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THE NATURE OF LEGAL RIGHTS AND DUTIES.[1]

ONE cannot long talk on a legal topic without using the words *right* and *duty* or some synonyms. It is familiar hearsay that a purpose of law is to create, delimit, and protect rights and to define and enforce duties. Therefore it is of importance to inquire what is meant by "a right" and by "a duty" when we use these terms in legal discussion. The question is a linguistic one; but in the process of finding the proper answer, we shall have to analyze some of our common sorts of mental concepts and perhaps shall finish with a clear comprehension of the purport of parts of our legal reasoning which ordinarily we veil by convenient and familiar words from careful scrutiny and any but the vaguest apprehension. I do not purpose to express the details of such an analysis in these pages. I desire only to explain the results of my thinking which may be verified or disproved by my readers through their own mental tests.

In the article to which this is a supplementary note, I sought to clarify the interrelation of three sorts of elements in legal study—(1) the phenomena of concrete events and their governmental consequences which constitute the objective field of law, (2) perception, thinking, and knowledge concerning that field, and (3) the expression of our consciousness of these mental processes. I dwelt on the facts that both mental concepts and language are implemental in character, that legal thinking and communication may be as free as those of any science, and that they are subject to intelligent criticism only for lack of accuracy, clearness, or efficiency. Particularly I insisted that language and its definition are subordinate matters and that disputes concerning merely the proper scope of legal terms and methods of expression are wasteful of effort. By reference to

[1] This is a supplementary note to an article entitled, "What is the Law," which appeared in the last volume of the Review. See 11 Mich. L. Rev., pp. 1 and 109.

that article I wish to reiterate these points. Again I state that I am not moved to force upon any one argumentatively my definitions of common legal terms. My discussion of words is only incidental to an ulterior main purpose and therefore is incomplete. That main purpose is to explain clearly my views concerning common methods of apprehending and discussing certain sorts of facts abstracted from that external field of causal events and governmental consequences which as lawyers we seek to comprehend. I think that these methods often are used without conscious clear perception of their purport and that therefore a brief exposition of the correlation of these methods and of facts in the objective field of law may tend to make legal thinking more definite and sure.

When we intelligently assert of a thing that it is "right," we mean that according to some human judgment, individual or collective, it meets a test with relation to some end or adjustment. The judgment may be our own or that of another or others which we adopt or accept. It may or may not be made through the employment of scientific criteria or rules. When we decide that certain conduct morally is right or wrong, we approve or disapprove of it in its aspect of an actual or potential cause of consequences to individuals and to society.[2] In evolving this judgment we may give weight to considerations of pertinent customs, habits, prevailing ideas and beliefs, social utility, individual liberty, harmful or beneficial effects, the personal idiosyncrasies and physiological limitations of the persons concerned, and the extent of their pertinent knowledge, and to considerations, superstitions, or prejudices of any other sorts, or we may be impelled to our decision, wholly or partly, by analogous instinctive motives. However we reach our conclusion, the term *right* or the term *wrong* is but an asserted label which cannot be appreciated accurately except in the light of the purposes which inspired and the mental processes which produced the application. Whether a certain method is a right method in the sense of being effective to produce specified results, is a question which the evolution of events may solve; but except insofar as human judgment settles on definite criteria of morality, there is no external measure of the correctness or incorrectness of a particular assertion of moral rectitude or delinquency.[3] "Morally right" and "morally wrong"

[2] This is not always the basis of approval or disapproval. The motives of our criticism of morals often are instinctive, unreasoned impulses from accumulated beliefs, superstitions, religious ideas, or other traditions and untrained mental habits, which produce them without conscious measuring of effects or purposes.

[3] In making this statement, I risk, of course, the criticism of all who insist on the existence of an external supernatural force which promulgates or establishes in this life an absolute, unassailable moral justice, and also of all who would contend that there

remain blind labels commonly used to signify approval or condemnation of conduct but not indicating definitely anything beyond this.

It is true that some sorts of conduct would be condemned and accordingly labeled universally by respectable opinion. It is true also that there is a predominant and potent public opinion on the "morality" of a large proportion of ordinary sorts of conduct, that this public opinion may be vouched in support of an individual assertion, and that our common knowledge of it furnishes a starting plane, a check, and a balance to all discussions of moral right and wrong. These facts, however, do not militate successfully against my postulates, for, in the first place, this predominant opinion is in many important particulars uncertain, varying, or indefinite both in conclusions and criteria and, in the second place, even independently of this lack of certainty and stability it cannot be the conclusive arbiter of decision or of the proper use of the word-labels which we are discussing. Individual opinion, and particularly the leading enlightened opinion of the day, may differ legitimately from the predominant opinion of the time. Therefore the motives for particular applications of the labels may vary legitimately even beyond the range of predominant usage.

To reiterate, "morally right" indicates either approval or non-condemnation by some human opinion or judgment of the thing to which the label is attached and "morally wrong" indicates the contrary; but knowledge of the identity of the opinion or judgment and of the criteria and processes which have produced it is an important prerequisite to a full appreciation of the import of the labeling.[4] Can we fasten a more definite and stable meaning to the usual use of the phrases *legally right* and *legally wrong?*

In my main article I argued that the law consists of the flux of concrete occurrences and their legal consequences brought about through the operation of authoritative governmental law-determining machinery and that the essential field of legal study consists of such actual sequences and the potentialities of similar future sequences.[5] Bearing in mind this comprehension of the nature of the

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actually exist independently of human will and judgment moral unitary rules and principles which may be discovered and demonstrated. The conflict between such criticism and my philosophy, I can not hope to reconcile. To avoid serious misunderstanding, let me hasten to assure my readers that there is nothing even remotely atheistical in these remarks.

[4] It is true that philosophers often have attempted to give a standard certain meaning to the term right; but if their definitions are examined critically, they will be found either vague and useless or, insofar as they attain definiteness, open to criticism from large bodies of men who hold opposing views of justice and policy, especially on the eternal question of the exact bounds which should be placed on individual liberty.

[5] For clarification of this phrase, see the main article, 11 Mich. Law Rev. 9-12.

Perhaps some additional light will be given by the following quotation from a reply which I made to a criticism of my main article by Arthur W. Spencer, Editor of The Green Bag:

"Jones and Smith have had business differences. They meet on the street. Jones stops Smith and accuses him of dishonesty. Smith angrily strikes Jones. Jones grabs Smith in his arms and holds him fast to prevent further 'unpermitted physical contact' from the energetic operation of Smith's fury. Friends appear on the scene and separate the gesticulating, garrulous combatants. A truce is imposed by neutral persuasion and physical restraint. Exeunt omnes, Jones and Smith promising reciprocally future undesirable results.

"Thus far I have stated no legal phenomenon. No consequences brought about through the operation of governmental agencies are included among the events narrated. I presume that Mr. Spencer would say that the panorama consisted of 'social phenomena' only, and certainly I should not object to the use of the epithet. I agree that no part of 'the law' has been indicated.

"Let us proceed with the trivial history, however. Jones, in whose mind the memory of Smith's blow still rankles, appeals to Newsome, attorney and counselor at law, to verify his conviction that Smith's assault grossly violated the majesty of the law and the rights of Jones to personal security. After due inquiry and cogitation, Newsome informs Jones that he is entitled to satisfaction in damages in an action for assault and battery. Jones directs Newsome to commence such a suit. Consequently a summons is taken out and served on Smith in accordance with the proper procedure of the jurisdiction. The issuance of this summons initiates a string of governmental events consequential to the assault. The sequence now becomes a legal phenomenon, though, of course, not yet one from which the lawyer would derive much professional information. From this event on through the preliminary procedure, the trial, verdict, judgment, appeal, reversal, retrial, etc., etc., through execution of the judgment in favor of Jones and completion of the records, there continue sequences of consequential governmental occurrences which, with respect to their causes preceding them in these sequences and in other collaterally contributing sequences, and with respect to their subsequent effects, are phenomena of the sort that excite our professional interest.

"Some of the 'collaterally contributing sequences' to which I referred above may result from legislative expression which is 'interpreted' and 'applied' in the determination of the case, and generally there are some sequences whose causal contribution to the decision are precedents of one sort or another. I shall not repeat here the indications which I gave in my article of the causative effects of precedents and legislation upon subsequent cases; nor shall I repeat my summary of the different phases of the element of judicial generalization and its expression. With respect to such generalizations, however, I wish to correct a mis-perception which Mr. Spencer states in the third paragraph of his criticism. He says:

> '. . . he includes in his definition of law not only the foregoing objective material, but also past judicial generalizations concerning the phenomena. He conceives of laws as mental processes in this sense, inasmuch, it would appear, as they are merely the reflection of the concrete sequences described. Other generalizations than these actual ones of the past he excludes. It is apparent, on examination, that in treating past judicial generalizations as the law, he refers not to the generalizations themselves but to their content. He says that we may by abbreviation speak of the science of law as "the law," but that when we use "the law" in this sense we mean not the law itself, but our knowledge concerning it, and he is on his guard against what he conceives to be pitfalls of such a catachresis. Essentially, therefore, he conceives of the law as external sequences of phenomena which not only afford material for legal rules but are to be identified with such rules.'

"I certainly include past judicial generalizations and also their expression in the official opinions among the phenomena in the field of legal study. I include them as part of the 'foregoing objective material,' however, and I would also include within objective potential governmental sequences the potenial judicial generalizations and

law, how are we to explain the use of the expressions which we are considering? Are "legally right" and "legally wrong" merely labels of approval and condemnation? If they are, whose judgment do they indicate? Do they refer only to mental operations, or do they refer to observable events outside of the mind?

Perhaps to many students of law these questions will smack of metaphysics and will promise no results of practical importance. "What is the use of such inquiries?" they will say. "Everyone knows what is meant by *legally right* and *legally wrong*. Why cloud the understanding with further puzzles of analysis?" But is this true? Let anyone try to point with definiteness and comprehension to a thing corresponding to the phrase *legal right*. I venture to predict that if the inquiry is new to him and he pursues it persistently, honestly, and intelligently, he will find it a puzzle. Yet common sense should conclude that if the law is so ubiquitously concerned with legal rights and duties and if those terms are commonly recurrent in technical speech, no one can pretend to mastery of any

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expressions in those sequences. I include official judicial generalizations in their concrete entirety and not merely 'their content,' whatever meaning Mr. Spencer may give to that phrase. These generalizations are mental processes, it is true, but they are external to the mind of the legal investigator and are therefore objective to his thought. They are a most important part of the mental operations through which the judges as governmental agents determine the subsequent legal effects of the 'case,' but although the expression of these generalizations must be carefully studied in order that their own causative force and that of abstracted facts in the preceding events of the case may be appreciated properly, they are not necessarily accurate comprehensions of the efficient causative elements in the 'case' nor authoritative trustworthy guides to prognostications of future decisions within their range. I will not trespass further on Mr. Spencer's space to explain this, but will refer the anxious mystified to my article for enlightenment. Necessarily I am touching rather lightly and partially only a few of the points of my theory in this cursory reply. I do not expect anyone to get from it an adequate understanding.

"Three miscellaneous statements had better be made here to obviate possible objections. First:—although the sequences of occurrences out of which a 'case' grows and through which it is carried to completion are infinite in their details, of course not all of these details are of importance to the lawyer who conducts the case nor to an observer of its history. Part of the details never come to the notice of either, and of those that do, many are discarded as immaterial by the trained intelligence. Second:—of course the governmental consequences which follow from the actual facts of 'a case' may be brought about through failure to properly conduct the case, through inability to produce admissible evidence of the facts, or through failure to convince the triers of fact of the truth. These facts are within the range of the lawyer's field of study, and, indeed, to some extent are dealt with in works and courses on evidence and procedure. Third:—the governmental consequences and processes which lawyers study and with which they deal include those brought about by other governmental agencies than the courts. For instance, a client may wish to know what will happen at the customs if he tries to import a certain commodity; or may request legal services with respect to proceedings before a commission or legislative body; but in the great majority of 'cases' which are fought to a finish, the ultimate authoritative direction of consequences is given by the judgment of a court. All actions by other governmental agencies upon his 'cases' are also of practical importance to the lawyer, however, and are within his field of legal study." 25 Green Bag, 162 at pp. 164, 166. April, 1913.

portion of the law or of its language until he realizes what he and others mean by "legal right" and "legal wrong." Let us, therefore, cheerfully make the effort to unmask the substance behind these convenient terms.

"According to law" and "against law" spring up in the mind as synonyms for "legally right" and "legally wrong," and I imagine that an orthodox legal theorist who was asked to give some further explanation might reply that anything is legally right if it complies with the rules of law and a thing is legally wrong if it does not accord with those rules. Those who endorse the views of my main article will find no difficulty in exposing the vagueness, shallowness, and uselessness of this specious definition. Its only merit is that it passes smoothly over a difficulty and helps the conventional text-writer to satisfy the conventional demand for a preliminary glossary without mental strain. Those who agree with me as to the nature of the law, will perceive easily that accordance with any rule or principle, real or imaginary, cannot be the ultimate test entitling conduct to the label "legally right." Our terms must have reference directly or indirectly to potential concrete operations of the law-determining agencies of government, consequential to the events and circumstances to which the terms are applied. Let us examine into the validity of this statement more closely, by attempting to define the partly correlative terms *legal right* and *legal duty*.

Black and White enter into a written agreement, whereby White promises to pay Black $1,000 for a certain piece of land and Black promises to convey the land to White on June 1 following. As a result of this agreement, a legal relationship arises between Black and White—that is to say, certain reciprocal legal rights and duties are "created" between the two. What is meant by this familiar statement? To what facts do those terms *legal rights* and *duties* refer? Can we point definitely to their objects? If one speaks of a certain horse named Carl, one can indicate with sufficient clearness the identity and nature of the object. Are not the specific application of legal terms as demonstrable?

