means to adopt a son, must assemble his kinsmen, give humble notice to the king, and then, having made an oblation to fire with words from the Veda, in the midst of his dwelling house, he may receive, as his son by adoption, a boy, nearly allied to him, or, on failure of such, even one remotely allied."27 The ceremony of tonsure

²⁰ Ibid. bk. 4, ch. 1, § 70.

²¹ Ibid. § 71.

²² *Ibid*. bk. 4, ch. 4, § 190.

²³ A Hindu at his pleasure may marry any number of wives, although he has a wife or wives living. Trevelyan, 32. The restriction as to number of wives among the Mahommedans of India has its origin in Hebrew custom, Mahomet having been guided on this question by the decision of Jewish doctors. Sale, *Preliminary Discourse on the Koran*, s. vi.

²⁴ "A son of any description should be anxiously adopted by one who has no male issue, for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name." Digest of Hindu Law, bk. 5, ch. 4, § 312.

²⁵ Ibid. §§ 183, 273.

²⁶ The question as to whether the precept prohibiting the adoption of an only son was a moral injunction or a positive law was long disputed, but was settled in 1899 when the Judicial Committee of the Privy Council, in the case of Sri Balusu Gurulingaswami v. Ramalakshmamma, L. R. 26 Indian App. 113, held that it was only directory.

To Digest of Hindu Law, bk. 5, ch. 4, § 273. The text which prescribes the adoption of a sapinda, or relative, is only a religious injunction, but the prohibitions as to difference of caste and as to adoption by women have been held to be positive laws. See Trevelyan, 107, 132, 133, and cases there cited.

completed his dedication to his new family.28 It is interesting to note the wide influence of these provisions of the Hindu law. They spread to China where the continuity of the family is also held to be of supreme importance and the same preference for the children of kinsmen is declared,29 and through China to Japan.30 Greece adopted them also from a belief in the same imperative need of a father "to have a son to perform at the tomb the sacred ceremonies, perpetuate his race, and transmit his name by an uninterrupted chain of descendants, and so confer upon him immortality." The Franks must have been cognizant of the Hindu institution and the rites accompanying it, for Luitprand in adopting Pepin performed the ceremony of tonsure,31 and there is absolute evidence that the Hindu law was the foundation of the Roman law of adoption, through which it has become a part of the civil law of Europe. The custom prevailed among the Babylonians in the time of Hammurabi but was entirely different in its nature and effects. It was not the unbreakable tie of the Hindus, and provision was made for a return of the adopted boy to his father's house if he proved rebellious, if his adopter did not teach him his handicraft, or if he failed to reckon him among his sons;32 whereas in Rome, as in India, an adopted son became as a son born in marriage, women could not adopt,35 and the arrogation of those sui juris was of a public character. It was considered a matter of public policy to keep a watch over such a proceeding lest the last of his gens should arrogate himself and its sacra be lost, and the approval of the comitia curiata was never granted if there was any likelihood of the sacred rites of the family of the person to be adopted becoming extinct by his departure from it.34 Still stronger proof of Hindu origin is afforded by the peculiar provision of the Roman law which allowed a man to adopt a grandchild by an undetermined son (nepos quasi ex filio incerto), the reason for which has given rise to much speculation among commentators. Professor Maynz thought it might be found in the difference which existed between the legal position of a son and grandson, but he admits that these differences were so unimportant in the time of the classic jurisconsults that they do not suffice to explain in a satisfactory manner the maintenance of the custom.³⁵ A similar provision, however, may be found in the Code of Manu to meet the case of a man who had a daughter, but no son. Under such circumstances the father might provide for the necessary male

²⁸ Digest of Hindu Law, bk. 5, ch. 4, § 182.

²⁹ Alabaster, Notes & Commentaries on Chinese Criminal Law, 168.

[∞] The laws of Iyeyas, Dickson, Japan, 202.

³¹ Michelet, Origines du droit français, 11-13.

²² Code of Hammurabi (transl. by Harper) art. 186, 189, 190.

^{**} Feminae nullo modo adoptare possunt, Gaius, I, 104.

⁵⁴ Sandars, Institutes of Justinian, xi, 41.

^{35 3} Maynz, 88, 22, n.

descendant by declaring that he adopted as his own son the child which might be born to his daughter when she married. "He who has no son may appoint his daughter in this manner to raise up a son for him, saying: 'the male child who shall be born from her in wedlock, shall be mine for the purpose of performing my obsequies.'"³⁶ Here we have the parallel case of the adoption of a child by a son as yet unknown, which seems to establish beyond doubt the origin of a custom so peculiar and artificial.

Another device for the assurance of male representatives was the practice of *niyoga*, by which a kinsman was appointed to raise up issue by the wife of a childless husband, or of one deceased without leaving sons. Mr. Iyer is of opinion that this was a custom prevalent among the aborigines of India at the time of the Aryan invasion, and therefore of great antiquity.37 The Brahmins regarded this form of sonship as immoral, but it had taken such deep root in the conquered territory that they were compelled not only to recognize it, but to enforce it. The Levirate law also decreed this form of union in the case of childless widows "in order," says Josephus, "that families may not fail and the estate may continue among the kindred."38 The Hebrews, however, did not sanction the appointment of a brother during the lifetime of the husband, and the Greek law of Solon³⁹ permitting this practice seems therefore to be of Indian origin. So strong was the opposition of the priestly Hindu caste to niyoga that the custom gradually declined, and has long been obsolete in India except among the Jats and the Lohd caste in the northwest. This result redounds to the honor of the Brahmins, who, though desiring above all things to ensure male representation of each family, scorned a practice which appealed to them as unworthy.

With the assurance of one degree of male descent the Hindu father had performed only his first duty. The next was to secure the necessary grandson, and this impelling cause led to that custom of child marriage which has had such a blighting effect upon India. The evils arising from the union of young boys and girls were never contemplated by the law of Manu, which contains provisions directed to the perpetuation of a race endowed with the highest physical and moral qualities. To ensure mental excellence, men of the higher ranks were enjoined to espouse only women of the same caste as them-

³⁰ Digest of Hindu Law, bk. 5, ch. 4, § 212.

³¹ Iyer, Hindu Law, 34. The practice is referred to in the Ramayana, bk. vi, pt. iv, where Sita charges Lakshman with looking upon his brother Rama's danger "with a cold and callous heart," and asks "Seekest thou the death of elder to enforce his widow's hand?"

⁵⁸ Josephus, Antiquities of the Jews (transl. by Whiston) bk. iv, ch. 8. In China a man may not marry his deceased brother's wife under penalty of death. Alabaster, 179.

^{*} Plutarch's Lives, Solon.

selves, a spirit of religious reverence was fostered by the denial of selection from any family which omitted prescribed acts of religion or in which the Veda had not been read, while the physical requirements were the strictest known to any system of law. Not only must there be freedom from any hereditary disease; there must be perfection of form and of disposition to a degree bordering upon the impossible. The bride must not be "very fat or very lean, nor very tall nor very short," nor must she be older than the bridegroom. Further, says Manu, "let him not marry a girl with reddish hair, . . . nor one immoderately talkative." As to the future husband, "It is better that the damsel, though marriageable, should stay at home till her death, than that he [her father] should ever give her to a bridegroom void of excellent qualities."

If a father learned after marriage that he had been deceived as to the essential qualities of the bridegroom, the law provided a remedy. "From a man of contemptible birth, from an eunuch or the like, from a degraded man, from one afflicted with epilepsy, vicious, or tainted with shocking diseases, . . . a parent may take back a damsel, though given away; and so may he one married to a man known from his family name to be sprung from the same primitive stock."42 On the other hand, "if a man give a faulty damsel in marriage, without disclosing her blemish, the husband may annul that act of her illminded giver."43 Fraud and lack of free consent also gave rise to a right of annulment. According to Vasishta,44 "If a damsel has been abducted by force, and not been wedded with sacred texts, she may lawfully be given to another man." The decrees of the ancient sages as to moral and physical fitness are now held to be merely directory, and not to possess the force of legal injunctions.45 Owing to later custom which regards the marriage of every person as imperative. whatever his defects, the Hindu writers greatly restricted the causes for pronouncing invalid a union which has been completed by the saptapathi.46 In the case of Dabychurn Mitter v. Radachurn Mitter.47 the first question put to the Pundits by the Calcutta Supreme Court was "By the Hindu law, is the marriage of a lunatic by consent of his family, binding?" The answer was: "The marriage of a lunatic a

Digest of Hindu Law, bk. 4, ch. 4, § 185.

⁴¹ Ibid. § 179.

¹² Ibid. § 178.

⁴⁸ Ibid. § 184.

[&]quot;14 Sacred Books of the East, 92.

⁴⁵ Iyer, 438.

^{*} Ibid. 436. The saptapathi is the seventh step around the sacred fire.

[&]quot;(1817) 2 Morley's Dig. 99. Unsoundness of mind does not invalidate a marriage, says Trevelyan (p. 30) and he cites the dictum of the Judicial Committee of the Privy Council in Mouji Lal v. Chandrabati Kumari (1911) L. R. 38 Indian App. 122, 125: "To put it at the highest, the objection to a marriage on the ground of mental incapacity must depend on a question of degree."

nativiti is immoral, but valid with the consent of parents. The marriage of one who becomes a lunatic after his birth and during his lunacy is valid." The court relying upon this opinion gave judgment accordingly. Although there have been no decided cases, it is believed that persons suffering from any physical disability, no matter how serious, would also be held competent to marry, 48 but fraud and force, 49 marriage within the prohibited degrees, 50 and marriage out of primary caste, 51 are still considered as insuperable obstacles. If a Hindu marries abroad, however, he cannot invoke the law as to caste to invalidate his action, and the union is regarded as binding both in the country of celebration and in India. 52 It is apparent that the intense desire that every person should have offspring caused a regrettable departure from the ancient law of Manu, which contained principles of prohibition which have found acceptance, with modifications suited to time and place, in many modern codes and systems.

India also affords the noblest example of those domestic communities which form so striking a feature of early law. The power of the Hindu father as head of the household was not the unbridled, tyrannic sway of the Roman pater-familias, but the benignant control of a person in whom the great trust was reposed of raising a family worthy to perform the sacrifices needed for redemption. If he alone directed, it was because experience had brought him greater wisdom; his hand was raised, not in anger, but to remedy some defect. His duties were as great as his rights, and stern was the punishment both here and hereafter if he failed to clothe and nourish his dependents. "The ample support of those who are entitled to maintenance, is rewarded with bliss in heaven; but hell is the portion of that man whose family is afflicted with pain by his neglect: therefore let him maintain his family with the utmost care," says Manu.53 If he illtreated his wife or daughters beyond endurance, they might invoke a curse upon him, and "on whatever houses the women of a family, not being duly honoured, pronounced an imprecation, those houses, with all that belong to them, utterly perish."54 All the property of the community must be used for the common good. If a husband consumed the property of his wife against her consent, he was compelled to pay interest to her and a fine to the king,55 and it was only at a time of distress, for the support of his household or for the performance of

⁴⁸ Iyer, 437.

Trevelyan, 47.

⁵⁰ Ibid. 42.

⁶¹ Trevelyan, 34, and authorities there cited. But marriage between persons belonging to different subdivisions of the same primary caste is valid. Ramamani Ammal v. Kulanthai Natchear (1871) 14 Moore Indian App. 346.

⁵² Chetti v. Chetti [1909] P. 67. And see Iyer, 404, 408.

Digest of Hindu Law, bk. 2, ch. 4, § 11.

⁵⁴ *Ibid*. bk. 4, ch. 1, § 39.

⁵⁵ Ibid. bk. 2, ch. 4, § 10.

religious duties, that he could mortgage or sell any of the immovable property.⁵⁸ Nor could he even dispose of movables until the necessities of his wife and children were provided for. "The giver of more, who leaves his family naked and unfed, may taste honey at first, but shall afterwards find it poison."57 Over his sons he had almost complete control, but not that absolute power vested in the early Roman bater. Under both systems the son, whatever his age and even if married, was in a state of perpetual tutelage, and parental control ceased only on the natural or civil death of the father, his becoming incapable of administering his affairs, or by voluntary emancipation. In Rome at the time of the Twelve Table (No. 4), a father might sell his children or expose them or even put them to death, but time ameliorated this condition until, like the Hindu father, he was restricted to a right of mild correction and could sell his offspring only in cases of extreme necessity in order to save both from privation.58 Here the parallel ceases, for the Roman pater could dispose of all the earnings and property of a son as he pleased, whereas there was certain ancestral property in which the son inherited a joint interest which the Hindu father could not alienate. 59 Moreover, the moral training of his boys which the Roman father might neglect without fear, was to the Hindu a matter of supreme importance. In the person of his offspring he was enjoined "figuratively [to] address his own soul."60 The child was considered as part of himself. If his son proved worthy, great was the father's reward in the hereafter:

"He who has a son pure, capable and virtuous in the first period of life, and perfected by the correction of his own defects, transports his ancestors over the abyss of death," but if the boy became degraded, terrible was the result.

degraded, terrible was the result.

"As a man would be drowned who attempted to pass deep water in a boat made of woven reeds, so does a father sink in the gloom of

death, who leaves only contemptible sons."62

This Brahminic doctrine that the sins of the children are visited upon the fathers stands alone in its compelling responsibility for their proper upbringing.

The Hindu parent might also inflict corporal chastisement on his wife or daughters, but as in the case of the son, the instruments of punishment were limited to "a rope or small shoot of cane" applied

⁵⁶ Ibid. § 55.

⁵⁷ Ibid. § 18.

⁵⁸ Sandars, 29.

Digest of Hindu Law, bk. 2, ch. 4, § 31.

[∞] *Ibid*. bk. 5, ch. 4, § 197.

⁶¹ Ibid. § 307.

[∞] Ibid. bk. 5, ch. 5, § 314.

[∞] *Ibid*. bk. 3, ch. 1, § 11.

on the back above the waist. Furthermore, by a maxim of almost universal acceptance he was abjured to "strike not, even with a blossom, a wife guilty of a hundred faults." But although women must be treated with kindness and consideration they were allowed no rights, "as the shadow to the substance, to her lord is faithful wife," and next to the evils of caste and the curse of child marriages, their subordinate position is the cause of the decadence of India. "A son is a light in heaven, a daughter but an object of compassion." At the birth of the latter there were no ceremonies with the recital of holy texts, and throughout their lives they were forbidden to study the Veda. Nothing could be done according to their mere pleasure, and their smallest duties—even domestic ones—were prescribed by law. They were also doomed to perpetual tutelage, for in the estimation of the Hindu sages women and weakness were synonymous terms:

"In childhood must a female be dependent upon her father; in youth, on her husband; her lord being dead, on her son; if she have no sons, on the nearest kinsmen of her husband; if he left no kinsmen, on those of her father; if she have no paternal kinsmen, on the sovereign: a woman must never seek independence." ⁶⁷

In this matter also Roman custom followed that of the Hindus. In Babylon during the period of Hammurabi great privileges had been granted to women, and in the commercial world they appear to have been on an equality with men, while the Romans, who drew so largely from India, through Greece, also adopted the principle of perpetual guardianship for women, 68 and it was not until after the time of Gaius that it disappeared and the equality of the sexes was conceded. This legal recognition of the rights of women, Rome was unable to transmit in its entirety. Both the canon law and the customary law for widely different reasons rejected equality, and as their influence proved the stronger upon the law of modern Europe, the wife was again placed in subjection; not to her blood relations but to her husband.69 It is only in India that the system of constant guardianship survives,70

^{84 2} Ibid. 4, n.

⁶⁵ Ramayana, bk. I, pt. vi.

⁶⁶ Digest of Hindu Law, bk. 4, ch. 1, § 25.

⁶⁷ Ibid. § 86.

⁶⁸ Livy, bk. 34, ch. 2. Majores nostri nullani, ne privatum quidem rem agere faeminas sine auctore, voluerunt: in manu esse parentum, fratrum, virorum.

⁶⁹ Maine, Ancient Law (10th ed.) 154.

To From the western point of view the whole position of women in India is wrong. But the West is not the East, and the conservative Hindu will probably say that as things are in the East, the caste system with its doctrine that every woman should always be under male guardianship, makes for the security of the family. The perpetuation of the family and the purity of its blood are the root ideas of Hinduism. It is impossible to judge the institution of caste fairly unless the Hindu position is understood. Holderness, 104.

and we have also to look to the East for those special reasons for which a wife might be superseded or forsaken, which seem so frivolous and inadequate to western nations. To understand their origin and significance it must be borne in mind that the thought dominating the Brahmins is the detachment of the individual from the things of this world. The future of those who have died is the only interest worthy the attention of the living; to assure happiness in heaven the great and only duty. As the consorts are to dwell together in the eternal mansions, there must be no discord here below, and she who spoke unkindly to her husband might be superseded by another wife.71 Because the Deities will not admit a woman addicted to intoxicating liquors into the same abode with her lord, this is also a great offense.72 Disease, which is believed to be a punishment for some grave sin committed in a previous existence, was also a sufficient reason for supersession.73 Barrenness, as a failure in the duty to provide the son necessary for salvation, entailed the same penalty,74 while abortion. destroying all hope for the future, rendered the wife infamous.75 Divorce is practically unknown to the Hindu law,76 but for all the above reasons a man might take unto himself another wife.77 The ancestral worship of the Chinese caused them to adopt these peculiar grounds in their entirety,78 but as only one lawful wife is permitted in that country⁷⁹ the penalty was divorce and not supersession. The Hindu law forbidding a wife from beholding sports and dances or attending crowded spectacles or jubilees in the absence of her husband, is reflected in the present law of Greece, which, unchanged throughout the centuries, still allows a right of divorce to the man whose consort has without his knowledge attended races, theatres, or sports.80

¹¹ Digest of Hindu Law, bk. 4, ch. 1, § 70.

⁷² Ibid. bk. 4, ch. 1, § 68.

¹⁸ Ibid. § 67.

⁷⁴ Ibid. § 70.

[™] Ibid. § 63.

⁷⁶ It is, however, allowed by custom in certain localities and among certain low castes. Trevelyan, 59. As to recognition of established customs contrary to the general law, the Judicial Committee of the Privy Council said:

[&]quot;The duty of a European judge who is under the obligation to administer Hindu Law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage." The Collector of Madura v. Moottoo Ramalinga Sathupathy (1868) 12 Moore Indian App. 397, 436.

The According to the Hindu law as now administered by courts, a Hindu may have as many wives as he chooses, and it is not necessary that before taking a second wife there should be any justifying cause referred to in the Sanskrit writings. Iyer, 413.

⁷⁸ Alabaster, 184.

[™] Ibid. 171.

⁸⁰ British Parl. Rep. on Laws of Marriage & Divorce in Foreign Countries (1892) pt. 2, p. 77.

ancient nations were agreed in regarding adultery as a heinous offense. If the wife of a Hindu proves unfaithful, "the honor of the family is forfeited, if that be lost the pure succession of progeny is lost; through that loss the sacraments of Deities and of manes are destroyed; these sacraments being destroyed duty fails; duty failing, the husband's soul is lost, and his soul being lost, everything is lost."81 Such a woman must either be forsaken or be subject to penance and mortification, but in an age when among other nations the penalty for this transgression was death in a cruel form, Manu ordained that she must neither be slain nor mutilated. If she remained in the same house with her husband it was a continuous penance, "her hair shall be shaved, she shall have to lie on a low couch, receive bad food and bad clothing, and the removal of the sweepings shall be assigned to her as her occupation."82 She can still claim shelter and what is known as "starving maintenance," that is, just sufficient food and raiment to support life.83 In the case of Honamma v. Timannabhat,84 the learned judges observed "the reason why bare food and raiment are directed by the Hindu sages to be given to an unchaste woman is that she may have a locus penitentia and that she may not be compelled by sheer necessity to live a life of shame and misery." A woman may, in turn, forsake a husband guilty of adultery or illtreatment, and in such case according to the texts she will be entitled to receive one-third of her husband's property for maintenance.85 But, while her husband may marry as often as he pleases, the only ground upon which she can break a marriage tie and contract a second union is that of repudiation or desertion by her husband on account of her conversion to Christianity; then, by The Native Converts Dissolution Act of 1866 she is granted special rights of divorce and remarriage. In all other cases her only remedy is to obtain a decree for judicial separation.86

Before the practice of *suttee* was abolished by the East India Company, the wife could assure her future happiness upon the death of her husband by ascending the same funeral pyre with his body. Moreover, by this act of devotion she expiated the sins of three generations on both the paternal and maternal sides of the family to which

⁸¹ Digest of Hindu Law, bk. 4, ch. 1, § 8.

²³ Sacred Books of the East, 183.

^{**} The jurisprudence on this point is still unsettled, but in *Parami v. Mahadevi* (1909) I. L. R. 34 Bombay, 278, 283, it was said:

[&]quot;A general rule to be gathered from the texts is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life he is bound to keep her in the house under restraint, and provide her with food and raiment just sufficient to support life. She is entitled to no other right."

 ⁸⁴ (1877) I. L. R. 1 Bombay, 559.
 ⁸⁵ Iyer, 543 and texts there cited.

³⁶ A Hindu woman who having a husband living, goes through a form of marriage with another, is guilty of bigamy, and punishable under section 494 of the Indian Penal Code.

she was united by marriage. Even though her consort had slain a priest, or returned evil for good, or killed an intimate friend, her sacrifice atoned for these crimes; "so does she draw her husband from hell and ascend to heaven by the power of devotion," there to remain in perfect bliss as long as fourteen Indras reign.87 Chinese widows in order that they might not be separated from their dead husbands often followed the same course, but burning was replaced by a ceremonial hanging, which was usually graced by the attendance of a government official and the sacrifice commemorated by a monument erected at the public expense;88 but the practice is declining. If the Hindu widow did not practice suttee, she was expected to remain faithful to her deceased husband and not to remarry. "Once is the partition of an inheritance made; once is a damsel given in marriage" declares Manu, and this was the law at the commencement of British rule. By The Hindu Widow Remarriage Act, passed by the Legislative Council of India in 1856, all legal obstacles were removed and it was provided that

"no marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding."

The present existence of millions of child widows in India, however, shows how closely they still adhere to their ancient law.

In these provisions governing caste and family relations, founded upon peculiar religious beliefs, there is much that is altogether alien to Western minds, but when we turn to other departments of jurisprudence it at once becomes evident that the ancient lawgivers of India were both practical and scientific, and we begin to realize something of their wonderful mentality. Where their decrees are not based upon the law of nature they are inspired by the highest human wisdom. Their laws for the protection of the people against the greed or craft of unscrupulous traders remain a model for all time. Faced with present-day needs, the West has evolved nothing better in food control than the ancient practice of the Brahmins:

"Once in five nights, or at the close of every half month, or of every month, according to the nature of the commodities, let the king make a regulation for market prices, in the presence of those experienced men [the traders]."90

⁸¹ Digest of Hindu Law, bk. 4, ch. 3, §§ 123, 125.

⁸⁵ Douglas, China, 130 et seq.

^{**} Digest of Hindu Law, bk. 5, ch. 5, § 252. There are, however, contradictory texts in Manu, but Yajnawalkya is most explicit in his prohibition. See Iyer,

[∞] Digest of Hindu Law, bk. 3, ch. 3, § 48.

"Adding the incidental charges to the first cost of the commodity, let a price be fixed that shall be equitable both to the buyer and the seller." 91

In early Rome also, the state showed the greatest solicitude in the food supply of the people and by various measures kept the price of cereals at a low rate. Very often the government sold wheat below its cost price. They also, by the *lex Julia de Annona*, prohibited combinations for raising the market price of provisions, while in China it is decreed that any person who unduly depresses or raises prices to gain personal advantage incurs the penalty of eighty blows, and undue profit derived therefrom is treated as theft. The Hindus grappled with the same problem and the sages ordained that:

"The fine on traders who combined to obtain or to vend goods at

wrong prices, is fixed at the highest amercement."94

"The highest amercement is directed for traders combining to maintain the price against labourers and artisans, although acquainted with the rise or fall of the price." 95

Just weight and measure must be given:

"He who falsifies scales, market rates, measures, or standard coins, and he who uses them, shall both be forced to pay the highest americament." ⁹⁸

"He who cheats in weights or measures to the amount of an eighth part, shall be forced to pay a fine of two hundred panas, and proportionably if the fraud be greater or less." 97

Pure food laws were also established:

"A man who adulterates vendible property, such as drugs, oil, salt, perfumes, grain, sugar, or the like, shall be compelled to pay sixteen panas."98

Trade deception was a crime:

"The fine for disguising the nature of earth, leather, beads, thread, iron, wood, bark, and cloth, is eight times the amount of the sale."99

Nor must there be concealment of defects in merchandise:

"The dishonest man, who sells a commodity knowing its blemish, but not disclosing it, shall pay double the price of it to the vendee, and a fine of equal amount to the king." 100

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91 Ibid. § 50.
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²² I Maynz, 91, 26, n, and laws there cited.

¹⁸ Alabaster, 545.

Digest of Hindu Law, bk. 3, ch. 3, § 46.

⁹⁵ Ibid. § 45.

[™] Ibid. § 39.

⁸⁷ Ibid. § 41.

^{**} Ibid. § 42.

⁸⁹ Ibid. § 43.

¹⁰⁰ Ibid. § 31.

Nareda sums up the whole duty of a trader:

"Let him not act crookedly; the straight path is the best in all mercantile business." 181

In levying taxes for the purpose of raising revenue, the king is counselled by Manu to be just and moderate: 102

"2. After full consideration, let a king levy those taxes continually in his dominions, that both he and the merchant may receive a just compensation for their several acts.

"3. As the leech, the suckling calf, and the bee, take their natural food by little and little, thus must a king draw from his dominions an

annual revenue."

"II. Let the king order a mere trifle to be paid, in the name of the annual tax, by the meaner inhabitants of his realm, who subsist by petty traffick."

"13. Let him not cut up his own root by taking no revenue, nor the root of other men by excess of covetousness; for, by cutting up his own root and theirs he makes both himself and them wretched."

Parasara expresses the same idea:

"Let the king gather blossom after blossom, like the florist in the garden; and not extirpate the plant, like a burner of charcoal." 108

In the endeavor to find a method of taxation which would be least burdensome, the Hindu sages adopted the plan of levying duties on inheritances, a means of obtaining revenue which has found great favor among modern nations. Vrihaspati says: "Let the king receive a sixth part from the property of a Sudra; a ninth from that of a Vaisya, a twelfth from that of a Cshatriya, a twentieth from that of a Brahmana."104 The Emperor Augustus, by the lex Julia Vicesimaria, imposed a tax of a similar nature on the estates of Roman citizens, and this indirectly led to the enfranchisement of all free subjects who were not citizens, for Caracalla, by his Constitutio Antoniana, granted rights of full citizenship to all inhabitants of the Empire, save those who were enslaved, in order to increase the number of persons whose estates were subject to succession duties. 105 With the added experience of centuries our legislators have been unable to improve upon many of the trade regulations and methods of taxation of the early Hindus.

To Manu also belongs the distinction of having first recognized that the loan of money at interest to whomsoever has need of it, or can usefully employ it, is a legitimate business resulting in a true economic

¹⁰¹ Ibid. § 38.

¹⁰² Ibid. bk. 2, ch. 2, § 14.

¹⁰⁸ Ibid. § 15.

¹⁰⁴ Ibid. bk. 2, ch. 3, § 22.

¹⁰⁵ 1 Maynz, 168.

product. This question formed the subject of grave controversy both in ancient times and during the Middle Ages. The Hebrews inhibited the lending of money at interest to brethren in distress, although permitting it as regards strangers, ¹⁰⁸ and the Mahomedans made the same distinction between the faithful and unbelievers. ¹⁰⁷ Even Rome for a long period forbade loans at interest between citizens, ¹⁰⁸ and the great French jurists Domat and Pothier, basing their arguments on the Old Testament and the *Ordinance de Blois*, thought that there should be no interest on the loan of money. ¹⁰⁹ But Manu in the beginning took the modern view and included the lending of money at interest in his classification of the seven virtuous means of acquiring property. ¹¹⁰

The system of granting prize-money in time of war was also in vogue among the Hindus, and a comparison of their regulations¹¹¹ with those of the French *Ordonnance sur la Marine* of 1681 shows an extraordinary similarity both in text and ideas:

Catyayana. "Of an enemy's property, brought from a foreign country by robbers commissioned by their lord, the king shall have a tenth part, and they shall divide the remainder by this rule: The leader of the robbers shall have four shares of it, the bravest of his men three, the most active two, the others equal shares."

Ordonnance sur la Marine, liv. 3, art. 52, tit. 9. "Le dixieme des prises, est acquis et doit être delivré a l'amiral. Le chef a droit à un plus grand nombre de parts; il en est alloué aussi de plus fortes aux

plus brave."

Catyayana. "If one of them when they set out on their adventure, should be taken prisoner, whatever he may give for his ransom, the rest shall pay equally with him."

Ordonnance, liv. 3, art. 17, tit. 4. "Si un matelot est fait prisonnier pendant la campagne, son rachat est payé concurrement par tous."

The old Hindu law of contract, now superseded by the Indian Contract Act of 1872, lacked the scientific arrangement and completeness of the Roman law which, however, did not differ from it in essential particulars. In both countries the forms were much the same. The agreement must be either in writing or, if oral, made in the presence of witnesses. All the parties must be legally capable, and a contract made by a woman, minor, idiot or lunatic, or by a person intoxicated or acting without proper authority, was null. The use of force¹¹² or

¹⁰⁶ Exodus, 22, 25; Leviticus, 25, 27; Deuteronomy, 23, 19.

¹⁰⁷ Hedaya, bk. 16, ch. 8; Al Koran, ch. 2.

¹⁰⁸ Sandars, 325.

¹⁰⁹ I Gibelin, 196.

¹¹⁰ Digest of Hindu Law, bk. 2, ch. 4, § 20.

¹¹¹ Ibid. bk. 2, ch. 3, § 57.

Digest of Hindu Law, bk. 2, ch. 2, p. 10. "What is given by force, what is by force enjoyed, by force caused to be written, and all other things done by force, Manu has pronounced void."

the existence of fear,113 error or fraud,114 also rendered it void, as did a consideration of an illegal nature. As regards the subject-matter of contracts it is interesting to compare a few of the provisions of the Hindu sages respecting loans and deposits with analogous articles of the Civil Code of the Canadian Province of Quebec, which is based upon the Code Napoléon, in its turn an amalgam of Roman and customary law:

Quebec Code, art. 1773. "The lender cannot take back the thing, or disturb the borrower in the proper use of it, until after the expiration of the term agreed upon, or, if there be no agreement, until after the thing has been used for the purpose for which it was borrowed."

Catyayana. "When it is borrowed for a particular purpose, or a specific time, if it be demanded when the purpose is only half accomplished, it shall not be recovered, nor shall the borrower be compelled to restore it."115

Quebec Code, art. 1774. "If before the expiration of the term, or, if no term have been agreed upon, before the borrower has completed his use of the thing, there occur to the lender a pressing and unforeseen need of it, the court may, according to circumstances, oblige the borrower to restore it to him."

Catayayana. "But where the owner's purpose would be disappointed from the want of that thing, the borrower may be compelled to restore it before the time stipulated, even though his purpose be only accomplished in part."116

Quebec Code, art. 1802. "The depositary is bound to apply in the

keeping of the thing deposited, the care of a prudent administrator."

Vrihaspati. "Should the bailee suffer the thing bailed to be destroyed by his negligence, while he keeps his own goods with very different care, or should he refuse to restore it on demand, he shall be compelled to pay the value of it with interest."117

Quebec Code, art. 1803. "The depositary has no right to use the

thing deposited without the permission of the depositor.'

Yajnyawalcya. "If the depositary, of his own accord, without the consent of the owner, use the thing deposited, he shall be amerced, and compelled to pay the price of the thing with interest."118

Quebec Code, art. 1804. "The depositary is bound to restore the identical thing which he has received in deposit."

Manu. "Whatever thing, and in whatever manner, a person shall deposit in the hands of another, the same thing, and in the same manner, ought to be received back by the owner: as the delivery was, so must be the receipt."119

Quebec Code, art. 1805. . "The depositary is only held to restore the thing deposited, or such portion as remains, in the condition in which

¹¹⁸ Ibid. bk. 2, ch. 4, § 53.

¹¹⁴ Ibid. § 61.

¹¹⁵ Ibid. bk. 2, ch. 1, § 43.

¹¹⁷ Ibid. § 34 118 Ibid. § 33. 119 Ibid. § 16.

¹¹⁶ Ibid. § 44.

it is at the time of restoration. Deteriorations not caused by his fault

fall upon the depositor."

Manu. "If a deposit be seized by thieves, or destroyed by vermin, or washed away by water, or consumed by fire, the bailee shall not be compelled to make it good, unless he took part of it himself."120

Quebec Code, art. 1807. "The depositary is bound to restore any

profits received by him from the thing deposited."

Vrihaspati. "Whatever depositary procures advantage for himself by the thing bailed, without the consent of the owner, shall be amerced by the king, and made to pay the price of that thing with interest."121

These are all dispositions of natural law in great part, but it is worthy of notice that the ancient law of India recognized and sanctioned them.

The composition and procedure of the old Hindu Courts "would have surprised Lord Coke," says Mr. Iyer, and in the time of Nareda they appear to have attained a high degree of perfection. In his introduction he states:122

"4. Let the king appoint, as members of a court of justice, honourable men, of tried integrity, who are able to bear, like good bulls, the burden of the administration of justice.

"5. The members of a royal court of justice must be acquainted with the sacred law and with rules of prudence, noble, veracious, and

impartial towards friend and foe.

"6. Justice is said to depend on them, and the king is the fountain head of justice."

As regards the duties of the king the same sage states:123

"34. Therefore let a king, after having seated himself on the judgment seat, be equitable towards all beings, discarding selfish interests and acting the part of (Yama) Vaivasvatha (the judge of the dead).

"35. Attending to (the dictates of) the law-book and adhering to the opinion of his chief judge, let him try causes in due order, adhibit-

ing great care."

37. Avoiding carefully the violation of either the sacred law or the dictates of prudence, he should conduct the trial attentively and skilfully.

"38. As a huntsman traces the vestiges of wounded deer in a thicket by the drops of blood, even so let him trace justice."

With the exception of ordeal the method of proof differed little from that of modern systems. Disputed cases were to be decided by documents in writing, or by oral testimony. "In a suit where proof is deficient, the king must himself decide according to the equal, greater,

¹²⁰ Ibid. § 26.

¹²¹ Ibid. § 31.

¹²² Pt. 3; 33 Sacred Books of the East, 36 et seq.

^{122 33} Sacred Books of the East, 14.

or less credibility of the parties."¹²⁴ "Let him fully consider the nature of truth, the state of the case, and of his own person; and, next, the witnesses, the place, the mode, and the time; firmly adhering to all the rules of practice," says Manu.¹²⁸ In certain cases of a quasicriminal character where there was not sufficient evidence to enable the king to come to a decision, proof by ordeal (*Dei judicium*) was directed,¹²⁶ and this form of trial, like the penalties of banishment and forfeiture,¹²⁷ was carried to northern Europe by the migrating Aryan tribes and introduced into England by the Saxons. Indeed, throughout the Hindu law we meet practice after practice bearing out the theory of which M. Gibelin is one of the greatest exponents, that as descendants of a common ethnic stock, the Teutons, Greeks and Romans retained many original Aryan customs, and that Indo-Sythe is the true "patrie du droit."

Certain it is that there is no study more interesting or profitable in the whole realm of comparative law than the Sacred Institutes of the Hindus, for as Savigny said of Roman law, they bind our juristic thought on the one side to a magnificent past, and bring us a better knowledge of the principles which still regulate the legal life of vast millions of people with whom we are thereby brought into a connection wholesome both for them and for ourselves.

¹²⁴ Digest of Hindu Law, bk. 2, ch. 2, § 52.

¹²⁵ Ibid. bk. 2, ch. 4, § 68.

¹²⁶ Ibid. bk. 2, ch. 1, § 12. Trial by ordeal was extensively practiced in Scandinavia, and formed part of the law of England until 1215, when it was discontinued in consequence of a degree of the Lateran Council.

¹²⁷ Ibid. bk. 3, ch. 2, § 15.

# LEASES AND THE RULE AGAINST PERPETUITIES

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Ι

#### INTRODUCTION

The purpose of this article is to consider the application of the rule against perpetuities to leases. A leasehold estate has certain peculiarities which distinguish it, as a practical matter, from other estates in land. At common law it required no livery of seisin, and so could be created to begin in futuro. Although it is not an estate of freehold the duration of the estate may be practically unlimited—it may be for 999 years or even in perpetuity. The reversion after an estate for years is necessarily vested, no matter how long the term of the lease may be, yet the leasehold estate is generally terminable at an earlier time upon numerous conditions subsequent, defined in the lease. In other words the leasehold estate determines without condition by the effluxion of the term defined in the lease but such termination may be hastened by the happening of one or more conditions. The application of the rule against perpetuities to such an estate presents special problems. The purpose of this article is to consider the application of the rule to the creation, termination and renewal of leases; and also its effect upon options inserted in leases.

II

#### CREATION

A leasehold estate may be created to begin in futuro, since livery of seisin was not at common law required for its creation. Unless limited by the rule a contingent lease might be granted to begin a thousand years hence. But the creation of a contingent estate for years to begin a thousand years hence is for practical reasons just as objectionable as the limitation of a contingent fee to begin at such a remote period by means of springing or shifting uses, or by the device of an executory devise. It is not surprising therefore that the rule against perpetuities has been held to apply to the original creation of contingent estates for years, and to prohibit their creation at a period too remote.¹

¹Hope v. Gloucester (1855) 7 DeG. M. & G. 647; Redington v. Browne (1893) L. R. 32 Ir. 347; Johnson v. Preston (1907) 226 III. 447.

In Hope v. Gloucester,² certain lands were conveyed by C. in 1529 by deed to the Corporation of Gloucester, the rents to be applied to a charity, and the city covenanting that it would from time to time, when and as a certain farm should become vacant, grant a lease thereof for 31 years at a certain rent to such one of the heirs of the body of B. as should then request such lease. This covenant the city observed for over 300 years, and until the expiration of a lease granted in 1815. At the expiration of that lease a person within the description of the indenture demanded a lease which was refused, whereupon he brought this bill for specific performance which was resisted upon the ground that the covenant was unenforceable specifically under the rule against perpetuities. This defense was sustained, the court deciding that a perpetual covenant to grant successive terms of 31 years to such one of the heirs of the body of B. as should first apply therefor violated the rule and was unenforceable specifically.

A similar result was reached in Attorney Gen. v. Greenhill,³ in which it was held that a gift of lands to a charity with a perpetual direction to lease to kindred of the grantor was good so far as the gift was concerned, but that the direction with respect to leasing was void as a perpetuity.

So also in Redington v. Browne⁴ a lease for three lives or 99 years, whichever should be longest, was granted on May 1, 1798. In 1814 while this term was still existent the reversioner covenanted that at the expiration of the prior lease he would grant a further lease for three unspecified lives. This was a bill in equity to enforce that covenant, to which the rule against perpetuities was urged as a defense. The court intimated that a present grant of an estate for years to take effect at the expiration of a present term for 99 years would not, if in all respects vested, violate the rule, but held that the estate created by the present covenant was not of that character since the nomination of the lives and so the period of the estate might not be determined until a period too remote.

In Johnson v. Preston⁵ a will devised certain real estate in trust to hold for the term of 25 years "from and after the probate of this will."

It was held that this devise was void under the rule since the will might not be probated within 21 years of the testator's death and so the event on which the estate was to begin might not happen within that time.

It may, however, be observed that in all these cases some essential element of the estate for years would not necessarily be determined within the period of the rule. In *Hope v. Gloucester* the lessee might

²7 DeG. M. & G. 647.

^{8 (1863) 33} Beav. 193, 9 Jur. N. S. 1307.

L. R. 32 Ir. 347.

^{*226} Ill. 447.

and indeed could not be so determined; in Redington v. Browne the lives by which the term was to be measured, and so the term itself, remained uncertain; in Johnson v. Preston the starting point of the term might not be ascertained within the required period. In all these cases, therefore, the leasehold remained contingent and so within the strict letter of the rule.

A more difficult case is that in which a definite term for years is granted to a definite person to begin without any contingency at a period beyond the ordinary limits of the rule-for example, a term for 50 years to A. to begin 50 years hence. Here the term and the lessee are ascertained exactly and without contingency, although the term is not to take effect for 50 years from date. On this point the writer has found no direct authority. It may be urged that A. has in praesenti not a strictly vested estate but a mere interesse termini,6 and therefore does not strictly satisfy the rule. But this argument is at best a technical one. The situation may be met and overcome if the owner of the property convey to a straw man who immediately reconveys to the grantor for 50 years, remainder to A. for 50 years, remainder in fee to the grantor. Here all the estates are vested and so not obnoxious to the rule. If this be so it is difficult to see why the term to A. may not be directly created without the intervention of the straw man. For practical purposes A.'s term is vested in either case. The only effect of invoking the rule is to prohibit the direct creation of a term to take effect without contingency 50 years hence, although the result may be attained by utilizing a straw man and a somewhat more elaborate procedure.

A slightly different case tends to sustain this view. Suppose a lease for 99 years has been granted to A. and that thereafter the reversioner grants another lease to B. to take effect at the expiration of the 99 year lease. According to an intimation in Redington v. Browne, supra, this would be good. Indeed the argument to support this view seems unassailable. The reversion after the 99 year term is vested and so not obnoxious to the rule. The reversioner might therefore convey the fee, subject to the lease, to B. If so he may clearly carve out any lesser vested estate—as an estate for years or for life or in tail—to take effect at the expiration of the 99 year lease. The situation is in no way different from that which would have existed had the original lessor leased to A. for 99 years, with remainder for 50 years or for life or in tail to B. Plainly if such vested estates, limited to take effect at the expiration of the 99 year lease, might have been originally created, they may subsequently be created by the reversioner by a separate instrument. Nor does this conclusion conflict in any way

^e Gray, Perpetuities (3d ed. 1915) s. 71; Hall, Landlord & Ten. 16. See Barwick's Case (1597) 5 Co. 93 b, 94 b; Weld v. Traip (1859, Mass.) 14 Gray, 320.

with the actual decision in *Redington v. Browne.*⁷ In that case the extent of the additional term was not to be determined until a period too remote, so that there could be no vesting of the estate within the period of the rule.

#### III

#### TERMINATION

Although a lease may be given for an unlimited term or even in perpetuity,8 the reversion is clearly not obnoxious to the rule,9 since it is a vested interest. Indeed the reversion is never out of the lessor. Thus in Sioux City, etc. Co. v. Trust Co. 10 the Sioux City Co. made a lease of its property for 100 years to another company, and subsequently mortgaged its reversion and rights under the lease to secure an issue of bonds. On foreclosure it was urged that both lease and mortgage violated the rule. It was held that since the reversion after the 100 year lease was vested it was not within the rule. So also in Redington v. Browne¹¹ it was intimated, though not actually decided, that the reversioner after a 99 year lease had a vested interest out of which he could grant a further vested term for years. Indeed the large number of cases13 which sustain covenants for renewal inserted in leases for terms of more than 21 years necessarily involve a recognition that the lessor still possesses a vested interest out of which the renewal term may be carved. In a word there seems no escape from the conclusion that the reversion after a lease, no matter how long the lease may be, is a vested interest not obnoxious to the rule.

Curiously enough this point was overlooked in Hanley v. Kansas & T. Coal Co. 14 which on this point is not to be supported. In that case W. devised lands to C. in fee in trust for Mariah Woolage and her descendants for 200 years, the remainder in fee to vest at the expiration of that time in the county in which the lands should then be situated. The trustee declined the trust. The plaintiffs (descendants of Mariah Woolage, who had died intestate) filed their bill alleging that defendant had wrongfully seized the lands and praying that title

⁷ L. R. 32 Ir. 347.

⁸ Atkinson v. Orr (1889) 83 Ga. 34; Cook v. Bisbee (1836, Mass.) 18 Pick. 527; Delhi School Dist. v. Everett (1883) 52 Mich. 314; Folts v. Huntley (1831) 7 Wend. 210; Lewis v. Effinger (1858) 30 Pa. St. 281.

^{*} Sioux City Co. v. Trust Co. (1897, C. C. A. 8 C.) 82 Fed. 124; Redington v. Browne, L. R. 32 Ir. 347; Gray, Perpetuities, ss. 209, 210.

¹⁰ See supra, note 9.

¹¹ See supra, note 9.

Gray, Perpetuities, ss. 209, 210; Sioux City Co. v. Trust Co. (1897, C. C. A.
 8 C.) 82 Fed. 124; Redington v. Browne, L. R. 32 Ir. 347.

¹³ See post, sec. IV.

^{14 (1901,} C. C. W. D. Ark.) 110 Fed. 62.

be quieted in them. The defendant demurred. The court held that the gift of the remainder in fee to the county was a contingent gift which was void under the rule; that the equitable if not the legal fee was in the plaintiffs; but that a bill to quiet title could not be maintained by persons out of possession. This case seems right in holding the gift over to the county contingent and void, since the county entitled to take would not be ascertained for 200 years; it seems wrong, however, in holding that the fee was in the plaintiffs, since if the gift to the county be held void, there was a reversion in fee in the heirs of the devisor, and as this reversion vested at the devisor's death it would not be obnoxious to the rule. This phase of the case seems to have been overlooked by the court.

Yet the status of the reversion or vested remainder after a lease for a term of more than 21 years is somewhat peculiar. It must come in by effluxion of time and without contingency at the expiration of the term. On the other hand most leases contain covenants in the nature of conditions to be performed by the lessee—such as to pay rent, to pay taxes, to repair, not to assign or underlet, etc. If the covenant be violated and so the condition be broken, the reversioner or remainderman as the case may be may enter and terminate the lease, thus accelerating the reversion or remainder. While the vesting of the reversion or remainder is not dependent upon any condition, the lessee's estate is subject to conditions subsequent which may terminate it prematurely and bring in the remainder or reversion. where the lease is for a period greater than 21 years the lessee's estate is subject to conditions subsequent which as to that estate might conceivably be deemed too remote, while the lessor's estate, which may be accelerated by the happening of those conditions, is still vested whether they happen or not.

It might be urged that the validity of such conditions should be determined with reference to their effect upon the lessee's estate. If so they would on principle be held bad if inserted in any lease for a term of more than 21 years. But this contention has never been raised or decided in any case known to the writer. Moreover, that contention seems contrary both to common sense and to justice. So long as the law permits the creation of terms for more than 21 years, there seems to be no reason to prohibit making such leases subject to conditions subsequent which may lawfully be attached to terms of less length. It would certainly be astonishing if a court should decide that a lessee for 20 years could be evicted for nonpayment of rent, but that this could not be done if the lease were for 22 years. Payment of rent is usually of the very essence of the transaction. The rule is essentially a rule of public policy. It can scarcely be that in such a case any public policy requires protection of the defaulting tenant at the expense of his landlord. If it were necessary, the rule cessante ratione, cessit ipsa lex might well be applied.

It is not, however, necessary to go so far as this. Viewed from the standpoint of the *lessor's* estate, the condition is in no way obnoxious to the rule, since that estate is vested. The happening of the condition does not vest the landlord's estate; it merely accelerates his taking possession by right of an estate which is vested whether the condition has happened or not. Moreover the landlord's right of entry may be sustained in this country by the mass of authorities which have upheld rights of entry for condition broken contained in conveyances in fee, salthough without consideration of the rule. For all these reasons it would seem that the contention cannot be sustained that a right of entry reserved in a lease for more than 21 years is bad.

### IV

#### RENEWAL

It is of course clear that the fact that a lease for more than 21 years may, by agreement of the parties then interested, be extended or renewed at a remote period, does not affect the present validity of the lease.16 Suppose, however, that a lease for over 21 years contains a covenant for renewal at the option of the lessee. Or suppose such a lease contains a covenant for a perpetual series of such renewals. It has been argued that such a covenant is incident to a present vested interest in the lessee, may be regarded as a part thereof and so, if sustained, furnishes no exception to the rule. But this argument is difficult to support. The question whether the option to renew will ever ripen into a further term depends on the will of the lessee. Until the option is exercised the additional term cannot be said to vest in any strict sense. If therefore the option may be exercised, and the actual vesting of the additional term may take place at a period beyond the limits of the rule, there seems no escape from the conclusion that such option if sustained does form an exception to the rule.

There seems to be no question, however, that such an option is good. It has been consistently sustained for over 200 years in England.¹⁷

¹⁵ Gray, *Perpetuities*, ss. 305-311, where the cases are collected.

¹⁶ Gray, Perpetuities, s. 230 et seq.

¹⁷ Bridges v. Hitchcock (1715, H. L.) 5 Bro. P. C. 6; Ross v. Worsop (1740, H. L.) 1 Bro. P. C. 281; Furnival v. Crew (1744) 3 Atk. 83, aff'd. H. L.; Atkinson v. Pillsworth (1787, Ir.) 1 Ridg. App. 449; Palmer v. Hamilton (1793, Ir.) 2 Ridg. App. 535; Rawstorne v. Bentley (1793, Ch.) 4 Bro. Ch. 415; Taylor v. Stibbert (1794) 2 Ves. Jr. 437; London v. Mitford (1807) 14 Ves. Jr. 41, semble; Brown v. Tighe (1834) 2 Cl. & F. 396, semble; Dockrill v. Dolan (1841) 3 Ir. Eq. 552; Sheppard v. Doolan (1842) 3 Dr. & War. 1; Copper Mining Co. v. Beach (1823) 13 Beav. 478; Hodges v. Blagrave (1853) 18 Beav. 404; Hare v. Burges (1857) 4 Kay & J. 45; Pollock v. Booth (1875) Ir. R. 9 Eq. 229; aff'd. ibid. 607; Nicholson v. Smith (1882) 22 Ch. D. 640.

The great weight of authority in this country is to the same effect.¹⁸ The single case which the writer has found *contra*¹⁹ rests on statute. Moreover such a covenant is enforceable in equity,²⁰ and runs with the land.²¹

It is true that in most of the English cases cited there is no discussion of the rule. In *Bridges v. Hitchcock*,²² which was a bill in equity by the assignee of the lessee specifically to enforce the covenant to renew against the lessor, it was objected that the covenant tended to a perpetuity, but the objection was overruled and the covenant was specifically enforced. In the other cases the point seems not to have been considered. It is, however, conceded that either as an exception to the rule or in spite of it such covenants are valid in England.²³ Moreover several of the American cases do expressly consider the validity of such covenants under the rule and uphold them none the less.²⁴ But whether the rule be actually discussed or not, the mere weight of decision seems sufficient to establish the result.²⁵

This apparent exception to the rule may well be justified on grounds of common sense. There seems to be no legal objection to a long lease with a right in the lessee to terminate it at his election either at the expiration of fixed periods or at any other time. Such termination merely brings in the reversion or the vested remainder of the person who holds the next estate. Furthermore as the termination is entirely in the hands of the lessee, it would seem unobjectionable in any case. It is true that here the lessee has an estate which is unquestionably vested, and so not obnoxious to the rule, whereas in the case of the option to renew he has merely a contingent right to extend his present vested interest. From the point of view of strict legal reasoning this is perhaps a real distinction. But for practical purposes it is of little worth. In either case the continuance of the lessee's estate depends

¹⁸ Banks v. Haskie (1876) 45 Md. 207; Boyle v. Peabody H. Co. (1877) 46
Md. 623; Blackmore v. Boardman (1859) 28 Mo. 420; Diffenderfer v. Board (1894) 120 Mo. 447; Drake v. Board (1907) 208 Mo. 540; Robinson v. Beard (1893) 140 N. Y. 107; Gomez v. Gomez (1895) 147 N. Y. 195; Hoff v. Royal M. F. Co. (1907) 117 App. Div. 884; aff'd. 189 N. Y. 555; Thaw v. Gaffney (1914, W. Va.) 75 W. Va. 229, 83 S. E. 983.

Di Morrison v. Rossignol (1855) 5 Cal. 64.

²⁰ See cases cited in notes 18 and 19, supra.

²¹ Blackmore v. Boardman (1859) 28 Mo. 420; Furnival v. Crew (1744) 3 Atk. 83; Taylor v. Stibbert (1794) 2 Ves. Jr. 437; Dockrill v. Dolan (1841) 3 Ir. Eq. 552. And see cases cited in notes 18 and 19, many of which were between assignees.

²² (1745, H. L.) 5 Bro. P. C. 6.

²⁸ See London & S. W. Ry. v. Gomm (1882) 20 Ch. D. 562, 579; Woodall v. Clifton [1905] 2 Ch. 257.

²⁴ Banks v. Haskie (1876) 45 Md. 207; Blackmore v. Boardman (1889) 28 Mo. 420; Thaw v. Gaffney (1914, W. Va.) 83 S. E. 983.

²⁵ See Gray, *Perpetuities*, ss. 305-311 concerning the similar situation in American courts as to the validity of a right of entry in a conveyance in fee.

on the lessee. Strict application of the letter of the rule would sustain one method of reaching the given result while disapproving of the other. It would mean merely a change in the form or the lease so as to permit the lessee to end a long term instead of to extend a short one. The rule is essentially a practical rule grounded on public policy. If the result may be reached without violating either the letter of the rule or the public policy on which it rests, an apparent exception which permits the result to be attained in a way which at most violates only the letter of the rule may well be sustained.

#### V

#### OPTIONS TO PURCHASE THE FEE INSERTED IN LEASES

Suppose that in a lease for more than 21 years the lessor covenants that the lessee at his option may purchase the fee at any time during the term. Is this option valid? The cases generally agree that if an option in gross to purchase back the fee, exercisable beyond the period of the rule, be inserted in a conveyance in fee, such option will not be specifically enforced in equity, since specific enforcement would in effect create a contingent estate which would violate the rule.28 therefore the letter of the rule is to be blindly applied, a similar covenant contained in a lease cannot be sustained. On the other hand leases are to some extent sui generis. Covenants for renewal contained in leases for over 21 years are sustained by authority. They may be supported on principle on the ground that they do not violate the policy of the rule even though they conflict with its letter. The question therefore is whether an option to purchase the fee, inserted in a lease for over 21 years, and exercisable at any time during the term, may be sustained as an exception to the rule, on the ground that it does not conflict with the policy on which the rule rests.

The policy behind the rule is undoubtedly to prevent one owner from unduly and unreasonably diminishing the value of ownership to his successors. The same policy also lies behind the companion rule—the rule against restraints on alienation—which prevents undue restriction of the right of alienation, which is one of the most valuable incidents of ownership. Property—especially real property—endures, while owners are ephemeral. Even an owner in fee is in a sense only a tenant for life with power of disposition. When in 1620 executory devises which would cut short vested interests were held to be

²⁶ London & S. W. Ry. v. Gomm (1881) 20 Ch. D. 562; Trevelyan v. Trevelyan (1885) 53 L. T. N. S. 853; Winsor v. Mills (1892) 157 Mass. 362; Barton v. Thaw (1914) 246 Pa. St. 348; Starcher v. Duty (1907) 61 W. Va. 373, 56 S. E. 527; Woodall v. Bruen (1915) 76 W. Va. 193, 85 S. E. 170; Gray, Perpetuities, s. 330.

indestructible,²⁷ this power of disposition was enormously increased. Unless restrained by law, any given owner might, by the creation of these indestructible contingent interests, practically deprive his inevitable successors of all the benefits of ownership throughout an indefinite future. So long as the present estate may be cut short at any moment a large part of its value either for use or sale is gone. As a practical matter no one will either buy or efficiently improve a property which he may lose at any moment upon the happening of a contingency beyond his own control. Public policy clearly required an antidote for this situation. That antidote was the rule against perpetuities²⁸ and its companion, the rule against restraints on alienation.²⁹

Is there a real and practical distinction between an option in gross to purchase the fee, and an option to purchase the fee attached to a leasehold and exercisable only during the term? In the opinion of the writer there is. An option in gross exercisable at a remote period hangs over and threatens the present estate in possession. It operates as a practical clog on development and alienation alike, since present possessor and possible purchaser have a tenure dependent on the caprice of a third party. Neither objection applies to an option to purchase attached to and exercisable during a presently vested term for years. In the first place the option is in aid of the estate of the party in possession and therefore encourages him to develop that estate to its utmost capacity. In the second place it is not a serious detriment, if indeed any detriment at all to the reversion. The reversioner has in effect transformed his estate into a present right to receive rental from time to time and an ultimate right to receive the property back. Its value is measured to a considerable extent by that rental. It is but a short step to commute the recurring payments of rental into a single cash payment in full. In a word the business reasons which render a remote option in gross extremely injurious to an estate in fee do not apply if the option be attached to a presently vested term for years. Such an option neither retards development nor places the reversion extra commerciam.

There are strong business reasons why such an option should be permitted in leases for over 21 years. In the first place such an option is frequently inserted in leases for less than that period—where no

²⁸ For the somewhat illogical and empiric manner in which the rule was developed, see Gray, *Perpetuities*, ch. V.

²⁷ Pells v. Brown (1620) Cro. Jac. 590. See Gray, Perpetuities, ch. V for the origin and history of the rule.

²⁰ The two rules are entirely distinct as Gray points out. Gray, *Perpetuities*, ch. VII. One prohibits the creation of remote future interests. The other forbids specific restraints on alienation beyond certain limits. See generally Gray, *Restraints on Alienation*. But both are the expression of public policy intended to protect each successive owner from unwarrantable clogs imposed by his predecessors.

possible objection can be made under the rule. In the second place long leases are frequently made of unimproved property, the lessee to improve at his pleasure. It is extremely desirable that the parties to such leases should be able to fix in the lease their rights at the termination of the lease. Broadly speaking, there are only four possibilities: (1) to permit the lessee to buy out the lessor; (2) to permit the lessee to require the lessor to pay to him the then value of the improvements; (3) to vest the improvements in the lessor without payment, on the ground that they are incorporated in the real estate; (4) to permit the lessee to remove them so far as he can. The last two are for business reasons undesirable since they inevitably tend to the depreciation of the estate at the end of the term. The first two are equally open to objection, if specifically enforced, under the letter of the rule against perpetuities. So long as the law permits the creation of leases for a term which may exceed the period of the rule, it seems undesirable to invoke the rule in order to limit the parties in adjusting their rights at the termination of the lease in ways which are common and unobjectionable in shorter leases. In a word the rule was made for man, not man for the rule.

Indeed it may well be urged that public policy is remotely if at all concerned in such a case—once the right to make the long lease is admitted. The question involves the disposition of two estates, each equally vested. Both are ultimately to be gathered into one hand, either that of the lessor or that of the lessee. We have already seen that at any time during the term-whether it is over 21 years or notthe lessor may enter and terminate the lessee's estate for breach of condition. Wherein is it more undesirable that the lessee, by payment of a sum of money at any time during the term, should be able to unite both estates in himself? Indeed such a proceeding bears a strong analogy to the common-law right of the tenant in tail to bar alike the entail and reversion by leaving a fine or suffering a common recovery30-a proceeding which has never been held to violate the rule. If there be any weight in this analogy it would seem that so far from frowning on the introduction of the option into long leases, public policy should favor it.

A further argument may be grounded on the fact that leases have been held to be in certain respects an exception to the rule against perpetuities and also to the rule against restraints on alienation. We have already seen that covenants for an indefinite series of optional renewals, or even for an optional renewal in perpetuity, are good.³¹ An optional covenant for a renewal in perpetuity is for practical pur-

⁸⁰ In most American states, estates tail are either abolished, or else may be barred by a conveyance in fee by the tenant in tail. And cf. also the rights of mortgagor and mortgagee: see Gray, Perpetuities, ch. XVI.
⁸¹ See supra, sec. IV.

poses substantially the equivalent of an optional covenant to convey the fee.³² So also covenants against assignment or underletting are universally sustained without question³³—a clear exception to the rule against restraints on alienation. If, as has been shown, options to purchase the fee inserted in long leases do not contravene the policy which underlies the rule, that exception to the letter of the rule may well be supported by the analogy of the two other exceptions just noted.

We turn to the authorities, which are few. In Woodall v. Clifton34 it was held that an option to purchase at any time during the term inserted in a lease for over 21 years will not be specifically enforced in equity. But the case was held to be governed by London & S. W. Ry. v. Gomm,35 which decided that an option in gross reserved in a conveyance in fee was invalid, and the court, without any extended argument, simply refused to follow the analogy of covenants for renewal in leases. Woodall v. Clifton has since been followed in Worthing Corp. v. Heather,36 in which, however, the covenant was held good at law and damages for its breach given against the estate of the covenantor. In Ireland a provision by which a perpetual rent charge might at any time be redeemed by payment of a fixed sum was sustained at first, but this decision was later overruled37 on the authority of the Gomm case and the other two English decisions just noted. In passing, it may be suggested that as a provision for relieving the estate from the encumbrance of a perpetual rent charge seems entirely in accord with the policy underlying the rule, this policy might well prevail over the letter. But it must be conceded that in England the letter of the rule has prevailed.

The writer has been able to discover only one American case which in express terms passes on and decides the question. Hollander v. Central Metal Co.³⁸ was a bill in equity to enforce specifically an option to purchase the fee contained in a lease for over 21 years, to which there was a demurrer on the ground that the option was bad under the rule. The case was fully argued and the English cases³⁹ as well as the authority of Mr. Gray⁴⁰ were all cited in support of this latter view. After full consideration the court held the option good, principally upon the ground that even if it conflicted with the letter of the

⁵² Gray, Perpetuities, s. 230.

²⁵ Gray, Restraints on Alienation, ss. 101-103.

^{34 [1905] 2} Ch. 257.

⁸⁵ 20 Ch. D. 562.

³⁶ Switzer v. Rochford [1906] 1 Ir. 399.

²⁷ In re Tyrrell's Estate [1907] 1 Ir. 292; In re Earl of Donoughmore's Estate [1911] 1 Ir. 211.

²⁸ (1908) 109 Md. 131.

[≈] See *supra*, notes 34-37.

Perpetuities (2d ed.) s. 230.

rule it was not in conflict with its underlying policy.⁴¹ This case is of unusual interest and authority because it was decided after full consideration of the cases which upheld and followed the letter of the rule.

In addition there is some American authority which has upheld such options inserted in long leases, but without consideration of the rule. Thus in Prout v. Roby,⁴² specific performance was given of an option to purchase the fee inserted in a lease in perpetuity.⁴³ And a similar decision was rendered in Hagar v. Buck⁴⁴ as to a similar option inserted in a lease for 99 years. It is true that in neither of these cases was the validity of the option under the rule specifically considered. Yet since specific performance was granted, the point was of necessity involved in the decision. Moreover the fact that the point was not specifically considered may perhaps be some indication that the result does not conflict with the policy of the rule even if it be contrary to the letter.

Finally if the letter of the rule be still considered a stumbling-block, the results may conceivably be attained by care in drawing the lease. The term of the lease may be made 20 years, with an option to purchase during the term, and a covenant be inserted for an indefinite series of renewal leases, each containing a similar option. We have already seen that covenants for renewal are good. And each renewal automatically creates a new option which is good for the renewal term. Indeed a similar result might possibly be reached by a covenant for renewal in perpetuity upon payment of a specified amount in lieu of all rental. If by either of these methods the result may be reached without violating even the letter of the rule, an exception to its letter may well be made in the case where the option to purchase it attached to a term of over 21 years. Again the question becomes one of form rather than one of substance.

· VI

VALIDITY AT LAW OF CONTINGENT COVENANTS WHICH MAY NOT BE PERFORMED WITHIN THE PERIOD OF THE RULE

The rule is a rule of property, not a rule of contract. It does not affect the validity at law of contingent covenants or contracts which

⁴¹ The local custom of making leases containing such options was undoubtedly a factor in the result.

^{42 (1872) 15} Wall. 471.

⁴⁵ For dicta to the same effect see Wells v. Savannah (1901) 181 U. S. 531, 544; York County Sav. Bank v. Abbot (1905, C. C. D. Me.) Fed. 988.

[&]quot; (1872) 44 Vt. 285.

[&]quot;Supra, sec. IV.

And as we shall see, post, sec. VI, the convenant is good at law. But cf. Starcher v. Duty (1907) 61 W. Va. 373, 56 S. E. 527. On this point this case is not to be supported, as the successive options are plainly separable. Cf. Gray, Perpetuities, ch. IX.

may not be performed within the period of the rule.⁴⁷ It is true that specific performance in equity may be denied, on the ground that the effect of such performance if granted would be to create remote contingent estates.⁴⁸ Yet the covenant or contract is still valid at law, and the covenantor must respond in damages for a breach of it.⁴⁷

The leading case is Walsh v. Secretary of State for India.⁴⁹ In 1770, Lord Clive transferred £62,000 to the East India Co. under a sealed agreement by the company to pay the interest upon an equal sum in pensions to European officers disabled in its service, and in the event that the company should ever cease to employ military officers in its service, to repay an equal sum to Clive or his representatives. In 1858, after the Sepoy Mutiny, Parliament transferred the forces and property of the company to the crown, but subject to the obligations of the company. This was a bill in equity by the then representatives of Clive to compel repayment of the £62,000. It was held that the covenant was valid and enforceable as a covenant, though the condition might not happen within the period of the rule.

A very neat illustration of the distinction between the equitable and legal enforcement is furnished by Worthing Corp. v. Heather, 50 which was a bill in equity to compel specific performance of an option to purchase the fee inserted in a lease for 30 years, and in the alternative to recover damages against the covenantor for breach of it. The court denied specific performance on the ground that such relief would in effect create a contingent equitable estate which would be too remote, but held the covenant valid at law and entered a decree for damages. 51 There could be no clearer illustration of the distinction between the contract and the property aspects of the same covenant.

## VII

#### CONCLUSIONS

It seems that to some extent leases are subject to the rule and to some extent are an exception to it. The authorities seem to support the following conclusions:

[&]quot;Gray, Perpetuities, s. 329; Walsh v. Secretary of State (1863) 10 H. L. 367; Witham v. Vante (1883, H. L.) reported in Challis, Real Prop. (3d ed.) 440; Borland's Trustee v. Steel Bros. [1901] 1 Ch. 279; Worthing Corp. v. Heather [1906] 2 Ch. 532.

⁴⁸ See supra, note 26.

[&]quot;(1863) 10 H. L. 367. It may be noted that the covenant did not require reconveyance of a specific trust estate, but merely payment of a sum equal to the original gift.

^{50 [1906] 2} Ch. 532.

⁵¹ Cf. Winsor v. Mills (1892) 157 Mass. 362, where specific performance was denied, but performance of the covenant enforced as the condition of equitable relief to the convenantor.

- 1. The rule prohibits the creation of contingent terms for years which may not vest or fail within the period of the rule. On the other hand, a presently vested term limited to take effect absolutely at a time which under the letter of the rule would be remote appears to be good.
- 2. Since the reversion after a term of years, no matter how long, is a vested estate, conditions are valid which accelerate that vested estate, even though they are contingent and not certain to take effect or fail within the period of the rule.
- 3. Covenants for renewal at the option of the lessee, exercisable at any time during the term, are an exception to the letter of the rule, and are sustained by the great weight of authority, even though the term be so long that the option may be exercised at a time beyond the period of the rule.
- 4. There is conflict as to the validity of options to purchase the fee at any time during the term, inserted in leases for terms of over 21 years. They certainly conflict with the letter of the rule. In England the letter of the rule prevails and specific enforcement of such options is denied. In this country such authority as there is seems to sustain In Maryland specific enforcement has been granted after mature consideration, on the ground that they do not conflict with the policy of the rule. In the Supreme Court of the United States and in Vermont they have been specifically enforced without consideration of the rule. In the opinion of the writer the broader American view should prevail over the letter of the rule, since such options in leases do not conflict with the policy of the rule and the result may be attained without conflict with even the letter of the rule by a mere change in form. Similar considerations do not, however, apply to remote options in gross attached to a conveyance in fee, which seem to be universally condemned.
- 5. Since the rule is a rule of property and not a rule of contract, contingent contracts or covenants are good at law even though the condition will not happen or fail within the period of the rule. If, therefore, such a covenant be broken, damages at law may be recovered from the covenantor.

# THE DELEGATION OF LEGISLATIVE FUNCTIONS

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As the interests of our people become more diversified and their industries grow more complex and assume greater proportions and variety of form, the demands upon the government necessarily increase. But add to the remarkable growth in scope and variety of interests possessed by our people to-day as compared with the situation even half a century ago, the increased tendency toward co-ordination and co-operation, not only in private but as between public and private business as well—the passing of the doctrines of laissez faire and unrestricted freedom of the individual as axioms of economics and political and legal theory—and we add enormously to the public burden. This is particularly true in matters of legislation; there all these considerations apply directly. In order to legislate intelligently and in detail, the members of Congress individually must know more things and know them more accurately and intimately than is humanly possible. The result has been that Congress has increasingly delegated to others the duty of doings things which in the inception of the government it might well have done itself.

How far may Congress or the state legislature under a state constitution modeled after the federal pattern go in this respect? How far may they delegate to others duties in the laying down of new rules intended to be obligatory upon all who come within their scope? For whenever a new rule of this type has been laid down an act essentially legislative in character has been done.¹

In the decisions of the courts upon the question of the delegation of legislative functions three things are almost invariably done: First, there is unanimous agreement that legislative powers cannot be delegated by Congress or by the legislature; second, although the judges rely upon the *dicta* of other courts and scarcely analyze the terms used, the delegation is usually permitted; and third, there seems to be a

¹ Field, J., in dissent, Sinking Fund Cases (1879) 99 U. S. 700, 761, 25 L. Ed. 496, 516:

[&]quot;The distinction between a judicial and a legislative Act is well defined. The one determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases under it."

Cf. Taylor v. Place (1856)4 R. I. 324; Smith v. Strother (1885) 68 Cal. 194, 8 Pac. 852.

[&]quot;Essentially, the promulgation of administrative orders or ordinances is legislative in character." 2 Willoughby, Constitution, sec. 742.

growing tendency in the decisions to give prominence to the supposed "necessity" of the case, even while admitting—unnecessarily, perhaps—that this delegation appears contrary to the letter if not to the spirit of the Constitution.²

Such a situation is unsatisfactory. The Constitution must be upheld and even great apparent necessity should not lead to shifts and evasions. On the other hand, we should not follow the vague reasoning of many of the courts nor be content with their faulty analysis nor be misled by the ambiguity and confusion of their terminology.³

It is interesting to note how often in the development of Anglo-American law the courts have reached a conclusion quite in accordance with the duty then resting upon them of balancing the interests involved; yet when the court is pressed to formulate the grounds of the decision a reason is given which is applicable neither logically nor historically.⁴ When later judges decide new phases of the same question they are apt to be led astray by a too literal application of the supposed reason offered for the former decision. This tendency seems inevitable in a system where busy judges, harassed by the pressure of many cases, must formulate the law to such an extent as they do with us.⁵

Our Constitution was framed with the idea that the first principles of government required a separation of legislative, executive and judicial powers. The framers feared tyranny, and the theories of Montesquieu were accepted by them and by the courts as the final word of political wisdom. Does this doctrine of the separation of the powers of government stand in the way of attempted delegations by the legislature of legislative functions? In answer it might be said that the theory of the separation of powers as applied by the framers of the

²Railroad Commission v. Central of Ga. Ry. (1909) 170 Fed. 225, 238, 95 C. C. A. 130; State v. Public Service Commission (1917, Mo.) 194 S. W. 287. But for a somewhat different connotation given to adverbs similar to "essentially" as qualifying "legislative," see *infra*, cases cited in notes 92 to 95, and pp. 920, 921.

⁸ See criticism of analysis on such questions by Edmund M. Parker, Executive Judgments and Executive Legislation (1907) 20 Harv. L. Rev. 116. For a discussion of the extent to which misuse of terms leads to confusion in thought, see Prof. Wesley N. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL, 16, 29. Compare terms used in cases cited in notes 92-96 post.

^{*}See articles by Prof. Jeremiah Smith on Surviving Fictions (1917–18) 27 YALE LAW JOURNAL, 147, 153, n. 41, 317. Professor Smith quotes Justice Holmes as saying "that judges know which way to decide a good deal sooner than they know how to give the reason why."

⁵ Prof. John C. Gray, The Nature and Sources of the Law (1909) 215-231, 465-512, 545-550, 628-636.

⁶ "The theory was accepted not . . . as a scientific theory but as a legal rule." Prof. Frank J. Goodnow, *Principles of the Administrative Law of the U. S.* (1905) 31.

government did not forbid transference of power from the legislative body to another branch of the government on the ground that it would be a mixing of functions. Historically there had never been a government in which legislative, executive and judicial functions—or at least two of them—were not united in the same branch; and when Montesquieu wrote and when the Constitution of the United States was framed, there was no government in existence which did not actually mingle even the powers themselves and combine them in one person or body or vest branches of the government with a combination of two of them. Montesquieu had in mind a political theory which at that time was nowhere realized in fact.⁷ The framers of the Constitution gave some slight thought to theory in the separation of powers, but more to matters of political expediency, and the reported debates of the Convention show that the members consciously mixed powers and functions which in their nature were legislative, judicial and executive,⁸

"Powers which would require promptitude, activity, decision, or unity of plan, if of sufficient importance, they vested in the executive. For instance, for such reason, they made the President . . . commander-in-chief of the army and navy. . . They vested the pardoning power in the executive. . . They did not waste time in discussing whether the power of receiving ambassadors could be considered executive, legislative, or judicial; . . . they vested the power in the President . . . They vested the treaty-making power in the executive, . . . subjected to the deliberative assent of two-thirds of the Senate

"The general clause, vesting legislative power in the legislature, vests therein only the power of enacting general laws for the entire government. Besides this, the constitutions specially vest many other powers in the legislature, such as the power of impeachment . . ."

William Bondy, Separation of Governmental Powers (1896) 5 Columbia Studies in Hist. Econ. & Public Law, No. 2, p. 74 et seq.

[&]quot;"From these facts [in regard to the British Constitution], by which Montesquieu was guided, it may be clearly inferred, that in saying, 'there can be no liberty, where the legislative and executive powers are united in the same person, or body of magistrates;' or, 'if the power of judging, be not separated from the legislative and executive powers,' he did not mean that those departments ought to have no partial agency in, or no control over the acts of each other. His meaning, as his words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." James Madison, Federalist, No. 47.

a free constitution are subverted." James Madison, Federalist, No. 47.

*"That no separation of powers, based upon the nature of the different governmental powers, was ever intended to be inserted in our organic law, would convincingly appear from a most cursory perusal of the debates in the constitutional conventions . . . Familiar with the theory of Montesquieu, but unfamiliar with any supposed possibility of classifying powers according to their intrinsic nature, they vested legislative power, meaning thereby only the power of enacting general laws for the entire government, in the legislature; judicial power, meaning thereby only the power of determining and protecting the rights of persons under the constitution and constitutional laws, in the courts; and executive power, meaning thereby the power of seeing that the laws are faithfully executed, in the executive department. Next they considered . . . other important powers which they thought their government in the course of its existence would probably be called upon to exercise. They did not enter into a philosophical discussion as to whether such a power was legislative, executive or judicial in its nature, but deliberated in which one or more of the departments already established by them the given power could with greatest propriety and safety be vested. Certain governmental powers . . . they vested in a governmental agency specially created for the purpose, and which did not form part of either of the three great departments.

"Powers which would require promptitude, activity, decision, or unity of plan,

and as freely defended the mixing on the ground that the greatest security results from a partial participation of each branch of the government in the powers of the other branches.⁹ The separation as judged by the nature of the powers was not intended to be complete, and in practice such a complete separation would be inadvisable if not impossible.¹⁰ The effect of a separation of the powers of government by the Constitution would, therefore, seem rather to be that no power definitely assigned to any branch could be considered as belonging to or delegable to any other; but as to every function not so assigned, it might well have been considered as delegable at the will of the legislative branch.¹¹

A second reason sometimes suggested for the non-delegability of legislative functions¹² is that each department of the government being itself a delegate could not, therefore, delegate. This idea finds expression in the maxim *delegatus non potest delegare*,¹³ and it is entitled to some respect as a broad assertion of principle if rightly limited and understood. As an exact and universal statement, it is

^o Federalist, Nos. 47, 48, 50, 51.

¹⁰ "The separation is not, and, from the nature of things cannot be total." Beall v. Beall (1850) 8 Ga. 210. Cf. Paddell v. City of N. Y. (1908) 211 U. S. 446, 29 Sup. Ct. 139, 53 L. Ed. 275; State v. Crosby (1904) 92 Minn. 176, 99 N. W. 636:

[&]quot;The marked tendency of legislation in recent years, not only in this state, but in other states, has been, to a large degree, to break away from the theory of three separate and independent departments of government . . ."

Cf. Minneapolis, St. P. etc. Ry. v. Railroad Commission (1908) 136 Wisc. 146, 116 N. W. 905, 17 L. R. A. N. S. 821.

[&]quot;No one will assert at present that the separation of powers . . . is essential to liberty. . . . It is a practical device existing for practical ends . . . the division of labor . . . a mere specialization." Dean Roscoe Pound, Spurious Interpretation (1907) 7 COLUMBIA L. REV. 379, 384.

[&]quot;Whenever a power is not distinctly either legislative, executive or judicial, and is not by the constitution confided to a designated department of the government, the mode of its exercise... must necessarily be under the control of the legislature." Bondy, op. cit. 80.

But note that the courts have applied the doctrine of the separation of powers as limiting the kind of functions which may be delegated to any branch of the government, limiting such delegation to functions not inconsistent with the nature of the principal duties of that department. While according to that view courts do not possess all functions judicial in nature, still they should refuse to accept and should be denied functions not judicial in nature unless given directly by the constitution. Western Union v. Myatt (1899) 98 Fed. 335; Bondy, op. cit. 83; Appeal of Norwalk St. Ry. Co. (1897) 69 Conn. 576, 38 Atl. 708; Village of Fairview v. Giffee (1905) 73 Ohio St. 183.

[&]quot;The principle of the separation of powers does not prevent the legislative delegation . . . of a considerable ordinance-making power." Willoughby, Constitution, sec. 742.

¹² State v. Public Serv. Com. (1917) 194 S. W. 287.

¹³ See the very sarcastic note by Bentham on this maxim: Principles of Morals and Legislation (Oxford ed. 1879) 13, n., I Works, 6, n.

false. Many delegates cannot further delegate the duty intrusted to them because it is to be personally exercised by the delegate himself. This is true of the judicial acts of a judge: he may be selected to try the case before him because of his personal and professional qualifications, and he cannot pass that duty to another. Many delegates cannot further delegate their functions because they are agents or mandataries for the purpose of doing a special act—such as sitting as a judge. With the legislature it is different. Of course the legislature should not delegate the function that is intrusted to its immediate personal care, but by the very nature of its being a delegating or duty-assigning body, it can delegate to others the power both to do acts it could not itself do, and also the power to do acts which it might well have done itself.14 Therefore the legislative branch being inherently a duty-assigning branch may, in the teeth of the maxim, assign such duties and functions to others as it is not, for some other reason, prohibited from assigning or they from receiving, even though itself a body of delegated and even limited powers; 15 without such ability the power would be barren and incomplete.16

The true limitation on the power of Congress or of a legislature to delegate functions must be found in the fact that the function attempted to be delegated has been intrusted by the Constitution to one of the departments of government, there to be personally exercised; as applied to legislative duties, these functions are intrusted to the personal care of the legislative body.¹⁷ This is the familiar doctrine of mandate as applied to governmental affairs.¹⁸ The limits of this

¹⁴ "Congress may certainly delegate to others powers which the legislature may rightfully exercise itself." Wayman v. Southard (1825) Wheat. 1, 42, 6 L. Ed. 253, 262. See Bondy, op. cit. ch. viii.

¹⁵ "Whatever inherent jurisdiction a magistrate had in right of his office, he could transfer by mandate to another proper person. That is to say, a magistrate could delegate his inherent jurisdiction, but could not sub-delegate his delegated jurisdiction." Brinton Coxe, Judicial Power and Unconstitutional Legislation (Phila. 1893) ch. xi, div. C, p. 121.

¹⁶ But note the contra view of John A. Fairlie, National Administration of the U. S. (N. Y. 1905) 23:

[&]quot;United States judges have held, . . . that Congress may delegate the power to make rules and regulations, and, . . . that this does not constitute a delegation of legislative power. These views would seem to be logically inconsistent with each other. . . . For Congress possesses only legislative power, and it would seem that any delegation of power by Congress must be a delegation of legislative power."

¹⁷ "The assumed incapacity to delegate is implied, as a necessary result, from the fact that, in our system of government, the power to make the laws is lodged in our senate and general assembly; that a consequent obligation rests upon them to exercise the function with which they are intrusted." Paul v. Gloucester (1888) 50 N. J. L. 585, 593, 15 Atl. 272, 276.

¹⁸ The doctrine of mandate as applied to governmental duties was known in America at the time of the framing of the Constitution through the writings of Vattel and others. See Varnum's Pamphlet on Trevett v. Weeden (1786, R. I.) 24, 25, 26; Vanhorn v. Dorrance (1795) 2 Dall. 308; Federalist, No. 78; Marbury v. Madison (1803) 1 Cranch, 137, 175 et seq.; Luther v. Borden (1849) 7 How. 1, 66.

doctrine would seem to be that no department could avoid the personal exercise of any function lodged with it by the Constitution unless it appeared by the terms or circumstances of the delegation that the function was to be exercised either by that body or by some other at its discretion. The exception does not apply to the judicial branch; even though a given function were assigned to it contingently, it could not delegate it because the judiciary is not a duty-assigning branch of the government. The exception does apply with full force to the legislative department which by the very nature of its being must assign functions to others.

The problem in relation to the delegation of legislative duties by Congress or the legislature is this: What is it that the Constitution requires of it as a personal duty? Second, how far have the courts already established a rule binding upon us by their precedents? So far as the Constitution originally left Congress free and so far as the courts have not specifically foreclosed the question, the free power of delegation undoubtedly exists.

Consider first the mandate given by the Constitution to Congress. It is found in article I, section I of the Constitution of the United States and provides:

"All legislative powers herein granted, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

If we construe those words standing alone they would be consistent with a very broad power of delegation of functions and duties legislative in their nature. For it must be conceded that the vesting of a power over a certain field does not of itself imply a duty to do personally every act necessary to be done under that power. To assert this would place a limit on the free exercise—and perhaps the most efficacious exercise—of that power. Webster's New International Dictionary gives, among other definitions for power:

"The possession of sway or controlling influence over others; control; authority; command; influence; ascendency, whether personal, social, or political."

Paraphrasing the above section and using any one of the suggested equivalents in place of the word power, it could scarcely be contended that this section standing alone forbids the delegation of legislative functions or duties as such, so long as Congress retains the control or authority over such acts; and indeed, in this sense, Congress cannot delegate its legislative *power* because that power, being conferred by the superior might of the Constitution, would remain in Congress subject to be resumed at will by that body in spite of any attempts it might make to delegate it.

As previously suggested, the question is: How far has the Con-

stitution intended this power over legislation to be personally effectuated by Congress; how far is that body, in furtherance of the exercise of the power, required to lay down in detail new rules for the future; in other words, how far is it required to do every act and perform every function legislative in nature which is necessary to make effective the power itself? Obviously the two things are not the same: the conferring of power or control or authority does not of itself imply a duty personally to perform the detailed act. In fact, as suggested above, if the exercise of the legislative power does entail the personal performance by Congress of all the minutiae of legislation in all cases, Congress is pitiably hampered in the carrying out of the very power supposed to be conferred by the Constitution. This idea, in one form or another, has been repeatedly expressed by our courts and text-writers.¹⁹

What, then, does the legislative power mean? Broadly speaking, there are but two functions of government: I. The choosing and adopting of policies. 2. The carrying out of these policies through the making and enforcing of detailed rules. But this broad division probably does not correspond with the facts of any government known to history. The first is, functionally considered, "law-creative" or legislative. Yet it does not correspond with our division of functions under the Constitution because it would include the policy-initiating, diplomatic, and treaty-making powers of the President.²⁰ But the power over this function—the power of ultimately choosing the policy to be adopted—is the heart and the essence of legislative power; and this is the legislative power given to Congress over those subjects committed to its care, and is the essence of legislative power generally.

The second function is administrative; it includes the principal activities of the executive aside from his political functions, and also

¹⁹ "As civilization becomes more complex . . . the government . . . must abandon the system of unconditional commands and resort to conditional commands which vest in the administrative officers large powers of a discretionary character." Prof. Frank J. Goodnow, *Principles of the Administrative Law of the II S* (1005) 324

the U.S. (1905) 324.

"Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officers the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted." Buttfield v. Stranahan (1904) 192 U.S. 470, 496.

"... Unless the Legislature could pass an act outlining the governing principles in somewhat general terms, and leave the railroad commission to fill in the

[&]quot;... Unless the Legislature could pass an act outlining the governing principles in somewhat general terms, and leave the railroad commission to fill in the details, the power of the Legislature on the subject would be practically useless and impossible of execution." Lumpkin, J., in Southern Ry. v. Melton (1909) 133 Ga. 277, 65 S. E. 665, 668. Cf. Georgia R. R. v. Smith (1883) 70 Ga. 694.

²⁰ Compare Locke's suggested division into legislative, executive and federative. His idea of federative combines the war powers and all relations with foreign states, which we to a large extent have combined in the executive branch under the power of the President. *Civil Government*, ch. 12.

the judicial activities.²¹ This administrative field includes all acts legislative in nature beyond the adoption of the broad policy, so that in this sense the legislature too performs essentially administrative functions when it works out details in the application of the policy.

Thus, the legislative power, while concerning itself with new rules for the future, has as its true and proper subject-matter the broad policy which it declares. All details in the application of the policy may be delegated, though these details may involve the exercise of discretion and a choice between policies subordinate to the broad policy of the legislature. Therefore, if article 1, section 1 stood alone as an expression of the duty of Congress, that body need only indicate the policy to be pursued, and it will have exercised the power conferred upon it. The further legislative acts of laying down in detail the rule to be followed might well be done by Congress, or at its option, delegated to any person or body whose possible activities are not expressly or impliedly circumscribed by the Constitution. For instance, these legislative functions and duties could not be conferred upon the courts provided for in the Constitution, but they might well be conferred upon some part of the executive branch because historically the executive has always had some legislative duties to perform and the Constitution puts upon him the duty of participating in certain legislative matters. The executive is more interested than any other branch of the government in the form, the machinery and the details of the law, because these matters have a bearing upon its practical and efficient execution. Especially may the legislative power be vested in other functionaries or boards anomalous in character, brought into being to give expertness and length to the legislative arm in the application of its policies through detailed rules. Such bodies would not be prohibited from exercising their duties and functions through any implied inhibition growing out of the doctrine of the separation of powers.²² This construction is strengthened by consideration of the provisions of article I, section 8, paragraph 18 of the Constitution and the construction placed thereon by the Supreme Court of the United States.²³ That paragraph provides:

²¹ For even though judges do "legislate," as is often asserted, they presumably operate only within the broad policy of the law as previously existing or as declared by the legislative arm of the government and as recognized by the court. Cf. note 5, supra.

[[]See John E. Young, The Law as an Expression of Community Ideals and the Lawmaking Functions of Courts (1917) 27 YALE LAW JOURNAL, 1.—Ed.]

²²People v. Provines (1868) 34 Calif. 520. Cf. A. A. Berle, Jr., The Expansion of American Administrative Law (1917) 30 HARV. L. REV. 430, 441.

²⁸ Chief Justice White, speaking of the above clause and the interpretation put thereon by Chief Justice Marshall, says:

[&]quot;That provision . . . gave legislative power to adopt every appropriate means to give effect to the powers expressly given. In terms it was pointed out that

"The Congress shall have the power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Thorough investigations by Congress through its committees, and the working out of minute details of laws are administrative functions which Congress has heretofore largely assumed,—and not improperly so long as it can effectively handle them. But Congress can as properly delegate these functions, retaining to itself only the control and direction of policies. In fact this becomes the duty of Congress whenever it finds that these functions can be more efficiently performed by some other person or body. In such case under the provisions of article 1, section 8, paragraph 18, it becomes the duty of Congress to delegate the making of detailed rules to an expert board or to an individual having the necessary skill and information. In doing this Congress is "making laws which shall be necessary and proper for carrying into effect the foregoing powers." And this is the true point of connection between "necessity" and the power to delegate legislative functions.²⁴

We should further note the bearing of other parts of article I of the federal Constitution on the power of Congress. Section 4, paragraph 2 requires Congress to meet each year; section 5, paragraph 4 forbids either house deserting the other in the performance of its duties. Under section 7, paragraph I, revenue bills must originate in the House, and the clear implication is that in completed form they must be passed by Congress itself. Paragraph 2 of the same section further limits the acts that may become laws. All these provisions indicate

this broad authority was not stereotyped as of any particular time, but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion, enabling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for. In fact, the rulings . . . were all summed up in the following passage, which ever since has been one of the principal tests by which to determine the scope of the implied power of congress over subjects committed to its legislative authority: 'We admit, as all must admit, that the powers of government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.' "First National Bank v. Rellows (1917) 244 U. S. 416, 419, 61 L. Ed. 1233, 1237.

²⁴ See cases note 19, supra; also State v. Atlantic Coast Line Ry. (1911) 56 Fla. 617, 47 So. 969, 32 L. R. A. N. S. 639; State v. Public Serv. Com. (1917, Mo.) 194 S. W. 287; U. S. v. Grimaud (1911) 220 U. S. 506, 55 L. Ed. 563; State v. Briggs (1904) 45 Ore. 366, 77 Pac. 750. In all the above cases necessity is spoken of as a justification for delegations—the necessity of resorting to some delegation to legislate effectively.

that Congress must give its personal attention to its work, and they make it clear that Congress may never by a "lex regia"25 turn over bodily to another the entire power of legislation. Congress must promulgate its policies as laws; in the case of revenue laws they must be worked out in detail, but in all other cases it is the power that Congress must personally execute. No legislation, therefore, can take place without the direction of Congress; and the laying down of directions by that body meeting in its legislative halls constitutes the exercise of the legislative power intrusted to it. All this is in no wise inconsistent with the views indicated, and this legislative power may still be exercised with relation to section 8, paragraph 18, of article 1. Congress may not delegate the choosing of policies nor the duty of formally enacting the policy into law, but it may formulate that policy as broadly and with as much or as little detail as it sees proper and it may delegate the duty of working out the details and the application of the policy to the situation it was intended to meet. The rule, therefore,—so far as there may be said to be a rule against the delegation of legislative powers—is not a prohibition against delegations of legislative functions or of the duty to do acts legislative in their nature after Congress has laid down the broad rule; but it is a prohibition of the attempted subdelegation of the very power itself or the duty of meeting in annual session and declaring the national will in some form of enactment in the general laws. As to when the necessity for delegation exists, the decision rests with the legislative body-a discretion not to be disturbed by the courts except in clear cases of abuse.26 The very fact of the separation of powers should make courts more careful in this respect.

The cases upon the question of the delegation of legislative functions and powers are numerous, but as expressed by the courts themselves:

"The line has not been exactly drawn, which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given those who are to act under such general provision to fill up the details."²⁷

²⁵ Inst. lib. 1, tit. 2, par. 6; Gaii. inst. I. 5, Dig. lib. 1, tit. 4, 1. 4.

²⁵ "When we recur to the fact that the power of eminent domain has been delegated to railroad and other corporations without challenge; that the important power of taxation and all the powers of local government have, for more than three generations, been delegated in our state, we are admonished not to be too confident in asserting where the precise limitation is upon the competency of the legislature to delegate powers of government.

of the legislature to delegate powers of government. "We must be careful, therefore, how, in the absence of express injunction or clear implication, we strip a co-ordinate branch of the state government of the right to give expression to its will, in the form of law, within its own department." Paul v. Gloucester (1888) 50 N. J. 585, 594, 15 Atl. 272, 276.

See notes 99 and 100, infra.

²⁷ In re Griner (1863) 16 Wisc. 423, 437.

"Touching the question of the delegation of legislative powers, the almost infinite variety of detail and circumstance and of the laws intended to meet them have led to an almost equal variety of judicial decision and utterance which, taken in the abstract, cannot be harmonized."²⁸

Thus, while there has been an inclination toward a liberal and favorable construction of such statutes, there is at the same time a tendency to attempt to put the decision upon some easily conceded ground such as the power to make a complete act effective upon the happening of a contingency,²⁹ or upon the ascertainment of a fact by the chief executive, as in the case of *The Aurora v. United States.*³⁰ This has been done even in cases where some warping of the true situation may have been necessary in order to make applicable the principle thus stated.³¹

# It has been phrased:

"Although the legislature cannot delegate its powers to make a law yet it can delegate a power to determine some fact or state of things upon which the law may depend." 32

Dicta also arise from cases where a certain class of things is prohibited generally under a proper exercise of the police power, and some officer or board is empowered to determine when cases do or do not fall within the general prohibition.³³ With such situations it is not intended to deal in this article. We are here interested in those decisions which concede the power to delegate a rule-making or ordinance-making function to executive officers or administrative boards, and with that class of acts which have been ambiguously described by the courts as administrative acts of a legislative nature.³⁴

A challenge to the whole theory attempted to be set forth herein has been sounded in a series of cases of which *Dowling v. Lancashire Ins.* Co. 35 is typical. It was there held that the legislature might not constitutionally empower the commissioner of insurance to

²⁸ State v. Public Serv. Com. (1917, Wash.) 162 Pac. 523, 526.

²⁰ Hudspeth v. Swayze (1914) 85 N. J. L. 592, 89 Atl. 780; State v. Parker (1854) 26 Vt. 357.

^{* (1813) 7} Cranch, 382, 3 L. Ed. 378.

⁸¹ Note the minority opinion in *Field v. Clark* (1892) 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294.

²² Field v. Clark, 143 U. S. 649; Locke's Appeal (1873) 72 Pa. St. 491.

³² Union Bridge Co. v. U. S. (1907) 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; Monongahela Bridge Co. v. U. S. (1909) 216 U. S. 177, 30 Sup. Ct. 356, 54 L. Ed. 435.

v. Dey (1888) 35 Fed. 866. As showing the uncertain meaning of "administrative" as applied to legislative functions, see note 96, and p. 921, post.

^{55 (1896) 92} Wisc. 63, 65 N. W. 738, 31 L. R. A. 112.

"prepare, approve and adopt a printed form in blank of a contract or policy of fire insurance together with such provisions, agreements or conditions as may be endorsed thereon or added thereto, and form a part of such contract or policy; and such form shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy" on the ground that the act "fails to provide definitely and clearly what the standard policy should contain, so that it could be put in use . . . without the determination of the insurance commissioner in respect to matters involving the exercise of a legislative discretion that could not be delegated."

The court held that the act was incomplete and uncertain until the commissioner acted. As

"a discretion was reposed in the commissioner as to the form of the policy which embodied the substance of the contract, and which was to have the sanction and the force of law," that "the effect, clearly, was to transfer to him bodily the legislative power of the state on that subject." Continuing, the court says: "Within the limits prescribed, he was to prepare just such a policy or contract as, in his judgment and discretion, would meet the legal exigencies of the case, and no one could certainly predict what the result of his action might be. It was not to be published, as laws are required to be, or to be approved by the governor. It was to be filed in the office of the insurance commissioner, instead of being deposited in the office of the secretary of state, and its use was to be enforced by the penal sanction of the act. He was not required by the act to perform any mere administrative or executive duty, or to determine any matter of fact for the purpose of executing or carrying the act into effect. The result of all the cases on this subject is that a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature, so that, in form and substance, it is a law, in all its details, in praesenti, but which may be left to take effect in futuro, if necessary, upon the ascertainment of any prescribed fact or

For this decision the court cites and relies largely upon Field v. Clark and the cases therein cited. That case, it should be remembered, sustained, so far as our question is concerned, the section of the Tariff Act of 1890 which provided that:

"Whenever, and so often as the President shall be satisfied that the government of any country producing sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States,

⁸⁶ Cf. the following cases in accord, dealing with powers conferred on boards of health: Anderson v. Manchester Fire Assurance Co. (1895) 59 Minn. 182, 63 N. W. 241; O'Neil v. American Fire Ins. Co. (1895) 166 Pa. St. 72, 30 Atl. 943; State v. Burdge (1897) 95 Wisc. 390, 37 L. R. A. 157, 62 Am. St. Rep. 123, 70 N. W. 347. In the case last cited the competency of such legislation as a proper exercise of the police power seems to have been the real question in the mind of the court.

which, in view of the free introduction of such sugar, molasses . . . into the United States, he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, . . . the free introduction of such sugar . . ., the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied . . . as follows:"

Detailed provisions as to such suspension duties follow. The court in *Field v. Clark* later says:

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

After holding that, as interpreted by the court, this was not a delegation of legislative power to the President, the court proceeds:

"'The true distinction' as Judge Ranney speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' Cincinnati W. & Z. Ry. Co. v. Clinton County Comrs. I Ohio St. 88. In Moers v. Reading, 21 Pa. 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in Locke's App., 72 Pa. 491: "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the Legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet fully developed, or to things future and impossible to know . . . The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

That these statements are not inconsistent with the decision of the Wisconsin court may be conceded. It must be remembered, however, that the decision in *Field v. Clark* was in favor of the validity of the provision in question; that the above statements were not necessary to the decision of the case before the United States Supreme Court, and that the situation immediately presented to Justice Harlan was one which as interpreted by him³⁷ did not involve a question of real delegation. On this point he says:

⁸⁷ Note that Justice Lamar, Chief Justice Fuller concurring, wrote a dissenting opinion in which, disregarding the form of the enactment, they contended that

"He [the President] had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress."

It would seem, therefore, that the majority opinion in *Field v. Clark* is not intended to apply directly to a case of real delegation of discretion, and as to such a situation it was *dictum*.

The questions presented by *Dowling v. Lancashire Insurance Co.* are:

- 1. Must a statute contain within itself all the detailed regulations which it contemplates, or may authority to make such detailed regulations be delegated?
- 2. May a discretion or choice as to means or method be included in this authority?
- 3. May such an act be sustained if it permits or requires the adoption of a policy or of standards by the delegate depending upon his discretion and judgment?

Of course such regulations are not statutes; a statute is a formal enactment of the legislature. But our question goes to the substance, not to the form or name of the enactment, and our inquiry is whether, and how far, a commission or an executive officer may lay down rules binding upon the public under the general authority of a statute.

We shall first inquire how far a delegate may be intrusted with the power of supplying the detailed regulations contemplated by a statute and in accordance with its policy.

In Atlantic Express Co. v. Wilmington & Weldon R. R., 38 the act brought in question denounces excessive charges, unjust discriminations and preferences as unlawful, and invests the commission with authority to "make such just and reasonable rules and regulations as may be necessary for preventing the same." The court says, quoting with approval from Georgia R. R. v. Smith. 39

"The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed is apparent and great; and this we understand to be the distinction

the discretion lodged in the President here to determine when duties were "reciprocally unequal and unreasonable" and to base such an order upon that determination, was the very essence of legislative duty. They distinguished the case of *The Brig Aurora*, 7 Cranch, 388, on the ground that in the latter case the act of Congress provided for all the contingencies. It should be noted, however, that if the interpretation of the minority is accepted, the duty of the President though legislative in nature is still to be exercised in subordination to the policy of Congress as declared in the act, and so falls within our main thesis.

^{88 (1892) 111} N. C. 463, 16 S. E. 393, 32 Am. St. Rep. 805, 18 L. R. A. 393.

recognized strikingly by all the courts as the true rule in determining whether or not, in such cases, a legislative power is granted."

In Blue v. Beach,40 the state board of health was by statute empowered to adopt

"rules and by-laws, subject to the provisions of this act and in harmony with other statutes in relation to the public health, to prevent outbreaks and the spread of contagious and infectious diseases."

Under this act, rule II of the board was promulgated. It provided:

"In all cases where an exposure to smallpox is threatened, it shall be the duty of the board of health, within whose jurisdiction such exposure shall have occurred, or danger of such an epidemic ensuing, to compel a vaccination or revaccination of all exposed persons."

Under article 4, section I of the constitution of the state, "All legislative authority" is lodged in the general assembly, and it is claimed that by virtue of that section of the state constitution the power to make such a rule may not be delegated to the board of health. The court sustained the delegation, saying:⁴¹

"While it is true that the character or nature of such boards is administrative only, . . . the power to make reasonable rules, by-laws, and regulations is generally recognized by the authorities . . . When these boards duly adopt rules or by-laws by virtue of legislative authority, such rules and by-laws, within the respective jurisdictions, have the force and effect of a law of the legislature."

In State v. Atlantic Coast Line Ry. this language is used:42

"Where a valid statute, complete in itself, enacts the general outlines of a governmental scheme, or policy, or purpose, and confers upon officials charged with the duty of assisting in administering the law authority to make . . . rules and regulations, . . . such authority is not an unconstitutional delegation of legislative power. . . . A statute may be complete when the subject, the manner, and the extent of its operation are stated in it."

In Cook v. Burnquist the court says:43

"The Legislature of the state, in passing a law, may include in that law many administrative details, as well as the main vital provisions of the law, or it may pass a law covering a matter broadly and in gen-

^{40 (1900) 155} Ind. 121, 56 N. E. 89, 50 L. R. A. 64, 84 Am. St. Rep. 195.

⁴¹ It is interesting to note that some of the cases chiefly relied on as sustaining *Dowling v. Lancashire Fire Ins. Co.* as authority for the proposition that the legislative act must be complete in detail and that no discretion can be lodged in the delegate, are in the case of *Blue v. Beach* cited for the opposite result, to wit, *Locke's Appeal*, 72 Pa. St. 491, and *Field v. Clark*, 143 U. S. 649.

^{42 (1911) 56} Fla. 617, 47 So. 969, 3 L. R. A. N. S. 639.

^{43 (1917) 242} Fed. 321, 329.

eral, leaving the administrative details to a board, or to certain designated persons; but the administrative details of any particular matter included in a statute still retain their character of administrative details, and the Legislature may pass an act permitting the carrying out of a change of these administrative details to a public board or to an individual, even after they have been enacted into the statute."

In Chicago & N. W. Ry. v. Dey Justice Brewer remarked that45

"the line of demarkation between legislative and administrative functions is not always easily discerned. The one runs into the other. The law books are full of statutes unquestionably valid, in which the legislature has been content to simply establish rules and principles, leaving execution and details to other officers."

That a statute may be general and that the details necessary to its policy and purpose may be supplied by a board or an individual, seems too well settled for further question.

The second question is whether a discretion may be granted to the mandatary as to means, method, or subject-matter. It would clearly appear from the decisions that, within the purpose and policy of the statute, a discretion—broad or narrow as the legislature shall deem expedient—may be vested in the delegate.⁴⁸ Further consideration of

cases cited.

[&]quot;In the more recent case of Red "C" Oil Mfg. Co. v. Board of Agriculture (1911) 222 U. S. 380, 56 L. Ed. 240, the delegation was upheld:

[&]quot;The legislative requirement was that the illuminating oils . . . should be safe, pure, and afford a satisfactory light, and it was left to the Board of Agriculture to determine what oils would measure up to these standards."

[&]quot;A direct exercise by the legislature of the police power is in accordance with immemorial governmental usage. But the subject matter may be such that only a general scheme or policy can with advantage be laid down . . . and the working out in detail of the policy indicated may be left to the discretion of the administrative or executive officials." McGhee, Due Process of Law, 366 and

^{45 (1888) 35} Fed. 866, 874.

⁴⁸ Red "C" Oil Mfg. Co. v. Board, 222 U. S. 380, supra, note 43; Buttfield v. Stranahan, 192 U. S. 470; Blue v. Beach, 155 Ind. 121.

In St. Louis, Iron Mt. & So. Ry. v. Taylor (1908) 210 U. S. 281, 287, 52 L. Ed. 1061, 1064, delegation by Congress of the duty to fix the standard height of drawbars for freight cars, was held constitutional.

State v. Briggs (1904) 45 Ore. 366, 77 Pac. 750:

[&]quot;It is sometimes said in opinions and in law books that, where a statute undertakes to regulate the licensing of callings, trades, or professions, the extent of the qualifications required of the licensee must be determined by the judgment of the Legislature; but this does not mean that the Legislature must necessarily provide in the act itself the exact qualifications required. It may delegate that power to a board or commission created and authorized by it, which, in the exercise of the authority vested in it, acts on behalf of the state; its conclusions and judgments, so long as exercised within the limits of the law, being the acts of the state, and binding as such."

of the state, and binding as such."

In State v. Normand (1913) 76 N. H. 541, 85 Atl. 899, 901, Ann. Cas. 1913 E, 966, the court says: "The statute is complete in itself. It in effect declares that bread unnecessarily exposed to flies and dirt is a public menace and provides a penalty for the infringement . . . of the act. . . . The state board of health

this question may be included under our treatment of the third inquiry: May a discretion thus granted be so broad as to permit the adoption of a policy by the delegate?

There are many dicta to the effect that no power to choose policies may be given to the delegate. But such statements usually accompany a decision sustaining the delegation complained of but insisting that it is not a real delegation of legislative functions or powers. To get clear light, one must ignore phrases and terms and look at the results attained.

In 1910, the fourth section of the Interstate Commerce Act was amended so that⁴⁷

"upon application to the Interstate Commerce Commission such carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances."

The effect of the act was to take from the carrier the right to determine in the first instance whether conditions were "substantially similar," and the right to determine in advance upon the modification of a given rate where it conflicted with the general provisions of the long and short-haul clause. The power to make such orders was vested in the commission. In order to standardize its rulings under this act, the Interstate Commerce Commission had divided the territory under its jurisdiction into zones, thus framing a general policy under which its special rules should be made. It was contended that this gave the commission too broad a legislative power. The court denied the contention,48 but it sustained the statute and the action of the commission upon the rather unsatisfactory ground that since the carrier had formerly been permitted to fix a rate for itself which depended for its validity on a consideration of whether circumstances were substantially similar, that had been equally a delegation of legislative power; and the carriers contending for that power-which would revert to them if the statute in question were unconstitutional or inoperativewere in no position to complain of the commission's exercise of the same power and of its classification by zones, similar to those which the railways had formerly used by agreement; if one was an illegal delegation, it followed that the other was also illegal. But it is submitted that a railroad company does not legislate in making a rate for its private business and for determining primarily its private profit. Its act binds only itself and those individuals who enter into relations with it; it has no power to bind other railroads. The public interest

is charged with the enforcement of the law, and for that purpose it is authorized 'to make all necessary rules and regulations.' . . . When the board of health made the rule requiring loaves of bread to be wrapped in paper they were not legislating."

⁴⁷ Act of June 18, 1910, 36 Stat. at L. 548.

⁴⁸ Intermountain Rate Cases (1914) 234 U. S. 476, 58 L. Ed. 1408.

and the duty of the carrier as a public utility are merely limitations on the private power of the railroad to make its own rates absolute. Legislation is the making of rules binding generally on others, not rules for the conduct of one's own business. The effect of the court's decision is, therefore, to acquiesce in the delegation to the commission of a broad discretion, with no standards prescribed other than the general purposes expressed in the act, and to acquiesce in the assumption by the commission of a duty to formulate a general policy to guide its action in the making of future rules and regulations.

Two remarkable acts of the type under discussion are the general acts authorizing a reorganization of the customs service by the President.⁴⁹ By the Act of August 24, 1912, Congress made the following provision:

"The President is authorized to reorganize the customs service and cause estimates to be submitted therefor on account of the fiscal year nineteen hundred and fourteen bringing the total cost of said service for said fiscal year within a sum not exceeding \$10,150,000.00 . . .; in making such reorganization and reduction in expenses he is authorized to abolish or consolidate collection districts, ports, and subports of entry and delivery, to discontinue needless offices and employments, to reduce excessive rates of compensation below amounts fixed by law or Executive order, and to do all such other and further things that in his judgment may be necessary to make such organization effective and within the limit of cost herein fixed; such reorganization shall be communicated to Congress at its next regular session and shall constitute . . . until otherwise provided by Congress the permanent organization of the customs service."

# The act of August 1, 1914, provides:

Sec. I. "The President is authorized from time to time, as the exigencies of the service may require, to rearrange, by consolidation or otherwise, the several customs-collection districts and to discontinue ports of entry by abolishing the same or establishing others in their stead: *Provided*, That the whole number of customs-collection districts, ports of entry, or either of them, shall at no time be made to exceed those now established and authorized except as the same may hereafter be provided by law: *Provided further*, That, hereafter, the collector of customs of each customs-collection district shall be officially designated by the number of the district for which he is appointed and not by the name of the port where the headquarters are situated and the President is authorized from time to time to change the location of the headquarters in any customs-collection district as the needs of the service may require: *And provided further*, That the President shall, at the beginning of each regular session, submit to Congress a statements of all acts, if any, done hereunder and the reason therefor."

These acts were brought about by the almost intolerable condition of customs districts in the United States, a condition that had from

⁴⁹ Act of Aug. 24, 1912, 37 Stat. at L. 434, and Act of Aug. 1, 1914, 38 Stat. at L. 623.

year to year been pressed upon the attention of Congress without result. The system of districts was substantially the same as that formulated in 1799; many of the 126 districts had become unnecessary, while newer parts of the country were not served at all.⁵⁰ The system was wasteful and extravagant, but detailed congressional action was apparently impossible because of the complexity of the public interests involved and the many conflicting local interests.

By virtue of the first act, President Taft promulgated and transmitted to Congress on March 3, 1913, his plan of reorganization, ⁵¹ making in the state of Maine, for instance, two districts instead of fourteen, and establishing forty-nine districts for the entire territory covered in place of the one hundred and twenty-six previously maintained. It will be of interest to note that among other changes in policy and detail put into effect by this plan, a protest fee of \$1.00 was established for each appeal in order to discourage useless and frivolous litigation.

It is true that under these statutes there is no unlimited discretion in the President; but he has some discretion, and it is contemplated that he shall adopt his own policy for the general purposes named in the act—to reduce expense and increase efficiency. But his acts thereunder are legislative in nature, and his authority is derived from the delegation of power to him by Congress.

Another instance of the authority to perform legislative functions so broad as to imply a duty in the delegate to establish a policy will be found in the provisions for a government for the Philippine Islands. The Act of March 2, 1901, provides that

"All military, civil and judicial powers necessary to govern the Philippine Islands . . . shall, until otherwise provided by Congress, be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said Islands in the free enjoyment of their liberty, property and religion." ⁵²

By the Act of May 11, 1908:

"That the President is hereby authorized in his discretion to create by Executive order, and name, a new executive department in the Philippine government, and to embrace therein such existing bureaus as he may designate in his order; and in his appointment of any commission member he shall specify in his message to the Senate the department if any, of which the appointee shall be the secretary."53

⁶⁰ See U. S. Finance Report (1906) 34; also testimony of Jas. F. Curtis, Assistant Secretary of the Treasury, before the Committee on Expenditures of Treasury Department, Aug. 16-17, 1911, esp. Report, p. 4.

⁵¹ Executive order of March 3, 1913. See also executive orders of President Wilson under the act of Aug. 1, 1914, dated Nov. 21, 1914, and May 15, 1917.

^{52 31} Stat. at L. 910.

⁶³ Ch. 164, s. 2, 35 Stat. at L. 125.

It is true that under the Constitution54

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

This provision is an authority to legislate, although on the face of it, it is no more an authority to delegate legislative power to the co-ordinate executive branch of the government than are the provisions of article I already referred to. The question was raised as to the first of the above statutes in Dorr v. United States,55 but the Supreme Court only said in answer to the objection that "The right of Congress to authorize a temporary government is not open to question at this day . . ." Of course the power of Congress to legislate for a territory cannot be denied, nor its power to delegate powers of local self-government to a locality or a territory. It is true, also, that the executive authority may do some things in the control and organization of new territory that falls into its hands; but none of these considerations touches the present question: Can Congress give to the President by delegation legislative power over the territories which he would not otherwise have? If so, it is additional evidence of our recognition of the power of Congress to delegate legislative functions, and it is broader than the dicta of the early cases.

A recognized power to delegate legislative functions, even to the extent of allowing the delegate to adopt a policy—or rather, as we hope may appear, requiring the delegate to adopt a policy—will be found in the cases dealing with the delegation of the rate-making powers. In Munn v. Illinois⁵⁶ the Court went so far as to declare that a legislative rate was a matter of policy to be controlled at the polls rather than in the courts. This sweeping result is not now deemed to follow the legislative exercise of the rate-making function but it is concededly a legislative function—a rule for the future binding upon all to whom it applies.⁵⁷ May this function be delegated by the legislature to a commission? In Interstate Commerce Com. v. Cincinnati etc. Ry. Justice Brewer said:⁵⁸

"There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty."

⁵⁴ Article IV, sec. 3, par. 2.

^{55 (1904) 195} U. S. 153, 49 L. Ed. 128.

[∞] (1876) 94 U. S. 113.

⁵⁷ Atlantic Coast Line R. R. v. North Car. Corp. Com. (1907) 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933 and notes; Interstate Commerce Com. v. Cincinnati etc. Ry. (1897) 167 U. S. 479, 42 L. Ed. 243.

⁵³ 167 U. S. 479, 494.

In Louisville & Nashville Ry. v. Garrett it is said:59

"It has frequently been pointed out that prescribing rates for the future is an act legislative, and not judicial, in kind. . . . It pertains, broadly speaking, to the legislative power. The legislature may act directly, or, in the absence of constitutional restriction, it may commit the authority to fix rates to a subordinate body."

The Supreme Court has said:60

"The function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated."

Chief Justice White, in Atlantic Coast Line R. R. v. North Car. Corp. Com. says: 51

"The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine."

In State v. Public Serv. Com. the court says:62

"It is also settled beyond doubt or cavil that this power of prescribing maximum rates for common carriers, which, as we have seen, Legislatures possess pursuant to an untrammeled grant of powers to pass laws, may be delegated to a public service commission. To this rule, unless inhibited by express constitutional provision, there is not a reputable exception. . . . He reads the cases in vain who does not concede the authority of the Legislature, absent an express constitutional provision which forbids, to delegate to an administrative body the power to fix rates for the carriage of freight and passengers."

By the provisions of the Missouri constitution63

"The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled the General Assembly of the state of Missouri." And "The General Assembly . . . shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties."

⁶⁹ (1913) 231 U. S. 298, 305, 58 L. Ed. 229, 239.

⁸⁰ Knoxville v. Knoxville Water Co. (1908) 212 U. S. 1, 8, 53 L. Ed. 371, quoted in San Joaquin Light & P. Corp. v. R. R. Com. (1917) 165 Pac. 16, 17. ⁶¹ 206 U. S. 1, 19.

⁶² (1917, Mo.) 194 S. W. 287, 291, 289, 292, 295.

[∞] Art. 4, sec. 1, Constitution of 1875.

⁶⁴ Art. 12, sec. 14.

Under these constitutional provisions the legislature had provided that⁶⁵

"Whenever the Commission shall be of the opinion . . . that the maximum rates . . . are insufficient to yield reasonable compensation for the service rendered, 66 . . . the Commission shall . . . determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute. . . ."

The court held that in spite of the direct mandate given by article 12, section 14 of the Missouri constitution to the legislature, the latter body had properly delegated this function, although the exercise of the subdelegated power by the commission involved the setting aside by the commission of a previously established legislative rate, ⁶⁷ and that the power of delegation to a commission was the same whether such provisions were in the constitution or not, and that "it is not a forbidden delegation of legislative power to clothe a public service commission with the power of establishing reasonable rates, maximum or minimum."

It is true that, while sustaining the rate-making function bestowed on a commission by statute, courts have attempted to show that this function is not legislative but rather judicial in nature. This tendency

⁶⁵ Laws of 1913, sec. 47, p. 583.

of Notice the qualification on the jurisdiction of the commission: it must first find that the maximum rate is insufficient to yield reasonable compensation. This makes it necessary for the commission to find that fact as a prerequisite to jurisdiction to act as a legislative body. Cf. Chicago, M. & St. P. Ry. v. Minnesota (1890) 134 U. S. 418. But it is believed that this fact being found, the power exercised is as purely legislative as though the statute were unqualified. See Illinois Act of May 2, 1873, sec. 8, which without qualification commanded the commission to "make for each railroad . . . a schedule of reasonable rates." This statute was upheld in Chicago, B. & Q. R. R. v. Jones (1894) 149 Ill. 361, 376, 37 N. E. 247.

⁶⁷ The Missouri court points out, however, that the state legislature is not dependent upon art. 12, sec. 14 for its power over rates.

[&]quot;Since . . . the Legislature of this state had and exercised the power to establish reasonable maximum rates of carriage for freight and passengers, long before section 14 of article 12 was ever written into our Constitution, the latter section of the Constitution was merely the expression of a theretofore existing constitutional power . . . and so the cases which come from states having no express provision as to the legislative authority over railroads, and which hold constitutional the delegation of this power, are just as cogent, binding and persuasive as cases from Illinois, West Virginia, Alabama, Washington, and Georgia, which have constitutional provisions similar to our own."

⁶⁸ For decisions in other states under similar provisions see Chicago, B. & Q. R. R. v. Jones, 149 Ill. 361, 376. Also State v. Baltimore & O. R. R. (1915) 76 W. Va. 399, 75 S. E. 714, 717, where under similar constitutional provisions the commission was authorized to "change any intrastate rate, charge or toll which is unjust or unreasonable, and may prescribe such rate, charge or toll as would be just and reasonable. . . ." This was held to be not unconstitutional as

is more likely to appear where the statute conferring the legislative duty couples with it as a prerequisite the duty of first ascertaining whether the rates previously in effect are unreasonable, and makes that finding a condition precedent to the exercise of the legislative function of establishing new rates. Here the commission has two functions to perform: one judicial in nature, in determining the jurisdictional fact of pre-existing unreasonable rates; the other legislative, in the establishment of the new rates; but the tendency has been to consider the two functions as one. Thus the Wisconsin court in Minneapolis, St. P. etc. Ry. v. Railroad Com. ⁶⁹ speaks of the power of the legislature to delegate to the commission the power of making rates under chapter 362, section 14, of the laws of 1905, providing in substance that whenever the commission shall find any existing rate unreasonable or unjustly discriminatory, it shall fix a reasonable rate to be followed in the future.

# The court says:

"This law establishes, and thenceforth assumes, the existence of rates . . . discoverable by investigation, but undisclosed, which are exactly reasonable and just. It commits to the Railroad Commission the duty to ascertain and disclose that particular rate. . . . The law intends that there is only one rate . . . that is reasonable and just. When the order of the commission is set aside by the court, it is because this reasonable and just rate . . . has not yet been correctly ascertained. When the order of the commission has been rescinded or changed by the commission because of changed conditions, it is because there is a new reasonable rate to be ascertained and disclosed, applicable to such new conditions and fixed by force of law immediately when the new conditions come into existence. But the theory and mandate of the law is that this point always exists under any combination of conditions and is always discoverable, although not always discovered. Until it is discovered and made known the former rates and service prevail. . . . If it were conceded that the commission had power or discretion to fix one of several rates, either of which would be just and reasonable, it would be hard to say that this was not a

delegating legislative power expressly conferred on the legislature by the constitution.

See also State v. Railroad Com. (1909) 52 Wash. 33, 100 Pac. 184, sustaining a Washington statute under similar circumstances.

Art. 4, sec. 2, par. I of the Georgia constitution provided that:

"The power and authority of . . . requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred upon the General Assembly, whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs." Under this provision the legislature provided that the commission should "make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this state on the railroads thereof." Code 1882, par. 719, p. 159.

The court in Georgia R. R. v. Smith (1883) 70 Ga. 694, 698, sustained the delegation because of the "utter impossibility of preparing by the legislature just and proper schedules for the various railroads." See also Railroad Com. v. Central of Ga. Ry. (1909) 170 Fed. 225, 238, construing the Alabama constitution.

60 (1908) 136 Wisc. 146, 116 N. W. 905, 911, 912, 17 L. R. A. N. S. 821.

delegation of pure legislative power to the commission. But the theory of this law is to delegate to the commission the power to ascertain facts and to make mere administrative regulations."

Note the statement of the court that the delegation in question is permissible only if one concedes that a reasonable rate is a fixed point to be found by the commission as a fact previously existing, and that if the latter had "power or discretion to fix one of several rates, either of which would be just and reasonable, it would be hard to say that this was not a delegation of pure legislative power."

Yet it is submitted that what may be a reasonable rate is not a fixed point. The court admits this for practical purposes, for it proceeds to say:

"In reviewing the order of the Railroad Commission the inquiry is not whether the rate . . . fixed by the commission is just and reasonable, but whether the order of the commission is unreasonable or unlawful. . . . The court is not investigating for the purpose of establishing a fixed point. Whether or not the order is within the field of reasonableness, or outside its boundaries, is the question for the court. . . . The order, being found by the court to be such that reasonable men might well differ with respect to its correctness, cannot be said to be unreasonable."

Of course what the court had in mind in the last quotation is the relation of the functions of the court and the commission, and the court treats it as somewhat like the relation of court and jury. But it should be recognized that a reasonable rate is not, even in theory, a fixed point, but is any point in that portion of a scale of possible rates between the point of unreasonable cost to the public on the one hand and of confiscation of the property of the utility on the other; and that even the location of this portion of the entire scale will vary according to the basis taken for valuation and proper return. That the duty of fixing the rate implies a broad discretion and a duty to establish a

⁷⁰ "The thing of real importance in a rate case is not the fair value of the property alone or the fair rate of return alone, but the product of the two." Report, p. 146, of committee on plans for ascertaining the fair value of railroad property submitted to 23d Annual Convention, National Association of Railroad Commissioners.

Commissioners.

"What is the test by which the reasonableness of rates is determined? This is not yet fully settled. Indeed, it is doubtful whether any single rule can be laid down, applicable to all the cases." Judge Brewer in Ames v. Union Pac. R. R. (1804) 64 Fed. 165, 177

R. R. (1894) 64 Fed. 165, 177.

"Little progress has been made toward a definition of 'fair value for rate purposes.' Some authorities state that the term is not subject to definition, if by definition is meant the laying down of a standard or rule or formula by which fair value can be determined. Each case must be considered on its own merits." Whitten, Valuation of Public Service Corporations (1914) Supp. 817.

Fair value "is a determination of what, under all the facts and circumstances

of the case is a just and equitable amount on which the return allowed to the corporation is to be computed." Minnesota Rate Cases (1913) 230 U. S. 352.

policy is well brought out in the case of re Portland Railway, Light & Power Co.:⁷¹

"In the consideration of any case . . . this commission will be governed by considerations of public policy, bearing in mind the constant need for the investment of new capital in order that the public may be properly served . . . the effect upon investors of a given action in rate regulation is not confined to the particular class of utility in which it is exercised."

And it seems well settled that whether rates are fixed by a commission or by the legislature directly, the courts will use the same consideration in dealing with them. They will not declare them confiscatory unless there is a clear case. Thus in Louisville & N. R. v. Garrett, Justice Hughes says:⁷²

"The rate-making power necessarily implies a range of legislative discretion; and, so long as the legislative action is within the proper sphere, the courts are not entitled to interpose and upon their own investigation of traffic conditions and transportation problems to substitute their judgment with respect to the reasonableness of rates for that of the legislature or of the railroad commission exercising its delegated power."

Another court puts it thus:78

"The vital question to both shipper and carrier being that the rates shall be reasonable, and not by what body they shall be put in force."

In Bluefield v. Bluefield Water Co.:74

"The valuation of the property of a public service corporation for rate making purposes and the fixing of rates for tolls and charges for the services to be rendered are purely legislative acts and are not the subject of judicial inquiry, except in so far and in so far only as may be necessary to determine whether such rates are void on constitutional or other grounds." ⁷⁵

We must conclude that the making of rates, whether by the legislature or by a commission, is a legislative function, that it is delegable to the commission, that it involves the exercise of a broad discretion and the adoption of a policy by the commission, and that no standards need be set for the commission other than the implied standard that the rates shall be not confiscatory on the utility nor oppressive to the public. Even as to these bounds no definite point can be fixed and the

⁷¹(P. S. C. Ore.) P. U. R. 1918 B, 266, 275.

⁷² (1913) 231 U. S. 298, 313, 58 L. Ed. 229, 242.

¹³ State v. Atlantic Coast Line R. R. (1908) 56 Fla. 617, 47 So. 969, 32 L. R. A. N. S. 639.

¹⁴94 S. E. 121, 122, P. U. R. 1918 B, 25.

⁷⁶ Cf. Chicago & N. W. Ry. v. Dey (1888) 35 Fed. 866; Des Moines Gas Co. v. Des Moines (1915) 238 U. S. 153, 59 L. Ed. 1244.

decision rests with the rate-making body subject to be set aside when the power granted is not exercised within the terms of the grant, or when the result is clearly confiscatory or is a clear invasion of the right of the public to a rate that is not oppressive.⁷⁶

Another class of cases in which the courts have apparently attempted to explain away clear delegations of legislative functions and to attribute the result attained to other grounds is in those instances where commissions are authorized to prescribe in advance demurrage and other charges. Some courts have seemed to imply that since this is fixing an element of civil damage for cases that may arise, it is like jury action and hence is not legislative. In State v. Public Service Com. the court says:77

"There is the same distinction between prescribing such compensation and fixing a penalty in its nature purely punitive as there is between the fixing of reasonable rates and the prescribing of such penalties. Both the fixing of reasonable rates and the fixing of reasonable demurrage for the failure to furnish cars in their nature involve the determination of the question of reasonable compensation."

The inference apparently intended to be conveyed in this and similar cases is that the act of designating a reasonable compensation is not legislative but it is akin rather to a judicial determination or a finding of fact by a jury. But this is not true: the distinction between a legislative and a judicial act is not that in the latter a remedy is applied while in the former it is rather a penalty; the true distinction lies in the fact that in legislation there is created a new general rule for future cases binding upon all to whom the rule applies, while in judicial acts the thing done is to ascertain the actual past damage in connection with a case before the tribunal. By this test, the fixing of damages or of rates of demurrage in advance is a legislative act; it is no less so when done by a commission than when done by a legislature. It would seem, therefore, that in spite of the dicta in the case last quoted, it makes no difference whether the delegation is of the authority to make a general rule inflicting penalties, or is intended to cover future cases for compensatory damages; the act required in either case is legislative, and if there is any distinction it should be sought on other grounds.

In the case of Ex parte Kollock the court says:78

"We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution."

⁷⁶ Beale & Wyman, Railroad Rate Regulation, sec. 442, 445.

[&]quot; (1917) 162 Pac. 523, 526. Cf. Chippewa & F. Improvement Co. v. Railroad Com. (1916) 159 N. W. 739; Southern Ry. v. Melton (1909) 133 Ga. 277, 65 S. E. 665.

⁷⁸ (1897) 165 U. S. 526, 533, 41 L. Ed. 813, 815.

In United States v. Maid the court puts it thus:79

"A department regulation may have the force of law in a civil suit to determine property rights, . . . and yet be ineffectual as the basis

of a criminal prosecution. .

"The obvious ground of said distinction is that to make an act a criminal offense is essentially an exercise of legislative power, which cannot be delegated, while the prescribing . . . of a rule, without penal sanctions, to carry into effect what congress has enacted, although such rule may be as efficacious and binding as though it were a public law, is not a legislative, but ministerial, function."

It is submitted that any "function" which can create a "rule binding as though it were a public law" for all future cases as they arise is legislative and that it is not ministerial in any proper sense of that term. Departmental regulations for the conservation of the national domain⁸⁰ or for the protection of dairy interests against unlabeled oleomargarine⁸¹ are regulations calling for a wide discretion to be exercised by the delegate. In *United States v. Eaton* this language is used:⁸²

"It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue . . . could be considered as a thing 'required by law' . . . in such manner as to become a criminal offence under § 18 of the act. . . . If Congress intended to make it an offence, . . . it would have done so distinctly."83

Reading between the lines, the real ground of distinction between cases where the commission attempts under delegated authority to impose a penalty and those in which it fixes a rule of damages for the future, would appear to be that the determination of the policy being the essential of the legislative act, the courts will look to the authorizing act of Congress or the legislature for that policy; and that while the intention to standardize damages might readily be assumed, yet the court will not presume the intended policy of allowing the commission or delegate to inflict a penalty or create a new crime in any case; therefore the authority to do that must at least be clearly expressed in the statute. But if so expressed, it may authorize the making of rules by administrative agencies which when made will be binding as law and their violation a crime. In other words, the inflicting of penalties and the creating of crimes is so much a matter of policy as to be what

¹⁰ (1902) 116 Fed. 650, 652.

⁸⁰ Grimaud v. U. S. (1911) 220 U. S. 506.

⁸¹ Ex parte Kollock, 165 U. S. 526.

^{62 (1892) 144} U. S. 677, 688, 12 Sup. Ct. 764, 36 L. Ed. 591.

⁸² Cf. U. S. v. Bailey (1835) 9 Peters, 238, 9 L. Ed. 113; and Oceanic Steam Nav. Co. v. Stranahan (1909) 214 U. S. 320, 29 Sup. Ct. 671, 53 L. Ed. 1013. ⁸⁴ Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, supra, n. 82.

is sometimes called an "essentially legislative" or "purely legislative act." But it is believed that even the above cases are not necessarily binding as precedents for the proposition that commissions may under no circumstances be allowed to fix penalties or name offences if definitely authorized by statute to do so: the cases cited go rather on the theory that such authority will not be presumed. On the other hand the cases seem to indicate so strong a tendency on the part of the courts jealously to watch delegations of policy-forming functions by the legislature when they conflict with "individual or property rights," that this result is doubtful. One reason is that such delegations of power are unnecessary. Few cases can be conceived in which the delegation of such functions was necessary; but if the necessity ever becomes apparent it is not doubted that the power will be conceded to exist unless the question has been definitely closed by precedent.

In this connection attention may be called to a class of cases arising under state constitutions which reserve no legislative power in the people. The legislature in such cases may attempt to refer back some legislative act to the people for their ratification, making a favorable popular vote the condition precedent to the operation of the act.

There are two groups of cases upon this point, one declaring such reference unwarranted as a delegation of legislative power to the majority, so and the other allowing it as the mere naming of a condition precedent upon which the law will become effective—an external act or happening which the legislature itself makes the condition of the law's operation. st

On principle, if the mandate to the legislature requires it to declare the policies of the state, the legislature should not shirk its duty by attempting to throw back upon the public the responsibility for the policy.⁸⁸ It was ingeniously suggested by Justice Redfield in *State v. Parker*.⁸⁹

"And in regard to those great moral, social, and economic reforms, can it be doubted that the question of the preparation of the public mind to sustain them, firmly and quietly, lies at the foundation of all hopeful legislation on the subject? And is this not precisely what American legislatures both state and national have always, in effect, although not in form, been accustomed to do?"

[≈] See *post*, notes 92 to 94.

⁸⁰ In re Municipal Suffrage to Women (1894) 160 Mass. 386, 36 N. E. 488, 23 L. R. A. 113; Cooley, Constitutional Limitations (7th ed.) 168 et seq.; People v. Kennedy (1913) 207 N. Y. 533, 101 N. E. 442.

⁸¹ Hudspeth v. Swayze (1914) 85 N. L. J. 592, 89 Atl. 780; State v. Parker (1854) 26 Vt. 357. See also Smith v. Janesville (1870) 26 Wisc. 291.

⁸⁸ Cf. dissenting opinion of Justice Holmes in In re Municipal Suffrage, 160 Mass. 386, 36 N. E. 488, 491, with Cooley, Constitutional Limitations (7th ed.) 168 et seq.—note 86, supra.

⁸⁹ 26 Vt. 357, 364.

It may be true that laws should be only those which the popular mind is ready to receive and that the enforcement of laws depends upon their appeal to the sentiment of the people at large; but this consideration should be addressed toward an amendment to the constitution if it is believed that the will of the people can be found only by a referendum. It should not be permitted to override a mandate expressed or strongly implied in the constitution requiring the legislature to take personal responsibility for all state policies formulated into statutes.

It may be objected that the line should be more sharply drawn, that we should either forbid all delegation of legislative functions, or else go to the other extreme and forbid nothing less than the surrender of the final and ultimate power itself. But it is believed that such a line need not be drawn and that the duty of Congress and of the legislatures will in this respect always be relative to the subject, to the emergency, and to the public needs-more, probably, in the future than in the past; more in war times than in times of peace. The question is what is reasonably necessary in view of what the times demand and of the end to be accomplished.90 The result may be that legislation for every-day purposes will increasingly be by rules and regulations, and that statutes will be limited to a position of mere policy-directing instruments. Statutes may bear a relation to the rules and regulations of the future somewhat analogous to that which constitutions have heretofore borne to statutes. It is true that such methods will be earlier used in cases where expertness and special knowledge are needed, or where the subject-matter is vastly complicated; but, within the limits indicated, it remains a potential means of practical legislation for broader fields.

Something might be said at this point on the use of terms by the courts in the classes of cases under consideration. It would appear that the courts classify these cases in which power is delegated after the court has decided to sustain or reject it, and the terms applied therefore become a sort of ex post facto justification or prohibition, according as the thing is deemed necessary or not. The fact that so many classes of permitted delegations of a power legislative in its nature have occurred shows the existence of a power to make such delegation which is gradually recognized as the necessity becomes apparent. The term "ministerial" has been used to describe an act really discretionary in nature, but so used as to disguise the true nature of the permitted act. The terms "strictly and essentially" or "strictly

See Professor Frankfurter, Constitutional Opinions of Justice Holmes (1916) 29 HARV. L. REV. 683, 686-688.

²¹ Douglas Park Jockey Club v. Talbott (1917) 191 S. W. 474; U. S. v, Maid (1902) 116 Fed. 650.

and exclusively legislative acts;"92 "purely legislative power;"93 or "purely legislative duties;"94 or "legislation in the broad sense"95—have all been used in the sense of the legislative policy control as distinguished from subordinate acts of a legislative character, or ultimate legislative discretion as contrasted with the act which declares the new rule. We also have the much-abused term "administrative powers and duties," which as applied to functions of a legislature nature seems to mean only "those legislative functions and powers which may be delegated." For the purposes of our discussion, the expression is a question-begging term more or less elastic in content.96

Let us disregard the terms used and consider the thing done. Several propositions must then be conceded: No rule against the delegation of legislative powers by the legislature or by Congress⁹⁷ within the scope of the subjects committed to it, prevents the delegation upon the executive department or upon specially created boards or commissions through general statutes of the power and duty to perform functions legislative in their nature. This delegated power may be so broad as to require the use of a broad discretion and to necessitate the adoption of policies by the delegate. While the power may be exercised only within the limits designated by the legislature, yet it is for the legislature to say how broad the limits shall be, and in this determination they are guided by their honest judgment as to the most efficient means of serving the public. The courts should not review the discretion of the legislature in this respect, but should interfere only in plain cases of an attempted abdication of the function of choosing policies, or because of arbitrary interference with matters of private right.98 In construing the rules laid down by a subordinate functionary under this power, the courts should treat their acts as valid if within the lines of the authority committed to them and not clearly

Lumpkin, J., in Southern Ry. v. Melton, 65 S. E. 665.

⁵² Interstate Commerce Com. v. Goodrich Trans. Co. (1912) 224 U. S. 194, 214, 56 L. Ed. 729, 737.

⁴⁴ State v. Crosby, 92 Minn. 176, 99 N. W. 636, quoted in Alexander v. McInnis (1915) 129 Minn. 165, 167, 151 N. W. 899, 901.

⁵⁶ Cook v. Burnquist (1917) 242 Fed. 321, 329.

⁸ State v. Atlantic Coast Line Ry. (1911) 56 Fla. 617, supra, note 34.

While Congress has only granted legislative powers and there is not the same presumption in favor of its power as is indulged in the case of a state legislature, yet it is believed that the power of Congress to delegate, within the field of legislation committed to it, must be unquestioned in view of the provisions of the federal Constitution quoted supra, and the construction placed upon them by the courts. See cases mentioned in notes 14, 19, 23, 46, 48, 55, 58 supra.

^{**}E"The Constitution should be interpreted so as not to render impotent or inoperative, but to preserve and make effective, the sovereign power of the state. . . . If the details of the general legislative purpose, within definite limitations, as expressed in a complete law, cannot be committed to administra-

against some constitutional inhibition. Of the wisdom or expediency of the subordinate policy contained in these rules the court should not judge.⁹⁹

Judicial reference has been made to the general tendency:100

"The marked tendency of legislation in recent years, not only in this state, but in other states, has been, to a large degree, to break away from the theory of three separate and independent departments of government, by imposing upon other departments duties and powers of a legislative character, which the courts have been inclined to sustain"

# And in Cook v. Burnquist: 101

"The tendency, not only in Congress, but in state Legislatures, is more and more to commit to administrative boards, or to individuals, or to some other branch of the government, administrative details."

Indeed the whole tendency of the cases has been toward a general readjustment of the relations of courts and legislatures; toward a greater inclination to concede to the latter freer lines as to policies; and toward noninterference on the part of the courts whenever political ideas are the moving considerations. Perhaps we are realizing more clearly that governmental problems, even under our written con-

tive officers, the sovereign power and duty to regulate would be impotent." State v. Atlantic Coast Line Ry. (1908) 56 Fla. 617, 47 So. 969, 32 L. R. A. N. S.

639, 659.

"As a general proposition, whatever laws or regulations are necessary to protect the public health and secure public comfort is a legislative question, and appropriate measures intended and calculated to accomplish these ends are not subject to judicial review. But nevertheless such measures or means must bear some relation to the end in view." Blue v. Beach (1900) 155 Ind. 121, 56 N. E. 80. 03.

For a case where the court tries to settle the question of the power to delegate by substituting its own judgment as to policy for that of the legislature, see Schaezlein v. Cabaniss (1902) 135 Cal. 466, 67 Pac. 755. The court quotes the following from Yick Wo v. Hopkins (1886) 118 U. S. 356:

"The very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

³⁰ "The appropriate questions for the court would be whether the commission acted within the authority duly conferred by the legislature, and also, so far as the amount of compensation permitted by the prescribed rates is concerned, whether the commission went beyond the domain of the state's legislative power and violated the constitutional rights of property by imposing confiscatory requirements." Louisville & N. R. R. v. Garrett (1913) 231 U. S. 298, 313, 58 L. Ed. 229, 243.

¹⁰⁰ State v. Crosby, 92 Minn. 176, 99 N. W. 636, 637. See note 26, supra, and 6 A. & E. Ency. Law (2d ed.) 1022.

101 242 Fed. 321, 325.

102 That the federal courts have in the past unconsciously tended to decide questions of power in reference to departures in legislation, upon political rather than on purely legal considerations, see Professor Freund, *Principles of Legislation* (1916) 10 Am. Pol. Sci. Rev. 1, 14.

stitutions, must be settled as questions of policy and expediency before they are finally laid to rest. The settled theory of our fathers that this shall be a government of laws and not of men cannot well be applied as a limitation upon the processes of the lawmaking and policydeclaring brand of the government in the same way that it can be applied to functions judicial in nature.

Our present inquiry is not what policy the legislature should adopt in the matter of delegation. That is a problem for political wisdom to determine, and it will always be largely affected by contemporaneous social and political views. The time will probably come when the legislature will go too far; the time has surely been when it did not go far enough. We are here concerned only with the question of power. It may be urged that it is wrong to agitate these problems anew solely in the light of present conditions and of political ideals which often greatly vary from those of our ancestors. But it is equally inadvisable to settle these problems by dicta of the past which in their turn were based upon theories now somewhat outworn and outgrown.

Perhaps we have grown too rapidly and are now at that stage in the development of a world nation where the sane and conservative views of our fathers have too little weight. But these are matters of political judgment, and if our times are wrong, the wrong will be righted later. The chief thing to remember is that our Constitution is capable of adaptation to new ideals as well as to new conditions, and that to realize this is to pay it the highest possible tribute. We must enter upon our new undertakings with full sense of the fallibility of all things human, and with a proper reverence for the wisdom of the past.

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# PRESENT STATUS OF COMPENSATION ACTS IN ADMIRALTY

The decision of the United States Supreme Court in Southern Pacific Company v. Jensen, denying to state compensation acts any validity as to cases coming within the jurisdiction of admiralty, has already been commented on in these pages. Relying on this decision, state courts have been compelled to refuse awards to injured maritime employees "innocent victims of the old feud between federal and state control." This was the situation as regards eight New York

^{1 (1917) 244} U. S. 205; 37 Sup. Ct. 524, Ann. Cas. 1917 E, 900.

² (1917) 27 YALE LAW JOURNAL, 255.

³ See Tallac Company v. Pillsbury (1917, Cal.) 168 Pac. 17; Neff v. Industrial Commission of Wis. (1917, Wis.) 164 N. W. 845. Cf. Lanigan v. Aetna Life Ins. Co. (1917) 57 N. Y. L. J. 1035.

⁴12 NEW REPUBLIC, 283 (Oct. 13, 1917).

cases considered at one time by the Appellate Division, in all of which compensation was denied, and in all but one of which awards made by the Industrial Commission were set aside. Sullivan v. Hudson Nav. Co. (1918, App. Div.) 169 N. Y. Supp. 645. The majority held that awards made prior to the Jensen decision, either with the assent of the insurers, or without the question of jurisdiction having been raised, might now be reopened and set aside. They also held that the decision included within its scope not only carpenters engaged as repair men and injured while so engaged on board a ship anchored in navigable waters, but also dockworkers who were not working upon navigable waters but were employed under maritime contracts.

The view of the majority that admiralty jurisdiction extends to maritime contracts performed on land is undoubtedly correct.⁵ And their view upon the other branch of the case that lack of jurisdiction of the subject matter is never waived and may be asserted at any time is likewise unanswerable.6 Though the dissenting judges denied that admiralty jurisdiction extended to dockworkers, they did not contest the rule as to jurisdiction, but held that it applied only when lack of jurisdiction appeared from the record. In only two of the cases did they consider that the record disclosed such a situation, and they thought that the other cases should not be reopened to allow proof along those lines. That this position is technical they admit, but say that it is fair "to offset technicality against technicality in the interest of justice." But their position seems unjustifiable. While we may sympathize with their regret at the Jensen decision, yet it is the law of the land, and specious means should not be resorted to in order to prevent the insurers from taking advantage of it. That the insurers may have collected premiums upon the basis of agreements to pay such compensation claims is a claim properly to be made only by the employers in seeking refund of premiums paid, and even in such case

⁵ See Mr. Justice Pitney's statement in Southern Pacific Company v. Jensen, supra, at p. 252: "The civil jurisdiction in admiralty in cases ex contractu is dependent upon the subject matter; in cases ex delicto it is dependent upon locality."

⁶ 15 C. J. 809; McClaughry v. Deming (1902) 186 U. S. 49, 66, 22 Sup. Ct. 786, 46 L. Ed. 1049. The case of Valley S. S. Co. v. Wattawa (1917) 244 U. S. 202, 37 Sup. Ct. 523, cited in 27 Yale Law Journal, 255, n. 1, where the court refused to consider the jurisdictional question decided in Southern Pacific Company v. Jensen, supra, on the ground that the point was not raised in the trial court, is not really contra, because, whether right or wrong, it went off on questions of state and federal appellate procedure. The case was one, however, where an employee had obtained a judgment in a common law action against his employer for an injury on shipboard under the Ohio elective compensation act, denying to an employer who, as in this case, refused to submit to the compensation features of the act, the defenses based on the fellow-servant rule, assumption of risk, or contributory negligence. As hereinafter developed, it is not clear that the rule of the Jensen case applied.

there may not have been an unjust enrichment where the insurance agreement is the usual one to pay only compensation claims legally due.

The majority judges properly cite the Jensen decision as sustaining the validity of the saving clause of the Act of 1789, which saved to suitors from the grant of admiralty jurisdiction to the Federal courts "in all cases the right of a common law remedy where the common law is competent to give it." Likewise, they correctly view the Federal decision as holding that it is the form of the remedy rather than the basis of liability created by compensation acts which renders such acts unconstitutional as applied to admiralty, and their conclusion seems correct that if the New York Compensation Act had provided a common law remedy for its enforcement, it might have been upheld in maritime cases. The Court does not, however, refer to the recent amendment by which Congress added to the saving clause the words "and to claimants the rights and remedies under the workmen's compensation laws of any state."

This Amendment, which was popularly supposed to nullify the *Jensen* decision, has caused considerable disagreement among commentators. In the case of *Veasey v. Peters* (1917, La.; rehearing,

⁷Cf. Matter of The Iron Steamboat Co. (1917) 58 N. Y. L. J. 17.

⁸I U. S. St. at L. 76, 77, chap. 20, sec. 9; U. S. Comp. Stat. 1916, secs. 991 (1), 1233. But in (1917) 6 Cal. L. Rev. 72, n. 18, it was considered that references in the *Jensen* case to the saving clause were mere *dicta*. Cf. 27 Yale Law Journal, 261, n. 21.

of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction." Southern Pacific Co. v. Jensen, supra, at p. 218. That recovery under state statutes has been allowed in both state and admiralty courts for maritime cases of death by wrongful act, for which there was no basis of recovery at common law, see 27 YALE LAW JOURNAL, 258, nn. 11, 12.

^{10 40} Stat. at Large, 385 (Oct. 6, 1917).

¹¹ See 12 NEW REPUBLIC 283 (Oct. 13, 1917), felicitating Congress on so effectually aiding shipping at a time when the need thereof is vital.

¹² Its constitutionality is considered beyond question in (1917) 17 COLUMBIA L. Rev. 705, 707, and in (1918) 3 SOUTH. L. QUART. 76, but its constitutionality is questioned and its effectiveness doubted in (1917) 6 Cal. L. Rev. 72, n. 18, and (1918) 31 Harv. L. Rev. 488. In 17 Columbia L. Rev. 707 it is suggested that the New York Compensation Act will probably be held invalid as to maritime cases as imposing a double liability upon the employer, for which Cunningham v. Northwestern Imp. Co. (1911) 44 Mont. 180, 119 Pac. 554 is cited, and a federal compensation law is suggested as a remedy. Yet it is difficult to see how the situation in respect to double liability differs from that in any other case where admiralty jurisdiction is concurrent with state jurisdiction; the tribunal which first acquires jurisdiction retains it and two recoveries are not allowed. If the amendment is valid, claimants would naturally appeal to the state tribunal for their compensation remedy. In 3 South. L. Quart. 76, a federal compensation law is urged as necessary to cover the case of injuries upon the high seas. This

1918) 77 So. 948, it was relied upon to uphold an award, previously disallowed on the authority of the Jensen case, in the case of an injury occurring before its passage. This case, which concerns a stevedore injured in the unloading of a vessel, involves a curious misreading of authorities.13 Upon the second hearing of the case, the court distinguishes the Jensen case on the ground that it was a proceeding in rem to hold the ship responsible, which is palpably an error. And it distinguishes Atlantic Transport Company v. Imbrovek, 14 upon which it had previously relied for its decision that admiralty had jurisdiction, on the ground that there the stevedore was engaged in loading the vessel, while in the case at bar (as in the Jensen case) he was unloading. The court then gives the amendment as a further ground for its decision, stating that because of its remedial character there is nothing to prevent a retroactive effect being given it. This seems erroneous, for the court does not distinguish the case where there is merely a change of remedy from the case where the giving of a certain remedy really creates a new basis of liability.15 In view of the Jensen case, Congress by the amendment attempts to create a new basis of liability and the amendment therefore cannot be retroactive.

The court does not discuss the constitutionality of the amendment. As already suggested, it seems to the writer that the amendment leads to a dilemma. If Congress can legislate to save to suitors in maritime cases their common law remedies,—and the saving clause of the Act of 1789 has always been considered valid and was so considered in the Jensen case,—why can it not legislate to save to such suitors their statutory compensation remedies? Yet the Jensen case holds that such remedies interfere with the grant of admiralty jurisdiction in the United States Constitution, an authority superior to Congress. There will be some question about any view of the case. To hold the amendment invalid while the saving clause itself has been upheld would be to ascribe some strange virtue to a common law remedy, a narrowness of view implying a recurrence to former times when forms of action were absolutely rigid. To hold the amend-

seems a valid argument if the tort theory of compensation acts is to prevail. If the contract theory is to be adopted, and such acts given extra-territorial effect, this argument would fail, and as indicated in (1917) 27 YALE LAW JOURNAL, 259, local state acts seem otherwise preferable. For discussions of the extra-territorial operation of compensation acts, see (1917) 27 YALE LAW JOURNAL, 113, and (1918) 27 YALE LAW JOURNAL, 707.

¹³ See criticism in (1918) 16 MICH. L. Rev. 562.

¹⁴ (1914) 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157.

¹⁵ Jacobus v. Colgate (1916) 217 N. Y. 235, 111 N. E. 837.

^{16 (1917) 27} YALE LAW JOURNAL, 261, n. 21.

That state courts may apply equitable remedies to cases where the jurisdiction of admiralty is concurrent, see *Reynolds v. Nielson* (1903) 116 Wis. 483, 93 N. W. 455, 96 Am. St. Rep. 1000 (suit for partition of vessel); *Soper v.* 

ment constitutional, the course desirable from a practical point of view, is to overrule, in part, the *Jensen* decision, to consider that it turned entirely upon the wording of the statute, and to decide that Congress may authoritatively interpret the meaning of the grant of admiralty jurisdiction in the Constitution.

But is there not a way out through the clear intimation of the Supreme Court that it is the form of remedy which is objectionable? Why not, therefore, provide a common law remedy, capable of enforcement by the ordinary process of the court, for the compensation liability?¹⁸ And under elective compensation acts, such as those of Connecticut and Ohio, or at least under extensions of the idea contained in such acts, why is it not possible to subject such maritime employers as refuse to submit voluntarily to the ordinary compensation procedure to suit in common law actions with the defenses based on the fellow servant rule, assumption of risk and contributory negligence not available?19 Such actions are enforced by common law remedies and the ordinary processes of the courts, and do not involve any greater change of liability from the common law than do the actions created by the death damage statutes. This would not be unfair discrimination against such employers. At most it would be simply taking from them an unfair discrimination in their favor.

C. E. C.

Manning (1888) 147 Mass. 126, 16 N. E. 752; Knapp S. & Co. v. McCaffrey (1899) 177 U. S. 638, 20 Sup. Ct. 824.

¹⁸ It would seem that Veasey v. Peters, supra, might have been decided in accordance with this view, and in favor of the employee, on the original hearing, for the Louisiana Act provides that it shall be enforced through an ordinary action at law, though the court is not to be bound by common law rules of evidence or technical rules of procedure. Louisiana Acts of 1914, No. 20, sec. 18. If Louisiana can be considered to have any "common law" remedies, this would appear to be one. But the court, in its original opinion, considers the Jensen case as referring, not to the change of remedy created by compensation acts, but to the change of liability. In Bjolstad v. Pacific Coast S. S. Co. (1917, N. D. Cal.) 244 Fed. 634, a compensation act was enforced negatively in an admiralty court. Here suit had been brought by libel in admiralty for damages for the death of the defendant's employee, the action being grounded upon the New Jersey death damage statute. The court held that the New Jersey Compensation Act applied, that under that act no recovery could be had for alien dependents, and that in this case, the dependents being aliens, judgment must be for the defendant. In Southern Surety Co. v. Stubbs (1917, Tex. Civ. App.) 199 S. W. 343, it was held that the fact that admiralty had jurisdiction was no bar, under the Jensen case, to a suit at common law against an insurer for compensation.

¹⁹ See note 6, supra.

#### RESCISSION FOR INNOCENT MISREPRESENTATION

In discussing the "rescission of contracts" on the ground of misrepresentation, a recent English writer makes the following statement: "In order to justify the interference of the court, . . . such contract must be executory, on one side or the other. If it has been fully completed by conveyance, or otherwise fully executed and exhausted on both sides, rescission will always be peremptorily refused, subject to the two exceptions mentioned below." The two exceptions are: (I) "Where the misrepresentation was characterized by fraud"; (2) where "there has been a misrepresentation leading to error in substantialibus, or 'essential error,' that is to say, where the representee has received under the contract something totally different, in substance and nature, from that which was represented."