We can answer these questions best by determining exactly what elements in the situation which I have outlined induce the statement of the existence of legal rights and duties. Every lawyer knows that if White pays or tenders Black $1,000 on June 1, and Black refuses to convey the land, White, by initiating a suit, properly prosecuting it, and successfully establishing these facts, normally will obtain judgment for damages entitling him to execution against Black's property. Also White has the alternative remedy of specific performance or reparation. Now let us assume that the contract

was oral, that a statute of frauds of the ordinary sort applied, and that White was never let into possession. Under these circumstances White would have no legal remedy for a failure of Black to keep his promise, except for reimbursement for any benefit Black may have received from White under the contract. Being without remedy, he is said to have no legal right against Black upon the contract and Black is under no legal duty of performance. The elements presented by the first case which are not paralleled in the second are (1) the contract was in writing complying with the statute of frauds; (2) the availability of legal remedies. Are there any other material facts concerning the first case which are not tallied by the second? I can see none. If there are none it is evident that the things which we call legal rights and duties must include as an essential one or both of these two distinguishing abstracted elements. Clearly the written contract forms no part of the legal duty or of the legal right, but is only one of the facts giving rise to the duty and the right. It follows then that the potential legal remedies must be objects of reference when it is asserted that White has legal rights on the contract against Black and that Black is under a legal obligation to White.

Do not the following statements express a reasonable working hypothesis for our further discussion of the meanings of these terms? The phrases *legal right* and *legal duty*, when they are used in a technical legal sense, always refer to the potentialities of legal remedies consequential to assumed or predicated events and conditions. That is said justifiably to be "legally right," irrespectively of its moral righteousness or unrighteousness, which would not meet with ultimate condemnation by the normal action of governmental agencies should its consequences bring such a question within the active jurisdiction of those agencies, and that is said justifiably to be legally wrong, irrespectively of its moral aspects, which would meet with such governmental condemnation under like circumstances. There is no absolute criterion of "legal right" or "legal wrong" excepting such governmental consequential action,[6] and this is an absolute and final criterion.

If the hypothesis is correct, the terms *legally right* and *legally wrong* when used technically are not similar in their significance to moral labels, but refer to actual and potential external results of certain sorts, and the correctness or incorrectness of the assertion that conduct is "legally right" or "legally wrong" may be proven by

[6] This statement and similar ones throughout the article should be modified so as to include such sanctions of preventive justice as the injunction in equity. I neglect this modification in the body of the article in the interest of terseness.

the evolution of events. It is not literally approval or condemnation by some authoritative voice[7] that concerns the lawyer, but the concrete legal results which may follow from postulated conditions and conduct.[8]

There are several common technical expressions and several common particular uses of these terms which will occur to my readers and possibly present obstacles to an acceptance of my hypothesis in spite of the logical difficulties of a disagreement. I wish to discuss some of these briefly and explain their accordance or discordance with the hypothesis.

It is evident that if my hypothesis is correct, the existence of legal rights and duties is not the cause of legal remedies, for the hypothesis is that the essence of legal rights and duties is the potentiality of legal remedies.[9] Legal remedies which actually occur may result exclusively from facts which include none to which the terms *right* and *duty* can be attached. For instance in the case of *White* v. *Black* which we considered above, the facts potentially causative of legal remedies did not include anything that could be called a legal right or a legal duty. They "raised" a legal right and a legal duty upon the written contract, but we found that the essence of the right and duty were the potential legal remedies that might result from conduct or events which, because of the availability of these remedies, would be called a "breach of legal duty and right." Whenever legal remedies result, they verify *pro tanto* a prediction that certain legal rights and duties existed and are not the result of them.

[7] Please take this literally. We may speak of the effects of legal proceedings as "the voice of the law" or "the approval" or "condemnation of the law," but these are figurative expressions. When the official opinions of judges are called "the voice of the law," there is uttered a theatrical and inaccurate metaphor which tends to produce and perpetuate a mental muddle.

[8] There is another sense in which the phrases **legally right** and **legally wrong** may be used,—a sense similar to that in which **right** and **wrong** are used in any art with reference to proposed or accomplished means. A certain course of action or conduct may be labeled "legally right" or "legally wrong" with reference to its efficacy or inefficacy for accomplishing certain desired legal results. A method may be condemned as "legally wrong" in this sense, although it does not subject anyone to legal liability; or it may be termed "legally right" in this sense although it does result in legal liability. For instance, an oral statement of transfer is not the "legally right" way to transfer land in fee simple. It is legally inefficacious; but it is also not a legal wrong. On the other hand, if one wishes to test his claim against A that he has "the right" to tear down a wall which according to A is subject to a party wall easement, a "legally right" way in the sense of a legally efficacious way, is to start tearing down the wall; but if it turns out that A's contention is correct, the result is legal liability for interference with the easement or (in equity) for a threatened interference. This use of the terms is not common, however, because ordinarily **right** and **wrong** without the qualifier **legal** would be used in these senses; and after it is understood, it is of no further importance to our inquiry.

[9] Compare:—"By the obligation of a contract is meant the means which at the time of its creation, the law affords for its enforcement." Mr. Justice Field, in Nelson v. St. Martin's Parish, 111 U. S. 716, 720.

They, as consequences of causal acts or omissions of the obligor, are the very meat and bone of legal rights and duties. But how can this dogma be reconciled with the common statements that legal remedies are afforded for breaches of legal right and duty and that legal rights may be classified into primary and secondary or into substantive and remedial? In so far as I can reconcile these statements, I can do so only by explaining their meanings as I see them.

When a lawyer is arguing for a certain legal result—for instance, that his client should have a certain sort of judgment—he may argue that his client had "a right" which has been violated, and he will cite cases and other authorities to support his assertion that the "right" existed; but if the court decides against him upon the basis of his contention, and if this judgment stands, it is evident that *pro tanto* the legal right did not "exist" as claimed. If the remedy had been adjudged, the right would have "existed"; but the denial of the remedy is the refusal *pro tanto* of the substance of the right and duty. If the lawyer still insists that the right and duty existed and were violated and that the court made a mistake, he means only that the court's decision was not sound. He cannot point to anything formerly or at present in existence which will correspond to his assertion of a broken right and duty. There are the facts of his case, the procedure and decision, his argument, pertinent precedents and other authorities, and the opinions of himself and others as to what sort of judgment should have been given. None of these constitute or include the asserted legal right and duty. Where and what was it? His assertion is only that something should have been which was not. It is a strong argumentative assertion of a judicial mistake and nothing more.[10]

[10] Sometimes a decision of a court,—even a decision beyond appeal,—is said to be "contrary to law" or "against legal right." Such a statement does not run counter to my analysis of the law or of the nature of legal rights and duties. It means that the decision is not in accord with the authorities which should have been given weight in the judgment,—i. e., that it is not in accord with the established course of decision on similar or analogous points, or is not in accord with results of approved lines of legal reasoning, or is not in accord with the approved interpretation of applicable legislative expression. Certainly insofar as the judgment is final on the questions litigated, it settles the law of the case and the legal rights involved. Therefore the criticism amounts only to a condemnation of the decision as erroneous in the light of the criteria of the art of the administration of justice.

In this connection it may be useful to reiterate the importance of distinguishing between the law, science or knowledge of the law, and the arts of the administration of justice and of legislation. (See 11 Mich. Law Rev., p. 9, note 11; pp. 14-15, note 16; pp. 19-20, note 21.) We may criticise the judicial results of particular litigation or the particular effects of legislation on judicial decisions. This criticism may be adverse to the skill, knowledge, and wisdom displayed by the judges or by the draftsmen and legislators. Or it merely may disapprove of the concrete results as undesirable. Nevertheless the operation of a court on litigation within its jurisdiction pro tanto settles the law beyond question; pro tanto it is a part of the law itself.

But suppose that judgment is rendered in favor of the plaintiff—let us say in an action for trespass on land. In such a case, does not the judgment result from the pre-existence of a legal duty and the breach of that duty? The lawyer for the plaintiff argued that defendant violated a duty owed to plaintiff. Undoubtedly he thought of the duty as a pre-existing thing and he cited authorities to establish its "existence." The judge in his opinion used similar language. "A landowner has a right to be free from unexcused and unjustified trespasses," he may have said. "The defendant's act falls within this description and he therefore was guilty of a legal wrong for which this action will lie." This sounds like a statement of cause and effect. How shall we explain it? We can bring it into accord with our hypothesis by carefully noticing the details of the reasoning. An extended expression of the reasoning justifying the decision would run as follows:

"From my knowledge of precedents and other authorities I know that it has been held consistently that a cause of action existed in favor of a land-possessor against one who had entered on his land without justification or excuse. Consistency with these precedents[11] and with customary and prevailing ideas demands that similar decisions be made in other cases of this sort. Therefore a generalization may be adopted as a reliable guide for judicial decisions to the effect that land-possessors have a legal right to be free from unjustifiable and unexcused trespasses on their lands. This case presents an unexcused and unjustified trespass by defendant against plaintiff. Therefore we logically conclude that defendant was guilty of a breach of legal duty and that this action lies."

In this chain of reasoning, the past authorities are not used to establish a breach of duty from which a decision of the case is deduced. They are used to establish a basis for deciding that a remedy should be given and the given remedy establishes that a breach of

[11] In giving reasons for the potency of precedents upon judicial decisions in my main article, I omitted an obvious and very important one. With the exception of justice itself, there is no more important characteristic of a successful administration of justice than its consistency and equality. Nothing in judicial decisions will tend to raise suspicion and bring the courts into disrepute more surely with lawyers and also with laymen, when the facts become generally known, than inconsistency of one decision with another. Aside from the other practical reasons in favor of consistency which I mentioned in my main article, there operates strongly in the same direction the essential policy of maintaining the court's reputation for even-handed and firm justice.

A desire to avoid even an appearance of arbitrariness or bias has been one of the principal motives which have led judges customarily to refer their decisions to formulated abstract rules and principles and often to endorse the seductive fiction that these rules and principles have an external existence and authority independent of the particular use to which they are putting them. See 11 Mich. L. Rev. 4-5; 15-23; note 5 on p. 5.

duty and right occurred, *i. e.*, that condemnatory legal consequences could be forced on defendant at the option of plaintiff as a result of the acts, omissions, or other events constituting the "breach." The precedents are potent arguments and the generalization concerning the duty not to trespass is a convenient mental form in which are handled conclusions of what has been and should be decided in such cases. The generalization comprehends that actual breaches of legal duty have been established in similar cases in the past by the concrete remedies which actually followed those breaches; it asserts that breaches of duty occurred in similar past cases although no remedy actually followed, because of the conclusion that a remedy would have been given in each similar case had it been sought properly; and it makes a similar assertion as to future similar cases, because of a similar prediction of legal consequences in such cases if the remedy is sought properly. The "deduction" of the decision in the case before the court from the generalization is purely a mental formality.

Perhaps the judge vaguely thinks of the particular duty involved as a thing existing in the past and perhaps he gives color and form to his apprehension by imagining the sort of conduct or the abstract elements of conduct whch would have absolved defendant from liability; but I submit that such an apprehension is a delusion. The imagined conduct never existed nor did anything exist to which the term legal duty could be attached correctly. Nevertheless the defendant "was under a legal duty" in this sense, that the failure of defendant to accomplish a certain sort of results gave the plaintiff an option to bring about remedial legal consequences.

Evidently, then, a statement of the "existence" of a legal duty or right is figurative and a statement that remedies are the result of the pre-existence of duties is also figurative and positively misleading.

But what of such expressions as "It was X's duty not to trespass"? Is not "not to trespass" the expression of the substance of the duty? Ignoring the vagueness of the expression, we can agree that it indicates part of the substance of the duty, that part which is of interest to one who requires only to know what is necessary in the way of conduct to insure escape from condemnatory legal consequences. It does not express what those consequences would be, however, and therefore does not fully indicate even an outline of the duty not to trespass. The potentiality of such consequences of failure to conform to the abstract concept of conduct is connoted nevertheless by the expression, for without such connotation the described conduct would have no professional significance. We connote a window in

place when we call a piece of framework at the mill a "window frame." Without reference to its destined use, it would not be a "window frame." So when we speak of imagined conduct as "a legal duty," we connote those potentialities of legal consequences of a breach without which the conduct could not be so labeled. Let us hold fast our realistic conclusion that a predication of the existence of a legal right or duty, is only the predication that undesirable ultimate legal consequences are imminently possible at another's option if the predicated conduct or result is not realized. The predicated conduct never exists unless the duty "is performed," but the duty figuratively is said to "exist" before performance and independently of performance.[12]

What of the classification of duties and rights into primary and secondary and into substantive and remedial? The classification into primary and secondary is only a classification of the sorts of conduct or results which will prevent the sequence of a successful suit by the holder of the right into (1) that sort, the failure to observe which will make the initiation of such a suit possible (or contingently possible) for the first time and (2) that sort which will remove a previous default and prevent the legal consequences of a condemnatory suit. The classification into substantive and remedial rights is often the same; but sometimes the term remedial rights has emphatic

[12] A **legal duty** sometimes is defined as that which a person legally is bound to accomplish and the **sanction** is spoken of as a distinct thing,—the "enforcement" or "recognition" of the duty. The "that which" of course must be a certain sort of conduct, results, or events. Conduct, results, or events considered abstractly and independently, however, do not constitute a legal duty. The connotation of the sanction is essential to the correct application of the term. Therefore, properly, we have not **legal duty and sanction** but **legal duty** including as an essential element the potentiality of the sanctioning governmental action. Furthermore, although our comprehension of these elements is abstract, general, and fragmentary, when they occur they will be concrete facts and we should prepare ourselves in any given case to analyze the duty in all its relevant details with definiteness and care, and not to be satisfied with cursory, superficial generalities.

A **legal right** sometimes is defined as an **interest recognized or protected by the law or by a rule of law**; or as a **capacity in a person to produce legal effects**; or in some similarly vague manner. The trouble with such definitions is that they do not define. They may suffice as figurative relaxations in expression for one who has clearly in mind the external facts and possibilities referred to by a technical use of our terms, but if clearness of indication is demanded, we must have answers to the questions:—What exactly is meant by **an interest**? What exactly is the nature of the **protection**? How does the ephemeral **rule of law** work its magic? What exactly is the nature of this mysterious **capacity** with which a person may be endowed by the law? What is meant by **legal effects** in this connection and how does the capacity produce them? When these questions have been answered satisfactorily, we shall see that the "definitions" are highly figurative and really are soporific and not enlightening to enquiry,—in short that as definitions they are extremely vague and useless. It is unfortunately characteristic of theoretical jurisprudence that it frequently dodges difficulties by raising new and barren ones of critical interpretation.

direct reference to the availability of remedial legal processes or their ultimate effects rather than to conduct or events which normally will bar those effects.