Apparently the American law, following the opinions of American text-writers rather than the English view, is developing a different doctrine.⁴ The Appellate Division of the New York Supreme Court

Like so many of the words in our legal vocabulary, the word "rescission" as applied to contracts is ambiguous. In discussions dealing with the effects of misrepresentation upon purely executory agreements, it is often said that the representee may in a given case "rescind the contract," when all that is meant is that the misrepresentation entitles him to treat the agreement as a legal nullity. In such cases it would seem that upon a correct analysis we must say that the representee is as yet under no contractual duty to the representor, for he need do nothing, before action is brought, to "disaffirm" the transaction. Thurston v. Blanchard (1839, Mass.) 22 Pick. 18. He has, however, a privilege and a power to "affirm" or "ratify" the transaction, i. e. to turn it into a binding bilateral contract. This privilege and power are not subject to destruction by the representor, i. e. they are protected by an immunity. On the other hand, "rescission" seems to have a different meaning in discussions of transactions not purely executory. If, for example, the representee has received something from the representor, his promise to pay for it seems to result in a contractual duty to do so. This duty, however, the representee has the privilege and power to destroy by tendering back what he received. The misrepresentation alone is therefore no defense to an action by the representor. Dawes v. Harness (1875) L. R. 10 C. P. 166. So also if the representee is, as plaintiff, seeking to recover at common law the thing which the misrepresentation induced him to sell to the defendant, he must before beginning his action offer to restore what he himself received from the defendant. Wilbur v. Flood (1867) 16 Mich. 40. In still other cases the "right to rescission" means the right to call upon the court of equity to restore the status quo, i. e. the condition as it was before the transaction in question took place. Here the representee need not, before action brought, offer to restore what he received from the representor, as the decree of the court will provide for that. Garner, Neville & Co. v. Leverett (1858) 32 Ala. 410.

² Bower, Actionable Misrepresentation, sec. 262.

³ The author treats the second exception as not fully established by the authorities. See sec. 264.

⁴ Canadian Agency, Ltd. v. Assets Realization Co. (1914, N. Y.) 165 App. Div. 96, 150 N. Y. Supp. 769.

in 1914 decided squarely that rescission of a fully executed purchase and sale of corporate stock would be granted in equity where the plaintiff was induced to purchase by misrepresentations innocently made. As the case arose on demurrer to a complaint which alleged misrepresentations but failed to allege fraud, the issue was squarely raised. The misrepresentations in that case did not result in "essential error," i. e. the thing received was not so different from the thing bargained for that it could be regarded as "totally different." This decision of the intermediate appellate court has now received the approval of the court of last resort in New York in the case of Bloomquist v. Farson (1918, N. Y.) 118 N. E. 855, in which the plaintiff sought to recover corporate bonds which he had transferred to the defendant in exchange for the bonds concerning which the misrepresentations were made. While the complaint alleged fraud, the trial court found that the misrepresentations were innocently made.⁵ In affirming the judgment of the Appellate Division, which had affirmed a judgment of the trial court granting rescission, the Court of Appeals relied entirely upon a line of New York cases, ending with the Appellate Division case referred to above.6 Apparently in doing so the court was not aware that the English law was to the contrary, or that there is in fact only slight authority in the way of actual decisions for the general rule now laid down that "an action may be maintained in equity to rescind a transaction which has been consummated through misrepresentations not amounting to fraud."7 With the exception of the one Appellate Division case referred to, the prior New York cases cited by the court do not, apparently, sustain the decision, except by way of more or less weighty dicta.

The English law seems to be in a state which can hardly be described as ideal. It may be summarized as follows: I. Innocent misrepresentations are not as such a defense to an action at law for damages for breach of contract.⁸ 2. They are as such a defense to actions for

⁵ As these findings of fact had been affirmed unanimously by the Appellate Division, the question of their correctness was not open in the Court of Appeals. ⁶ Note 4, supra.

⁷ If the misrepresentations were made "fraudulently," i. e. not innocently, the bonds or their value could of course be recovered at law in an appropriate action.

^{**}Rennedy v. Panama, etc., Mail Co. (1867) L. R. 2 Q. B. 580. In that case, however, all the judges recognized that if the misrepresentation led to error in substantialibus, there would be a defense at law. Bower (op. cit. 231) states that innocent misrepresentations are now a defense to all actions on the contract, but apparently cites only dicta in support of the proposition. He relies upon the fact that under the Judicature Act "every court is now a court of equity." This hardly seems a sufficient reason for asserting that the rule at "common law" has necessarily been changed, although it is to be expected and hoped that under its influence the courts will ultimately adopt for the "legal" action for damages the principles applied in the "equitable" action for specific performance.

specific performance, except in cases in which it has been thought to be fair to grant specific performance with compensation.⁹ 3. They are ground for rescission if the transaction is not "fully executed."¹⁰ 4. They are not ground for rescission where the transaction has been "fully executed."¹¹

The decision in the case of the Canadian Agency, Ltd. v. Assets Realization Co.,12 was apparently based largely upon statements of text-writers who cite and rely chiefly upon dicta.18 Indeed, some of them rely upon the very English cases which deny rescission where the transaction has been fully executed by the plaintiff. As a matter of sound policy, it seems only fair to compel a defendant to forego the benefit of a bargain which he has obtained by means of misrepresentations, even though the latter do not lead to "error in substantialibus." If so, there seems to be no sound reason for making the distinctions found in the English cases. If we are to be consistent, the innocent misrepresentations ought, subject to the exception set forth in the note below,14 to be a defense to all actions, whether for damages or for specific performance, in which the representor seeks to obtain the benefit of the bargain; they ought also, with the same exception, to be a ground for compelling him to surrender that benefit if the transaction has been carried out in whole or in part.

W. W. C.

Bower, Actionable Misrepresentation, sec. 342.

¹⁰ Flight v. Booth (1834) I Bing. N. C. 370; Redgrave v. Hurd (1881, C. A.) 20 Ch. D. I. The action usually is "in equity," i. e. in the Chancery Division. Apparently it may be brought in the King's Bench Division when the character of the relief sought makes that the appropriate tribunal.

¹¹ Seddon v. North Eastern Salt Co. [1905] I Ch. 326: Angel v. Jay [1911] I K. B. 666. Cf., however, Attorney-General v. Ray (1873) L. R. 9 Ch. App. 397. Apparently "fully executed" must be interpreted to mean "on the part of the plaintiff," and not "on both sides," as Bower seems to state in the passage quoted at the opening of this discussion. If this were not so, rescission would have been granted in at least one of the cases above cited.

¹² Note 4, supra.

¹⁵ The court cited, for example, 2 Parsons, Contracts (9th ed.) 775; Anson, Contracts (13th Eng. ed.) 172; Story, Commentaries on Equity Jurisprudence (13th ed.) 149.

This should be subject to the limitation that enforcement of the contract ought not to be entirely denied when the misrepresentation is of such a character that if the transaction is carried out the thing which will be received by the representee will differ from that bargained for only in a way which is unessential, and for which adequate compensation can be made by an abatement in the purchase price. In such cases, very properly, specific performance is refused only if the representor declines to make pecuniary compensation by abatement in price. Scott v. Hanson (1829, Eng. Ch.) I Russ. & M. 128; King v. Wilson (1843, Eng. Ch.) 6 Beav. 124; Hughes v. Jones (1861, Eng. Ch.) 3 De G. F. & J. 307.

CONSEQUENCES ARISING FROM MISTAKE IN TRANSMISSION OF A TELE-GRAPHIC OFFER FOR THE SALE OF GOODS

Through a mistake in the transmission of a telegram, an offer to sell potatoes at \$1.35 per hundred was delivered as an offer to sell at 35 cents per hundred, and was promptly accepted. The offeror shipped the potatoes, sending a bill of lading to a bank with draft attached for the amount of the sale at \$1.35 per 100. The offeree tendered the amount due at the 35 cent rate both to the bank and to the carrier, and being refused possession, brought replevin. A decision was rendered in favor of the plaintiff by the Kansas City Court of Appeals. J. L. Price Brokerage Co. v. Chicago B. & Q. R. R. Co. (1917, Mo. K. C. App.) 199 S. W. 732.

The conclusion of the court was based upon two assumptions: (1) that the offeror must be held for the mistake of the telegraph company; (2) that upon tender of the contract price the offeree's right of possession was complete. It is submitted that with respect to both of the above assumptions, in view of the particular facts of the case, the learned court was in error.

I.

There is much difference of opinion in regard to the test to be applied to the subject of mistake in the matter of offer and acceptance. Some of the leading jurists support the will theory, according to which no contract is formed unless the outward expression of the parties' will coincides with their inner will.¹ Others are in favor of what is called the mercantile theory. According to this theory a party will be bound whenever the other party reasonably assumed that the outward expression of the will corresponded with the inner will.² Still others entertain intermediate views.³

Whether an offer erroneously transmitted by an agent or a telegraph company should be governed by the same principles has been subject to dispute. The German Civil Code⁴ allows the offer to be avoided under the same conditions as a declaration of intention made under a mistake. In regard to the later the Code provides:⁵

¹For example, Savigny, 3 System des heutigen römischen Rechts, 264. Berlin,

² "The legal meaning of such acts on the part of one man as induce another to enter into a contract with him, is not what the former really intended, nor what the latter really supposed the former to intend, but what a 'reasonable man,' i. e. a judge or jury, would put upon such acts." Holland, *Jurisprudence* (10th ed.) 256.

³ See Dernburg, 1 Pandekten (7th ed.) 228, note.

⁴ Sec. 120.

⁵ Section 119 (Wang's translation).

"A person who, when making a declaration of intention, was under a mistake as to its purport, or did not intend to make a declaration of that purport at all, may avoid the declaration if it is to be supposed that he would not have made it with knowledge of the state of affairs and with intelligent appreciation of the case."

Anglo-American law has not yet adopted any definite theory with respect to the general question of mistake. In the matter of the liability of the offeror for a mistake in the transmission of an offer by a telegraph company, the English and Scotch courts and a few American courts hold that the offeror is not bound. The weight of American authority and the better view make the sender responsible for the mistake of the telegraph company and give to him a right of action against the company.

Both the English and the American courts approach the problem from the standpoint of agency, according to which a principal is held for the mistakes of his agent made within the scope of his employment. The explanation of the English cases lies in the fact that in England the telegraph lines are connected with the postoffice and that according to Anglo-American law the Government is not responsible for the negligence of its employees. It seemed unfair to hold the sender liable on account of the carelessness of the telegraph company without giving him any redress against the company. With respect to the American doctrine the contention may be made that a telegraph company is an independent contractor and that the sender should not be held responsible, therefore, for mistakes in the transmission of telegrams. The liability of the sender of the message may be sustained nevertheless on the second theory above indicated,

⁶ A party avoiding a declaration under Sections 119 and 120 must compensate the other party for any damage the latter may have sustained by relying upon the validity of the declaration, not, however, beyond the value of the interest which the other party has in the validity of the declaration. The duty to make compensation does not arise if the person injured knew or ought to have known of the ground on which the declaration was voidable. Sec. 122, Civil Code.

The Japanese Civil Code renders a declaration which does not agree with the inner will void on principle. Section 95 provides as follows:

[&]quot;An expression of intention is invalid when there is a mistake in the essential element of the juristic act. But when there is serious fault (culpable negligence) on the part of the person expressing intention he himself cannot assert such invalidity." (De Becker's translation.)

Holland, Jurisprudence (10th ed.) 255.

⁸ Henkel v. Pape (1870) L. R. 6 Ex. 7.

^o Verdin v. Robertson (1871, Scot.) 10 Ct. Sess. Cas. 35.

¹⁰ Pepper v. Telegraph Co. (1889) 87 Tenn. 554, 11 S. W. 783; Shingleur v. Telegraph Co. (1895) 72 Miss. 1030, 18 So. 425.

¹¹ Western Union Telegraph Co. v. Shotter (1883) 71 Ga. 760; Ayer v. Western Union Telegraph Co. (1887) 79 Me. 493, 10 Atl. 495; Sherrerd v. Western Union Telegraph Co. (1911) 146 Wis. 197, 131 N. W. 341. See also Jones, Telegraph and Telephone Companies, sec. 738.

governing mistake in the declaration of will. The sender having chosen the particular mode of communication should make good the promisee's reasonable expectation as induced by the promisor's act.¹² It follows that if there is anything in the message or in the attendant circumstances indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting.¹³ In the case under discussion the exceptionally low price indicated in the telegram as received should have aroused the suspicion of the plaintiff that some mistake had occurred.

II.

If it be assumed, for the sake of argument, that the court's conclusion on the subject of mistake was correct, the question is whether the plaintiff was entitled to succeed in his action of replevin. In order to recover he must prove that at the time of the tender of the purchase price of \$.35 per 100 he was entitled to immediate possession by virtue of some property right as distinguished from a mere contract right. It is manifest, however, that he had no such right. defendant had agreed to sell to the plaintiff potatoes at \$.35 per 100 and thereupon declined to deliver them for less than \$1.35 per Too it could hardly be claimed that the plaintiff could replevy the potatoes after tendering \$.35 per 100. He could have sued only in an action for breach of contract. The bill of lading in the case does not lead to a different conclusion. The potatoes were apparently consigned to the seller's order and a draft attached for the amount of the potatoes at \$1.35 per 100. Prima facie these facts show a reservation of title in the shipper. In accordance with mercantile custom the shipper indicated in this manner that he did not intend to part with the legal title to the goods until the payment of the draft.14 The buyer would thus have only a contract right for the delivery of the potatoes on tender of the purchase price, unless the special facts of the case disclosed an intention to confer upon him a property right. Such an intention may be inferred, perhaps, under ordinary circumstances, where it is reasonable to suppose that the

¹² See Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 Yale Law Journal 169, 205.

The above constitutes also the ground upon which Section 120 of the German Civil Code rests. The Anglo-American doctrine that a principal is responsible for the negligent act of his agent within the scope of his employment is not recognized in Germany nor on the continent in general.

¹³ Ayer v. Western Union Telegraph Co. (1887) 79 Me. 493, 499; 10 Atl. 495, 497; Germain Fruit Co. v. Western Union Telegraph Co. (1902) 137 Cal. 598, 70 Pac. 658.

¹⁴ Turner v. The Trustees of Liverpool Docks (1851) 6 Ex. 543; Dows v. National Exchange Bank (1875) 91 U. S. 618; Portland Flouring Mills Co. v. British Marine Insurance Co. (1904, C. C. A. 9th) 130 Fed. 860.

buyer was to bear the risk of loss incident to the transportation of the goods. In such an event the courts would say that the consignor retained only a special property right. Upon a proper analysis the situation would in such a case be the same as if the seller had passed the title to the purchaser and the latter had given back to the former a purchase-money mortgage. The seller would thus have reserved the bare legal title for purposes of security only, the purchaser having obtained the beneficial ownership.15 But if this theory be applied to the present case, it would seem clear that, whatever the seller's legal obligations, the "mortgage" right which he had in fact reserved was for \$1.35 per 100. This conclusion rests, not on his undisclosed intention, but on the necessary interpretation of his acts in connection with the shipment. If these acts were sufficient to confer any property right on the buyer, it was only a right subject to the shipper's title by way of security to the amount of the draft. And as the buyer had never consented to receive any property right in the goods (and accompanying risk of loss) on these terms, it would follow that no title or property right whatever passed to the buyer.

This conclusion is supported by direct authority in a case even stronger in the buyer's favor, in that the bill of lading was made out to the buyer, but forwarded to a bank with draft attached for an amount claimed to be excessive. In such a case the seller retains as security, not legal title, but what is called the *jus disponendi*—a right in the nature of a lien. But the extent of the right retained is measured, not by his contract obligation as interpreted by the court, but by his acts in connection with the shipment, or specifically by the amount of the draft which accompanies the bill of lading.

# REMOVAL OF CAUSES: THE DOCTRINE OF EX PARTE WISNER

Among other cases on the subject of removal to the federal courts discussed in the February number of the present volume of the YALE LAW JOURNAL, the decision in M. Hohenberg & Co. v. Mobile Liners, Inc. (1917, S. D. Ala.) 245 Fed. 169, was noted. The case was stated as one in which a citizen of one state sued a citizen of another state in a state court of a third state; and the holding that the defendant might remove to the federal court for the district within which the suit was pending was described as directly in conflict with the decision of the United States Supreme Court in Ex parte Wisner.²

¹⁵ See Williston, Sales, sec. 284, p. 418 f. This is also the rule adopted in the Uniform Sales Act, sec. 20 (2). The principal case, however, did not come under the act.

¹⁶ Greenwood Grocery Co. v. Canadian County Mill & Elevator Co. (1905) 72 S. C. 450, 52 S. E. 191.

¹27 YALE LAW JOURNAL, 567.

² (1906) 203 U. S. 449, 27 Sup. Ct. 150.

The report of the *Hohenberg* case contains no preliminary statement of facts, nor are the facts in regard to the citizenship of the parties stated in the opinion. To determine the exact point presented for decision, it was therefore necessary to rely on inference from the argument of the court. It is believed that any reader of the opinion would draw the same inference which was drawn in our February number.3 The editors have since been informed by a correspondent that this inference was not correct; that there were two plaintiffs, both citizens of Alabama, one residing, however, in the Middle District of Alabama and the other in the Southern District. The suit was brought in a state court in the Southern District, against a corporation of Louisiana. The question thus presented on proceedings for removal is not wholly novel, as will appear below, nor does it require any modification of our previous conclusion that the decision is directly opposed to the doctrine of Ex parte Wisner,* but it does furnish one further argument against the soundness of that much doubted decision, which is not applicable to the case where neither plaintiff nor defendant is a citizen of the state in which the suit is brought. The subject is perhaps of sufficient practical importance to justify a more extended examination.

The Wisner case arose under the Judiciary Act of 1887, as amended in 1888,5 but as the adoption of the federal Judicial Code of 1911,6 now in force, involved only a rearrangement of the provisions in regard to removal, with no change in substance affecting the question now under discussion, it will be sufficient to quote the sections of the present law.

Section 24 provides that "the district courts shall have original jurisdiction . . . of all suits of a civil nature . . . between citizens of different states."

Section 51 provides that:

"No civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded

⁶ The nearest approach to a statement of specific facts is in the closing sentences of the opinion (p. 173), which are as follows:

[&]quot;If plaintiff, being a resident of one state, and defendant of another, bring his suit in a federal court of a third state, defendant can, by appearing generally, waive the objection as to venue, and such court has jurisdiction to try such suit. If therefore, plaintiff brings his suit in a state court, defendant is given by section 28 the right to remove it to this same court, and it has just as much jurisdiction to try such case as if plaintiff had originally brought it there.

[&]quot;I therefore conclude that the motion to remand should be denied."

^{*}Supra, note 2.

⁵24 U. S. St. at L. 552; 25 ibid. 433.

⁶36 U. S. St. at L. 1087; I U. S. Comp. St. 1916, Ann. 532. The sections specifically referred to in the text are found in I U. S. Comp. St. 1916, Ann. on the following pages: section 24 on p. 553; section 51 on p. 1116; section 28 on p. 841; section 29 on p. 954.

only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 28, after providing for the removal of suits arising under the Constitution or laws of the United States, proceeds as follows:

"Any other suit of a civil nature . . . of which the district courts of the United States are given jurisdiction by this title, and which . . . may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State."

Section 29 provides that:

"Whenever any party entitled to remove any suit mentioned in the last preceding section . . . may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court . . . for the removal of such suit into the district court to be held in the district where such suit is pending, . . . ."

It will be noted that two of the above sections (24 and 51) purport to deal only with original jurisdiction and original process; in fact they are expressly so limited. That part of section 24 which is material to the present inquiry requires diversity of citizenship as the basis of jurisdiction; and section 51 limits the venue to the district of residence of plaintiff or defendant. Sections 28 and 29, on the other hand, deal expressly with removal. By section 28 the cases which can be removed are limited to those of which the district courts are given original jurisdiction "by this title." In the Act of 1887-8 the words were "by the preceding section"; and the preceding section combined the present sections 24 and 51.7 This clearly limits the cases which can be removed to those described in section 24. Does it further adopt and incorporate into the removal provisions the limitation to the district of residence of the plaintiff or defendant which is now found in section 51? The argument that it does would seem to rest on the construction of the words "of which the district courts of the United States are given jurisdiction," as found in section 28. Does "jurisdiction" here include venue? Or to put it in another way, are the venue provisions of section 51 strictly jurisdictional?

The words of section 28 would seem to favor a negative answer. That section refers to suits of which "the district courts" generally are given jurisdiction, not those of which any particular district court, such as "the district court of the district in which the suit is pending" or "the district court to which removal is sought," is given jurisdiction.

⁷ Section 1 of the Judiciary Act of 1887-8 (note 5, supra). This was true also of the earlier act of 1875 (18 U. S. St. at L. 470).

A stronger argument is based on the character of the provisions in sections 24 and 51 respectively, and the way they are expressed. There is a clear distinction between jurisdiction of the cause, without which all proceedings are a nullity, and power to subject a particular defendant to process against his will. The wording of the statutes seems to recognize this distinction. Section 1 of the Act of 1887-88 first enumerated the suits of which the federal circuit courts should have original "cognizance." This enumeration was in form complete and unqualified. Then was added the following sentence:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; . . . ."

The Judicial Code emphasizes the distinction still more clearly. The first part of section 1 of the Act of 1887-8 is placed by itself in section 24 of the Judicial Code, and the word "cognizance" is changed to "jurisdiction." The provisions in regard to the district in which the suit may be brought are placed in a different section, and one widely separated from the section which now in terms defines the "jurisdiction" of the district courts.

Finally this distinction is authoritatively recognized by the Supreme Court. The doctrine that, while the provisions now found in section 24 are jurisdictional in the strict sense, those now placed in section 51 are intended for the protection of the defendant, and confer merely a personal privilege or immunity which can be waived, had been consistently followed by the Supreme Court before the decision in Ex parte Wisner, and the dictum to the contrary in that case has since been overruled.

On the whole, the most natural conclusion would seem to be that when section 28 authorized removal of all suits "of which the district courts of the United States are given jurisdiction by this title," or, as it read in section 2 of the Act of 1887-8, "of which the circuit courts of the United States are given jurisdiction by the preceding section," the limitation intended in both statutes was to those cases which come within the enumeration now found in section 24, including cases of diversity of citizenship, and not the further limitation of venue, expressly applicable only to "original process or proceeding," now

⁸ Supra, note 5.

[°] See In re Moore (1908) 209 U. S. 490, 28 Sup. Ct. 585, which cites the earlier cases, and Western Loan & Savings Co. v. Butte Mining Co. (1908) 210 U. S. 368, 28 Sup. Ct. 720.

found in section 51. This conclusion is enforced, as will appear below, by a consideration of the practical results of the opposite construction, in their relation to the policy presumably underlying the constitutional and statutory provisions in regard to the jurisdiction of the federal courts.

It would follow that when a citizen of one state sued a citizen of another state in a state court of a third state, the case would be one "of which the districts courts . . . are given jurisdiction" by section 24, and the defendant, "being a nonresident of" the state of suit, would have, under section 28, an absolute right of removal to the federal district court, "for the proper district." From the procedural provisions of section 29, the "proper district" would seem to be very clearly the district in which the case is pending.

The right of removal in such a case had not been passed on by the Supreme Court before Ex parte Wisner, but the question had come often before the lower federal courts, and the overwhelming weight of authority was in favor of the right and in accord with the above conclusions.¹⁰ The decision in Ex parte Wisner¹¹ was directly to the contrary. It was rendered without citing or noticing the score or so of lower federal court decisions on the subject, and though the opinion (by Chief Justice Fuller) was not remarkably clear, it appeared to proceed on two grounds. In certain respects not directly touching the present inquiry the Act of 1887-8 had expressly narrowed the jurisdiction of the federal courts and the right of removal.12 The first ground relied on in the Wisner case seems to have been that "in view of the intention of Congress by the Act of 1887 to contract the jurisdiction of the circuit courts," the limitation in cases of diversity of citizenship to the district of residence of the plaintiff or the defendant must be regarded as jurisdictional in the strict sense, so that no consent or waiver could confer jurisdiction on any other federal court. The second ground was that, even if the limitation to particular districts could be waived by consent of both parties, and jurisdiction thus conferred on a district court of a district in which neither resided, there had been no such waiver in the case at bar. The petition for removal was characterized as "in the nature of process," and the action of the defendant in filing such petition was likened to the action of a plaintiff who sues in a federal court in a district in which both parties are non-residents. As such a suit cannot be maintained by a

¹⁰ See authorities collected in Louisville & N. R. R. Co. v. Western Union Tel. Co. (1914, E. D. Ky.) 218 Fed. 91, 93-95.

[&]quot; Supra, note 2.

¹² The Act of 1875 had allowed suit to be brought in the federal courts in any district in which the defendant could be found, had given the plaintiff as well as the defendant the right to remove, and in diversity of citizenship cases had not limited the defendant's right of removal to cases in which he was a non-resident of the state of suit.

non-resident plaintiff against the objection of the non-resident defendant, so the court held that the petition for removal by a non-resident defendant could not be maintained against the objection of the non-resident plaintiff.

So far as the decision rested on the first ground, it was very shortly overruled by In re Moore¹³ and the former rule reëstablished, to the effect that the statutory limitation to the district of residence of one of the parties may be waived by voluntary appearance, pleading to the merits, entering into stipulations, or otherwise submitting to the jurisdiction of the court. The facts in In re Moore were the same as in Ex parte Wisner, except that the plaintiff, after removal, and before moving to remand, had filed an amended complaint in the federal court, and entered into a stipulation giving the defendant time to plead. Chief Justice Fuller, dissenting in In re Moore, adhered to the views he had expressed in Ex parte Wisner. The latter decision, however, if it stands at all,14 must now stand on the second ground above stated.15 Thus limited, its doctrine apparently is that, in diversity of citizenship cases, a defendant may remove to a federal court only if, as plaintiff, he could have sued the actual plaintiff, as defendant, in the same federal court.16 It follows that where both parties

¹⁸ Supra, note 8. Accord, Western Loan & Savings Co. v. Butte Mining Co., supra, note 8; Male v. Atchison, etc., Ry. Co. (1916) 240 U. S. 97, 101; 36 Sup. Ct. 351, 353.

¹⁴ Its decision on another point, namely the propriety of mandamus as a remedy for refusal to remand, was overruled in Ex parte Harding (1911) 219 U. S. 363, 31 Sup. Ct. 324.

¹⁵ The first ground was at least consistent. If both the requirements now found in section 24 and those now found in section 51 are jurisdictional in the strict sense, then the word "jurisdiction" in section 28 would naturally refer to both. The second ground treats the word "jurisdiction" in section 28 as used in a sense sufficiently broad to include not only the requirements of section 24, which all agree are jurisdictional and cannot be waived, but also those of section 51, even though the latter be conceded to confer only a personal privilege which can be waived—a not impossible construction, but one not very convincing. The real source of the error, if error there was, in Ex parte Wisner seems to have been a misplaced reliance on general statements in earlier cases to the effect that a suit is not removable unless it is one the plaintiff could originally have brought in the federal court. If this means in a federal court, the statement is of course sound, and that was all that was involved in the earlier cases relied on. To say that a case is not removable to a particular federal court, unless it could have been brought originally in the same federal court, is another proposition.

¹⁰ This is in effect the interpretation of the *Wisner* case adopted in such cases as *Keating v. Pennsylvania Co.* (1917, N. D. Oh.) 245 Fed. 155 (discussed in 27 YALE LAW JOURNAL, 567) holding that a non-resident defendant sued in a state court by an alien may remove to the federal court in the district in which the suit is pending, since an alien may be sued in the federal court in any district where he may be found. This interpretation also would explain the action of the Supreme Court in *In re Tobin* (1909) 214 U. S. 506, 29 Sup. Ct. 702, in

are non-residents of the state in which the suit is pending in a state court, there can be no removal, without the plaintiff's consent, to the federal court "in the district where such suit is pending." And as no procedure is provided for removal to any other district, it seems to follow that the case cannot be removed at all.¹⁷

However doubtful as a matter of statutory construction, this result would not seem to involve any great injustice, or conflict with any essential policy involved in the establishment of federal courts, so long as its application is limited to cases where both plaintiff and defendant are non-residents of the state of suit. Notwithstanding the many difficult questions that have arisen in construing the jurisdictional provisions of the various judiciary acts, and especially those relating to diversity of citizenship, and the considerable conflict of opinion over various points, the cases are singularly lacking in discussion of the general policy which presumably underlay both the constitutional extension of the federal judicial power to controversies between citizens of different states, and the legislation enacted by Congress to put this grant into effect. The most obvious purpose of the removal provisions would seem to be, as suggested in one of the cases, 18 to protect a non-resident sued in the plaintiff's own state againt any possible local favoritism on the part of the state court, by affording him the option of removing to a supposedly impartial tribunal.19 If this be the purpose, there is no similar reason for removal when both parties are non-residents of the state in which the suit is brought.

But a different situation is presented when there are two or more federal districts within a state, and the plaintiff, being a resident of the state, sues a non-resident defendant in a state court, but not in the district of the plaintiff's residence. If we apply the rule of Ex parte Wisner, the suit is not removable. Under section 29 it can be removed, if at all, only to the district court in the district where the suit is pending. But that is not, in the language of section 51, "the district of the residence of either the plaintiff or the defendant," and neither

refusing, without opinion, a writ of mandamus to compel the remanding of a case like the Keating case. For speculation on the significance of In re Tobin, see the Keating case, at p. 161; Sagara v. Chicago, etc., Ry. Co. (1911, D. Colo.) 189 Fed. 220, 223; and Louisville & N. R. R. Co. v. Western Union Tel. Co. (1914, E. D. Ky.) 218 Fed. 91, 103-104.

¹⁷ The attempts of certain federal courts to avoid this result, and, by disregarding the procedural limitation of section 29 of the Judicial Code, to permit removal to the district of the defendant's residence, were referred to in 27 YALE LAW JOURNAL, 567.

¹⁸ Foulk v. Gray (1902, C. C. S. D. W. Va.) 120 Fed. 156, 164.

¹⁹ Conversely a non-resident plaintiff, forced to go to the defendant's own state to bring his suit in order to obtain service, is allowed to avail himself of the federal court there. And his option to choose the federal court of his own district, if he can obtain service there, may be explained as merely anticipating the defendant's right of removal.

could have brought an original suit against the other in that district. Hence under Ex parte Wisner the defendant cannot remove to that district.²⁰ The result is that the plaintiff obtains whatever advantage there may be in suing in a court of his own state a non-resident defendant. If local favoritism on the part of state courts is to be feared, it would hardly be limited by the arbitrary lines of federal districts; and the apparent policy of the Constitution and the judiciary acts is thus defeated.

The one federal case found, before the *Hohenberg* case, which was decided in the teeth of *Ex parte Wisner*, was of this sort.²¹ Nor was there any dodging of the issue. It was frankly admitted that *Ex parte Wisner* was a direct authority against the removal; but Judge Cochran, in a voluminous and very able opinion, reviewed the authorities both before and after the *Wisner* case, and reached the conclusion, not only that *Ex parte Wisner* was wrong, but that it had been so weakened by subsequent Supreme Court decisions, and was so certain to be overruled altogether at the first opportunity, that he was justified in rejecting its authority. Other federal judges have since applauded his reasoning, but have stopped short of following him to the ultimate conclusion.²²

²⁰ It was so held in Shawnee Nat. Bk. v. Missouri, K. & T. Ry. Co. (1909, E. D. Okla.) 175 Fed. 456, and Wheeler v. Atchison, etc., Ry. Co. (1911, W. D. Mo.) not separately reported, but quoted in Stone v. Chicago, etc., R. R. Co. (1912, W. D. Mo.) 195 Fed. 832, 833.

²¹ Louisville & N. R. R. Co. v. Western Union Tel. Co., supra, note 10.

²² Another reductio ad absurdum of the doctrine of the Wisner case has resulted from its application to the removal of suits arising under the Constitution or laws of the United States. The statutory provisions governing this question are found in the same sections as those governing the removal of diversity of citizenship cases, and are substantially similar, except that an original suit may be brought only in the district where the defendant resides, and the right of removal is not restricted to a non-resident defendant. On the authority of Ex parte Wisner it has been held, in effect, that an "arising under" suit may be removed only when the state court in which it is pending is in the district of the defendant's residence, so that the plaintiff could have brought the suit originally in the federal court of that district. Western Union Tel. Co. v. Louisville & N. R. R. Co. (1912, E. D. Tenn.) 201 Fed. 932 and cases there cited. These decisions find some support in the language of the Supreme Court in Matter of Dunn (1909) 212 U. S. 374, 384, 387 ff., 29 Sup. Ct. 299, 301, 303. It may be suggested that it would be more consistent with the reasoning of the Wisner case, as interpreted above, and would produce a somewhat less illogical result, if in these cases the defendant petitioning for removal were regarded as the moving party, in a position analogous to that of a plaintiff bringing an original suit in the federal court, and the actual plaintiff as the defendant in the removal proceedings, and removal were therefore restricted to cases pending in a state court in the district of residence of the removal-defendant, that is, the actual plaintiff. But that is not the view taken by the cases cited.

The underlying reason for giving the federal courts original jurisdiction of suits arising under the federal Constitution or laws, and for permitting the

The Hohenberg case, as the facts are stated by our correspondent, presented in substance the same question. One plaintiff, it is true, was a resident of the district in which the case was pending in the state court; but it is settled that to give jurisdiction in the district of the plaintiff's residence under section 51 of the Judicial Code (or the corresponding provisions of earlier acts) all the plaintiffs must be residents of the district.23 So far as removal was concerned, therefore, the case was the same as if both plaintiffs, instead of only one, had been residents of a different district of Alabama from that in which the suit was brought. The case would furnish weightier support to Judge Cochran's views if it had faced the issue with equal frankness. Our correspondent, who approves the decision, informs us that it was thrice argued, and that Ex parte Wisner was much relied on by the plaintiffs; but the opinion cites neither that case, nor Judge Cochran's decision, nor any other authorities. Under these circumstances, it rather adds to than helps to clear up the uncertainty in which the law now stands.

# JUDGMENTS BASED ON PRESUMPTION OF DEATH AS AFFECTING AN ABSENTEE'S RIGHTS

To determine the effectiveness of a judgment based upon the presumption of death arising from several years' absence¹ to protect a person who acts in reliance upon the judgment against claims of the

removal of such suits, is obviously to give either party the option of having a federal question decided in the first instance by a federal court. This option on the part of the plaintiff can in no way be defeated by the defendant. The defendant's right should be equally assured. But the result of the above decisions is to permit the defendant to remove only in the cases where he presumably cares least about doing so, namely, where he is sued in his own state court; to leave the choice between state and federal courts for the trial of a federal question wholly in the hands of the plaintiff, provided only that he can secure service on the defendant in some state where the latter does not reside; and to make the right of removal depend on an accidental circumstance which, in this class of cases, has nothing whatever to do with the real reason for allowing removal at all.

²² Smith v. Lyon (1890) 133 U. S. 315, 10 Sup. Ct. 303; Turk v. Illinois Cent. R. R. Co. (1914, C. C. A. 6th) 218 Fed. 315.

¹It is held almost universally that a rebuttable presumption of death arises when a person has been absent from his last or usual place of residence and no tidings of him have been received for a considerable period of time. Usually the necessary period of absence is established as seven years. The beginning of this seven year presumption as a common law rule applicable in all questions of life and death is found in *Doe v. Jesson* (1805, K. B.) 6 East 80. For the origin and history of the presumption, see James Bradley Thayer, *Presumptions and the Law of Evidence* (1889) 3 HARV. L. REV. 151-154. The rule is sometimes modified by statute. See 2 Chamberlayne, *Evid.* sec. 1097 et seq.

supposedly dead absentee, in case he afterwards reappears, discrimination is required between three classes of cases.

- (1) The actual death of the absentee may be a jurisdictional fact—as in probate proceedings on the estate of a decedent. In such cases a judgment based upon the seven year presumption of death is utterly void, if in fact the absentee was alive. It confers no power to alter legal relations; it cannot change the rights or immunities of the absentee, nor afford protection to anyone making payment in reliance upon it. Hence payment by a debtor of the supposed decedent to the person appointed administrator of his estate is no defense to a subsequent suit by the creditor himself; nor will a court decree protect the innocent purchaser of his property at judicial sale.² Nevertheless, in the exercise of its police power over property within its boundaries, a state may provide by statute for the distribution of the estate of absentees, for in this event absence for the required period, not death, is the jurisdictional fact.³
- (2) If death is not a jurisdictional fact, and if the proceeding in which the judgment is rendered is a proceeding in rem, the judgment will protect one acting in reliance upon it against the claims of the absentee erroneously supposed to be dead. A typical instance of cases falling within this second class may be found in a decree of distribution entered in the administration of a decedent's estate. The administrator who makes payment in accordance with the decree is privileged so to distribute the property even though an heir of the decedent was erroneously omitted from the distribution. Such a decree, though based on an erroneous finding of the death of an absent heir, is effective, until set aside, to change legal relations in respect to the res, because the court had jurisdiction of the subject

² Jochumsen v. Şuffolk Savings Bank (1861, Mass.) 3 Allen 87; Scott v. McNeal (1894) 154 U. S. 34, 14 Sup. Ct. 1108.

^{*}Such statutes do not violate the Fourteenth Amendment to the Constitution if the requisite period of absence is not unreasonably short, if adequate notice by publication is given to the absentee, and if reasonable safeguards are provided for the protection of the absentee's rights in case he returns. Cunnius v. Reading School Dist. (1905) 198 U. S. 458, 25 Sup. Ct. 721; New York Life Ins. Co. v. Chittenden (1907) 134 Iowa 613, 112 N. W. 96; cf. Lavin v. Emigrant Savings Bank (1880, C. C., S. D. N. Y.) 1 Fed. 641; and see Nelson v. Blinn (1908) 197 Mass. 279, 83 N. E. 889. The last case sustains the Massachusetts statute as a statute of limitations.

Under such statutes administration of the property of absentees falls within the second class of cases mentioned in the text.

Statutes of a similar nature are those relating to abandoned bank deposits. See Provident Institution, etc. v. Malone (1911) 221 U. S. 660, 31 Sup. Ct. 661; Commonwealth v. Dollar Savings Bank (1917, Pa.) 102 Atl. 569.

⁴Loring v. Steineman (1840, Mass.) 1 Metc. 204; Cleaveland v. Draper (1907) 194 Mass. 118, 80 N. E. 227; Jones v. Jones (1916) 223 Mass. 540, 112 N. E. 224; cf. Ernst v. Freeman's Estate (1902) 129 Mich. 271, 88 N. W. 636, and In re Price's Estate (1917, Minn.) 162 N. W. 454.

matter and notice by publication satisfies the requirements of due process in respect to all parties interested.⁵

(3) The third class of cases is composed of those where death is not a jurisdictional fact, and the proceeding is not in rem but in personam. A judgment rendered in such a proceeding is entirely inoperative with respect to the rights of any claimant not before the court.⁶ The danger that a defendant, after being held liable to claimant B. on the theory that claimant A. is dead, may also have to pay A., should A. later appear, is unavoidable unless the defendant by some statutory form of interpleader is permitted to change the proceeding from one purely in personam to one quasi in rem.⁷

The necessity of discriminating between the above mentioned classes of cases is illustrated by a decision of the Supreme Court of Pennsylvania. Maley v. Pennsylvania R. R. Co. (1917, Pa.) 101 Atl. 911. The defendant railroad was the depository of an employee's savings fund payable upon the death of the depositor to his sons, or, if they were not living, to his legal representatives. The executrix of a deceased depositor demanded payment of such a fund, the sons of the depositor having been absent and unheard of for some eighteen years. The trial court left to the jury the question whether the sons were dead, and on a verdict for the plaintiff the court entered judgment. The defendant appealed on the ground that the judgment would not protect it from having to pay again to the sons, should they subsequently appear. The judgment was affirmed, with a dictum that it would fully protect the defendant against any future claim by the sons.

The case appears to fall within the third group of the classification above mentioned. Clearly it is not in the first class. The sons had left home prior to 1898, while their father, the depositor, did not die until 1913. According to the presumption, therefore, they

⁵ "Wherever the court has jurisdiction as to the subject and parties, its judgment must be conclusive on all parties and privies notwithstanding any error of fact or of law, until it be reversed, or be vacated for fraud." Per Wardlaw, Ch., in *Hurt v. Hurt* (1853, S. C.) 6 Rich. Eq. 114, 120; see also *Mooney v. Hinds* (1894) 160 Mass. 469, 36 N. E. 484.

⁶ Kelly v. Norwich Fire Ins. Co. (1891) 82 Iowa 137, 47 N. W. 986; Mahr v. Norwich, etc., Soc. (1891) 127 N. Y. 452, 28 N. E. 391; Pennoyer v. Neff (1877) 95 U. S. 714.

⁷ Cf. Perry v. Young (1916) 133 Tenn. 527, 182 S. W. 577; and see (1917) 27 YALE LAW JOURNAL, 252.

⁸ It is not apparent why the question of the sons' death was left to the jury. The fact of absence for seven years unheard from is to be taken, by a rule of law independent of the jury's belief, as equivalent to death, in the absence of explanatory facts to the contrary. See 4 Wigmore, Evid. sec. 2490; 2 Chamberlayne, Evid. sec. 1090. But even if the trial court did not charge the jury with precise accuracy as to the effect of the presumption of death, the error was not prejudicial to the defendant.

predeceased their father. The plaintiff's claim to the fund was not derived through the sons, but was based upon the defendant's agreement to pay the depositor's legal representatives, if he outlived his sons. Hence the suit against the depositary was in no sense a proceeding to distribute the estate of the sons. Neither does the case fall within the second group. It was not a proceeding in rem to distribute a fund admittedly forming part of the depositor's estate. It was simply a suit on a contract to recover money payable to the plaintiff if a certain contingency had happened, or payable to the sons if it had not happened. No attempt appears to have been made to give notice by publication or otherwise to the absent sons. It cannot therefore be considered as a valid proceeding in rem to cut off their claims. The suit was simply a proceeding in personam to recover money alleged to be owing to the plaintiff as executrix of the depositor. It

It is respectfully submitted, therefore, that while the affirmation of the judgment for the plaintiff was correct, the dictum that payment thereunder would protect the defendant against the sons' demand, should they reappear, was unsound.¹² There is nothing unusual in subjecting a defendant to the danger of having to pay twice. The possibility always exists that a judgment in a suit in personam may be based on an error of fact and that the true claimant may also obtain a judgment against the defendant. Suppose, for example, that A. gets judgment against B. for converting a certain horse alleged by A. to be his. In truth the horse may have belonged to C. and therefore C. may also get a judgment against B. for the very same act of conversion already held tortious as to A. The fact that in the first suit the horse was decided to be A.'s, and that B. has already paid the judgment in A.'s favor, will furnish no protection to B. if C. can establish that the horse was really his.¹³

# DECREES AFFECTING FOREIGN PROPERTY

When a court sitting in one state is called upon to render a judg-

⁹ Jones v. Jones, supra, note 4, was such a suit and is therefore distinguishable from the case under discussion.

¹⁰ Cf. Perry v. Young, supra, note 7.

¹¹ The happening of the condition on which the money was payable to the plaintiff, namely, the death of the sons, was one of the operative facts creating the defendant's duty to pay, which the plaintiff was obliged to prove. Having proved it—by virtue of the presumption of death—she was entitled to judgment.

¹² It is believed that a decision in accordance with this *dictum* would be unconstitutional as depriving the absentee of his property without due process. See (1917) 27 YALE LAW JOURNAL, 121.

¹³ The principle is too elementary to require the citation of authorities. On the general subject of the non-conclusiveness of judgments as against strangers to the proceedings, see Black, *Judgments*, sec. 600; 23 Cyc. 1237.

ment involving land or movables situated in another state it usually tries to walk circumspectly in order not to tread roughly on the toes of its neighbor's sovereignty. There appears to exist among states something of an instinctive feeling that each should have exclusive dominion within its geographic limits. And, inspired by this laudable sentiment, as well as moved by some hardheaded realization of their inability to enforce a meddling decree concerning foreign property, courts have laid it down times without number that they cannot, by their own decree, transfer the title to land outside their jurisdiction.

Where, however, they have the owner before them, chancery tribunals, by what paradoxically might be called equitable coercion and duress, require him to part with his own title to whomsoever they direct and so effect the same end,²—though by a means supposedly inoffensive to the sovereign of the situs.³ This is orthodox and customary. In thus operating on the person of the defendant and so stimulating him to operate in turn on the foreign situated res, or his rights in it, whatever difficulties may arise are largely questions of expediency. The court must enforce its decree by contempt or other personal proceedings against the defendant.⁴ It is, therefore, apparent that the decree may be an empty recital if the defendant is outside the jurisdiction, having, perhaps, hastily departed before judgment issued.⁵ Ordering the defendant to go into another state and

¹67 Am. Dec. 95, note; 69 L. R. A. 673, note; 5 Ann. Cas. 533, note; see, Westlake, Private Int. Law (5th ed.) sec. 173. A court at the situs will usually not recognize an attempted conveyance or petition by a foreign court. Watts v. Waddle (1833, C. C. D. Oh.) I McLean, 200, approved on this point in (1832, U. S.) 6 Pet. 389; Johnson v. Kimbro (1859, Tenn.) 3 Head, 557, 75 Am. Dec. 781. But compare Mallette v. Scheerer, post, note 13. There is, however, one noteworthy break in the application of this rule. Courts have decreed the foreclosure of a mortgage on foreign land. Sir James Bacon, V. C. by insisting that he was only acting personally against the defendant, and so following the general rule, and only foreclosing the defendant's personal right to redeem, really accomplished, if the decree was effective, an absolute blotting out of the defendant's equitable rights in land situated in the West Indies. Paget v. Ede (1874) L. R. 18 Eq. Cas. 118, 125, citing Toller v. Carteret (1705, Ch.) 2 Vern. 494. Compare the language of the court in Contee v. Lyons (1890) 19 D. C. 207, 208. "It (a court of chancery) may conclude dormant equities, but cannot assign legal titles." See, Strange v. Radford (1887, Ch. Div.) 15 Ont. Rep. 145, following Paget v. Ede in decreeing a foreclosure, but refusing to order a sale pursuant thereto of lands in Manitoba. See also, Burley v. Kappen (1910, K. B.) 20 Man. Rep. 154, 157, cancelling a contract for the purchase of foreign land, i. e. extinguishing equitable interests as in the mortgage cases.

² Penn v. Lord Baltimore (1750, Ch.) 1 Ves. Sr. 444; Lyman v. Lyman (1829, C. C. D. Vt.) 2 Paine, 11, 46, Fed. Cas. 8628. See 67 Am. Dec. 95, note; 69 L. R. A. 673, note. Westlake, op. cit. sec. 172.

^a The courts of the *situs* will enforce rights so conferred. Tardy v. Morgan (1844, C. C. D. Ind.) 3 McLean, 358, Fed. Cas. 13752.

⁴Miller & Lux v. Rickey (1904, C. C. D. Nev.) 127 Fed. 573, 580; Phelps v. McDonald (1878) 99 U. S. 298, 308.

Wicks v. Caruthers (1884, Tenn.) 13 Lea, 353, 365. To defeat this a Ne

act there, or enjoining him from acting in another state, has the same weakness. The absent defendant can make sport of the decree by simply not following its orders, and a court, often foreseeing the unenforceability, may decline to issue an ineffective decree.⁶ Such decisions, however, when rendered in personam against a defendant over whom the court has obtained proper jurisdiction, are conceded to be valid and binding, even though they may be perhaps unenforceable. And so in the case of Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co. (1917, C. C. A. 9th) 245 Fed. 9, we find a federal court in Idaho, on personal jurisdiction of the defendant, a Nevada corporation, ordering it (1) negatively, to desist from taking more than a certain quantity of water from the Salmon River in Nevada, and (2) affirmatively, to go into Nevada and place meters on its land there situated to keep track of the water in fact taken. The embarrassment above alluded to in cases of sending defendants out of the jurisdiction to act were probably not present here, since the defendant, a corporation, very likely had offices in both states and so was capable of being present in two places at once, and could be prodded through its officers in Idaho at any time for a failure to place meters in Nevada as ordered.

So much for the orders in personam, wherein the court scarcely departed from the well settled doctrine heretofore announced or enlarged the action taken in the Salton Sea Cases.⁸ But the court went further than that. It decreed that the plaintiff, who was injured by removal of water above him on the land of the defendant, might go upon that land from time to time to read the meters to be installed thereon. This, it will be observed, was an order directly affecting the foreign land, or to speak more accurately, directly dealing with the defendant's rights in his land. This is the thing which courts have repeatedly said they could not do. We have already noted, however, that there is a nick in the rule in the mortgage foreclosure cases wherein the court does blot out the defendant's equities in

exeat Regnum could be issued against the defendant, although this writ is in present disfavor. Archer v. Preston (undated) 1 Eq. Cas. Abr. 133, case 3, cited in Arglasse v. Muschamp (1682, Ch.) 1 Vern. 75, 77; Mitchell v. Bunch (1831, N. Y.) 2 Paige Ch. 606, 22 Am. Dec. 669, 673; Enos v. Hunter (1847, Ill.) 4 Gilm. 211, 214.

⁶ Wicks v. Caruthers, supra. A court, however, which desires to assume jurisdiction may either require a bond of the defendant before leaving or, as to most matters, require him to act by agent.

⁷Dicey would seem to make expediency the test of a court's right, under established rules, to make such decrees. Dicey, Confl. of Laws (2d ed.) p. 40.

⁸ (1909, C. C. A. 9th) 172 Fed. 792 and 820, 97 C. C. A. 214. See also, Miller & Lux v. Rickey (1904, C. C. D. Nev.) 127 Fed. 573, 575-580; Rickey Land & Cattle Co. v. Miller & Lux (1910) 218 U. S. 258, 31 Sup. Ct. 11, and Comment thereon (1911) 5 Ill. L. Rev. 442.

foreign land. We now have a case in which the court undertakes to blot out a single one of the defendant's legal rights in foreign land, namely his claim that the plaintiff shall not trespass. Correspondingly and at the same time it creates in the plaintiff a right in that land,—gives him a small piece of the title, in the privilege of going on it for certain purposes. The same court would probably have followed the usual rule and would not have undertaken to transfer the whole title from the defendant to the plaintiff, *i. e.*, to extinguish all the defendant's rights in his Nevada land and invest the plaintiff with a similar set. But it does do the same thing as to one of those rights. This is a matter of degree.

What is the effect of such a decree? Inquiry may be directed to its validity, its expediency (including enforceability and recognition by the courts of the *situs*), and its constitutionality.

There seems, as to the first point, no reason to question the validity of the decree if it involved two foreign countries and so no question of constitutionality. The decision having been rendered, it would create rights in the country where rendered at least. If anything in that country were ever at a future time to turn on the point of who had the particular right in question, the second case would stand or fall on the decree in the first. The question of its effectiveness at the situs is not one of validity. That is the point of the second inquiry.

Would it be enforceable,—expedient? If a Prussian court had decreed "made-in-Germany" rights in a plaintiff to go upon land in Nevada, it would decidedly not be enforceable. The question of expediency is one to be worked out by the Court asked to make the decree, in view of that unenforceability.

Now inside the United States both of the above inquiries and answers are qualified by a further question. The Federal Constitution must be reckoned with.

Validity must be considered in reference to due process. Had the defendant in the *Vineyard* case appealed on the constitutional ground that his property, or one right in it, was taken without due process of law, it is not certain what success he would have had. Had the court below purported to divest his whole title, the United States Supreme Court would probably find in his favor and reverse the

⁹ Supra, note 1.

¹⁰ In addition to this privilege, the decree establishes also in the plaintiff a claim that the defendant shall not keep him off of the land. It establishes in the plaintiff, as well, an immunity against the defendant's revocation. That is, under the decree, as in the case of an easement, the defendant is unable,—has no legal power,—to divest the judicially conferred rights. In absolute analysis, therefore, the decree does not give a single right only, but since the relatively small number of rights conferred group themselves around the single privilege of going on the land, the expression single right is used for convenience. Indeed any "single right" under a contract carries with it an immunity like that above.

decree.¹¹ But when a single right is concerned, the Supreme Court might sustain the lower court. As mentioned heretofore, this is a question of degree, for the nature of the deprivation is the same in each instance. The fewer the rights in land which are involved, however, the more nearly does the decree approach to being a personal one.

The above discussion assumes a direct appeal under the due process clause. The decision may come into question in another way. If, in a subsequent suit in Nevada, the decree were set up by the present plaintiff as establishing his right to enter upon the Nevada land, would the Nevada court be required to accord it full faith and credit? It appears from the language of the United States Supreme Court in some cases¹² that an Idaho decree purporting to transfer the whole legal title to Nevada land would not be entitled to full faith and credit under the Constitution.¹³ A decree, however, affecting so little of the title as does this one might possibly be held on the contrary to be entitled to full faith and credit. That depends on the same question of degree previously set forth. On the whole, although the decree appears sound as regards the due process clause, its sufficiency as a basis for requiring Nevada unwillingly to recognize and enforce this decree rendered in Idaho may well be doubted.

¹¹ See language in *Hart v. Sansom* (1884) 110 U. S. 151, 154, 3 Sup. Ct. 586, 588; Carpenter v. Strange (1891) 141 U. S. 87, 11 Sup. Ct. 960; Fall v. Eastin (1909) 215 U. S. 1, 30 Sup. Ct. 3, affirming Fall v. Fall (1907) 75 Neb. 120, 113 N. W. 175.

¹² Carpenter v. Strange and Fall v. Eastin, supra, note II. The latter case involved an additional fact. The claims were not against the original parties but against a purchaser of the land. See, Professor Henry Schofield, Equity Jurisdiction under the Full Faith and Credit Clause (1910) 5 ILL. L. REV. I.

¹³ If, however, a state voluntarily chooses to give full faith and credit when under the constitution it would not be required to, this is not necessarily a violation of the due process clause as to the person injured. See *Chicago Life Ins. Co. v. Cherry* (1917) 244 U. S. 25, 37 Sup. Ct. 492, Holmes, J., and comment (1917) 27 YALE LAW JOURNAL, 121. See *Mallette v. Scheerer* (1916) 164 Wis. 415, 160 N. W. 182 and comment (1917) 26 YALE LAW JOURNAL, 311, citing case as *Mallette v. Carpenter et al.* The fact that the decree of a foreign court can be and sometimes is recognized and enforced would seem to be an answer to any contention that the foreign court lacked power to make such a decree. See *Haddock v. Haddock* (1906) 201 U. S. 562, 26 Sup. Ct. 525.

### RECENT CASE NOTES

BILLS AND NOTES—DELIVERY OF INCOMPLETE INSTRUMENT—EXTENT OF AUTHORITY TO COMPLETE.—The defendants endorsed an accommodation note made "to the order of . . .", The person whose name the maker wrote into the blank as payee refused to discount the note. To effect a discount to the plaintiff, the maker therefore had the plaintiff add the words "or bearer." Held (two judges dissenting), that the plaintiff could not recover from the accommodation endorsers, as the insertion of "or bearer" was an unauthorized material alteration which avoided the note as to them under the Negotiable Instruments Law. First Natl. Bank v. Wood (1918, N. C.) 95 S. E. 140.

Negotiable paper completed before delivery to the accommodated party for purposes of negotiation falls under the general rule, and may not be altered. Builders' Lime Co. v. Welmer (1915) 170 Ia. 444, 151 N. W. 100. But where accommodation paper contains a blank for the name of the payee, the accommodated party is "presumed" to have authority to fill that blank for purposes of negotiation in any way consistent with the nature of a negotiable instrument. Michigan Ins. Bank v. Eldred (1870, U. S.) 9 Wall. 544; Bank of Spartanburg v. Mahon (1906) 75 S. C. 255, 55 S. E. 529; see also I Daniel. Neg. Inst. (6th ed.) sec. 142. The principal case turns on the court's interpretation of the extent and purpose of such authority. It is clear that the accommodated party may fill in the name of a payee. N. I. L. sec. 14. He may also turn the instrument into "bearer" paper by filling in the word "bearer," the name of a fictitious payee, or in the absence of express prohibition, his own name. See I R. C. L. 1027; I Daniel, Neg. Inst. (6th ed.) sec. 145. In both instances the single aim is to procure negotiation. With such negotiation, therefore, all authority to alter ceases. Builders' Lime Co. v. Welmer, subra. And so, until the instrument by such negotiation becomes a note, the authority should continue. Cf. Douglass v. Scott (1837, Va.) 8 Leigh, 43 (change of date before negotiation). To hold that the authority is "exhausted" by inserting the name of a payee is to hold that failure of negotiation to that one payee will, contrary to the intention of all the parties, defeat the purpose for which the transaction was entered upon. It seems hardly open to question that the dissent in the principal case represents the sounder view.

CHARITABLE CORPORATIONS—LIABILITY FOR TORTS—ELEVATOR ACCIDENT IN BUILDING OPERATED FOR PROFIT.—The plaintiff's decedent was a tenant in an office building owned by Vanderbilt University and used in part for the accommodation of its law school but occupied chiefly by tenants to whom offices were rented. To a declaration charging that the tenant's death was caused by the negligence of an elevator operator employed by the defendant University a demurrer was interposed on the ground that being an eleemosynary institution it was immune from liability for the negligence of its agents. Held, that the defendant was liable, with a dictum that a judgment for the plaintiff would be collectible only from the income of the office building or other property of the defendant not used for educational purposes. Gamble v. Vanderbilt University (1918, Tenn.) 200 S. W. 510.

The case contains an admirable review of the various theories upon which different courts have rested the generally recognized exemption of charitable corporations from liability for the torts of their agents. See also (1917) 26 YALE LAW JOURNAL, 791; 5 R. C. L. 374. Tennessee had previously adopted the "trust fund theory," which bases the charity's immunity upon the ground

that the payment of damages for torts would divert trust funds from the purposes of the trust and would tend to discourage possible donors to charities, to the detriment of the public welfare. Abston v. Waldon Academy (1906) 118 Tenn. 24, 102 S. W. 351 (the plaintiff being a student in the defendant academy). A number of states explain the exemption on the theory that beneficiaries of the charity assume the risk of negligent injuries. Powers v. Homeopathic Hospital (1901, C. C. A. 1st) 109 Fed. 294; cf. Paterlini v. Memorial Hospital (1918, C. C. A. 3d) 247 Fed. 639. This theory, of course, permits recovery when the plaintiff, as in the principal case, does not belong to the class of persons who enjoy the benefits of the charity. Bruce v. Central M. E. Church (1907) 147 Mich. 230, 110 N. W. 951; Hordern v. Salvation Army (1910) 199 N. Y. 233, 92 N. E. 626; Marble v. Nicholas Senn Hospital (1918, Neb.) 167 N. W. 208. While rejecting these distinctions and adhering to their own doctrine founded on public policy, the court asserts that "public policy is not a thing inflexible" and that distinctions must be made from time to time as sound reason may dictate. Under the circumstances of the principal case, public policy is deemed to demand the imposition of liability. A few authorities in accord are cited in the opinion. Winnemore v. Philadelphia (1902) 18 Pa. Super. Ct. 625; Holder v. Mass. Horticultural Soc. (1912) 211 Mass. 370, 97 N. E. 630. It is submitted that the result of the decision is sound and in accord with modern tendencies to restrict the rule of general immunity of charities.

Conflict of Laws—Jurisdiction—Degree Affecting Foreign Reality.—In a suit brought before the United States District Court for the Southern Division of the District of Idaho, against a Nevada corporation, the plaintiff charged the defendant with using excessive quantities of water for irrigation in Nevada from a river which also supplied the plaintiff further down stream in Idaho. The federal court ordered, (1) that the defendant should not use more than a stated quantity of water, (2) that it should place water meters on its Nevada land to register the amount taken, and, (3) that the plaintiff should have the privilege of going on that land for the purpose of inspecting the meters. The defendant appealed on the ground, among others, that the court had no jurisdiction to enter such a decree respecting foreign land. Held, that the decree below was correct. Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co. (1917, C. C. A. 9th) 245 Fed. 9.

See Comments, p. 946.

Constitutional Law—Admiralty—State Workmen's Compensation Acts not Applicable to Injuries within Admiralty Jurisdiction—Effect of Amendment by Congress.—By consent or without objection from the respondents as to jurisdiction, the New York State Industrial Commission had made awards to employees in cases within the jurisdiction of admiralty, prior to the announcement of the decision in Southern Pacific Company v. Jensen (1917) 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, Ann. Cas. 1917 E 900, discussed in (1917) 27 Yale Law Journal, 255. Held, that, under that decision, such awards were invalid, and that they might now be set aside, since want of jurisdiction of the subject matter could not be waived; also that admiralty jurisdiction extended not only to repairmen working on a ship anchored in navigable waters, but also to dockworkers employed under maritime contracts. Sullivan v. Hudson Nav. Co. (1918, App. Div.) 169 N. Y. Supp. 645.

A stevedore was injured while assisting in unloading a vessel. On the authority of Southern Pacific Company v. Jensen, supra, it had been held that compensation could not be awarded under the Louisiana Compensation Act. On rehearing it appeared that meanwhile (Oct. 6, 1917) Congress had amended

the act dealing with the grant of admiralty jurisdiction to federal courts, and saving to suitors their common law remedies, by adding to it the words "and to claimants the rights and remedies under the compensation law of any state." 40 U. S. St. at L. 385. Held, that admiralty had no jurisdiction, since the stevedore was engaged in unloading, that Southern Pacific Company v. Jensen was distinguishable as a proceeding in rem, and that in any event the amendment applied and operated retroactively to permit the awarding of compensation. Veasey v. Peters (1917, La.; rehearing, 1918) 77 So. 948.

See Comments, p. 924.

Contracts—Impossibility of Performance—Effect of Government Order Suspending Work.—The defendant contracted to construct a system of reservoirs to be completed within six years. Eighteen months after the work was begun the Minister of Munitions, acting under authority conferred by the Defence of the Realm Act, ordered the defendant to cease work and requisitioned his plant. The plaintiff sought a declaration by the court that this order was covered by a section of the contract which empowered the plaintiff's engineer to extend the time in case of any "difficulties, impediments, obstructions" or "oppositions" in the work, without affecting the obligation of the contract. Held, that the contract was dissolved by the order. Metropolitan Water Board v. Dick, Kerr & Co. (1917, H. of L.) 117 L. T. Rep. N. S. 766.

Following the rule stated in an oft repeated dictum in Paradine v. Jane (1647, K. B.) Aleyn 26, subsequent impossibility has been held not to discharge the promisor. School District v. Dauchy (1857) 25 Conn. 530. But an early exception to this rule was subsequent impossibility by action of the public authorities, through legislation or otherwise. Baily v. De Crespigny (1869) L. R. 4 Q. B. 180. The general rule was restricted further by readiness to imply a condition of the continued existence of some person or thing, as in Taylor v. Caldwell (1863, Q. B.) 3 B & S. 826; Dexter v. Norton (1871) 47 N. Y. 62. And with the implication of a condition to excuse performance where impossibility supervenes due to events that cannot be regarded as having been in the contemplation of the parties, the "rule" is practically destroyed. See Baily v. De Crespigny, supra, at p. 185; Chicago, etc., Ry. Co. v. Hoyt (1893) 149 U. S. 1, 14-15, 13 Sup. Ct. 779, 784; Tamplin S. S. Co. v. Anglo-Mexican, etc., Co. (H. of L.) [1916] 2 A. C. 397, 403-404. The result seems to be that the promisor is now held liable only when he expressly or by reasonable implication assumed the risk of the particular contingency which gives rise to the impossibility; but judges differ widely in their willingness to find such provision or implication. Cf. the opinions in the case last cited. In the principal case, however, the impossibility was only temporary. In such cases it has been held that the obligation is not discharged but at most is only suspended. Baylies v. Fettyplace (1811) 7 Mass. 325; Tamplin S. S. Co. v. Anglo-Mexican, etc., Co., supra. Here again, however, the modern tendency is to deal with each case on its own facts. It had been held in earlier English cases that a delay arising from a cause expressly excepted in the contract might be so long as to amount to a "frustration of the adventure," so that to require performance of the obligation after such an interval would be, not the enforcement of the original contract, but the substitution of a new one. Geipel v. Smith (1872, Q. B.) 26 L. T. Rep. N. S. 361; Jackson v. Union Marine Ins. Co. (1874, Ex. Ch.) L. R. 10 C. P. 125. The decision in the principal case applying the same doctrine to enforced suspension by compulsion of law seems a reasonable one. The difficulty of drawing the line, however, between those delays which are regarded as mere temporary interruptions, and those involving a "frustration of the adventure," is illustrated by a comparison of the principal case with the Tamplin S. S. Co. case, supra.

Contracts—Offer and Acceptance—Mistake in Transmission of Offer by Telegram.—The National Bank of Powell, Wyo., telegraphed to the plaintiff an offer to sell a car of potatoes at \$1.35 per 100. Through a mistake in the transmission of the telegram it read when delivered: "Can furnish one car clean potatoes at once \$.35 per 100 f. o. b. Powell." The plaintiff accepted the offer and the Wyoming bank shipped the potatoes. Held, that the sender of the telegram was bound by the message as delivered and that a contract was completed on the basis of \$.35 per 100. J. L. Price Brokerage Co. v. Chicago B. & Q. R. R. Co. (1917, Mo. K. C. App.) 199 S. W. 732. See Comments, p. 932.

Contracts—Personal Service—Grounds for Dismissal.—The plaintiff, employed as superintendent of gas engine shops, absented himself for several days from his work, for "diversion strictly personal," at a time when his presence was needed for the completion of delayed orders. He was dismissed shortly after, and in the subsequent bankruptcy of his employer, filed a claim for damages accruing from the alleged breach of his employment contract. Held, that the claim could not be allowed because an employee's voluntary and unnecessary absence from duty at a time when his presence was necessary to the success of his employer's business was ground for discharge; and if such ground in fact existed it was immaterial whether it was assigned, or even known to the employer, at the time of the dismissal. Farmer v. First Trust Company (1917, C. C. A. 7th) 246 Fed. 671.

Any act or neglect by an employee which injures, or tends to injure, his employer's business, is ground for the employee's dismissal. Deane v. Cutler (1892, Buff. Super. Ct.) 20 N. Y. Supp. 617; Kidd v. American Pill & Medicine Co. (1894) 91 Ia. 261, 59 N. W. 41; Pearce v. Foster (1886, C. A.) 17 Q. B. D. 536. This doctrine also applies to those serving in a supervisory capacity. Armour & Cudahy Packing Co. v. Hart (1893) 36 Neb. 166, 54 N. W. 262; Norton v. McMurtry (1860, Exch.) 2 L. T. Rep. N. S. 297. Yet the tendency is not to hold this class of employees as strictly for their time as the clerk or common laborer. Turner v. Kouwenhoven (1885) 100 N. Y. 115, 2 N. E. 637; Shaver v. Ingham (1886) 58 Mich. 649, 26 N. W. 162. An employer is protected in dismissing an employee if a justification exists at the time, even though he does not state it, or know of its existence; and though he assigns another ground. Green v. Edgar (1880, N. Y. Sup. Ct.) 21 Hun 414; Sterling Emery Wheel Co. v. Magee (1890) 40 Ill. App. 340; Baillie v. Kell (1838, Eng. C. P.) 4 Bing. N. C. 638. Nor is the employer's motive of moment. McKeithan v. Telegraph Co. (1904) 136 N. C. 213, 48 S. E. 646; Jackson v. New York Medical School (1893, N. Y. C. P.) 6 Misc. 101, 26 N. Y. Supp. 27; Boston Deep Sea Fishing Co. v. Ansell (1888, C. A.) 39 Ch. Div. 339. Though practically all the cases raising the point relate to personal service, this would seem to be merely a sound application of the general doctrine of contracts, that a breach by one party releases the other from further performance. Conversely, of course, the discharge cannot be justified by acts or circumstances subsequently arising, for in such a case the employer, by the discharge, has committed the first breach. Gerardo v. Brush (1899) 120 Mich. 405, 79 N. W. 646. And a breach by the employee, as a ground of discharge, may be waived by condonation. Spindel v. Cooper (1905, N. Y. App. T.) 46 Misc. 569; 92 N. Y. Supp. 822. Two early Massachusetts cases indicate a contrary tendency, holding that a church or parish may justify the dismissal of its pastor only on those grounds which were alleged at the time of the dismissal. Thompson v. Catholic Society (1827, Mass.) 5 Pick. 469; Whitmore v. Fourth Congregational Society (1854, Mass.) 2 Gray, 306. These seem to be the only cases in America relating to the discharge of ministers; but they are so opposed to the current of authority as to warrant the expectation that even in Massachusetts they would now be overruled or confined to their exact facts. Authority is lacking on the question of whether the servant, in his turn, could set up as a defence for abandonment, grounds not assigned when he left; but no reason appears why the doctrine should not be equally applicable to such a case. See Woods, Master & Servant, sec. 121; Thayer v. Wadsworth (1837, Mass.) 19 Pick. 349.

CRIMINAL LAW—CONSPIRACY—INDUCING RESISTANCE TO SELECTIVE DRAFT ACT.—The Act of Congress of June 15, 1917, known as the Espionage Act, provides in section 3 for the punishment of any person who, "when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States." The defendant was indicted under this provision for advising registrants under the Selective Draft Act not to report for duty when called. Held, that the words "military forces" in the above provision of the Espionage Act included those who had registered under the Selective Draft Act and had received serial numbers, though not yet called by the local exemption boards for examination, and that advising such persons not to report when called constituted a violation of section 3 of the Espionage Act. United States v. Sugarman (1917, D. Minn.) 245 Fed. 604.

Section 37 of the federal Criminal Code (Comp. St. 1916, sec. 10201) makes it an offense to "conspire... to commit any offense against the United States." Section 332 (Comp. St. 1916, sec. 10506) provides that "whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." Section 6 of the Selective Draft Act of May 18, 1917, makes it a misdemeanor for any person to "evade... the requirements of this Act." The defendants were indicted under these provisions for conspiring to induce persons not to register under the Selective Draft Act whose duty it was to do so. Held, that the conspiracy alleged was indictable under the sections above quoted. Goldman v. United States (1918) 38 Sup. Ct. 166.

There seems to have been an oversight on the part of Congress in failing to provide specifically in the Selective Draft Act for the offense of seeking to persuade another to evade or disobey the provisions of the Act. The attempt in the Sugarman case to bring this offense under the Espionage Act seems hardly sustainable. One wonders if the same court would hold that a registrant not yet called for examination who became intoxicated or committed a breach of the peace could be tried by court martial. 'The view taken by the court not only does violence to the natural meaning of words and to common sense, but is contradicted, at least by implication, by the Selective Draft Act itself, which distinguishes between registration and draft, and provides in section 2 that "all persons drafted into the service of the United States . . . shall, from the date of said draft . . . be subject to the laws and regulations governing the Regular Army." The decision in United States v. Hall (1918, D. Mont.) 248 Fed. 150, contrary to the Sugarman case, that "military or naval forces" in the Espionage Act means those organized and in service, is therefore to be commended.

The procedure adopted in the Goldman case to reach a similar offense rested on a sounder basis. At first sight it might seem that a distinction was overlooked between a conspiracy to do something and a conspiracy to induce another to do it. Chief Justice White's opinion does not help to clear up this difficulty, by paraphrasing the statute and speaking of a conspiracy "to bring about an illegal act." The real ground for sustaining the indictment was that, in the light of section 332, above quoted, the conspiracy contemplated the actual commission of a substantive offense against the United States by one or more of the conspirators. Under that section, not only the person persuaded not to

register, but also the person who persuaded him, would be guilty, as principal, of a violation of the criminal provisions of the Selective Draft Act. The same result had been reached on general principles of criminal law before section 332 was enacted. As applied to misdemeanors, that section is but declaratory of the general doctrine of the common law. See United States v. Snyder (1882, C. C. D. Minn.) 14 Fed. 554. And the resulting proposition that a conspiracy to persuade another to commit a misdemeanor against the United States necessarily involves a conspiracy to commit the same misdemeanor,—that is, to become liable to indictment as a joint principal in the offense which the other is persuaded to commit,-was clearly worked out by Judge Taft in Toledo, etc., Railway Co. v. Pennsylvania Co. (1893, C. C. N. D. Oh.) 54 Fed. 730, 735-737. While adequate for the Goldman case, this indirect method of reaching the offense of seeking to induce others to resist the draft would obviously fail when there was only a single offender and therefore no conspiracy; and this was probably the reason why the prosecution in the Sugarman case fell back on the Espionage Act. The dicta in United States v. Baker (1917, D. Md.) 247 Fed. 124, intimating that anything done with intent to procure the commission of an offense is necessarily indictable, would seem clearly unsound. Cf. the remarks about attempts in United States v. Hall, supra, at p. 153.

The omission to cover adequately this class of offenses has perhaps been cured by the Sedition Act, recently passed by Congress. According to newspaper reports, this Act provides for the punishment of any person who shall "cause or attempt to cause or incite or attempt to incite insubordination, disloyalty, mutiny or refusal of duty . . . or shall willfully utter, print, write or publish any language intended to incite, provoke or encourage resistance to the United States, or to promote the cause of its enemies." Part of this language is the same as that of the Espionage Act, as quoted above in the statement of the Sugarman case, but it will be noted that the limiting words, "in the military or naval forces of the United States," are omitted. Such general language leaves much to construction, but the provisions quoted would seem broad enough to cover inducing resistance to the draft, especially since, whatever may be their attitude in ordinary times, the courts in war time are evidently not disposed to any niceties of construction in passing on offenses which obstruct the war program.

EQUITY—INNOCENT MISREPRESENTATION—RECOVERY OF PROPERTY TRANSFERRED.—The defendant innocently made to the plaintiff misrepresentations of fact which led to a mutual exchange of corporate bonds. Plaintiff brought the present action to recover the bonds transferred to the defendant, offering to restore those received from the latter. *Held*, that plaintiff was entitled in equity to recover the bonds. *Bloomquist v. Farson* (1918, N. Y.) 118 N. E. 855. See Comments, p. 929.

GIFTS—GIFT INTER VIVOS—DELIVERY OF UNENDORSED CERTIFICATE OF STOCK.—A mother handed her son, the defendant, a certificate of stock with words of gift, but without filling out the usual form of assignment and power of attorney on the back. In a subsequent will she bequeathed the stock to the plaintiff, who brought suit to recover the legacy. Held, that the prior transaction did not constitute a valid gift inter vivos, and that the plaintiff legatee was entitled to recover. Heyer v. Sullivan (1917, N. J. Ch.) 102 Atl. 249.

The court in the principal case followed without comment a previous New Jersey decision, *Matthews v. Hoagland* (1891, V. C.) 48 N. J. Eq. 455, 21 Atl. 1054; and see in accord, *Baltimore, etc., Co. v. Mali* (1886) 65 Md. 93, 3 Atl. 286. But these decisions are opposed to the great weight of authority in this

country. Marshall, Corporations, sec. 318; Bond v. Bean (1904) 72 N. H. 444, 57 Atl. 340; Smith v. Meeker (1912) 153 Iowa, 655, 133 N. W. 1058. The majority rule fits with the general American rule that delivery of the evidence of a chose in action, though without consideration, and without a written assignment, will constitute a valid gift inter vivos of the chose in action, if the delivery is made with that intent. Grover v. Grover (1837, Mass.) 24 Pick. 261 (negotiable note); Meriden Savings Bank v. McCormack (1906) 79 Conn. 260, 64 Atl. 338 (bank book); Hani v. Germania Ins. Co. (1900) 197 Pa. 276, 47 Atl. 200 (insurance policy). It has been said that the rule arose because our courts did not recognize the distinction made by the English courts in regard to choses in action between gifts causa mortis and gifts inter vivos. Oliver S. Rundell, Gifts of Choses in Action (1918) 27 YALE LAW JOURNAL, 643, 654; and see George P. Costigan, Gifts inter Vivos of Choses in Action (1911) 27 L. QUART. REV. 326. But whatever the origin of the rule, it is now based on the doctrine that since a chose in action is alienable at law as well as in equity, its transfer should be assimilated to that of interests in tangible chattels; hence that delivery of evidence of a chose in action-evidence received everywhere in the business world as practically the chose in action itself in tangible formthat such delivery made with intent to effect a gift of that chose, does constitute a valid gift inter vivos. Walter W. Cook, The Alienability of Choses in Action (1016) 20 Harv. L. Rev. 816; and see Editorial Note (1018) 27 YALE LAW JOURNAL, 655, and cases there cited. And the fact is that the desirability of making shares of stock easily transferable has frequently caused the courts to treat stock certificates in other respects as possessing attributes of tangible property rather than as being merely evidence of choses in action. I Morawetz, Corporations (2d ed.) sec. 226; Puget Sound Nat. Bank v. Mather (1895) 60 Minn. 362, 62 N. W. 396; Simpson v. Jersey City Contracting Co. (1900) 165 N. Y. 193, 58 N. E. 896.