Now let me clarify all of this by a concrete example. James borrows $100 from Smith and promises to repay the loan without interest on May 1 following. These facts are not rights or duties; but they are said to "give rise" to a right and a duty—that is, they are titular or investitive facts. They constitute Smith's title to the legal right of payment of $100 from James on May 1 and James's correlative legal duty to pay Smith. But what facts external to the mind of the observer constitute that right and duty? Not merely the act of James's payment to Smith when it occurs nor the prospect or possibility that it will occur. The right and duty "exist" independently of performance. It is the fact that if the act of payment is not performed or tendered, Smith may sue James and normally, by properly prosecuting his action and proving his case, get judgment for damages against James and execution against his property that justifies the assertion of the "existence" of the legal right and duty. This possibility of legal condemnatory consequences as a result of a failure of James to accomplish payment is the substance of the legal right and duty. The abstract imagination of the performance or tender of the act of payment on May 1, with the threatening legal consequences of non-performance connoted, is labeled a substantive, primary, principal, or antecedent right and duty. If James fails to fulfill this primary duty, it is said that immediately the primary right and duty are broken and a secondary right and duty arises. That is to say prevention of the legal consequences of a successful suit in favor of Smith against James is no longer possible by means of a performance of James's "duty" of payment on May 1. May 1 is gone forever. There still remains, however, figuratively a legal burden on James in favor of Smith which is denominated a secondary right and duty. In reality what is this secondary right and duty? Again the essential external substance will be found to be the possibility of the same undesirable legal consequences as a result of the breach, if satisfaction of the breach is not made by the payment of the legal damages suffered by Smith. The label "secondary right and duty" has immediate reference, however, to the abstract imagination of the payment by James of the proper amount of damages to bar the retributory legal consequences, with those alternative threatening consequences connoted. The term "remedial right" might be used in the same sense, or it might be used to indicate the legal remedial procedure which is available to Smith for James's default or the ultimate remedial effect of that procedure.

In short, and by way of reiteration, the phrases "legal right" and "legal duty" are referable to facts in the external world or our mental realizations or imaginations of such facts.[13] They are used to handle and communicate abstractly, and generally with some convenient vagueness, our mental concepts and reasoning concerning the

[13] Perhaps I had better here remove an opportunity for critical distraction. There may be some who will charge me with inconsistency in first applying the terms legal right and legal duty to external phenomena and the next moment applying them to our mental apprehensions and presages of external things. Also there may be others of a philosophical bent who will go further and assert that there is no reality excepting an internal one,—that our consciousness constitutes our world; that no science has an external field; and that language necessarily always is applied only to phases of the consciousness of the user and the interpreter. A few words will suffice to satisfy our present interest in this question of metaphysics.

It is true that we realize things only through the physiological processes of consciousness and that according to strict analysis we use language with direct reference only to phases of the consciousness which dictates it. The purpose of language is the communication of consciousness and this purpose is accomplished only insofar as the mental images, symbols, and "feelings" of the user are tallied by equivalents in the mind of the interpreter as the result of his interpretation. Nevertheless, it is at best merely a verbal quibble to insist that there is no real existence of things outside of the mind. Certainly our thought and speech are largely concerned with the realization of external facts. Habitually, except when we are interested in psychology, we conceive that we think and talk about things outside of the mind rather than about our own mental reflections and projections of external things; and this custom, (to put it euphemistically), of thought and speech, which enables us blurringly to identify our settled perceptions of a work of art, or of a cow, or of a series of events, with the objects of those perceptions, and to converse with another as though each participant were thinking and speaking directly of the same external thing instead of phases of his own limited consciousness concerning that thing, makes for terseness and is a great convenience in thought and communication. Generally the blurring will not misguide thought on subjects such as ours, and therefore I have followed this common, useful, and proper, but not analytically accurate, manner of speech. When, however, the terms legal right and legal duty are referable partly or wholly to imaginations of contingent future events, such as the possible legal consequences of a failure to fulfill a duty, for instance, it is obvious that pro tanto no external things exist to which the terms can be applied. The possibilities "exist" only in a figurative sense. Therefore, to avoid the appearance of absurdity, I have in one or two places risked the appearance of inconsistency, and given alternatively the analytically correct application of our terms. The inconsistency is not real, but only apparent. It is the result of following as far as is expedient common and proper short cuts in thought and speech.

With respect to this matter of common economies and conveniences in thought, it may be useful to call attention to the fact that we use and further our knowledge of external things to a remarkable extent by means of metaphorical mental images, impressions, and symbols and that in legal discussion it is wise to be on our guard against being misled by our figurative devices or stopped by their accustomed plausibility in our legal analyses before we have comprehended the actual objects of our investigations. For instance, the feeling or vague mental knot which ties the terms "legal right" and "legal duty" to our perceptions and stored knowledge of the related objective externals, may take the symbolic form of a connecting rope, a knot, a figurative bond of any simple typical sort, tying the obligor to the obligee; but this figure only connotes the actual facts of legal obligation and right and does not photograph accurately the external essential to which those terms indirectly refer. Such mental tools of consciousness are useful, but a study of the nature of legal rights and duties should not end with noting their use; nor should their use be confused with comprehension of the externals which constitute the rights and duties.

potential causal relations between predicated events and circumstances and the legal consequences which may follow through the operation of our governmental law-determining and justice-administering machinery. We may deal with information concerning such sequences without the use of the terms "legal right" and "legal duty." For instance in our hypothetical case of *Smith* v. *James* we could describe in particular detail what sort of conduct would lay James open to liability and what would absolve him from liability, and through what sort of legal processes liability would be enforced, without once using the words "right" or "duty." When those terms are used, they serve only as convenient brief handles for abstract discussion of phases of the situation and its potential consequences.[14]

If I have been understood thus far, it should be easy to admit the truth of several correlated propositions which I shall now set forth in succession and which probably will surprise those who never have analyzed carefully their use of common legal terms. For purposes of terse consolidated statement, let me premise by repeating in terse abstract form two of my previous points.

My first proposition is that legal remedies[15] are not the result of

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[14] The use of the phrase legal duty in connection with one sort of cases may raise some difficulty of interpretation. I refer to cases where, without any previous relevant conduct or failure on the part of X which would meet with judicial condemnation in consequential legal proceedings, a risk of liability, which may be entirely beyond his control, is placed upon X. Instances of this sort of cases are, in some jurisdictions, cases covered by the so-called, much criticised "rule in Rylands v. Fletcher" (L. R. 1 Ex. 265; L. R. 3 H. L. 330), and, in all jurisdictions, insurance cases. Is there properly a legal primary duty in such cases, or only a contingent and not discreditable legal liability without antecedent right or duty? Unless the words legal duty can be used in a sense which does not imply that condemnable conduct or neglect must be involved in a breach, it is not linguistically proper to say that a primary or substantive duty and its breach are involved in these cases. If, however, we use these expressions as indicating only that legal liability of X will follow if events turn out so and so,—a burden of contingent liability arising from certain causative or "investitive" facts,—there is no serious objection to applying the terms in these cases as well as in others, and I think that there is sufficient authority in the way of past usage to support the application in this sense.

[15] By the phrase legal remedy, I mean to indicate the entire legal procedure through which satisfaction is obtained, including the initiation of a suit, service of process, pleadings, the trial, arguments of counsel, the reasoning of the judges, the expression of their opinions, judgment, appeal, reversal or affirmance, execution, etc., etc. However, for reasons of technical convenience, it usually is said that a new substantive legal right arises upon a judgment,—a right distinct from the one upon which the suit was brought. The reasons of convenience are that another suit may be brought upon the judgment within certain limits of time and circumstance, if the judgment is not satisfied, that the judgment itself constitutes the initiatory element of title to maintain that suit, and that the considerations which must be resorted to in determining whether successful and proper legal procedure on the judgment has been barred,—i. e., whether the right has been discharged or otherwise suspended or destroyed,—are distinct from those which were applicable to a similar question on the original cause of action and may be

the correlative legal rights and duties which, according to common phraseology, they "vindicate," or "enforce," or "sanction," but the potentiality of consequential remedies constitutes an essential element of the duties and rights.[16]

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quite different in details, and that the old cause of action is "merged." Nevertheless a complete appreciation of the original primary right for whose breach the first judgment is obtained, can not be made before the first cause of action arises without determining in detail to the practical limits of execution, etc., the legal results which may follow a breach. Therefore, I make the first statement in this note.

[16] "Where there is a perfect obligation, there is a right coupled with a remedy, i. e., an appropriate process of law by which the authority of a competent court can be set in motion to enforce the right. Where there is an imperfect obligation, there is a right without a remedy. This is an abnormal state of things, making an exception whenever it occurs to the general law expressed in the maxim: **Ubi jus ibi remedium.** And it can be produced only by the operation of some special rule of positive law. . . ." Pollock on Contracts, 641-642.

In the chapter from which this passage is quoted, Sir Frederick Pollock discusses various types of cases which involve, he asserts, imperfect legal obligations. This chapter and similar instances of use of the terms, "legal rights and duties of imperfect obligation" and "imperfect legal rights and obligations" may raise or fortify doubts of the soundness of my theory of the nature of legal rights and duties. Therefore they demand at least a brief consideration.

Can these uses of our terms be reconciled with my theory? We shall find no difficulty in justifying an affirmative answer to this question provided we keep in mind the following two points. (1) If we would understand any particular use of our terms, it is not sufficient to accept unquestioningly an abstract definition by the user, or to acquire vague impressions of the meaning intended; but we must apprehend distinctly the objective facts actually indicated by the use. (2) The terms, "legal right" and "legal duty" are used in various senses and we may find here another meaning or other meanings than the primary one which we have evolved.

A great amount of space would be required to discuss in detail the uses which are the subject of this note, but I think that a sufficient indication of the proper method of interpretation may be given in a few words to those who will read Chapter 13 of Pollock on Contracts in order to obtain a background for my remarks. See also Salmond, Jurisprudence, 2nd Edition, pp. 198 et seq. The "legal effects" which, according to the phraseology of this chapter, evidence the existence of an imperfect obligation on an agreement, are of various sorts. Some of them, such for instance as the fact that in some jurisdictions a creditor whose debt is barred by a statute of limitations can appropriate without liability money paid by the debtor on account to satisfaction of the barred debt instead of other debts unless the debtor indicates otherwise, or that an executor properly can retain out of the estate for a debt due himself which is barred by a statute of limitations, are legal liberties or "defensive rights," which exist because of the agreement and which are not barred by the terms of the statute. Similarly some of them, such as the fact that in some jurisdictions a creditor whose debt is barred by the statute of limitations, nevertheless can enforce liens on property which he holds as collateral security, are unaffected rights, powers, and liberties of action. The fact that a creditor who is barred in one jurisdiction by its statute of limitations has recovered judgment in another jurisdiction,—i. e., that the bar has been adjudged a local and procedural one,—is evidence that a right of action may exist by the law of the second jurisdiction although there is no right of action by the law of the first jurisdiction. The fact that the statute of limitations must be pleaded and specially relied upon to make it effective as a defense, is a point of procedure only which does not affect the validity of my theory. Any available defense may fail if not properly maintained. A plaintiff who has no cause of action and who had no substantive right of the sort alleged against defendant may get a judgment through defendant's default. The fact that a new promise without consideration will "revive" a cause of action on a contract after it has been barred by the statute of limitations and that "if A agrees informally with X to sell

The second proposition is that the division of legal rights and duties into primary or substantive and secondary or remedial is only a classification of conditions, conduct, events, and results in their aspect of barriers to condemnatory legal consequences.

The following propositions are corollaries.

Proposition three:—Every legal right and duty is concrete in this sense. The investitive facts are concrete events of the past and present. The conduct or results which will prevent or bar the condemnatory legal consequences will be concrete events, if they are rendered. The condemnatory consequences of a breach also will consist of concrete events. The persons in whose favor and against whom the legal remedies are contingently available are, or will be before the remedy is accomplished, concrete determinable persons. It is true that our mental perception and imagination of all these matters is more or less abstract and often is quite generalized. This is characteristic of human knowledge and reasoning.

Proposition four:—No right or duty is completely defined until there have been indicated with particularity, (1) the person or persons in whose favor the right and duty "exist"; (2) the person or persons against whom it "exists";[17] (3) the alternative events which

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land to him, and afterwards agrees in writing to sell the same land to Z, and then conveys to X in pursuance of the first agreement, Z has no equity as against X," are not evidence of the existence of legal obligations in favor of the original promisees before the occurrence of the subsequent events in their favor, but are evidences of the strong persuasive force which their cases still exercise on courts excepting where the bar of the statutes is adjudged effective. Similarly, the fact that a plaintiff who is "obligee" of an "imperfect obligation" often may recover in quasi-contract, shows that the applicable hampering statute or principle does not render absolutely void the transaction of agreement. The agreement itself, however, according to my language, does not give rise to an obligation or a right on the contract, but, together with other concurrent or subsequent facts, constitutes part of a good title to a quasi-contractual right of action.

Obviously in each sort of case mentioned by Sir Frederick Pollock, the essence of the "imperfect legal obligation" and "right" is the various legal effects on which he relies for his statement. There is nothing else tangible to which the terms might be applied colorably. Therefore, our term "legal right" and the qualifier "imperfect" are used by him in a distinguishable heterogeneous conglomerate sense and denote all of the various facts of law indicated by his discussion of each particular sort of "imperfect obligation." An abstract idea binding all these various sorts of facts together is that courts habitually uphold the case of the "imperfect obligee" except insofar as the statute or barring principle prevents a remedy.

I trust that this will show sufficiently my manner of explaining all similar uses of the terms "right," "duty," and "obligation." I do not intend it in the slightest degree as an adverse criticism of such uses. I am not concerned at present with commending or condemning any of the various uses of our terms, but only with explaining those uses, so as to prevent as far as I can the shadows which language often casts over our legal reasoning.

[17] The person in whose favor or against whom a legal right exists may be an individual, a corporation, the state, or some other collective legal entity. We need not stop now to analyze the nature of legal persons who are not individuals. It will in no

will "discharge" the duty; and (4) the alternative potential consequences of a "breach."

Proposition five:—Legal rights and duties sometimes are said to be correlative. As a matter of fact a legal right and its "correlated" legal duty are identical. The terms refer mediately to exactly the same facts, actual and imagined and potential—*i. e.*, to the same opposing persons, the same titular events, the same "demanded" conduct or results, and the same contingently available legal remedies. When we speak of the duty, however, our realization stresses the burden phase, whereas when we speak of the right, our realization stresses the benefit phase. The terms are correlative, but the indicated facts are the same.[18] Figuratively speaking, we may say that a legal right is a legal duty seen from the handle end and that a legal duty is a legal right seen from the club end.

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way affect the validity of my exposition to adopt the well established mode of speech which calls the state or a corporation a legal person.

Perhaps, however, a familiar dogma of some jurists that a legal duty can not be owed a state within its own jurisdiction by one of its own citizens or subjects and, conversely, that a state has no "legal rights," (i. e., "offensive" rights), against its own citizens or subjects within its own jurisdiction should be discussed briefly. For instance, John Austin classified certain sorts of legal duties as "absolute duties," because he said that they were not correlatively rights. (Austin, Jurisprudence, Lecture XVII). Among them he placed duties owed the sovereign, because:—

"To every legal right, there are three several parties: namely, a party bearing the right; a party burthened with the relative duty; and a sovereign government setting the law through which the right and the duty are respectively conferred and imposed. A sovereign government can not acquire rights through laws set by itself to its own subjects. A man is no more able to confer a right on himself, than he is able to impose on himself a law or duty. Every party bearing a right, (divine, legal, or moral), has necessarily acquired the right through the might or power of another: that is to say, through a law and a duty, (proper or improper), laid by that other party on a further and distinct party. Consequently, if a sovereign government had legal rights against its own subjects, those rights were the creatures of positive laws set to its own subjects by a third person or body...." (Austin, Jurisprudence, p. 284, Lecture VI. See also pp. 282 et seq.)

Obviously this is only a matter of definition of the term legal right. If my definitions of the term correspond with actual technical usage, I see no sound objection to stating that a legal right existed in favor of any person to whom the agencies of authoritative government afford remedial processes against another who has failed to fulfill his correlative duty. The state or its representative has such remedies in cases of breaches of duties constituting crimes or constituting infringements of property rights of the state. Therefore, I say that it has legal rights; and I believe that this follows common linguistic usage. (Compare 1 Bl. Com. 268; 3 id. 40; 4 id. 88.) Similarly I say that the state owes legal duties to those in whose favor its agencies offer remedial processes against the state for events which constitute "breaches" of those duties. (Compare Salmond on Jurisprudence, 2nd ed., pp. 200-202; Holland on Jurisprudence, 10th ed., pp. 126-127.) Of course any differences in the details, scope, or effectiveness of the remedy afforded against the state from those afforded against others should be noted in describing rights against the state,—for instance the common unavailability of compulsory execution against the state.

Let me repeat that I am accepting without critical analysis the common technical habit of thinking of the state as a legal unitary person.

[18] Austin noted this fact. See Austin's Jurisprudence, p. 400. (Lecture XVII.)

Several other propositions are related to those which I have stated, but they demand some further preliminary elucidation.

Rights in rem is a common legal phrase and is opposed to *Rights in personam*. *Rights in rem* is used, it is said, as a label to indicate rights which are good against the world in general. It is more accurate language to say that they are good against indeterminate persons. *Rights in personam* on the other hand are good against determinate or determinable persons only, or against such persons and their successors in interest. How does this common speech agree with my third proposition?

The truth is that a *right in rem* is not one right but a multitude of rights, "existing" and potential or all potential, which are apprehended or imagined together in a vague abstraction and labeled "a right." For instance, the "property right" of a particular land-possessor is classed as a *right in rem;* but a land-possessor has not merely a single right. His "right" is, figuratively, a great bundle of infinitely varied and numerous potential concrete rights. The fruition or birth of each right in this bundle will consist of certain events imminently imposing upon a certain person or certain persons a necessity to accomplish a determinate sort of conduct or events and conditions if they would escape legal liability to the "holder" of the right. For instance, if one Jones approaches the holder's boundary line, he is under the necessity of not crossing it without legal justification or excuse if he would avoid legal liability. This statement indicates partially the substance of this particular determinate duty and of its "correlated right." Similar illustrations might be given of the occurrence of a restriction or burden upon a certain person to avoid liability for a nuisance to the holder as legal possessor, or to avoid liability for an "infringement of his riparian rights," etc., etc.; and each illustration would portray partly a distinct concrete legal duty and right, whose full definition would include all the elements catalogued in my fourth proposition. All of these infinitely numerous potential concrete rights are indicated compendiously but vaguely by the phrase *the property right of a land-possessor.*

A similar but more limited statement would be true concerning the phrase *right in personam*. One will find frequently that what he terms "a right in personam," is only his abstract apprehension of a "mass" of various potential concrete rights and liberties, each "operative" against the same determinate person or persons, or their successors in interest. It is evident, therefore, that we have here a distinct use of the term "legal right" to denote a mental conglomerate of potential "legal rights" of the concrete sort which we have considered previously. This compendious use of the term and a sim-

ilar use of the correlative term "legal duty" is quite common in technical speech and rarely is distingished from the more definite and concrete application. Although its natural result is to darken and confuse an inquiry into the nature of legal rights and duties, of course usage makes both the different sorts of applications of the term linguistically proper.[19]

Proposition six:—A *right in rem* is not an actual concrete external entity, but is an infinite "mass" of actual and potential concrete rights imagined or realized vaguely and labeled by an entity term for purposes of rough classification and convenience in thinking. A similar statement often will be applicable to uses of the phrase *legal right in personam*.[20]

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[19] Not only is this very abstract and compendious use of the terms legal right and legal duty very common but it also often stretches the capacity of the terms to the limits of abstract elasticity. We commonly speak of "the right of self-defense." This phrase indicates all the actual and future concrete liberties of conduct which would be classified under it. It is a very compendious term since its limits are not confined by a specification of any particular holders of the legal liberties included or of any particu lar person against whom they are available, or of any particular sort of circumstances in which they arise. It is therefore a vague class label of a multitude of varied legal liberties and future legal liberties. The phrase "the right of a land-possessor" is even more extensive in its spread. It covers not only all the multifarious legal "offensive" rights in favor of whatever person and against whatever person, which may be grouped under this abstract label, and all similar future rights, but also an infinity of legal liberties and future legal liberties of countless variety.

Perhaps a word or two more on this point may aid in clarifying the puzzling shadows of language. I have said that such expressions as "the right to be free from harmful assaults" and "the duty to perform binding contracts" are not indicative of a single right or duty but of an infinitude of past, present, and potential concrete rights and duties. Why, then, are these commonly used labels singular instead of plural in form? Is the usage incorrect?

The usage is not incorrect. Propriety in language is determined by usage and not exclusively by logical rules. The legitimate meanings of words and phrases stretch in every direction responding to the pull of usage directed by imaginative mental figures and pictures, by instinctive correlations and combinations of associated ideas, and by mental blurrings, as well as by careful logical thinking. Men think largely in abstract ideas and they naturally tend to treat abstractions concerning different but similar external things as mental symbols of the same thing, just as they commonly think and speak of exactly similar rules or principles existing in different minds at different times as one and the same rule or principle. See 11 Mich. L. Rev., pp. 4-9. Thus the similarity between the abstract comprehensions of similar characteristics of all the concrete duties which might be grouped under the designation "the duty to perform a binding contract" tends to produce the impression of the oneness of these duties; and we have an infinite number of concrete similar duties referred to as "a legal duty" and an infinite number of similar concrete rights referred to as "a legal right."

It is evident that this is a different, though related, meaning of the words from that which they have when a specific course of conduct is ascribed to a certain person as "a legal duty." Also it should be evident that it is a meaning which could not be distinguished clearly and easily by a terse definition. Therefore I have taken a little space to explain it. The explanation is important because the use is common and rarely discriminated consciously from other related uses.

[20] The substance of the following note is a corollary to these points concerning the nature of legal duties.

A very common mode of legal argument runs in form as follows:—"Jones had a legal right (of a sort described by general specifications). Smith's acts were in violation of this right. Therefore Jones has a good cause of action." The assertion that Jones had "a legal right" of the very generally described sort is regarded as a major premise of law from which and the facts of the case (the minor premise) the conclusion follows irresistibly. If the general description of Jones's "right" is definitely indicative in expression or suggestion of the circumstances under which a cause of action will accrue to Jones, if the truth of the statement is properly established, and if the case against Smith falls within the specifications, there is no objection to the argument. Three facts should be borne in mind, however.

First, unless the description of Jones's "right" definitely indicates the various circumstances under which liability to Jones might arise and the nature of those liabilities as far as relevant, it is not a satisfactory major premise. These matters need not be expressed fully. It suffices that the expression induces memory of the required facts. The description of the "right" is, of course, a generalized description of a multitude of actual and potential concrete rights, and fails as such in proportion as it fails in definiteness and clearness. For instance, an assertion that a person has a legal right to be free from harm intentionally inflicted without legal justification or excuse does not tend to establish in the slightest degree that Jones has a particular cause of action for harm which Smith has caused him intentionally. The statement, taken in its unobjectionable sense as a prologue to a partial summary of legal liability is a truism; but it leaves wholly unclarified the limits of legal liability because it fails to indicate in what cases defendant will be excused or justified in spite of the intentional harm he has caused. It has not even the degree of definiteness that attaches to a general rule subject only to special unmentioned exceptions. No learned lawyer would maintain that the abstract fact that Smith has intentionally caused harm to Jones, taken by itself, would raise either a natural or a legal presumption that Smith violated a legal duty owed Jones. The cases in which harm has been caused another intentionally without either legal or moral blame are too numerous and varied to permit of a presumption that a legal wrong has been committed against Jones or of a conclusion that consequential legal liability is the general rule; although the fact that certain concrete harm has been intentionally caused by defendant is undoubtedly in many cases a strong consideration against him. As a prologue, the statement has merit in that it tends to free the mind of a pedantic, archaic bias that would limit recovery to the narrow analogies of stereotyped precedent, and thus broadens and clarifies the vision at the outset of enquiry; but it merely postpones the solution of the problem which induces it. In determining Jones's liability, we can derive no further help from this indefinite proposition, but must depend upon discovering and balancing the arguments which would determine the outcome of litigation.

Second:—Whether or not Jones had "a right" of the specified sort is immaterial except insofar as it included the contingent availability of the legal remedy in dispute, and the availability of this remedy can be established only by establishing that the courts will give him judgment if he seeks it properly. Therefore, the general statement of Jones's "right" must include or imply an assertion that he has the right of action in dispute or it is not a satisfactory major premise.

Third:—Unless, however, the assertion that the right of action exists is supported by proof, the question is begged. How is the proof to be accomplished? Conclusively by the outcome of litigation. Predictively by discovering, analyzing, and appreciating precedents and other considerations which would weigh with the courts and by balancing probabilities. The major premise concerning Jones's "right" may be supported entirely, or insofar as it is material, by such investigation and reasoning of the one who utters it or of someone else whose report is accepted; or its general form may serve to awaken common professional knowledge of its truth. In any of these ways the requirement of proof may be met and the syllogism relieved from the appearance of a dogmatic assertion.

In short, the syllogistic form of summing up a defendant's liability is no part of the analytical investigation and reasoning establishing that liability. Although it is sometimes useful in putting memory and reason in order, it is not necessary to legal

Another related but distinct meaning of the term *legal right* attaches to it in such a phrase as *legal right of action.* This use denotes only the fact that the "holder" of the right could maintain a suit upon the basis of a connoted accrued "cause of action." Obviously this use differs from those discussed previously, although in referring to the outcome of potential litigation or other legal processes it has a partial similarity of meaning.[21]

There remain three other technical uses of the words *legal right*

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reasoning or to reasoning in other fields. That Smith is liable or is not liable to Jones may be proven by analysis of the facts and of precedents and other authorities without resort to syllogistic parade. Indeed the enforced or habitual use of the syllogism in arguments concerning legal liability has a vicious natural tendency to induce a superstition that the major premise asserts the existence of an independent pre-existing entity,—a "right" whose violation is the cause of particular legal liability, and also the more general fallacy that a sound major premise is part of "the law," (i. e., a system of rules and principles), which mysteriously is responsible for and justifies judicial action.

[21] Perhaps a subconscious confusion of this meaning of the term legal right, (i. e., right of action), and the meaning first indicated by me accounts partially for the frequency with which a rather trivial question is discussed at length and with insistence. In many cases, of course, damage is an essential element of a cause of action, i. e., an essential element in a title to a right of action. The question to which I refer is whether in such cases it is correct to say that the substantive duty involved was "broken" before the damage occurred. For instance, Dennis drives his automobile close to Piper's horse and sounds his horn unnecessarily and carelessly, thereby frightening the horse. If the horse bolts and causes "proximate" damage to Piper, there is a cause of action; if no damage follows, there is no cause of action. When the horn is blown, the results are in the future and the cause of action is not yet matured or negatived. Has a breach of legal duty occurred?

If we stop a moment to think, it becomes clear that the problem involved in this question is a linguistic one only. There is no doubt concerning the facts, nor concerning the circumstances under which Dennis will become liable to Piper,—in short no question of fact or of law. The inquiry put is to be answered only by defining what is meant by "a breach of duty." It therefore is one of linguistic import only. If we choose to apply the term breach of duty only when a cause of action has accrued, Dennis has broken no legal duty owed Piper. Such a limited use of the term is supported by the argument of some legal technicians. On the other hand, if we mean by "breach of duty" such conduct, results, or events as raise either an accrued legal liability, or a contingent legal liability for whatever "proximate" damages may follow, Dennis has broken a legal duty owed Piper, although a cause of action has not yet accrued. Certainly his conduct was legally condemnable,—i. e., it would be considered by a court sufficient to subject him to liability for any consequential damages within the limits of legal liability. Indeed, somewhat similar cases might be imagined in which an injunction against dangerous threatened conduct might be issued on the ground that it would be legally condemnable and that there would be no adequate remedy at law for the probable damaging consequences. Therefore, I do not see any good reason against labeling Dennis's conduct a breach of legal duty in this sense, and I think that such a use of the term would be in accord with the prevalent usage of judges and practicing attorneys and of many text writers. However, some theorists object to this use with an insistence which implies a belief that the point is an important one of substance. This it certainly is not, for to escape the objection one need only substitute another expression to carry the same intended meaning that the conduct, results, or events labeled would be held by the court to throw on the obligor liability for consequential legally "proximate" damages.

to which I would call attention. If X gives to Y an oral permission to cross his land, Y, while the license is unrevoked, is said to have "a right" to cross X's land. If we examine in detail the potentialities of causal events and legal consequences to which this labeling phrase thus is applied, we find that an interference by X or by anyone else with Y's passage without a legal wrong in respect to Y's personal security, affords no cause of action in favor of Y. If a personal assault is made on Y, or if his person is injured by the method of interference adopted, legal liability to Y may ensue; but abstractly the fact that Y's passage is prevented does not cause liability. The effect of the license is merely to afford Y exemption from liability to X for trespassing on his land.[22] It is an element which will prevent a concrete passage over the land by Y from causing a normal series of legal condemnatory events at the option of X. Between *rights* of this sort, whose essence is the holder's freedom from legal liability within their limitations, and concrete *rights* of the sort first discussed, whose essence is the contingent liability of others in favor of the holder, there is an obvious distinction which frequently is blurred in the mind. The blurring is intensified and perhaps caused by the fact that the same word is used to designate these two dissimilar sorts of things. For convenience we may call *rights* of the sort which we first discussed *offensive rights*, and *rights* of this last sort *defensive rights* or *liberties*. We may indicate tersely the distinction between the two sorts by the statement that *offensive rights* are correlatively duties owed the holder whereas *defensive rights* are essentially the absence of pertinent

[22] See Reeves, Real Property, § 235; Tiffany, Real Property, § 304.