Insurance—Change of Beneficiary—Effect of Insured's Death before Action by Insurer.—In an insurance policy the power and privilege of changing the beneficiary were reserved. Such change was to be made "by written notice to the company at its home office, accompanied by the policy, and will take effect only when endorsed on this policy by the company." The insured made out a notice in writing, changing the beneficiary, and deposited it with his policy in the hands of the local agent of the company. The insured died suddenly, and thereafter the agent forwarded the papers to the home office and the change was duly endorsed on the policy. Held, that these facts operated to effect a change of beneficiary. State Mutual Life Ass. Co. v. Bessett (1918, R. I.) 102 Atl. 727.

The prevailing rule to-day is that the beneficiary has a vested right as soon as the policy is executed. This right, however, may be created subject to a power in the insured, or in the insured and insurer together, to change the beneficiary. The question is as to just what facts will operate legally as an exercise of this power,—a question to be answered by a fair construction of the terms of the insurance contract, involving both state statutes and company by-laws. If no special method of exercising the power is prescribed, any ordinary and reasonable method, such as a written notice by the insured, is sufficient. Supreme Conclave v. Cappella (1890, C. C. E. D. Mich.) 41 Fed. 1. See also Ellis v. Fidelity Co. (1913) 163 Iowa, 713, 144 N. W. 574 (changed by will). Where the method is prescribed, it must be substantially complied with. But where exact compliance with the prescribed method has been prevented by the beneficiary, the change is usually held to be complete. Marsh v. Supreme Council (1889) 149 Mass. 512, 21 N. E. 1070; Hirschl v. Clark (1890) 81 Iowa, 200, 47 N. W. 78. In many cases, the power is regarded as resting in the insured alone,

and it has been very generally held that an attempted change of beneficiary was effective when the insured had done "all that was required of him, or all possible for him to do" even though the company's action on his request took place after his death. Mutual Life Co. v. Lowther (1912) 22 Colo. App. 622, 126 Pac. 882; Wandell v. Mystic Toilers (1906) 130 Iowa, 639, 105 N. E. 448; Grand Lodge v. McFadden (1908) 213 Mo. 269, 111 S. W. 1172; Luhrs v. Luhrs (1890) 123 N. Y. 367, 25 N. E. 388. According to these cases the provision that the change is to "take effect only when endorsed on the policy by the company," or when some similar act is done, does not give the insurer the privilege of non-compliance with the insured's desire, but provides for a purely ministerial act, the performance of which could either be compelled by the new beneficiary or dispensed with altogether. There are some cases substantially in conflict with these, holding that where the insurer had not acted on the insured's request the change was not effective and could not be enforced. Freund v. Freund (1905) 218 Ill. 189, 75 N. E. 925; O'Donnell v. Metropolitan L. Ins. Co. (1915, Del.) 95 Atl. 289; Sheppard v. Crowley (1911) 61 Fla. 735, 55 So. 841. Even if an act of the insurer is one of the necessary operative acts to effect the change, and even if this act is discretionary with the insurer (i. e. he is privileged to do or not to do the act), there is no reason for requiring that act to be done prior to the death of the insured. The power in the insurer to effectuate the change comes from the original contract, to which the beneficiary's right is at all times subject, and the later action of the insured would seem to be merely a condition to the exercise of this power. Therefore the death of the insured after having fully performed the condition should not revoke the power of the insurer, even though the insured might possibly have revoked it by a voluntary act while living. Luhrs v. Luhrs (1890) 123 N. Y. 367, 25 N. E. 388 (semble). It necessarily follows, however, from the recognition of a discretionary power in the insurer, that there is no change of beneficiary if the company in its discretion refuses to do the necessary operative act, and this is true whether the insured is living or dead. Freund v. Freund, supra. And the contract may, of course, expressly confine the power of the insurer to acts performed prior to the death of insured. Modern Woodmen v. Headle (1914) 88 Vt. 37, 90 Atl. 893.

JUDGMENTS—EQUITABLE RELIEF—DEFENSE PREVENTED BY FAILURE TO RECEIVE SUMMONS.—A son forged his mother's signature to a note. In a suit upon the note summons was served at the mother's former residence (where she no longer resided) by delivery to the son, who concealed it from his mother. At the trial he appeared and testified to the genuineness of his mother's signature, and judgment was rendered against her. As the statutory period of 30 days for setting aside a judgment had expired, the trial court denied relief. The mother sued in equity for an injunction against enforcement of the judgment. Held, that proceedings on the judgment should be perpetually stayed unless the defendants should agree to a new trial. Yung v. Roll Stickley & Sons (1917, N. J. Eq.) 102 Atl. 698.

By rather labored reasoning the court construed this as a case of "accident," justifying equitable relief on that ground. No such straining of language would seem to be necessary. The objection to the validity of the judgment was the more fundamental one that the court had never acquired, by proper service, any jurisdiction over the judgment defendant. But though the judgment was void, there was no procedure at law to set it aside after the thirty days, and the aid of equity was therefore necessary to stop the machinery of enforcement. It is well settled that where, in an action depending on personal service to give jurisdiction, notice was not properly served upon the defendant, equity will enjoin enforcement of a judgment. Jones v. Commercial Bank (1840, Miss.)

5 How. 43 (defendant absent from residence); 2 Pomeroy, Eq. Remedies, sec. 663. This rule is of course subject to the usual qualification that equity will act only when common law procedure affords no adequate remedy. Knight v. Creswell (1907) 82 Ark. 330, 101 S. W. 754. Where the record at law is regular on its face, there is a conflict of authority as to whether a meritorious defense must be shown before an injunction will be granted. The majority rule seems to require such a showing. Jeffery v. Fitch (1879) 46 Conn. 601; Bernhard v. Idaho Bk. (1912) 21 Idaho 598, 123 Pac. 481; contra, Cooley v. Barker (1904) 122 Iowa 440, 98 N. W. 289. The persuasive argument of the minority is that the complainant is deprived of his property without due process of law, and on this ground an injunction should be granted independently of any other consideration. 2 Pomeroy, Eq. Remedies, sec. 667. But it would seem that the hearing before the court of equity would give him his day in court. In the principal case there was no difficulty on this point, as the facts alleged showed a complete defense to any liability on the note. Nor is it any bar to equitable relief in such cases that the plaintiff at law was innocent of any wrongdoing or unfairness. Jeffery v. Fitch, supra; 2 Pomeroy, Eq. Remedies, sec. 663.

JUDGMENTS — PERSONS CONCLUDED — RIGHTS OF ABSENTEE PRESUMED TO BE DEAD.—The defendant was the depositary of an employees' savings fund. The particular deposit in question was payable upon the death of the depositor to his sons or, if they were not living, to his legal representatives. His executrix demanded payment, the sons having been absent and unheard of for 18 years. From a judgment for the plaintiff the defendant appealed on the ground that such judgment would not protect it from having to pay again to the sons, should they subsequently appear. Held, that the judgment for the plaintiff was correct, with a dictum that payment thereunder would protect the defendant. Maley v. Pennsylvania R. R. Co. (1917, Pa.) 101 Atl. 911.

See Comments, p. 943.

Negligence—Acting in Emergency.—The defendant company in constructing a dam pumped water into a chute whence it was discharged into the river causing a swift current. The deceased, an employee of the defendant and an expert swimmer, fell into the chute, was carried into the river and was drowned. In a suit for wrongfully causing his death, the negligence complained of was that a fellow employee attempted to give aid to the deceased instead of immediately stopping the pumps and thus abating the current. Held, that a verdict for the defendant was properly directed. Kelch's Adm'r v. National Contract Co. (1918, Ky.) 199 S. W. 796.

Negligence is a relative term dependent upon the circumstances under which one acts or fails to act. In an emergency, one who acts according to his best judgment, even though the event proves that he failed to choose the most judicious course, is not chargeable with negligence. Such act or omission may be called a mistake but not carelessness. Brown v. French (1883) 104 Pa. 604; Floyd v. Philadelphia R. R. Co. (1894) 162 Pa. 29, 29 Atl. 396. The question usually arises in cases where the defendant seeks to escape liability on the ground that the injured plaintiff was guilty of contributory negligence in choosing the wrong way to protect himself from the impending danger. See Geary v. McCreary (1912) 147 Ky. 254, 143 S. W. 1004. Dicta in certain Iowa cases seem to indicate a tendency to confine the emergency rule to such situations. See Boice v. Des Moines City Ry. Co. (1911) 153 Iowa 472, 477; 133 N. W. 657, 659. But other courts have applied the rule to defendants acting with mistaken judgment in an emergency which they have not caused. Sekerak v. Jutte (1893) 153 Pa. 117, 25 Atl. 994. It is submitted there is no sound basis for limiting the rule to the defence of contributory negligence. The effect of an emergency in depriving a person of time for calculated consideration is the same whether he be the one in danger or the one whose duty it is to avoid the threatened injury. The principal case correctly holds that the law of negligence does not and should not require mathematical accuracy or conduct of exact calculation in emergencies whatever the relation of the person to the event. See *Wise Ter. Co. v. McCormick* (1905) 104 Va. 400, 414, 51 S. E. 731, 736.

Negligence—Assumption of Risk—Volunteer Removing Electric Wire from Public Street.—A broken telephone wire of the defendant company became charged with electricity by contact with a wire of the city lighting system. The plaintiff's decedent, a volunteer, received a fatal shock while attempting to remove the broken wire from the street in order to avert possible injury to passers-by. His administratrix sued the defendant for negligently causing his death. Judgment was rendered for the plaintiff. Held, that the judgment was correct. Hamer, J., dissenting. Workman v. Lincoln Tel. & Tel. Co. (1918, Neb.) 166 N. W. 550.

The defendant's negligence being established by the verdict of the jury, the decision turns upon the effect of the plaintiff's assumption of risk. In actions of this type assumption of risk will bar recovery unless sufficient justification is found for the plaintiff's assuming it. Protection of one's own property is held to be such a justification; as where one was injured in attempting to remove a sputtering wire which endangered his property. Leavenworth Coal Co. v. Ratchford (1897) 5 Kan. App. 150, 48 Pac. 927. But this principle does not apply where it was not the wire which brought danger to the property, but the location of the property, or the owner's desire to make a given use of it, which brought the plaintiff into danger. State v. Chesapeake & Potomac Tel. Co. (1914) 123 Md. 120, 91 Atl. 149 (climbing telegraph pole to rescue a pet cat); Hickok v. Auburn Light, etc., Co. (1911) 200 N. Y. 464, 93 N. E. 1113 (climbing pole to put new bulb into a light). Under certain conditions the plaintiff can also find justification in his intention to prevent injury to persons. So with a foreman, not employed by the defendant, killed while attempting by removal of the defendant's dangling live wire to prevent possible injury to his fellow-workers. New England Tel. & Tel. Co. v. Moore (1910, C. C. A. 1st) 179 Fed. 364. So also with a policeman, whose duty it is to protect the public. Bourget v. Cambridge (1892) 156 Mass. 391, 31 N. E. 390; Dillon v. Allegheny, etc., Co. (1897) 179 Pa. 482, 36 Atl. 164. The principal case is novel in that it seems to be the first in which recovery was allowed in the given situation for injuries sustained by an ordinary member of the public, acting only from public spirit. With this principle the dissenting opinion may perhaps be reconciled, and the dissent rested on the ground that the decedent was not reasonably prudent in his choice of means. Of course recovery is properly barred where the risk is taken in acts which have no reasonable relation to the protection of property or persons, such as touching wires to show that they are harmless. Carroll v. Grande Ronde Electric Co. (1906) 47 Ore. 424, 84 Pac. 389; Anderson v. Jersey City Electric Co. (1900, Ct. Err.) 64 N. J. L. 664, 46 Atl. 593. And it may be suggested that the evil sought to be avoided might be required to bear some proportion to the apparent risk. For a further note on the liability of tort feasors to volunteers, see 27 YALE LAW JOURNAL, 415.

REMOVAL OF CAUSES—RESIDENCE OF PARTIES—PLAINTIFF A RESIDENT OF STATE BUT NOT OF DISTRICT IN WHICH SUIT IS BROUGHT.—Two citizens of Alabama, one residing in the Middle District and the other in the Southern District, sued a Louisiana corporation in a state court in the Southern District of Alabama. Held, that the defendant might remove the cause to the federal district court

for the district within which the suit was pending. M. Hohenberg & Co. v. Mobile Liners. Inc. (1917, S. D. Ala.) 245 Fed. 169.

See Comments, p. 935.

SALES—BILLS OF LADING—RESERVATION OF TITLE.—The National Bank of Powell, Wyo., telegraphed to the plaintiff an offer to sell a car of potatoes at \$1.35 per 100. Through a mistake in the transmission of the telegram it read when delivered: "Can furnish one car clean potatoes at once \$.35 per 100 f. o. b. Powell." The plaintiff accepted the offer and the Wyoming bank shipped the potatoes, sending a bill of lading to a bank at St. Joseph, Mo., with draft attached for the amount of the sale at \$1.35 per 100. The plaintiff tendered the amount due on a 35¢ basis both to the St. Joseph bank and to the carrier. Being unable to obtain possession of the shipment the plaintiff brought replevin against the railroad company. Held, that upon tender of the price according to the contract, the title and right to possession passed to the plaintiff, and that the action could be maintained. J. L. Price Brokerage Co. v. Chicago B. & Q. R. R. Co. (1917, Mo. K. C. App.) 199 S. W. 732. See Comments, p. 932.

SALES—WARRANTIES—IMPLIED WARRANTY OF WHOLESOMENESS OF FOOD.—The plaintiff purchased and ate at the defendant's drug store ice cream manufactured by the defendant. In an action for damages for illness caused by the presence in the cream of tyrotoxican, a filth product, the trial court charged that the defendant impliedly warranted the cream wholesome and fit to eat. *Held*, that the instruction was correct. *Race v. Krum* (1918, N. Y.) 118 N. E. 853.

See Comments, next month.

Torts—Enticing Away Plaintiff's Employee—Justification.—The defendant corporation induced an employee of the plaintiff corporation to leave the plaintiff in order to enter the service of the defendant. Under his contract with the plaintiff the employee in question was under no duty to remain. The plaintiff sought an injunction. *Held*, that the defendant had committed no legal wrong and that an injunction should be denied. *Triangle Film Corporation v. Arteraft Pictures Corporation* (1918, C. C. A. 2d) 59 N. Y. L. J. 283.

In spite of the dictum of Pitney, J., to the contrary in Hitchman Coal & Coke Co. v. Mitchell (1917) 38 Sup. Ct. 65 (commented on in [1918] 27 YALE LAW JOURNAL, 794-795), the decision in the principal case seems both sensible and sound. As Learned Hand, J., says in the course of his brief but illuminating discussion, "the result of the contrary would be intolerable both to such employers as could use the employee more effectively and to such employees as might receive added pay. It would put an end to any kind of competition." The learned court felt the contention of the plaintiff to be "so extraordinary" that it refused "to consider it at large" and apparently deemed it unnecessary to cite authorities. Actual decisions upon the point are in fact not numerous. See (1918) 27 YALE LAW JOURNAL, 794. The opinion of the court in the principal case is to be commended for its frank recognition that the decision really involved a determination of policy, viz., what shall be recognized as "just cause" for intentionally interfering with the "status" of employer and employee which existed between the plaintiff and the person induced to leave.

Torts—Negligence—Liability of Contractor to Third Party.—The defendant corporation constructed a highway bridge under contract with county commissioners. Some years after the bridge had been accepted by the county, the appellant's decedent sustained fatal injuries from its collapse due, as the plaintiff alleged, to negligence in its construction. *Held*, that the complaint stated a good

cause of action. Travis v. Rochester Bridge Co. (1918, Ind. App.) 118 N. E. 694.

This case calls attention to the gradual passing of the old rule that a contractor is not liable to indeterminate third parties for injuries caused by defective construction because there is no privity of contract between them. See Winterbottom v. Wright (1842, Exch.) 10 M. & W. 109. The first departure from the old rule was made in the case of articles inherently dangerous to life or health. Thomas v. Winchester (1852) 6 N. Y. 397 (poison wrongly labelled). The character of the article imposed upon the maker a positive duty of care a tort duty—not to deal with it so as to cause harm to any person who might reasonably be expected to use it; the lack of privity of contract could be no defense to a violation of this duty. Waters-Pierce Oil Co. v. Deselms (1908) 212 U. S. 159, 29 Sup. Ct. 270. Some courts extend the duty of care to include cases where the instrumentality was not dangerous in itself but was made so by defective construction. Huset v. Case Threshing Machine Co. (1903, C. C. A. 8th) 120 Fed. 865; MacPherson v. Buick Co. (1916) 217 N. Y. 382, 111 N. E. 1050; see also (1916) 25 YALE LAW JOURNAL, 679. But many courts have refused to go so far. Some hark back to the old and pointless objection of lack of privity, as though the sole liability were in contract for breach of implied warranty, and not equally in tort. See Cadillac Co. v. Johnson (1915, C. C. A. 2d) 221 Fed. 801. Other courts have argued that the doctrine would create a liability so indefinite as to expose industry to ruin through litigation. Curtin v. Somerset (1891) 140 Pa. 70, 21 Atl. 244. Indefiniteness, if an objection, would apply to any tort duty; the conclusion drawn from it seems to represent a mistaken view of fact and policy-it presupposes a prevalence of negligence which, if it exists, can best be remedied by making such negligence expensive. On the relation of the doctrine here discussed with that of liability for breach of warranty by a vendor, see p. 961, supra. As in the principal case, bridge contractors have been held liable for injuries caused to the traveling public by negligent construction, but the cases have always, so far as discovered, laid emphasis upon the fact that the defects in construction were known to the defendant and were concealed from the other contracting party as well as from the public. O'Brien v. American Bridge Co. (1910) 110 Minn. 364, 125 N. W. 1012. Whether there would be liability if the contractor had faithfully performed his contract and the injury were due merely to a defect in the plans which the contractor ought to have recognized as creating a structure dangerous to the public is a question which the principal case suggests but does not decide. Nor does it at all discuss the question of the defendant's knowledge of the defect: the case came up on demurrer to a complaint in which actual knowledge was alleged. Such actual knowledge is held in one group of cases essential to the defendant's liability. Schubert v. Clark (1892) 49 Minn. 331, 51 N. W. 1103; Earl v. Lubbock [1905] 1 K. B. 253. A second group holds "imputed" knowledge to be sufficient, but only when the circumstances are such as to warrant a jury in finding that the defendant must have known of the defect. O'Brien v. American Bridge Co., supra. Courts which follow this theory deny the defendant's liability where he only "should have known" or "ought to have known." Wood v. Sloan (1915) 20 N. M. 127, 148 P. 507. A third group holds that if the defendant should have known, he cannot escape because he did not know. MacPherson v. Buick Co., supra. The last rule, applying a purely objective test, seems to be more in accord with the general principles of tort liability.

Trade-Marks—Application to Different Goods of Same Class.—The plaintiff was the registered owner of the trade-mark "Old Crow" which it had always applied to its straight rye and bourbon whiskey. It sought an injunction against the defendant's use of the same trade-mark on the defendant's straight

whiskeys. The defendant pleaded a prior adjudication to the effect that the defendant had first appropriated the trade-mark "Old Crow" to designate its blended whiskey, although by lackes it had lost its exclusive rights in this name as against the plaintiff. Held, that by virtue of prior appropriation of the trade-mark for blended whiskey the defendant was privileged to use it also for straight whiskey. Rock Spring Distilling Co. v. Gaines & Co. (1918, U. S.) 38 Sup. Ct. 327.

The gist of the wrong of unfair competition in trade-mark cases is the probability that the public may be led to mistake the defendant's goods for those of the plaintiff. Amoskeag Mfg. Co. v. Garner (1876, N. Y. Sup. Ct.) 54 How. Prac. 297. The test applied by the courts to determine such probability is free of fine distinctions; it is the care exercised by the average buyer of that particular class of goods. Bass, Ratcliff & Gretton v. Feigenspan (1899, C. C. D. N. J.) 96 Fed. 206. Rushmore v. Badger Brass Mfg. Co. (1912, C. C. A. 2d) 198 Fed. 379. It follows that the right to the exclusive use of a given trade-mark may be restricted to its use on a particular class of goods, and the use of the same mark by another permitted in connection with a different class. Virginia Baking Co. v. Southern Biscuit Works (1910) III Va. 227, 68 S. E. 261 (soda crackers and ginger snaps; the propriety of putting them in separate classes may, however, be doubted). But within its own class the trade-mark will be protected by injunction. As the court says, great confusion would arise in business from recognizing the same trade-mark as belonging to different persons for different kinds of the same article. Authorities in the lower courts accord: American Tobacco Co. v. Polacsek (1909, C. C. S. D. N. Y.) 170 Fed. 117 (smoking tobacco and cigarettes); Collins Co. v. Oliver Ames Corp. (1882, C. C. S. D. N. Y.) 18 Fed. 561; (axes, etc., and spades) G. G. White Co. v. Miller (1892, C. C. D. Mass.) 50 Fed. 277 (straight and blended whiskey); Layton Pure Food Co. v. Church & Dwight Co. (1910, C. C. A. 8th) 182 Fed. 35 (baking powder and baking soda). See also (1911) 30 L. R. A. (N. S.) 167. It is, however, possible as in the principal case that a prior appropriator may by laches lose his exclusive right against all competitors and as far as the other party to the suit is concerned, have merely a privilege or as the case calls it, a "defensive right" to use the mark. The cases on the main point of the instant case, though not numerous, are in agreement.

Trading with the Enemy—Contracts Conferring Pecuniary Advantage on Citizen.—In August, 1915, the defendants, D & Co., a French firm, sold to the plaintiff, Y, a subject of Bulgaria resident in Marseilles, a quantity of wheat to arrive. By the French law of September 27, 1914, the performance of any contract between a German or Austrian and a Frenchman, operating to the advantage of the German or Austrian, was declared null and void, which provision of law was extended to subjects of Bulgaria by decree of November 7, 1915. When the wheat arrived this decree was in force, on which ground the defendants refused to make delivery to the plaintiff. The plaintiff had in the meantime resold much of the wheat to French individuals at a loss. Examination of the terms of the contract and of the interests of the various parties under it showed that it operated to the decided advantage of Frenchmen and to the disadvantage of the plaintiff. Held, that the defendants should be ordered to make delivery to the plaintiff. Yulzari v. Dreyfus, Tribunal de Commerce of Marseilles, Nov. 16, 1915, reported in (1917) 44 Clunet, 1015.

The case illustrates two striking differences between the French and the Anglo-American law. (1) The plaintiff, although resident in France, was regarded as an alien enemy, the test of nationality determining enemy character for trading purposes. The Anglo-American test of domicil would have relieved the plaintiff from this status. His permission to sue in France is attributable

to the special privilege in this respect extended to Bulgarians for political reasons. (2) Under the French law, not all contracts between alien enemies appear to be void and non-executable, but only such as are of pecuniary profit to the enemy. This requires the court to examine the benefits to be derived from the operation of such a contract. Although in this case the court found that the plaintiff would sustain a loss and Frenchmen derive a profit from the enforcement of this contract, it is not explained why the plaintiff sued at all. Quaere, whether the court would examine comparative advantages, and follow the test of preponderating advantage. Under Anglo-American law, the contract would be absolutely void, if made between alien enemies in the Anglo-American sense, regardless of the question of benefits. The consideration of "benefit to the subject" is applied in another connection, namely, in aid of the rule that alien enemies are not relieved from suit in the courts at the hands of subject plaintiffs. Porter v. Freudenberg (C. A.) [1915] I K. B. 857. Cf. also Ertel Bieber & Co. v. Rio Tinto Co. (H. of L.) [1918] A. C. 260.

TRUSTS—CONSTRUCTIVE TRUST—MURDER OF TENANT BY ENTIRETY BY CO-TENANT WITHOUT INTENTION TO PROFIT BY HIS CRIME.—A husband and wife held real estate as tenants by the entirety. The husband murdered his wife and then committed suicide. It was shown that he committed the crime without any intention of acquiring title as surviving tenant by the entirety. The executor and heirs of the wife filed a bill in equity to quiet their title against the administrator and heirs of the husband. Held, that the plaintiffs were entitled to the relief prayed for. Van Alstyne v. Tuffy (1918, N. Y. Trial T.) 9 Rochester-Syracuse Daily Record, 44.

When a prospective heir murders his ancestor, or when a devisee or legatee murders his testator, a problem arises upon which the courts have taken divergent views. By legislation the murderer may, as part of the penalty for his crime, be deprived of the privilege of inheritance. Estate of Donnelly (1899) 125 Cal. 417, 58 Pac. 61. In the absence of legislation three views are possible. (1) The murderer may be given title on the ground that the courts are powerless to read into the statute of descent or into the will an exception excluding him. Although the result shocks one's sense of justice, this view is supported by the weight of authority. Wall v. Pfanschmidt (1914) 265 Ill. 180, 106 N. E. 785. (2) The opposite view, sustained by a few courts, excludes the murderer from taking title, on the ground that the statute of descent or the will must be read in the light of public policy, which forbids a person to profit by his own crime. Perry v. Strawbridge (1908) 209 Mo. 621, 108 S. W. 641. (3) The third view, based on principles of constructive trusts, prevails in New York and a few other jurisdictions. Legal title is recognized as passing to the murderer, but on equitable principles a trust is raised in favor of the heirs of the person murdered. Ellerson v. Westcott (1896) 148 N. Y. 149, 42 N. E. 540, explaining Riggs v. Palmer (1889) 115 N. Y. 506, 22 N. E. 188; Cleaver v. Mutual Reserve, etc., Assn. (C. A.) [1892] I Q. B. 147. This view, it is submitted, accomplishes justice without judicial legislation and in accordance with recognized principles. It also enables a bona fide purchaser from the murderer to be protected in his title. The principal case is a logical extension of the New York rule. It is worthy of note in that it applies the constructive trust principle to the innocent heirs of the wrongdoer, and this regardless of the motives of the murderer in committing the crime. On the latter point cf. Hall v. Knight (C. A.) [1914] P. I (a recent English case excluding from succession under a will a devisee convicted of manslaughter in killing the testator). Only one other case dealing with estates by entireties in this connection seems to have been decided. Beddingfield v. Estill (1907) 118 Tenn. 39, 100 S. W. 108. There an opposite result was reached on the ground that in an estate by the entirety the surviving spouse does not take by inheritance but as survivor by virtue of the original grant. But this is no adequate reason for refusing to apply the equitable principles above discussed. See (1897) 36 Am. L. Reg. (N. S.) 225, 237.

Waters and Watercourses—Obstructing Natural Stream—Extraordinary Rain as Act of God.—The defendant enclosed in culverts a stream flowing through its land. As the result of an unprecedented storm the culverts proved insufficient, and overflowing water damaged the plaintiff's property. In its natural condition the channel would have been sufficient to carry off the flood. Held, that the defendant was liable, some of the opinions resting on the ground that an extraordinary rainfall in Scotland was not to be deemed an act of God, and one at least on the ground that one who substitutes an artificial watercourse for a natural one is absolutely responsible for damage caused by any flood which would have passed safely through the natural channel. Corporation of Greenock v. Caledonian Railway Co. (1917, H. of L.) 117 L. T. Rep. N. S. 483.

Persons who obstruct the natural flow of a stream will in general be liable for damage by overflow caused by the obstruction. McCoy v. Danley (1852) 20 Pa. 85, 57 Am. Dec. 680. But it is commonly said that for damage due to such an unwonted flood as may be deemed an act of God, the defendant will be absolved from liability. Dorman v. Ames (1867) 12 Minn. 451. When a flood may be so deemed is a question to which it is difficult to find a definite answer in the decisions. Of course one who artificially changes a watercourse must build to accommodate all the water which can be anticipated under the circumstances, having in view the climate, topography, etc. Sabine v. Johnson (1874) 35 Wis. 185. Thus when the stream had previously several times overflowed its banks, it was held not enough to accommodate only the water that would flow within the natural bed and banks. Dunn v. Chicago, etc., Ry. Co. (1917, Ind. App.) 114 N. E. 888. While each decision in this field must necessarily depend on its own peculiar facts, it would seem that the principal case illustrates a tendency of the courts of Great Britain to be rather less willing than are American courts to find an act of God in given circumstances. Cf. Kerr v. Earl of Orkney (1857, Scot. Ct. Sess.) 20 Dunlop, 298; Dorman v. Ames, supra; Helbling v. Allegheny Gemetry Co. (1902) 201 Pa. 171, 50 Atl. 970. Indeed, Lord Wrenbury's opinion indicates that, in his view at least, no storm, however extraordinary and unforeseeable, would excuse the defendant if the natural channel would have been sufficient to carry off the flood. The case is also interesting for the comments of the Lords Justices upon Nichols v. Marsland (1876, C. A.) 2 Ex. Div. 1, in which the act of God exception to the Rylands v. Fletcher doctrine was established.

Workmen's Compensation Act—Injury Arising "Out of" the Employment—Assault by Fellow-Employee.—The claimant's intestate, an employee of the defendant company, died as a result of injuries received in a fight following an assault upon him by a fellow-employee, arising out of a controversy over the possession of a ladle. It was the policy of the defendant company in making iron castings to furnish their employees with only a limited number of ladles so as to avoid too much crowding of the casters around the cupola where the molten metal was drawn out, and so as to prevent them from finishing their day's work too early. Held, that the injury did not arise "out of" the employment. Jacquemin v. Turner & Seymour Mfg. Co. (1918, Conn.) 103 Atl. 115.

An injury resulting directly from a wilfully tortious or sportive act of a fellow-employee who departs temporarily from the scope of his employment to conduct himself in this manner is not generally held to be within that class of injuries for which the legislatures have provided compensation. (1917) 27 YALE LAW JOURNAL, 142; Kiser, Workmen's Compensation Acts, 79; Federal

Rubber Mfg. Co. v. Havolic (1916) 162 Wis. 341, 156 N. W. 143; Pierce v. Boyer, etc. Coal Co. (1916) 99 Neb. 321, 156 N. W. 509. An injury resulting indirectly from such an act is within the compensable class. Knopp v. American Car & Foundry Co. (1914) 186 Ill. App. 605. However, the general rule has been narrowed by exceptions. Where the nature of the employment peculiarly exposes the employee to the risk of such injuries, an injured employee is entitled to compensation. Polar Ice & Fuel Co. v. Mulray (1918, Ind. App.) 119 N. E. 149 (shooting of a servant employed to check and collect for shortages of other servants); State v. District Court (1916) 134 Minn. 16, 158 N. W. 713. And when the fellow-employee is in the habit of conducting himself in a manner dangerous to his fellows, it is held that the injury arises "out of" the employment, as resulting from a risk incidental to the conditions under which the employee must work. In Re Loper (1917, Ind. App.) 116 N. E. 324; McNicol's Case (1913) 215 Mass. 497, 102 N. E. 697. But, for recovery in such a case, it must appear that the employer had knowledge of the danger. Schmoll v. Weisbrod & Hess Brewing Co. (1916, Sup. Ct.) 89 N. J. L. 150, 97 Atl. 723; Stuart v. Kansas City (1918, Kan.) 171 Pac. 913. Under this subjective test it would seem that, as with the dog-bite scienter, the first injury caused by a given employee to another is not compensable, even though the second one might be. But see M'Intyre v. Rodger & Co. (1903, Ct. Sess.) 41 Scot L. Rep. 107; Heitz v. Ruppert (1916) 218 N. Y. 148, 112 N. E. 750. There seems to be no reason to doubt either the holding in the principal case, or its suggestion that notice of a tendency in the conditions or the men to cause trouble would be enough to charge the employer although no actual injury had previously

## CURRENT DECISIONS

Conflict of Laws—Jurisdiction for Divorce—Domicil—Nationality.—A husband and wife, having been married and continuously domiciled in France, brought cross-actions for divorce. The husband was a citizen of Argentina, the wife a native of France. Argentine law does not permit divorce, but only legal separation. Article 7 of the Argentine Civil Code provides that the capacity of Argentinians for acts performed abroad is governed by the law of their domicil. By French law divorce was obtainable. According to Argentine law the marriage of an Argentinian to an alien woman does not confer his nationality upon her, in which event under French law she retains her French citizenship. Held, on the question of jurisdiction, that divorce would be granted; and on the question of citizenship, that the wife was French. Rocholl v. Rocholl, Tribunal civil de la Seine (4th Chamber) December 8, 1915, reported in (1917) 44 Clunet, 1020.

Here the provision of the law of the husband's nationality to the effect that capacity for legal acts of Argentinians abroad was to be governed by the lex domicilii was deemed to qualify the absolute prohibition of divorce, the husband being domiciled in France, where divorce was permitted. Moreover, the court held the wife to have retained her French nationality on marriage, in accordance with the French law, because by the law of her husband's country, marriage did not confer his nationality upon her. Under the United States Act of March 2, 1907, section 3, providing that "any American woman who marries a foreigner shall take the nationality of her husband," a wife similarly situated would have lost American citizenship without acquiring Argentinian citizenship. Our law has overlooked the wise precaution of France safeguarding native women against statelessness. See (1918) 27 YALE LAW JOURNAL, 840.

CONSTITUTIONAL LAW—WAR POWERS—KEEPING BROTHEL IN VIOLATION OF SELECTIVE DRAFT ACT.—The defendant was indicted for a conspiracy to violate section 13 of the Selective Draft Act, and the regulations of the Secretary of War promulgated in pursuance thereof, by keeping a house of ill fame within five miles of the Columbus Barracks. A demurrer was interposed. Held, that the Act was a valid exercise of the war powers of Congress. United States v. Casey (1918, S. D. Oh.) 247 Fed. 362. Accord, United States v. Scott (1918, D. R. I.) 248 Fed. 361.

While in time of peace regulations of the character here involved would fall within the police power reserved to the states, there seems no reason to doubt the correctness of the court's decision that, as incidental to its war powers, Congress may prohibit acts which militate against the health, morals and efficiency of its military and naval forces. It is expressly authorized "to make all laws which shall be necessary and proper for carrying into execution" the war powers. Constitution, Art. 1, sec. 8, cl. 18.

Constitutional Law—War Powers—Regulation of Food Prices.—The defendant was convicted of selling bread at a price higher than that permitted by the regulations made pursuant to the War Precautions Act of Australia. He contended that the Act was unconstitutional. Held, that under the constitutional power "to make laws . . . with respect to the naval and military defense of the Commonwealth" the Act was constitutional. Duffy and Rich, JJ., dissenting. Farey v. Burvett (1916, Australia) 21 C. L. R. 433, reported in 7 Brit. R. C. 628.

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The case is of interest to American readers because the provisions in the Australian Constitution are sufficiently similar to those on which the war powers of our Congress depend, so that the case may be thought a persuasive authority upon the question of the validity of our Food Control Act of August 10, 1917. Indeed, the words of the Australian provision seem rather less broad than the language in our own Constitution. Cf. United States v. Casey, noted supra.

CONTRACTS-CONSTRUCTION-AMERICAN WATERS AS "WAR REGION."-A ship was chartered under an agreement providing that if the charterers should order her to trade "in the war region," war risk insurance premiums paid by the owners should be refunded to them by the charterers. The ship was trading between Sydney (C. B.), Halifax and Boston when a number of vessels were sunk in one day by a German submarine near Nantucket Lightship. There were no further sinkings in American waters and the submarine was not again reported, but premiums on insurance in these waters were for a time greatly increased. Two days after the sinkings the owners effected war risk insurance at the increased premium, and suit was brought against the charterers to recover the premium so paid. Held (the Lord Chancellor dissenting), that the "war region," for the purposes of the agreement in question, must be held to include any waters where for the time being warlike operations were being conducted or were reasonably to be apprehended, or (per Lord Dunedin) where the war affected the risk that ships would run; that the plaintiffs had acted reasonably; and that they were entitled to recover the premiums paid. Dominion Coal Co. v. Maskinonge S. S. Co. (1918, H. of L.) 118 L. T. Rep. N. S. 115. The case has, perhaps, more news interest than legal importance. Considering all the circumstances and the apparent object of the provision in question, the construction adopted seems a reasonable one.

Contracts—Trusts—Third Party Beneficiary—Suit by Donee-Beneficiary.—Land was conveyed by A. to her mother, E., on the latter's promise to A. that she would pay to A.'s daughter, the plaintiff, a certain sum of money that had been invested in the land by A.'s husband, in case E. should ever sell the land or should die without selling it. E. died without having performed her promise. Held, that the plaintiff has a valid claim against E.'s executor for the promised amount. In re Edmundson's Estate (1918, Pa.) 103 Atl. 277.

In this case the plaintiff was the sole beneficiary of the contract and was a mere donee. She was the daughter of the promisee, but the court rightly makes no reference to this fact. Cf. Seaver v. Ransom (1917, App. Div.) 168 N. Y. Supp. 454, discussed in 27 YALE LAW JOURNAL, 563. In the present case the promisor received property, but not as a trustee. The contract created an ordinary conditional debt in favor of a third person.

COURTS-MARTIAL—PERSONS SUBJECT TO MILITARY LAW—PASSENGER ON ARMY TRANSPORT.—A passenger on an army transport returning from France volunteered to stand watch and did so for several days, but finally refused to continue, although ordered so to do by the army officer in charge of the vessel. For disobedience of this order he was sentenced by a court-martial to five years' imprisonment. He applied for a writ of habeas corpus to obtain his release from imprisonment. Held, that the petitioner was not entitled to be released, since he was subject to the jurisdiction of the court-martial as a person "accompanying or serving with the armies of the United States in the field." Ex parte Gerlach (1917, S. D. N. Y.) 247 Fed. 616.

Prior to the enactment of the present Articles of War two classes of civilians were subject to military discipline in time of war: (a) "retainers to the camp"

and (b) "persons serving with the armies of the United States in the field." See I Winthrop, Mil. Law, 117 et seq. Article 2 of the present Articles of War (Act of Aug. 29, 1916, Comp. St. 1916, sec. 2308a) has added a third class, namely, "persons accompanying the armies of the United States." The principal case is the first, so far as discovered, to place a judicial construction upon this language. Judge A. N. Hand states in the opinion: "The captain in charge of the vessel had, in my opinion, the right to call upon all persons on board to protect the transport in any way that seemed best in view of the danger. The section of the Articles of War subjecting persons accompanying armies to military authority not only enables military officers to preserve order on the part of such persons, but also in the cases that it covers to call on them for assistance and direct their action while they are properly in the field of military operations."

CRIMINAL PROCEDURE—AMENDMENTS—EFFECT OF CLERICAL ERROR IN INDICEMENT.—An indictment found on February 8, 1915, charged the defendant with having committed the criminal acts in question on October 17, 1915, i. e. subsequent to the finding of the indictment. The trial court permitted the prosecution to amend the indictment so as to change 1915 to 1914. From a decision of the New York Appellate Division affirming this decision, the defendant appealed. Held (two justices dissenting), that the defect in the indictment was one of substance which could not be cured by amendment. People v. Van Every (1917, N. Y.) 118 N. E. 244.

The decision is put on the ground that, although the precise time at which the crime was committed need not be stated in an indictment and the New York statute permits indictments to be amended on just terms at the trial in order to correct variances between proof and allegations, nevertheless the indictment in question was invalid from the beginning and to allow an amendment would be to permit the trial court to usurp the functions of the grand jury. In taking this view the court seems clearly to be following the precedents in New York and other states. It seems equally clear that in some way our system of criminal procedure ought to be so amended as to permit of the correction without re-indictment of what was obviously a mere clerical error. Probably that could best be done in connection with a general reform and simplification of the forms of indictments.

Insurance (Marine)—Whether Insurance against "Men-of-War" Covers Abandonment of Voyage from Reasonable Fear of Capture.—Goods in transit by a German ship from Calcutta to Hamburg were insured by English owners in June, 1914, against various perils, including "men-of-war . . . enemies . . . takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition and quality soever." War broke out between Great Britain and France on one side and Germany on the other while the vessel was at sea, and the captain put into Messina, then a neutral port, to avoid the risk of capture by British or French cruisers then in the Mediterranean. He later moved the ship to Syracuse, and declared the voyage abandoned. The owners of the cargo sued the insurer, claiming a constructive total loss by a peril insured against. The ship was at no time pursued by any hostile cruiser, nor was any actually sighted. It appeared by a statement from the British Admiralty that a German steamer proceeding through the Mediterranean at the time in question would have been "in peril of capture by British or allied warships." Held, that the frustation of the adventure was due, not to the peril insured against, but to something done to avoid that peril, and that the insurer was not liable. Becker, Gray & Co. v. London Assurance Corp. (1917, H. of L.) 117 L. T. Rep. N. S. 609.

The case does not go to the length of holding that nothing but actual capture by men-of-war would be within the policy, but seems to require at least such imminent peril of capture as to force the ship to take refuge in a neutral port in order to escape. The English courts have apparently adopted a stricter rule of construction for such cases than the American courts. For discussion of similar questions, see (1917) 26 YALE LAW JOURNAL, 247, 791; 28 ibid. 130.

INTERNATIONAL LAW—NATIONALITY—EFFECT OF MOTHER'S NATURALIZATION BY MARRIAGE ON NATIONALITY OF HER CHILDREN.—A and B, the children of a Belgian widow, who had married C, a Frenchman, were adopted by C and applied for registration in France as his adopted children. On refusal to register them on the ground that according to French law foreigners could not be adopted in France, it was held, that they were French and should be registered. In re Hollaender and Donnet, Court of Rouen, Sept. 8, 1916, reported in (1917) 44 Clunet, 1009.

For an American case to the same effect see Brown v. Shilling (1856) 9 Md. 74. In most countries citizenship is conferred on minor children by the naturalization of the father or the widowed mother. Marriage of an alien woman to a citizen is a method of naturalization. Mackenzie v. Hare (1915) 239 U. S. 299. Adoption is not like marriage in this respect, and citizenship is not conferred on an alien child by his adoption by an American citizen. 3 Moore, Digest of International Law, sec. 415.

RULE AGAINST PERPETUITIES—REVERSIONARY LEASE TO BEGIN MORE THAN TWENTY-ONE YEARS IN FUTURE.—A lessee was in possession under a lease having nearly fifty years to run. The owner in fee of the reversion made a second lease of the premises to the same lessee for a term of thirty years, to begin immediately on the expiration of the existing lease. Held, that the second lease did not violate the rule against perpetuities. Mann, Crossman & Paulin, Ltd. v. Registrar (1917, Ch. D.) 117 L. T. Rep. N. S. 705.

This seems to be the first direct decision on the point involved. The question is discussed by Mr. Edwin H. Abbot, Jr., in his article in this number on Leases and the Rule against Perpetuities (page 880, supra). The above decision is in accord with the views there expressed.

Sales—Rescission for Fraud—Effect of Vendor's Refusal to Accept Tender of Goods.—The defendant induced the plaintiff to buy goods by fraudulent representations that he owned them. On discovering the fraud, the plaintiff promply offered to return the goods and demanded that the purchase price be refunded. The defendant refused to do so. The plaintiff sued to recover the purchase price. *Held*, (Smith, J., dissenting) that the plaintiff was not entitled to recover the purchase price. *Kennedy v. Hasselstrom* (1918, S. D.) 166 N. W. 231.

The view of the dissenting judge seems obviously correct. In the case of sales of chattels induced by fradulent misrepresentations, the law is well settled that the misrepresentee has a legal power by appropriate notice and tender to the misrepresentor to bring about a rescission. Tilley v. Bowman, Ltd. [1910] I.K. B. 745.

WILLS—CONSTRUCTION—Powers of Life Tenant.—A codicil to a will gave one to whom the will gave only a life estate the power "to execute and deliver deeds of conveyance and absolute title" to the property whenever the devisee of the life estate "believed it to be of advantage to sell the same." The life tenant filed a bill in equity asking the court to construe the will, making the

remaindermen defendants. Held, that the codicil did not enlarge the estate of the life tenant but merely conferred a legal power to convey the property in fee, and that the life tenant would upon a sale be entitled merely to the income of the proceeds, the principal to be distributed among the remaindermen on the death of the life tenant. Barton v. Barton (1918, Ill.) 119 N. E. 320.

The decision turns, of course, purely upon the fair construction of the language of the testator. It is interesting chiefly for the reason that it furnishes an excellent illustration of a legal power vested in one person to transfer rights and other jural relations which are vested in others. The conveyance of the life tenant would divest not only the rights, etc., of the life tenant but also those of the remaindermen. It would also invest the grantee with an aggregate of jural relations—a fee simple—differing in many ways from those divested by the conveyance.

Workmen's Compensation Act—Injury Due to Third Person's Fault—Subrogation of the Employer to the Rights of the Employee.—The plaintiff was an Illinois employer who had elected to be bound by the Workmen's Compensation Act of that state. One of his employees was injured by the negligence of the defendant and applied for compensation under the Act, which was paid by the plaintiff's insurer. Under the Illinois Act such an employer, having once become obligated to pay compensation, is subrogated to the rights of the injured employee against third persons not subject to the Act, in order to indemnify himself, any surplus collected being held for the employee. The plaintiff brought action against the defendant. The defendant claimed that the plaintiff employer was not the proper plaintiff, since the insurance company had paid the compensation. *Held*, that the plaintiff was the proper party to sue. *Marshall-Jackson Co. v. Jeffery* (1918, Wis.) 166 N. W. 647.

In absence of a provision in the statute to that effect, an employer obligated to pay under a Workmen's Compensation Act has no right of action against the wrongdoer. Inter-State Tel. Co. v. Public Service Elec. Co. (1914, Sup. Ct.) 86 N. J. L. 26, 90 Atl. 1062. When he is given such a right, therefore, the nature of the right depends on the statute creating it. In construing the Illinois statute, the Wisconsin court in the principal case held that the right thus created is not one that the employer can assign to the insurer, and hence not one to which the insurer can be subrogated. In construing their own statute, the same court had held otherwise. McGarvey v. Independent Oil & Grease Co. (1914) 156 Wis. 580, 146 N. W. 895. For other peculiarities of the Illinois statute, see (1918) 27 Yale Law Journal, 708.

# **BOOK REVIEWS**

Guide to the Law and Legal Literature of Argentina, Brazil and Chile. By Edwin M. Borchard. Published by the Library of Congress, Washington. 1917. pp. 523. \$1.

This is the fourth in the series of guides to foreign law begun by the author when he held the post of law librarian in the Library of Congress, whose head, with characteristic intelligence, perceived the value of such work when well done, and gave it support and encouragement. In the present volume, as in those that have preceded it, there is the threefold object (I) to furnish lawyers and students with information as to the institutions and legal literature of the countries concerned, (2) to acquaint legislators and men of affairs with developments in foreign legislation, particularly on economic and social questions, and (3) to aid students of jurisprudence and of history with a discriminating indication of the sources from which a knowledge of the contributions of other countries to the theory and philosophy of law may be obtained.

In the performance of his present task, the author had the advantage of making a journey through the countries of Central and South America, including the three whose law and legal literature the work now before us surveys. Not only was he thus enabled to supplement his studies in the foreign law collections of the Library of Congress by studies in each of the countries concerned, but he had the highly valuable opportunity of direct conference with their jurists and scholars. As a result he is often able to impart to what might otherwise have been a dry bibliographical description or reference an illuminating quality which tends to instruct as well as to interest the reader. In this relation he makes special acknowledgment of his obligations to Dr. José Léon Suarez and other members of the Faculty of Law of Buenos Ayres, to Dr. Rodrigo Octavio and Senator Ruy Barbosa of Rio de Janeiro, and to Señor Carlos Silva Cruz and Dr. Julio Philippi of Santiago de Chile—names very familiar to those who are acquainted with recent developments in legislation and in legal science in South America.

The reader cannot fail to be impressed with the extent and variety of the legal literature here passed in review, embracing, as it does, commentaries on constitutional law, on the organization and procedure of the courts, on the codes of civil, commercial, and penal law, on administrative, military and ecclesiastical law, and on international law. Naturally, the legal literature of Chile, the country being not only smaller but possessing less diversity of economic and industrial interests than the other two, is not so extensive as that of Argentina or of Brazil, but it includes titles of great repute and value. The writings of Chilean publicists have indeed been characterized by thoroughness and care; and, with the single exception of the work of Ciriaco Morelli, professor at the University of Córdoba, on the law of nature and of nations, which was first published in Latin at Venice and has only lately been translated into Spanish, the earliest South American treatise on international law is that of the Chilean, Andres Bello, which appeared in 1832. But, while the work of Morelli is in the main a philosophical disquisition on natural, civil and public law, that of Bello is justly called by Dr. Borchard a "classic treatise" on the law of nations. Editions have appeared in Madrid, Paris, Carácas and Bogotá, in addition to the four that have been published in Chile. Dr. Borchard states that Bello's work "largely influenced our own celebrated publicist, Wheaton, in the latter's work on international law."

The service which Dr. Borchard has rendered in the preparation of the series of guides to foreign law is greatly enhanced by the latest number.

JOHN BASSETT MOORE

Columbia University

Roman Law in the Modern World. By Charles Phineas Sherman (Vol. I, History of Roman Law and its Descent into English, French, German, Italian, Spanish and other Modern Law. pp. xxvii, 413. Vol. II, Manual of Roman Law Illustrated by Anglo-American Law and the Modern Codes. pp. xxxii, 496. Vol. III, Subject-Guides to the Texts of Roman Law, to the Modern Codes and Legal Literature, and Index. pp. vii, 315.) Published by The Boston Book Co., Boston. 1917.

The appearance of Professor Sherman's three-volume work marks an epoch for the English-speaking student of Roman law. The author has evidently conceived his task of presenting the contribution of Roman law to the jurisprudence of to-day to have three phases, each of which he has attempted to cover in one of his volumes.

The historical connection between the past and present is of course a necessary link if the causal relation is to be established for the sequence of the latter from the former. The avenue through which a given doctrine could descend must first be shown before conviction that such descent took place is possible. This is the purpose and scope of the first volume entitled "History." Another phase of the presentation is the pointing out of the actual similarities between the Roman and the modern law. This is the task of the second volume. The third phase of the presentation is to give the student an exhaustive bibliography of Roman and modern law. This forms the material for the third volume.

That the conception of the work is extremely clear and logically sound is at once apparent. The execution of the plan has been brilliantly accomplished. The style is lucid and concise. Indeed its lack of ponderous legal circumlocutions gives the perusal of the first two volumes a charm rarely found in reading a legal treatise. Nor, on the other hand, does the treatment at all border on the loose or inexact, for the stupendous amount of research in the original and secondary sources as shown by the brief but multitudinous notes is uniformly reflected in the scholarly character of the text.

Volume one, as mentioned above, is an historical development of Roman law from its earliest beginnings down to the present time. As the object of the work is to present the Roman law as it exists to-day, not much space is allotted to the earliest periods of its growth. These are hurriedly yet, for the purpose, adequately treated. The remainder of the volume is devoted to demonstrating the channels by which Roman legal concepts flowed into the various systems of present-day law. This volume is prefaced by a comprehensive table of contents which aids in no small measure in presenting the most complete and lucid picture yet to appear of the historical connection between the Roman and the modern systems of jurisprudence.

The second volume forms the doctrinal exposition of Roman law as it existed at the time of Justinian, with enough historical perspective to enable the student to grasp intelligently the finished juristic phenomena as they appear in the Corpus Juris. Besides this, a most valuable part of this treatise is the constant comparison of the Roman with the modern doctrine. In some cases dissimilarities are noted. The similarities by far preponderate. The order of subjects is generally that of the Code Napoléon. This order has been adopted, as Dr. Sherman tells us, because of the influence this great codification has exerted

on most of the systems with which he draws comparisons. This being the object the book has to accomplish, the choice is a wise one. In this volume as in volume one the text is supported with copious references to the sources of Roman and modern law and to the representative authorities on both. This renders the exposition of the doctrines particularly valuable to the student, for it puts him immediately in a position to carry on an independent investigation if he cares to go further than the text carries him.

The third volume of "subject-guides to the texts of Roman law and to the modern codes and legal literature" fills a want which has long been acutely felt by students of these subjects. It opens the way clearly and easily to that mass of available literature which it is essential for the research student speedily to find. This volume, although it is simply a collection of authorities and texts arranged according to the various legal systems covered in volume one, and again according to the subjects of volume two, is perhaps, from some standpoints, the most unique accomplishment of this whole work. Its value cannot be over-emphasized, and no one in the future can afford to study Roman law and its affiliations without availing himself of the friendly aid of this volume.

That this work will be received with universal approbation is, however, not to be expected. The bigotry of the so-called "common-lawyer" has not entirely been overcome; and it is therefore not to be wondered at if from certain quarters, either through ignorance or through prejudice, the position taken by Dr. Sherman should be severely, albeit unjustly, criticized. Again our author opens himself to the wrath of some of the teaching fraternity by his frank avowal of his distrust in the exclusive case system as the correct method of teaching law. That he is not, however, unreasonably opposed to the case form of instruction may perhaps best be seen from the fact that he is at present engaged in the preparation of a Roman law case-book, made up largely of translations of the cases used by Roman students of law under the later empire.

That Dr. Sherman has ably accomplished the task set himself in presenting the contribution of Roman law to the modern systems cannot be denied; and his handsomely printed book forms one of the most important contributions of recent times to the literature of the subjects treated.

THOMAS R. ROBINSON

New Haven

The National Budget System and American Finance. By Charles Wallace Collins. Published by The McMillan Co., New York. 1917. pp. vi, 151.

This book is not written as a reference book for those who would make an exhaustive study of the budget question, but for the general public as a convenient handbook showing the essential features of the budget system in countries where it is in force, the grave defects in our national finances which can only be remedied by such a system, together with a brief discussion of the constitutional and legal questions involved. The concluding chapter summarizes the recent agitation of the reform in this country, the earnest efforts of President Taft on its behalf during his administration, and its endorsement by the recent national conventions of our political parties.

The book discusses only the necessity for a national budget, and no reference is made to the need for the same reform in the states under our dual government, and even in the large cities of the country. The system of "general appropriations" without any budget control is vicious and ineffective in our states and cities as well as in the national government, and the demand for a reform is urgently and widely extended. The subject is now being extensively agitated by governors of different states, and the reform has been adopted in

several states, and in some of our large cities, as shown in the Boards of Estimate and Apportionment in New York, St. Louis and other cities. In view, however, of the enormous increase in federal appropriations under the necessities of war, the demand for federal reform is so urgent that the author seems to have been justified in limiting his present discussion to the finances of the national government.

The book is what it purports to be, a convenient handbook. The style is clear and direct, and the analysis of the financial systems of the different nations of the world is in an effective and convenient form. The author has made an interesting, concise and readable presentation of a somewhat complicated subject which will be most useful in promoting the correct popular understanding of a system which now demands the thoughtful consideration of all who are interested in the efficient control of public finance.

FREDERICK N. JUDSON

St. Louis

Handbook of Criminal Procedure. By Wm. L. Clark, Jr. Second edition by William E. Mikell. (Hornbook Series.) Published by West Publishing Co., St. Paul. 1918. pp. xi, 748. \$3.75.

The editor informs us in his brief preface that the twenty-two years that have elapsed since the publication of the first edition of this well-known treatise have witnessed a marked change in the law governing criminal procedure. "This change has been brought about," we are told, "partly by statutory enactment and partly by judicial legislation;" and the "change wrought by both of these agencies has been in the same direction—towards a more rational system of procedural law." It is especially comforting to be assured that the "super-technicalities once dominating criminal procedure are yearly being attacked by legislatures and daily meeting with less respect by the courts."

These brief statements lead the reader to expect that the editor has done his work with a wholesome desire to point the way to better things in this intensely interesting and important subject. This expectation is in part fulfilled. See, for example, pages 179, 180 and 186. One might wish, however, that the distinguished editor had allowed himself more latitude in pointing out the absurdities that still obtain in this branch of the law and had given more prominence to those statutes and court decisions which make for progress in a field where the need for progress is so urgent. The changes for the better that have been made cannot be brought too forcibly to the notice of the student, the bar, and the bench.

As a practical manual, also, the book leaves some things to be desired. It is obviously not exhaustive of the cases either old or new. The paucity of the very recent cases is especially noticeable. Approximately 6,000 cases are cited. This number stands in marked contrast with the 28,000 or 29,000 cases cited by Mr. Bishop in his New Criminal Procedure as far back as 1896. In no subject so much as in a procedural one is the practitioner so interested in detail. Generalizations, even when accompanied by what might seem a reasonable number of illustrations, are not sufficient. This difficulty could have been remedied in part by inserting references to the Century Digest and the Key Number Series of the Decennial Digest, in accordance with the practice pursued in some of the recent companion books in the Hornbook series; also specific references to statutes where in some instances their existence has been noted only in a general way, would save the student and practitioner time. The index, too, should contain more detail.

Again, because of the brevity of the treatise, there is a failure to elucidate adequately a number of important topics. For example, neither on page 29, where the necessity for a sworn complaint preceding arrest is referred to, nor elsewhere so far as the reviewer can discover, is there any discussion of the question whether a judgment of conviction can be supported on an unsworn complaint or information. A recent Illinois case holds that it cannot. See People v. Clark (1917) 280 Ill. 160. See, also, for an able criticism of the case, a note by H. W. Ballantine in I ILLINOIS LAW BULLETIN, 175.

There are a few places where a failure to note the existence of a substantial conflict in the authorities makes the statements in the text misleading. These shortcomings appear chiefly in the chapter on "Evidence;" but, since this chapter may be looked upon as somewhat incidental to the primary purpose of the work, they should not be taken too seriously. On page 595 the statement is made without qualification that on a prosecution for homicide, when the defendant sets up self-defence, it may be shown that the decedent had previously threatened the defendant, as tending to show that the decedent began the encounter. It is true that there are some authorities which support this statement, but there are also numerous authorities to the effect that the threats of the decedent are not admissible unless it is first established that the decedent was the aggressor in the affray, and then only to prove that the defendant acted reasonably. In support of the statement in the text the author cites among other cases Campbell v. People (1854) 16 Ill. 17. The language of the court in this case is somewhat ambiguous, and the recent cases of People v. Terrell (1914) 262 Ill. 138, does not at all support the statement in the text, but rather the rule here suggested. A similar error is made on page 632, concerning proof of the character of the deceased. In the case of State v. Byrd (1897) 121 N. C. 684, it is made clear that such evidence is not admissible to show that the decedent was the aggressor, but only to establish the reasonableness of the defendant's conduct. On page 643, in dealing with the subject of the privilege of a witness not to incriminate himself, it is said that "if he answers so as to disclose part of the transaction, he waives his right to refuse to answer further." One case is cited in support of this statement, with the addition "But see Reg. v. Garbett, I Denn. Cr. Cas. 236." No reference is made to such a clear-cut American decision as Chesapeake Club v. State (1885) 63 Md. 446, in which it is held that the witness may at any point in his testimony refuse to make further disclosures of an incriminating character.

There is difficulty in accurately appraising a book of this character. It is neither an exhaustive digest and statement of the law of the subject, nor a critical and constructive treatise. It is believed that in this day law-books should be of one character or the other, and preferably of the latter character. Moreover, the need for the latter type of book is especially great in a branch of the law which is going through a process of change and in which the reform kettle is boiling so vigorously. We can only regret that such a distinguished scholar and expert on criminal law and procedure as Professor Mikell has not given us the full benefit of his mature learning in a book entirely of his own making.

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# CONTINGENT REMAINDERS AND OTHER POSSIBILITIES

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In an article on the rule in Whitby v. Mitchell published in the YALE LAW JOURNAL for February, 1917, Mr. Charles P. Sanger examines the recent cases of In re Park's Settlement, In re Bullock's Will Trusts, and In re Garnham, and suggests that the limitations which caused the difficulty in In re Park's Settlement and In re Bullock's Will Trusts were valid, not for the reasons given by Sargant, J., in the latter case, but on the ground that in applying the rule in Whitby v. Mitchell to any particular case, actual and not possible events are to be considered. This ingenious suggestion has, it is submitted, two defects: in the first place, it assumes that the rule in Whitby v. Mitchell applies to such cases as In re Park's Settlement and In re Bullock's Will Trusts, and in the second place, it is inconsistent with the origin and objects of the rule.

### STATEMENT OF THE RULE IN WHITBY V. MITCHELL

The rule in Whitby v. Mitchell forbids the limitation of land to an unborn person and his issue in succession. You cannot limit an

^{1 [1014]} I Ch. 595.

² [1915] 1 Ch. 493.

^{* [1916] 2} Ch. 413.

^{&#}x27;In some text-books of great repute, the rule is said to forbid the limitation of a remainder to the unborn child of an unborn child of an existing person: Farwell, *Powers* (2d ed.) 286: Sugden, *Powers* (8th ed.) 2. This is quite inaccurate, for if land is limited to A. for life with remainder to the eldest

estate to an unborn person for life with remainder to the issue of that unborn person.⁵ Consequently if land is limited to A., a living person, for life with remainder to X., a person then unborn, for life, with remainder to the issue of X., this last remainder is void.

In In re Park's Settlement the limitations were in effect to A., a living person for life, with remainder to X., an unascertained and possibly unborn person, for life, with remainder to the children of A.; Eve, J., held that the remainder to the children of A. infringed "the rule against limiting land to an unborn child for life with remainder to his unborn child." At first sight it is a little difficult to understand how a limitation to the children of a living person can be a limitation to the children of an unborn person. The mystery, however, is partly explained by the fact that in In re Park's Settlement X. was the widow (if any) whom A. might leave surviving him; there was therefore a "double," not to say a "treble," possibility that A. might marry a woman unborn at the date of the settlement, and have children by her; and in that case, if she survived her husband, the limitation to the children following her life estate would, as Eve, J., put it, "offend against what has been called the rule against double possibilities, but what is more accurately described . . . . as the rule against limiting land to an unborn child for life with remainder to his unborn child": in other words against the rule in Whitby v. Mitchell. This line of argument shows the mischief which is done by that misleading expression, "the rule against double possibilities." There is, as will presently be explained, a rule which prohibits the limitation of successive contingent remainders, but there is no general rule against double possibilities.

It is fortunate for the credit of the law that In re Park's Settlement has been over-ruled by the decisions in In re Bullock's Will Trusts and In re Garnham. The reasoning of Sargant, J., in the former case shows conclusively, it is submitted, that such cases as In re Park's Settlement, In re Bullock's Will Trusts and In re Garnham, in each of which the ultimate limitation was to the children of a living person, are not within the letter of the rule in Whitby v. Mitchell, and the history of the rule shows that they are not within its spirit.

As for the remark of Younger, J., in In re Clarke's Settlement⁶ (which Mr. Sanger cites with tacit approval), expressing regret "that the American view has not prevailed in this country [England] and

grandson of B., a bachelor, this is perfectly good. The error arose from the absurd suggestion that a limitation which infringes the rule in Whitby v. Mitchell involves a possibility on a possibility.

^{*}Per Kay, J., in Whitby v. Mitchell (1889) 42 Ch. D. 494, 500; affirmed by the Court of Appeal (1890) 44 Ch. D. 85.

^{*[1916] 1} Ch. 467.

that a rule so artificial and now without defenders or necessity [meaning the rule in Whitby v. Mitchell] has not been abrogated by the more modern rule against perpetuities," it may be pointed out that the remark does not display any great amount of knowledge on the subject. So far as the present writer is aware, there is no American decision with reference to the rule in Whitby v. Mitchell; if there had been any decision to the effect that the rule in question has been abrogated by the modern rule against perpetuities, Mr. J. C. Gray would hardly have failed to chronicle the fact.8 On the other hand, the legislature of Massachusetts has recently passed a statute declaring that remainders shall in future be governed by the rule against perpetuities, "exclusively of any other supposed rule respecting limitations to successive generations or double possibilities." It seems unlikely that the legislature would have taken this trouble if the rule in Whitby v. Mitchell had been treated as "abrogated" by the American courts. And as for the rule being "artificial and without necessity," the learned judge is respectfully advised to read the Third Report of the Real Property Commissioners; he will perhaps then be able to understand the necessity for the rule and its great practical importance when it was first laid down.

#### POLICY OF THE RULE IN WHITBY V. MITCHELL

Independently of the question whether the rule in Whitby v. Mitchell applies to such cases as In re Park's Settlement and In re Bullock's Will Trusts, Mr. Sanger makes the suggestion that, in every case to which the rule applies, we must have regard to actual and not to possible events. Speaking with all respect, the suggestion seems inconsistent with the origin and object of the rule.

Mr. Sanger argues by analogy. He points out that a legal contingent remainder (assuming it to be valid in its creation) does not fail if in the result it vests at or before the determination of the particular estate; in other words, the question whether it will take effect or not depends on actual and not on possible events. Mr. Sanger argues that the same principle applies to all rules governing legal contingent remainders, and that where land is limited to X.,

The case of Whitby v. Mitchell is not even mentioned in the chapter on "Perpetuities" in Mr. Alfred G. Reeves' Real Property, Special Subjects (1904) referred to in complimentary terms by Mr. J. C. Gray, Perpetuities (3d ed.)

^{*}In the first edition of his Rule against Perpetuities published in 1886, three years before Whitby v. Mitchell was decided, Mr. J. C. Gray pronounced the rule (established by that decision as a rule of long standing) to be "a nonexistent rule based on an exploded theory," and he steadfastly maintained this view until the last: Mr. J. C. Gray, Whitby v. Mitchell once more (1913) 29 LAW QUAR REV. 304.

an unascertained person, for life, with remainder to his issue, and if when X. is ascertained it turns out that he was born at the time when the settlement took effect, the remainder to his issue is not invalidated by the rule in Whitby v. Mitchell. It is extremely improbable that the question will ever arise, because in ninety-nine cases out of a hundred when land is limited to an unborn person, the limitation takes the form of a limitation to the child of a named individual who has no child at the time. In other words, the person to take under the limitation is necessarily unborn at the date of the settlement. But casting probabilities on one side, it is possible to imagine a case raising the point. Suppose a testator seised of land in fee simple devises it to A., a living person, for life, with remainder, if he leaves a widow surviving him, to that widow for life, with remainder to her children born within twenty-one years after A.'s death. A. marries a woman who was born in the testator's lifetime: she survives A. and dies leaving children born within the required period; whether they are children by A. or by a subsequent husband is immaterial. Is the devise to the children good? Mr. Sanger says "Yes." The present writer ventures to think that in the particular case the limitations to the widow and children would be successive legal contingent remainders, and that the devise to the children would be bad under the rule recognized by the Court of King's Bench in Chapman v. Brown. If, however, the limitations were equitable, the rule in Chapman v. Brown would not apply, and it is submitted that the devise to the children would be good, because the rule in Whitby v. Mitchell was never intended to apply to such a case.

However this may be, there seem to be two answers to Mr. Sanger's theory that the rule in *Whitby v. Mitchell* is like the rule requiring a contingent remainder to vest in due time, and that its operation therefore depends on actual and not on possible events.

In the first place, the two rules compared by Mr. Sanger rest on different principles. The rule requiring a legal contingent remainder to vest at or before the determination of the particular estate, and allowing it to take effect if in the result it does so vest, is a technical rule derived from the doctrine of seisin. It does not apply to equitable contingent remainders.

"The reason why a contingent remainder under a legal devise failed, if at the death of the previous holder of the estate of freehold there was no person who answered the description of the remainderman next to take, was the feudal rule that the freehold could never be vacant, for that there must always be a tenant to render the services to the lord, and therefore if the remainder could not take effect immediately on the determination of the prior estate, it never could take effect at all. This result of feudal rules was never held to apply

^{*} Post, p. 985 et seq.

to equitable estates, and it was sometimes said that the legal estate in the trustee supported the remainder. That was not the best mode of expressing the doctrine, the principle really being that as the legal estate in the trustees fulfilled all feudal necessities, there being always an estate of freehold in existing persons who could render the services to the lord, there was no reason why the limitations in remainder of the equitable interest should not take effect according to the intention of the testator. If, at the time of the determination of the prior equitable estate of freehold, there was no person capable of taking, a person afterwards coming into existence within the limits of the rule of remoteness, and answering the terms of the gift, was allowed to take."10

And in the same case, Lord Justice Cotton remarked that "in equity the feudal rules of tenure will not be allowed to defeat the trusts which the testator has declared by his will."11

The rule in Whitby v. Mitchell, on the other hand, is quite different in its origin and object. It has nothing to do with feudal doctrines;12 it had its origin in the well-grounded fear of perpetuities caused by the persistent endeavors of landowners in the sixteenth and seventeenth centuries to make perpetual settlements by limiting their land to unborn generations for successive life estates. It is difficult for us at the present day, even in England, to realize the dangers of unbarrable entails, and to appreciate the "abhorrence" which they inspired in the minds of the judges,18 but no one who investigates the history of the subject can have any doubt that what we call the rule in Whitby v. Mitchell was directed against attempts to create "perpetuities" or unbarrable entails. This is explained with perfect clearness by the Real Property Commissioners¹⁴ and by Mr. Charles Fearne.¹⁵ Mr. Joshua Williams expressed the same idea when he said, in speaking of the rule afterwards established by the decision in Whitby v. Mitchell:

¹⁰ Per Jessel, M. R., in Abbiss v. Burney (1881) 17 Ch. D. 211, 229.

¹² The reader must not allow himself to be misled by the extraordinary statement made by Lopes, L. J., in his judgment in Whitby v. Mitchell that the rule established by that case was "an old rule originating out of the feudal system." In commenting on this statement Mr. T. Cyprian Williams remarked: "What a travesty of legal history is this!" Contingent Remainders and the Rule against Perpetuities (1808) 14 LAW QUAR. REv. 234, 244. The expression is not too strong. The first suggestion of the rule in Whitby v. Mitchell is to be found at the end of the sixteenth century in the refusal of the courts to allow "uses of perpetual freeholds." Charles Sweet, Limitations of Land to Unborn Generations (1913) 29 LAW QUAR. REV. 304, 307.

¹⁸ See 2 Bl. Com. 116; Jarman, Wills (6th ed.) 281 et seq.

¹⁴ Third Report (1833) 29. The passage is printed in extenso in an article by Charles Sweet, The Rule in Whitby v. Mitchell (1912) 72 COLUMBIA LAW Rev. 199, 204-5.

¹⁸ Contingent Remainders, 502: also printed at p. 201 of the article referred to in note 14, and in 29 Law Quar. Rev. 304, 317.

"It may not be sufficient to restrain every kind of settlement which ingenuity might suggest, but it is directly opposed to the great motive which usually induces attempts at a perpetuity, namely the desire of keeping an estate in the same family and it has accordingly been hitherto found sufficient." ¹⁶

### Mr. Burton states the law in similar language:

"Life estates may by law be given in succession to any number of persons in existence, and ulterior estates in succession to their children yet unborn. . . . . . But no remainder can be given to the child of a person who is not in existence. For if this were once allowed, no limit could be assigned to the extension of contingent remainders through the remotest generations, and it would be easy to accompany these, for their preservation, with other remainders to persons ascertainable in due time as trustees, so as to make the settlement perpetual: and thus all the political inconveniences which attended entails in their first creation would be renewed."

In other words, the rule in Whitby v. Mitchell, like all rules directed against attempts to make property inalienable, is a rule of public policy, and when a limitation or other disposition of property offends against a rule of public policy it is void ab initio, without regard to actual events. As Mr. Charles Fearne puts it, such a limitation "is by our courts considered void in its creation; as in the case of a limitation of lands in succession, first to a person in esse, and after his decease to his unborn children, and afterwards the children of such unborn children, this last remainder is absolutely void."18 When Mr. Charles Fearne says that it is "absolutely void" he means that it is void ab initio, and that no subsequent event can make it good. This quality of being a rule of public policy distinguishes the rule in Whitby v. Mitchell from the rule allowing a legal contingent remainder to take effect if it vests at or before the determination of the preceding estate of freehold. The latter rule does not involve any question of public policy; it is a technical rule derived from feudal doctrines.

In the second place, Mr. Sanger is evidently under the impression that the rule in Whitby v. Mitchell was originally designed to restrict the creation of contingent remainders, and that it only applies to them, for he describes it as "an old rule dealing with contingent remainders." In this he appears to have been misled by the only statement of the rule which is given by Mr. Charles Butler, namely, that "if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person's issue!" 10 person's issue!" 11 person's issue!" 11 person's issue!" 12 perso

¹⁶ Real Property (3d ed.) 227 (12th ed.) 274. The passage does not appear in the editions published in more recent years.

²⁷ Burton, Compendium, 255.

¹⁸ Fearne, Cont. Rem. (1826) 502.

¹⁵ Note to Fearne, Cont. Rem. (10th ed.) 565.

Similar statements of the rule are given by Mr. Joshua Williams,²⁰ Mr. Burton²¹ and Mr. Stephen M. Leake.²² And it is true that the first example given by Mr. Fearne of the application of the rule is a limitation by way of remainder:

"In the case of a limitation of lands in succession, first to a person in esse, and after his decease to his unborn children, and afterwards the children of such unborn children, this last remainder is absolutely void."²³

But it is to be noted, first, that this passage occurs not in that part of Mr. Fearne's work which treats of contingent remainders, but in that part which deals with executory interests; second, that he begins by saying that the rule applies to "any limitation in future or by way of remainder;" and third, that as a further illustration of the application of the rule he cites Humberston v. Humberston,²⁴ where lands were demised to a corporation upon trust to convey them to certain persons and their male descendants one after another successively in perpetuity, so that no one should take more than an estate for life; these trusts, which were certainly not contingent remainders, were held to infringe the rule in question, because, in the language of Mr. Fearne, they tended to create a perpetuity or unbarrable entail,²⁵ but in order to give effect to the testator's intention as far as possible (cy-près) the first unborn sons were held to take ordinary barrable estates tail.

The devise in Humberston v. Humberston was one of many attempts made to create unbarrable estates tail by limiting successive estates for life to unborn generations. At first it was hoped that this might be done by way of use, but the courts soon held that such uses were not executed by the statute.²⁸ Shortly afterward, when executory bequests of terms of years were held to be valid, attempts were made to bequeath them in strict settlement to named persons and the heirs of their bodies. Entails of this kind, if they had been lawful, would

²⁰ Real Prop. (12th ed.) 274.

[°]n Compendium, 256.

²² Prop. in Land (1st ed.) 333-4.

²³ Cont. Rem. (1826) 502. ²⁴ (1716) 1 P. Wms. 332.

In the last edition of his Rule against Perpetuities, 166, note, Mr. J. C. Gray did me the honor of accepting this explanation of Humberston v. Humberston as accurate, but he could not bring himself to see that the doctrine of cy-près is an exception to the rule forbidding the creation of unbarrable entails, and not to the modern rule against perpetuities: see Rule against Perpetuities, 650; Charles Sweet, Limitations of Land to Unborn Generations (1913) 29 LAW QUAR. Rev. 304.

²⁸ Charles Sweet, Limitations of Land to Unborn Generations (1913) 29 LAW QUAR. Rev. 307 et seq.

have been unbarrable, but the courts refused to allow them.²⁷ Then the experiment was tried of devising land to trustees in fee upon trust for certain persons and their male issue or descendants forever, each to take for 99 years if he should so long live;²⁸ or of limiting land in strict settlement by way of entail, subject to a term of 1000 years vested in trustees upon trust, in the event of any tenant in tail barring the entail, to raise £5000 and pay it to the person next in remainder.²⁹ These experiments failed. Another device was to settle land in strict settlement subject to a power of revocation given to trustees, with a direction that on the birth of a tenant in tail they should reduce his estate to a tenancy for life with remainder to his sons in tail, "and thus by creating a succession of estates for life by way of substitution for the original estates tail to create a direct perpetuity. This contrivance also failed of effect."³⁰

It is therefore clear that the principle on which the rule in Whitby v. Mitchell is based applies to executory trusts of freeholds,³¹ to reversionary equitable terms of years,³² to appointments under powers,³³ and to executory bequests of long terms,³⁴ as well as to contingent remainders. It has been decided that it applies to equitable contingent remainders.³⁵

Why, then, it may be asked, do such learned text-writers as Charles Butler, Burton, Joshua Williams and Leake state the rule in Whitby v. Mitchell as one which applies only to contingent remainders? The answer is that Mr. Charles Butler introduced confusion into the subject by mixing up two doctrines supposed to have been laid down in Lord Coke's time—namely, the rule against remote possibilities or contingencies, and the rule against double possibilities or a possibility on a possibility. It requires some patience to unravel the tangle.

[&]quot;Leventhorpe v. Ashbie (1635) I Roll. Abr. Devise L, pl. I. In Stanley v. Leigh (1732) 2 P. Wms. 686 where an entail of this kind was attempted, Jekyll, M. R., remarked that "the law does equally abhor a perpetuity" whether the subject of it is land held in fee simple or land held for a long term of years.