[23] The substantial distinction between freedom from legal liability consequential to predicated conduct, and the availability of legal remedies as a consequence of another's breach of a legal duty is obvious and is at once noted by every careful student of law. The fact that the same word "rights" commonly is used with reference to each of these two different sorts of things also has been noted many times by text writers, jurists, and teachers. Often, however, it has been ignored. On the other hand, sometimes we meet in this connection that strange bias of mind which insists upon magnifying a finical discrimination in the manipulation of language into a matter of great moment and a prerequisite to a proper understanding of the law. For instance, one may be charged with serious error in following the common usage which applies to the phrase legal right both of the two senses that I have distinguished, and gravely told that it makes all the difference in the world whether what I call a legal defensive right is labeled a right or a legal liberty. It is important that differences in external facts within our range of study be appreciated, but language accomplishes its purpose if it conveys information efficiently. It seems obvious to me that much more is gained by explaining common usage than by stigmatizing common usage as erroneous because it does not conform to a personal vocabulary, however carefully and logically that vocabulary has been devised. When the critic goes so far in his linguistic zeal as to confuse substance and language and to overemphasize language, his efforts become not merely uneconomical, but distinctly pernicious. We cannot condemn too heartily that sort of legal pseudo-analysis which

legal duties burdening the holder in favor of others.[23] Abstractly the term *legal defensive right* has a similar denotation to that of the term *legal offensive right* insofar as it refers to the fact that pertinent potential governmental results of the predicated events will be favorable to the holder of the right.

Just as *offensive* rights are concrete, so *defensive* rights or liberties are concrete. Similarly also, a legal liberty is never defined completely until its elements are defined in concrete particularity and detail. Also we commonly use the terms *legal liberty* and *legal right* (in the sense of *legal defensive right*) to indicate, not a single concrete liberty, but a multitude of similar legal liberties apprehended or imagined compendiously as a unit, and we may use the phrases *legal liberty in rem* and *legal liberty in personam* with meanings analagous to those indicated by the phrases *in rem* and *in personam* in connection with the phrase *legal rights* used in the sense of *offensive rights*. Furthermore "offensive" rights and "defensive" rights or liberties commonly are associated mentally in those large "bundles" of concrete legal rights which usually are designated by entity names, such as "the land-possessor's right of possession," "X's riparian right," "Z's right of personal liberty." That is to say X's "riparian right" includes legal liberties to use the water (freedom from legal liability for a proper use) and also "offensive rights," essentially consisting in the potential liabilities of others to him for "violations" of these offensive rights.

Another distinct use of the term legal right appears in such an expression as "the right to convey." If we consider this expression in a concrete application as, for instance, "Jones has good right to convey his land X in fee simple to Henry," we shall find that it means only that a proper instrument of conveyance will "create" in favor of Henry a mass of legal rights and liberties similar to those which Jones had before the "conveyance" and will result in an extinguishment, partial or total, of the legal rights and liberties of Jones in the land. The "right to convey" is a power to accomplish legal effects by a conveyance. Its essence is this, and not freedom from legal liability; nor is it the "handle end" of a legal duty. Therefore this is quite a distinct meaning of the phrase *legal right*. With a similar denotation, it is often, in fact usually, employed in an abstract and general sense to indicate the power to make any of an indefinite number of possible "conveyances" instead of referring only to a particular concrete conveyance.

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results in a futile alleged science that might be denominated "verbal jurisprudence,"—a "science" which insists on a rigid set of artificial definitions of words as the fundamental essential.

Finally, another sort of signification of the term "legal right" may be noted in such an expression as "X's heir has the legal right of succession to the estate of the deceased." This does not mean directly and simply that X's heir now has the handle to a certain freedom from legal liability, nor that he has a particular right of action, nor that he has the power of "conveying" certain property rights. It means that the heir, through the death of X, has become entitled to succeed to X's estate—*i. e.*, it means indirectly that he has or in due time will become invested with legal rights and liberties protecting his enjoyment of the succession, but more particularly that his title to get or hold these rights and liberties would be maintained as good against adverse claims in litigation. Thus this use of the term *legal right* is fringed with the first two meanings which we have considered because the subject matter of which the "right" is predicated is itself a bundle of rights and liberties, but it also denotes more directly and particularly the fact that the net result of litigation and other judicial proceedings would establish X's heir in the possession of these rights and liberties. In this connection, then, and in other similar uses, the term in its principal significance is practically equivalent to "the best title."

In conclusion—I do not offer this brief supplementary note as a full exposition of the meanings which the phrases considered may bear in technical legal communication. I have attempted to explain the most important technical meanings common in scientific discussions of legal topics. I have not attempted to reconcile or criticise previous definitions nor to discuss the limited uses of particular authors. All word-definition purports to explain the actual usage of words or to propose certain uses. To be reliable, the explanation of word usage must be based on a careful examination and consideration of that usage. It should be remembered, however, that abstract definition by a user is not always a true or reliable indication of his use. Words commonly are used instinctively without analysis of ideas and therefore without full comprehension of the identity and actual nature of the things denoted and connoted. The analysis of ideas and the determination of the identity and nature of the objects of technical thought and speech on complicated matters is a work that requires close attention, thought, discrimination, and patience, and ordinarily does not interest even an intelligent and trained lawyer sufficiently to insure the use of these requisites and a reliable result. Therefore my purpose has been to expose the external facts to which our terms relate in common usage by analysis independently of previous formal abstract definition. I trust that I have succeeded in convincing at least some of my readers

that this note is a demonstration of actual technical usage, and not an argument for a preferred set of definitions.[24]

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[24] It may be of use to reiterate my reasons for discussing these tedious questions of superficial legal psychology. I have not been attracted to them by a fondness for observing and indicating meticulous details of mental habits and of the use of language. I have encountered these questions in the path of my professional studies and have had to answer them that I might clarify my vision and gain confidence and efficiency in mastering the particular problems which, as lawyer and teacher, I meet daily. My observation of the thinking of my students and others and the study which produced my solution have convinced me that many lawyers and law students are greatly handicapped by the lack of an exact comprehension of the nature of the law and of the correlation of its different elements. A greater handicap, quite common among students (even those who are college graduates), is a woeful lack of elementary knowledge of the processes of thought and of the limited functions of language, which condemns all but those endowed naturally with superior intelligence and initiative or obstinate determination, to stumbling in leading strings through their courses in law. It should be obvious that since lawyers continually must solve problems requiring independent, analytical thought and careful, clear expression, and since their problems are complicated by the thought and expressions of other men and bodies of men, a full mastery of the profession can not be claimed by one who has not at least a sound elementary and practical understanding of the processes of thought, the uses of language, and the interplay of the two.

Let me put this point a little differently. Our profession is not peculiar in that it will satisfy a great capacity for analytical reasoning, but the nature of the field in which it operates invites an intense, persistent, and searching scrutiny of reasoning, of motives, and of the elements of thought and speech in actual operation which is equalled by no other profession of the business world. Particularly, if we are to avoid doubtful, vague, and inaccurate thinking on legal problems, it is necessary that we perceive with clearness and precision the purport of our mental concepts and the particular application of our technical terms. Habits of thought which will permit of the care, discrimination, and patience requisite to attain these results are not common in the profession; but they must become familiar before the law will stand on an equal footing with modern medicine as the field of a learned and progressive science.

I have written the article to which this one is a supplementary note in the hope that it will suggest lines of thought which will bring beneficial results to some of my readers similar to those brought to me through my studies and that perhaps it will aid a step towards making the law the field of an accurate science. My main theme has been that the law,—i. e., the thing which is the object of our professional knowledge,—is not a set of rules and principles; that not even the common law should be studied as is a dead language; that the law is an external field of concrete phenomena; that it should be studied with such intense and careful attention as is devoted to other fields of scientific investigation; and that the rules and principles which may be endorsed as part of a science of law are not authoritative promulgations, but are mental generalizations evolved in a manner similar to those of any science. I have attempted to clarify this theme by indicating briefly the interrelations of some of the principal sorts of elements operating in the concrete field of law and by explaining, criticising and reconciling with my theory various modes of thought and speech current in the profession. The words right and duty are so frequent in legal discussion that there would be a noticeable gap in my article, fragmentary though it is, unless I gave some account of the nature of the things denoted by these terms. Hence this supplementary note.

CONSTITUTIONALITY OF TEACHERS' PENSIONS LEGISLATION.

II. The Validity of the Proposed Michigan Law.[a]

IN the preceding paper,[b] we considered pension legislation in general,—its extent, forms, purpose, and relation to the taxing power of the state and nation. It is proposed in this paper to discuss in detail the provisions of the proposed Michigan teachers' pension law in the light of the general principles set forth in the former paper, with reference to specific constitutional provisions, and the decisions of the courts upon the validity of pensions for firemen and policemen which are similar in many respects to teachers' pension systems, together with such decisions as have been made concerning the constitutionality of particular teachers' pension laws.

As we saw in the former paper, taxes can be levied only for a public purpose, determined by the courts, guided by the course of history, legislation, custom, equity, and the demands of the public welfare,—not limited to mere necessities of government, but embracing things tending to subserve or advance the well-being of the whole society, including pecuniary inducements for the faithful performance of public duties. Taxes for such purposes are valid, unless clearly violating some specific constitutional provision, construed with reference not only to conditions existing at the time of making it, but also with reference to problems likely to arise from changing future conditions. By history, custom, constitutions, legislation, and decisions, the whole subject of public education, with all that pertains thereto, is a matter of the highest public interest to be advanced by legislation as the public welfare may demand. So, too, by history, custom, equity, and legislation a pension system has been found to be among the best methods of securing and advancing in various lines of governmental action, the most faithful and effi-

[a] The proposed law reviewed herein was pending in the Michigan Legislature at the time this and the preceding paper were prepared, for the use of the teachers in urging the passage of the bill. This paper, prepared before the opinions referred to below were given, has been rearranged to some extent but not otherwise changed. The Attorney General, the Honorable Grant Fellows, gave an opinion that the proposed law was unconstitutional because the proposed contribution by the State would require taxation for private purposes, the required contributions by the teachers would take their property without due process of law, and would interfere with the teachers' right to contract,—relying mainly on the Missouri and Ohio cases reviewed herein. The Hon. Benton Hanchett gave an opinion that the proposed law was constitutional. The House passed the bill with a referendum clause; the Senate passed it without the referendum. The House would not recede and the bill failed.

[b] Mich. L. Rev., May, 1913, p. 451.

cient public service, and justifies taxation therefor unless constitutional provisions expressly and unequivocally forbid.

The title of the proposed Michigan law is:

"A bill to provide for retirement salaries for teachers in certain cases, and to provide means to pay the same."

The Constitution of Michigan, as do most of the state constitutions, provides that "no law shall embrace more than one object, which shall be expressed in its title."[1]

This title is sufficient to cover the other provisions of the bill,—definitions,—establishment of retirement fund,—board to administer the fund,—officers,—powers of board,—rules,—contributions of teachers,—duties of school boards,—penalties,—terms of retirement of teachers,—payment of annuities, and refund of contributions. All these are germane to the subject which is single, according to the decisions of our Supreme Court.[2] Under the title "An Act to establish a thorough and efficient system of free public schools and to provide for the maintenance, support and management thereof," a teachers' pension system similar to the one under discussion may be established without violating such a constitutional provision.[3] So too, the title "An Act to Incorporate the Firemen's Benevolent Association, and other purposes," is sufficient to justify a tax on fire insurance companies to raise the funds necessary to pension firemen.[3a]

The bill continues:

"The People of the State of Michigan enact: Section I. *Definitions.* The term *teacher* as used in this act shall include all persons employed in teaching by any city board of education, or school board or other managing body of any city, town, village or rural school district in this State and all superintendents and assistant superintendents of said schools, all supervisors of instruction, all principals and assistant principals, and special teachers of said schools. It shall include county school commissioners, county normal teachers, the state superintendent of public instruction and his deputy."

"The words 'retirement fund' as used in this act shall mean the Michigan State teachers' retirement fund for public school teachers as established by this act."

This section includes two classes of persons: *teachers,* who are *employees,* and not public officers; and school commissioners and

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[1] Const. Mich. (1909) Art. V, § 21.

[2] McMorran v. Great Hive of Maccabees, 117 Mich. 398; Atty. Gen'l v. Joy, 55 Mich. 94; Jackson Traction Co. v. Commr. of R. R.'s, 128 Mich. 164; Atty. Gen'l v. Lowrey, 131 Mich. 639, 199 U. S. 233, 26 S. Ct. 27.

[3] Allen v. Board of Education (1911), 81 N. J. 135, 79 Atl. 101; Lyons v. Police Pension Board, 255 Ill. 139, 99 N. E. 337. See also Notes Ann. Cas. 1912 A. p. 102, and 1912 D. p. 157.

[3a] Firemens' Benev. Assn. v. Lounsbury (1859), 21 Ill. 511, 74 Am. D. 115. See also Pennie v. Reis (1889), 80 Cal. 266.

the State Superintendent of public instruction, who are elective public officers, holding for definite terms at salaries fixed by law.[4]

The teacher is an employee under contract,[5] which is protected by the state and federal constitutional provision that "no law shall be passed impairing the obligation of contracts."[6] Public offices however are not created by grant or contract, but are revocable at the will of the legislature, unless constitutions forbid.[7] Most state constitutions provide as does the Constitution of Michigan that "Salaries of public officers shall not be increased or decreased after election or appointment."[8] Whether the contributions to the retirement fund required by Section VIII (*infra*), is a breach of the teachers' contract, or a decrease of the officers' salary, or whether the annuity paid under Section X, is extra compensation, or an increase of salary, is considered in discussing those sections.