²³ Beard v. Westcott (1813) 5 Taunt. 393; Somerville v. Lethbridge (1795) 6 T. R. 213.

²⁹ Mainwaring v. Baxter (1800) 5 Ves. 458.

³⁰ Real Prop. Commissioners, Third Report, 30. Cf. Duke of Marlborough v. Godolphin (1759) 1 Eden, 404.

⁵¹ Humberston v. Humberston, supra, note 25.

Beard v. Westcott and Somerville v. Lethbridge, supra, note 28.

²⁸ Duke of Marlborough v. Godolphin, supra, note 30.

[&]quot;Stanley v. Leigh, supra, note 27.

^{**} Monypenny v. Dering (1852) 2 DeG. M. & G. 145; In re Nash [1910] 1 Ch. I. If it had been a technical rule applying to legal contingent remainders, there would have been no reason to extend it to equitable contingent remainders, for they are subject to the modern rule against perpetuities.

### VARIETIES OF POSSIBILITIES

There is a certain ambiguity in the term "possibility," because sometimes it means a contingent or uncertain event, and at other times an interest in property which depends on a contingency. Thus a contingent remainder is not an estate, but the possibility of having an estate at some future time.³⁶

We find in the old books at least three distinct doctrines with regard to possibilities laid down or suggested:

I. In the Rector of Chedington's Case,³⁷ Popham, C. J., said that a lease for years could not commence "upon a contingent which depended upon another contingent," but the case was decided on other and quite sufficient grounds, and Popham's dictum, so far from being supported by the authority which he cites,³⁸ was treated as inaccurate by Lord Coke³⁹ and by Lord Nottingham, who said:⁴⁰

"That there may be a possibility upon a possibility, and that there may be a contingency upon a contingency, is neither unnatural nor absurd in itself, but the contrary rule given as a reason by my Lord Popham in the Rector of Chedington's Case looks like a reason of art, but in truth has no kind of reason in it, and I have known that rule often denied in Westminster Hall."

The correct opinion seems to be that there is no general principle of law which invalidates a limitation on the ground that it involves a possibility on a possibility. There are, however, two specific rules which have this effect:

(a) Estates upon condition. In former days, before the introduction of uses and trusts and before contracts were specifically enforceable in equity, conditions were used to create future estates. But the courts kept a watchful eye upon them lest they should be used to restrict the free alienation of land.⁴¹ Hence Lord Coke lays down the rule that, if an estate is granted subject to the performance of a condition, a further estate cannot be granted to take effect on the performance of an additional condition, because the first estate is "but in contingency, which is not a foundation upon which a greater [estate] can increase, for a possibility cannot increase upon a possibility." This doctrine is now of no practical importance, because the desired result can generally be attained by means of a use, trust,

^{*}Challis, Real Prop. (3d ed.) 76.

^{** (1598) 1} Co. 153 a, 156 a.

See Gray, Perpetuities, sec. 126.

Blandford v. Blandford (1675) 1 Rolle R. 318, 321.

^{*}Duke of Norfolk's Case (1647) 3 Ch. Cas. 1, 29.

^a Charles Sweet, Restraints on Alienation (July, 1917) 33 LAW QUAR. REv. 236, 237.

The Lord Stafford's Case (1609) 8 Co. 73 a, 75 a.

or covenant, subject of course to the restrictions imposed by the modern rule against perpetuities.

(b) Successive contingent remainders. In 1694 a testator who desired that his lands should continue in his name and blood "so long as it shall please God to permit the same," devised them to his nephew William Brown, son of the testator's brother Reginald Brown, for his life, with remainder to his sons in tail male, with remainder to the second son of Reginald Brown for life, and after the death of such second son then to the first son of the body of such second son of Reginald Brown and to the heirs male of the body of such second son. Thomas Brown, the second son of Reginald Brown, was born after the testator's death, but during the life of William Brown, who died without having had a son; the devise to Thomas Brown as the second son of Reginald therefore took effect, but the question arose whether he took an estate for life or an estate in tail male. The case was submitted to several learned counsel, who differed in their views. Mr. Wilbraham's opinion, dated October 29th, 1746, is instructive:—

"I take it clearly that the testator intended to limit his estate to the second son of Reginald unborn, and that he intended to make him tenant for life, with a contingent remainder to his first and other sons in tail.43 This I think is not within the rules of law, for though the law may allow a contingent remainder possibly for one life, yet I incline to think that it will not allow a contingent remainder upon a contingent remainder, so that the limitation to the first son of the second son of Reginald, I think, was not legal; for the limitation to the second son of Reginald was a contingent remainder, and if the law should allow another contingent remainder to be limited upon the first, the law might allow another upon that, and so on in infinitum, which would lock up real property longer than the policy of the law will admit, and would tend to perpetuity. I therefore incline to think that the limitation to the first son of the second son of Reginald, which second son was not then in esse, was not a legal but a void limitation. If this limitation be a void limitation, then leaving out or rejecting it, the limitation will run thus 'to the second son of Reginald for life and to the heirs male of the body of such second son lawfully to be begotten,' which would I think create an estate tail."44

The case subsequently came before the courts and they decided it in accordance with the opinion of Mr. Wilbraham and Mr. Booth. The Court of King's Bench said that even if they supplied the omission in the will by inserting a limitation to the heirs of the body of the first son of Thomas, this would not effectuate, but defeat, the intention of the testator, because such a limitation would be void. Both

⁴⁵ It was clear from the whole frame of the will that some words had been accidentally omitted after the devise to the first son of the body of the second son of Reginald, and that the testator intended to give him an estate in tail male.

[&]quot;Cases and Opinions, ii, 426-7. Mr. Booth was of the same opinion: ibid. 428.

Lord Mansfield and Wilmot, J., said that a possibility cannot be limited upon a possibility. Now a contingent remainder, as everyone knows, is not an estate, but the possibility of having an estate at some future time; and therefore in saying that a possibility cannot be limited upon a possibility, what the learned judges meant was that a contingent remainder cannot be limited so as to follow and be dependent on the vesting of a preceding contingent remainder. As Thomas Brown was unborn at the testator's death, the devise to him was contingent, and although it vested on his birth, the succeeding contingent remainder which the testator intended to give to his eldest son was beyond the limits allowed by law for the creation of such possibilities, and was therefore void. That this is the true doctrine is clear from the opinion given by Mr. Yorke in advising on a later case in which he thus stated the law: 46

"A contingent remainder must vest during the life or immediately upon the death of the devisee of the particular estate which precedes it, such devisee being in esse at the time when the will speaks, but it cannot be made to wait or expect the vesting of another estate, prior in limitation and equally contingent with itself. The law does not allow a contingency to depend upon a contingency, or one possibility to be thus raised upon another."

It is submitted that In re Frost,⁴⁷ referred to in Mr. Sanger's article, was rightly decided on the ground that the limitations in that case involved successive contingent remainders.⁴⁸

II. Lord Coke has some remarks with regard to limitations of estates tail, which but for the great reputation of their author might fitly be described as arrant nonsense:

"If lands be given to a man which hath a wife and to a woman which hath a husband and the heires of their two bodies, they have presently [that is, immediately] an estate taile, for the possibility that they may marry . . . . But if lands be given to a man and two women and the heires of their bodies begotten, in this case they have a joynt estate for life and every of them a severall inheritance, because they cannot have one issue of their bodies, neither shall there be any construction a possibility upon a possibility, viz.: that he shall marry the one first and then the other."

^{**}Chapman v. Brown (1765) 3 Burr. 1626, aff'd. by the House of Lords in accordance with the unanimous opinion of the judges: 3 Bro. P. C. 269. It is remarkable that the doctrine which we call the rule in Whitby v. Mitchell was not referred to. See Charles Sweet, The Rule in Whitby v. Mitchell (1909) 25 LAW QUAR. Rev. 385, 397-8.

^{*} Cases and Opinions, ii, 440.

^{4 (1889) 43} Ch. D. 246.

Williams, Real Prop. (22d ed.) 422.

^{*}Co. Litt. 25 b. There is a passage at 184 a to the same effect, and in Lamper's Case (1610) 10 Co. 46 b, 50 b, Lord Coke develops the point at some length.

It is indeed obvious that they cannot have one issue of their bodies; this is a sufficient explanation of the construction put upon the limitation, and it is difficult to see why Lord Coke should drag in the doctrine of a possibility on a possibility, for supposing that the man married first the one woman and then the other, and had a child by each of them, how could this affect the question?

The truth is that the question in the case supposed by Lord Coke is purely a question of construction, and the rule stated by him is an instance of the willingness of the judges in early days to adopt a benignant construction in order to give effect to the presumed intention of the parties.

III. In Cholmley's Case,50 the judge laid down the doctrine that a contingent remainder cannot be limited on a remote possibility.

"A possibility which shall make a remainder good ought to be a common possibility and potentia propinqua, as death, or death without issue, or coverture, or the like. And therefore as the logician saith, potentia est duplex, remota et propinqua; the remainder to a corporation which is not at the time of the limitation of the remainder, is void, although such be erected afterwards during the particular estate, for it was potentia remota; and this plainly appears in a common case in our books. If a lease be made for life, the remainder to the right heirs of J. S., this is good, for by common possibility J. S. may die during the life of the tenant for life; but if at the time of the limitation of the remainder, there is no such J. S., but during the life of the tenant for life J. S. is born and dies, his heir shall never take."

It will be noticed that there is not a word here about a double possibility, or a possibility on a possibility, for when it is said that potentia est duplex, remota et propinqua, this of course means that possibilities are of two kinds, remote and near.⁵¹ Yet for some reason which has never been explained, our most learned real property lawyers persist in regarding the case put by Lord Coke of a remainder limited to the heirs of J. S., a nonexistent person, as one involving a double possibility or possibility on a possibility, the reason given being that

"it amounts to the concurrence of two several contingencies ... first that such a person as J. S. should be born, which is very uncertain, and secondly that he should also die during the particular estate,

^{•• (1597) 2} Co. 50, 51 b.

The reader must not resent this somewhat obvious explanation of the meaning of duplex; that it is not wholly uncalled for appears from the fact that even so learned a writer as Mr. Joshua Williams thought that duplex meant "double;" for in commenting on the doctrine laid down in Cholmley's Case, Mr. Williams says that "the chance that a married woman shall have a son named Geoffrey is stated to be a double or remote possibility," as if "double" were the same as "remote." There is not a word about double possibilities in Cholmley's Case.

which is another uncertainty grafted upon the former. This is called a possibility upon a possibility, which Lord Coke tells us is never admitted by intendment of law."52

The learned writer does not seem to have noticed that his explanation does not fit the first example given by the court in *Cholmley's Case* of a remote possibility, namely that of a limitation to a nonexistent corporation; there is no possibility upon a possibility here.⁵³ Mr. Fearne's explanation is a blunder, pure and simple.

The real reason why the judges in the sixteenth century were afraid of remote possibilities was that at that time contingent remainders were of comparatively recent introduction, for they were unknown to the original common law,54 and the judges were apprehensive that they might be made use of for the purpose of tying up land by restricting its alienation. This fear proved to be groundless, partly because every contingent remainder was liable to be destroyed by the owner of the particular estate, and partly because the doctrine of seisin made it necessary that every contingent remainder should vest at or before the determination of the particular estate. It follows from this latter rule that the nature of the contingency on which a remainder is limited to take effect is quite immaterial, for whether the event is almost a certainty or whether it is wildly improbable, the period within which it must happen is the same; if it happens at or before the determination of the particular estate the remainder takes effect, otherwise the remainder fails, but in neither case does the improbability or remoteness of the contingency postpone the vesting, or affect the alienability of the land. It is not clear at what period this simple truth dawned upon the judicial mind,55 but it must have been before 1843, for in that year Lord St. Leonards, in a passage which has puzzled those who fail to connect it with the doctrine supposed to be laid down in Cholmley's Case, stated clearly that the doctrine of remote possibilities had long ceased to be a rule of English law.56

²⁵ Fearne, Cont. Rem. 251; Third Report of Real Prop. Comm. 29; 1 Preston, Abstracts, 128. Even Mr. J. C. Gray, usually so critical and clear-sighted, makes the same blunder: Perpetuities, 191.

⁵³ "The true ground . . . seems to be that the gift to a corporation while in fact no such corporation exists . . . is void for want of capacity or uncertainty." Preston, Abstracts, 128.

⁵⁴ Littleton thought they were impossible, having regard to the doctrine of seizure. See sec. 721, and Lord Coke's commentary.

It was perceived by the Real Property Commissioners in 1833: Third Report, 29.

Cole v. Sewell (1843) 4 Dr. & Wal. 1, 28-29. See Charles Sweet, The Rule in Whitby v. Mitchell (1909) 25 LAW QUAR. Rev. 385, 394; Charles Sweet, Remoteness of Terms and Powers (1914) 30 LAW QUAR. Rev. 66, 76.

#### ERROR AND CONFUSION

Having regard to the very obvious criticisms to which the doctrine of remote possibilities and the doctrine of a possibility upon a possibility are open, it is difficult to understand, first, how Mr. Fearne could have brought himself to repeat the obsolete nonsense uttered by the judges in *Cholmley's Case* as establishing a rule still applying to contingent remainders, and second, how he could have mixed up this nonsense with the still greater nonsense written by Lord Coke to explain the construction of a limitation to the heirs of the bodies of a man and two women, for it is with reference to this latter question that Lord Coke tells us, in the passages referred to by Mr. Fearne, that a possibility upon a possibility is never admitted by intendment of law.⁵⁷ He does not use the expression with reference to contingent remainders.

Mr. Charles Butler, in annotating Mr. Fearne's treatise; pointed out that "the expression of a possibility upon a possibility, which in the language of Lord Coke cited in this place⁵⁸ is never admitted by intendment of law, must not be understood in too large a sense," and he went on to demonstrate that a remainder may validly be limited so as to depend on a possibility upon a possibility, ⁵⁹ but he failed to notice that Lord Coke does not use the expression with reference to contingent remainders; the question whether a limitation to a man and two women and the heirs of their bodies gives them an estate for life or an estate tail has nothing to do with contingent remainders; it is a mere question of construction.

Not content with this confusion, Mr. Butler, in a note on strict settlements of land contained in the last edition of Mr. Fearne's treatise, made confusion worse confounded. He pointed out, quite accurately, that before the introduction of executory interests no question of remoteness, or (as he calls it) perpetuity, could arise, because future estates could only be created by way of remainder, and that the remoteness of a remainder, however great, was no objection to it. He went on to say:⁶⁰

"The case of a possibility on a possibility may be considered as exceptions from the rule. They proceeded on a different ground, and gave rise to this important rule, that if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person's issue."

⁵⁷ Ante, pp. 988-9.

³⁸ Mr. Fearne's reference is to Co. Litt. 25 b, 184 a.

[&]quot;Mr. Preston gave an instance of a remainder being validly limited on a treble possibility: Abstracts, 128.

Fearne, Cont. Rem. (10th ed.) 565.

It follows that Mr. Butler made three blunders:

- (i) He mixed up Lord Coke's ridiculous theory that the reason why a limitation to the issue of the bodies of three persons does not give them a single estate tail is because it involves a possibility on a possibility, with the doctrine laid down by the judges in *Cholmley's Case* (but now happily exploded) that a remainder cannot be limited to take effect on a remote contingency.
- (ii) He thought that the rule which we call the rule in Whitby v. Mitchell was derived from the curious mixture thus produced.
- (iii) He therefore concluded that the rule in question only applies to remainders.

In this singular combination of error, Mr. Butler has been followed by many later writers on the law of real property.⁶¹

#### CONCLUSIONS

A careful study of the history of the subject leads, it is submitted, to these conclusions:

I. There is no general principle of law that a limitation which involves a possibility on a possibility is bad.

"The cases given in illustration of this [supposed doctrine] may be easily accounted for on principles of law, without resorting to the quaint and unintelligible terms of a possibility on a possibility."⁶²

Two rules of the common law for which this doctrine is given as the reason⁶³ are really due to the instinctive distrust of complicated limitations entertained by the early judges. Since the invention of the modern rule against perpetuities no extension of the doctrine in question is likely to be made.⁶⁴

II. The rule in Whitby v. Mitchell has nothing to do with the supposed rule against a possibility on a possibility. It is derived from the general principle forbidding the creation of unbarrable entails, which down to the time of Mr. Fearne were called "perpetuities." 65

^{et} Williams, Real Prop. (12th ed.) 272; Challis, Real Prop. (3d ed.) 116. The present writer is constrained to admit that his respect for the distinguished authors here criticized long prevented him from attempting to solve the mystery.

a I Preston, Abstracts, 128.

[&]quot;Supra, p. 985 et seg.

[&]quot;In re Bowles [1902] 2 Ch. 650.

Example According to Mr. Fearne, the rule that if a life estate is given to an unborn person no estate in remainder can be given to his issue, is an instance of the application of the general principle that any limitation in future "which in its nature tends to a perpetuity" is void in its creation: Cont. Rem. 502. Mr. Fearne does not anywhere, it is believed, use "perpetuity" as equivalent to "remoteness." No one who thinks that those terms were interchangeable in the eighteenth century can understand Mr. Fearne's treatise.

III. The rule in Whitby v. Mitchell is a rule of public policy, being a branch of the general principle of law which forbids limitations savoring of perpetuity or remoteness. Consequently every limitation which infringes it is void ab initio, and subsequent events cannot make such a limitation good.

It is difficult to predict how the courts will deal with the questions raised by Mr. Sanger. Having regard to the decision of the House of Lords in Cadell v. Palmer, 66 it may well be that our judges will consider it conclusively settled that the rule in Whitby v. Mitchell does not apply to executory bequests of terms of years. On the other hand, there seems no reason why our judges should abrogate the rule recognized by the Court of King's Bench and apparently the House of Lords in Chapman v. Brown, more especially as it justifies the decision in In re Frost. Nor does it seem probable that any court will adopt Mr. Sanger's suggestion that the application of the rule in Whitby v. Mitchell depends on actual events, unless the court altogether disregards the origin and object of the rule.

[∞] (1833) 1 Cl. & F. 372. In an article on Contingent Remainders (Jan. 1917) 30 HARV. L. REV. 226, Mr. J. L. Thorndike points out that a series of executory devises of a long term of years to unborn generations, confined within the limits allowed by the rule against perpetuities, was held to be valid by the House of Lords in Cadell v. Palmer. This decision upheld the judgment of the court below, which was commented on by the Real Property Commissioners in their Third Report, 33. The main question in Cadell v. Palmer was whether the period of 21 years allowed by the modern rule against perpetuities must have reference to the minority of a person taking under the settlement, or whether it may be a term in gross: the House of Lords decided in favor of the latter allowance. Mr. Gray says that "the result seems to have been arrived at by accident rather than by any process of judicial reasoning," and elsewhere refers to "the curious and illogical manner" in which this extension was made. Perpetuities, ss. 186, 223. But he does not seem to have noticed that the decision in Cadell v. Palmer was partly based on a misapprehension of Beard v. Westcott; the limitations in that case were void because, as the Real Property Commissioners and Mr. Fearne pointed out, they tended to create a "perpetuity" in the sense of an unbarrable entail; they would have been void if the modern rule against perpetuities had never been invented.

# COMMON LAW AND COMMON SENSE¹

## WILLIAM RENWICK RIDDELL

Supreme Court of Ontario

Early in the last century (1804), Mr. Smith, an eminent lawyer of Woodbury, Connecticut, in an eloquent and impressive argument before the Supreme Court of Errors² indignantly disputed the proposition of Lord Mansfield stated in Corbett v. Poelnitz.³ "That as the times alter, new customs and new manners arise, and new exceptions and applications of the rules of law must be made." Inveighing against the sins of England, he exclaims:

"And, to be sure, manners have there led the law and law the manners, till all barriers are thrown down. And are we to go on in their tracks, not by degrees, but to take at once the last step which corruption has there introduced and bury in oblivion the principle that a feme covert has no separate existence?"

Counsel had never heard in Connecticut of exceptions to the marriage contract so that the wife need not lose her independence, or of relatives giving property to married women to their separate use; and he warmly insisted "that the generosity of our females has not allowed them to wish to keep their property from those to whom they have not refused their persons."

The Supreme Court of Errors, sitting at Hartford, to whom this typical argument was advanced, was composed of Jonathan Trumbull, the governor, Lieutenant Governor John Treadwell and ten assistants, all unknown to fame except Oliver Ellsworth, afterwards Chief Justice of the Supreme Court, of whom la Rochefoucault-Liancourt, in that most delightful of all works of travel, his Voyage dans les Etats Unis d'Amérique, thus speaks (he calls him "Elleword," but that is a detail):

"Les Américains qui passaient avec nous et qui presque tous étaient des jeunes gens n'avaient pas plus d'égard pour lui que pour

¹The substance of this article was contained in an address delivered before the graduating class of the Yale School of Law.

² Dibble v. Hutton (1804, Conn.) 1 Day, 221, 224.

^{* (1785) 1} T. R. 8.

^{&#}x27;One is irresistibly reminded of the address to a jury attributed to Erskine—or sometimes to Scarlett, who though bright was not deep-read: "Gentlemen of the jury, the reputation of a cheesemonger in the city of London is like the bloom upon a peach. Breathe on it!—and it is gone for ever."

Not the original Jonathan, Washington's "Brother Jonathan" who, beginning as a clergyman, ended up as a judge, but his son.

See I. W. Stuart, Life of Jonathan Trumbull, Senr. (Boston, 1859).

le maître d'hôtel nègre, et cependant c'est, apres le Président le second, peut-être le premier personnage de l'Union."

That court stood by the old ways-steterunt super vias antiquas:

"the maxims of the ancient common law . . . are plain and simple; our state of manners and society do not require that they should be relaxed or qualified. The principles . . . of the common law remain unimpaired."

When after 1783 some thousands of Americans passed from the new republic, chiefly from New York, Pennsylvania and New Jersey, but some from Connecticut and other parts of New England, across the international rivers into northern wilds, many of them victims of as gross a disregard of treaty as ever has been witnessed in history—at least until the present decade—they took with them that same common law which was the object of the reverence and devotion of Mr. Smith and the court he addressed in Connecticut.

The French-Canadian might wonder that they should think their property safer in the determination of tailors and shoemakers than in that of their judges—they were French and did not know any better; but the man of English descent, saturated with the common law could not endure any other. The French-Canadian law, the Coutume de Paris, had been reintroduced into all Canada by the Quebec Act of 1774, greatly to the delight of the French-Canadian but much to the disgust and indignation of the English-speaking inhabitants. In the old province, the French largely predominated, but when the new settlers came into the upper part of the British territory, the Englishspeaking largely outnumbered the French there. The result might have been disastrous, since neither race could be satisfied with the law of the other; but the lesson of 1776 had been well learned. Britain, always sincerely anxious for the well-being and well-doing of her colonies-some school histories to the contrary notwithstanding-and she did make mistakes-had thoroughly learned that the colonies and the colonists must be and do well in their own way and not necessarily in hers; that the way to make colonists contented is to let them alone, and that in most instances they know infinitely better what is best for them than any statesman three thousand miles across the sea. however enlightened and however benevolent.

Accordingly the wise scheme was devised of making two provinces, one in most part populated by the French-Canadians, the other in most part populated by the newcomers, Americans. The Con-

^{*}Voyage dans les Etats Unis d'Amérique fait en 1795, 1796 et 1797; par la Rochefoucault-Liancourt à Paris l'an VII de la Republique, tome Quatrième, 2, 3. "To whom our American fellow-passengers, most of them young, showed no more respect than to the negro waiter, and yet he is after the President, the second, perhaps the first, personage in the Union."

stitutional or Canada Act of 1791 formed two provinces, Upper Canada and Lower Canada, and gave to each full power of legislation, civil and criminal. In 1792, when the parliaments met in the two provinces, while the French province, Lower Canada, retained its law, the upper province by its very first act introduced the law of England, and by its second the full jury system. So strongly devoted to the common law was Upper Canada that she went for nearly half a century without a court of chancery—her first court of chancery not appearing till 1837. What was the cause of this intense attachment to the common law of England shared in by all of English stock—indeed, by all who spoke English, for the Scot, having come to a common-law country, soon forgets his Scottish law, based as it is on the civil law of Rome, and cleaves to the English law?

For Upper Canada we may say that she was a British possession formed into a state by an Act of British Parliament; but Connecticut formed her own constitution, and

"so far as its provisions are concerned the King and Parliament . . . might as well have been non-existent. It is made . . . on the authority of the people . . . its objects are to establish an orderly and decent Government . . . and for these purposes its authors do . . . associate and conjoin themselves to be as one Public State or Commonwealth."

Is not the real reason to be found in the belief that the common law is the perfection of human reason—in a word, that the common law is common sense? What we call "common sense" is not the old metaphysical common sense, nor is it the sentiment which might be conceived to flow from lofty and altruistic philosophy; but it consists in the application of the rules of justice and honesty to the things of this work-a-day world, so full of anomalies and of fallible, imperfect, human beings.

A well-known English judge, watching village children drawing up rules for their cricket team for the year, said they were showing him how the common law of England was made. I venture to think that this view is not quite correct. The common law was no set of rules purposely drawn up for the governance of the community but rather a set of customs which evolved into form in the course of years. Now and then, indeed, the sovereign power intervened to modify the old rule or prescribe others; but in most cases where the judge was called on to give a decision he was not like the umpire at cricket

¹ This is more fully explained in articles on the Early Courts of the Province (Ontario), CAN. LAW TIMES (1915) 879, 964.

^a See The Genesis of a New England State (Connecticut), by Alexander Johnston, A.M., Johns Hopkins University Studies, No. XI, Baltimore (Sept. 1883) 14, 15. The language has been here slightly modified and the archaic spelling modernized.

or baseball, sent to his body of formal and fixed rules to find out what should govern and to decide according to the rule prescribed; he was rather like the friendly arbitrator deciding according to what he considered the requirements of decent neighborhood, that is "the customs of the country"-Sittlichkeit, if you will. Every time he made a decision, he made the custom more definite. He did not, indeed, affect to lay down any new rule or to govern himself by any but the existing sense of the community-that is, what was just and right in the particular case, bearing in mind the customs which were followed and which fixed rights and duties, more or less indefinitely indeed, but nevertheless fixed them. But every time, he used his own sense of what was just and right in the particular case. Every art tends to become a science, practice inevitably demands theory, and when law came to be written it was rather deductive than inductive: the judgments were examined, and from them the general rule was deduced. The real law is always the state of the decisions for the time being, whatever may be the state of the rules supposed to be binding.

"One-third of a judge is a common juror if you get beneath the ermine," says Lord Bramwell, and the other two-thirds may not be far different. A judge is necessarily the creature of his times. In our system the judge comes from the bar; he is not educated as a judge, but as a lawyer, who handles matters of everyday life, and is in close touch with the people. The common sense of the judge was not far away from the common sense of the mass of the people—and the dicta of the judge recommended themselves to the people because they were much the same as they would themselves have uttered had they been articulate.

So long as the law was unwritten, there was no difficulty in the evolution of legal precept keeping pace with social and international evolution. But *litera scripta manet rigescitque*: once the decision is written, it cannot be overlooked, nay, it must be followed, and law necessarily becomes fixed, unyielding, in a sense arbitrary.

Common sense is not the same in all ages. In the times of Matthew Hale, common sense told everyone that there were such things as witches. Was one blasphemously to assert that the Almighty did not know what he was talking about when he said, "Thou shalt not suffer a witch to live?" Were there not many cases in which old women had confessed their sin and even boasted of it? What other explanation could be given of the abnormal phenomena—they called them "wonders"—so often witnessed than that they were produced by the power of Satan? Not only in the mother country but on this side of the Atlantic, not only at Suffolk, England, but at Hartford,

^{*}Cf. Leckie, History of Rationalism.

Connecticut, unfortunate beings, more than half convinced of their own guilt, suffered the extremity of the law for a crime which our common sense tells us does not exist. The conception of witchcraft is to us hardly consistent with sanity. Was the whole nation then insane?—for no doubt there is much truth in Butler's contention that nations may become insane, like individuals. It may indeed be that the present age is witnessing such a phenomenon. Insane? Not at all, but wholly sane, considering their light and the available evidence.

So in the case of the woman. The first woman was made subject to the first man; in the first reported criminal trial the judge pronounced the sentence, "He shall rule over thee"—and of course the subsequent women must be subject to the subsequent men. Then, too, in the state of society when the common-law rules were in the making, the woman could not be of much avail in making property or in keeping it—working or fighting to procure or to protect. She was weak compared with the man, and craft had not yet come into its own. It "stood to reason," then, that every woman should have a man for a master, and that she should not be trusted with property which she did not make and which she could not keep. It was much that she was allowed an immortal soul of her own; all else was properly and naturally her husband's. If some one beat her or otherwise injured her, the husband should sue, for he was the master and he was the injured party.

It is difficult for us to breathe in the intellectual atmosphere in which such were the real views of the community; but that community was wholly sane and their views were common sense. That common sense, however, passed away with a speed more or less rapid at various periods; and justice demanded the recognition of woman's rights in her own property.

Equity had of course done something, but not enough; the common law riguit, was inflexible and unbending; and the legislature had to interfere. Accordingly, in some places sooner, in others later, the married woman was declared to be a human being with the ordinary rights of property as a human being. This terrible change in the law, the very thought of which so shocked the sages a century ago, does not seem to have destroyed society. God is still "in His heaven and all's right with the world."

In a late volume of the Connecticut Reports I find it solemnly laid down that a woman may sue her husband for an assault and battery committed on her person. Shades of Coke and Blackstone! Some fine morning the community may wake up and actually find that a married woman may be intrusted with a voice in selecting those who are to make laws for her, with no greater danger to the state than

¹⁶ Brown v. Brown (1914) 88 Conn. 42.

that caused by giving the vote to the emancipated negro or the immigrant not far removed in time or in intelligence from serfdom.

Whether this change will be welcomed or not must depend on the state of mind of the community, whether more or less intelligent, less or more reasonable—I decline to express any opinion whether it is the less or the greater amount of intelligence and reason which will determine a change.

Now to another bit of history. As I write these lines, I have before me a little volume, 11 written ninety years ago by the Reverend Ammi Rogers, a minister of the Episcopal church, who seems to have had rather a hard time of it in his day. He barely escaped imprisonment in the Newgate of Connecticut at Simsbury (now East Granby), and was imprisoned for 731 days in the Norwich jail—just for being a Republican, he says. Quis talia fando temperet a lacrymis? There was indeed a trifle of a conviction for crime—but we are assured that the charge was false (which indeed is likely enough), and would not have been prosecuted but that he opposed the Presbyterian or Federal party—credat Judaeus Appella. He says:

"In Connecticut every settled congregational Presbyterian minister can send his collector and take any man's horse from under him, or his oxen or cows or hogs, or any property which he possesses, unless he has signed off¹² and can sell it at the post without suing him or granting him a hearing. I have known them take even a man's Bible and sell it at the post to pay the minister's tax. I have known Episcopalians, Baptists and others actually locked up and confined in a filthy disgraceful jail in Connecticut merely because they would not or could not in conscience pay their money to support that which they did not believe to be true."

The common law—whether assisted or not by royal edict or legislation is of little importance—early settled that "an honourable and

¹² Memoirs / of the / Rev. Ammi Rogers, A. M., / a Clergyman of the Episcopal Church, educated at / Yale College in Connecticut, ordained in Trinity / Church in the City of New York / Persecuted in the State of Connecticut on Account / of Religion and Politics for almost Twenty Years / . . . Composed, Compiled and Written by the said / Ammi Rogers / Late Rector of St. Peter's Church in Hebron, Tolland Co., Conn. Etc. / . . . Second Edition / Schenectady Printed by G. Ritchie, Jun. / 1826, 12 mo, 272 pp. The quotation is from p. 51.

p. 51.

²² A delicate touch—fraudulent conveyances have been in use ever since there have been conveyances: but just to think of anyone trying in this way to beat the parson!

My friend, Governor Baldwin, informs me that I have quite misapprehended the meaning of "signed off" in the connection. He says that "signing off" was the filing with the proper authorities of a paper certifying that the person belonged to some other religious body, and he gives me an instance of one gentleman's filing a certificate something like the following:—"I, John Smith, hereby certify that I have ceased to be a Christian and have joined the Episcopal Church."

competent maintenance for the ministers of the gospel was jure divino," that those who separated from the world for the sake of the rest of mankind had "a right to be furnished with the necessaries, conveniences and moderate enjoyments of life at the expense of those for whose benefit they forego the usual means of providing them." 13

One has only to read Gladstone's *Church and State* to see how entirely reasonable such a state of the law is—provided he belongs to the favored church. The Dissenter, whether Presbyterian as in England or Episcopalian as in Scotland and old Connecticut, can never be persuaded that the logic is sound; but then he is a dissenter.

The common sense of the people then in Connecticut, as now in certain other parts of the globe usually looked upon as civilized, considered that the value of true religion was such that all legitimate means should be used to spread it, including support of its teachers by the community from public funds; that all should contribute to these funds and this support—the only question open being, "What is the true Religion?" Connecticut settled that early and conclusively; it was the particular brand offered by the Congregational Presbyterian.

In Upper Canada we had not such an easy task. First, the Church of England, or Episcopalian, claimed a monopoly of state support, derived from the sale of land, the "Clergy Reserves"; then the Established Church of Scotland claimed a share and had its claim allowed. Other religious bodies asserted equal rights with these, but Non est bonum sumere panem filiorum et mittere canibus, and the favored churches grudged even that Catelli edunt de micis quae cadunt de mensa dominorum suorum.\(^{14}\) Our people at last grew tired of the jangle, and took away the land—or such of it as was left—from the churches altogether, and applied it to education. We have a brutally direct way of doing things in my democratic country, and have no trouble over constitutional limitations.\(^{15}\)

Our common sense changed; so in Connecticut the common sense of the people changed, and now one would be looked upon as not far from a lunatic who should propose a return to the old practice. I do not think that even the "settled congregational Presbyterian minister" regrets the change or would desire to take a man's horse from under him even if he had not "signed off"—not to mention the "man's Bible."

About the year 1802, one Joel Goodyear sued the administrators

^{28 2} Tomlins, Law Dictionary, sub voc., "Tythes" I.

[&]quot;Vulgate version, Matt. XV. 26-27.

¹⁵ "The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body . . . We have no such restriction upon the power of the legislature as is found in some states." Florence Mining Co. v. Cobalt Lake Mining Co. (1908) 18 Ont. L. Rep. 275, 279, per Riddell, J., affirmed in the Court of Appeal and the Judicial Committee of the Privy Council.

of Joel Bradley in "an action of book debt," and at the trial in the Superior Court of Connecticut, 16 he was allowed to give his own evidence to establish that he had sent the decedent \$100 in cash by his negro to apply on his promissory note. This would never do. The defendants appealed, and by two eminent counsel urged that the "principle adopted by the Superior Court would enable any man to swear away his own note of hand." Counsel on the other side were not so bold as to contend that a party could be allowed to give evidence in his own behalf in an ordinary case, but they argued that it was different in an action "where the plaintiff charged the defendant on book." The Supreme Court of Errors was adamant. "The plaintiff cannot in any form of action avail himself of his own testimony"—notwithstanding a previous adjudication by the court, of which "the consequences which have followed probably were not then foreseen."

At the common law, common sense taught that anyone allowed to give evidence on his own behalf would perjure himself. As Bentham puts it, "every defendant is par etat, by his station in the cause, a liar, a man who if suffered to speak would be sure to speak false"—in other words, a litigant is a liar ex officio.¹⁷ Accordingly, from this presumed want of integrity, all parties are excluded from giving evidence.

Once this was sound common sense, wherever the common law prevailed; but the common sense has changed almost everywhere. Connecticut is considered by some to have led the van when in 1849 she removed all disqualification on the ground of interest, and not for two years afterwards did England take the same step for all courts, though she had launched the experiment in certain courts in 1846.

But I claim priority for my province. As early as 1792²⁰ in erecting courts of requests for the easy and speedy recovery of small debts, the parliament of Upper Canada expressly provided that it should be lawful for the justices "to administer an Oath to the Plaintiff or Defendant as well as to such Witness or Witnesses as shall be produced by each Party." It is true that we did not introduce this into the superior courts till 1856; but then we are not a logical people.

For more than half a century in most jurisdictions the theory that a party must not be allowed to give evidence on his own behalf has been effete, and no one but a fool would suggest its reinstatement—that is, he would be a fool only if, in making such a suggestion, he had in contemplation a civil action.

¹⁸ Bradley v. Goodyear (1803, Conn.) 1 Day, 104, 105.

[&]quot;I once heard a college president say "a College President is a liar ex officio"—he proved his own status—for if he told the truth he was a liar.

¹⁸ Wigmore, Evidence (1904) par. 577, note 4.

¹⁰ Boyle v. Rothschild (1908) 16 Ont. L. Rep. 426.

See Statutes of Upper Canada, 1792, 32 Geo. III, ch. 6, s. 3.

In many jurisdictions one charged with a crime is not allowed to give evidence on his own behalf; the person who must know most about the facts has his mouth closed. Why? Because he is apt to disregard the truth and may perjure himself?—But that fear we disregard in civil actions. Because he may injure his own case?—Why shouldn't he, if he wants to? In some jurisdictions the accused is permitted, but cannot be compelled to give evidence on his trial. That is our law in Canada.

"This restriction is part of, or intimately connected with the traditional law that no one should be compelled to condemn himself. There was reason in such a rule when the criminal was not uncommonly one who had offended the powers that were, and too often it was to be feared that the self-condemnation was brought about by torture. But now the criminal is always the enemy of society, of the people and not of the king or government. No one desires the destruction of the accused because he is he, and irrespective of whether he has committed a real crime. The whole concern of the prosecution is (or should be) to investigate whether the accused has committed an offence against the people; not only does the law not desire the punishment of an innocent man, it does not desire the punishment of a man who cannot be proved guilty."²¹

Not being a prophet or the son of a prophet, I do not venture to predict that at some time in all common-law countries the accused will have just the same rights as a defendant in a civil suit, nor do I try to bring on that time anywhere. Every people has the government it deserves—leaving aside cases of physical force,—so every people should have the law with which it is satisfied.

If there is one matter more than another which excites the interest of an Ontario lawyer in the courts of some of the states of the Union (I except of course the enormous length of time taken in trials), it is the devotion to the jury system. This is a cardinal characteristic of trials at the common law, and most common-law countries insist upon its retention. With us, it is the exception that a civil case is tried by a jury—and indeed, the vast majority of criminal cases are also disposed of by a judge. I shall speak chiefly of the civil side.

Looking at the matter from an a priori point of view, there is no magic in a jury trial; there is nothing at all inherently necessary to an English-speaking community in the "institution" of the jury. Take, for example, the history of Connecticut. The wealthy and somewhat aristocratic body of immigrants who arrived on this continent from England in 1637, and, resisting the inducements held out at Boston to settle in Massachusetts, came the following year and founded a colony of their own, New Haven, differed in one respect at least from the poorer immigrants who a year or two before had

²¹ The quotation is from an address delivered before the Wisconsin Bar Association at Green Bay, Wisc., June, 1914.

come from Massachusetts and settled in and near Hartford—the "Connecticut" Colony. Hartford or "Connecticut" provided for trial by jury; New Haven did not; and there is no record or tradition indicating that the New Haven courts were any less effective in doing justice than those in the colony up the river or in its Say and Sele purchase at Saybrook. That the jury system conquered in Connecticut (as elsewhere), was one more of the indignities to which this aristocratic but unhappy settlement was forced to submit by way of penance for its slackness in hunting down the regicides Goffe and Whalley and its want of promptness in recognizing that the King had come to his own again.

For long it was bad law, and for longer, bad form, for a judge, trying a case with a jury, to express an opinion on the evidence—except indeed in a government prosecution; the unfortunate who set himself up against the constituted authorities had of course no rights. In some jurisdictions the law still is that the judge must not express his opinion on facts; the common sense of such communities tells them that if you have a jury trial you should have a trial by jury; the judge is there simply to act as an umpire—"to see fair"—and declare the law.

Judges do not like to be thus limited in their activities—crede experto—and in some places sooner, in some places later, they began to express opinions. Even as late as the middle of the last century we are told by a celebrated English solicitor:

"In fact, in trials by jury (and no causes were or could be tried without a jury) the presiding judge was supposed to be impartial—or rather, to express no opinion, but in summing up merely to explain the law and read or refer to the evidence given on the one side and the other, without intimating his own view or openly endeavoring to influence the jury as to the verdict they should give. But this kind of impartiality was dying out."

So in Connecticut, at least as early as 1851, it was laid down as clear law that the trial judge had the right to give in his charge a clear expression of his own opinion, so long as he made it plain that

²² Jottings of an old / Solicitor / By Sir John Hallams / London / John Murray, Albemarle Street W. / 1906.

He says

[&]quot;it became common for counsel to impress on jurors that it was for them to decide and that they ought not to be influenced by the Judge. I well remember a trial at Guildhall before Chief Justice Jervis . . . in which Serjeant Wilkins made, as was his wont, a very excited speech to the jury in replying for the plaintiff, and concluded by saying 'I tremble for liberty, I tremble for justice, I tremble for my country, when I find a Judge ignoring his position of impartiality, usurping the functions of a jury, the safeguards of the liberties of Englishmen and endeavouring to deprive my client of that unbiassed verdict of a jury of his country to which he is entitled."

he did not intend to "direct or control" the jury.²³ From that, the state has never departed. In my own province the same law has been followed from time out of mind.

That practice has recommended itself to the common sense of some peoples; but others have not yet been infected with the virus, and still think that a jury trial is a jury trial and the litigant has the right to the opinion of a jury uninfluenced by the umpire. That the umpire may promptly set aside a finding which he thinks not in accordance with the evidence is a detail; there is, anyway, the chance of another jury, and another; and courts sometimes get tired of setting aside verdicts. Logical consistency is on the side of this practice; but since when has an English-speaking people cared for consistency? What works well is with them all right, even if it is not logical. A Frenchman will fight half a dozen duels before breakfast for a principle; but the practical "Anglo-Saxon" cares only for a practice; theory is a beautiful thing, but we want something that will do good work in this work-a-day world.

Not to worry about logic and consistency, is there any good reason why the judge, a trained observer accustomed to hear and weigh evidence, better educated than most jurors and presumably of higher intelligence and capacity (the presumption is not juris et de jure), should not help the jury, not only by reading to them the evidence, but also by giving fully and fairly his own views of its weight and effect? Counsel do that from one point of view and the other; why not the judge from an impartial point of view? The answer of the common sense of the community will determine the course of the courts; for every community has the law it wants.

In most common-law countries we have not got to the standpoint of the French-Canadian a century and a half ago; tailors and shoemakers are still preferred to judges in determining the rights of litigants. True, in a very large class of cases, a chancellor or other equity judge may sit and determine not only law but also fact. Why should the same thing not be done in other cases? The distinction between legal and equitable issues is of course historical; there is no difference in ethics or morals; and (leaving aside history) it is hard to see why a judge who can satisfactorily decide a question of fact

²⁸ First Baptist Church and Congregation in Stamford v. Rowe (1851) 21 Conn. 160, 166. Stamford, now I understand a most decorous place, was in early times the most unmanageable of the towns of Connecticut. Colonized from Wethersfield, one of the three Connecticut towns, bought by New Haven in 1640, it became and long remained a thorn in the side of the grandees of New Haven.

²⁴ I use the wholly incorrect and somewhat misleading terminology for want of a better. I mean those who speak English and are either of English descent or have adopted the English conception of legal and political right, law and government.

in a proceeding on a mortgage or a trust should not do equally well in a proceeding on a contract or a trespass. Why the practice should be followed of a judge directing a jury to find so-and-so instead of his trying the issue himself and doing his own finding, is well deserving of careful consideration. There may be many cases of fact which a judge prefers that a jury should determine; and one can see no objection to that course in such cases—generally very simple and depending on the relative credibility of witnesses. But in most cases, is not the judge more likely to be right than the "tailors and shoemakers"?

In our Ontario practice no one is entitled as of right to a trial by jury excepting in cases of libel and the like. If anyone desires a jury trial, he files a notice for a jury, but the trial judge determines whether the case shall be tried by a jury or not; and even if neither party has filed a jury notice the judge may order a jury to be called. An enormous amount of time is saved by dispensing with a jury. There are no opening addresses and the final addresses are cut short; objections to evidence lose much of their importance, oratory is at a discount and lucid sensible argument at a premium. The common sense of our people says that is an improvement. That of other people will depend upon what they wish the courts to be and what they think of their judges.

A people which really thinks the court a place of amusement, a stage for the display of oratory, and a lawsuit an interesting game to be won by technical skill and ability to take the measure of a jury's foot, or which does not trust in the integrity and capacity of its judges, will of course insist on the traditional method of trial; but if the judges are trusted both as to their ability and as to their honesty, if a lawsuit is conceived of as a real means of doing real justice and of giving every man his own, there surely can be little question what course will, at least in most cases, be adopted. Even if a jury be insisted upon—and in criminal cases few English-speaking communities have abolished the jury in the most serious cases, even on consent—the time taken in securing a jury is sometimes a public scandal.

I was recently told by a brother judge that it had taken him an hour to empanel a jury to try a certain criminal case which excited much public interest in Toronto. Until that day I had never heard of it ever taking more than half an hour to procure a jury in my province, and my experience is neither small nor unique. When we Canadians hear of it taking days, weeks or even months to swear a jury, we involuntarily clap our hands on our pockets; we know we could not afford any such luxury, and marvel at any others being able to stand it.²⁵ Whether the common sense of such other com-

^{*}I have more than once told the story of my going as a trial judge to a Canadian city along the same line of rail that would have landed me in a few

munities will abolish what to Canadians looks so absurd, will, as in all such matters, depend on the view taken of the true function and object of the courts.

Passing from this subject, I would say a word or two as to "practice." If courts are to be held as a means whereby the citizen may vindicate his rights, much attention must be paid to the methods through which this object is to be attained. It is inevitable that general rules should be laid down for the conduct of litigation, and it is natural that these rules should tend to become rather an end in themselves than a means toward an end.

The old law of procedure was like everything primeval—a matter of custom, formal; it gave much weight to set words, set phrases, fixed methods. Everything in a primeval community partakes of the nature of a religion, a magic; formulae are sacred; to depart from them fatal; this way is right, all else wrong. But as life becomes wider, more complex, the value of mere words goes below par, and facts press their claim. A slip in practice is thought to be only a slip and not a crime or a fault of such gravity as to deprive him who made it, or his client, of his rights. It is no doubt a very nice thing to have a perfect record without blot or interlineation or defect; but it is of much more importance that a litigant should have his rights.

And now, in all communities really civilized, a technical court which haeret in cortice is considered a scandal; errors made by a lawyer in reducing to writing his client's case are punished, if necessary, by costs, but are not allowed to interfere with justice according to the very right of the matter, according to the facts established and not according to the language in which a writer has expressed a claim. Once a community has advanced to the stage in which its common sense teaches that rights depend upon facts and not upon statements, upon facts and not upon technical skill in draftsmanship and acumen in taking advantage of rules, it will insist that the courts at every stage shall be independent of form, shall amend where necessary, shall not be shackled by antiquated or even modern rules which would prevent full justice being done to all.

I have often quoted the remark of the late Goldwin Smith: "It is as reasonable to expect the tiger to abolish the jungle as the lawyer to reform legal procedure." Even a professor of history may not be wholly cognizant of the history of legal procedure; and certainly that statement shows lamentable ignorance of the facts, historical and otherwise, of legal reform. The tiger has never abolished the jungle, but the law has always been reformed by the lawyer. Whether the law is considered as adjective or substantive, that has always been so, both in England and on this continent. It must continue to be so, or

hours more in an American city. In this city a court began to empanel a jury in a murder case upon the same day on which I opened my court. I had tried four criminal cases and seven civil cases and was home in Toronto before my American brother had six jurymen in his murder case.

reform will stop; for the leadership of the lawyer in all such matters is firmly established. He knows the defects, and can best devise the remedy. No call of public duty can be more insistent than the call to make and keep the courts as useful as possible. It cannot be denied that in some jurisdictions the courts do not in all cases do all that is expected of them; that efficiency methods seem not adapted to them; that they fail in doing justice in many instances; that, in more, the cost is utterly disproportionate to the good effected; that the practice is unwieldy and offers to the astute, means of escaping the just result of his acts.

Sometimes the hands of the court are tied. A legislature which allows the doctor to practise in his own way (sub modo) prevents the lawyer from doing the same, and will not even permit the expert lawyer of the judiciary to lay down the rules. Why the court should not, within reason, have the power to prescribe its own practice I cannot conceive, unless it be that the judges are not trusted or are not believed to know more about the needs of their court than the legislator.

Defects there must be in everything human—errare humanum est defects in the judge, defects in the practice, defects in the practitioner; but these may be minimized. Where the judge is elected, it is the lawyer who decides who shall be the candidate. An honest and capable bar will not tolerate any but an honest and a capable bench. Honest and capable judges will see to it that a reasonable practice is prescribed if they have that power, and if they have no power to prescribe or alter, they will see to it that the existing practice is reasonably interpreted. But yet I must qualify these statements a little— "nature is subdued to what it works in, like the dyer's hand." A judge, however honest and however capable, is prone to stand by the old ways—stare super vias antiquas—and to change as little as possible. It is hard for anyone to learn that the art on which he has spent many a diligent hour is worse than useless.28 Moreover, a judge is necessarily conservative ex officio. In not a few cases, honest and capable judges have by that very conservatism rendered, if not nugatory, at least less useful, changes which have been prescribed. The poet sings:

"For forms of government let fools contest, "That which is best administered is best."

He does not, I presume, expect his readers to accept that maxim literally; at all events they will not. An American could not become monarchist or a Canadian, democratic as he is, become republican. Still, there is much truth in it. So, too, in the administration of the

The lament of the bankruptcy lawyer is well known—on the repeal of a Bankruptcy Act he wailed, "Congress has abolished all I ever knew."

law, there is no little importance to be attached to the idiosyncracies of the judge. Some can make an almost villainous practice quite tolerable; others a tolerable practice almost villainous—and all equally honest and capable. All desire to do justice according to law, but some lay the emphasis on law, as others on justice. Therefore I add, it is not enough that a judge shall be learned, honest and capable; he must have a passion for justice irrespective of formality.

It is for the bar to see to it that such judges are selected and to support them in all reasonable efforts towards real justice. The lawyer is a member of a liberal and a learned profession. He must indeed do all for his client which the existing practice permits and the rules of honor do not prohibit; but nevertheless he must remember that he is a citizen of a free state, with an interest deep and abiding in its advancement; he must never forget that on this continent the lawyer is the leader in the thought of the people, that the common sense of the lawyer tends ever to become the common sense of the community. He should be in advance of his fellows; he must enlighten and attract; as he leads, the rest will soon follow.

# CONTRACTS FOR THE BENEFIT OF THIRD PERSONS¹

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By the great weight of authority in the United States the same facts that operate to create contractual relations between the offeror and the acceptor may also operate to create rights in a third person.² It may be useful, therefore, to examine in detail the nature and limits of this doctrine and to classify and discuss the cases in distinct groups.

To many students and practitioners of the common law privity of contract³ became a fetish. As such, it operated to deprive many a claimant of a remedy in cases where according to the mores of the time the claim was just. It has made many learned men believe that a chose in action could not be assigned. Even now, it is gravely asserted that a man cannot be made the debtor of another against his will. But the common law was gradually influenced by equity and by the law merchant, so that by assignment a debtor could become bound to pay a perfect stranger to himself, although until the legislature stepped in, the common-law courts characteristically made use of a fiction and pretended that they were not doing that which they really were doing.

#### TRUST BENEFICIARIES

If without privity of contract, one may become indebted to another, the lack of privity is surely no reason for denying him a beneficial right. As usual, equity saw this long before the common law did.⁴

¹This article contains the substance of certain sections in an edition of Anson on *Contracts* to be published by the Oxford University Press. Some use has been made of the notes of Professor E. W. Huffcut in an earlier edition.

² See 13 C. J. 705, sec. 815, citing more than 350 cases; 6 R. C. L. 884, sec. 271; Wald's Pollock, Contracts (Williston's ed. 1906) 237-278.

^{*}In order that privity of contract may exist, it seems to be necessary for A to say to B "I promise you." It requires the voluntary selection of each party by the other. See criticism of the term privity in 15 Am. Law Rev. 244-5. For recent adherence to the fetish, see 6 R. C. L. 885, sec. 271.

^{&#}x27;Not alone in the cases of trustee and cestui que trust was this true. The court did not shrink from expanding the concept of a trust to cover the case of a contract beneficiary. See Tomlinson v. Gill (1756) Ambler, 330, before Hardwicke, L. C.; Moore v. Darton (1851) 4 DeG. & Sm. 517. See also School District v. Livers (1899) 147 Mo. 580; Forbes v. Thorpe (1911) 209 Mass. 570; Grime v. Borden (1896) 166 Mass. 198; Nash v. Commonwealth (1899) 174 Mass. 335.

No privity is necessary to create rights in a cestui que trust, and no consideration need move from him. If it was possible and desirable for equity to recognize the very extensive rights, powers, privileges, and immunities of a cestui que trust, it is equally possible, and it appears to the American courts to be equally desirable, to recognize similar relations betwen a promisor and a contractual beneficiary. It is no answer to say that in the one case the magic words "in trust" were used, while in the latter they were not. This would be mere fetish worship once more. It may be that the rights, powers, privileges, and immunities of a cestui que trust are more numerous and valuable than are those of a contract beneficiary. The cestui que trust, without privity and without giving value, gets so much;—should not the contract beneficiary be given at least a crumb?

It may be argued that in the case of trust there is a specific res, while in the case of the contract there is not. This is also a distinction that proves nothing. Suppose there is a specific physical res—its mere existence is no reason for creating rights in a beneficiary without privity and without value given by him. In many cases of trust, however, there is no physical res. The trust res is then said to consist of the rights and powers of the trustee, which he "holds" in trust and must exercise for the benefit of the cestui que trust. If such an unreal res may be the basis of rights in a beneficiary, there is no greater difficulty in the case of contract.

The reasons for recognizing rights in the contract beneficiary are substantially the same as those underlying the rights of a cestui que trust. By so doing the intention of the parties is carried out and the beneficiary's just expectations are fulfilled. The reason is not, as has sometimes been suggested, that the promisee was acting as the agent of the third party. He was not in fact so acting and nobody supposed that he was. Nor is the beneficiary's right to be explained on some theory of subrogation.

# POSSESSION OF ASSETS BY THE PROMISOR

In nearly all of the American jurisdictions, including those that deny a right of action to most third party beneficiaries, there is one sort of beneficiary who is given a right of action. "Where, under a

⁵ See Pennsylvania Steel Co. v. New York City R. Co. (1912) 198 Fed. 721, 749. Lord Mansfield in Martyn v. Hind (1776) Cowp. 437, 443, said it was a matter of surprise how a doubt could have arisen in a case like Dutton v. Poole (1677) 2 Lev. 210.

⁶ See opinion of Johnson, C. J., and Denio, J., in Lawrence v. Fox (1859) 20 N. Y. 268; Union Inst. v. Phoenix Ins. Co. (1907) 196 Mass. 230. In accord with the text is the opinion of Finch J., in Gifford v. Corrigan (1889) 117 N. Y. 257.

⁷ See discussion below in connection with mortgagee-beneficiaries.

contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person," the beneficiary can maintain an action at law in his own name.8 These cases essentially recognize that a beneficiary can acquire a legal right without privity and without giving consideration. In some such cases a true equitable trust may exist with respect to some specific res. In most such cases, however, this is not so. If there is a trust and a specific res, the duty of the promisor should be held to be merely the duty to account. The fact is that the duty enforced against the promisor is that of a debtor.9 Some of these cases may properly be regarded as based upon the quasi-contractual doctrine of unjust enrichment, in which case the defendant's duty is limited by the value received by him. By the great majority of courts, however, it is regarded as unjust for the promisor not to perform as he promised in return for a consideration; and the beneficiary's right is dependent upon neither a specific res nor an unjust enrichment, but upon the existence of a valid contract.10

# PLAINTIFF A PROMISEE, BUT CONSIDERATION GIVEN BY ANOTHER

In some cases the promise is made to the plaintiff, but the consideration moves from a third party. Here the plaintiff is a promisee and there is no lack of *privity*. The problem is merely one as to con-

⁶ See National Bank v. Grand Lodge (1878) 98 U. S. 123; Hall v. Marston (1822) 17 Mass. 575; Fitch v. Chandler (1849, Mass.) 4 Cush. 254; Mellen v. Whipple (1854, Mass.) 1 Gray, 317; Exchange Bank v. Rice (1871) 107 Mass. 37. And see cases cited in 13 C. J. 704, secs. 809, 810. A recent Massachusetts case says that the plaintiff's right is "in equity"; but this does not affect the character of the right and the duty, for the defendant is treated as a debtor and not as a trustee. Forbes v. Thorpe (1911) 209 Mass. 570. Cf. Borden v. Boardman (1892) 157 Mass. 410. A remedy at law was denied in Morgan v. Randolph & Clowes Co. (1900) 73 Conn. 396.

The "assets" here referred to are assets in the hands of the promisor and do not include the *promise* itself, which is sometimes regarded as an asset of the promisee.

^{*}For example, where a devise given on condition that a certain sum be paid to a beneficiary is accepted by the devisee, the latter is a debtor of the beneficiary irrespective of the value of the devise. Felch v. Taylor (1832, Mass.) 13 Pick. 133; Adams v. Adams (1867, Mass.) 14 Allen, 65; Olmstead v. Brush (1858) 27 Conn. 530; Brown v. Knapp (1879) 79 N. Y. 136; Flickinger v. Saum (1884) 40 Oh. St. 591; Porter v. Jackson (1884) 95 Ind. 210; LaValle v. Droit (1913) 179 Ill. App. 484; Etter v. Greenawalt (1881) 98 Pa. 422. See also Feldman v. McGuire (1899) 34 Ore. 309.

¹⁰ The plaintiff's action, therefore, may be assumpsit for unliquidated damages as well as debt for a specific sum. His action lies also where the defendant has assumed to settle a claim for unliquidated damages that the plaintiff had against the promisee. Likewise the beneficiary has been given an injunction for the enforcement of a negative covenant. Ferris v. Amer. Brewing Co. (1900) 155 Ind. 539.

sideration. It is the English law that the consideration must move from the promisee.11 Such is not the American law as generally laid down by our courts,12 and some of the cases draw a clear distinction between a promise to the plaintiff upon a consideration moving from another13 and a promise to X for the benefit of the plaintiff upon a consideration moving from X. In some cases the promise seems to be made simultaneously to both the plaintiff and the one furnishing the consideration.14 Where a promise is made to two persons jointly, it seems not to be questioned whether the consideration must move from both. No doubt a fiction is indulged and the joint promisees are regarded as a unity. Where the beneficiary is not himself the promisee, he can always establish a sufficient "privity" to satisfy the courts by obtaining an assignment from the promisee. He will then possess whatever rights the promisee had as well as such rights as a beneficiary as may be recognized in the particular jurisdiction.15

# DONEE-BENEFICIARIES AND SOLE BENEFICIARIES

In many cases the purpose of the promisee in securing a promise for the benefit of a third party is to confer a gratuitous benefit upon that third party. In such cases this third party will usually be the only person who will be benefited by the promised performance; he will be the sole beneficiary. Performance will not benefit the promisee; he is not to receive it, and such performance will not discharge any duty of the promisee, for he owes none to the beneficiary. If the purpose is to discharge some duty owed by the promisee to the third party, the latter is not a donee.

¹¹ Dunlop v. Selfridge [1915] A. C. 847.

¹² Van Eman v. Stanchfield (1879) 10 Minn. 255; Rector v. Teed (1890) 120 N. Y. 583; Palmer Sav. Bk. v. Insurance Co. (1896) 166 Mass. 189. See also Gardner v. Denison (1914) 217 Mass. 492.

¹² In First N. B. v. Chalmers (1895) 144 N. Y. 432, 439, the court says:

[&]quot;I do not deem the doctrine of Lawrence v. Fox (1859) 20 N. Y. 268 involved in this controversy. That doctrine applies where no express promise has been made to the party suing, but he claims the right to rest upon a promise between other parties having respect to the debt due to him and as having been made for his benefit. It struggles to obviate a lack of privity upon equitable principles, but is needless and has no proper application where the privity exists, and a direct promise has been made upon which the action may rest."

See also De Cicco v. Schweizer (1917, N. Y.) 117 N. E. 807, and the dissenting opinion of Comstock, J., in Lawrence v. Fox (1859) 20 N. Y. 268.

¹⁴ Bouton v. Welch (1902) 170 N. Y. 554; Furbish v. Goodnow (1867) 98 Mass. 296.

¹⁵ Hyland v. Crofut (1913) 87 Conn. 49; Reed v. Paul (1881) 131 Mass. 129; Litchfield v. Flint (1887) 104 N. Y. 543; Societa Italiana v. Sulzer (1893) 138 N. Y. 468.

¹⁶ The plaintiff may be a donee-beneficiary even though he is not the sole beneficiary. In such case he can maintain suit. Jenkins v. Chesapeake & O. R. Co. (1907) 61 W. Va. 597.

It is clear that a sole beneficiary should be allowed to enforce the contract, and great numbers of cases have so held.¹⁷ It was once suggested by the United States Supreme Court¹⁸ that a sole beneficiary was the only kind who could sue, on the ground that to allow a creditor-beneficiary to sue would subject the promisor to two suits for breach.¹⁹ On the other hand, the New York courts long repeated the rule that no beneficiary could sue unless he was a creditor (or an obligee) of the promisee.²⁰ Neither of these limitations, contradictory to each other as they are, should be sustained.

Some cases have decided in favor of a donee-beneficiary on the ground of a relationship by blood or marriage between the beneficiary and the promisee.²¹ Such relationship is an evidential fact showing

¹⁶ National Bank v. Grand Lodge (1878) 98 U. S. 123. By statute, this rule seems to prevail in the Virginias. Newberry Land Co. v. Newberry (1897) 95 Va. 119; King v. Scott (1915) 76 W. Va. 58.

¹⁹ The rights of the promisee will be discussed below.

²⁰ King v. Whitely (1843, N. Y.) 10 Paige, 465 [but see Thorp v. Keokuk & Co. (1872) 48 N. Y. 253]; Vrooman v. Turner (1877) 69 N. Y. 280; Durnherr v. Rau (1892) 135 N. Y. 219; Jefferson v. Asch (1893) 53 Minn. 446. Their substantial abandonment of this doctrine will be indicated below. Nevertheless the doctrine continues to influence the decisions in many states in certain classes of cases. See the sections below on "Mortgagee-beneficiaries" and "Liability of Water Companies."

ⁿ Dutton v. Poole (1677) 2 Lev. 210; In re Edmundson's Estate (1918, Pa.) 103 Atl. 277; Daily v. Minnick (1902) 117 Iowa, 563; Benge v. Hiatt (1885) 82 Ky. 666; Schemerhorn v. Vanderheyden (1806, N. Y.) 1 Johns, 139; Todd v. Weber, supra; Coleman v. Whitney (1889) 62 Vt. 123. Contra, Linneman v. Moross (1893) 98 Mich. 178.

In the following cases, it is believed, the relationship by blood or marriage caused the court to strain the facts and to hold, contrary to the fact, that the beneficiary was also a promisee: DeCicco v. Schweizer (1917, N. Y.) 117 N. E. 807; Gardner v. Denison (1914) 217 Mass. 492; Eaton v. Libbey (1896) 165 Mass. 218; Freeman v. Morris (1907) 131 Wis. 216. In the following cases such relationship caused the court to hold that the promisee owed the beneficiary a legal or an equitable duty when in fact there was none: Buchanan v. Tilden (1899) 158 N. Y. 109; Seaver v. Ransom (1917, App. Div.) 168 N. Y. Supp. 454. Cf. Opper v. Hirsh (1901) 68 N. Y. Supp. 879.

In re Edmundson's Estate (1918, Pa.) 103 Atl. 277; Rogers v. Galloway Female College (1898) 64 Ark. 627 (beneficiary of a charitable subscription); St. Louis v. Von Phul (1895) 133 Mo. 561; Todd v. Weber (1884) 95 N. Y. 181 (promise to the mother of plaintiff to furnish support. See other cases of this type in note 21 infra); Whitehead v. Burgess (1897) 61 N. J. L. 75; Bouton v. Welch (1902) 170 N. Y. 554; Pond v. New Rochelle W. Co. (1906) 183 N. Y. 330 (promise to a village for the benefit of the inhabitants); Rigney v. New York Central R. R. Co. (1916) 217 N. Y. 31 (same); Smyth v. New York (1911) 203 N. Y. 106 (same); Independent Sch. Dist. v. Le Mars Water Co. (1906) 131 Iowa, 14; Doll v. Crume (1894) 41 Neb. 655; Gorrell v. Water Co. (1899) 124 N. C. 328; Tweeddale v. Tweeddale (1903) 116 Wis. 517; Simons v. Bedell (1898) 122 Cal. 341 (specific performance decreed). Contra, Knights of the Maccabees v. Sharp (1910) 163 Mich. 449. See further 22 L. R. A. (N. S.) 492; 39 L. R. A. (N. S.) 151; 49 L. R. A. (N. S.) 1166.

that the promisee truly intended that the third party should receive a benefit, and indicates the causa—the reason or motive—for which he paid the consideration. But the intention to benefit the third party can be clearly shown by the express words of the contract, or by other evidence, and relationship should not be held to be a necessary operative fact.²²

In life insurance the beneficiary is usually a sole beneficiary, and in all jurisdictions he can maintain suit on the policy. In England and a few of our states, this result was attained by statute.²³ It would indeed create a scandal to deny him a right of action either because he was not the promisee or because he gave no consideration.

## CREDITOR-BENEFICIARIES

Where the third party is a creditor of the promisee, or has a right against him for some particular performance, the purpose with which the promisee contracts with the promisor may be to induce the latter to pay the debt or otherwise to discharge the third party's claim. In such case, performance will directly benefit both the third party (the creditor or claimant) and the promisee. The third party is not a donee and is not a sole beneficiary. Although not the first case of the sort, the famous case of Laurence v. Fox24 is now regarded as the leading authority to the effect that a creditor-beneficiary has an enforceable right. Here a money debt of \$300 was owed by Holly to Lawrence, and he had that sum ready to be paid. Fox borrowed the money over night, promising Holly to pay the debt to Lawrence next day. It was held that Lawrence could maintain suit against Fox to enforce this promise. For a good many years this decision was severely criticised, the critics being obsessed with the idea that privity was logically necessary. Fine distinctions were often drawn so as to avoid following this decision, but in spite of some confusion thus caused, the great weight of authority is in harmony with it and a creditor-beneficiary can maintain suit.25

²² It now seems to be assumed to be the settled law of England that blood relationship will not enable a beneficiary to sue. *Tweddle v. Atkinson* (1861) 1 B. & S. 393.

²³ In Massachusetts the beneficiary's right has been said to be in equity only. Nims v. Ford (1893) 159 Mass. 575. It is not apparent on casual inspection why the procedural statute, R. L. 1902, C. 159, sec. 8, should not sustain an action of "contract."

^{26 (1859) 20} N. Y. 268.

^{**}Bohanan v. Pope (1856) 42 Me. 93; Joslin v. New Jersey Car Spring Co. (1873) 36 N. J. L. 141; Barker v. Bucklin (1846, N. Y.) 2 Den. 45; Wood v. Moriarty (1887) 15 R. I. 518; Zell's Appeal (1886) 111 Pa. 532, 547; Ballard v. Home Nat'l. Bank (1913) 91 Kan. 91, L. R. A. 1916 C, 161, and note. See 25 L. R. A. 257, note; 13 C. J. 705, sec. 815, citing hundreds of cases.

Where a new partner enters a firm and promises the old members to pay a

### MORTGAGEE-BENEFICIARIES

One of the most frequent cases where a third party attempts to enforce a contract on the theory that he is a beneficiary is that of a mortgagee. A mortgagee is nearly always to be regarded as the creditor of somebody, but he may not be the creditor of the *promisee*. Where a mortgagor who is himself personally indebted sells his interest in the property mortgaged to a grantee who assumes payment of the mortgage debt, the mortgagee is a *creditor-beneficiary*, and he is almost universally allowed to maintain suit against the grantee and to get a personal judgment against him for the amount of the debt.²⁶

share of the previous debts he may properly be sued by the creditors. Arnold v. Nichols (1876) 64 N. Y. 117; Lehow v. Simonton (1877) 3 Colo. 346; Dunlap v. McNeil (1871) 35 Ind. 316; Floyd v. Ort (1878) 20 Kan. 162; Hannigan v. Allen (1891) 127 N. Y. 639; Classin v. Ostrom (1874) 54 N. Y. 581; Maxsield v. Schwartz (1890) 43 Minn. 221; 13 C. J. 709. It was once held that a promise to pay one-half or some other fraction of all the previous debts cannot be enforced by any creditor because no single creditor can well show that it is for his benefit. Wheat v. Rice (1884) 97 N. Y. 296; Serviss v. McDonnell (1887) 107 N. Y. 260; distinguished in Hannigan v. Allen, supra. Contra: Johnson v. McClung (1885) 26 W. Va. 659.

Where a mortgagor insures premises and the policy is made payable to the mortgagee as his interest may appear, the mortgagee can sue the insurer. Union Inst. v. Phoenix Ins. Co. (1907) 196 Mass. 230 (on theory of agency); Palmer Savings Bank v. Ins. Co. (1896) 166 Mass. 189. Contra: Minnock v. Eureka F. & M. I. Co. (1892) 90 Mich. 236.

Where a municipality owes a duty to travellers to keep a street in repair and makes a contract with the defendant for the latter to do this, a traveller who is injured can sue the defendant by virtue of this contract. Jenree v. Metrop. St. Ry. Co. (1912) 86 Kan. 479; McMahon v. Second Ave. R. Co. (1878) 75 N. Y. 231. See many other cases of this sort cited in 49 L. R. A. (N. S.) 1166, note.

See further, mortgagee-beneficiary cases, infra.

A very few states still hold that a creditor-beneficiary cannot sue in a common law action. Morgan v. Randolph & Clowes Co. (1900) 73 Conn. 396; Mellen v. Whipple (1854, Mass.) 1 Gray 317; Exchange Bank v. Rice (1871) 107 Mass. 37; Borden v. Boardman (1892) 157 Mass. 410; Minnock v. Eureka F. & M. I. Co. (1892) 90 Mich. 236; Edwards v. Thoman (1915) 187 Mich. 361; National Bank v. Grand Lodge (1878) 98 U. S. 123.

²⁰ Gifford v. Corrigan (1889) 117 N. Y. 257; Thorp v. Keokuk Coal Co. (1872) 48 N. Y. 253, 257; Burr v. Beers (1861) 24 N. Y. 178; Gay v. Blanchard (1880) 32 La. Ann. 497; Pope v. Porter (1887) 33 Fed. 7; Urquhart v. Brayton (1878) 12 R. I. 169; Carver v. Eads (1880) 65 Ala. 190; Allen v. Bucknam (1883) 75 Me. 352; Figart v. Halderman (1881) 75 Ind. 567; Huyler v. Atwood (1875) 26 N. J. Eq. 504; George v. Andrews (1882) 60 Md. 26; Cooper v. Foss (1884) 15 Neb. 515. Contra in the Virginias, where by statute only a sole beneficiary can sue: Newberry Land Co. v. Newberry (1897) 95 Va. 119; King v. Scott (1915) 76 W. Va. 58.

See, further, cases cited in 13 C. J. 707, sec. 816. In Michigan and Connecticut a mortgagee-beneficiary can sue by virtue of a special statute. Mich. Comp. Laws 1897, sec. 519; Corning v. Burton (1894) 102 Mich. 86; Conn. G. S. 1902, sec. 587.

Suppose, however, that the mortgagor sells his interest to a grantee who buys subject to the mortgage but who makes no promise whatever to pay the mortgage debt. He does not "assume the mortgage debt." In such a case, the grantee's rights in rem are limited by the mortgage,27 but he undertakes no duty to pay the debt. The mortgagee, therefore, can maintain no action against him, and neither can the grantor. Such a grantee, however, has in numerous cases sold his interest to a second grantee and has caused the latter to assume payment of the mortgage debt. There is here an express promise the performance of which requires a payment directly to the mortgagee. The first grantee is the promisee, and he will not be benefited at all by the payment. So far as the promisee is concerned, therefore, the mortgagee seems to be a mere donee-beneficiary and the sole beneficiary. At this point the decisions are found to be hopelessly at variance.28 Those holding that the mortgagee can sue the promisor in these cases seem to be more nearly consistent with the weight of authority in other beneficiary cases. Those holding the contrary generally do so on the ground that a third party cannot enforce a contract unless the performance will operate not only as a benefit to him, but also as the fulfillment of a legal or an equitable duty owing by the promisee to him. This rule was laid down during the period when many of the courts desired to limit the application of the rule of Lawrence v. Fox.29 It denies all donee-beneficiaries a remedy, and is being abandoned.30

Some of the cases denying the mortgagee a remedy under these circumstances rest upon the theory that a beneficiary's right is based upon the equitable doctrine of subrogation. It is generally held in equity that a creditor is not only entitled to sue his principal debtor and all collateral sureties and to realize on such securities as may have been charged with the debt, but also to make use of all securities

The grantee lacks many rights and immunities because of the mortgage; he has certain "no-rights" because the mortgagee has privileges, and he has liabilities because the mortgagee has powers.

The mortgagee can sue: McDonald v. Finseth (1915) 32 N. D. 400; Casselman v. Gordon (1916) 118 Va. 553; Llewellyn v. Butler (1915) 186 Mo. 525; Thorp v. Keokuk Coal Co., supra. Dean v. Walker (1883) 107 Ill. 540; Marble Sav. Bank v. Mesarvey (1897) 101 Iowa, 285; Crone v. Stinde (1900) 156 Mo. 262; Hare v. Murphy (1895) 45 Neb. 809; McKay v. Ward (1899) 20 Utah, 149; also many other cases in accord, cited in Fry v. Ausman, infra.

Contra: Fry v. Ausman (1912) 29 S. D. 30; 39 L. R. A. (N. S.) 150, citing many other cases; Vrooman v. Turner (1877) 69 N. Y. 280; Ward v. DeOca (1898) 120 Cal. 102. See note in 22 L. R. A. (N. S.) 492.

²⁹ Jefferson v. Asch (1893) 53 Minn. 446; Vrooman v. Turner (1877) 69 N. Y. 280; Durnherr v. Rau (1892) 135 N. Y. 219.

Modern decisions are: Buchanan v. Tilden (1899) 158 N. Y. 109; Pond v. New Rochelle Water Co. (1906) 183 N. Y. 330; De Cicco v. Schweizer (1917, N. Y.) 117 N. E. 807; Gardner v. Denison (1914) 217 Mass. 492.

that the principal debtor may have given to the surety for the indemnity of the latter.³¹ It is also held that where one assumes the debt of another, although the latter is not thereby discharged, he occupies thereafter the position of a surety and the new promisor occupies the position of a principal debtor. Thus where the promisee is himself indebted to the mortgagee, but has become, under the above theory, a mere surety by reason of his contract with the new promisor, the courts may resort to the doctrine of subrogation and sustain an action by the mortgagee against the promisor because the promisee could have maintained such an action. On the other hand, if the promisee is not himself bound to pay the debt, he is not a surety and the doctrine of subrogation is not applicable.

It appears, however, that this is a very doubtful ground upon which to sustain the action of the mortgagee (or other beneficiary) against the promisor. The doctrine of subrogation has no doubt been very beneficial in spite of fiction and artificiality; but in this instance it has been used to confer new security and new rights upon a creditor, as a gift out of a clear sky. In suretyship it is used only as against one who is already legally indebted in order to secure the fulfillment of that legal duty. A doctrine whose purpose was the enforcement of a previously recognized duty cannot properly be given as the sole reason for creating an entirely new duty.³²

To rest the beneficiary's right to recover on such a theory as this would shut out all donee (or non-creditor) beneficiaries altogether, yet they are the very persons once thought by the Supreme Court of the United States to be the *only* beneficiaries who should be permitted to sue on a promise made to another person.³³ Included among such beneficiaries are most of the persons for whose benefit life insurance policies are issued.

The mortgagee's right against the promisor should rest on the same ground as the right of other beneficiaries. The promisor has under-

³¹ Brandt, Suretyship (3d ed.) sec. 357; Sheldon, Subrogation (2d ed.) sec. 154; Spencer, Suretyship, sec. 181; Ames, Cases on Suretyship, 620 and note; Keller v. Ashford (1890) 133 U. S. 610; Hopkins v. Warner (1895) 109 Cal. 133.