"Section II. *Establishment of State Teachers' Retirement Fund.* There is hereby established the Michigan State teachers' retirement fund for public school teachers which shall consist of:

1. All contributions made by teachers as hereinafter provided.
2. All donations, legacies, gifts and bequests which shall be made to establish a permanent fund.
3. The income of interest derived from the investment of the moneys contained in the said permanent fund.
4. In case the amount of said fund, not including the principal of the permanent fund, is at any time insufficient to carry out the provisions of this act, there is hereby appropriated out of the general fund in the State treasury such additional sum or sums as may be necessary to pay the retirement *salaries* and expenses herein provided for. The auditor general shall add to and incorporate in the state tax for the year 1913 and every year thereafter a sufficient amount to reimburse the general fund for the amounts appropriated by this act."

Subdivision (1) of this section will be considered under Section VIII, below. There can be no doubt about the validity of subdivisions (2) and (3). The State may receive and accept donations for such purposes, and place them at interest according to the directions of the donor, as was done with donations by Japanese Embassadors to the police department of New York City.[9]

[4] Commissioners are elected for 2 years, term begins July 1, and their salaries are fixed by County Supervisors, C. L. 1897, §§ 4809-17. State Superintendent of Public Instruction is elected in April for 2 years, term begins July 1, and salary is fixed by the State Legislature, $4,000 per year, P. A. 1909, p. 15.

[5] Murphy v. Board of Ed. (1903), 84 N. Y. S. 380; Steinson v. Board of Education, 165 N. Y. 431; Ball v. Trustees, 71 N. J. L. 64; School Dist. v. Gage, 39 Mich. 484, 33 Am. R. 421; Allen v. Board of Education (1911), 81 N. J. L. 135, 79 Atl. 101.

[6] Const. Mich. Art. II, § 9. U. S. Const., Art. I, § 10.

[7] Atty. Gen'l v. Jochim, 99 Mich. 358, 41 Am. St. R. 606; State v. Hocker (1897), 39 Fla. 477, 63 Am. St. R. 174; State v. Sargent, 145 Ia. 298, 139 Am. St. R. 439; State v. Rhame (S. C. 1912), 75 S. E. 881.

[8] Const. Mich., Art. XVI, § 3.

[9] Peel v. Board of Met. Police (1865), 44 Barb. 91; Dikes v. Miller (1860), 25 Tex. Supp. 281, 78 Am. D. 571; State v. Blake (1897), 69 Conn. 64, 36 Atl. 1019.

The validity of subdivision (4), providing for the appropriation of public money to make up any deficit in the funds necessary to pay the retirement salaries provided in Section X, and requiring the sums so used to be raised by taxation is the crucial question here. Section X provides that a sum not less than $240 nor more than $500 per year shall be paid during the remainder of their lives to teachers who have retired after thirty years of teaching, and to others who have not taught so long, certain proportionately smaller sums. It will be noted that this applies only to those who are in the service after the law takes effect (a matter discussed below); but is not based upon any disability or injury received while in the service, nor is payment limited to those in needy circumstances.

Four principal objections urged against these provisions are: (a) The tax is not for a *public* purpose; (b) violates "due process" and "equal protection" provisions of State and Federal constitutions; (c) grants the *credit* of the state to persons; or (d) gives *extra compensation* after service is performed. These will be considered in order.

(a) Is the purpose, *"to provide retirement salaries"* for teachers under the conditions stated,—a public purpose? The term "salary" is generally applied to payments for services to be rendered, and not to payments to be made after the obligation to render services is terminated,—which is more properly called a pension; the payments to be made under the provisions of this law partake of the nature of both salary and pension, in that the payments are continued after the obligation to render services is terminated, but nevertheless are part of the compensation stipulated to be paid for engaging or continuing in the service,—payment only being deferred until after the service is terminated. It is therefore not inappropriate to call such a "retirement salary," any more than it would be to designate it a "pension." In fact West Virginia, not having a teachers' pension system, in 1907 in creating the Parkersburg Independent School District provided that teachers who had taught 30 years or more should be put on the substitute or reserved list of teachers at three-fourths pay, subject to call into the service at any time,—and in this way are retained on a salary.[10] The difference between such a plan, and the one under discussion, is that payment of part of the salary bargained for while in the service, is deferred until after the service, and the obligation to render service, are terminated. Such could properly be designated *"deferred* salary." The validity of the payment however will depend not upon the name but upon the substance of the transaction. Are such payments for a public purpose?

[10] Squier, Old Age Dependency in U. S. (1912), p. 181.

They certainly are so under all the principles applied under the Federal laws and decisions to pensions for military, naval, and hospital service, and retirement pay to judges, officers and marines. They certainly are so under the principles of the state bounty cases, state provisions for old soldiers' homes, and state payments to old soldiers under the Massachusetts decisions, state pensions to confederate soldiers, referred to in former paper,[11] and are also within the dictum of Judge Cooley, that such are valid if they are designed to benefit the public by being "an inducement to the faithful performance of a public duty in a responsible position,"[12] or if "it will encourage them to render better service,"[13] or "if there is the least probability of promoting the public welfare,"[14] or "if it can fairly be thought the public good will be served by the grant of such (even unstipulated) reward," whether "for civil or military service."[15]

That provision for such a retirement fund, or to pay such retirement salaries, partly by taxation, is a public purpose is made equally clear by the history of Firemens' and Police pension funds, derived from public revenue.

Firemen are public employees[16] of the cities which they serve, and are paid salaries similar to *teachers*. Policemen on the other hand are usually classed as public officers;[17] so these two stand in positions similar to teachers and the Superintendent of Public Instruction under the proposed act.

When Stuyvesant was director general of New Netherland a penalty was imposed on the owner of every chimney found to be insufficiently swept; the sum so derived was applied to buy buckets, ladders, etc. for use in putting out fires by the citizens; in 1731 two fire engines were bought; these were also used by citizens; in 1737 the city asked to be authorized to appoint 24 firemen to run the engines, and to be exempt from constable and militia duty; this

[11] See May No., 1913, pp. 465, 470, 473, 475; U. S. v. Hall, 98 U. S. 343, 346; Cole v. U. S. 34 Ct. of Cl. 446; Broadhead v. Milwaukee, 19 Wis. 624; Thompson v. Inhab. of Pittston, 59 Me. 545; Booth v. Woodbury, 32 Conn. 118; Opinion of Justices (1912), 211 Mass. 608, 98 N. E. 338; Elder v. Collier (1897), 100 Ga. 342; Bosworth v. Harp, — Ky. —, 157 S. W. 1084.

[12] In People v. Salem Twp. (1870), 20 Mich. 452, 486.

[13] Thompson v. Inhab. of Pittston (1871), 59 Me. 545.

[14] Booth v. Woodbury (1864), 32 Conn. 118.

[15] Opinions of Justices (1900), 175 Mass. 599, 602, 49 L. R. A. 564; Moffatt v. O'Donnell, — Mass. —, 102 N. E. 344.

[16] Sandwich v. Krake (1896), 66 Minn. 110, 61 Am. St. R. 395; Trustees of Exempt Firemens' Fund v. Roome (1883), 93 N. Y. 313, 45 Am. Rep. 217, on 220; Gillespie v. City of Lincoln, 35 Neb. 34, 16 L. R. A. 349; Cunningham v. Seattle, 40 Wash. 59, 4 L. R. A. (N. S.) 629; Brown v. Dist. Col. 29 App. D. C. 273, 25 L. R. A. (N. S.) 98; State v. City of Anaconda (1910), 41 Mont. 577, 111 Pac. 345.

[17] Monette v. State (1907) 91 Miss. 662, 124 Am. St. R. 715; Brown v. Russell, 161 Mass. 14, 55 Am. St. R. 357.

was done, and the common council appointed the "first fire company" charged with the public duty of extinguishing fires, but whose compensation consisted only in the *exemptions* granted; while the work was light, the dangers were obvious, and there were soon left men maimed and crippled, and widows and orphans prematurely deprived of their natural protectors; in 1792 the firemen undertook to establish a fund for their relief, and the "chimney fire money,"—public money,—was devoted to this; to do this more efficiently, the firemen were incorporated; in 1816 the legislature extended the *exemptions* for life after 10 years of honorable service, and in 1829, after five years of such service; the fund became inadequate by 1849, when the legislature directed that two per cent of the gross premiums received by agents of foreign insurance companies in any city (which by the act of 1837 had before been made payable to the state for the privilege of doing business in the state) should be paid to the fire department of the city, and in New York City to the existing corporation of firemen in that city. This act was immediately attacked as unconstitutional, on two grounds,—that it was a taking of property not for a *public*, but for a *private* purpose, that is taxing or taking the property of one private corporation for the benefit of another, and also deprived foreign corporations of the privileges and immunities of citizens, contrary to the Federal constitution. In *Fire Department* v. *Noble*[18] both these contentions were ruled against the insurance companies. The court said: "The laying of a tax or requiring a license fee to be paid can never be considered as taking private property in the sense of the constitution. . . . It has always been conceded that the legislature has the power to apply moneys raised, either by tax or otherwise to purposes of charity. The plaintiffs are the representatives of a public charity well worthy of support. . . . If the tax may be imposed for the benefit of the department, I see no reason why it may not be payable at once to them instead of passing through the state treasury for that purpose."

After this decision, another case,[19] involving the same points, was decided the same way; the opinions of five leading lawyers of the country were obtained,[20] and the matter was then taken to the Court of Appeals, which unanimously affirmed the decision of the Court below. Four of the five lawyers whose opinions were asked held the law invalid,—three of them[21] because it deprived the foreign

[18] 3 E. D. Smith (N. Y. 1854), 440.

[19] Fire Department v. Wright (1854), 3 E. D. Smith 453, (see Notes, 440, 458).

[20] Daniel Webster, Samuel Jones, and George Wood of New York; Judge Mark Skinner of Illinois, and Wm. L. Dayton of New Jersey.

[21] Webster, Jones and Wood.

insurance companies of their privileges and immunities under the Federal constitution. Judge SKINNER held that it took "the private property of one person and gave it to another private person, for his private use," and this was not within the power of taxation by the legislature.[22] Mr. DAYTON held the law did not violate the Federal constitution.[23] The attorneys argued fully the proposition that the tax, being for the support of the Fire Department (a private corporation) to provide pensions for disabled firemen, was for a *private* and not a public purpose, and the court ruled against this contention.

The act under discussion in these cases was amended in 1857, and re-enacted, and its substantial provisions remained unchanged down to 1883, when they again came before the Court of Appeals.[24] At that time the volunteer fire department had been replaced in 1865 by a paid organization, called the Metropolitan Fire Department, using steam apparatus and new appliances; this resulted in the discharge of many firemen, but their life exemptions were preserved to them; and because of this great increase in the number of *exempts,* the benevolent fund was imperiled; to preserve this a new corporation called the Trustees of the Exempt Firemen's Benevolent Fund was created, and to it was continued for 5 years at first, then 7 years more, and then, in 1877, 9 years more, or 21 years in all, the right to receive the insurance tax, although the exempt firemen were not in the service after they were displaced by the paid service in 1865. In 1875 the constitution was amended by providing "the money of the state" shall not be given "to or in aid of any association, corporation or private undertaking," and it was claimed that the act of 1877, continuing this gift for 9 years more, violated this provision, and "however the payment might be construed while the firemen were a public body and doing a public duty, the appropriation became purely a gift when made after the service ended, and when there was no legal or equitable obligation upon the State." The court by FINCH, J., says: "The State, in continuing the appropriation to the firemen when their services were no longer required, recognized an honorable obligation founded upon their past services and the injuries and suffering which those had occasioned . . . That which would have been merely a charity or a gift is not such by reason of the service given, the consideration rendered, the honorable obligation incurred. . . . When the State takes from the

[22] Judge Skinner's Opinion, on p. 473. This should be compared with the Illinois case, Firemens' Ass'n v. Lounsbury, 21 Ill. 511, given below.

[23] Opinion given on p .486, and also in Tatem v. Wright, 1 Zabr. N. J. 429.

[24] Trustees of Exempt Firemens' Fund v. Roome (1883), 93 N. Y. 313, 45 Am. Rep. 217. The case was argued by Joseph H. Choate and James C. Carter.

public treasury a sum of money and gives it to a corporate body for the relief of deserving beneficiaries it does one of two things. It either bestows a charity, or recognizes and discharges an obligation due it to the recipients. The former it cannot do except in specified cases. The latter it may always do, for the constitutional provision was not intended and should not be construed to make impossible the performance of an honorable obligation founded upon a public service, invited by the State, adopted as its agency for doing its work, and induced by exemptions and rewards which good faith and justice require should last so long as the occasion demands."[25] The court says also: "It seems to us equally plain that the tax thus made payable was in no just sense, a gift of public money or a charity on the part of the State. It was an appropriation of the tax to a proper governmental and public purpose, and was received not on the ground of poverty or as alms, but as fairly and fully earned and justly paid."[26] This tax law is still substantially in force and valid, and does not violate the Fourteenth Amendment,[27] and ten per cent of the amount so received (except in New York City) shall be paid toward the support and maintenance of the Volunteer Firemens' Home at Hudson, New York.[27a]

In 1852 the Firemen's Benevolent Association of Chicago was incorporated by act of the legislature of Illinois, which provided that 2% of the fire insurance premiums written in Chicago should be paid by the agents of the companies doing business there, to this corporation, to be used for the relief of the distressed, sick or disabled members of the firemen's association. One objection was that "here a revenue is attempted to be raised, not for state purposes, nor yet to meet any public exigency or want, but merely for the benefit of a private charity." The court held that since "all legislative power" was conferred upon the legislature, and "whenever it is alleged that the legislature has transcended its powers," it is necessary "to point out some restriction or limitation which has been disregarded," and here "it is not pretended that there is any express provision in the constitution inhibiting the legislature," it has power to impose such burden, and "to divert this fund to the direct endowment of this charity," and it is not necessary that it "should be paid

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[25] pp. 326, 327.

[26] p. 323.