The extension of the subrogation theory to cover this case, where the promisor was not indebted to the third party by reason of any operative fact other than his promise to the promisee, is merely a cumbrous intellectual expedient for holding that a contract between two parties can create an enforceable right in a third. E. g. see Keller v. Ashford (1889) 133 U. S. 610, 623.

See Nat'l Bank v. Grand Lodge (1878) 98 U. S. 123.

The Virginia court regards the fact that the promisee was not bound to pay the debt as showing that the mortgagee was necessarily the "sole beneficiary" within the meaning of the Va. Code, sec. 2415, giving such a beneficiary a remedy. Casselman v. Gordon (1916) 118 Va. 553. See also Merriman v. Moore (1879) 90 Pa. 78; Davis v. Davis (1912) 19 Cal. App. 797. Under such a statute it was held that the mortgagee could not sue the grantee of one who was himself personally indebted. King v. Scott (1915) 76 W. Va. 58.

taken for a sufficient consideration to perform an act that will be beneficial to the third party. If such benefit was the contemplated result, and if judgment and execution in favor of the third party will give effect to the intention of the promisor and of the party giving the consideration, there is ample justification for sustaining action by the beneficiary.

Some of the cases denying the mortgagee a remedy may perhaps be justified for the reason that the contracting parties had no intention of benefiting the mortgagee or of conferring a right of action upon him. Indeed, some of them are placed squarely on this ground.³⁴ But it is believed that where the promisor has received consideration for a promise the fulfillment of which necessarily requires him to pay money directly to a mortgagee or other third person, it would seem not unreasonable to draw an invariable inference that such third person was contemplated as a beneficiary and as the holder of a new and additional right of action.

### INCIDENTAL AND UNINTENDED BENEFICIARIES

These are persons not intended by the contracting parties to have new rights, and not named as beneficiaries or even as the persons to whom payment is to be made or other performance given. In order that a third party may sue upon a contract made by others he must show that he was intended by them to have an enforceable right or at least that the performance of the contract must necessarily be of benefit to him and such benefit must have been within the contemplation and purpose of the contracting parties.³⁵ He has no right of action where he incidentally finds a provision in some contract which makes to his advantage. On this ground a remedy has, in some instances, been refused to a material man suing on a builder's bond conditioned on paying all claims for material,³⁶ and likewise to a

³⁴ See Fry v. Ausman (1912) 29 S. D. 30; King v. Scott (1915) 76 W. Va. 58.

³⁵ Durnherr v. Rau (1892) 135 N. Y. 219; Wheat v. Rica (1884) 97 N. Y. 296;
Campbell v. Lacock (1861) 40 Pa. 448; Adams v. Kuehn (1888) 119 Pa. 76;
Miller v. Winchell (1877) 70 N. Y. 437; Case v. Case (1911) 203 N. Y. 263;
Lockwood v. Smith (1913) 143 N. Y. Supp. 480; Thomas Mfg. Co. v. Prather
(1898) 65 Ark. 27; Buckley v. Gray (1895) 110 Cal. 339. In New Orleans St.
J. Assn. v. Magnier (1861) 16 La. Ann. 338, the plaintiff was denied a remedy
because performance of the defendant's primary contractual duty would not
have benefited the plaintiff, although the plaintiff was expressly named as beneficiary of a penalty clause. This decision should not be followed. See further
13 C. J. 709.

The Standard Gas Power Corp. v. New England Casualty Co. (1917, N. J.) 101 Atl. 281, 27 Yale Law Journal, 274. Cf. School District v. Livers (1899) 147 Mo. 580. See infra as to statutory provisions. Many cases contra are cited in 49 L. R. A. (N. S.) 1166, note.

citizen who sues on a contract between a water company and the municipality.³⁷ It is not always easy to determine in fact whether or not the plaintiff was contemplated by the parties as a beneficiary, and much of the apparent conflict in decisions can be explained on this ground. Where the beneficiary is a *sole* beneficiary, the difficulty does not exist; but in the case of creditor-beneficiaries the question may always be regarded as an open one. If the intention to create a right in a third party is indicated with reasonable certainty, an action by him should be maintainable even though the intention to benefit him was only secondary and conditional,³⁸ and irrespective of whether he is a donee or a creditor. Where the agreed performance involves a payment direct to the third party, the enforcement of the contract by him will carry out the intention of the parties.

# LIABILITY OF WATER COMPANIES

Where a water company has contracted with a municipality to maintain a certain supply of water for the putting out of fires and has failed to do so, with the result that the property of an individual citizen has been destroyed, it is very generally held that the citizen has no claim against the water company for breach of contract.** Various reasons are given for these decisions. Sometimes they are made to rest solely upon the lack of privity, without observing that this is inconsistent with other cases in the same jurisdiction allowing beneficiaries to maintain suit. In other cases it is asserted that the contract was not made for the benefit of the citizens, an assertion that would seem to be generally untrue in fact; and in others it is said that the municipality had no legal power to make such a contract for the benefit of its citizens, a statement that we may be permitted to doubt as a matter of law. Most of the cases denying any right to the citizen have done so for the reason formerly given by the New York courts in all beneficiary cases, to the effect that no beneficiary

Salem W. Co. (1899) 94 Fed. 238. Contra: Gorrell v. Greensboro W. Co. (1899) 124 N. C. 328. See further post, "Liability of Water Companies to Third Persons."

⁸⁸ For this reason the decision in New Orleans St. J. Assn. v. Magnier, supra, should be disapproved.

⁸⁹ Ancrum v. Camden W. Co. (1909) 82 S. C. 284, 21 L. R. A. (N. S.) 1029, 64 S. E. 151; Hone v. Presque-Isle W. Co. (1908) 104 Me. 217. Contra, Woodbury v. Tampa Waterworks (1909) 57 Fla. 243, 21 L. R. A. (N. S.) 1034. The cases are very numerous. See Arthur L. Corbin, Liability of Water Companies (1910) 19 Yale Law Journal, 425, where the cases are collected and the possible liability in tort is also considered. Individual citizens are very generally allowed to sue transportation companies and other public service companies on contracts made with the municipality. See note in 49 L. R. A. (N. S.) 1166.

can sue unless the performance by the promisor will discharge some legal or equitable duty of the promisee to the beneficiary. This reason has already been shown to be unsound, as denying rights to all done-beneficiaries. Also it has been practically abandoned by the courts of New York where it was invented. In all cases of this class the rights of the citizen will vary with the words used by the parties in the express contract; but if a water company contract is in fact for the benefit of third persons they should have the same right of action that other beneficiaries have.

#### CONTRACTS UNDER SEAL

The fact that the parties to a contract have executed a formal instrument under seal should not affect the rule as to a third party beneficiary's right to sue. If the right of a beneficiary is recognized at all, it should be recognized in the case of contracts under seal, and there is much authority to this effect.⁴⁰ Many of the courts, however, make the presence of a seal a reason for refusing to recognize a right in the beneficiary.⁴¹

# THE BENEFICIARY'S RIGHT IS NOT BASED ON NOVATION

It has been held in a few cases that the third party beneficiary must elect between his former debtor and the new promisor, and that a suit against either one, even though it does not result in collection, will bar any action against the other.⁴²

The theory underlying these cases, though not expressed clearly, seems to be that the agreement between the promisor and promisee operates as an offer of a novation to the beneficiary. The chief objection to this theory is that in fact the parties contemplate no such offer and the beneficiary has no reason to believe that in taking advantage of the new contract he is extinguishing his previous rights. If such an offer is in fact made and accepted, the case no longer falls under the present heading. Where a novation is effected, there is a new contract between the promisor and the new promisee, and the latter

^{**}Bassett v. Hughes (1877) 53 Wis. 319; Hughes v. Oregon R. & Nav. Co. (1884) 11 Ore. 437; Coster v. Albany (1871) 43 N. Y. 399; Pond v. New Rochelle W. Co. (1906) 183 N. Y. 330; King v. Scott (1915) 76 W. Va. 58, 84 S. E. 954 (Code 1913, sec. 3740); Newberry Land Co. v. Newberry (1897) 95 Va. 119 (Code 1904, sec. 2415). See further 13 C. J. 711, sec. 818.

^a Harms v. McCormick (1889) 132 Ill. 104; Hendrick v. Lindsey (1876) 93 U. S. 143; Willard v. Wood (1890) 135 U. S. 309; Crowell v. Hospital (1876)

² Bohanan v. Pope (1856) 42 Me. 93; Wood v. Moriarty (1887) 15 R. I. 518; Warren v. Batchelder (1845) 16 N. H. 580. See also Aldrick v. Carpenter (1893)-160 Mass. 166.

is not a beneficiary of a contract between other persons. Instead, he is a *promisee* and he has given valuable consideration by discharging his previous debtor.

In the absence of a novation, there seems to be no sufficient reason for holding that the beneficiary's attempt to enforce the duty created by the new contract amounts to a discharge of his previous rights against the promisee. The history of the law of discharge at common law justifies no such holding, and no sufficient reason appears for inducing equity to intervene and to discharge the promisee. In like manner, a suit by the beneficiary against his former debtor should not affect his rights against the new promisor.

Where the beneficiary is not a creditor of the promisee he has no rights to discharge, and the novation theory is wholly inapplicable. Clearly also, the better authority appears to be that the creditor-beneficiary's right against the new promisor is an additional security.⁴³ This carries out the real intention of the parties.

# CHARACTER OF THE THIRD PARTY'S RIGHT

The right of a third party beneficiary should be described as a legal right and as a contractual right. It is contractual because the operative facts creating it are acts of offer and acceptance; the party who assumes the duty does so by consenting thereto, and the necessary consideration is the same as that required for any contract. Upon breach of the primary duty by the promisor, the secondary right of the beneficiary may be a right to damages collectible in express assumpsit; the beneficiary is not restricted to an action of debt or indebitatus assumpsit for the amount of the defendant's unjust enrichment. Indeed, in most cases it is held that the promisor need not have received anything at all; it is merely necessary that the promisee shall have given consideration for the promise. There is no particular reason therefore for describing the right and the duty as quasi-contractual. We cannot properly say that the promisor and the third party have made a contract, even though the third party has assented; the contract was made by the promisor and the promisee. The assent of the third party is certainly not the acceptance of an offer, and the third party gives no consideration. Nevertheless, the

Efischer v. Hope Mut. Life Ins. Co. (1877) 69 N. Y. 161; Rodenbarger v. Bramflett (1881) 78 Ind. 213; Davis v. Hardy (1881) 76 Ind. 272; Gay v. Blanchard (1880) 32 La. Ann. 497, 505 ("True, there was no novation of the debt. There was simply an additional obligor bound for it."); Feldman v. McGuire (1899) 34 Ore. 309; Smith v. Pfluger (1905) 126 Wis. 253, 105 N. W. 476. See also Poe v. Dixon (1899) 60 Oh. St. 124.

This is necessarily true in mortgagee-beneficiary cases where the court bases the mortgagee's right against the grantee who has assumed the debt upon the doctrine of subrogation. See *Hopkins v. Warner* (1895) 109 Cal. 133.

right of this party and the duty of the promisor are properly described as contractual.

There is no sufficient reason for describing the third party's right as an equitable right instead of a legal one. The recognition of the third party's right has very largely come about in jurisdictions where there have never been separate courts of common law and of equity; and even in other jurisdictions the right has been enforced in the courts of law as well as in equity. Moreover, in fundamental character, there is no difference between an equitable right and a legal right. Any right, legal or equitable, implies a duty of performance by another, the non-performance being penalized by society. Its existence does not depend upon the number of officials or courts to whom application must be made or upon the complexity of the machinery of enforcement, although these may determine what the secondary and other subsequent rights will be. The term equitable has often meant in the past that application must be made to a chancellor in a particular form called a "bill" and that the societal penalty for nonperformance will be of a particular kind. It no longer has that definite meaning; and if it has such a meaning it is inapplicable in this instance.

In the past, certain rights have been described as equitable because there was a liability to their extinguishment for the benefit of some innocent purchaser. Certain admittedly legal rights were likewise subject to such a liability by the rules of market overt, and hence the existence of such a liability is not the basis of a clear distinction. The right of the third party beneficiary, however, is accompanied by no liabilities that do not accompany all contract rights. The fact that the promisee may have the power of extinguishment is not material on this point. There is no chance here for the application of special bona fide purchaser doctrines.⁴⁴

The accuracy of the foregoing seems not to be doubted in the case of a sole beneficiary. In the case of a creditor-beneficiary, however, the contrary has been maintained, especially in cases where the court overlooked altogether the rights of a sole beneficiary. Thus it has been held that a mortgagee or other creditor can sue the promisor only according to the procedure of a court of equity, and on the theory that the promise is an "asset" of the promisee.⁴⁵ Not only

[&]quot;The relation between a beneficiary and the promisor is not a fiduciary one. Attorney General v. American Legion of Honor (1910) 206 Mass. 158.

^{*}Keller v. Ashford (1889) 133 U. S. 610; Green v. Turner (1898) 80 Fed. 41, 86 Fed. 837; Hopkins v. Warner (1895) 109 Cal. 133; Forbes v. Thorpe (1911) 209 Mass. 570. Observe that this asset theory is different from the one discussed previously. Here the promissory duty is the asset, and is to be reached as an asset of the promisee. The other doctrine supposes the existence of assets in the hands of the promisor. Forbes v. Thorpe, supra, might rest upon both doctrines at once.

is such a theory wholly inapplicable to sole beneficiaries, but it is not the theory on which the rights of creditor-beneficiaries have generally been based and it has not been consistently adhered to in any state.46 If the promisee has an "asset" in this case it should be available like other assets to his other creditors as well as to the particular creditor who is named as the payee. The present writer has seen no creditor's bill for realizing on this asset brought by any creditor other than the named payee; but if other creditors could maintain such a bill, it would result in the payee's getting the whole of this asset and still sharing other assets pro rata with the other creditors as to any balance that might be due him. By differentiating this particular creditor from other creditors and this particular "asset" from other assets we are merely recognizing that he has obtained a special right in personam as against the promisor, a right that is created by a contract to which he was not a party. He gains this special right because the contracting parties intended that he should have it, or at least that the performance should go direct to him. To apply the "equitable asset" theory is merely to recognize the third party beneficiary's right under another and mis-descriptive name.

There is no doubt that the chancery procedure had many advantages over that of the common law. This was especially true with respect to its flexibility in the matter of parties to the suit, where more than two parties were involved. In all beneficiary cases there are three interested parties, although the interest of the promisee is not quite the same in sole beneficiary cases as it is in creditor-beneficiary cases. The rights and duties of the three can no doubt be better determined and enforced in one suit to which all are parties than in two or more suits in each of which only two are parties. If the promisor is sued by either the promisee or the third party he should have the power to make the other one a party to the suit. No doubt the procedure of nearly all of our courts is now such as to permit this. Even if not, the case should be regarded merely as one where the promisor has undertaken duties to two persons severally.

#### THE RIGHTS OF THE PROMISEE

It was once held in England that where a third party was sole beneficiary, the promisee having no pecuniary interest in the performance, the promisee could maintain no action at law.⁴⁷ The same

[&]quot;(1) Sole beneficiaries. Every state recognizes the right of a sole beneficiary in some cases. (2) Statute of limitations. The mortgagee can sue the mortgagor's grantee who assumes the debt, even though the statute of limitations has barred the remedy against the mortgagor. Davis v. Davis (1912) 19 Cal. App. 797; Daniels v. Johnson (1900) 129 Cal. 415. (3) Other defenses. It is no defense to the promisor that the promisee may have had a good defense against the plaintiff. Washer v. Independent M. & D. Co. (1904) 142 Cal. 708. "Levet v. Hawes (1599) Cro. Eliz. 619, 652.

has been held in some cases in the United States.⁴⁸ There seems to be no sufficient reason for this. The promisee has paid the consideration and the law should vindicate his right that performance shall take place, even though the damage to the plaintiff is nominal. Where the promisee has a pecuniary interest in performance, as where it is to discharge a debt owed to the third party beneficiary, the promisee certainly can sue the promisor in case of breach.⁴⁹ Thus the latter may be sued by two persons on the same contract; but this is not unjust, because his breach causes an injurious disappointment to two separate persons. By availing himself of modern code procedure or that of equity the promisor can avoid the expense of two actions and the danger of a double recovery.

In states where the beneficiary cannot sue, of course the promisee can, and he can recover the full amount promised.⁵⁰ The promisee's right is assignable,⁵¹ and if the assignment is to the beneficiary the latter can sue as assignee.⁵²

# POWER OF THE PROMISEE TO RELEASE THE PROMISOR

It is now clear that after the beneficiary has become aware of the contract made for his benefit, and has either acted in reliance on it or has in some manner expressed an assent and approval, the promisee no longer has power to release the promisor from his duty to the beneficiary.⁵³ This is true whether the relation of the beneficiary to the promisee is that of donee or that of creditor. No notice of his

^{**}Ayers v. Dixon (1879) 78 N. Y. 318; Adams v. Union Ry. (1899) 21 R. I. 134; Reeves v. Bluff City Bank (1901) 63 Kan. 789; New Haven v. New Haven & D. R. Co. (1892) 62 Conn. 252.

^{*}Meyer v. Hartman (1874) 72 III. 442; Tinkler v. Swaynie (1880) 71 Ind. 562; Baldwin v. Emery (1897) 89 Me. 496; Merriam v. Lumber Co. (1877) 23 Minn. 314, 322; O'Neill v. American Legion of Honor (1904) 70 N. J. L. 410; Langan v. American Legion of Honor (1903) 174 N. Y. 266 (semble); Kelly v. Security Co. (1906) 186 N. Y. 16. The last two cases suggest that the promisee is entitled to a decree for specific performance. See further U. S. Fidelity & G. Co. v. U. S. (1917) 246 Fed. 433.

⁵⁰ Furnas v. Durgin (1876) 119 Mass. 500; Boardman v. Larrabee (1883) 51 Conn. 39.

The promisor can compel the promisee to pay over the sum collected to the third party beneficiary if the latter holds a mortgage on the promisor's land. Williams v. Fowle (1882) 132 Mass. 385 (semble); Furnas v. Durgin, supra, (semble).

⁵¹ Hyland v. Crofut (1913) 87 Conn. 49. ⁵² Reed v. Paul (1881) 131 Mass. 129.

^{**}Gifford v. Corrigan (1889) 117 N. Y. 257; New York Ins. Co. v. Aitken (1891) 125 N. Y. 660; Hill v. Hoeldtke (1912) 104 Tex. 594, 142 S. W. 871; 40 L. R. A. (N. S.) 672, with note; Bassett v. Hughes (1877) 43 Wis. 319.

[&]quot;The person who has made the stipulation cannot revoke it if the third party has declared that he wished to take advantage of it." French Civil Code, sec. 1121. See also Civ. Code Cal. sec. 1559; Civ. Code S. Dak. sec. 1193; Rev. L. Okla. 1910, sec. 895.

assent by the beneficiary to the promisor is necessary.⁵⁴ Prior to assent by the beneficiary the promisee may perhaps have the power to release.⁵⁵ Where the third party is the sole beneficiary of the contract the promisee is generally held to have no power whatever to release the promisor, even before the third party is aware of the contract.⁵⁶

#### DEFENSES OF THE PROMISOR AS AGAINST THE BENEFICIARY

The beneficiary's rights against the promisor spring from the contract as it was made, and if that contract was in the beginning void for lack of any essential element the third party has no rights. So likewise if the contract was voidable for infancy or insanity or fraud, it is voidable as against the beneficiary.⁵⁷ If the duty of the promisor is subject to some condition precedent, the correlative right of the beneficiary is likewise conditional.⁵⁸

On the other hand, just as soon as the right of the beneficiary is in existence and beyond the power of the promisee to destroy by a release or rescission, it is also beyond his power to destroy by wrongful acts that would discharge the promisor's duty to himself. Thus a beneficiary can still hold a surety on his bond even though the promisee has discharged such surety's duty to himself by surrendering collateral securities⁵⁹ or by making an alteration of the contract with the principal and without the surety's consent.⁶⁰

⁵⁴ Hill v. Hoeldtke, supra.

⁸⁵ Trimble v. Strother (1874) 25 Oh. St. 378; Berkshire Life Ins. Co. v. Hutchings (1884) 100 Ind. 496; Commercial N. B. v. Kirkwood (1898) 172 Ill. 563; Gilbert v. Sanderson (1881) 56 Iowa, 349.

⁵⁶ Tweeddale v. Tweeddale (1903) 116 Wis. 517; Wetutzke v. Wetutzke (1914) 158 Wis. 305, 148 N. W. 1088. The right of the beneficiary of a life insurance policy is generally held to be irrevocable by the insured, even prior to any knowledge or assent by the beneficiary, unless the power of revocation is reserved in the policy. Such a power may of course be reserved.

⁵⁷ Arnold v. Nichols (1876) 64 N. Y. 117 (the usual rules as to rescission for fraud concerning the return of the consideration, etc., apply); Jenness v. Simpson (1910) 84 Vt. 127, 139; Cohrt v. Koch (1881) 56 Iowa, 658; Crowe v. Lewin (1884) 95 N. Y. 423; Dunning v. Leavitt (1881) 85 N. Y. 30; Green v. Turner (1898) 80 Fed. 41, 86 Fed. 837.

vs. John Hancock M. L. I. Co. (1902) 23 R. I. 457, is in effect contra, and cannot be supported.

The power of rescission or alteration may be reserved in express terms.

⁸⁰ Doll v. Crume (1894) 41 Neb. 655; School District v. Livers (1899) 147 Mo.

[∞] Equitable Sur. Co. v. McMillan (1913) 234 U. S. 448; United States v. National Sur. Co. (1899) 92 Fed. 549; Victoria Lumber Co. v. Wells (1916) 139 La. 500; Cowles v. U. S. Fidelity, etc. Co. (1903) 32 Wash. 120; Conn. v. State (1890) 125 Ind. 514; Steffes v. Lemke (1889) 40 Minn. 27.

The duty of the promisor to the beneficiary is quite independent of previous or subsequent relations between the promisee and the beneficiary.⁶¹

#### MASSACHUSETTS LAW

Prior to 1850 the Supreme Court of Massachusetts held in a number of cases that a beneficiary could sue on a contract made by others.62 It was largely upon these cases that the decision in Lawrence v. Foxes was based, and they have had an important influence upon the law in the United States to-day. In Mellen v. Whipple it was held that a mortgagee could not sue the grantee of the mortgagor although he had assumed the debt, and Judge Metcalf put all the earlier cases into three classes which he declared to be exceptions to the general rule that no action lies by one not a promisee. Two of these classes were, first, cases where the defendant had received assets which he ought to pay over and, second, cases where the beneficiary was related by blood to the promisee. In Putnam v. Field⁶⁵ a liberal application was made of the assets exception. In Exchange Bank v. Rice66 a creditor-beneficiary was not allowed to sue. Judge Gray referring to the three classes of exceptions with no very marked approval. Somewhat later all of Judge Metcalf's classes of exceptions seem to have been disapproved, and the cases on which they were based have been declared to be overruled. In Marston v. Bigelow⁶⁷ it was held that a sole beneficiary who was the son of the promisee could not enforce the contract in either law or equity; and in Borden v. Boardman⁶⁸ the assets exception was disregarded and it was held that the beneficiary could not sue unless the parties had

^{e1} The fraud of the plaintiff as against the promisee is not available as a defense to the promisor. Hurst v. Knight (1914, Tex.) 164 S. W. 1072. The grantee of the mortgagor who has assumed the mortgage debt can set up no defenses against the mortgagee except a satisfaction. Washer v. Independent M. & D. Co. (1904) 142 Cal. 702, 708; Davis v. Davis (1912) 19 Cal. App. 797 (statute of limitations); Daniels v. Johnson (1900) 129 Cal. 415 (same).

^{ex} Felton v. Dickinson (1813) 10 Mass. 287 (sole beneficiary and blood relation); Arnold v. Lyman (1821) 17 Mass. 400; Hall v. Marston (1822) 17 Mass. 575; Fitch v. Chandler (1849) 4 Cush. 254; Brewer v. Dyer (1851) 7 Cush. 337 ("the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation").

^{55 (1859) 20} N. Y. 268.

^{64 (1854) 1} Gray, 317. See also Dow v. Clark (1856, Mass.) 7 Gray, 198.

[∞] (1870) 103 Mass. 556.

^{* (1871) 107} Mass. 37. But see Nash v. Commonwealth (1899) 174 Mass. 335, where the exceptions laid down in Mellen v. Whipple seem to be approved.

^{et} (1889) 150 Mass. 45. But see Dean v. American Legion of Honor (1892) 156 Mass. 435, 438; Attorney Gen. v. American Legion of Honor (1910) 206 Mass. 158, 166.

⁶³ (1892) 157 Mass. 410. A right in the plaintiff in this sort of case has since been recognized as enforceable by a bill in equity. Forbes v. Thorpe (1911)

created a trust. Had the magic word "trust" been used, it is clear that the beneficiary's action in "contract" would have been sustained.

Thus the Massachusetts law is supposed to have been brought into harmony with that of England. There is some reason to believe, however, that the Massachusetts court is not wholly satisfied, and numerous decisions very materially limit the rule. In several cases the court has established the existence of "privity" by the liberal use of fiction. Thus where the defendant promised an expectant father to pay a sum of money to the yet unborn child in return for the father's giving the child a certain name it was held that the child could maintain suit on the contract. 89 In some curious fashion the court was able to convince itself that the child was the promisee and also gave part of the consideration. The child was really a sole (and donee) beneficiary. In like manner an artificial privity in favor of a creditor-beneficiary was discovered by the court in a case where the licensee of a patent had agreed to pay a royalty and had later assigned his license to the defendant "subject to covenants." The licensor was given judgment against the assignee for the royalty due. 70 Again, where an insurance policy was issued to a mortgagor but the loss was payable to the mortgagee "as its interest may appear," it was held that the mortgagee could sue on the policy in its own name.71 In a later case, 72 the question was raised whether the mortgagee here sued as a promisee or as an assignee; but so far as appears, the plaintiff was a creditor-beneficiary.78 Much earlier, the court had held that a mortgagee-beneficiary could sue the promisor if he held an assignment from the promisee.74

²⁰⁹ Mass. 570. And in other cases a trust was held to be created by reason of a statute that bears no obvious indication of any such intent. See Nash v. Commonwealth (1899) 174 Mass. 335; George H. Sampson Co. v. Commonwealth (1909) 202 Mass. 326.

[®] Gardner v. Denison (1914) 217 Mass. 492; Eaton v. Libbey (1896) 165 Mass. 218.

^m Paper Stock D. Co. v. Boston D. Co. (1888) 147 Mass. 318. In this case the licensee had an express power to assign; but this is not the power of an agent, much less is it the power to effect a novation.

ⁿ Palmer Sav. Bank v. Insurance Co. (1896) 166 Mass. 189. Even if the plaintiff was in fact the promisee, which seems unlikely, it gave no consideration; and in the English courts this fact would deprive the plaintiff of a right to sue. Dunlop v. Selfridge [1915] A. C. 847. No doubt this Massachusetts decision was influenced by R. L. 1902, c. 118, sec. 58; but that statute does not purport to confer a right of action upon a third party beneficiary. To the same effect is Union Inst. v. Phoenix Ins. Co. (1907) 196 Mass. 230, where the mortgagor is declared to be the mortgagee's agent.

¹² Attleborough Bank v. Security Ins. Co. (1897) 168 Mass. 147, 149.

The Michigan courts regard the mortgagee as a mere third party beneficiary, and deny him a remedy. Minnock v. Eureka Ins. Co. (1892) 90 Mich. 236; Hartford F. I. Co. v. Davenport (1877) 37 Mich. 609.

[&]quot;Reed v. Paul (1881) 131 Mass. 129.

In a recent case the court has held that a creditor-beneficiary has an equitable claim against the promisor on the theory that the duty of the promisor to the promisee is an asset of the latter that is available to his creditor. In another case, where A promised B "as trustee" to pay a sum of money to C, it was held that B could recover substantial damages and would hold them in trust for C. It is to be observed that the promise of A was not to pay the money to B, in trust for C, but was to pay the money directly to C. Te

Another method of creating a right in a creditor-beneficiary is to describe the defendant's failure to perform his contract as a tort.⁷⁷ This method would be used only in cases where the defendant's conduct falls naturally within the tort field, and very likely the other existing facts would be held to create a tort liability in the absence of any contract whatever.

The foregoing cases indicate that the Massachusetts court is quite willing to enforce a duty in the absence of privity in favor of certain kinds of beneficiaries. It may be admitted that this tendency is as yet illustrated only in decisions that are based upon a liberal use of fiction or upon specious distinctions. This is the traditional manner in which a conservative court abandons a previously asserted general rule.⁷⁸

#### NEW YORK LAW

The law in New York has already been sufficiently indicated in discussing the rules prevailing throughout the whole country, for the New York courts have had a decisive influence on those prevailing rules. In one respect, however, these courts have been following a course similar to that indicated in Massachusetts. In a number of cases it was laid down that the doctrine of Lawrence v. Fox⁷⁹ was to be restricted to cases exactly parallel thereto, thus allowing creditor-

^{*}Forbes v. Thorpe (1911) 209 Mass. 570. See also Clare v. Hatch (1902) 180 Mass. 194. Observe that the existence of this "asset" makes the promisor a debtor and not a trustee. The same is true where a devisee accepts a devise on condition of payment of a legacy to a third party. Felch v. Taylor (1832) 13 Pick. 133; Adams v. Adams (1867) 14 Allen, 65. See discussion of this "asset" theory supra.

¹⁸ Grime v. Borden (1896) 166 Mass. 198.

[&]quot; Phinney v. Boston El. Co. (1909) 201 Mass. 286.

[&]quot;The contract with the city, whereby the defendant undertook to relieve the city of the performance of its statutory duty, brought the defendant into a relation to those travellers which was the foundation of a legal obligation to provide for their safety."

[&]quot;By statute the beneficiary of a life insurance policy can sue thereon in his own name. St. 1894, C. 225. See also Dean v. American Legion of Honor (1892) 156 Mass. 435; Attorney Gen. v. American Legion of Honor (1910) 206 Mass. 158 ("on a broad construction of the statutes").

[&]quot; (1859) 20 N. Y. 268.

beneficiaries to sue and shutting out sole or donee-beneficiaries. The existence of the relation of debtor and creditor between the promisee and the third party was required, or at least the former must owe the latter some "legal or equitable duty" which will be discharged by the promisor's performance.80 The New York courts are rapidly destroying this very unsatisfactory limitation, but are doing it by greatly expanding the content of the term "legal or equitable duty." Thus, the general duty that a husband owes to his wife to care for and support her is sufficient to enable her to sue on a promise (made to the husband) to pay her \$50,000.81 An aunt owes a sufficient duty to her favorite niece when the latter has lived in the aunt's house free of charge and has loved her aunt.82 A resident of a municipality can sue on a contract made between it and the defendant for the benefit of the inhabitants even though the resident could not have sued the municipality in this particular case, inasmuch as the municipality owes some sort of duty to conserve the interests of the inhabitants.83 On the same principle, the duty that a labor union owes to its members who pay dues is sufficient to sustain an action by a member as beneficiary.84

#### STATUTORY PROVISIONS

Some states provide by statute that one for whose benefit a promise is made may maintain an action upon the promise.⁸⁵ Third parties

Durnherr v. Rau (1892) 135 N. Y. 219; Vrooman v. Turner (1877) 69 N. Y. 280; Lorrillard v. Clyde (1890) 122 N. Y. 498. Todd v. Weber (1884) 95 N. Y. 181 is directly contra.

^{**}Buchanan v. Tilden (1899) 158 N. Y. 109; Bouton v. Welch (1902) 170 N. Y. 554. See also DeCicco v. Schweizer (1917, N. Y.) 117 N. E. 807. It may be observed that the payment by the promisor will not discharge the duty of the husband to support his wife.

^{*}Seaver v. Ransom (1917, App. Div.) 168 N. Y. Supp. 454.

^{*}Little v. Banks (1881) 85 N. Y. 258; Pond v. New Rochelle W. Co. (1906) 183 N. Y. 330; Smyth v. New York (1911) 203 N. Y. 106; Rigney v. New York, etc. R. Co. (1916) 217 N. Y. 31; Schnaier v. Bradley Cont. Co., decided Feb. 15, 1918, in N. Y. App. Div. See also City of St. Louis v. Von Phul (1895) 133 Mo. 561.

[&]quot;Gulla v. Barton (1914, N. Y.) 164 App. Div. 293.

[&]quot;If oversent or provide he mode for the sole benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Cal. Civ. Code, § 1559; Idaho Civ. Code, § 2728; Mont. Civ. Code, § 2103; N. Dak. Rev. Codes, § 5285; S. Dak. Civ. Code, § 4688.

[&]quot;If a covenant or promise be made for the sole benefit of a person with whom it is not made, such person may maintain in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." Va. Code, § 2415; W. Va. Code, ch. 71, § 2.

"If there be a valid consideration for the promise, it matters not from whom

[&]quot;If there be a valid consideration for the promise, it matters not from whom it is moved; the promisee may sustain his action, though a stranger to the consideration." Georgia Code (1911) § 4249.

[&]quot;Any person or persons for whose benefit any contract shall have been made or may hereafter be made, whether such contract be under seal or not, may maintain an action thereon in any court of law or equity and may use the same

can everywhere maintain suit upon statutory official bonds that have been required by law for their protection. Likewise there are statutes providing that contractors engaged on public works shall give a bond to secure performance and also to protect material men and laborers, a suit by such third persons being expressly or impliedly authorized. The secure performance are suit by such third persons being expressly or impliedly authorized.

Most states having the reformed procedure provide that all actions shall be brought in the name of the real party in interest. It has been inferred that this provision "places the matter beyond all doubt, for the person for whose benefit the promise is made is certainly the real party in interest."88 In fact, however, this statutory provision does not affect the problem. It was adopted merely for the purpose of creating a more direct and satisfactory procedure for the enforcement of rights already recognized as existing by either law or equity (or by some other system of courts). The question to be determined here is what is the legal operation of the facts of offer and acceptance between promisor and promisee with respect to a third party beneficiary. Do they create in such third party any legal or equitable right? Until we answer this question in the affirmative, it can hardly be said that the beneficiary is "the real party in interest" as that term is used in the procedural statute. And after we have answered it in the affirmative, the beneficiary does not need the aid of this statute to sue in his own name.

as matter of defense to any action brought or to be brought against such person or persons, notwithstanding the consideration of such contract did not move from such person or persons." New Jersey Law 1902, c. 251.

See also French Civil Code, sec. 1121. The Louisiana Code is similar to the French. See New Orleans St. J. Assn. v. Magnier (1861) 16 La. Ann. 338; Gay v. Blanchard (1880) 32 La. Ann. 497.

England and Massachusetts have statutes enabling the beneficiary of an insurance policy to sue. Mass. St. 1894, c. 225. In Michigan and Connecticut there are similar statutes in favor of mortgagee-beneficiaries. Mich. Comp. Laws 1897, sec. 519; Conn. G. S. 1902, sec. 587.

^{*}Such bonds are distinguished in Jefferson v. Asch (1893) 53 Minn. 446. Coster v. Albany (1871) 43 N. Y. 399, 412 (semble).

^{**} See the Federal statutes, 30 St. at L. 906, c. 218; 33 St. at L. 811, c. 778. Mass. R. L. 1902, c. 6, sec. 77; Mass. St. 1909, c. 514, sec. 23. Equitable Sur. Co. v. McMillan (1913) 234 U. S. 448. Many cases of this sort are cited in note, 49 L. R. A. (N. S.) 1175-1197.

^{*}Pomeroy, Rem. and Rem. Rights, § 139; Stevens v. Flannagan (1891) 131 Ind. 122; Ellis v. Harrison (1891) 104 Mo. 270.

# CONFLICT OF LAWS IN LATIN-AMERICAN COUNTRIES¹

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The sources of private international law are: the treaties between nations which create a positive rule binding the nations parties thereto; the rules established in the statutes of every country, which present the local law for the solution of such international conflicts; finally, science, which studies the general principles of law and seeks to create a common ideal for the solution of those conflicts.

In this study we shall confine ourselves to the rules established in the statutes of the Latin-American countries,² and to present the conclusions arrived at by the South American Congress held in Montevideo in 1888-1889.

The reader must not expect that all the points that may give rise to international conflicts are covered in this study. Perhaps his impression will be that the article is fragmentary, but this deficiency is due to the fact that the statutes do not always cover all the points. In some countries there are rules which are not found in others, and vice versa. He must not be disappointed, therefore, in finding that after the statement of certain rules, we mention only some of the codes of the Latin-American countries, omitting others which do not refer, so far as we have been able to find, to that particular matter. On the other hand, some rules referring to particular contracts or acts are not discussed here because they find their place in the corresponding chapter of my treatise on Latin-American law, whereas in the present article I usually refer to the general principles.

General remarks. All the rules which are herein set forth are subject to a superior principle, namely, that prohibitory laws concerning persons, their acts or property, and those which relate to public order or good morals, are not overruled by virtue of laws enacted or judgments rendered, or by regulations or agreements made in a foreign country.*

¹ The substance of this article will appear in a chapter in a forthcoming book on Latin-American Commercial Law by T. Esquivel Obregón, to be published and copyrighted by World Book Company, Yonkers-on-Hudson, New York.

³ The modern Spanish codes will also be considered, not only because they have been the model of some American countries, but because they are now in force in Cuba and Porto Rico. It will be understood when we mention Spain, that Cuba and Porto Rico are included, unless otherwise stated.

^{*}Spain, 11 c.c.; Argentina, 14 c.c.; Brazil, 17 c.c.; Honduras, 2372 c.c.; and Mexico, 15 c.c. (c.c. is the abbreviation for civil code.)

The party who invokes rights created by a foreign law has to prove the existence and the applicability of said law to the case.*

As a consequence of the principle that contracts and acts are subject to the forms established by the law of the place where they are executed, the means of evidence are also governed by that law. Article 12 of the civil code of Brazil expressly so provides.

#### I. STATUS AND CAPACITY OF PERSONS

#### A. In General

System of Spain. Laws relating to family rights and obligations, or to the status, condition and legal capacity of persons, obligate citizens even though they reside in a foreign country.⁵

System of Brazil. The same rule is established by article 8 of the civil code of Brazil; but article 9 provides that the law of the domicile is subsidiarily applied—

- 1. When a person has no nationality.
- 2. When dual citizenship is attributed to a person, namely that of his birth, and that of his parents, the Brazilian law governs, provided Brazilian citizenship be one of the two ascribed to the person.

System of Chile. The national law governs the status or legal capacity of a native, with respect to acts which must produce their effect in the country, and to the rights and obligations created through family relations only in matters referring to a native wife and children or relative.⁷

System of Mexico. According to article 12 of the civil code of the republic concerning the status and capacity of persons the Mexican law obligates Mexicans with respect to legal acts or con-

^{*}Argentina 13 c.c.; Mexico 19 c.c.—A decision rendered in this respect by the court of Medellin, in Colombia, on Sept. 5, 1906, is very important, as it establishes that when the national law provides for the application of foreign laws, the judge must ex officio inquire into the provisions of said laws, if the parties have not done so. 2 Garavito A. Fernando, Jurisp. de los Tribunales de Colombia, 725.

^{*}Spain, 9 c.c. See In re Butler y Harrap Decision (Dec. 14, 1901, no. 65, Tribunal Supremo, Cuba). Notwithstanding the fact that art. 10 of the civil code declares the rights of foreigners in Cuba, neither that provision nor any other gives jurisdiction to the Cuban Tribunals to pass upon them. 9 Jurisprudencia del Tribunal Superior en materia civil (Havana, 1908) 1019. See also decisions of the Tribunal Superior, Spain, Dec. 11, 1893, and Dec. 18, 1894.

See Hayti, 7 c.c.; Honduras, 13 c.c.; Santo Domingo, 3 c.c.; and Venezuela, 7 c.c.

^{*}Pascuali v. Bicudo (Sept. 25, 1914, Court of Appeals of S. Paulo, Brazil) 8 Rev. del Sup. Trib. Rio de Janeiro (1915) pt. 2, p. 40.

⁷Chile, 15 c.c.; Colombia, 19 c.c.; Ecuador, 14 c.c.; Nicaragua, 15 c.c.; San Salvador, 15 c.c.; and Uruguay, 4 c.c.

tracts which must be performed in Mexico, whatever the law of the country where the act or contract is executed.8

System of Costa Rica. The civil code of Costa Rica embodies the same provisions as article 12 of Mexico, but adds that the Costa Rican law also binds aliens respecting acts which take place or contracts which are executed and must be performed in Costa Rica.9

The codes of the above-mentioned countries do not all provide for acts done by their citizens abroad, which must produce effect without their territory; this is a matter which has been left for the law of the country in which the act must take place, or to the agreement of the parties, or to the rules of international law, in default of both.

System of Argentina. The civil code of Argentina adopts an entirely different principle; instead of considering the law of the nationality of a person, in order to establish his status and legal capacity, it considers the law of the country in which a person is domiciled, independently of his nationality. This system is contained in the following articles:

Art. 6: "The capacity or incapacity of persons, domiciled in the territory of the republic, whether nationals or foreigners, is governed by the laws of this code, even though acts performed or property situated in a foreign country are involved."

Art. 7: "The capacity or incapacity of persons domiciled outside the territory of the republic is governed by the laws of their respective domiciles, even though acts performed or property situated in the republic are involved."

Art. 138: "Whoever moves his domicile from a foreign country to the territory of the republic, and is of legal age or has been emancipated according to the rules established in this code, shall be so considered even though he is a minor or not emancipated according to the laws of his former domicile."

#### B. Citizenship and Domicile of Married Women

With respect to the citizenship of a married woman, or her domicile, as the case may be, the Latin-American law is as divergent as it is in the matter of general status of persons. Therefore, we have to subdivide this point, in accordance with the different systems which prevail.

System of Spain. A married woman follows the status and citizenship of her husband in Spain and certain other countries.¹⁰

^{*}Dorsay v. Diaz Barriga (Apr. 12, 1911, Segunda Sala del Supremo Tribunal del Dist. Fed.) 23 Diario de Jurisprudencia (Mexico, 1911).

⁴⁰ C.C

¹⁹ Spain, 22 c.c.; Bolivia, 8 c.c.; Colombia, art. 3, law of July 4, 1823; Guatemala, 56 c.c.; Hayti, 5 pol. c. (pol. c. is the abbreviation for political constitution); Honduras, 48 c.c.; Peru, 41 c.c.; and Santo Domingo, 12 and 19 c.c.

System of Mexico. The principle that a married woman follows the status and citizenship of her husband is true also of Mexico,¹¹ Costa Rica,¹² and Venezuela;¹³ but matrimony does not denationalize a native woman when the law of the husband's home does not admit her to his citizenship. In the United States, under the act of March 2, 1907, an American woman marrying a foreigner is denationalized whether or not by the law of her husband's country she acquires his nationality.

System of Brazil. In Brazil¹⁴ a system has been established which is virtually opposite to that heretofore described, inasmuch as it provides that a foreigner who possesses real estate in the republic and is married to a Brazilian woman, or has Brazilian children, is considered a Brazilian, provided he resides in Brazil; unless he expressly declares his intention of retaining his original citizenship.¹⁵

System of Ecuador. In Ecuador, a foreign woman married to an Ecuadorian acquires the citizenship of her husband, if she establishes a domicile in his country; and an Ecuadorian woman married in Ecuador to a foreigner does not lose her nationality as long as she remains domiciled in Ecuador.¹⁶

The laws of other Latin-American countries are silent upon this point, and since in principle it is necessary to have the consent of a person for acquiring, as well as for losing, his nationality, if the law does not provide otherwise, it seems to follow that in these countries marriage does not denationalize a native woman.¹⁷

System of Argentina. It has been noted that in Argentina the principle of domicile has replaced that of nationality, and the law establishes in regard to the domicile the same rule that Spain has established in regard to the citizenship of married women. The Argentine civil code¹⁸ provides accordingly that a married woman who is separated by competent authority from her husband preserves the domicile of the latter unless she has created another for herself. The widow retains the domicile which her husband had as long as she does not establish herself elsewhere.¹⁹

¹¹ Art. 2, par. IV, law of May 28, 1886.

¹² Arts. 3 and 4, law of Dec. 21, 1886.

¹⁸ c.c.

¹⁴ Art. 8, law no. 909, Nov. 12, 1902.

¹⁵ See also Panama, 6 pol. c.; Uruguay, 8 pol. c. Cf. Octavio Rodrigo in 6 REVUE DE L'INSTITUT DE DROIT COMPARÉ, 307.

¹⁶ Arts. 13 and 14, law of Aug. 28, 1886.

¹⁷ I F. Laurent, Principes de Droit Civil Français, no. 349.

¹⁸ Art. 90, sec. IX.

¹⁹ A married woman during the existence of marriage takes the domicile and law of her husband: Luzato v. Arquato (Nov. 14, 1912, Camara Federal de Apelación) Jurisprudencia de los Tribunales Nacionales (Nov. 1912) 93-

#### II. REAL ESTATE-GENERAL PRINCIPLE

Real property is always governed by the law of the country in which it is situated.²⁰

Spain, however, makes an exception to this rule in favor of legal and testamentary successions, as well as in regard to the order of succession, as to the amount of the inherited rights and to the intrinsic validity of the testamentary provisions, which are governed by the nationality of the decedent, whatever the nature of the property and the country in which it is located.²¹

The same exception is found in the civil code of Brazil,²² but it is limited to cases in which the decedent was not married to a Brazilian woman, or has not Brazilian children, because in these cases the succession is subject to the laws of Brazil.

On the other hand, in Hayti the law is so strict that not only does it provide that real property is governed by the *lex rei sitae*, but also that foreigners cannot acquire or possess it; thus when a Haytian gives up his citizenship he must part with any real property he may have in Hayti.²³

#### III. PERSONAL PROPERTY

Traditional system. The tradition in the matter of personal property is that it is governed by the law of its owner. An ancient legal proverb states that movables adhere to the bones—meaning that movables are considered a part of the person himself.

Movables were formerly considered of no importance; only real property conveyed honor and consideration to its possessor. The law of each country, therefore, showed little interest in chattels, leaving them to be governed by the law of the person whether citizen or foreigner. An economic revolution later took place, and personal property is now as valuable as real estate; but the law reflects the tradition in Spain, where the civil code²⁴ provides that personal property is subject to the law of the owner.

In countries such as France, where no provision is found, a doubt

^{**} Spain, 10 c.c.; Argentina, 10 c.c.; Bolivia, 3 c.c.; Brazil, 10 c.c.; Chile, 16 c.c.; Colombia, 20 c.c.; Costa Rica, 4 c.c.; Ecuador, 15 c.c.; Guatemala, 5 c.c.; Hayti, 6 c.c.; Honduras, 14 c.c.; Mexico, 13 c.c.; Nicaragua, 16 c.c.; Peru, 5 c.c.; San Salvador, 16 c.c.; Santo Domingo, 3 c.c.; Uruguay, 5 c.c.; and Venezuela, 8 c.c.

I IO C.C.

^{*}Art. 14.

^{*6} pol. c. For further treatment of the capacity of foreigners to acquire real estate, see my treatise on Latin-American Commercial Law, ch. 3.

*Art. 10.

may arise and opinion may be divided, but the weight of authority is for the application of the traditional principle.²⁵

Argentine system. In reference to personal property, a distinction is made in Argentina,²⁶ Brazil,²⁷ and Uruguay;²⁸ when it has a permanent situs, it is governed by the law of the place where it is located; but personal property carried by its owner, or intended for his personal use, whether at his domicile or abroad, as well as personal property to be transported and sold, is governed by the law of the domicile of its owner.

System of Chile. In Chile,²⁹ Colombia,³⁰ Costa Rica,³¹ Ecuador,³² Honduras,³³ Nicaragua,³⁴ and Venezuela,³⁵ personal property as well as real property is governed by the law of the place where it is located.

#### IV. FORMS OF CONTRACTS AND LEGAL ACTS

The legal formal requisites of contracts, wills and other instruments are governed by the law of the country in which they are executed.³⁶

In Costa Rica,³⁷ Guatemala,³⁸ Mexico,³⁹ Panama,⁴⁰ and Venezuela,⁴¹ it is not compulsory to draw instruments according to the law of the place in which they are executed; the party may choose between the law of the country in which the instrument is made and that of the country in which it must have effect.

^{*}Merlin, Répertoire, word "Loi," pr. 6, no. 3; F. Laurent, loc cit. vol. 1, no. 120.

*II c.c.	¹¹ 4 c.c.
¹⁷ 10 C.C.	22 15 c.c.
25 C.C.	# 14 C.C.
* 16 c.c.	* 16 c.c.
²⁰ 20 C.C.	** 8 c.c.

^{*}Spain, II c.c; Anglada de Serres v. Giro y Manzano (Dec. 8, 1902, no. 54, Tribunal Supremo, Cuba). A last will made by a foreigner in Cuba must fulfill all the formalities of the Cuban laws, no matter what the provisions of the law of the foreigner's country. 14 Jurisp. del Trib. Sup. en mat. civil, 664.

Argentina, 12 c.c.; Bolivia, 36 c.c.; Brazil, 11 c.c.; Chile, 17 c.c.; Colombia, 21 c.c.; Ecuador, 16 c.c.; Hayti (Mar. 23, 1829, court of cassation); Honduras, 15 c.c.; Nicaragua, 17 c.c.; and San Salvador, 17 c.c.

^{** 8} c.c.

¹³ C.C.

^{*14} c.c. Dorsay v. Diaz Barriga (Apr. 12, 1911, Segunda Sala del Trib. Sup. del Dist. Fed. Mexico). A foreign document written in a foreign language and presented without translation cannot be accepted. Diario de Jurisp. (1911).

Vega Perez v. Agente del Ministerio Público and Juez del Registro civil (June 26, 1911, Segunda Sala del Trib. Sup. del Dist. Fed. Mexico). A religious marriage entered into in a foreign country in which the same is valid, produces all its effects in Mexico. Documents proceeding from a foreign country when duly authenticated constitute full evidence. Ibid. 1911. Converur y Compañía v. Lack (Oct. 30, 1909) 19 Ibid. 729.

^{*7} cc

⁴⁹ cc

The codes of Spain⁴² and Bolivia⁴³ provide that when the aforesaid instruments are to be authenticated by diplomatic or consular officials of those countries abroad, the formalities required by the respective law of Spain or Bolivia must be observed.

Colombia,⁴⁴ Costa Rica,⁴⁵ Ecuador,⁴⁶ Honduras,⁴⁷ Nicaragua,⁴⁸ San Salvador,⁴⁹ and Venezuela⁵⁰ have another limitation upon the above rule concerning the formal requisites of instruments, which provides that in case the codes or laws of said countries require the public instrument as evidence in matters within the jurisdiction of national courts, private instruments are invalid no matter what force they have in the country in which they were executed.

Argentina,⁵¹ Nicaragua⁵² and San Salvador⁵³ also limit the general principle by providing that contracts concluded in a foreign country conveying rights in real estate situated in the republic have the same force as those made within the state, provided they are executed in a public instrument and are presented legalized. Where the title of real property is sought to be conveyed to them, such conveyance is without effect unless the contract is protocolized by a decree of a judge of competent jurisdiction.

In treating below of wills we shall consider certain provisions referring to legal forms.

#### V. EFFECTS OF CONTRACTS

Argentina⁵⁴ provides that contracts entered into in the republic or out of it, to be performed within its territory, are governed as to their validity, nature and obligation by the laws of the republic whether the contracting parties be nationals or foreigners. Contracts entered into in the republic to be performed outside of it are governed as to their validity, nature and obligation by the laws and usages of the country in which they are to be performed, whether the contracting parties be nationals or foreigners.

In Brazil⁵⁵ the obligations are governed as to the substance and effects they produce by the law of the place where they were contracted. But the law of Brazil governs:

- 1. Contracts entered into in a foreign country which must be performed in Brazil.
  - 2. Obligations contracted between Brazilians in foreign countries.

a II c.c.	₩ 18 c.c.
4 37 c.c.	∞ [•] 9 c.c.
"22 C.C.	⁵¹ 1245 c.c.
<b>"</b> 8 c.c.	53 IG C.C.
# 17 C.C.	53 16 C.C.
₫ 16 c.c.	54 1239 c.c.
4 18 c.c.	# 13 c.c.

- 3. Acts relative to real estate situated in Brazil.
- 4. Acts relative to the Brazilian mortgage system.

In Chile,⁵⁵ Colombia,⁵⁷ Guatemala,⁵⁸ Honduras,⁵⁹ Mexico,⁶⁰ Peru,⁶¹ and San Salvador,⁶² the effects of contracts made in a foreign country, to be performed in the aforesaid countries, are governed by the law of those respective countries.

Peru⁶³ provides that an obligation contracted between foreigners cannot be enforced in that country unless they have submitted themselves to the jurisdiction of the Peruvian courts.

The Costa Rican civil code provides that64

"In interpreting a contract and in determining its immediate and remote effects, the law of the place where it was made shall be taken into consideration; but if the contracting parties have the same citizenship their national law must prevail."

#### VI. WILLS

We have already seen that in most of the Latin-American countries the legal formal requisites of wills are governed by the law of the country in which they are executed; but this general rule suffers some exceptions which we are going to review.

In Argentina, ⁶⁵ Chile, ⁶⁶ Colombia, ⁶⁷ Honduras, ⁶⁸ San Salvador, ⁶⁹ Nicaragua, ⁷⁰ Panama, ⁷¹ and Uruguay, ⁷² it is provided that a written will made by a citizen in a foreign country must be executed by a minister plenipotentiary of his government, a chargé d'affaires or a consul and two witnesses domiciled in the place where the will is made, and bearing the seal of the legation or consulate. When it is not executed before a head of legation, it must be viséed by the latter, if there is a head of legation, at the end thereof in an open will, and on the wrapper in a sealed one. An open will must always be rubricated by the head of legation, at the beginning and end of each page, or by the consul if there is no legation. If there be neither consulate nor

¹⁰ 16 c.c. See *Dorsay v. Diaz Barriga* (Apr. 12, 1911, Segunda Sala del Trib. Sup. del Dist. Fed. Mexico). If the obligations created in a foreign country are to be fulfilled in Mexico they must be governed by the Mexican laws: *Cutelli de Contri v. Contri* (Feb. 1, 1909, Segunda Sala del Trib. Sup. del Dist. Fed. Mexico) 23 *Diario de Jurisp*. (1900) 154. Peru, 1156, 1157 c.p.; Uruguay, 512, 513 c.p.; and Venezuela, 722 c.p.

legation of his country, these formalities must be fulfilled by the minister or consul of a friendly nation. The head of legation or the consul must forward a copy of the open will, or of the inscription on the wrapper of the sealed one, to the minister of foreign affairs of the country that he represents, and the minister, after authenticating the signature of the head of legation or consul, must transmit it to the judge of the last domicile of the deceased, in order that the judge may cause it to be incorporated in the protocols of the notary public of the same domicile. When the domicile of the testator in the country is unknown, the minister of foreign relations must forward the will to the judge of first instance of the capital for incorporation in the protocol of said notary as the judge may determine.

In Argentina, Chile, Colombia and Honduras, the will of a person who is outside of the respective country produces effect within it only if made with the formalities prescribed by the law of the place in which he resides, or according to those observed in the nation to which he belongs, or according to those which the national law prescribes.

According to the code of Brazil⁷⁸ legal or testamentary successions, the order of succeeding, the rights of the heirs and the intrinsic validity of a will are governed by the law of the country of the deceased, whatever the nature of the property and the country in which he is, except as otherwise provided by the Brazilian law in regard to vacant inheritances. If the testator was married to a Brazilian woman or if he left Brazilian children the rights of inheritance are governed by Brazilian law.

The Brazilian consular agents may serve as officers in the execution and approval of wills made by Brazilians in foreign countries, of serving the prescriptions of the Brazilian code.

The Chilean code⁷⁴ and the Colombian code⁷⁵ provide in the matter of inheritances that foreigners are called to the legal successions in Chile or Colombia, in the same manner and according to the same rules as the citizens of those countries. In the legal succession of a foreigner who dies within or without the territory of those republics, citizens must have as hereditary or conjugal portion or as alimony the same rights which belong to them according to the Chilean and Colombia law upon the legal succession of a Chilean or a Colombian. Citizens interested in a succession of that kind may ask for the application of property belonging to the deceased, within the territory of the country, up to the amount that may belong to them in the succession of the foreigner. The same rule is applied when the case

¹¹⁴ C.C.

^{14997, 998} c.c.

^{™ 1052, 1053} C.C.

may give to the succession of a citizen of those countries who leaves an estate in a foreign country.

In Guatemala the civil code⁷⁶ provides that in regard to legal formalities and wills, the laws of the countries in which they are executed must prevail. Natives or foreigners residing outside the territory of the republic may, however, comply with the legal formalities provided for by the law of Guatemala in cases in which the will must be complied with in that republic.

The rights and obligations arising from wills executed in a foreign country by citizens of Guatemala are governed by the law of Guatemala in all that must take effect in the republic.

In regard to the essential requisites of a will, the testator may choose between his national law and that of Guatemala, when the testament must be executed in the territory of the latter and the testament refers to personal property. As to real estate situated in Guatemala the laws of the republic must be observed.

According to the code of Hayti¹⁷ and the code of Santo Domingo,⁷⁸ citizens of those republics who are in a foreign country may draw their wills in a private document, written, dated and signed in their own handwriting, or in a public instrument with the formalities established in the country in which they are.

Testaments made in a foreign country cannot be executed so far as they refer to property situated in those republics, except after being filed in the registry at the domicile of the testator, or if that be unknown, in the registry at his last known domicile. In case the testament contains provisions relating to real property situated in those republics, it must also be filed in the office of the place in which it is situated.

The code of Mexico⁷⁹ provides that the Mexican law governs real property whether owned by citizens or foreigners, and that foreigners have no capacity to inherit either by will or by legal succession when, according to the laws of their countries, Mexicans are not permitted to receive legal or testamentary inheritances.⁸⁰

The code of Peru⁸¹ prescribes that foreigners residing in that country can devise to other foreigners the real property that they possess in their own country, or bequeath personal property, jewelry, money or merchandise which they have in the territory of Peru, according to their national law. But in disposing of the real property located in Peru, they are subject to the laws of Peru.

¹³⁻¹⁵ c.c.

^π805, 806 c.c.

^{™ 999, 1000} c.c.

¹⁹ 13 c.c.

^{** 3300} c.c.

⁴⁷⁵ C.C.

#### VII. FOREIGN JUDGMENTS

#### Procedure

It is a general principle that final judgments rendered in foreign countries have in the territory of a nation that force provided for in the respective treaties with those countries.⁸²

Some nations, accepting the principle of reciprocity as a basis, prescribe that when there are no special treaties with a foreign nation in which the judgment was rendered, the judgment shall have the same force that is given in that nation to final judgments of the country in which it is to be enforced. If it is rendered in a country under whose laws judgments rendered in the other nation are not executed, the judgment is not enforceable in the latter.⁸³

The following conditions must be satisfied before a foreign judgment may be enforced:

- 1. That it is final, and that it was rendered in a personal action.
- 2. That it is not a judgment by default.
- 3. That the obligation for the enforcement of which the action was instituted was lawful according to the laws of the country in which the request is made for its execution.
- 4. That the letter rogatory possesses the formal requisites which are necessary for its validity as evidence in the country in which it was issued and in the country in which its enforcement is requested.⁸⁴

Chile, 240, 241 c.p.; Colombia, 876, 877 c.p. Judgments of foreign courts shall be without force in Colombia. unless a treaty otherwise provides. See Medellin (Aug. 2, 1906) 378; Garavito, Jurisp. de los Tribs. de Colombia; In re Echeverria (Jan. 11, 1900, no. 5, Tribunal Superior, Cuba). See also 4 Jurisp. del Trib. Sup. en materia civil (1908) 10, and the case of In re Anglada de Serres v. Giro y Manzano (no. 54).

In this matter of proving foreign laws in Colombia, the provision of article 13, law no. 124, 1890, is also important. It reads as follows:

"Powers of attorney, acts referring to the civil status of persons and other documents executed in foreign countries, which the interested parties may produce before the courts and tribunals of Colombia, in order to prove their claims, shall be considered valid if they have been authenticated according to the Colombia laws. After they have been so authenticated, they are presumed to have been executed in conformity with the law of the place of their origin, unless the adverse party presents proof to the contrary."

"Spain, 954 c.p.; Argentina, 559 c.p.; Colombia, 878 c.p.; Costa Rica, 1067 c.p.; Cuba and Porto Rico, 953 c.p.; Ecuador, 500 c.p.; Guatemala, 1566 c.p.; Honduras, 238 c.p.; Mexico, 785 c.p. See Cutelli de Contri v. Contri, note 60,

Spain, 951 c.c.; Argentina, 558 c.p.; Bolivia, 7 c.c.; Chile, 239 c.p.; Colombia, 876 c.p.; Cuba and Porto Rico, 950 c.p.; Ecuador, 235 c.p.; Guatemala, 1563 c.p.; Honduras, 235 c.p.; Mexico, 780 c.p.; Peru, 1155 c.p.; San Salvador, 450 c.p.; and Uruguay, 511 c.p.

Spain, 952, 953 c.p. A decision by the courts of Argentina, In re Bueno v. Royal Insurance Co. (Aug. 5, 1912) stated that judgments of foreign courts have no extraterritorial effect. Rev. de Leg. y Jurip. de la Rep. Argentina (1914) 568.

Chile prescribes that when a foreign judgment is to be enforced there by reason of a special treaty or through reciprocity, the judgment shall have in the territory of Chile the same force which the decisions of Chilean courts have in the country in which the judgment was rendered, provided it has the following requisites:

- That it does not conflict with the laws of the republic.
- That it does not encroach upon the national jurisdiction.
- That it is not a judgment by default.
- 4. That it has been declared enforceable by the laws of the country in which it was rendered.

In Peru the code of civil procedure prescribes, in matter of foreign judgment or decrees, as follows:

Art. 1159: "In order that a foreign judgment be declared enforceable by the superior courts of the country it is required: that it shall not pass upon matters pertaining to the jurisdiction of the Peruvian courts, as set forth in the following article; that it is not contrary to good customs or to prohibitory laws of the republic; that it has the character of a final and enforceable judgment in accordance with the laws of the country in which the action was brought; and that the judgment debtor be served with process in the manner prescribed by the laws of the place."

Art. 1160: "Peruvian courts have exclusive jurisdiction in cases

relating to the following matters:

"I. Real estate located in the territory of the republic.

"2. Vessels under the Peruvian flag.

"3. Civil actions arising out of crimes, quasi-crimes, or negligence which occurred in Peru.

"4. Inheritances of Peruvians or of foreigners domiciled in Peru, whenever citizens of or foreigners residing in Peru or a Peruvian charitable institution or the state of Peru have an interest in the estate."85

supra. In order to execute a foreign judgment in Mexico it is necessary that the judgment has been rendered in a personal action.

The action of divorce is not a personal action: Diario Jurisp. loc. cit; San Salvador, 451 c.p.; Uruguay, 514 c.p.

ss In this connection, Colombia has an important provision relating to the manner in which the legality of a judgment must be proved, which is often a difficult matter. Art. 879, c.p. reads:

"The force and legality of a judgment rendered in a foreign country are proved by means of a certificate from the diplomatic or consular agent of Colombia or of a friendly nation residing in the aforesaid country. This certificate must state:

"I. That the judgment was rendered in accordance with the laws of that

country.

"2. That according to said laws, the judgment debtor has exhausted his legal remedies.

"Should there be no diplomatic or consular agent of Colombia or of any other friendly nation in the country in which the judgment was rendered, the certificate referred to in this article may be obtained from the secretary of state of said country, through the Minister of Foreign Affairs of Columbia."

#### VIII. INTERNATIONAL CONGRESS OF MONTEVIDEO

One of the most notable events in the history of Latin-American private international law was the meeting of the South American International Congress in Montevideo during the years 1888 and 1889. At that Congress the following countries were represented: Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay.

Eight treaties were drafted on the following matters: International civil law, legal procedure, copyright, international commercial law, international criminal law, the liberal professions, patents and trade marks, and an additional protocol.⁵⁶

Brazil and Chile did not accept those treaties. The main reason for their refusal was that in their law they follow the rule derived from the principle of nationality for solving the conflicts of law, whereas the treaties accept the principle of domicile.

Dr. Andrade Figueiras, representative of Brazil, in opposing the acceptance of the Montevideo treaties on the ground of their acceptance of the principle of domicile instead of that of nationality, summarized his objection thus:

"The law of the domicile for governing the relations whether of citizens or foreigners, means a retrogression in the evolutionary progress of our science, and is almost the derogation of the principles which constitute the basis of private international law.

"The economic interest of the new countries in itself makes the adoption of the law of nationality advisable for the solution of questions relating to the status and civil capacity of foreigners, and for their succession."

The same representative considered the principle of domicile, far from protecting new countries, as an obstacle to the attraction of capital and to the settlement of immigrants; this principle aims to break the relations of the immigrants with the country of origin.

Among the rules established in the treaty on international civil law, the following are worth noticing:

- Art. 1. The capacity of persons is governed by the law of their domicile.
- Art. 2. A change of domicile cannot alter the capacity already acquired as a result of emancipation, legal majority or judicial declaration of competency.
- Art. 5. The law of the place where a person resides determines the conditions necessary to constitute a domicile.
- Art. 6. Parents, guardians and curators⁸⁷ have their domicile in the territory of the state from whose laws they derive their functions.

^{**}These treaties were ratified by the Argentine Congress on December 6, 1894; by the Congress of Peru on October 25, 1889; by that of Paraguay on September 10, 1889, and by that of Bolivia on February 25, 1904.

A curator is a person appointed to supervise the acts of the guardian.

- Art. 8. The domicile of husband and wife is where the legal partnership of marriage has been established, and in default thereof it is presumed to be that of the husband. A woman judicially separated from her husband retains his domicile so long as she does not establish another.
- Art. 9. Persons not having a known domicile are considered as domiciled in the place of their residence.
  - Art. 13. The law of the matrimonial domicile governs:
  - (a.) The separation of husband and wife.
- (b.) Their divorce, provided the reason alleged therefor is admitted by the law of the place in which the marriage took place.
- Art. 26. Property, whatever its nature, is governed exclusively by the law of its *situs*, in matters relating to its character, possession, and alienation, absolute or relative, and to all the legal relations, real in character, of which it is capable.
- Art. 29. Debts are considered as situated in the place in which the corresponding obligations are to be performed.
- Art. 30. A change in the location of property does not affect rights acquired in accordance with the law of the place where it was at the time of the acquisition. The interested persons, however, are bound to fulfill the formal and substantial requisites necessary by the law of the place of the new location in order to acquire or preserve the aforesaid rights.
- Art. 31. Rights acquired by third parties in such property according to the law of its new location, after the change has been made, prevail over those of the first owner.
- Art. 33. The same law governs their creation, nature, validity, effects, consequences and performance: in short, all matters of whatever nature concerning contracts.
- Art. 34. It follows that contracts relating to certain and specific things are governed by the law of the place where such things are at the time of the execution of the contract.

Those relating to things determined only by their class, by the law of the domicile of the obligor at the time of entering into the contract.

Those relating to fungible things, by the law of the domicile of the debtor at the time of the agreement.

Those dealing with the performance of services:

- (a.) If they refer to things, by the law of the place where they were at the time of the execution of the contract.
- (b.) If their efficacy is related to some special place, by that in which there are to produce their effect.
- (c.) In other cases, by that of the domicile of the debtor at the time the agreement was entered into.
  - Art. 35. A contract for the sale of goods in different places where

conflicting laws prevail is governed by the domicile of the contracting parties, should it be common at the time of the agreement; otherwise by the law of the place in which the contract was entered into, should their domicile be different.

- Art. 36. Accessory contracts are governed by the law of the principal obligation to which they refer.
- Art. 37. The final conclusion of contracts entered into by means of correspondence or agents is governed by the law of the place whence the offer started.
- Art. 39. The form of public instruments is governed by the law of the place where they are executed.
- Art. 51. Negative prescription of personal actions is controlled by the law to which the obligations out of which they arose are subject.
- Art. 52. Negative prescription of real actions is governed by the law of the place where the burdened property is situated.
- Art. 53. If the burdened property is chattel and its location has been changed, prescription is governed by the law of the place where the necessary period of prescription has been completed.
- Art. 54. Acquisitive prescription of chattels or of realty is governed by the law of the place in which the property is situated.

In the convention relating to *legal procedure* we find the following rules:

- Art. 1. Actions at law and their incidents, whatever their character, shall be presented in accordance with the law of the nation in which they are instituted.
- Art. 2. Evidence shall be admitted and evaluated or righted according to the law governing the subject-matter of the action. From this rule is excepted such evidence as is not authorized by the law of the place in which the action is proceeding.
- Art. 3. Judgments of courts and decisions of arbitrators duly confirmed, rendered in civil or commercial cases; public instruments, and those issued by officers of the state, which have been authenticated and letters rogatory or requisitorial shall be given effect by each of the high contracting parties according to the stipulations of this treaty, provided they are properly legalized.
- Art. 4. A legalization is considered properly made when it takes place according to the law of the country where the document originated, provided it has been authenticated by the diplomatic or consular agent of the country in which its enforcement is asked. This consular agent must reside in the place where the document is legalized.
- Art. 5. Judgments or decisions by arbitrators and acts of non-contentious jurisdiction issued in civil or commercial matters in one of the countries which is a party to this agreement, shall have the same force in the territory of the others that they have in the issuing country, provided they possess the following requisites:

- (a.) That the judgment was rendered by a court which is competent in the international acceptance of that word.
- (b.) That it had the character of a final judgment, considered as res judicata in the country in which it was rendered.
- (c.) That the party against whom it was rendered was legally summoned and represented in the suit or else that he was declared to be in default in accordance with the laws of the country where the action was instituted.
- (d.) That it is not contrary to the public policy of the country in which it is to be executed.
- Art. 6. In requesting the enforcement of a judgment the following documents shall be required:
  - (a.) A complete copy of the judgment or arbitrator's decision.
- (b.) A copy of all the papers necessary to prove that the parties were cited.
- (c.) An authenticated copy of the judicial decree in which it is declared that the judgment or arbitrator's decision has the character of a final judgment and has been established as res judicata, as well as a copy of the laws upon which said decree is based.
- Art. 7. The character of executive or compulsory judgments or arbitrator's decisions and the proceedings which must be followed in order to execute them shall be determined by the law of procedure of the country in which execution is demanded.
- Art. 8. Matters falling within noncontentious jurisdiction, such as inventories, opening of last wills, appraisements or other acts of like nature performed in one state shall have in the other contracting states the same force and effect as if they had been performed in their own territory, provided they have the requisites established in the previous articles.
- Art. 9. Letters requisitorial or rogatory whose object it is to serve legal notices, to receive testimony of witnesses or to perform any other judicial act, must be complied with in any of the contracting countries, when such letters have all the requirements exacted by this treaty.
- Art. 10. When the letters requisitorial or rogatory refer to attachment of property, appraisements, inventories or provisional remedies, the judges shall do everything necessary respecting the appointment of experts, appraisers, depositories;—i. e., everything that may lead to the best fulfillment of the commission.
- Art. 11. Letters requisitorial or rogatory shall be carried out in accordance with the laws of the country in which the execution is requested.
- Art. 12. Persons interested in the execution of letters requisitorial or rogatory may at their expense appoint attorneys.

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#### NEGOTIABILITY AND THE RENVOI DOCTRINE

A recent English case decides two interesting and very important questions in the Conflict of Laws. A, of Liverpool, bought cotton from B in the United States, who drew a bill of exchange on A, which contained in the margin the date of the sale contract and a reference to the quality of the cotton and in the body of the document the words "value received and charge the same to account of  $\frac{100}{R.S.M.I.}$  bales of cotton." C, in New York, in good faith purchased the draft with what purported to be the bill of lading of the cotton attached, and sent the documents to A, who accepted the draft and paid it at

[1046]

maturity. The bill of lading was a forgery and no cotton had been shipped. On discovery of the fraud, A brought an action in the District Court of the United States for the Southern District of New York to recover back from C the amount of the money paid. trial court, treating the question as one of American law, rendered judgment in A's favor. The judgment was reversed by the Circuit Court of Appeals1 and a new trial ordered on the ground that the case was governed by English law and that the trial judge had disregarded the evidence before him of what the English law was. In order to avoid the necessity of taking evidence of expert witnesses concerning English law at the new trial, C decided to obtain a declaratory judgment of the English courts upon the English law applicable.2 The King's Bench Division held that the judgment of the American court was binding upon the parties in England, but that according to English law the rights of the parties depended upon American law. It was held, therefore, that A was entitled to recover the money paid. Guaranty Trust Co. of New York v. Hannay & Co. [1918] 1 K. B. 43.

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It is evident at the outset that the English court sanctions the renvo: doctrine in the Conflict of Laws. It purports to decide the case according to English law as directed by the judgment of the United States Circuit Court of Appeals, but it decides it actually according to American law. The term "English law" to which the American judgment referred may have one of two meanings. It may mean the internal law of England relating to negotiable instruments, foreign bills of lading, etc., exclusive of the English rules of the Conflict of Laws, or it may mean the English law as a whole, inclusive of its rules of the Conflict of Laws. The renvoi doctrine, so-called, signifies that the foreign law, to which the rules of the Conflict of Laws of the forum refer the controversy, is understood in the latter sense. The King's Bench Division accepts the interpretation last mentioned, apparently without being aware that in so doing it takes sides with respect to one of the most disputed problems in the Conflict of Laws.3 Indeed, it accepts the renvoi doctrine in its most extensive form-

¹ Guaranty Trust Company of New York v. Hannay et al. (1913, C. C. A. 2d) 210 Fed. 810.

²For a discussion of the English procedure permitting merely declaratory judgments, see article by Prof. Borchard to appear in the following number.

^{*}For a discussion of the problem, see Lorenzen, The Renvoi Theory and the Application of Foreign Law (1910) 10 Columbia L. Rev. 190, 327, and The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country" (1918) 27 Yale Law Journal, 509; Schreiber, The Doctrine of the Renvoi in Anglo-American Law (1918) 31 Harv. L. Rev. 523. A bibliography of the subject may be found in 27 Yale Law Journal, pp. 531-534.

that of "forward reference." In applying it to the validity and obligation of contracts, as distinguished from capacity and matters of form, it goes beyond any English⁴ or Continental⁵ court in the matter. Practical considerations of a very decisive character speak against the adoption of the renvoi doctrine in any form.⁶ Its application to contracts in general is well-nigh impossible. Hence it is recognized by even the most ardent advocates of the doctrine that it should not be extended to commercial contracts.⁷ All questions of the Conflict of Laws should be settled, save in a few exceptional cases,⁸ by the rules of the Conflict of Laws of the forum, and the foreign law which these rules adopt should be understood to be the foreign law on the ultimate question to be determined, and not the foreign rules of the Conflict of Laws.

 $\mathbf{I}$ 

How did the English court reach the conclusion that American law was applicable? It was conceded in the case that the acceptor could recover his money if the draft was non-negotiable. And it was found that according to the American law of Bills and Notes the instrument paid was a mere conditional order, but that, if it were governed wholly by the English law of Bills and Notes, it would be a negotiable draft. The question therefore arose whether, as regards the English acceptor, the law of England or that of the United States should decide the negotiability of the instrument. The English court answered this question by reference to the Conflict of Laws provisions of the English Bills of Exchange Act. Section 72 of that Act provides as follows:

"(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue. . . .

"Provided that . . . (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment

⁴ (1910) 10 COLUMBIA L. REV. 332, et seq.; (1918) 31 HARV. L. REV. 537, et seq.

^{6 (1910) 10} COLUMBIA L. REV. 192-193.

^{*(1910) 10} COLUMBIA L. REV. 205-206; (1918) 27 YALE LAW JOURNAL, 524, ct seq.

¹ Although the German code has accepted the *renvoi* doctrine, the consensus of German juristic opinion appears to have been opposed to the application of the doctrine to contracts in general. See 4 Verhandlungen des 24 Deutschen Juristentages, 76.

^{*}Concerning such exceptions, see (1918) 27 YALE LAW JOURNAL, 529, et seq.