[27] Fire Deparment v. Stanton (1899), 159 N. Y. 225; Birdseye's Rev. Stat. and Gen'l Laws, N. Y., Vol. II, p. 1868; Consol. Laws 1909, c. 28; Ramsay v. Hayes (1907), 187 N. Y. 367, 80 N. E. Rep. 193; In re Roche (1910), 126 N. Y. S. 766; Exempt Firemens' Ass'n v. Little Falls (1911), 132 N. Y. S. 798; Egbert Ashley Co. v. Fire Dept. (1911), 133 N. Y. S. 591.

[27a] Consol. Laws N. Y. 1909, Vol. 3, p. 1793 (Insurance Law, § 133).

into the treasury of the State."[28] The law is substantially the same in Illinois at the present time.[29] Two recent cases in Illinois have held that statutes requiring a pauper's relatives, when able, to support him, and cities to pay for the destruction of private property by mobs, are within the constitutional power of taxation, and are for public purposes.[30]

The Wisconsin law of 1852, requiring insurance agents to pay 2% of premiums received from fire insurance in Milwaukee to the Fire Department, for a fund for benefit of firemen, although challenged because "it assumes to take the property of one person and transfers it to another without due process of law," and violated the constitution that the "rule of taxation shall be uniform," was held by DIXON, C. J., to be valid.[31] The same policy still prevails in this state.[32]

In 1856, the legislature of Pennsylvania, imposed a license fee of $200 per year upon foreign insurance company agencies doing business in Philadelphia. In 1857 the law was changed so as to require all such agencies to pay 2% of their premiums for insurance done in Philadelphia to the Philadelphia Association for the Relief of Disabled Firemen, a private corporation, and to secure the payment by a bond with proper sureties. Action was brought upon the bond, and the court refused to enforce it, because it was "so extraordinary in character, of such doubtful constitutional validity, so dangerous in its tendency as a precedent, and unusual in the form of its enforcement" as to justify a court in refusing to enforce it. The court says the act "simply and arbitrarily imposes upon agents of foreign insurance companies the duty of paying two per cent of the premiums received by them to a private corporation in Philadelphia. Of course there is a good motive for this. The relief of disabled firemen is a purpose worthy of society . . . This is an association for a charitable purpose, it is true, but still it is strictly a private corporation. . . . The imposition upon the defendant of the duty of contributing to its support is therefore simply taking one man's property and giving it to another. It is depriving a man of his property without due process of law. . . . It is simply a decree that one class of men shall pay to others a share of the profits of

[28] Firemen's Benev. Ass'n v. Lounsbury (1859), 21 Ill. 511, 74 Am. Dec. 115.

[29] See Hurd's Statutes (1897), p. 331; O'Connor v. Trustees Firemen's Pension Fund (1910), 155 Ill. App. 460, 247 Ill. 54, 93 N. E. 124.

[30] People v. Hill (1896), 163 Ill. 186; City of Chicago v. Cement Co. (1899), 178 Ill. 372.

[31] Fire Department v. Helfenstein (1862), 16 Wis. 136.

[32] Wis. Stat. Supp. 1899-1906, Ch. 89, § 1926. State v. Knowles (1911), 145 Wis. 523; Laws of Wis., Ch. 214, 1907, p. 243, §§ 959-46e.

their business. *True, the legislature might have imposed an equivalent tax on the business, and when paid into the public treasury, might have appropriated it to this association.*"[33] The case has met with some criticism. In *Weber* v. *Reinhard*,[34] Judge SHARSWOOD says of this case: "There are many things contained in the opinion in that case entirely aside from the point decided, and therefore mere *obiter dicta*. All that was determined was that an act of assembly which required all agencies for foreign insurance companies in the city of Philadelphia to pay two per cent of their gross premiums to an association for the relief of disabled firemen was not taxation at all; it was taking the property of A and giving it to B., whether for a charitable or any other mere private purpose it mattered not. *No doubt after money raised by taxation had reached the public treasury it may be appropriated by the legislature to charities or individuals.* It was admitted, indeed, that the tax in that case would be clearly constitutional, if it had been levied for and paid into the public treasury, and the idea that the court could pronounce the tax unconstitutional on the mere ground of injustice or inequality was expressly repudiated." To like effect is *Kelly* v. *Pittsburgh*.[35] Then in *Commonwealth* v. *Walton* (in 1897), it was expressly ruled that "a reasonable appropriation by the councils of a city to a corporation organized to create a fund to pension its members who are policemen is an appropriation to a strictly municipal use, and does not violate a constitutional provision that the "general assembly shall not authorize a city to appropriate money for, or loan its credit to, any corporation, association, institution or individual," and there is no merit in the objection that councils delegated the distribution of the sum appropriated to the Philadelphia Police Pension Fund Association, instead of distributing it themselves."[36] In 1895, the Pennsylvania legislature "imposed a tax upon the business done in this state by foreign fire insurance companies, of which one half the net amount was directed to be paid over by the state to the treasurers of the several cities in proportion to the amount of tax derived from each town."[37] The cities may appropriate the money so received to pensioning firemen if they so choose. The court says[38]: "The protection of the city from fire is a municipal function of the highest importance, and as said in *Commonwealth* v. *Walton*,[39] "a judiciously

[33] Philadelphia Ass'n v. Wood (1861), 39 Pa. St. 73.
[34] Weber v. Reinhard (1873), 73 Pa. St. 370, on 373.
[35] Kelly v. Pittsburgh (1877), 85 Pa. St. 170, on 178, Mr. Justice Gordon.
[36] Commonwealth v. Walton (1897), 182 Pa. St. 373, 61 Am. St. R. 713.
[37] P. A. 1895, June 28, 408. Stewart's Purdon's Digest, Vol. 2, p. 1985.
[38] Commonw. v. Barker (1905) 211 Pa. St. 610, 614, 61 Atl. 253.
[39] 182 Pa. St. 373.

administered pension fund is doubtless a potent agency in securing the services of the most faithful and efficient class of men," and "appropriation of money received from the state to a firemen's relief association" does not violate the constitution prohibiting appropriations for any corporation, institution or individual." To the same effect is the later case of *Firemen's Relief Ass'n* v. *Scranton.*[40] So in Pennsylvania the appropriation of public money derived from taxation, to pensioning firemen and policemen is a proper public purpose, and such funds can be used to supplement those derived from the contributions of members.[41]

In 1853, the legislature of Louisiana enacted that every agency of a foreign insurance company in New Orleans, shall be taxed $500 per annum, to be collected by the State tax commissioner, and immediately thereafter paid to the city treasurer to the credit of the fire department, to be divided between the fire companies as the majority of the firemen shall determine. The constitution provided that "taxation shall be equal and uniform throughout the state." *Held,* "We regard this annual imposition as a tax. It is levied by the State. It is collectible by the State tax collector. . . . One class of corporations is taxed an invariable sum for the benefit of another class. . . . A bounty is secured by the fire department by confiscating the money of the defendants, without providing that any service shall be rendered to the defendants by the fire department, and even if this could, for a moment, be regarded as an assessment for benefits conferred, its inequality is glaring."[42] The law was repealed before this decision was rendered. It of course was based upon the idea that the fire company was a *private* company. By an Act of 1902, the City of New Orleans is authorized to appropriate one per cent of all the revenues received by the city from licenses issued by it, to a fund for pensioning disabled and superannuated firemen. The validity of this act was not questioned in a late case involving its application.[43]

In *San Francisco* v. *Insurance Co.,* the Supreme Court of California held that a law requiring agents of foreign insurance companies to pay a certain percentage of premiums received from writing insurance within cities to the fire departments of such cities, violated the constitutional provision that the legislature should not impose a tax upon the inhabitants of a city for municipal

[40] Firemen's Relief Ass'n v. Scranton (1907), 217 Pa. St. 585.

[41] See Act 1893. P. A. 129, Stewart's Purdon's Digest, Vol. 3, p. 3546.

[42] State v. Merchants Ins. Co. (1857), 12 La. Ann. 802.

[43] State v. Bd. Trustees Firemen's Pension and Relief Fund (1906), 117 La. 1071.

purposes, but such taxes must be imposed by local authority alone.[44] After this decision the legislature passed an act directing the local authorities to provide by general tax upon the property of the local subdivision, a fund for pensioning firemen, which with amendments and supplements still remains in force.[45]

In 1895 the legislature also created an Exempt Firemen's Relief Fund, and directed that $12,000 per year be set aside from the municipal funds to pay pensions of $25 per month to exempt disabled firemen residing in any county or city in the state, whether they had ever rendered any service in said city or county or not. This law was held invalid as violating the constitutional provision forbidding the legislature "from making or authorizing a gift of public moneys to any person." The *exempt* firemen were such as had been firemen a few years somewhere, but now might be residing in an altogether different place from where the service had been rendered, and might under the provisions of the law congregate in any city, and claim and receive a pension from such *city*, without having served therein at all,[46] and the court points out the distinetion between the provisions of this act and that of 1889. A police pension fund partly derived from moneys raised by taxation has existed since 1889 or earlier, and its provisions enforced in the courts without question.[47]

The Nebraska Supreme Court, following *San Francisco* v. *Insurance Co.*[48] above, held that a law requiring insurance companies to pay a percentage of their gross receipts to fire companies, was unconstitutional because the legislature was forbidden to impose a tax for *corporate* purposes,[49] but later cases hold a law authorizing the *cities* to impose such a tax for such a purpose is valid.[50] The Court says in the *Love* case that "A firemen's pension may be classified as part of his compensation for services rendered, or it may be said that it is paid to him for the purpose of stimulating all those engaged in like public duty to prevent and suppress the destruction of prop-

[44] City and County of San Francisco v. Liverpool and London Co. (1887), 74 Cal. 113, 5 Am. St. R. 425.

[45] Act 1889, p. 108, (March 11); Acts 1901, p. 101, 575; Acts 1903, p. 158; Acts 1905, p. 412; Baker v. Board of Fire Pension Fund Commrs. (1912), — Cal. App. —, 123 Pac. 344.

[46] Taylor v. Mott (1899), 123 Cal. 497.

[47] April 1, 1878 (p. 879); March 4, 1889 (p. 59). Pennie v. Reis (1889), 80 Cal. 266; Clarke v. Police Board (1898), 123 Cal. 24; Clarke v. Police Board (1900), 127 Cal. 550; Kavanagh v. Board of Police Commrs. (1901), 134 Cal. 50; Nicols v. Police Pension Fund (1905), 1 Cal. App. 494, 82 P. 556.

[48] San Francisco v. Ins. Co. (1887), 74 Cal. 113.

[49] State v. Wheeler (1891), 33 Neb. 563.

[50] German Am. F. Ins. Co. v. Minden (1897), 51 Neb. 870, 71 N. W. 995; Aachen and Munich Fire Ins. Co. v. Omaha (1904), 72 Neb. 518, 101 N. W. 3; State v. Love (1911), 89 Neb. 149, 131 N. W. 196, 33 L. R. A. (N. S.) 403, Ann Cas. 1912 A, 495.

erty and the loss of human life. . . . Within whichever class the pension may fall, public funds may be appropriated in conformity with legislative authority to pay the firemen, and the money is thereby expended for a public purpose."

In 1878 Minnesota imposed a tax upon fire insurance companies doing business in the state. By subsequent acts the amount of this tax derived from cities having fire departments is directed to be paid back to such cities for establishing a service and disability pension fund for firemen.[51] The supreme court has recently said: "The obvious intention of the laws here under consideration was to care for firemen who in the nature of their occupation are exposed to peculiarly dangerous hazards likely to result in death or permanent disability and are precluded from availing themselves of the ordinary means of commercial profit. It was fitting and just, and it is not here questioned, constitutional, that this provision should be made, and liberally construed."[52]

In North Dakota, a similar statute was enforced without question.[53] The Kentucky law of 1902, creating a pension fund for firemen, by a tax not exceeding one cent on each one hundred dollars of value of the taxable property in cities, has likewise been enforced by the courts without question.[54] The courts of New Jersey have also enforced a similar law enacted in 1902.[54a]

In *Henderson* v. *London &c Ins. Co.*, the supreme court of Indiana held the act of March 9, 1891, creating firemen's pension fund from a tax imposed on the premiums of foreign fire insurance companies for insurance written within the *county*, to pay pensions to disabled firemen in any *city* in the county, to be unconstitutional because firemen are not servants of the state, or county, but of the city, and because it is not a uniform and equal rate of taxation, and also applies only to a portion of a class of the citizens of the State.[55] Indiana now has a pension system for both firemen and policemen

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[51] Gen'l St. 1878, § 298, title 6, Ch. 34; Laws 1885, c. 187; 1887, c. 44; 1895, c. 73; 1897, c. 58; 1901, c. 188; 1903, c. 20. Rev. Laws Supp. 1909, §§ 1653 seq.

[52] Buckendorf v. Minn. Fire Dept. Rel. Ass'n. (1910), 112 Minn. 298, 127 N. W. 1133.

[53] Act June 7, 1904, 1905. Continental Hose Co. v. Fargo (1908), 17 N. D. 5, 114 N. W. 834.

[54] Carroll's Ky. St. 1909, ch. 89, § 2896a, subsec. 17. Board of Trustees of Firemens' Pension Fund v. McCrory (1909), 132 Ky. 89, 116 S. W. 326; Tyson v. Board of Trustees (1910), 139 Ky. 256, 129 S. W. 820; Schmidt v. Board of Trustees (1912), 146 Ky. 335, 142 S. W. 688.

[54a] Leffingwell v. Kiersted (1897), — N. J. —, 65 Atl. 1029; Compare Scott v. Jersey City, 68 N. J. L. 687, 54 Atl. 441.

[55] Henderson v. London Ins. Co. (1893), 135 Ind. 23, 41 Am. St. R. 410. Acts 1891, p. 415.

partly provided by taxation.[56] This has been enforced without question of its validity.[57]

As early as 1880, Ohio provided for a pension fund for firemen in cities of "second grade of first class" (Cleveland) by a tax on the premiums on foreign fire insurance companies. This was followed by similar acts for Cincinnati and Columbus. These and others were in 1902, superseded by a general law applicable to all cities, providing for a pension fund derived from a municipal tax of 3-10 of a mill, part of the Dow liquor license tax, fines on members, penalties for violating city ordinances, and contributions from members.[57a] The Cleveland, Columbus, and Cincinnati laws were enforced by the courts without questioning the propriety or validity of raising the funds by taxation, although the supreme court in the Columbus case intimated that the law might then be of uncertain validity because it violated the provision that "all laws of a general nature shall have uniform operation throughout the state."[58] Similar legislation exists with reference to policemen pension funds.[59]

A recent case in Alabama sums up the doctrine as to firemen's pensions thus: "The statutes of 1870, 1872, 1873, requiring all fire insurance companies taking premiums for fire insurance within the county of Montgomery, shall pay into the fire department of the City of Montgomery an annual sum of $200," to provide for disabled firemen and their families, "are not unconstitutional and void because they impose a specific tax for a private purpose; but the tax so imposed is one levied for public purposes, and is valid and enforceable."[60] The court adds:[61] "The exercise of the taxing power by legislature must become wanton and unjust, be so grossly perverted as to lose the character of legislative function, before the judiciary will feel themselves entitled to interfere on constitutional grounds. . . . The absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable,—so clear and palpable as to be perceptible by every mind at first

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[56] 3 Burns Stat., §§ 8797, 8804.