*If there had been a difference between the English and American law on this point, the English law would probably have controlled, even though the question arose in the United States, because the matter relates to the performance of the contract.

thereof, be treated as valid between all persons who negotiate, hold, or become parties to it in the United Kingdom."

These provisions apparently support the proposition that if the instrument is negotiable under the law of the place of its issue it will be deemed so with respect to all parties, but if it is non-negotiable according to such law, it may be negotiable, nevertheless, as between persons who hold or become parties to it in the United Kingdom. The conditions required by proviso (b) of the English Act are, however, (1) that the bill shall conform to the law of the United Kingdom as regards requisites of form; (2) that the suit shall be "for the purpose of enforcing payment thereof"; (3) that it arise between persons who negotiate, hold, or become parties to it in the United Kingdom. The instant case appears to be the first involving an interpretation of this proviso of the English Act. Had the case turned wholly on the second of the above conditions, that is, had both parties to the suit become parties to the instrument in England, an interesting question might have arisen in determining whether the instrument was to be considered as negotiable for the purpose of enforcing payment against the acceptor even though all the facts were known, but nonnegotiable when the suit was the other way, so that the acceptor, having paid voluntarily in ignorance of the facts, could at once recover back what he had paid. It seems absurd to say that a party can, on a given state of facts, recover back money paid, although, if he had not already paid it, he could now on the same state of facts be compelled by suit to pay. In the actual case, however, it is not quite clear whether the second or the third condition was held controlling. The court admits that if the acceptor had refused to pay an English holder, suit might have been maintained on the acceptance. But the question was, says the court, "Was this draft a conditional order when the plaintiffs bought it, and when they presented it for acceptance to the defendants, and they accepted it? This question is untouched by the proviso." It is true that the plaintiff, C, did not become a party to the instrument in the United Kingdom, but C transmitted it to a bank in Liverpool to be presented there to A for acceptance, and after acceptance C negotiated it in England, and payment was finally made to a London bank, as the ultimate holder. It would seem therefore that C might have been held within the description of "persons who negotiate, hold, or become parties to [an instrument] in the United Kingdom."

Enough has been said to show the difficulties of construing the proviso of the English Act and to indicate a doubt whether, purely as a question of construction, the decision of the King's Bench Division was correct. It would have been better if the proviso in the English Act had followed the example of either the Argentine Commercial

Code¹⁰ or the German Bills of Exchange Law,¹¹ and simply imposed general liability on any person becoming a party to the instrument in the United Kingdom.

The proviso being out of the case, the English court proceeded to apply the general Conflict of Laws provision of subsection (1) of Section 72 of the English Act. The case illustrates in a most striking manner the strange consequences to which the recognition of the renvoi doctrine in the Conflict of Laws may lead. An American appellate court decides that the lower court erred in applying American law to determine the negotiability of an instrument with respect to an acceptor, and that this question is to be determined according to English law. The judgment is regarded as binding upon the parties in an English court. Suit is brought thereupon in England to get a decision on the English law, and behold, it is gravely answered that American law governs! One almost wonders why the English court did not go one step further. If "English law" includes English Conflict of Laws, why does not "American law" include American Conflict of Laws? Having found, then, that the "English law" invoked by the American court "throws the parties back upon American law," why did not the English court hold, under the decision of the American court, recognized as binding on the parties, that "American law" would "throw the parties back upon English law?" And so the game of battledore and shuttlecock might continue indefinitely.

Or, if it be said that the *renvoi* principle can be applied but once in a single controversy, it is interesting to speculate on what law of Bills and Notes the English court would have applied, had the suit been brought in England in the first instance. Apparently it would have been held, under the Bills of Exchange Act, that American law governed. Would the *renvoi* then have been invoked to apply the American doctrine of Conflict of Laws and "throw the parties back upon English law?" If so, the only reason for reaching a different result in this case, and finally applying American Bills and Notes law, would seem to be that in this case an American court had first held, in a decision binding on the parties, that English law applied!

¹⁰ The Argentine Code applies only to endorsers. It reads as follows: "Nevertheless, if the statements made in a foreign bill of exchange are sufficient according to the laws of the Republic, the circumstance that they are defective according to foreign laws cannot give rise to defences against endorsements afterwards added in the Republic." Art. 738.

¹¹ The German Code provision refers to acceptors as well as to endorsers. It provides as follows: "If, however, the statements inserted abroad on the bill satisfy the requirements of the inland law, no objection can be taken against the legal liability incurred by statements subsequently made within the Empire (Inland) on the ground that the statements made abroad do not satisfy the foreign law." Art. 85.

It is to be remembered, however, that the real question is whether the English court correctly interpreted the American decision, and that the American court will have the last word. When the Circuit Court of Appeals referred the parties to English law, did it mean English Bills and Notes law only, or English Conflict of Laws? The opinion would seem to indicate the former. The evidence which the lower federal court disregarded seems to have related solely to the law of Bills and Notes, as distinguished from Conflict of Laws. If this is what the Circuit Court of Appeals meant, then its decision conclusively determined between the parties all questions of Conflict of Laws involved, and the only question left open was what the English law of Bills and Notes might ultimately be found to be. English court discussed this question and held that under English Bills and Notes law the acceptor would be bound and could not recover back. So much of the decision, if it stands unreversed in England, would presumably be binding on the parties in subsequent proceedings in the American courts. The rest of the English decision the American courts are at liberty to disregard, as at variance with the decision already rendered by the Circuit Court of Appeals between the same parties on the question of Conflict of Laws, and resulting only from a misinterpretation of that decision by the English court.

It is to be hoped that the New York federal courts will hold fast to the distinction between questions of Conflict of Laws and questions of Bills and Notes, and will not be misled by any errors of the English courts into giving their sanction to this astonishing and unfortunate extension of the *renvoi* doctrine. To follow the English courts into that maze can lead only to hopeless confusion in our commercial law.

As this is written, we note a report in a New York newspaper for May 30th to the effect that the English decision has been reversed by the Court of Appeals. The grounds of reversal are not stated, but may be awaited with interest.

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A few words may be added in regard to the American rule of Conflict of Laws in respect to the negotiability of instruments, which was applied by the Circuit Court of Appeals in the case under discussion. Most American courts decide the question in accordance with the general rule that the law of the place of payment governs the validity and obligation of contracts.¹² As each endorsement or acceptance on a bill or note is regarded as a separate contract governed by the law

¹² Strawberry Point Bank v. Lee (1898) 117 Mich. 122, 75 N. W. 444; Barger v. Farnham (1902) 130 Mich. 487, 90 N. W. 281; Freeman's Bank v. Ruckman (1860, Va.) 16 Gratt. 126.

of the place of its performance, and this place of performance is not necessarily the same for all parties, the conclusion has been drawn that the negotiability of the instrument should be determined with respect to each party by the law governing his contract.13 The United States Circuit Court of Appeals held therefore, upon the basis of the American decisions, that the liability of the English acceptor in the present case was controlled by English law. It is submitted, however, that the principle on which the American courts proceed is unsound, and that the provisions of the English Bills of Exchange Act approach more nearly to the correct solution of the problem. Bills of exchange cannot be regarded from a purely local point of view. They have international functions to perform, and they cannot serve this purpose unless the status as negotiable documents which the law at the time of their issue has conferred upon them is recognized in all countries with respect to all parties. Whether the governing law should be the law of the place where the original instrument was issued, that is, the law of the place where it was delivered, or whether it should be controlled by the law of the place where the principal contract was to be performed, need not be investigated here, although it would seem reasonably clear that in the absence of an international agreement adopting the law of the place of payment of the instrument as the law governing the rights and obligations of all parties, the law of the place of issue should be given the preference.

It does not follow, of course, that if the original instrument is non-negotiable under the law applicable at the time of its creation, a person accepting or endorsing the instrument in a different state or country might not justly be held in the courts of that state or country as an acceptor or endorser of a negotiable instrument. If the original instrument would have been regarded as negotiable had it been executed in the state where the person in question becomes a party to the instrument, there is no reason why on grounds of local policy aiming to protect purchasers of foreign bills of exchange the local acceptor should not be deemed by his own courts to have assumed liability on that basis.¹⁴

As regards an endorser, such a result may be derived without express legislation from his implied warranty that at the time of the endorsement the instrument is an existing bill or note. The endorsee, who is not chargeable with knowledge of foreign law, may well claim that the endorser's warranty should protect him against a non-validity arising from foreign law. An acceptor, on the other hand,

¹³ Hyatt v. Bank of Kentucky (1871, Ky.) 8 Bush. 193; Mackintosh v. Gibbs (1911) 81 N. J. L. 577, 80 Atl. 554; Nichols v. Porter (1867) 2 W. Va. 13.

¹⁴ See Lorenzen, The Rules of the Conflict of Laws Applicable to Bills and Notes (1917) 1 Minn. L. Rev. 328-332.

does not warrant the validity of the instrument and herce would not be estopped, without specific legislation to that effect, to set up the invalidity of the original instrument under a foreign law. In a number of foreign countries both the endorser and the acceptor are made liable under the above circumstances by express legislation.¹⁵

While the foregoing argument would lead to the conclusion that, in a case like the instant cases, the American courts should on principle apply American law to determine the rights of all parties, this criticism of the American decision should not obscure the fact that it was not only in accord with the great weight of American authority, but was a binding adjudication between the parties. Rightly or wrongly, it settled the rule for this case that English law was to apply, and no question of its theoretical soundness will justify the English court in "throwing the parties back on American law."

### AMENDMENTS FROM EQUITY TO LAW AND THE STATUTE OF LIMITATIONS

Looked at from different viewpoints a given set of facts may be regarded as giving rise to different causes of action. A trespassory taking and carrying away of another's chattel, for example, may be looked at as an unlawful invasion of another's possession, for which the common law remedy is an action of trespass; it may, on the other hand, be viewed as an assertion of that kind of unlawful dominion over another's property which we call a conversion, for which the common law action is trover.1 Again, according to many authorities, it may be treated (where the chattel is permanently retained by the tort feasor) as resulting in an unjust enrichment for which an action of indebitatus assumpsit for goods sold and delivered will lie.2 If to the trespassory taking and retention there be added the additional fact that the chattel has been sold by the tort feasor, it is universally held that an action for money had and received may be brought. In other cases either trespass for injury to person or property or trespass on the case for negligence resulting in injury to person or property will lie-e. g., where one negligently drives his carriage against the person or property of another.3 In still others, the injured person has his choice between legal and equitable actions. An example of the latter

¹⁵ German Bills of Exchange Law, art. 85; Argentine Commercial Code, art. 738. See also English Bills of Exchange Act, sec. 72, subsection (1), proviso (b), discussed in the text.

¹ Basset v. Maynard (1601, Q. B.) Cro. Eliz. 819, is one of the early cases so holding; see also 1 Rolle, Abr., 105 (M) pl. 5.

² One of the best discussions of the problem involved is found in the opinion in *Braithwaite v. Akin* (1893) 3 N. D. 365, 56 N. W. 133.

^{*} Williams v. Holland (1833, C. B.) 10 Bing. 112.

kind is found where property has been obtained by means of fraud. Here if the property conveyed be real estate, it may be recovered by bill in equity; on the other hand, the injured party has his option to retain what he received from the defendant and sue at law for damages in an action for deceit.

In cases of this kind the question arises whether commencing an action in which one of two or more alternative remedies is asked will stop the running of the statute of limitations against the other remedies, at least to the extent that the plaintiff may amend his statement of claim so as to shift to one of the other points of view without being subject to defeat by a plea of the statute. This problem is involved in the recent case of Friederichsen v. Renard (1918, U. S.) 38 Sup. Ct. 450. The petitioner in that case filed a bill in equity in the United States District Court for the District of Nebraska, asking for the cancellation of a deed to land, on the ground that the defendants had obtained the same by fraudulent representations as to land which the petitioner took in exchange. The master to whom the case was referred reported that the plaintiff had lost the right to equitable relief because, after learning of the fraud, he had cut a quantity of timber on the land received from the defendants. The case was then, pursuant to equity rule 22, transferred to the law side of the court, and the plaintiff was permitted to file an amended petition praying for a judgment at law for damages for deceit. To the amended petition the defendants pleaded the Nebraska four year statute of limitations. The District Court held that the cause of action stated in the amended petition was barred by the statute. This judgment, affirmed by the Circuit Court of Appeals, was unanimously reversed by the United States Supreme Court, on the ground that the causes of action stated in the original petition and in the amended petition were but different aspects of one transaction, and that, for the purpose of preventing the statute of limitations from continuing to run against them, suit on one was suit on both.

The result reached by the learned court seems equally sensible and sound, but it departs very clearly from older traditions. Obviously, so long as law and equity were administered by separate tribunals, the petitioner in the principal case would have been unable to meet successfully the plea of the statute when, after losing in the equitable proceeding, he began the suit at law. Now that one tribunal administers both law and equity, however, the problem should be treated as not different from that in cases in which the plaintiff seeks to amend from one common law form of action to another. In cases of the latter kind the various jurisdictions have rules of varying strictness and liberality. In some an amendment which seeks to shift from one common law form to another, as from trespass to case or case to trespass, while permissible as an amendment, is regarded as

substantially beginning a new action and so subject to a plea of the statute of limitations, even though it is apparent that the same general transaction is involved.4 Other courts take a more sensible and liberal view, similar to that in the principal case, and do not allow the statute to defeat an honest litigant who has been trying to enforce his rights, but who has been badly advised by his lawyer as to the precise remedy open to him.⁵ The question is, it seems clear, purely one of the fair construction to be given to the statute of limitations, i. e., what may fairly be called starting suit within the meaning of the statute so as to give the defendant fair notice of the nature of the plaintiff's claim? In certain jurisdictions—fortunately few in number-a most narrow and illiberal view prevails, viz., that a declaration which omits absolutely an essential allegation may not, after the statute has run, be amended to insert the missing allegation, even though no attempt is made to change the form of action.6 The reason given for this illiberal view is that the original declaration was defective in substance and so in legal effect equivalent to no declaration at all. Decisions of this kind cannot be supported upon any ground of policy or fair dealing. The rules which determine what allegations must go into a declaration or statement of claim are necessarily in many respects arbitrary, and a litigant ought not to lose his cause of action because his attorney has made an error of the kind in question. For this reason the rule in most jurisdictions is contrary to that established by the courts just referred to.7 The just rule would seem to be that where there has been a fair and honest attempt within the statutory period to enforce the rights growing out of the transaction in question, a plea of the statute should not be permitted to bar the plaintiff from shifting to a different remedy, although the result may be to change from one form of action to another, or even from equity to law or law to equity. It is indeed fortunate that the Supreme Court has added the weight of its great authority upon the side of justice and common sense.

# FOREIGN INHERITANCE TAXES AS DEDUCTIBLE ADMINISTRATION EXPENSES

The increasingly prevalent mode of taxation commonly known as the inheritance tax is usually based upon the theory that the tax is laid upon the legal privilege of the legatee, devisee or heir to acquire property of the decedent by will or by descent.¹ The measure of the

⁴ Hess v. Birmingham Ry. Co. (1906) 149 Ala. 499, 42 So. 595.

^{*}Reynolds v. Missouri, K. & T. R. R. Co. (1917, Mass.) 117 N. E. 913.

^{*}Foster v. St. Luke's Hospital (1901) 191 Ill. 94, 60 N. E. 803.

McLaughlin v. West End St. Ry. Co. (1904) 186 Mass. 150, 71 N. E. 317.

¹While the tax is commonly described as a tax on the privilege of succession, it is believed to be more strictly accurate to consider it a tax on the

tax is commonly the value of the property so acquired as of the time of death of the testator or the intestate decedent. Consequently the tax is determined by the value of the beneficiary's "net succession," that is, the property which remains for distribution to him after payment of debts and expenses of administration.² But just what items may properly be included as expenses of administration is a matter on which the courts have frequently reached different conclusions. In Corbin v. Townshend (1918, Conn.) 103 Atl. 647, the Supreme Court of Connecticut has rendered a decision of first impression holding that the estate tax payable under the federal act, and also inheritance taxes payable under the statutes of various states, are expenses of administration properly deductible in determining the net estate subject to the Connecticut inheritance tax of a testatrix resident in Connecticut.

The Connecticut tax is of the sort above mentioned—a succession tax or "death duty" prescribed in respect to the beneficial interest passing by force of Connecticut law to the beneficiaries of the decedent, and measured by the value of the property so passing,² i. e., by the value of the distributive share as of the time of the

exercise of such privilege, i. e., on the passing of the property. When a legatee renounces his legacy, no tax in respect to such legacy is collectible. Matter of Wolfe (1903, N. Y.) 89 App. Div. 349, 85 N. Y. Supp. 949, affd. 179 N. Y. 599, 72 N. E. 1152; Estate of Stone (1906) 132 Iowa, 136, 109 N. W. 455.

Sometimes the tax appears to be considered as a tax upon the privilege of the decedent to transmit rather than upon the privilege of the beneficiary to acquire. In *Minot v. Winthrop* (1894) 162 Mass. 113, 38 N. E. 512, Field, C. J., said: "But the right or privilege taxed can perhaps be regarded either as the right or privilege of the owner to transmit it on his death, by will or descent, to certain persons, or as the right or privilege of these persons to receive the property." See also *United States v. Perkins* (1895) 163 U. S. 625, 628, 16 Sup. Ct. 1073. In *Nettleton's Appeal* (1903) 76 Conn. 235, 56 Atl. 565, Hamersley, J., said:

"Nor is it material to the essence of the tax at what time it is ascertained and collected during the passage of the property, through the channel of the law, from the dead to the living; whether the property is tapped as it falls from the lifeless hand, or midway in its course, or as it passes into the grip of the new owner; whether it is called a probate, a succession, or a legacy tax. Such nomenclature is convenient; its distinctions may be important for clear discussion of the policy of death duties and the mode of using this form of taxation; and an accurate conception of them may serve to throw light upon the actual intent of the legislature, when language of doubtful meaning is used, in determining the amount and manner of enforcing the tax."

² Sometimes the deduction of debts and expenses of administration from the appraised value of the estate is expressly provided for statute, as in the present Connecticut law. Acts 1915, ch. 332, sec. 5. In other cases the courts have recognized the doctrine without express statutory declaration. See Gallup's Appeal (1904) 76 Conn. 617, 620; 57 Atl. 699, 700; Estate of Kennedy (1910) 157 Cal. 517, 108 Pac. 280; Ross, Inheritance Taxation, sec. 270.

³ This was the construction placed upon the former statute. See *Hopkins' Appeal* (1905) 77 Conn. 644, 649; 60 Atl. 657, 659. The present law (Acts 1915, ch. 332) expressly provides:

decedent's death and not by the net gain to the estate of the distributee. The latter is less than the former by the amount of the Connecticut inheritance tax.

#### I. THE FEDERAL TAX

The federal tax must likewise be construed as a tax in the nature of a death duty, for if it were a direct tax upon the property it would be unconstitutional.4 Moreover, it is expressly laid upon the "transfer" of the estate. But unlike the Connecticut tax or the former federal inheritance tax it is levied upon the estate as an entity, and is paid by and out of the estate, instead of by the beneficiaries out of their shares.⁵ With reference to the federal tax the Connecticut court said:

"The federal act of 1916 imposes a tax payable out of the estate before distribution, thus differing from the federal inheritance tax of 1898, payable by the individual beneficiaries. It is not a tax upon specific legacies, nor upon residuary legatees. It is taken from the net estate 'before the distributive shares are determined rather than off the distributive shares.' Its payment diminishes pro tanto the share of each beneficiary. The executor or administrator must pay the tax out of the estate before the shares of the legatees are ascertained. It is an obligation against the estate and payable like any expense which falls under the head of administration expenses. The tax paid is no part of the estate at the time of distribution; it has passed from the estate and the share of the beneficiaries is diminished by just so much . . .

[&]quot;Sec. 3. All property owned by any resident . . . which shall pass by will

[&]quot;Sec. 3. All property owned by any resident... which shall pass by will or by the provisions of the general statutes relating to the distribution of intestate estates, ... shall be liable to a tax as hereinafter provided.

"Sec. 5. The net estate for taxation purposes shall be ascertained by adding to the appraised value of the inventoried estate [certain gains] and deducting therefrom the amount of claims paid, all funeral expenses and expenses of administration, ... and losses incurred during the settlement of the estate in the reduction of choses in action to possession..."

The opinion in the principal case states that the Act is a re-enactment of the provisions of the former statute in the light of their settled construction.

See Knowlton v. Moore (1900) 178 U. S. 41, 20 Sup. Ct. 747.

⁵ The Revenue Act of Sept. 8, 1916 (ch. 463), as amended March 3, 1917 (ch. 159), imposes a tax (sec. 201) "upon the transfer of the net estate of every decedent" dying after the passage of the Act. It is based upon the amount of the entire estate, less an exemption of \$50,000 and certain specified deductions (sec. 203), without regard to the value of the shares of the several beneficiaries or the degrees of their relationship to the decedent. The intent of the Act is expressed (sec. 208) to be that "so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." U. S. Comp. St. 1916, sec. 63361/2, a-m, 39 Stat. 777, 1002.

In (1917) 3 Am. BAR ASSN. JOUR, 178, it is said: "The Federal Estate Act was carefully drawn so that it would not duplicate the inheritance taxes of the states, but would come off the net estate before the distributive shares were determined rather than off the distributive shares."

"Any expense arising by operation of law which is a charge against or must be paid out of the estate is an administration expense within the meaning of this term as used in section 5 of the [Connecticut] Act of 1915.

"The payment of the federal tax is an expense of the estate, as

much so as any expense of administration."

It is submitted that this reasoning and the result to which it leads are sound. A similar decision was recently rendered in Minnesota, but several lower New York courts have decided otherwise.

#### II. TAXES LEVIED BY OTHER STATES

The court's decision that inheritance taxes paid other states are likewise deductible is based upon the premise that such taxes "are upon the same basis as the federal tax; they must be paid before the executor or administrator can reduce the bonds or stock to possession." "These cannot be transferred until the state tax is paid and the value of the security so transferred is reduced by the amount of the tax which the executor or administrator has had to pay." But is this premise sound? The federal tax, as the court has indicated, is payable out of the estate as a whole before the distributive shares are determined, but this is not usually the case in respect to state inheritance taxes. They are commonly levied upon the succession of the individual distributive shares and chargeable against these shares, not imposed upon and paid by the estate as a whole before the distributive shares are determined. Take, by way of illustration, the tax of Wisconsin which was one of those involved in the principal case. The theory of the Wisconsin tax is precisely the same as that of Connecticut—a tax upon the privilege of succession, chargeable against the distributive share passing to the individual beneficiary and measured by the value of the property so passing before the tax itself is taken off.8 In stressing the argument that the foreign tax must be paid before the property can be reduced to possession by the executor, the court has evidently confused a provision for enforcing the tax with the theoretical basis of the tax. This is the more strange

^{*}State v. Probate Court (1918, Minn.) 166 N. W. 125.

^{*}In re Bierstadt's Estate (1917, Surr.) 163 N. Y. Supp. 1104, affd. (1917) 178 App. Div. 836, 166 N. Y. Supp. 168; In re Sherman's Estate (1917, App. Div.) 166 N. Y. Supp. 19. These decisions were much influenced by an earlier case holding that the inheritance tax imposed by the War Revenue Act of 1898 was not deductible in determining the state tax. Matter of Gihon (1902) 169 N. Y. 443, 62 N. E. 561. In Massachusetts an opposite conclusion had been reached on the federal tax of 1898. Hooper v. Shaw (1900) 176 Mass. 190, 57 N. E. 361.

^{*}Wis. Stat. 1911, secs. 1087-1 to 1087-24; Laws 1913, ch. 627. For cases construing the statute, see *Beals v. State* (1909) 139 Wis. 545, 121 N. W. 347; *Estate of Bullen* (1910) 143 Wis. 512, 128 N. W. 109; *Estate of Smith* (1915) 161 Wis. 588, 155 N. W. 109.

because the Connecticut statute has a like clause, and in the words of the court itself: "This [the Connecticut tax], by section 10, is required to be paid by the administrator or executor from the funds passing to the beneficiaries."

When, therefore, the foreign tax is levied upon and payable out of the beneficiaries' shares, it is submitted that it cannot properly be considered as an expense of administration and should no more be deducted than should the Connecticut tax itself. Since the taxes of both states are based upon the same theory, there is believed to be no more reason for allowing the Wisconsin tax to be deducted to determine the Connecticut tax, than there would be for allowing the Connecticut tax to be deducted to determine the Wisconsin tax. The impracticability of applying a rule which permits deductions by each state is obvious.

Under the ruling of the Treasury Department state inheritance taxes were for a time deducted in determining the federal estate tax, but by a later order this ruling was repealed.¹⁰

Another state inheritance tax involved in the principal case was that of New Jersey. There is more reason for permitting the deduction of this tax. It appears from the New Jersey decisions that the inheritance tax of that state is not based upon the same theory as are those of Connecticut and Wisconsin. As applied to personal property of non-resident decedents, the New Jersey statute has been construed as imposing a tax, not on the "singular succession" of the individual legatee or distributee, but on the "universal succession" of the foreign executor or administrator.11 In other words, the New Jersey court takes the view that all New Jersey law does is to permit the property to vest in the executor or administrator and thus become a part of the general estate, the law of the state of the decedent's domicile then prescribing how it shall pass to the individual beneficiaries. Hence the only succession New Jersey taxes is the succession of the executor or administrator to the New Tersey personalty as a whole, not the passing of the several distributive shares to the beneficiaries. This construction of the New Jersey tax may furnish a sound foundation for the argument that it is laid upon the same basis as the federal tax and should be charged against

^{*}The authorities from other states are not numerous and are conflicting. Allowing deduction of foreign tax, see In re Van Beil's Estate (1917) 257 Pa. 155, 101 Atl. 316; Bullard v. Redwood Library (1914) 37 R. I. 107, 91 Atl. 30. Disallowing deduction, see Matter of Penfold (1915) 216 N. Y. 171, 110 N. E. 499; Matter of Gihon (1902) 169 N. Y. 443, 62 N. E. 561.

¹⁶T. D. No. 2524, Sept. 10, 1917.

¹¹ Carr v. Edwards (1913, Ct. Err.) 84 N. J. L. 667, 87 Atl. 132; Senff v. Edwards (1913, Sup. Ct.) 85 N. J. L. 67, 88 Atl. 1026; Maxwell v. Edwards (1916, Sup. Ct.) 89 N. J. L. 446, 99 Atl. 138; Security Trust Co. v. Edwards (1917, N. J. Ct. Err.) 101 Atl. 384.

the estate as a whole like a general expense of administration. Therefore the deduction of the New Jersey tax as well as of the federal tax is perhaps justified, but the Wisconsin tax cannot properly be so treated for the reasons already indicated. The Connecticut court, however, lumped all foreign state inheritance taxes together without considering whether there was any difference in their character.

The apparent injustice of compelling a beneficiary to pay a duty to two states on something he does not get, namely, the full amount of his legacy or distributive share, no doubt inclines the court of the decedent's domicile to permit the deduction of foreign inheritance taxes. But this injustice is really the result of double taxation, of allowing more than one state to levy a duty on the transfer of the same property. It arises from the fact that the state of the decedent's domicile, on the fiction mobilia sequentur personam, asserts that it grants the privilege of succession and so may tax it, while the other state, the state of the situs, asserts that it has the power of controlling how the property within its limits shall pass, that it grants the privilege of allowing such property to pass in accordance with the rules of the domicile, and therefore may tax this privilege.¹² It is not, however, the purpose of this discussion to enter upon a consideration of the validity of the theories which lead to double taxation. It is sufficient that the possible weakness of the court's opinion, in classifying all foreign state inheritance taxes as similar to the federal estate tax rather than analyzing them separately, has been pointed out, in the hope that, if incorrect, the rule laid down by the court with respect to deducting other state taxes may be corrected, or if correct, that the reasons for the decision may be more clearly set forth in later cases.

#### EFFICIENCY OR RESTRAINT OF TRADE

To develop a just, reasonable and practicable construction of the Sherman Anti-Trust Act and apply it to the complicated facts of our industrial and commercial structure is not a simple task. No rule of thumb, no test capable of easy and instant application to every situation, could either work justice or secure the economic ends for which the act was passed. The test of legality must first be expressed in broad general terms, like the act itself; it must then be applied with painstaking study and discrimination to the facts of each case, bearing always in mind the clear general purpose of the act; the border-line between lawful and unlawful must be pricked out, point

¹² See Estate of Bullen (1910) 143 Wis. 512, 520; 128 N. W. 109, 111. The evil of double taxation has been partially removed by recent legislation in Wisconsin. See Laws 1913, ch. 627, sec. 2. For similar legislation in Massachusetts, see Acts 1909, ch. 490, Part iv., sec. 3.

by point, as specific cases arise. The "rule of reason," much misunderstood and much criticised when it was first announced, laid a sound foundation for future development. It focussed attention on the evils which the statute was intended to reach, which may be summed up as the artificial creation of non-competitive conditions in the sale of any product entering into interstate commerce, with the resulting enhancement of prices, deterioration of product, reduction of output, and other "characteristic evils of monopoly." An arrangement or course of conduct, whatever its form, whose purpose or necessary effect is predominantly or in any substantial degree to produce these evils is forbidden. One not so intended and not so resulting is outside the purview of the act.²

But however simply it may be stated, difficult questions of fact must arise in the application of such a rule. The law aims to secure, for the benefit of the consumer, vigorous and efficient competition. But the chief spur to competition is the desire to get the largest possible share of the business. Neither that object, nor even notable success in its achievement, can be held unlawful without defeating the very purpose of the statute. It is then a question of means. But the means employed for efficient competition may closely resemble those of monopoly. The union of two or three out of many competing concerns may be the best means to more effective competition. The added strength so obtained may make the difference between survival and failure in the war of competition. It seems clear that under the "rule of reason" such a combination is not unlawful. But the same combination as a step in a definite plan to eliminate competition and control the industry would be forbidden. And as intent may often be judged only by acts, it is easy to see that as combination is carried a little further and a little further, difficult questions of fact may arise in regard to the intent to be inferred. Nor is it wholly a question of intent. Combination may reach the point where, whatever its intent, the necessary practical result is to give the combined organization a substantial domination of the market, to free it from the checks and the spurs of effective competition. It can hardly be doubted that combination carried to that point is, regardless of its intent, within the reach of the law.

Again there can be no objection to the combination of two con-

¹ In Standard Oil Co. v. United States (1911) 221 U. S. 1, 31 Sup. Ct. 502; United States v. American Tobacco Co. (1911) 221 U. S. 106, 31 Sup. Ct. 632.

² The "rule of reason" means merely that the test is not formal, technical or arbitrary, to be applied like a foot-rule, but calls for intelligence, reason and common sense in its application. Some early misconceptions of its meaning have been brushed away by later decisions. See for example, Thomsen v. Cayser (1917) 243 U. S. 66, 37 Sup. Ct. 353, discussed in (1917) 27 Yale Law Journal, 139.

cerns, making and selling two lines of goods, not competitive but supplementary. A maker of office desks and chairs and a maker of filing cabinets may properly unite, to secure the advantages of offering a complete line of office furniture. Here is only increased efficiency, and not restraint of trade. But here again, specific cases will not always be clear cut. The principal lines of the two combining concerns may have been desks and filing cases respectively; but both may have made chairs. Or one may have made flat-topped desks and the other roll-topped. Are these competing or supplementary lines?

Add further to the supposed combination the lawful monopoly of patent rights; large capital; remarkable business acumen and efficiency; and great commercial success; and the problem of determining how far the initial combination contributed to the business success attained, and whether its contribution was through legitimate increase in efficiency or through illegitimate suppression of existing or possible competition, is full of complications.

Such were some of the elements in the problem presented to the Supreme Court in United States v. United Shoe Machinery Co. (1918) 38 Sup. Ct. 473. The questions involved were so largely questions of fact that except as every actual decision gives concreteness to establish rules of law, the case adds little to the legal definition of the offenses denounced by the Sherman Act. The decision in favor of the company does, however, further emphasize some points which were tolerably clear before, as that neither mere size nor the fact of getting most of the business constitutes in itself an illegal monopoly. No doubt great size and wealth in themselves give power that may be abused, but if size and wealth are attained by legitimate means, the law must be content to watch for signs of abuse. On this point the conclusion of the majority of the court is summed up as follows: "The company, indeed, has magnitude, but it is at once the result and cause of efficiency, and the charge that it has been oppressively used has not been sustained."

The Government charged a general scheme of monopoly to which all the specific acts alleged were contributory and subordinate. These acts were of three general classes: first, the combination in 1899 of three or four companies manufacturing shoe machinery; second, the subsequent acquisition of a large number of smaller businesses, patent rights, etc., in the shoe machinery field; and third, the method of doing business by which machines were leased under leases alleged to contain oppressive clauses designed to extend and perpetuate the monopoly.

^{*}The very complicated issues of fact involved in the sifting of these charges had been considered with painstaking fullness by the three judges who tried

With regard to the original combination, it appeared that the machines the constituent companies were making were in general non-competing, and that the chief result of the combination was to give the United Company a more nearly complete line of shoe machinery. That such a combination would involve no violation of the Sherman Act was obvious, and had already been decided by the Supreme Court in a criminal suit based on the same alleged monopoly.4 The Government charged, however, that in respect to one type of machine, namely lasting machines, there was competition between two of the constitutent companies; and, in respect to weltsewing machines, between one of these and a third constituent company. Had these claims been fully sustained by the evidence, the decision might have thrown some light on one of the many questions of degree involved in the application of the general rule of the Sherman Act to particular cases. It appeared, however, that the alleged competing machines were in general adapted to use on entirely different types of shoes, though there was some speculative possibility that by further improvement and adaptation they might have become more fully competing. In one instance such improvement was later made by the United Company. It is sufficient to say on this point that the findings of the District Court, virtually adopted by the Supreme Court, reduced the actual competition between the machines in question at the time of the combination very nearly to the vanishing point, and left only possibilities of future competitive development, much too speculative to furnish a basis for dissolving a combination which had stood unchallenged for twelve years before the bill was filed, and had long since practically superseded the original machines by the improvements it had itself developed.

Similar findings disposed of the long line of subsequent acquisitions, impressive in the mass, but losing most of their significance when examined in detail. The most important, that of the Plant shoe machinery patents, was complicated by mutual claims of patent

the case in the District Court, each of whom wrote a long opinion, concurring in the decision in favor of the defendants. United States v. United Shoe Machinery Co. (1915, D. Mass.) 222 Fed. 349. The majority opinion in the Supreme Court discusses some few portions of the evidence in some detail, but rather by way of illustration than exhaustive consideration, and in the main adopts and relies on the findings and conclusions of the lower court. Two of the three dissenting judges also wrote opinions but they merely summarized certain portions of the evidence with the conclusions drawn therefrom. For any statement of the evidence in sufficient detail to judge of the merits of the conclusions, the opinions in the District Court must be carefully studied, and even these could give only an incomplete summary,—so great was the number and so complicated the details of the transactions covered by the inquiry.

^{*}United States v. Winslow (1913) 227 U. S. 202, 33 Sup. Ct. 253.

infringement, by pending and threatened litigation, and by the fact that the Plant machinery, while ineffective and of little commercial value as it stood, contained patented features which could be developed as improvements to the United Company's machines, thus producing more efficient machinery than either Plant or the United Company could produce without the use of the other's patents.

If the difficulties which may arise on the facts in determining the legality of a combination are considerable, the difficulties of determining when conduct other than combination becomes an unlawful "attempt to monopolize" are still greater. Here it is perhaps even more true that the methods of legitimate competition may closely resemble the methods of attempted monopoly. Again it must be emphasized that monopoly in a legal sense is not simply getting all the business. Monopoly involves the idea of exclusion. "Monopolizing," in the absence of combination, means, within limits yet to be clearly defined by statutes or decisions, the exercise of oppressive, coercive or unfair means to exclude competitors from the market. The principal claim of the Government in regard to the United Company's leases will serve as an illustration. The claim was that by so-called "tying clauses" the lawful patent monopoly of certain "essential" machines was used to force shoe manufacturers to take also the United Company's auxiliary machines, with which otherwise manufacturers of other lines of shoe machinery might successfully have competed. If this claim had been sustained by the evidence it would seem from the reasoning of previous decisions that a violation of the law might perhaps have been found.5

But the facts were found not to support the charge. The whole leasing system was attacked by the Government as merely an instrument devised by the United Company to foster its monopoly. But the lower court found, and the Supreme Court affirmed the finding, that the leasing system was employed by the constituent companies before the combination; that it had a sound economic basis and had proved highly advantageous to shoe manufacturers and to the shoe manufacturing industry, particularly in enabling the small shoe manufacturer to compete successfully with his larger rival; and that on the whole the changes made by the United Company in the forms of the leases had been in the direction of greater liberality rather than less. The principal "tying clause" required the leased machine to be used only in connection with certain other machines leased from the

^{*}See especially Motion Picture Patents Co. v. Universal Film Mfg. Co. (1917) 243 U. S. 502, 37 Sup. Ct. 416, discussed in (1917) 26 YALE LAW JOURNAL, 600; and cf. Standard Sanitary Mfg. Co. v. United States (1912) 226 U. S. 20, 33 Sup. Ct. 9.

United Company. On violation of this condition the United Company could cancel the lease. The Government's expert testified that the Goodyear welter and stitcher were the only two "essential" machines, and the District Court's finding was practically to the same effect. Had these machines been leased only on condition that they be used with other machines of the defendant, there would have been strong ground for the Government's charge. It appeared, however, that leases of these two machines had never contained that clause. The lessees of the welter and stitcher were entirely free to use them with any machinery of other manufacturers for performing other operations. It was the subordinate machines that were restricted to use with the Goodyear welter and stitcher. And even the subordinate machines were always obtainable on so-called unrestricted leases, without the "tying clause," on the same royalty, but with the addition of an initial payment.

What, then, was the reason for the "tying clause"? The royalties were fixed at so much a pair of shoes. The welter and stitcher had the largest royalties attached to them and had also recording devices to determine the number of shoes operated upon, which greatly simplified the difficult question of royalty accounting. The defendant could therefore afford to lease its subordinate machines on better terms to those who also used its welter and stitcher. There were other business reasons for the arrangement. It appeared that the efficiency of all the machines, and consequently their output and the royalties earned, depended on the very careful adaptation of each machine to use with the machines preceding and following it in the process of shoe manufacture. Again the United Company gave an inspection and repair service without additional charge, the cost of which per machine would evidently be less in a factory where many United machines were in use. These and other reasons were sufficient to justify the company in making better terms for a full set of machines than for individual machines. In fact most of the clauses to which the Government objected finally came down either to the question of a wholesale as against a retail rate, or to an inducement to the shoe manufacturer to make the greatest possible use of the machines leased, resulting in larger royalty earnings, and incidentally making possible a lower royalty rate.

But arrangements like that condemned in the Motion Picture Co. case⁷ have something of the same element of a wholesale as against a retail transaction, with the very important addition, however, that in that case the vendor who sought to link two products together

^{*} See 222 Fed. at p. 395-

⁷ Supra, note 5.

refused to furnish them at all for separate use. But suppose that a company engaged in furnishing machinery for electric power plants refuses to take any contracts except for a complete installation. Is such a course of business in violation of the Sherman Act? Does it become so if the company has a lawful patent monopoly of one machine entering into the installation, so superior that its desirability, in connection with the policy described, furnishes a strong inducement to go to that company for the entire installation? difficult questions here, which future cases must answer. All we can gather from the Shoe Machinery case is that if alternative terms are offered for separate machines, and if there are legitimate business reasons for the wholesale rate, and if the course of business as a whole negatives the intent to make one or two superior machines a lever to force the sale of the rest, the arrangement may be upheld. While it gives us no final test for all cases, this seems a sound and sensible result as far as it goes.

One clause in certain of the United Company's leases seems to have been directly within the rule of the Motion Picture Co. case.8 Leases of "metallic machines" (for attaching to shoes certain metallic fastenings) required the purchase of the fastening material from the defendant in lieu of royalty. This clause is not discussed in the opinion of the District Court, but is incidentally mentioned and might be taken as inferentially approved by the Supreme Court opinion. But too much weight can hardly be attached to this reference. The bill alleged a monopoly or attempted monopoly of shoe machinery, not of fastening material. If the clause in regard to metallic fastenings tended to unlawful monopoly of anything, it was of fastening material. It had therefore no tendency to support the charge in the bill, unless on the theory of cumulative evidence of general monopolistic intent. It was doubtless in this light that the majority opinion of the Supreme Court referred to it as a "mere make-weight" and "not of special materiality." It is to be noted also that when the case was tried in the lower court the Dick case," since overruled by the Motion Picture Co. case, still stood as law on the validity of such conditions as that involved in the clause in question; and this is probably a further reason why objections to that clause were not pressed at the trial, or discussed by the District Court.

It may be possible, however, that we have not heard the last word on the legality of such a condition; that in a given case legitimate business reasons might be found to justify it, and take it out of the prohibition imposed by the *Motion Picture Co.* case. It is certain

^{*} Supra, note 5.

Henry v. A. B. Dick Co. (1912) 224 U. S. 1, 32 Sup. Ct. 364.

that we have not heard the last word on the shoe machinery leases. The case just decided turned wholly on the Sherman Act, the suit having been begun before the Clayton Act was passed. It is generally understood that certain provisions of the Clayton Act were aimed directly at the United Shoe Machinery Co. and its leases, though possibly rather at what was supposed to be their purpose and effect than at what the court in the Sherman Act case found these to be. A federal suit against the company under the Clayton Act is now pending in a different federal district from that in which the Sherman Act case was tried.¹⁰ The ultimate determination of the legality of the leases under the present law must await the decision of that case.

The case just decided, as has been said, turned almost wholly on questions of fact.11 Whether the conclusions of the District Court, affirmed by the majority of the Supreme Court, on these questions of fact, or those of the dissenting judges in the higher court, were more nearly correct, only one who had read all the evidence could reasonably undertake to judge. It may be said, however, as the Supreme Court held, that every reasonable presumption should be indulged in favor of the unanimous conclusion of the judges who sat through the long trial, heard most of the testimony in open court, and carefully read and sifted all the evidence. It should be said also that their opinions are thorough, well-reasoned, and much more convincing than the generalities of the dissenting opinions in the court above, which seem rather to jump to conclusions. Considering the popular impressions of the "Shoe Machinery Trust," the fondness which the Department of Justice has very naturally displayed for such shining marks, and the enormous labor involved in going carefully into the multitudinous issues which such a prosecution raises, it is rather reassuring to those who fear the tendencies of popular government that the Supreme Court, which has heretofore found so uniformly for the Government in all the big trust prosecutions, should have given this proof of its willingness to weigh each case on the

¹⁰ See *United States v. United Shoe Machinery Co.* (1916, E. D. Mo.) 234 Fed. 127, in which the defendant's motion to dismiss was denied,—a decision, of course, purely on the sufficiency of the allegations of the bill, and preliminary to the taking of evidence to support the allegations. How far the findings in the Sherman Act case in regard to the intent and effect of the lease clauses under attack may be held to be *res adjudicata* in the Clayton Act suit is an interesting question.

[&]quot;It is perhaps fortunate that the case turned largely on fact rather than law; for it was in effect a minority decision. Justices McReynolds and Brandeis, having been concerned as counsel at earlier stages of the case, took no part in the decision, and the remaining seven judges divided four to three. There might therefore have been some doubt of the ultimate authority of any new law laid down.

evidence and to discriminate where it finds judicial discrimination to be warranted. The demonstration would of course be more impressive had the result not been reached by so narrow a margin.

It must not be forgotten, in judging the correctness of the decision. that the ultimate result of the efficient competition which the law seeks to foster may appear superficially much like the result of the monopoly which it prohibits. A number of facts which appear to have been established, such as the continual efforts of the United Company to improve its product by constant experiment and large expense, its policy of giving its customers the benefit of these improvements without additional charge, the testimony of the witnesses to the excellence of its service, the lack of any substantial proof of unreasonable rates or charges, the repeated refusals to buy competing businesses or patents, much more numerous than the acquisitions actually made, the high level of efficiency constantly maintained, and the fact that so far as competition with patented machines is possible there has always been competition, tend strongly to support the conclusion of the majority of the court that here was a success established by distancing rather than by suppressing competitors, and maintained only by unremitting effort for greater efficiency in the face of actual or possible competition. In these days when we are realizing as never before the value of industrial efficiency, a decision that the law has no quarrel with success so obtained is particularly timely.

## TORT AND CONTRACT IN THE MARKETING OF FOOD

It was a dictum in New York which introduced into American law the doctrine that in sales of foodstuffs a dealer always impliedly warrants their fitness for consumption. The question has just come before the Court of Appeals for the first time, and the doctrine has been squarely affirmed, in Race v. Krum (1918, N. Y.) 118 N. E. 853. The plaintiff purchased and ate at the defendant's drug store ice cream manufactured by the defendant. In an action for damages for illness caused by the presence in the cream of a filth product, tyrotoxicon, the trial court charged that the defendant impliedly warranted the cream wholesome and fit to eat. The instruction was on appeal held correct.

¹ See Van Bracklin v. Fonda (1815, N. Y. Sup. Ct.) 12 Johns. 468.

²Discussed (1918) 16 Mich. L. Rev. 555; the problem involved is also considered in (1908) 15 L. R. A. (N. S.) 884. The present comment deals wholly with liability to the *consumer* of food intended for human beings. See also (1914) 48 L. R. A. (N. S.) 213, 219; and on the more general relations of the topic, *ibid.* 213, and (1909) 19 *ibid.* 923.

The court expressly distinguishes the case from that of an innkeeper or restaurateur. These latter have been held not to warrant because they do not sell; they merely set before a guest food, to which title does not pass, but which the guest in return for his money receives the privilege of consuming on the spot so far as he desires to.3 On the soundness of this doctrine the court refuses to pass; in the instant case, it finds a clear sale. Yet it is hard to see wherein the serving of ice cream over the counter of a drug store differs in this respect from the serving of ham and eggs at a lunch counter. But without further regard to whether or not such cases do in fact and general understanding constitute sales, it is submitted that the existence of an implied warranty need not be conditioned on the existence of a strict sale. Implied warranties rest either on an attempt to interpret the parties' true mutual understanding, or on public policy; the warranty of wholesomeness of food belongs to the latter class.4 The considerations of policy which attach that warranty of wholesomeness to the sale of meat to a consumer in the market⁵ apply with equal force to the serving of meat to a guest in a hotel; if anything, they are stronger, because the guest has less opportunity than the ordinary purchaser in the market to discover defects in food

³ Merrill v. Hodson (1914) 88 Conn. 314, 91 Atl. 533, criticized (1914) 24 YALE LAW JOURNAL, 73, where two criminal cases are cited which held such serving to be a sale. See also (1917) 27 YALE LAW JOURNAL, 140. What the true relations of the parties are in such a case is something of a problem. Certainly title does not necessarily pass to all the food; the guest may reject part; it is part of the contract that the innkeeper will dispose of all the guest may leave. But suppose the latter desires to take some of the food to his room to eat later-fruit, for example. Or suppose a pearl is found by the guest in oysters served on the half-shell. It has been suggested that the situation may be different in a hotel dining room or conventional restaurant on the one hand, and in a self-serve dairy-lunch on the other; or even different according to whether service is table d'hôte or à la carte. Cf. Valeri v. Pullman Co. (1914, S. D. N. Y.) 218 Fed. 519, 521; but cf. also the seeming facts in Leahy v. Essex Co. (1914, N. Y.) 164 App. Div. 903, 148 N. Y. Supp. 1063. Perhaps there might also be a difference as to kinds of food. The test may well be found in an attempt by the server of food to revoke and retake possession before the food is consumed.

[&]quot;The consequences resulting from the purchase of an unsound article may ... prove so disastrous to the health and life of the consumer," etc. "The vendor has so many more facilities for ascertaining the soundness," etc. Wiedeman v. Keller (1898) 171 Ill. 93, 99, 49 N. E. 210, 211. Cf. on the related question of the public policy back of criminal regulation of sales of food (1916) 26 YALE LAW JOURNAL, 67; and (1917) ibid. 416; also (1918) 27 ibid. 961; and see a suggestive discussion by Hand, J., in Valeri v. Pullman Co., supra.

^{*}Rinaldi v. Mohican Co. (1916, N. Y.) 171 App. Div. 814, 157 N. Y. Supp. 561 (warranty of retailer); Catani v. Swift and Co. (1915) 251 Pa. 52, 95 Atl. 931 (warranty of manufacturer to consumer for goods resold in the original package).

set before him. Why cannot the warranty be attached to the sale of a privilege of consuming food⁶ as well as to the sale of the food itself?

The common law history of this warranty doctrine, indeed, is almost wholly one of extension. It is based, ultimately, on a statement in Blackstone that "in contracts for provisions, it is always implied that they are wholesome." But Blackstone's exception to caveat emptor rested in no wise on warranty, but on ancient criminal statutes; the predication on it of the warranty doctrine, by a multitude of dicta, and then by decided cases, seems a case of growth by mistake. Mistake or no, however, it is established law to-day, and the principal case, resting on it, reaches a sound result.

For all that, the doctrine of warranty is not sufficient unto the needs it has been called upon to fill. For while a warranty protects only those "privy" to it, 18 the public policy on which the warranty rests demands protection of all consumers of foodstuffs. There have been heroic attempts to make the means meet the situation; it has been

^{*}The meaning of such a transaction seems to be that the innkeeper, for a money or credit consideration, extinguishes in himself certain rights in the food and creates in the guest certain others; the essential relation involved is a privilege in the guest to consume the food—a privilege which, though perhaps not transferable, is almost as valuable as the complete ownership. This may fairly be called a sale of a portion of the title to the food; for sale of the whole title, i. e., of the food, is only the same operation applied to all the legal relations of which that title is made up.

⁷ 3 Bl. Comm. *165.

^{*}Benjamin, Sales (7th ed.) sec. 672; Williston, Sales, sec. 241; Burnby v. Bollett .(1847, Exch.) 16 M. & W. 644.

⁹2 Mechem, Sales, sec. 1356; 11 R. C. L. 1120; 15 Am. & Eng. Enc. Law (2d ed.) 1238; and cases cited.

Mich. 60; Wiedeman v. Keller, supra, n. 4; Sloane v. Woolworth Co. (1916) 193 Ill. App. 620. In citing these cases it is not always noticed that those in Illinois were decided under a statute similar to that Blackstone had in mind. See Wiedeman v. Keller, supra, at p. 99. Indeed the whole matter is frequently regulated by statute. See Catani v. Swift and Co., supra, n. 5, at p. 56; Flessher v. Carstens Packing Co. (1916) 93 Wash. 48, 53; 160 Pac. 14, 16; and see note 12, infra.

¹¹ See citations supra, n. 8.

[&]quot;It is something of a question, however, how far the Sales Act—which, although adopted in New York, is not discussed by the court in the principal case—should be held to have changed this common law rule. The English Sales of Goods Act brings the sale of an article of food, as to implied warranty, within the ordinary rule of reasonable reliance applied to sales of goods generally. 15 Hals. Laws Eng. 3; Frost v. Aylesbury Dairy Co. (C. A.) [1905] I. K. B. 608. And the provisions of the American Uniform Sales Act are taken from the English Act. Williston, Sales, sec. 248.

²³ See Ketterer v. Armour & Co. (1912, S. D. N. Y.) 200 Fed. 322, 323, for this reason rejecting the strict warranty view in favor of liability practically in tort.

said that "a manufacturer, dealer, or other person may bring himself into privity with others under exceptional circumstances, and thereby be charged with a duty toward such person different or greater than that which he owes to" persons in general; the "special circumstances" come down largely to knowledge that certain other persons were intended by the buyer to use the commodity bought, —to a groping part-application of a sort of third party beneficiary rule. No theoretical difficulty appears, indeed, in recognizing warranties for the benefit of third persons; but there is the practical question whether the courts would consciously accept such a doctrine, and just how far they would carry it if they did.

The idea of liability in tort seems simpler and more apt: that every manufacturer and dealer in foodstuffs is under a common law duty to any person who may reasonably be expected subsequently to use those foodstuffs, to use reasonable care to make and keep them wholesome.¹⁷ And so it is very generally held: drugs, and then food,

¹⁴ Hasbrouck v. Armour & Co. (1909) 139 Wis. 357, 363; 121 N. W. 157, 160. This case follows an excellent discussion of the principles involved in food and other cases with the remarkable finding of fact that injury to the hand of a consumer was not a consequence to be expected from allowing a needle to become imbedded and hidden in a cake of soap. Attempts to follow the court in its application of theory to facts have led to regrettable results. See (1917) 27 YALE LAW JOURNAL, 281, criticizing Jacobs v. Childs Co. (1917, Mun. Ct.) 166 N. Y. Supp, 798 (nail in cake).

¹⁵ So Woodward v. Miller (1904) 119 Ga. 618, 46 S. E. 847, where the defendant manufacturer sold a buggy he knew to be defective to a municipal corporation for the use of one of its employees; and the Hasbrouck case, supra, so explains Bishop v. Weber (1885) 139 Mass. 411, 1 N. E. 154, where a caterer was employed to furnish dinner to a man and his guests; but a later Massachusetts case finds that "there seems to be ground for holding that the declaration in Bishop v. Weber was good as a declaration on a contract between the plaintiff and the defendant." Farrell v. Manhattan Mkt. Co. (1908) 198 Mass. 271, 286; 84 N. E. 481, 487. The actual writ in the Bishop case covered both tort and contract; the decision was only that the action lay.

¹⁶ There seems no reason to question that a warranty may to-day be treated as a contract, whether or no it took its origin in tort. Cf. Nash v. Minnesota Title Ins. & T. Co. (1895) 163 Mass. 574, 40 N. E. 1039.

"*Ketterer v. Armour & Co., supra, n. 13; and see Flessher v. Carstens Packing Co., supra, n. 10, at p. 56; Parks v. Yost Pie Co. (1914) 93 Kan. 334, 337; 144 Pac. 202, 203; Doyle v. Fuerst and Kraemer (1911) 129 La. 838, 841; 56 So. 906, 907; Ketterer v. Armour & Co. (1917, C. C. A. 2d) 247 Fed. 921, 927. On what difference there may be between the liability of the manufacturer and that of the seller, see note 20, infra.

The benefit of this liability in tort extends to the members of the household of the purchaser of food or drink. See Ketterer v. Armour & Co. (C. C. A. 2d) supra, n. 17, at p. 923. It extends to a casual licensee or guest. Watson v. Augusta Brewing Co. (1905) 124 Ga. 121, 52 S. E. 152. It would seem, therefore to cover almost any consumer; but it would probably not be extended to benefit a thief, and possibly not a finder. Liability to one who buys to resell is of course a wholly different question, itself not free from conflict of authority.

have been brought under the ordinary rule of torts as to dangerous instruments.¹⁸ The test of reasonable care serves also to avoid another difficulty of the warranty doctrine at which some courts have balked:¹⁹ that it is absolute. It seems hard, for instance, to hold a retail dealer for damage caused by meat of good appearance, which he chose and kept carefully, and which bore the government stamp.²⁰

Compare Neiman v. Channellene Oil & Mfg. Co. (1910) 112 Minn. 11, 127 N.W. 394; Mazetti v. Armour & Co. (1913) 75 Wash. 622, 135 Pac. 633; and the rule as stated in 15 L. R. A. (N. S.) 884.

¹⁸ (1916) 25 YALE LAW JOURNAL, 679; see also, on the general duty of a manufacturer (1918) 27 ibid. 961; but see Farrell v. Manhattan Mkt. Co., supra, n. 15, at p. 286.

is Bigelow v. Maine Central R. Co. (1912) 110 Maine, 105, 85 Atl. 396, where it was said that with the changed conditions of modern industry, public policy might no longer impose upon caterer, seller or host the old implied warranty of wholesomeness; that with canned goods, as with other packed and branded food sold in the package, vendor and vendee rely equally on the brand, with no greater opportunity in the former to know the quality of the goods, unless their history or appearance put him on notice. This view as to canned goods appears to be finding approval. See Flessher v. Carstens Packing Co., supra, n. 10, at p. 54; but see Chapman v. Roggenkamp (1913) 182 Ill. App. 117.

²⁰ As in the Illinois cases, and as in *Rinaldi v. Mohican Co., supra*, n. 5, despite misgivings. Courts often comment on the severity of the rule, but seem to feel that its general working is nevertheless salutary. If so, the benefits must be found, as with the statute of frauds, not in the litigated cases, but in the regulation of conduct to prevent the question arising.

In the Rinaldi case, in Sheffer v. Willoughby (1896) 163 Ill. 518, 45 N. E. 253, in the principal case, and often elsewhere, the rule of warranty is phrased to apply to a dealer who makes or prepares the article he sells; who is, therefore, a manufacturer; and again, to a sale for immediate use. If the latter qualification is intended to exclude liability for the spoiling of goods in the hands of the consumer, its presence is unnecessary; if it is intended to exclude the vendee's purchaser, it is again unnecessary in most instances, as the warranty is rarely—save where the original package rule (note 19, supra) is applied to exonerate the dealer—held to enure to the sub-vendee's benefit. The word "consumption" substituted for "immediate use" would be more accurate and less likely to mislead.

The restriction of the warranty to a sale by a manufacturer, it will be noticed, is not in consonance with the passage from Blackstone as read by the courts; it appears to rest on the thought that the opportunity to discover defects which is available to a dealer who does not prepare his food is not enough better than that of his patrons to justify the imposition of any warranty. This hardly holds true in fact. It is submitted that, subject always to the limitation pointed out in note 19, dealer and manufacturer should be on one footing as to warranty of food—as they are in other warranties under sec. 15 (1) of the Sales Act.

The tort obligation likewise would appear to rest on manufacturer and dealer alike. It may seem proper in many cases to hold the manufacturer rather more strictly to account than the dealer; the nicer definition of the standard of care must be left to each court on the facts of each case. Cf. note 21, infra. Of course a merely casual vendor will rarely be held on either theory. See Burnby v. Bollett, supra, n. 8; Williston, Sales, sec. 242; but see Hoover v. Peters (1869) 18 Mich. 51.

On this point of policy, however, the courts are not agreed;²¹ many even of those cases which go off on the tort theory tend to place upon the seller—particularly if he be also the manufacturer—not a mere duty to use due care, but the liability of an insurer of the food sold;²² a liability even broader than that under the implied warranty, because it extends to any person who may use the food.

The advantages of the tort doctrine, then, over that of implied warranty, are that it is no anomaly, but fits into the general law of the subject; that without danger of uncertainty or mistake it protects all those whom the public policy on which it rests is intended to protect; and—if this be an advantage—that it may easily be applied to impose a duty, not absolute, but tempered by reason.

But between the two theories there is no conflict. If a single one had to be chosen, certainly that of tort would be preferable; but there is no cause to choose a single one.²³ When a man ships goods by a common carrier, relations result which may impose liabilities not only in contract, but in tort as well. If a man under contract to repair something of mine makes a botch of it, he is liable not only in con-

¹² Even in the cases which rest recovery on negligence the varying strictness of the requirements of proof leads to widely differing results. Some hold that the negligence must expressly be averred and proved. Sheffer v. Willoughby, supra, n. 20. Or that evidence tending to show that the plaintiff bought and ate food at the lunch room of the defendant, and had ptomaine poisoning in consequence, was not sufficient to enable the plaintiff to go to the jury on the question of negligence. Crocker v. Baltimore Lunch Co. (1913) 214 Mass. 177, 100 N. E. 1078; see also Ketterer v. Armour & Co. (C. C. A. 2d) supra, n. 17. Certainly the more liberal view in this matter is the preferable. So Tomlinson v. Armour & Co. (1908, Ct. Err.) 75 N. J. L. 748, 70 Atl. 314; Watson v. Augusta Brewing Co., supra, n. 17; Doyle v. Fuerst & Kraemer, supra, n. 17. But it should be noted that this very liberalization of procedure can be made to mean holding the defendant as an insurer. Cf. the cases in the following note. The Massachusetts rule appears to be peculiar unto itself: "As due care is no defence when the dealer makes the selection, so there is no liability for negligence when a dealer offers several articles of food for sale from which the buyer is to make his own selection. In offering . . . he impliedly represents that he believes all of them to be fit for food. That is the extent of his liability." Farrell v. Manhattan Mkt. Co., supra, n. 15, at p. 286. It is believed that the test of selection is not satisfactory, unless perhaps for warranty alone; as to which it might be justified as an application of the Sales Act. Cf. note 12, supra.

Parks v. Yost Pie Co., supra, n. 17; Catani v. Swift and Co., supra, n. 5; Jackson Coca Cola Bottling Co. v. Chapman (1914) 106 Miss. 864, 64 So. 791; but see Crigger v. Coca Cola Bottling Co. (1915) 132 Tenn. 545, 179 S. W. 155.

²³ The possibility of recovery on either of two theories in cases where, for instance, a dealer himself prepares food and sells it to an immediate consumer, is often recognized and discussed by the courts; which at times—particularly when refusing recovery—distinguish sharply between the two. See Crocker v. Baltimore Lunch Co., supra, n. 21; Hasbrouck v. Armour and Co., supra, n. 14; and see also Tomlinson v. Armour and Co., supra, n. 21. On the other hand, some courts would merge the theories. See Flessher v. Carstens Packing Co., supra, n. 10.

tract for failure properly to perform, but in tort for misdoing.²⁴ And so in the situation under discussion, there may well be two liabilities, each with its own content. That New York has chosen to affirm the doctrine of implied warranty of wholesomeness is no cause for reproach—if only she does not for that reason disaffirm the rule of liability in tort.

### FOREIGN CORPORATION TAXES AND INTERSTATE COMMERCE

The decision of the Supreme Court in the recent case of International Paper Company v. Massachusetts (1918) 38 Sup. Ct. 292, is of importance in that it reaffirms in the broadest language the doctrine laid down in the earlier case of Western Union Telegraph Company v. Kansas, which there was reason to think had been considerably narrowed by later cases.

It will be remembered that in the Western Union case the court decided that a license fee imposed upon a foreign corporation for the privilege of doing local business and based upon a given per cent of its entire authorized capital was unconstitutional. It held that such a fee was necessarily "a burden and tax on the company's interstate business. . . . Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business."

The Western Union was a corporation engaged in interstate commerce, and its interstate business was so intimately connected with its intrastate business that they could not be separated as an economically sound business proposition.

Later decisions of the court, upholding statutes differing somewhat from that in question in the Western Union case were thought to limit the broad doctrine laid down in that case.² This was particularly true of the case of Baltic Mining Company v. Massachusetts.³ In that case the court held constitutional a tax which was imposed for the privilege of doing local business and based upon the total authorized capital, but with a maximum limit of \$2000. This act had been construed as not applying to corporations whose sole business was interstate commerce or which carried on interstate and intrastate business in such close connection that the intrastate business could not be abandoned without serious impairment of the interstate business of the corporation.⁴ The Baltic Mining Company was

^{™ (1917) 26} YALE LAW JOURNAL, 486.

¹ (1910) 216 U. S. 1, 30 Sup. Ct. 190.

^{*}See cases cited in the principal case.

^{* (1913) 231} U. S. 68, 34 Sup. Ct. 15.

^{*}See Baltic Mining Co. v. Commonwealth of Massachusetts (1911) 207 Mass. 381, 93 N. E. 831, at end of opinion.

described as carrying on "a purely local and domestic business quite separate from its interstate transactions." Contrasting this state of facts with the situation in the Western Union case, and holding that "Every case involving the validity of a tax must be decided upon its own facts," the court came to the conclusion that in the Baltic Mining Co. case the authorized capital was used in truth only as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce.

This language led constitutional lawyers to believe that the doctrine of the Western Union case would not be applied where the tax, though based upon total authorized capital, was laid upon and made the condition of doing a purely intrastate business, economically separable from interstate business.

The decision in the International Paper Company case, however, upsets this belief and reaffirms the broad language of the Western Union case. The statute, as construed by the court, was identical with that in the Baltic Mining Co. case, except that the maximum limit had been removed. The court now makes no mention of the fact that the intrastate and interstate business are separable, but lays down the broad rule that no excise tax, based upon total authorized capital, without maximum limit, may be laid upon a foreign corporation for the privilege of doing local business. It is apparent therefore that the separability of local and interstate business no longer enters into the question, and that the earlier decision in the Baltic Mining Co. case must stand wholly on the maximum limit.

The reason for this distinction seems unsatisfactory, since to the small corporation which does not receive the benefit of the limited maximum the tax under either statute equally affects its interstate commerce. Possibly the distinction may be justified on the ground that where there is no maximum the intention is evident to measure the tax by the whole business capital, both interstate and intrastate. which necessarily in every case means that the tax is greater if interstate commerce is greater, thus burdening interstate commerce, while where there is a reasonable maximum this intention is not manifest and the fact that it may burden interstate commerce in the case of small corporations is incidental only and not the intended effect of the statute. Hence the statute may be upheld as being a local regulation which merely incidentally affects interstate commerce, as has frequently been held of police regulations. This explanation, however. is not wholly satisfactory and it is to be hoped that the court will see fit more clearly to enunciate the grounds of its decision in future cases,5 W. W. G.

^{*}For a full discussion of these cases see a series of articles (not yet completed) on "Indirect Encroachment on Federal Authority by the Taxing Powers of the State" by Thomas Reed Powell, in (1918) 31 HARV. L. REV. 321, 572, 721, 932.

# RECENT CASE NOTES

ADMIRALTY-PRIZE COURT PROCEEDINGS-PROPERTY SUBJECT TO CONDEMNA-TION.—A German firm chartered a Russian sailing ship, on May 6, 1914, to carry a cargo of nitrate from Chile to Europe, loading not to begin before July 13, 1914. On that day, the Hamburg firm sold the cargo to the appellant, a Dutch corporation, by a contract according to which the invoice price was to be payable "90 days after receipt of first bill of lading," or if the ship arrived earlier, then "against acceptance of the documents." The appellant was to name the port of arrival, and the cargo, after loading, was to be at its risk. On August 6, the loading was completed, and the appellant was notified. The German firm through their Chilean branch took the 3 bills of lading, with the cargo deliverable to their order. On September 9 they deposited the first bill of lading with their bank in Amsterdam, with instructions not to turn over to the appellant the bills of lading until the invoice was paid. On October 19, the German firm sent the appellant an invoice for the price, with a statement that the amount was due December 9. The cargo was seized as prize at Plymouth, December 6, but the appellant, unaware of the seizure, had written to the German firm's bankers at Amsterdam, who then held two of the bills of lading, enclosing the invoice price with instructions not to pay over the money until they received the third bill of lading. This was received on January 25, 1915, whereupon the bankers paid the German firm, and handed all the bills of lading to the appellant. From the decision of Sir Samuel Evans, President of the Prize Court, holding that the property had not passed to the Dutch buyer, but remained in the German sellers and was subject to condemnation, an appeal was taken to the Privy Council. Held, that the cargo was not subject to condemnation, property having passed to the Dutch buyer when the loading was completed. The Parchim (1917, P. C.) 117 L. T. 738.

The enemy character of goods seized as prize is determined by property, not by risk. The Miramichi [1915] P. 71; The Odessa [1916] A. C. 145. Intermediate lienors may carry all the risk of loss, yet may not have property. Still, risk raises an important inference as to property, and a prima facie inference as between seller and buyer directly: Res perit domino. Martineau v. Kitching (1872) L. R. 7 Q. B. 436, 453. In the instant case, interpreting the contract and the intention of the parties, Lord Parker concluded that from the moment the cargo was loaded and the Dutch buyer notified thereof, a duty to pay arose, all risk of loss fell on the buyer, and the property passed to it. The buyer merely had a credit of ninety days from the time of arrival of the first bill of lading in Europe for the actual payment of the purchase price. The sellers did not retain any jus disponendi, as Sir Samuel Evans concluded; but as security for the purchase price the sellers, through their bankers, were to retain control of the bills of lading, the evidence of title, which were not to be turned over to the buyer until the purchase price was paid. See Mirabita v. Imperial Ottoman Bank (1878) L. R. 3 Ex. D. 164; Browne v. Hare (1858, Ex.) 3 H. & N. 484. The Privy Council appears to have correctly construed the contract as to the time when property was to pass.

CARRIERS—ACTION BY NOMINAL CARRIER AGAINST CARRIER IN POSSESSION—LIABILITY OVER AS BASIS OF RECOVERY.—The plaintiff held himself out as a carrier of freight by boat and received goods for transportation, chartering for the purpose of carrying the goods the cargo space in a vessel owned and operated by the defendant. Because of the unseaworthiness of the ship, the

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cargo became a total loss, and the plaintiff brought suit for the value of the cargo, on the warranty of seaworthiness in the charter-party. *Held*, that the plaintiff, whether or not technically a bailee of the cargo, could recover the amount claimed. *Pendleton v. Benner Line* (1918, U. S.) 38 Sup. Ct. 330.

Like anyone who holds himself out as a carrier, though employing a subcontractor to perform the physical transportation, the plaintiff was under a carrier's liability to the shipper. See Buckland v. Adams Ex. Co. (1867) 97 Mass. 124; Transportation Co. v. Bloch Bros. (1888) 86 Tenn. 392, 6 S. W. 881. As pointed out by Mr. Justice Holmes in the opinion, the right of a bailee to recover full damages against a third person for a wrong affecting the goods was for centuries rested on his liability over to the bailor. Whether all bailees were ever under an insurer's liability to the bailor is by no means clear; but as it became settled that the modern law imposed no such sweeping liability, the courts, after a hard struggle to make the traditional explanation of the right against third persons fit the various cases that arose, finally abandoned the attempt, resting the right squarely on present or prior possession. See Brewster v. Warner (1883) 136 Mass. 57; The Winkfeld [1902] P. 42; see also Holmes, Common Law, 164 et seq.; 2 Pollock & Maitland, History of Eng. Law (2d ed.) 170 et. seq.; Bordwell, Property in Chattels (1916) 29 HARV. L. REV. 731. But the traditional explanation failed, not because liability over was not a sufficient basis for recovery, but because, in the case of the ordinary bailee, it was too often lacking. In the principal case, it was the element of present or prior possession that was lacking, or at least doubtful. But liability over being in fact present, both theory and precedent justify the court in allowing recovery under the old theory. It is interesting that the opinion should have been written by Mr. Justice Holmes, who perhaps did more than anyone else to expose the fallacy of the old reasoning as applied to bailees in general.

CONFLICT OF LAWS - NEGOTIABLE INSTRUMENTS - APPLICATION OF RENVOI Doctrine.-Cotton brokers in Liverpool agreed to buy cotton from a firm in Alabama, and to accept drafts for the purchase price. In pretended compliance with this contract the Alabama firm drew a draft on the purchasers' bank in Liverpool, to which was attached a forged bill of lading for cotton, but no cotton in fact was shipped. The draft with bill of lading attached was purchased in good faith by the Guaranty Trust Co. of New York, which presented it to the purchasers' bank in Liverpool for acceptance, and it was duly accepted for account of the purchasers. The Guaranty Trust Co. then sold the accepted draft in England, and it was later paid by the acceptors to the ultimate holder, a London bank. On discovering the facts, the acceptors brought action against the Guaranty Trust Co. in the United States District Court for the Southern District of New York to recover back the amount paid. The case turned on whether certain words in the draft referring to the contract for cotton made it a mere conditional order as distinguished from a negotiable bill of exchange. The District Court, applying American law, gave judgment for the acceptors, which was reversed by the Circuit Court of Appeals in a decision reported in (1913) 210 Fed. 810, on the ground that the question of negotiability as against the English acceptors was governed by English law, and that evidence of that law was disregarded by the trial court. Pending a new trial in the District Court, the Guaranty Trust Co. brought suit against the acceptors in the King's Bench Division in England to obtain a declaratory judgment determining what the English law was on the question at issue. Held, that the American decision was binding on the parties in England to the extent of deciding that English law governed, that the plaintiff in the English court was entitled to a declaration of the English law, that under the English law of Bills and Notes, the acceptors would not be entitled to recover back what they had paid, but that under the Conflict of Laws provision of the English Bills of Exchange Act, English law "threw the parties back upon American law," and that under American Bills and Notes law the acceptors would be entitled to recover. Guaranty Trust Co. of New York v. Hannay & Co. [1918] I K. B. 43.

See Comments, p. 1046.

Conflict of Laws—Cause of Action Arising in a Foreign Jurisdiction— Effect of Foreign Statute of Limitations.—The plaintiff was owner of a trestle bridge spanning a stream which was an international boundary. The defendant's locomotive in Canada set fire to the bridge which was burned and destroyed The Canadian statute applicable to the facts provided that suit for such an injury "shall be commenced within one year and not afterwards." Over five years had elapsed before the commencement of this action in New Hampshire. Held, that the Canadian statute of limitations was not a bar to the action. Connecticut Valley Lumber Co. v. Maine Cent. R. R. Co. (1918, N. H.) 103 Atl. 263.

The general Anglo-American view is that questions of limitation touch the remedy and as such are to be determined by the lex fori. Huber v. Steiner (1835, C. P.) 2 Bing. N. C. 202. It follows that an action may be brought on a contract or tort at any time before the remedy is barred by the local statute of the forum, although action has already been barred by the lex loci contractus or solutionis or lex loci delicti. Harris v. Quine (1869) L. R. 4 Q. B. 653; Townsend v. Jemison (1850, U. S.) 9 How. 407. The rule is also applied to a judgment obtained in a foreign jurisdiction. Fanton v. Middlebrook (1882) 50 Conn. 44. Nor does it violate the full faith and credit clause to deny enforcement because the statute of the forum has run, although the judgment would still be enforceable in the state where rendered. McElmoyle v. Cohen (1839, U. S.) 13 Pet. 312. Upon the Continent, however, the time limit on the enforcibility of an obligation is held a part of the obligation and hence determined by the law of the obligation. Guthrie, Savigny, 221. In the United States a distinction has been made, based upon the residence of the parties, which has presented an opportunity for approaching the Continental rule. Where the statute of the state whose law governs the obligation is clearly expressed as extinguishing the obligation, and both the parties have resided in that state during the whole period of the statute, the law of that state has been applied in suits brought elsewhere. Brown v. Parker (1871) 28 Wis. 21; Perkins v. Guy (1877) 55 Miss. 153, 177; Story, Conflict of Laws (8th ed.) sec. 582. This appears to be an over-refinement; if the statute purporting to "extinguish" the obligation does extinguish it, the matter ceases to be one of procedure, and residence would become immaterial; whereas if such words do not extinguish the obligation there seems little reason for the exception based on residence. Where a right not existing at common law has been given by statute, and its duration limited, the forum has very generally denied a remedy after the expiration of that period, and this regardless of residence. Eastwood v. Kennedy (1876) 44 Md. 563. The same tendency to approach the Continental view is indicated by state statutes expressly barring actions upon obligations which have been barred in the jurisdictions where they arose. See Holmes v. Hengen (1903, Sup. Ct.) 85 N. Y. Supp. 35. But upon the general proposition that limitation is a matter of remedy the courts have been consistent in their reasoning; many even of the preliminary questions, bearing on the ultimate question whether the action is barred, are also determined by the lex fori. Obear v. First Nat. Bank (1895) 97 Ga. 587, 25 S. E. 335 (provision requiring partial payment on a note to be entered thereon); Walsh v. Mayer (1884) III U. S. 31 (form of acknowledgment necessary to take claim out of the statute). Whatever may be said in favor of the Continental view, our rule, as illustrated by the principal case, has at least the advantage of uniformity. Any change which might be attempted, unless by statute under the movement for uniform state laws, would be bound to be slow and partial.

Constitutional Law—Due Process of Law—Municipal Regulation of the Size of Bakers' Loaves.—The defendant below, a woman running a home bakery and selling bread of her own make, was convicted of selling a loaf weighing 11¾ ounces, in violation of an ordinance of the City of Toledo which permitted the exposure for sale of bread in loaves of one pound and upward "and in no other way." The defendant claimed on writ of error that the ordinance was invalid and in violation of the due process clause of the Fourteenth Amendment. Held, that the ordinance was invalid in so far as it penalized the making and selling of bread in loaves weighing less than one pound. Allion v. Toledo (1918, C. P. Lucas County, Oh.) 28 Oh. Super. & C. P. Dec. 337.

Police power regulation of the sale of foodstuffs is commonly intended to protect the public health from injurious substances and bad food. It is often however, of a second kind, aimed to prevent fraud and deception in the sale of articles which are admitted to be wholesome enough; regulation to assure the public just what and how much it is getting. See Freund, Police Power, secs. 274-275; also (1917) 26 YALE LAW JOURNAL, 67, 416. The section of the Toledo ordinance in question is obviously a regulation of the latter class, and must be justified, if at all, as a measure to prevent deception of the public. The court however, omits a discussion of the fraud element and spends some effort in demonstrating what needs no demonstration: that small loaves are no more injurious to public health than large ones. But the court does strike squarely the difference between the ordinance of the City of Toledo and one of the City of Chicago which had been sustained in the United States Supreme Court. See Schmidinger v. Chicago (1913) 226 U. S. 578, 33 Sup. Ct. 182. The Chicago ordinance permitted the sale of loaves in fractional parts of a pound, only prescribing what those fractions should be. There is a genuine and unquestioned need for small loaves, which the Toledo ordinance forbade altogether, and here lies the difference between reasonable and unreasonable regulation, between due process of law and a failure of due process.

Corporations—Corporations not for Profit—Power to Hold Meetings and Elect Trustees Outside the State.—The American Medical Association. incorporated under the laws of Illinois, but having numerous constituent associations scattered throughout the United States, held an election of trustees outside the State of Illinois, through its house of delegates, as provided in its by-laws. The appellant by an information in the nature of quo warranto sought to oust the trustees so elected. Held, that the election was valid, the statute which required stockholders' meetings to be held within the state having no application to corporations not for profit. People ex rel. Hoyne v. Grant (1918, Ill.) 119 N. E. 344.

The general rule as to corporations for profit is that stockholders' meetings must be held within the state in which the corporation was created. 2 Cook, Corp. (7th ed.) sec. 589. Some states expressly so provide by statute. Hilles v. Parrish (1862, Ch.) 14 N. J. Eq. 380. No very satisfactory reason has been

assigned for the rule. Some authorities explain it as the logical result of the theory that corporations have no legal existence outside the state which created them. 3 Fletcher. Cyc. Corp. sec. 1635. It has been pointed out, however, that that theory itself is unsound. See Prof. W. N. Hohfeld, Stockholders' Individual Liability (1910) 10 COLUMBIA L. REV. 283, at p. 297 ff. Other authorities state the rule as one of public policy and convenience, it being regarded as unjust to compel stockholders to go outside the state for the purpose of attending meetings. I Morawetz, Priv. Corp. (2d ed.) sec. 488. In the light of present day business conditions this reason loses much of its original weight. Corporate stock is widely distributed and, despite the legal presumption to the contrary, the majority of the stockholders in a large proportion of cases are not in fact residents of the state of incorporation. There is, in fact, a decided tendency to organize big corporations in states whose laws are favorable, though they be remote from the real business headquarters, and though, too, a great majority of the stock be held still elsewhere. At least one eminent writer has declared that even in the case of corporations for profit, there is no reason why, in the absence of express statutory prohibition, shareholders should not be permitted to provide for extra-state meetings, if desired. 1 Morawetz, Priv. Corp. (2d ed.) sec. 488. But whatever might be said of the general rule when applied to corporations for profit, it is unsatisfactory in its application to non-profit corporations. In the case of such corporations, especially those having constituent organizations throughout the country, whose very value depends on the promotion of widespread national interest in the objects of the corporation, public policy, far from dictating that meetings be held within the state, would justify the holding of meetings at any place selected. It has been so held in the case of mutual benefit associations. Derry Council No. 40, J. O. U. A. M. v. State Council J. O. U. A. M. (1900) 197 Pa. 413, 47 Atl. 208; Sovereign Camp, Woodmen of the World v. Fraley (1900) 94 Tex. 200, 59 S. W. 879. The decision of the principal case is a welcome extension of the rule to other corporations not for profit and is of considerable practical interest. See (1918) 56 Nat. Corp. Rep. 477.

EMINENT DOMAIN—PROPERTY ALREADY DEVOTED TO PUBLIC USE—COMPENSATION TO COUNTY FOR FLOODING PUBLIC ROAD.—The United States constructed a dam in the Cumberland River which resulted in permanently flooding a public road in Wayne County, Ky., the fee of the road being in the abutters. The county thereupon opened a new road in lieu of the flooded portion of the old, and brought suit against the United States to recover the cost of constructing the new road. Held, that the county was entitled to recover, since the easement which it held in trust for the public must be regarded as private property within the prohibition of the fifth amendment forbidding the taking of private property without just compensation. Wayne County v. United States (Apr. 22, 1918) U. S. Ct. Cl. No. 32713.

Public property of a county, such as a street or bridge, is not within the protection of the state constitution when appropriated by the state legislature for another public purpose. Heffner v. Cass and Morgan Counties (1901) 193 Ill. 439, 62 N. E. 201; cf. Mt. Hope Cemetery v. Boston (1893) 158 Mass. 509, 33 N. E. 695. But it would seem that such property might well be deemed private property with respect to a taking by a different sovereignty, the national government. This appears to have been the holding in certain cases involving the condemnation by the United States of certain municipal property for the site of fortifications. Nahant v. United States (1905, C. C. A. 1st) 136 Fed. 273, 70 C. C. A. 653 note; United States v. Nahant (1907, C. C. A. 1st) 153 Fed. 520; see also United States v. Certain Land, etc. (1908, C. C. N. H.)

165 Fed. 783; United States v. City of Tiffin (1911, C. C. N. D. Oh.) 190 Fed. 279; cf. In re Certain Land (1902, D. C. Mass.) 119 Fed. 453. On the precise issue that the United States must make compensation to a county for taking a public road, there is an almost complete dearth of authority. The Nahant case favors a contrary decision but contains no adequate discussion of the point.

HUSBAND AND WIFE—RIGHT OF WIFE TO SUE HUSBAND FOR ASSAULT AND BATTERY.—The plaintiff sued her husband for assault and battery. Statutes provided that husband and wife might contract with each other; that she might sue alone for injuries to her property, person, or reputation; and that the damages recovered should be her separate property. *Held*, that she could maintain the action. *Johnson v. Johnson* (1917, Ala.) 77 So. 335.

The common law rendered it impossible for a wife to sue her husband because of the theoretical unity of the relation; which in practice meant that recovery would be useless, as he would get the damages as soon as recovered. 1 Bl. Comm. 443; see I Bishop, Married Women, sec. 109; see Co. Litt. 133. Enabling statutes giving the wife control of her separate property, and hence of any damages recovered, have been generally and properly construed topermit an action by the wife against the husband for injury to her property. Mason v. Mason (1892, N. Y. Sup. Ct.) 66 Hun, 386, 21 N. Y. Supp. 306; De Baun v. De Baun (1916) 119 Va. 85, 89 S. E. 239; Regal Realty, etc., Co. v. Gallagher (1916, Mo.) 188 S. W. 151; Borton v. Borton (1916, Tex. Civ. App.) 190 S. W. 192. But there has been an obstinate indisposition to allow a similar action in tort for injury to the wife's person or reputation. Thompson v. Thompson (1910) 218 U. S. 611, 31 Sup. Ct. 111. Strom v. Strom (1906) 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191, and note; Nickerson v. Nickerson (1886) 65 Tex. 281; Schultz v. Schultz (1882) 89 N. Y. 644. The supposed public policy on which these decisions are based (the protection of the home and the sacred relations of marriage) is believed to be more imaginary than real. For divorce proceedings are permitted, which wholly break up the home. And it is hard to see why criminal proceedings, which are also allowed, do not do more violence to the sanctity of the marriage relation than the civil action which is denied. See Fiedler v. Fiedler (1914) 42 Okla. 124, 140 Pac. 1022. The principal case is supported by adjudications in other jurisdictions. Brown v. Brown (1914) 88 Conn. 42, 89 Atl. 889; Fitzpatrick v. Owen (1916) 124 Ark. 167, 187 S. W. 460; see also Sykes v. Speer (1908, Tex. Civ. App.) 112 S. W. 422; Abbe v. Abbe (1897, N. Y.) 22 App. Div. 484, 48 N. Y. Supp. 25. The decisions reached seem to depend not so much on the phraseology of the statutes as on the judicial attitude towards them. By some courts they are considered as "statutes in derogation of the common law," and hence to be strictly construed. Compton v. Pierson (1877, Prerog.) 28 N. J. Eq. 229; Union Trust Co. v. Grosman (1917) 38 Sup. Ct. 147. By other courts they are construed liberally as "remedial statutes." Fiedler v. Fiedler, supra. The liberal construction seems the saner. These statutes change the common law, to be sure, and add to it. But like survival statutes, they add in order to remedy long-felt defects; and the new rights they create should be measured with a view to the needs which called forth their creation. See Black, Construction and Interp. of Laws, 244.

INTERNATIONAL LAW—CITIZENSHIP—EXPATRIATION.—X, a native American citizen, son of a Chinese citizen, proceeded to China in 1890, married there a Chinese woman and continuously resided there until 1917, when he died. For

many years prior to 1917, he was an invalid, and it appeared that he was unable to return to the United States. In 1915, the American consul had refused to register X as an American citizen, on the ground that he had by his long residence in China raised against himself a presumption of expatriation, which was not overcome by proof of his physical disability or occasional expressions of intentions to return to the United States. On a petition for the probate of X's will before the United States court for China, the deceased was described as an American citizen, his citizenship being a necessary condition of the court's jurisdiction. Held, that he was an American citizen. In re Lee's Will, U. S. Court for China, March 30, 1918 (not yet reported in Fed. Rep.).

The Consul, in refusing to register X, confused expatriation with loss of protection, and the rule governing native citizens with that governing naturalized citizens. Act of March 2, 1907, (34 Stat. L. 1228) sec. 2; Department of State Circular Instruction of July 26, 1910; Borchard, Diplomatic Protection of Citizens Abroad, 695. The native citizen can become expatriated in one or two ways only: (1) by naturalization abroad; (2) by taking the oath of allegiance to a foreign state. Act of March 2, 1907, sec. 2; Newcomb v. Newcomb (1900) 108 Ky. 582, 57 S. W. 2; Martin (U. S.) v. Mexico, July 4, 1868, Moore, International Arbitrations, 2467. Mr. Hay, Secretary of State, to Mr. Smith, Nov. 6. 1898, 3 Moore, Digest of Int. Law, 730. As to the nature of the oath of allegiance required, see Mr. Forsyth, Secretary of State, to Mr. Emerson, Jan. 23, 1839, 3 Moore, Digest, 719, and Borchard, op. cit. 682. Long residence abroad can only have the effect, under certain circumstances involving an intent not to return to the United States, of forfeiting protection, but not citizenship. (1859) 9 Op. Atty. Gen. 356; Department of State Circular Instruction of July 26, 1910. This was at its worst the status of the testator during his lifetime, although it appears that he had expressed an intent to return to this country. A naturalized citizen raises against himself a presumption of expatriation by residing in his native country for two years or in any other country for five years, although he may overcome the presumption by proving that he was abroad as the representative of American business or for reasons of health which disabled him from returning, provided he had an intention to return when able. Act of March 2, 1907, sec. 2; Department of State Circular of April 19, 1907, Expatriation, For. Rel. 1907, p. 3; Borchard, op. cit. 704. The court's decision that the decedent was an American citizen seems entirely correct.

International Law-Immunity of State Property from Attachment—Property of Business Corporation Organized by Yucatan.—The defendant corporation was organized by the state of Yucatan, Mexico, to undertake the purchase and sale of sisal hemp for the benefit of the producers of Yucatan. In an action brought against the corporation in New Jersey to recover damages for the conversion of crops grown on the plaintiff's land in Yucatan some of the defendant's property in New Jersey was attached. The defendant moved to dissolve the attachment on the ground that the property belonged to a foreign government. Held, that the motion must be denied. Molina v. Comision Reguladora del Mercado de Henequen (1918, N. J. Sup. Ct.) 103 Atl. 397.

The principal ground for the denial of the motion was that Yucatan was not a sovereign state, but a constituent member of a federal union, having possibly a constitutionally, but not an internationally, sovereign character. Moreover, even if it had such a status, the corporation having been organized for business purposes, would not enjoy immunity from judicial process in the

United States. In this respect, its status is analogous to that of the old United States Bank. Bank of United States v. Planter's Bank of Georgia (1824, U. S.) 9 Wheat 904. The immunity of the property of foreign sovereigns from local jurisdiction is very wide in Anglo-American law. More frequently it is applied in respect to purely public property. Schooner Exchange v. Mc-Faddon (1812, U. S.) 7 Cranch, 116, a French warship; Vavasseur v. Krupp (1878, C. A.) L. R. 9 Ch. D. 351, munitions owned by Japan. But it also extends to public property devoted to or engaged in commercial pursuits. The Parlement Belge (1880) L. R. 5 P. Div. 197, a mail steamer owned by the King of Belgium; Mason v. Intercolonial Railway of Canada (1908) 197 Mass. 349, 83 N. E. 876, a railway owned by the King of England, but doing business in the United States. When the public property is engaged in trade, the rule of immunity is stretched to its widest limits, and in the opinion of the courts of Belgium and Italy, and of certain continental writers, beyond the limits of reason. De Paepe, Etude sur la competence civile à l'égard des Etats étrangers, Bruxelles, 1894; A. Hartmann (1890) 22 Rev. DE Dr. INT. 425-437: 3 Laurent, Droit civil international, Paris, 1880, 42-103. The courts of Belgium and Italy follow the distinction of administrative law between acts jure imperii and acts jure gestionis into the field of international law, the State being regarded as exempt from suit in the former but not in the latter case. We make this distinction in our law of municipal corporations, but not when it comes to the State. For a criticism of the Belgium and Italian decisions, in favor of the wider rule, see D. Anzilotti, (1895) 5 Zeitschr. f. int. Privat- u. Strafrecht, 24-37, 138-147. The New Jersey decision in the instant case was therefore not only correct on the principal ground, that a constituent state of a federal union cannot claim the immunity which is extended to internationally legal sovereigns, but it places a very proper limitation upon a rule already too widely extended, by stating that the property of a corporation organized by a foreign State for commercial purposes cannot claim the immunity from local jurisdiction that might have been extended to the State itself or its directly owned property. With the larger participation of Government in commercial enterprise, which seems an inevitable evolution of the present period, the rule of jurisdictional immunity of public property may be expected to receive further limitation.

LIFE INSURANCE—ASSIGNMENT—SPECIFIC PERFORMANCE OF LOAN CLAUSES.—One Henry Caplin insured his life with the defendant company without reserving to himself the power to change the beneficiaries or revoke the insurance. The policy contained a clause to the effect that the defendant would lend money thereon to the "insured or owner" of the policy. The insured "assigned" the policy to the plaintiff and the defendant refused to make the loan to him. Held, two judges dissenting, that the plaintiff should have specific performance of the clause since he, as "assignee," was the "owner" of the policy. Caplin v. Pennsylvania Mutual Life Insurance Co. (1918, App. Div.) 169 N. Y. Supp. 756.

It is well settled, except in Wisconsin, that the vested benefits of a policy of life insurance cannot be assigned without the beneficiary's consent. See 25 Cyc. 778 and cases cited n. 97. But this does not mean that the same contract which vests the interest of the beneficiary may not expressly reserve a power in the insured to convert the policy into cash, or effect a loan to its full value, and thus defeat the beneficiary's interest. And so it was held in Travelers' Ins. Co. v. Healy (1898, N. Y.) 25 App. Div. 53, 49 N. Y. Supp. 29 (borrowing power in the "holder"). Reservation of this power of defeasance in the "insured or owner," like reservation in the policy's "holder,"

would seem fairly to imply a further power in the insured to alienate this interest of his. See Travelers' Ins. Co. v. Healy, supra. This is analogous to the doctrine that the beneficiary may—in the absence of express provision to the contrary—assign whatever interest he has in a policy. See Hewlett v. Home for Incurables (1891) 74 Md. 350, 24 Atl. 324; Connecticut Mutual Life Ins. Co. v. Baldwin (1885) 15 R. I. 106, 23 Atl. 105; and cf. in this connection (1915) 24 YALE LAW JOURNAL, 433. What difficulty there is in this branch of the principal case appears to arise in giving preference to either of what the dissent regards as two inconsistent tendencies in a poorly drawn policy: the insured may not change his beneficiary or revoke the insurance; yet the "insured or owner" may borrow to the limit of its value.

Equity will refuse specific performance of an agreement to borrow money. Rogers v. Challis (1859, Rolls Ct.) 27 Beav. 175. In such a case the damages at law are clearly adequate. The same rule has been applied to a contract to loan. Sichel v. Mosenthal (1862, Rolls Ct.) 30 Beav. 371; Conklin v. People's Bldg. & Loan Assn. (1886, Ch.) 41 N. J. Eq. 20, 2 Atl. 615. So far as this is based on the theory of mutuality, it would appear to be without sound foundation. See Comments (1917) 27 YALE LAW JOURNAL, 261. So far as the desired loan can be procured elsewhere, at, perhaps, a higher rate of interest, there is no call for equity to interfere. Where the loan cannot be procured elsewhere, and the defendant knew of the special purpose to which the money was to be applied, special damages are recoverable. See (1918) 18 Col. L. Rev. 170. But even special damages must often be conceded inadequate. It has been said that there is hardship in forcing a loan from a man, to one whose credit is not such that he can borrow elsewhere. See (1918) 18 Col. L. Rev. 491; see also Conklin v. People's Bldg. & Loan Assn., supra. But where the contract is fairly made, one who repents of his bargain should not be allowed by crying hardship to escape performance and inflict greater hardship on the other party. In the principal case even the argument of hardship does not apply. The insurer does not suffer, since the amount of the loan is limited to the value of its own policy. And as such a policy would probably not be acceptable security for borrowing elsewhere, the case seems clear for the decree of specific performance.

Limitation of Actions—Amendments—Changing from Equitable to Legal Remedy after Statute has Run.—The plaintiff filed a bill in equity in the federal District Court for the District of Nebraska, seeking on account of the defendants' fraud the cancellation of a deed given in an exchange of lands. The master in chancery reported that the plaintiff had lost his right to equitable relief because, after learning of the fraud, he had cut timber on the land received from the defendants; the case was transferred to the law side of the court, and the plaintiff amended his complaint and asked for a judgment for damages for deceit. To the amended complaint the defendant pleaded the Nebraska statute of limitations. Held, that filing the original complaint for equitable relief prevented the statute of limitations from continuing to run as against the claim for relief at law set up by the amendment. Friederichsen v. Renard (1918, U. S.) 38 Sup. Ct. 450.

See Comments, p. 1053.

Monopolies—Sherman Act—Combination of Non-Competing Products— "Tying Clauses" in Leases.—In a government suit to dissolve an alleged combination of manufacturers of shoe machinery in restraint of trade, the bill charged a general scheme of monopoly, evidenced and carried out by (1) uniting in one corporation the business of several competing manufacturers; (2) subsequent acquisitions of competing businesses, patent rights, etc.; (3) a system of leasing shoe machinery with "tying clauses" in the leases, whereby the monopoly was extended and perpetuated. The District Court found on the facts that there was no substantial competition between the machines manufactured by the constituent companies before the combination: that neither the purpose nor the effect of the subsequent acquisitions was in any substantial degree to suppress competition; that the so-called "tying clause" in the leases were reasonable agreements made for legitimate business reasons, and not for the purpose or with the effect charged in the bill; that the general monopolistic intent alleged had not been proved; and that the defendant company's very large share of the total business in shoe machinery had been secured through its lawful patent monopoly of the best machines, combined with unusual business efficiency. From a decree for the defendants the United States appealed to the Supreme Court. Held, that in a case involving conflicting testimony on all the issues, most of which was heard in open court, great deference should be given to the findings of the trial judges; that these findings were justified by the evidence and should be affirmed; and that the facts proved did not show any violation of the Sherman Act. Day, Pitney and Clarke, JJ., dissenting. (McReynolds and Brandeis, JJ., took no part in the decision) United States v. United Shoe Machinery Co. (1918, U. S.) 38 Sup. Ct. 472.

See Comments, p. 1060.

Mortgages—Rights and Powers of Successive Mortgagees—Assignment of Rents and Profits.—The holder of a fourth mortgage brought suit to foreclose and obtained a receiver to collect the rents in accordance with a provision in the mortgage deed. The owner of a prior mortgage, who was made a party, claimed the rents collected by the receiver by virtue of a provision in his mortgage deed giving him a right to enter and receive the rents and concluding "and said rents and profits are, in the event of any default, hereby assigned to the mortgagee. *Held*, reversing the decision of the Appellate Division, that the rents so collected belonged to the holder of the fourth mortgage. *Sullivan v. Rosson* (1918, N. Y.) 119 N. E. 405.

Even in the absence of any provision in the deed it is not unusual for equity to appoint a receiver of the rents and profits in case the security is inadequate. In such case, however, the mortgagee has no right to rents accrued prior to the receivership decree. A junior mortgagee who takes possession in person or by a receiver is entitled to the rents collected prior to a similar taking of possession by the senior mortgagee. Ranney v. Peyser (1880) 83 N. Y. I; Madison Trust Co. v. Axt (1911) 146 App. Div. 121, 130 N. Y. Supp. 371. This is true even though the rents are expressly pledged as security to the senior mortgagee. Freedman's Sav., Etc., Co. v. Shepherd (1887) 127 U. S. 494, 502; 8 Sup. Ct. 1250. The reason for this is that such a provision is not an assignment; it gives to the mortgagee no right but only a power to create a right to the rents by the act of entry or by having a receiver appointed. Before the exercise of this power the right to the rents is still in the mortgagor, and the latter has both the power and the privilege of dealing with them as he pleases, as by reducing the amount of the rental, or assigning his right to a third party. Frank v. N. Y. L. E. & W. R. R. Co. (1890) 122 N. Y. 197, 221; 25 N. E. 332. One who claims the rent by virtue of an assignment from the mortgagor should therefore be preferred over another who has previously been given a mere power that he has not yet

exercised at the time of the assignment. It would be otherwise in case the holder of the power has a contract right also that the rents shall not be assigned. If the assignment antedates the power, as it did in the principal case, it nullifies the power altogether, and rents collected under the supposed power belong to the previous assignee. Harris v. Taylor (1898) 35 App. Div. 462, 54 N. Y. Supp. 864. Such an assignee can sue the tenant for the rents. Thomson v. Erskine (1901, App. T.) 36 Misc. 202, 73 N. Y. Supp. 166. The assignment is valid even though the assignee's right is conditional upon default by the mortgagor. State Bank v. Cohen (1910, Spec. T.) 68 Misc. 138, 123 N. Y. Supp. 747. It would seem to be entirely immaterial whether the assignment is effected by a separate document, as in Harris v. Taylor, or by appropriate words in the mortgage deed, as in Thomson v. Erskine and in the principal case. In the latter case, however, the provision may be given the interpretation that the words of assignment are merely redundant and refer only to rents and profits collected after possession has been taken by the mortgagee or by his receiver. In re Banner (1907, D. C. S. D. N. Y.) 149 Fed. 936; In re Israelson (1916, S. D. N. Y.) 230 Fed. 1000; Abrahams v. Berkowitz (1911) 146 App. Div. 563, 131 N. Y. Supp. 257. This was the construction given in the principal case, with the result that both mortgagees were held to have no right by assignment but only a power to create rights by entry or by a receivership, and the junior mortgagee was preferred because he exercised his power first. Such an interpretation may be reasonable, but the opinion of the lower court to the contrary, reported in (1915) 166 App. Div. 68, 151 N. Y. Supp. 613, is very persuasive.

NEGLIGENCE—INJURY TO VOLUNTEER IN WHOSE PRESENCE THE DEFENDANT HAS AN INTEREST.—The plaintiff, a professional dancer, by consent of the defendants, voluntarily attended and took part in the rehearsals for a revue to be given by the defendants, in the hope that she would thereby obtain an engagement in the revue when produced. She was under no contract with the defendants. While attending a rehearsal, she was injured by the negligence of a servant of the defendants. Held, that the plaintiff was a "volunteer with a private interest," and as such not in common employment with the defendants' servant, and so was entitled to recover her damages from the defendants. Hayward v. Moss Empires Limited (1917, C. A.) 117 L. T. Rep. 523.

Ordinarily a mere volunteer assisting in the master's work is, as regards the master, in no better position than a trespasser, and cannot claim higher protection than that the master himself, after learning of his presence, shall not wilfully or carelessly injure him. Degg v. Midland R. R. Co. (1857, Exch.) I H. & N. 773. Consequently, if injured by the negligence of a servant, he cannot recover against the master. Eason v. S. & E. T. R. R. Co. (1886) 65 Tex. 577; see (1918) YALE LAW JOURNAL, 415. A mere licensee stands in much the same position. Benson v. Baltimore Traction Co. (1893) 77 Md. 535, 26 Atl. 973. But a licensee who is on the premises on the owner's business, or on business in which both have a common interest, is entitled to the same rights as an invitee. Holmes v. N. E. R. R. (1871) L. R. 6 Ex. 123. There being no difference in rights, there seems little reason for the distinction in terms drawn by the English cases. And American cases call such persons invitees: in fact many cases seem to say that this is the test of an invitee: whether he is there for the benefit of the owner, or whether there is some mutuality of interest in the subject of the visit. Plummer v. Dill (1892) 156 Mass. 426, 31 N. E. 128; Benson v. Baltimore Traction Co., supra; Clopp v. Mear (1890) 134 Pa. 203, 19 Atl. 504. To such persons, English and American authorities agree, the owner is under a general duty of care to prevent injury; he is

responsible to them for his own negligence and that of his servants. Indermaur v. Dames (1867, Ex. Ch.) L. R. 2 C. P. 311; Clopp v. Mear, supra. Had the plaintiff gone on the stage without invitation, merely to apply for employment, she might have been considered a mere licensee. Cf. Larmore v. Crown Point Iron Co. (1886) 101 N. Y. 391, 4 N. E. 752. On the other hand, in the actual case her position approached closely that of a fellow servant, and to apply the fellow servant rule to her would have involved no great extension of it. The rule was first developed as an application of the broader doctrine of assumption of risk. See Farwell v. Boston & Worcester Ry. Co. (1842, Mass.) 4 Met. 49; Hutchinson v. York, etc. Ry. Co. (1850) 5 Ex. 343, 351 ff. And the view that assumption of risk necessarily depends on contract seems unsound. 3 Labatt, Master & Servant (2d ed.) sec. 1285 ff. It is better explained along the lines of volenti non fit injuria. But the fellow servant rule itself has been much criticized as an unwarranted outgrowth of this principle, and a further extension of it, however slight, is hardly to be desired.

PROXIMATE CAUSE—INTERVENING ACT OF INDEPENDENT WRONGDOER.—As a result of the defendant's negligence the plaintiff was knocked unconscious and his goods spilled from his wagon. While he was unconscious, some bystander stole the goods. The plaintiff brought action against the defendant for the loss. Held, five judges dissenting, that he could recover for the goods which were stolen, since the accident was the proximate cause of the theft. Brower v. New York Cent. & H. R. R. Co. (1918, N. J. Ct. Err.) 103 Atl. 166.

A burglar broke into the plaintiff's house and left scattered about and unprotected certain clothing of the plaintiff. While thus exposed, it was damaged by moths. Having been insured by the defendant company against "direct loss by burglary," the plaintiff sued for the loss caused by the damage to the clothing. Held, six judges dissenting, that he could not recover, since the damage was not a direct result of the burglary. Downs v. New Jersey Fidelity, etc., Ins. Co. (1918, N. J. Ct. Err.) 103 Atl. 205.

While it is impossible to reduce to consistency the mass of decisions on the question of proximate cause in torts, and especially on the effect of the intervening act of an independent wrongdoer, the better view is that the first wrongdoer may still be held liable for the damage, if the intervening act was reasonably to be anticipated. Lane v. Atlantic Works (1872) 111 Mass. 136; Daneschocky v. Sieben (1917, Mo. App.) 193 S. W. 966. The tendency to hold only the last wrongdoer has been much stronger where his act was not merely negligent but also wilful and criminal; but even in such cases there is respectable authority for the view that the defendant should be held if the wilful intervention of the third person was a natural and probable sequence. Salmand, Torts (4th ed.) 134; Henry v. Dennis (1883) 93 Ind. 452; contra, Milostan v. Chicago (1909) 148 Ill. App. 540. The Brower case appears to be a sound application of this principle. Nor is it necessarily inconsistent with the decision in the Downs case. Were the burglar being sued, no doubt his acts might have been held to be the proximate cause of the damage to the plaintiff's clothes; but the actual issue in the Downs case was the question of construction—the meaning of the words "direct loss by burglary." In construing policies insuring against "direct loss by fire," the courts have said that the word "direct" has no significance, and, whether used or not, the fire must be the proximate cause of the loss or damage. O'Connor v. Queen Ins. Co. (1909) 140 Wis. 388, 122 N. W. 1038; see also, Bird v. St. Paul Fire Ins. Co. (1917, N. Y. App. Div.) 167 N. Y. Supp. 707. Fire insurance contracts are construed strongly in favor of the insured, and the company has been held liable for goods stolen during a fire as the proximate result thereof. Witherall v. Maine Ins. Co. (1861) 49 Me. 200. Likewise in burglary insurance the policy will be interpreted favorably to the insured. Bankers' Mut. Cas. Co. v. State Bank (1906, C. C. A. 8th) 150 Fed. 78. It would seem, therefore, that the court might well have found the loss in the Downs case within the meaning of the policy without straining its language.

SALES—WARRANTIES—IMPLIED WARRANTY OF WHOLESOMENESS OF FOOD.—The plaintiff purchased and ate at the defendant's drug store ice cream manufactured by the defendant. In an action for damages for illness caused by the presence in the cream of tyrotoxicon, a filth product, the trial court charged that the defendant impliedly warranted the cream wholesome and fit to eat. Held, that the instruction was correct. Race v. Krum (1918, N. Y.) 118 N. E. 853.

See Comments, p. 1068.

TAXATION-FOREIGN CORPORATIONS-EXCISE TAX BASED ON AUTHORIZED CAPITAL STOCK INVALID .- A Massachusetts statute of 1909 required every foreign corporation there doing business to pay an annual excise tax of onefiftieth of one per cent. of the par value of its authorized capital stock, the amount of such tax not to exceed \$2000 in any one year. A statute of 1914 required every corporation subject to a tax under the 1909 law to pay an additional tax of one one-hundredth of one per cent. of the par value of its authorized capital stock in excess of ten million dollars. Under these statutes taxes were assessed against a New York corporation, engaged in both interstate and local business, whose total capital stock was \$45,000,000 and of whose assets not more than 134 per cent. were invested in Massachusetts. The tax was paid under protest and suit was brought to recover it back on the ground that the tax was in violation of the commerce clause of the federal constitution. Held, that the tax was invalid as a burden on interstate commerce, since the two statutes must be construed as part of a single scheme and imposed a tax, without limitation of amount, upon the corporation's total authorized capital. International Paper Co. v. Commonwealth of Mass. (1918, U. S.) 38 Sup. Ct. 292.

See COMMENTS, p. 1074.

TAXATION—INHERITANCE TAXES—FEDERAL AND FOREIGN STATE INHERITANCE TAXES AS DEDUCTIBLE ADMINISTRATION EXPENSES.—In commuting the Connecticut inheritance tax upon the estate of a resident testatrix, inheritance taxes paid to other States and to the United States were deducted to ascertain the net estate taxable under the Connecticut Act. Section 5 of that Act provides that "the net estate for taxation purposes shall be ascertained by adding to the appraised value of the inventoried estate [certain items] and deducting therefrom . . . expenses of administration . . . and losses incurred during the settlement of the estate in the reduction of choses in action to possession, . . ." The tax commissioner appealed. Held, that these deductions were proper. Corbin v. Townshend (1918, Conn.) 103 Atl. 647.

See Comments, p. 1055.

TORTS—LABOR UNIONS—INJUNCTION AGAINST RULE FIXING MINIMUM NUMBER OF EMPLOYEES.—The plaintiff corporation was proprietor of a moving-picture and vaudeville theater. The defendants were officers and members of a labor union of musicians. A rule of the union specified the minimum number of musicians to be employed at each theater in the city, and forbade members

of the union under penalty of fine or expulsion to work at any theater where a smaller number was employed. The number specified for the plaintiff's theater was five, while the plaintiff desired to employ only one. During the summer of 1916 the union rule had been relaxed and the plaintiff had hired a single union organist under an employment terminable at will. Thereafter the defendants notified the plaintiff that the rule was to be enforced. The plaintiff thereupon filed its bill for an injunction. It appeared that the union organist was ready to continue in the plaintiff's employ, except for the union rule, and that the plaintiff could secure a non-union organist only at higher wages. Held, that the plaintiff was entitled to an injunction against the enforcement of the rule. Haverhill Strand Theater v. Gillen (1918, Mass.) 118 N. E. 671.

The plaintiff's right, the court says, is "the right to the free flow of labor." This right is limited by the privilege of each individual musician to refuse to enter the plaintiff's employ-a privilege which may be exercised from any motive whatsoever. It is further limited by the privilege of each musician to persuade his fellow musicians not to enter the plaintiff's service, provided the means of persuasion and the purpose of it are such as the law deems justifiable. What means and what purposes shall be deemed justifiable are questions which must ultimately rest upon economic theories. Consequently it is not surprising that the decisions in labor cases are conflicting. Only one decision on facts precisely like those of the principal case has been found. There the injunction was denied. Scott-Stafford Opera House Co. v. Minneapolis Musicians' Assn. (1912) 118 Minn. 410, 136, N. W. 1092. The basis of that decision was that what one employee is privileged to do singly any number may lawfully agree to do jointly-a principle which the Massachusetts court admits only when the purpose of the combination is thought to be justifiable. Interference by a union for the purpose of raising wages or getting better working conditions is admittedly justifiable. Combined interference was also held legal when the purpose was to secure for one of two unions a larger share of the work formerly done by both. Pickett v. Walsh (1906) 192 Mass. 572, 78 N. E. 753 (union masons combined to refuse to lay bricks unless they could also get the work of pointing the mortar). The defendants in the principal case contended that their action came within the rule of Pickett v. Walsh. But the court distinguished that case on the ground that there the contractor wanted the pointing done by some one, while here the defendants' purpose was to force the theater to make for them work which the plaintiff did not want done by anyone. The consequences of holding legal a combination for such a purpose would, in the opinion of the court, be farreaching and dangerous. Whether one agrees with the Minnesota or the Massachusetts case depends upon one's views of the extent to which labor unions should be controlled by law. That the rule in question was unreasonable and economically wrong can hardly be questioned; but whether such excessive demands should be checked at once by legal interference, or be left to be dealt with by counter-action on the part of employers and by the force of public opinion is another matter. It is a serious question whether labor unions will best learn wisdom or self-restraint by legal compulsion or by the experience to be derived from greater freedom of action. It may be worth noting that the Massachusetts court did not decide the case, as under its earlier decisions it might have done, on the narrower ground that enforcement by fine made the rule of the union illegally coërcive. See Willcutt & Sons Co. v. Driscoll (1907) 200 Mass. 110, 85 N. E. 897; contra, Rhodes Bros. Co. v. Musicians' etc. Union (1915) 37 R. I. 281, 92 Atl. 641. Though this feature of the case was not mentioned by the court, it is probably too much to hope that this marks a recession from a doctrine both the logic and the wisdom of which may be doubted.

Torts—Malpractice—Effect of Plaintiff's Consent in Barring Civil Action.—In an action on the case brought to recover damages for malpractice while performing an operation to procure an abortion on the plaintiff, and for unskilled treatment subsequent to the operation, the defendant, a surgeon, demurred to the complaint on the ground that since the plaintiff consented to an illegal operation she could not recover. Held, that the plaintiff could recover, since consent to allow an illegal act to be performed upon oneself does not constitute a defense to an action against the doer of the act to recover the actual damages suffered. Lembo v. Donnell (1918, Me.) 103 Atl. 11.

recover the actual damages suffered. Lembo v. Donnell (1918, Me.) 103 Atl. 11. Consent to an act prima facie a tort is ordinarily a good defense to a civil action on the principle "volenti non fit injuria." See Cole v. Searfass (1912) 49 Ind. App. 334, 97 N. E. 345. But it is clear that such a defense may be no answer to a criminal charge. Commonwealth v. Collberg (1875) 119 Mass. 350, 20 Am. Rep. 328. For criminal law is concerned not with the injury to the individual but with the injury to society. To hold, however, that the criminality of the act makes the consent inoperative to bar recovery in a civil action, when the same consent to a lawful act would bar recovery, amounts in effect to allowing a plaintiff to recover by virtue and only by virtue of his having transgressed. There is, then, logical reason for attacking the decision in the principal case; and in a very similar case the opposite result was reached. Goldnamer v. O'Brien (1896) 98 Ky. 569, 33 S. W. 831. Yet the instant decision is supported by another abortion case. Miller v. Bayer (1896) 94 Wis. 123, 68 N. W. 869. Similarly, in cases where breach of the peace is involved, the great weight of authority holds that consent bars neither party from recovery for injuries sustained. Shay v. Thompson (1884) 59 Wis. 540, 18 N. W. 473; contra, Lykins v. Hamrick (1911) 144 Ky. 80, 137 S. W. 852. This has been explained on the not very illuminating ground that wilful hurt is not excused by consent, if it has no reasonable object. Pollock, Torts (10th ed.) 168. There are other cases where the law finds public policy better served by regarding the plaintiff's consent as inoperative in order that, by encouraging civil actions, the criminal may be the more readily detected. Webb v. Fulchire (1843) 25 N. C. 485 (recovery in quasi-contract of money lost in a shell game); but see contra, Stewart v. Wright (1906, C. C. A. 8th) 147 Fed. 321. In the former case a distinction is taken between the habitual law-breaker and the person led only momentarily into breaking the law. The more numerous jurisdictions appear to accord with the rule which helps the "unfortunate" to indemnify himself at the expense of the "knave." It is an important and perhaps doubtful question, in determining the wisdom of allowing the civil action, how far this in practice accomplishes the purpose of securing the criminal punishment of the knave. But even if he escapes the state, it may be that public policy is well served by penalizing him at least to the extent of making him recompense the plaintiff. The case has been discussed thus far as if the tort consisted solely in the illegality of the operation. The plaintiff alleged, however, not merely an illegal operation, but negligence in the performance of it and in the treatment after the operation. To such negligence there was of course no consent. The defense, if any, must be that the plaintiff was particep's criminis; that one who engages with another in a criminal enterprise must assume all risks of injury; that the law will not aid either to recover against the other for injuries resulting from the way in which the criminal design was carried out. Cf. Gilmore v. Fuller (1902) 198 Ill. 130, 65 N. E. 84. Here again we come back to a question of public policy. If both parties are to be regarded as equally guilty and the injury flows directly from the criminal act, it seems both sounder principle and better policy to leave the loss where it falls. Where, as in the principal case, one party may be regarded as the victim of sudden and overpowering temptation and the other as a professional criminal dangerous to the community, the rule which tends most to the exposure of the latter is perhaps to be preferred.

Torts—Telegraph Companies—Failure to Deliver Telegram Containing Offer of Employment.—The plaintiff had sent a telegram to a baseball club offering his services. The telegraphic counter-offer of the club was never delivered; the plaintiff consequently lost an opportunity he would have accepted, and was subsequently unable to secure similar work. The defendant had notice of the telegram's importance, but failed to deliver because of an error in transmission. Held, that the plaintiff could recover compensatory damages. Pfiester v. Western Union Tel. Co. (1918) 282 Ill. 69, 118 N. E. 407.

When an undelivered telegram contains an acceptance of an offer to contract, recovery is permitted the sender against the company. Western Union v. Blackwell Co. (1909) 24 Okla. 535, 103 Pac. 717. Nor is there any reason why the addressee should not also be allowed recovery. Cf. Penobscot Fish Co. v. Western Union (1916) 91 Conn. 35, 98 Atl. 341, and note thereon (1917) 26 YALE LAW JOURNAL, 252. Courts have indeed refused him a remedy against the company where a message arrived, but was altered in transmission; but this has been on the theory that the addressee of an offer can hold the sender on the contract according to the offer as transmitted; leaving to the sender the remedy against the company. Ayer v. Western Union (1887) 79 Me. 493, 10 Atl. 495; and cf. Sherrerd v. Western Union (1911) 146 Wis. 197, 131 N. W. 341; see also Comments (1918) 27 Yale Law Journal, 932, 933. But where an acceptance wholly fails to arrive, although a contract may have been completed by its sending, it seems clear that in practice this hardly protects the addressee; on the contrary, his troubles are likely to be increased by holding him bound by a contract of which he has no knowledge. In such cases, therefore, remedy should be given him directly against the company. This is borne out by the cases on undelivered offers. There the propriety of suit by the addressee seems admitted; recovery is contested only on the ground of uncertainty as to whether he would have accepted. Remedy has been denied him on this ground. Beatty Lumber Co. v. Western Union (1903) 52 W. Va. 410, 44 S. E. 309; see also Ann. Cas. 1914 C 209. But the probability of acceptance is now generally and properly considered a question of fact. Western Union v. Sights (1912) 34 Okla. 461, 126 Pac. 234; Postal Tel. Cable Co. v. Talerico (1911, Tex. Civ. App.) 136 S. W. 575. Recovery being allowed, the measure of damages in cases of undelivered or wrongly transmitted offers or acceptances of contract other than employment is, as in an action for breach of the contract, the loss actually sustained, or the profit which would have been made, or both. Western Union v. Sights, supra; Postal Tel. Cable Co. v. Talerico, supra; Hasbrouck v. Western Union (1899) 107 Iowa, 160; 77 N. W. 1034. Where employment is offered, if it is not for a definite period but terminable at will, compensatory damages cannot be recovered, the theory being that the damages are too uncertain to be estimated. Larsen v. Postal Tel. Co. (1911) 150 Iowa, 748; 130 N. W. 813. Merrill v. Western Union (1886) 78 Me. 97, 2 Atl. 847. But see Western Union v. McKibben (1887) 114 Ind. 511, 14 N. E. 894. But where the period of the contract is definite, the injured party is held entitled to full compensatory damages. Western Union v. Valentine (1885) 18 Ill. App. 57; McGregor v. Western Union (1900) 85 Mo. App. 308. See also 37 Cyc. 1766. The principal case properly follows the latter rule, and since the plaintiff used due diligence in attempts to find other employment, permits a recovery not only for the contract salary, but also for loss of reputation and skill, through lack of practice.

## **CURRENT DECISIONS**

CARRIERS—LIMITATION OF LIABILITY FOR NEGLIGENCE—CARMACK AMENDMENT.—Cattle were shipped by railroad under the "Uniform Live-Stock Agreement" by which, in consideration of a reduced rate, it was agreed that in the event of negligent delay or detention damages should be limited to the amount actually expended by the shipper in the purchase of food and water for the cattle while so detained. Suit was brought for loss arising from negligent delay. Held, that the attempted limitation of liability for negligence was invalid under the Carmack Amendment. Boston & Maine R. R. Co. v. Piper (1918, U. S.) 38 Sup. Ct. 354.

The case apparently arose before the adoption of the latest amendments to the Interstate Commerce Act, by which, in the case of "ordinary live-stock," all contracts of any kind attempting to limit liability are forbidden. See Act March 4, 1915, 38 U. S. St. at L. 1196, and Act Aug. 9, 1916, 39 U. S. St. at L. 441. It is chiefly interesting as showing that the court was not disposed to extend the agreed valuation doctrine of Adams Express Co. v. Croninger (1913) 226 U. S. 491, 33 Sup. Ct. 148, and other later decisions, which, as applied to cases of negligence, was said in Wells Fargo & Co. v. Neiman-Marcus Co. (1913) 227 U. S. 469, 476; 33 Sup. Ct. 267, 269, to rest on estoppel. There was clearly no basis for estoppel in the principal case.

CIVIL RIGHTS—RACE DISCRIMINATION—PLACES OF PUBLIC ACCOMMODATION.—Section 40 of the Civil Rights Law of New York forbids discrimination on account of race or color at any "place of public accommodation, resort, or amusement." The law defines such a place as including hotels, restaurants, public conveyances, and several other places, but makes no mention of saloons. The plaintiff, a negro, was refused liquors at a saloon belonging to the defendant, the refusal being due solely to the plaintiff's color. He sued for the penalty in accordance with other provisions in the statute. Held, three judges dissenting, that he had no cause of action. Gibbs v. Arras Bros. (1918, N. Y.) 118 N. E. 857.

The plaintiff, a negro, sought to purchase tickets to the floor of a dancing pavilion maintained at a park owned and operated by the defendant electric railroad company as auxiliary to its transportation business. On account of his color he was denied admittance. The Civil Rights Law makes no express mention of dancing pavilions. Held, that the plaintiff was entitled to the penalty provided by the law for exclusion from a place of public accommodation, resort or amusement. Johnson v. Auburn & Syracuse Elec. R. Co. (1918, N. Y.) 110 N. E. 72.

These cases give a reasonable construction to a statute that exists in most of the Northern states. If the legislature means to forbid race discrimination in every sort of private business, it should do so expressly. When the statute list certain places, as hotels, bathhouses, barber shops, theaters and music halls, the courts should not extend the application of the law to other sorts of business by mere analogy or inference. Such a law deprives citizens of customary and desirable privileges. Sound policy would restrict such laws to the kinds of business long recognized as affected with public interest and as requiring governmental regulation.

Constitutional Law—Federal Child Labor Law Invalid.—Suit was brought by a father in his own behalf and as next friend of his two minor sons, one under the age of fourteen and the other between fourteen and six-

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teen years of age, employees in a cotton mill at Charlotte, N. C., to enjoin the enforcement of the Federal Child Labor Law (39 St. at L. 675) which prohibits the shipment in interstate commerce of any product of a mill, factory, etc., in the United States, in which within thirty days before the removal of such product children under the age of fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a day, or more than six days in any week, or between seven in the evening and six in the morning. Held, that the Act was invalid, since "it not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend." Holmes, McKenna, Brandeis and Clarke, JJ., dissenting. Hammer v. Dagenhart (June 3, 1918) U. S. Sup. Ct. Oct. 1917 Term, No. 704.

Mr. Justice Day's opinion distinguishes the earlier decisions which were thought to be controlling, such as the Lottery case, the Pure Food case, the White Slave case, the Whiskey case, on the ground that "in each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results," while here "the goods shipped are of themselves harmless" and the thing intended and affected by the statute is not the regulating of transportation among the states but the standardizing of the ages at which children may be employed in manufacturing and mining within the states. One cannot read the luminous dissenting opinion of Mr. Justice Holmes without doubting the soundness of this distinction and questioning the wisdom of the majority's view that legislative motive and the indirect effects of legislation may limit the exercise by Congress of its admitted power to regulate commerce.

Contracts—Contract to Bequeath—Action at Law for Damages.—The plaintiff sued in the federal court for the southern district of New York the executors of L, alleging a promise by L to bequeath her \$50,000 if she would perform certain services, that she had performed them, and that L had bequeathed her only \$10,000. The District Judge transferred the suit to the equity side of the court on the ground that an action at law could not be sustained by New York law. The plaintiff filed a petition for mandamus to require the judge to entertain the suit at law. Held, that the petitioner was entitled to a writ of mandamus, since the law of New York permits an action at law for breach of a contract to leave a legacy. Matter of Simons (June 3, 1918) U. S. Sup. Ct. Oct. 1917 Term, No. 26 Original.

For a discussion of testamentary contracts, see (1918) 27 YALE LAW JOURNAL, 542.

Corporations—Stock—Shares Issued for Consideration Less Than Par Value Void.—The constitution of Oklahoma forbids any corporation to issue stock except "for money, labor done, or property actually received to the amount of the par value thereof, and all fictitious increase of stock... shall be void." A stockholder in an Oklahoma corporation filed a bill in equity asking cancellation of certain certificates of stock, alleging that they had been issued in violation of this provision. It appeared at the trial that they had been issued in good faith for only forty per cent. of the par value, which was all that could be obtained at the time. A portion of the "shares" had been transferred by the original holder to a bona fide purchaser for value. Held, that the shares issued in violation of the provision were absolutely void, even in the hands of a bona fide purchaser for value, and that the certificates should therefore be cancelled. Lee v. Cameron (1917, Okla.) 169 Pac. 17.

The court calls attention to the fact that in a large number of states the constitutional provision merely requires the stock to be issued for money or property, but does not, as in Oklahoma, require that the value received shall equal the par value of the stock. Decisions which hold that under provisions of that kind stock issued in good faith is valid, are therefore not in point in Oklahoma. The application of the rule to the bona fide purchaser for value may at first sight seem harsh, but the court leaves open the question of whether he would have an action for damages against the corporation or its officers, merely deciding that he is not entitled to retain his stock certificates or to have his name remain on the list of stockholders. The decision seems to carry out the obvious intention of the framers of the Oklahoma constitution.

Foreign Corporations—Right to Sue—Installation of Machinery Nor Local Business.—A Pennsylvania manufacturing corporation contracted with residents of Texas for the sale of an ice plant which was to be shipped from Pennsylvania, installed in Texas under the supervision of the seller's superintendent, and tested by him before the purchasers were obliged to accept it. The corporation, having performed its part of the contract, brought suit for the contract price, and was met by a plea that it had transacted business in Texas without having obtained a permit therefor and hence under Texas statutes was not authorized to prosecute its suit. Held, that the suit was maintainable, since the installation of the machinery was incidental to its sale in interstate commerce. Pitney, J., dissenting. York Mfg. Co. v. Colley (1918, U. S.) 38 Sup. Ct. 430.

The Texas courts had denied the plaintiff's right to maintain its suit on the strength of Browing v. Waycross (1914) 233 U. S. 16, 34 Sup. Ct. 578. That case held that the erection of lightning rods as incidental to an interstate sale of them was local business. Similarly, it had been held that the installation of an automatic railway signal system, including the digging of trenches for conduits for the wires, was local business. General Ry. Sig. Co. v. Virginia (1918, U. S.) 38 Sup. Ct. 360. The principal case distinguishes these decisions on the ground that in them the service to be performed in the foreign state was not essentially connected with and inherently related to the subject matter of the sale, while here it was. The distinction is obviously sound but not always easy of application.

Monopolies—Sherman Act—Price-Fixing for Certain Hours of the Day.—By a rule of the Chicago Board of Trade members were forbidden to buy or offer to buy, during the hours between the closing of one day's session and the opening of the next, grain "to arrive" in Chicago, that is, grain then in transit to that city, at a price other than the closing bid of the session. Purchases of grain "to arrive" constituted a small proportion of the total transactions in grain, the greater part being "spot sales" and "future sales." Held, that the rule above stated was not in violation of the Sherman Anti-Trust Act. Board of Trade v. United States (1918, U. S.) 38 Sup. Ct. 242.

This case illustrates very well the operation of the modern and rational construction of the Sherman Act under the principles first enunciated in Standard Oil Co. v. United States (1911) 221 U. S. I, 31 Sup. Ct. 502. The Board of Trade rule, during the hours of its operation, eliminated all competition between members of the Board of Trade in respect to prices for grain "to arrive"; but it affected only a small part of the grain coming to Chicago, left other important grain markets open to competition, operated only for certain hours of the day,—chiefly not regular business hours—and the price which it

fixed for those hours each day was a price established by competitive bidding on the Board. The court therefore found as the decisive fact that it "had no appreciable effect on general market prices"; and as good business reasons appeared for the adoption of the rule, which, within its narrow limits, was shown to have improved market conditions and even promoted competition in certain respects enumerated by the court, the decision sustaining its legality very properly followed. For other discussions of the "rule of reason" as applied to the construction of the Sherman Act, see Comments, p. 1060, supra, and (1917) 27 YALE LAW JOURNAL, 139.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE OF CHILD—CONSTRUCTION OF STAT-UTE.—The New Jersey Railroad Law (3 Comp. St. 1910, p. 4245) sec. 55, declares that if "any person shall be injured by an engine or car while walking, standing or playing on any railroad," except at lawful crossings, he shall be deemed to have contributed to the injury sustained and shall not recover damages. The plaintiff, a boy less than seven years old, had been playing marbles near a railroad siding and was injured by the moving of a car while he was trying to extricate his marble from under the car. Held, that the plaintiff was barred from recovery. Day and Clarke, JJ., dissenting. Erie R. R. Co. v. Hilt (1918, U. S.) 38 Sup. Ct. 435.

The lower federal courts had construed this statute merely as declaratory of the common law and not as declaring with sufficient clearness an intention to charge children, however immature, with contributory negligence. Erie R. R. Co. v. Swiderski (1912, C. C. A. 3d) 197 Fed. 521. A state court had taken the opposite view. Barcolini v. Atlantic City, etc. Co. (1911, Sup. Ct.) 82 N. J. L. 107, 81 Atl. 494. The principal case follows the construction of the state court, although not the court of last resort in the state, and seems to approve such construction. It appears a rather harsh interpretation of the statute, and the arguments of the lower federal courts are thought to be more persuasive.

Public Service Corporations—Regulation of Rates—Regulation of Water Company Whose Franchise Had Expired.—After the expiration of the complainant water company's franchise the City of Denver passed an ordinance declaring the company to be a mere tenant at sufferance and fixing the rates it should thereafter charge. The company contended that these rates were confiscatory and sued to enjoin the enforcement of the ordinance. Held, three judges dissenting, that the company was entitled to an injunction, that the rate ordinance should be construed as granting a franchise of indefinite duration, and that in determining the reasonableness of its rates the plant was to be valued as a plant in use and the item of "going value" was to be considered. Denver v. Denver Union Water Co. (1918, U. S.) 38 Sup. Ct. 278.

The case is of interest both in respect to the holding that the regulatory ordinance granted a license for an indefinite term, and in respect to the reaffirmation of the rule that "going value" is an element to be considered in rate regulation. For a discussion of the latter point, see (1918) 27 YALE LAW JOURNAL, 386.

STATUTE OF FRAUDS—PAROL AGREEMENT WITH TENANT IN POSSESSION FOR FUTURE TENANCY—HOLDING OVER AFTER LANDLORD'S REPUDIATION.—A landlord agreed with the tenant in possession under a lease expiring July 31, 1915,

for a tenancy in futuro to continue eight months from the expiration of the original term. But thereafter, on May II, 1915, the landlord made a lease to other parties and notified the tenant to surrender possession on August II, 1915. In a suit by the landlord for rent from August Ist to August IIth, the defendant counterclaimed for damages caused by breach of the parol agreement to extend the lease. Held, that the parol agreement was within the Statute of Frauds and was not validated by the tenant's possession after the expiration of the original term because prior thereto it had been repudiated by the landlord. Buschman Co. v: Garfield Realty Co. (1918, Ohio) 119 N. E. 142.

When a yearly tenant holds over without any agreement he is presumed to make a contractual proposal for a yearly tenancy which the landlord accepts by acquiescing in his possession or by the receipt of rent. When a yearly tenant holds over pursuant to a prior oral agreement his continued possession acquiesced in by the landlord, is equivalent to an entry into possession under the new agreement and takes it out of the Statute of Frauds. Bumiller v. Walker (1917) 95 Oh. St. 344, 116 N. E. 797. But if the landlord has already repudiated the prior oral agreement, as in the principal case, then the tenant's holding over cannot be treated as a delivery of possession under the new agreement, so as to remove the bar of the Statute. The principal case is believed to be a sound decision of a point on which there is little precise authority.

STATUTE OF FRAUDS—PART PERFORMANCE—SPECIFIC PERFORMANCE OF ORAL CONTRACT RELATING TO WATER RIGHTS.—The defendant owned a water right. He orally agreed with the plaintiff that if the latter would rebuild the flume which carried the water, he would give him a right to one-fourth of the water and a right of way across the defendant's land for the flow of the water. Plaintiff rebuilt the flume in pursuance of the agreement and, on defendant's refusal to carry out the bargain, asked for specific performance. Held, that plaintiff was entitled to the relief asked. Tucker v. Kirkpatrick (1917, Or.) 169 Pac. 117.

The court took the view that there had been sufficient "part performance" to "take the oral agreement out of the statute of frauds" according to the Oregon precedents. Apparently the facts in the principal case presented a novel situation somewhat unlike those involved in previous adjudications. However, the analogy between what had been done and the situation in the case of a so-called "parol license" which "becomes irrevocable when acted upon" by the licensee seems sufficiently close to justify the present decision.

TAXATION—CORPORATION INCOME TAX—INCOME DERIVED FROM EXPORTA-TION.—The plaintiff corporation paid under protest a federal income tax computed upon the net income derived from its business of exporting goods to foreign countries. It contended that such tax was in violation of Art. I, sec. 9, cl. 5 of the Constitution, providing that "no tax or duty shall be laid on articles exported from any state." Held, that the tax was valid. William E. Peck & Co. v. Lowe (1918, U. S.) 38 Sup. Ct. 432.

While it has been held that the exportation must be free not only from a tax on the articles exported but also from any tax which directly burdens the exportation, the tax in question is unlike any of those previously condemned. It burdens exportation no more directly than do general taxes upon articles intended for exportation, and these are admittedly valid.

WORKMEN'S COMPENSATION ACT—FACIAL DISFIGUREMENT.—The claimant suffered a laceration of the scalp due to the catching of her hair by a revolving shaft near which she was working. This resulted in a scar across the forehead from ear to ear, and serious facial disfigurement. Her earning capacity was not shown to be impaired thereby. *Held*, that an award of \$1000 by the State Industrial Commission, for the facial disfigurement alone, was valid. *Erickson v. Preuss* (1918, N. Y.) 119 N. E. 555.

The object of most compensation acts is to make compensation for loss of earning power, and such was the policy of the New York law prior to 1916, when an amendment provided for an award in case of "serious facial or head disfigurement." Concurrent awards for disfigurement and for loss of earning power are now permissible.

WORKMEN'S COMPENSATION ACT—INJURY "ARISING OUT OF" THE EMPLOY-MENT—CONCUSSION FROM EXPLOSION OF ENEMY AIRCRAFT'S BOMB.—The plaintiff, a potman in the defendant's employ, being engaged in cleaning a brass door plate on the street door of the defendant's public house, was slightly injured by concussion from the explosion in another street of a bomb dropped by German air raiders. In his suit under the Workmen's Compensation Act to recover for the injury sustained, the trial court allowed a recovery. An appeal by the defendant was allowed by the Court of Appeal on the ground that, since there was no evidence of special risk in the work the plaintiff was doing, the injury did not arise out of the employment within the meaning of the act. (1917, C. A.) 144 L. T. 111. The applicant then appealed to the House of Lords. Held, that the injury did not arise out of the employment. Allcock v. Rogers (H. L.) [1918] Weekly Notes 96; 144 L. T. Jour. 401.

Compensable injuries are those (1) "arising out of" and (2) " in the course of" the employment. Earlier decisions had seemed to render almost indistinguishable these two conditions of liability. See Thom v. Sinclair [1917] A. C. 127, discussed in (1917) 27 YALE LAW JOURNAL, 143; Dennis v. J. A. White & Co. [1917] A. C. 479, discussed in (1918) 16 MICH. L. REV., 179; also (1918) 30 JURID. REV., 162. The principal case indicates that a distinction does still exist and that the accident must arise out of, as well as in the course of, employment to impose liability.

## **BOOK REVIEWS**

American City Progress and the Law. By Howard Lee McBain. Published by the Columbia University Press, New York. 1918. pp. viii, 269.

The title indicates very precisely the scope of the volume in hand. The purpose of the volume is to discover the principles which, as derived by the courts from the fundamental law of the nation, of a state and of a particular city itself, control the extension of city activities into certain new paths. The general inquiry, as expressed in the preface, is this: "In what respects does the law as it now stands facilitate or obstruct the city in its endeavor to apply this or that new policy to the solution of an existing problem?" Fiscal, political, economic and other aspects of policies under discussion are considered only "so far as the views of the courts have been predicated upon one or more of these aspects."

After a discussion of two general topics in this field—viz., legislative grants of home rule, and variations in the rule of strict construction of municipal powers—the book is devoted to an analysis of the legal rules affecting the particular projects of most concern to those interested at present in the enlargement and improvement of the city's services. To what extent and by what methods may a city control the smoke nuisance; regulate bill boards; limit the height of buildings; establish building lines; create zones for building or other regulations; establish industrial and residential zones; apply excess condemnation of land for protection of public improvements, financial profit, or other purposes; acquire and operate public utilities; control living costs; provide facilities for recreation and entertainment; promote local commerce and industry? The essential guiding legal principles relating to these questions, as well as questions incidental to them, are amply explained within the brief compass of 250 pages. The exposition is at all points clear and precise, and is nowhere needlessly technical.

Though holding the discussion strictly within the special province of the book, yet the author is able upon proper occasion to assume the attitude of critic or guide. Thus, for example, he is able at some points to point out inconsistency or inexactness in the opinions of the courts, and at other points to suggest new constitutional grounds upon which to defend innovations for which more familiar constitutional supports have proved unavailing before the courts.

The book is a highly useful and reliable aid for any one concerned with the promotion of study of city progress. For most new steps in a city's development not only popular opinion but the courts also must be persuaded. The volume gives the key to information that should save many attempted advances from mishaps which they would otherwise suffer before the courts. It should be observed also that the analysis of decisions which the book presents affords new evidence that the courts are not in all instances inflexible censors of public opinion, and that even the courts' law is, in the familiar words of the late Justice Brown, "to a certain extent, a progressive science."

F. W. COKER

## Yale University

La Unificacion International de la Letra de Cambio. By Dr. Carlos C. Malagarriga. Published by J. La Jouane & Co., Buenos Ayres. 1916. pp. 289.

Dr. Carlos C. Malagarriga has published under this title a revised edition of the thesis which he presented for the degree of Doctor of Jurisprudence at the National University.

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The volume begins with general considerations of the subject of uniform bills of exchange legislation and presents a detailed summary of the work done to bring this about. The opinions of noted jurists such as de Parieu, Asser and Le Touzé are set forth, and the proceedings of such congresses as those held in Hungary, Denmark and Germany from 1872 to 1875, are summarized. He refers to the twenty-seven articles which were agreed upon in the conferences of Bremen, Antwerp and Frankfort from 1875 to 1878, and dwells on the diversity of views, some tending to uniformity and others content with harmony in the law of bills of exchange throughout the commercial-law systems of Europe.

The author gives close attention to the labors of the Institute of International Law founded in 1871, the International Congress of Commercial Law held at Antwerp in 1885, and that of Brussels in 1888. He emphasizes the failure of official action looking to the incorporation into the various national commercial codes of the model laws prepared at these congresses. Finally, he refers to the International Congress of Chambers of Commerce which met at Liège in 1905, and to the draft of bills of exchange rules approved by the International Law Association in 1908. He then takes up in great detail the work of The Hague Conferences of 1910-1912, so well known to all who have had occasion to study this subject.

In his second chapter Dr. Malagarriga analyzes, with the most conscientious citation of authorities, the general question of the uniformity of the law of bills of exchange, and declares himself in favor of uniformity, which he believes to be more advantageous than mere harmony. He then asks whether uniformity is possible. His answer rests upon a historical analysis, and he notes as among the causes of divergence between the laws on bills of exchange the following three points:

- 1. Distinct commercial usage and tradition.
- 2. Diverse sources of legal criteria for legislation.
- Strong differences between the legal theories of the jurists of different countries.

Dr. Malagarriga himself accepts the view of Lyon-Caen, that the divergencies which exist between the laws on bills of exchange do not rest on fundamental grounds but are due merely to the fact that certain legislators have not had sufficiently in mind the changes in commercial usages surrounding bills of exchange, and have failed to observe that the reasons for the ancient rules on commercial paper have disappeared. Our author gives as his own conclusion that uniformity is in reality not only desirable but even possible (page 58).

So far as the practical possibility of uniformity is concerned, the author recognizes the importance of these obstacles. First, in the United States and Great Britain, the long and elaborate development of jurisprudence and the effort to bring about local uniformity will make difficult any attempt to bring these two great commercial nations within the bounds of any international agreement. If they were to accept such an agreement they would face the confusion due to a double system of laws on bills of exchange, domestic and international.

In the second place, there is no international legislative power capable of preparing through an agency of international committees uniform model laws to be submitted to national legislatures. (The so-called De la Grasserie plan.)

Third, there is no international judicial power. De la Grasserie proposed the creation of an International Court of Cassation; and article 30 of The Hague Convention of 1912 offers a remedy, according to Dr. Malagarriga, by providing for future conferences concerning modifications of or additions to the convention or the uniform rules. Nevertheless, Dr. Malagarriga is somewhat pessimistic and foresees that after this war there may develop among all the peoples

of the world an aloofness and a reserve towards all internationalist movements of the type so familiar during recent years of peace. In regard to this last observation we must differ vigorously with our author, for as a matter of fact international tendencies already show themselves to be diametrically opposite to what he has predicted. Indeed, if there were not to follow almost immediately after this war an era of international co-operation and solidarity such as never has existed in the world, we should in truth have to abandon forever any idea of progress.

In his third chapter, the last of part one, the author deals with the work of the various American congresses and conferences so far as they have been concerned with the uniformity of the law of bills of exchange. He emphasizes the failure of the Juristic Congress of Montevideo of 1889 to recognize clearly the program which it should have followed; many were satisfied that this congress should aim merely at harmony, and that in fact was the object of all its conclusions. In the same way Dr. Malagarriga feels obliged to criticize the fact that as between a universal program and a merely continental one, the Congress of 1889 choose the latter. The author then mentions the Pan-American Conference of Washington (1890), of Mexico (1902), of Rio de Janeiro (1906), and Buenos Ayres (1910), and refers incidentally to the Latin-American Scientific Congress (1905). Somewhat irrelevantly the author then takes up the much debated question whether or not there exists an international law of the American hemisphere. He is very pessimistic as to the result of these Pan-American Conferences and says that their complete meaninglessness in no way corresponds with the words spoken by Dr. Victoriano Plaza at the Buenos Ayres Conferences of 1910, when that distinguished statesman declared that the sentiments of the American peoples were held in common and that they were led by the same aspirations and animated by the same ideals.

If it be possible to deny the feasibility and desirability of an international law of the Americas, with democracy as the unifying basis for the hemisphere, on the other hand, a community of sentiment and ideals is recognized and cannot be underestimated because of differences of language, race, etc. If Dr. Malagarriga declares:

"America should endeavor to preserve as fundamental truths and positive realities those concepts of the state and of the rights of the individuals as contrasted with the state, which have ever animated the constitutions of the American republics, in order that these concepts, preserved within each of our nations, may later be extended and become triumphant throughout the world,"

then the author himself accepts a possible basis of common action which he fixes, however, in the future. We believe that the future day of which he speaks will never come. He makes it contingent upon the realization within each of our republics of those concepts of the state and of the rights of the individual as contrasted with the state which have animated our various constitutions. This, everyone will admit, is not to be realized. The best thing about democracy is that it is life, that is to say evolution, the effort at perfection, blunders, weakness, collapse, and then,—progress greater than has marked the past.

In the second part of his work Dr. Malagarriga deals with the various essential elements of legislation on bills of exchange and with the problems with which they confront the legislature. He analyzes the lex loci actus, the lex domicilii and lex patriae, and declares himself in favor of the law of domicile, "without admitting the procedure of renvoi nor acceptance of the exceptions provided for in article 74, paragraph 2 of the Uniform Law, or article 18 of the Convention of 1912." (p. 116.)

Concerning the form of a bill, its endorsement, the guaranty known as aval, acceptance, payment, recourse, and notice, as well as the promissory note, the

author has made a comparative study of the important legislation of the world, and particularly with reference to the uniform rules and the Convention of The Hague of 1912. This he has compared particularly with the law of Argentina.

The appendix which occupies the last ten pages of Dr. Malagarriga's book has an unusual importance for an appendix. The author expresses the hope that there will be no further discussion in later international gatherings of the matter dealt with in article 74 of the Uniform Rules and articles 18 and 20 of the Convention, that is to say, of the conflict of the law of domicile and nationality. He says that since uniformity of criterion is impossible because neither the United States nor the other countries of the continent will accept The Hague rules, he is justified in hoping that no further useless discussion will be carried on.

Yet he is not the first to see the difficulty here involved. Whoever examines the proceedings of the Buenos Ayres meeting of the International High Commission will see that no effort was made to overcome the particular difficulty that he is dealing with, but rather that the effort was concentrated upon bringing about the existence of but two systems in the American hemisphere in place of the many that exist: one in the United States and the other in the Latin countries, which even to-day are separated rather by sentimental considerations than by substantial reasons.

Here as in other places where the author is giving his own original point of view, his associations go somewhat further than is justified from a scientific point of view. He declares on page 281 that the chief interest in the meeting of the Pan-American Conference has been, beyond all discussion, that of the United States.

"Now, as in 1889, the real motive of that country in fostering these meetings is the conquest of the markets of Central and South America, and in general the absorption within the orbit of its own influence of the republics of Iberian origin. From the very moment in which the government of the United States becomes aware of the fact that at least so far as bills of exchange legislation is concerned, the countries of Latin America show resistance to Yankee legislation, and rules resulting from European conferences and on the basis of the legal systems of Europe, from that moment the United States will give up its interest in this matter and will turn to other things wherein less opposition is shown by our peoples."

There is no justification for the assertion that the United States is trying to conquer markets in any sense other than that of the most absolute reciprocity. The motto of our government in the Pan-American meetings has been a motto of complete co-operation based on perfect mutual respect. There is no ground for Dr. Malagarriga's suspicion that the United States is trying to make the markets of America a kind of colonial system. This country has something to buy and something to sell: that is true of the other countries of this continent; and no jealousy can be justified by transactions which do not unjustly confer benefit or privilege on others.

The statement that the United States upon finding a certain resistance to the imposition of our legal system upon the whole hemisphere will abandon whatever happens to be on hand finds an immediate and singularly effective answer in the recent publication of a volume of 300 pages by the Central Executive Council of the International High Commission on the subject of bills of exchange. This council is composed of Secretary McAdoo, the Honorable John Bassett Moore and the Honorable L. S. Rowe. In this report, published by the council in the Spanish language, the fullest play as well as the foremost place is given to eminent jurists of South and Central America, and not a single word appears to indicate the least desire on the part of this body to impose the legislation of the United States upon the countries to the south.

The International High Commission is still in existence and is working

vigorously in its task of mutual benefit. It is to be hoped that its labor will produce good results since among its resources it may count upon some of the best intelligence in the hemisphere. No small role in its work has been assigned to some distinguished countrymen of Dr. Malagarriga himself.

To sum up, the book under consideration gives evidence of laborious study, a satisfactory assimilation on the part of the author of prevailing doctrines of law and an excellent comprehension of the matter as a whole. Nevertheless, there is a certain lack of maturity naturally due to the youth of the author, and a certain undue readiness to suspect others. It is to the interest of us all that the latter weakness be held in check, not alone among jurists but among all who write and speak.

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An Outline Sketch of English Constitutional History. By George Burton Adams. Published by Yale University Press, New Haven. 1918. pp. 208. \$1.75.

What Professor Adams has heretofore written on the English constitution has been addressed primarily to students and specialists in the field of medieval English constitutional history, and to them his teaching is well known. It is summed up in his Origin of the English Constitution, a work published in 1912. The present volume he clearly intends for a wider public. It is brief in compass, non-technical in language and not freighted with the paraphernalia of historical research wherewith to deter non-academic readers from its perusal. It should prove valuable and stimulating to all who desire to acquaint themselves with the origin and development of Anglo-American conceptions of government and liberty. It is, however, a popular treatise on the English limited monarchy, the subject with which Mr. Adams' research has been concerned, rather than what he calls it, an outline sketch of English constitutional history, and it contains no account of many institutions of government that fall within the scope of the title which he has chosen.

What is most original and significant in Mr. Adams' teaching is explained in large measure by the point of view from which he first approached the study of English institutions. He is not an Englishman and unlike the classical constitutional historians of England his outlook has never been insular. His starting point was not the history of England at all, but continental, and especially Frankish feudalism; and it was his belief that the English constitution is of feudal origin that first turned his attention to its study. The weight of recent expert opinion, based upon laborious investigations in the sources of medieval English institutional history, not a little of which Mr. Adams has himself inspired, undoubtedly supports his argument. According to this, the central government of England is of Norman-French rather than of Saxon origin, as the classical school held; modern English political institutions have grown out of the feudal assembly of the Anglo-Norman kings; and the limited monarchy is derived from the idea of contract implied in the feudal relationship between the king and his barons, an idea that was first given institutional expression in Magna Carta.

What that much-quoted and much-misrepresented document really did, says Mr. Adams,

"was to lay down two fundamental principles which lie at the present day, as clearly as in 1215, at the foundation of the English constitution and of all constitutions derived from it. First that there exist in the state certain laws so necessarily at the basis of the political organization of the time that the king,

or as we should say today the government, must obey them; and second that, if the government refuses to obey these laws, the nation has the right to force it to do so, even to the point of overthrowing the government and putting another in its place."

Magna Carta does not indeed contain any formal statement of the right of deposition, though it legalizes temporary insurrection if the king will not obey the law, but Mr. Adams insists that the right was logically involved in it, and that the principle upon which the nation acted in the political revolutions that followed, in 1327, 1399 and 1689, is to be found in its famous sixty-first clause.

With the rapid decline of feudalism as a political system in the thirteenth century, and the beginnings of a national organization of the state, the earlier idea of a feudal contract between king and barons broadened out into the conception of a contract between king and nation. After the period of the Lancastrian government, which, Mr. Adams tells us, was almost modern in form, came a reaction to practical despotism under the Tudors, a despotism which the Stuarts strove to provide with a theoretical and philosophical justification. But divine right and royal absolutism were finally swept from the field by the revolutions of the seventeenth century which assured the triumph of the fundamental principle of the constitution, the subjection of the government, to the law. The growth of the cabinet as an institution of government, together with the extension of the franchise and the restriction of the powers of the House of Lords, has made possible the existence of a democratic republic under the forms of a monarchy. Such in baldest outline is Mr. Adams' interpretation of English constitutional history.

It may be noted in passing that the use of the word "nation," without qualification, to describe the body politic of England in times prior to the nineteenth century, is likely to cause misapprehension in the minds of readers who have not acquired the habit of thinking historically. They might, for example, infer from what Mr. Adams says that it was the people who effected the Revolution of 1399. But in reality the Parliament which deposed Richard II was the same institution that had done its utmost to suppress the most genuinely popular movement of the middle ages, the Peasant Revolt of 1381; it was quite as vigorously opposed to the "people" as to a despotic king.

Mr. Adams' interpretation is, as he would probably be the first to admit, purely institutional, and as such it cannot fully explain the English constitution or the limited monarchy. For, as he has himself said elsewhere, there are two sets of causes in all institutional history. There are environmental conditions which make new institutions necessary, and there are old institutions upon which these conditions act to transform them into new institutions. Expressing the same fact in another way, we may say that there are two factors in the production of every crop of institutions, soil and seed, and both are necessary. An acorn dropped in the desert does not grow into an oak. Granted that the contract idea of feudalism is the germ whence has sprung the English limited monarchy, it does not of itself afford a sufficient explanation of the limited monarchy. There was the same idea in French feudalism, but the French monarchy became absolute, not limited. The soil, the environmental conditions, which enabled a conception common to all feudal relationships to grow in England alone into limited monarchy, with all that is implied in that term, lies outside the realm of institutional history proper.

Mr. Adams rightly emphasizes the ecumenic character of the English constitution. Too often we allow ourselves to think of it as a system peculiar to England. In reality it belongs, in varying degrees, to almost every modern people either by inheritance or through adoption. Two facts explain the spread of English political institutions throughout the world. The first is the spread of the English race by colonization, carrying with it naturally and

inevitably the laws and institutions of the home land. The second is the copying, more or less conscious, by alien peoples of the English constitution. When the absolute monarchies of the continent of Europe were falling before the forces of revolution and reform, liberals everywhere looked to England as the exemplar of political liberty, and in many cases frankly borrowed her institutions. Wherever the representative legislature and responsible government and guaranties of individual liberty exist to-day, there is indebtedness to England, and this is as true of countries that are republican in form as of those that are monarchical. But no country outside of the British Empire is so peculiarly and palpably English in its laws and institutions as our own. All of what is fundamental in our political system—the supremacy of law over the government, the representative system, individual liberty, the sovereignty of the people-is derived institutionally from England and from nowhere else, a fact which the relatively superficial differences between a republic and a constitutional monarchy should not be permitted to obscure. With us, however, there has been no importation of an alien system; the process has been one of inheritance and adaptation. The thread of Anglo-American institutional history was not cut by the American Revolution. Indeed the principles of government and liberty proclaimed by the Declaration of Independence were as truly English as the language in which they were expressed, and a people that cherishes this document as its birth certificate can never view the winning of English liberty as an alien theme.

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