[57] Hutchens v. Covert (1906), 39 Ind. App. 382.

[57a] See Apr. 17, 1880 (77 O. L. 309); Mar. 27, 1889 (86 O. L. 149, Cincinnati); Apr. 13, 1892 (89 O. L. 259, Columbus); Apr. 23, 1902, 95 O. L. 233; Page and Adams, Ohio Gen'l Code, §§ 4600 et seq.

[58] In re Price v. Farley (1901), 22 O. C. C. 48 (Cleveland); Karb v. State (1896), 54 O. S. 383 (Columbus); Rice v. State (1902), 48 O. L. Bull. 12 (Cincinnati); City of Cincinnati v. Steinkamp (1896), 54 O. S. 284.

[59] Page and Adams Ann. Ohio Gen'l Code, §§ 4616, et seq.

[60] Phoenix Assurance Co. v. Fire Dept. (1897), 117 Ala. 631.

[61] Ib. on pp. 647-649, quoting from Cooley on Taxation, pp. 103-106 (2d ed.), and Shenley v. City of Allegheny, 25 Pa. St. 128; Broadhead v. Milwaukee, 19 Wis. 624, 88 Am. D. 711, and Booth v. Woodbury, 32 Conn. 118.

blush. . . . If there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy and not of natural justice, and the determination of the legislature is conclusive. . . . The purposes for which this tax is imposed are not private or individual—nor is it a stimulus to the performance of a private or individual duty, as distinguished from a public duty; nor are the benefits the public are expected to derive, contingent or incidental."

In addition to these fourteen states,[62] from which cases relative to firemen's pensions supported in part by taxation, assuming or holding them to be valid, have been reviewed, the following states also have funds partly so provided, viz: Colorado, Iowa, Kansas, Massachusetts, New Hampshire, North Carolina, Oklahoma, Tennessee, Utah, Virginia, Washington.[63] And while I have not found decisions upholding them "the very fact that such cases are wanting is plenary evidence against any unconstitutionality of these laws."

The Supreme Court of South Carolina has recently held that the Act of 1906, establishing a firemen's pension fund was unconstitutional.[64] The act directed that 2 per cent of the premiums collected by fire insurance companies in the cities of the state having a fire department should be paid over "to firemen's associations" in such cities "for benefits, gratuities and pensions." This was held invalid because the tax was not uniform, nor for a public purpose, and because the Constitution expressly forbade granting pensions except for "military and naval service." The Court following cases from California, Indiana, Louisiana, Nebraska, and Pennsylvania, reviewed above,[65] says "where the benefits go to a Firemen's Benefit Association the public purpose seems to be lacking. Therefore we hold that the act cannot be sustained on the ground that it is a police regulation, the important characteristic, publicity of purpose being wanting. . . . In the present case the Legislature has gone further than attempting to raise money for fire departments, municipal organizations, in that it seeks to raise a fund by taxation for what seems to us merely a benevolent purpose. The money collected under the Act of 1906 is not for the use of the fire department but is to be paid to

[62] Ala., Cal., Ill., Ind., Ky., La., Minn., Neb., New Jersey, New York, No. Dak., Ohio, Pa., Wis..

[63] Colo. 1903, p. 447; Iowa, Apr. 7, 1909; Kans., 1895, ch. 363; Mass. 1898, 267; 1900, 246; N. H. Pub. St., 1901, 362; N. Car. Rev. St. 1905, § 4391; Okla. Comp. L. 1909, p. 383, § 975; Tenn. Laws 1909, ch. 408; Utah, Laws 1911, ch. 146; Va., Mar. 11, 1908, Am. Code 1910, ch. 181; Wash. Rem. and B. Ann. Code 1910, § 8074.

[64] Aetna Ins. Co. v. Jones (1907), 78 S. C. 445, 125 Am. St. R. 818.

[65] San Francisco v. Liverpool Ins. Co. (1887), 74 Cal. 113; Henderson v. London Ins. Co. (1893), 135 Ind. 23; State v. Merchants' Ins. Co. (1857), 12 La. Ann. 802; State v. Wheeler (1891), 33 Neb. 563; Philadelphia Ass'n v. Wood (1861), 39 Pa. St. 73.

certain firemen's asociations for benefits, gratuities, and pensions. These associations are incorporated under the law and their sole purpose is to take charge of the funds collected and disburse them in the manner provided for by the act." The Court itself acknowledges that this is dictum, because the case is clearly ruled by the express provision that no pension shall be granted "except for military or naval service". The reasoning however is based upon the private character of the private corporation that was to administer the fund, and does not deny that if it was paid to the municipality instead, it would then be for a public purpose; so far as it holds otherwise it stands alone among firemen's pension cases, and is also in conflict with New York, Illinois, Wisconsin, and Alabama cases above.[66]

As above stated many of the states have police pension funds derived partly from taxation, as in the case of firemen. Among these are California, Connecticut, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, New York, Ohio, New Jersey, Pennsylvania, Tennessee, Washington, and Wisconsin.[67] Many of these laws have been applied by the courts, assuming or deciding them to be constitutional.[68]

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[66] Trustees Exempt Firemen's Fund v. Roome (1883), 93 N. Y. 313; Fire Dept. v. Stanton (1899), 159 N. Y. 225; Firemen's Benev. Ass'n v. Lounsbury (1859), 21 Ill. 511; Fire Dept. v. Helfenstein (1862), 16 Wis. 136; Commn. v. Walton (1897), 182 Pa. St. 373; Commn. v. Barker (1905), 211 Pa. St. 610; Phoenix Assurance Co. v. Fire Dept. (1897), 117 Ala. 631.

[67] Cal. Laws 1878, 1889, 1891, 1897. St. 1905, c. 412; 5 Henning's Gen'l Law, p. 1062; Conn. Laws 1893, c. 115; Ill., Hurd 1908, p. 394, Am. 1911, p. 163; Ind. 3 Burns, § 8797, 1905, 236; Ia., Apr. 7, 1909; Ky., Laws 1904, 1912, p. 372; La., 1904, Act. 32, Am., 1910, p. 15; Mass. R. L. 1890, c. 108; 1892, p. 378; 1901, 377; Minn. Laws 1903, c. 159; Neb., Comp. St. Ann. 1911, § 917, July 2, 1909; New Jersey, Comp. St. 1208; N. Y. Laws 1885, 486; Pa., Brightly's Purdon, Vol. 2, p. 1428; Tenn. Laws 1909, c. 408; Wash., Rem. and Bal. Ann. Code 1910, §§ 8061-8080; Wis. Sess. L. 1911, p. 329.

[68] See Pennie v. Reis (1889), 80 Cal. 266, 132 U. S. 464; Clarke v. Police Board (1898), 123 Cal. 24; Clarke v. Police Board (1900), 127 Cal. 550; Kavanagh v. Board of Police (1901), 134 Cal. 50; Nicols v. Police Commrs. (1905), 1 Cal. App. 494; Burke v. Board Trustees (1906), — Cal. App. —, 87 Pac. 421; Edwards v. Sweigert (1911), 15 Cal. App. 503, 115 Pac. 256; Cohen v. Henderson (1912), — Cal. App. —, 124 Pac. 1037; Mott v. Scanlan (1912), — Cal. App. —, 125 Pac. 762; Hutchens v. Covert (1906), 39 Ind. App. 382; McAuliffe v. Board of Trustees (1909), — Ky. —, 115 S. W. 808; Head v. Jacobs (1912), — Ky. —, 150 S. W. 349; Eddy v. People (1905), 118 Ill. App. 138; Eddy v. People (1905), 120 Ill. App. 626, 218 Ill. 611; Moffatt v. O'Donnell — Mass. —, 102 N. E. 344; People v. Matsell (1883), 94 N. Y. 179; People v. Murray (1886), 102 N. Y. 468; People v. Partridge (1902), 172 N. Y. 305; People v. Coler (1903), 173 N. Y. 103; Matter of Friel v. McAdoo (1905), 101 App. D. 155, 181 N. Y. 558; Matter of Hickey (1907), 106 N. Y. S. 148; People v. Bingham (1908), 110 N. Y. S. 136, 193 N. Y. 610; Reynolds v. Bingham (1908), 110 N. Y. S. 520; Beal v. Bingham (1908), 112 N. Y. S. 465; Hodgins v. Bingham (1909), 196 N. Y. 123; People v. Bingham (1910), 198 N. Y. 274; Commonwealth v. Walton (1897), 182 Pa. St. 373; State v. Board of Trustees (1904), 121 Wis. 44; State v. Bd. of Trustees (1909), 138 Wis. 133, 20 L. R. A. (N. S.) 1175.

Although, as we have seen, the United States and many states, have granted pensions to veterans of the civil war, and nearly every one of the southern states have to the confederate soldiers, by laws enacted long after the service had been fully performed, and Maryland has to her ex-judges and Massachusetts to ex-soldiers and ex-employees, and such have usually been upheld as for a public purpose,[68a] yet in the case of policemen's and firemen's pensions the rule laid down in *Mead* v. *Acton*,[69] that some part of the service must be rendered after the law was enacted, otherwise the pension will be a mere gift or gratuity for a purely *private* purpose, and consequently invalid, has been followed in several cases. Such was the conceded rule in *State* v. *Love*, where the court says: "If no part of the service was rendered subsequent to the enactment of the law, the compensation would be a gratuity forbidden by the fundamental law of the State," and this was the rule applied to a teachers' pension case in New York.[70] In the *Love* case, however, it was also said: "But the relator continued in the service nine years after the law was enacted, and thereby earned a right to his pension under that act so long as it shall remain in force." The act directed cities to pension "all firemen of the paid department whenever such firemen *shall have* first served in such fire department for the period of 21 years," etc. The same rule has been applied even where the service after the law went into operation has been only a few months,[71] or years,[72] as well as longer periods of time.[73]

The reason for this view is stated in the *Love* case: "The fact

[68a] Maryland in 1904 enacted that all judges and ex-judges of all courts, who were or became 70 years old, and whether in office or not at the time the act took effect could be retired and paid $2,400 from the public treasury. Pub. Gen'l Laws, p. 759. Maryland grants pensions to teachers by special acts. See Laws 1902, c. 196; 1904, c. 584; Laws 1912.

[69] Mead v. Acton (1885), 139 Mass. 341. This rule in this case is confined to very narrow limits by the later decisions. See Opinions of Justices (1900), 175 Mass. 599; (1904), 186 Mass. 603; (1906), 190 Mass. 611; (1912), 211 Mass. 608, 98 N. E. 338.

[70] State v. Love (1911), 89 Neb. 149, 131 N. W. 196, Ann. Cas. 1912 C,, p. 542; Matter of Mahon v. Board of Education (1902), 171 N. Y. 263, 89 Am. St. R. 810; People v. Partridge (1902), 172 N. Y. 305; Edwards v. Sweigert (1911), 15 Cal. App. 503, 115 Pac. 256; Clarke v. Police Bd. (1900), 127 Cal. 550.

[71] Hutchens v. Covert (1906), 39 Ind. App. 382; Moore v. Board of Education (1907), 106 N. Y. S. 983. See Trustees of Exempt Firemen v. Roome (1883), 93 N. Y. 313, supra.

[72] O'Connor v. Trustees (1910), 155 Ill. App. 460, 247 Ill. 54.

[73] See Pennie v. Reis (1889), 80 Cal. 266; Nicols v. Police Pension Fund Commn. (1905), 1 Cal. App. 494; Cohen v. Henderson (1912), — Cal. App. —, 124 Pac. 1037; Kavanagh v. Board of Police (1901), 134 Cal. 50; Eddy v. People (1905), 118 Ill. App. 138; State v. Bd. Trustees (1906), 117 La. 1071; Hodgins v. Bingham (1909), 196 N. Y. 123; State v. Board Trustees (1904), 121 Wis. 44; State v. Knowles (1911), 145 Wis. 523; Buckendorf v. Minn. Fire Dept. (1910), 112 Minn. 298; Tyson v. Bd. Trustees (1910), 139 Ky. 256, 129 S. W. 820; Schmidt v. Board Trustees (1912), 146 Ky. 335, 142 S. W. 688.

that some firemen earned their pensions by serving a comparatively short time subsequent to 1895, whereas others were compelled to continue in the service for a greater length of time does not make the legislation void. The constitutional limitations do not apply to such conditions. The legislature is not restrained from paying unequal compensation for official services so long as its laws with regard thereto are general."[74]

In conflict with the foregoing doctrines relating to service pensions for firemen and policemen is the case of *State* v. *Ziegenhein*.[75] The constitution provided that "the general assembly shall have no power to authorize any city to grant public money in aid of or to any individual, association or corporation whatever." In 1895 the legislature enacted that "any person who shall serve as a policeman of St. Louis for 20 years may be retired from active service on half pay for the remainder of his life." The relator had served 20 years, but less than 2 years after the act went into operation. The court ruled that the act violated the constitutional provision; that it could not be upheld as a payment in compensation for services rendered before retirement; and even if constitutional, since the words are *"shall serve for 20 years* or more," he would have to serve 20 years after the law went into effect. The court says: "It is conceded that the legislature cannot, under the Constitution authorize a city to give money out of its treasury simply as a gratuity in recognition of *past* services rendered by public officers. It is claimed that the provision for retirement on half pay after 20 years service is part of the contract of employment of those appointed since that act took effect, and constitutes a portion of the *compensation* for the services rendered *before* retirement. . . . Eighteen of the 20 years of his service were before there was any provision for such alleged compensation, payable after retirement. If this be regarded as an additional salary *for twenty years of faithful and efficient work* in the police department the relator would certainly be receiving, in part, at least, a gratuity for what he had done before the act went into effect, and before any such compensation, as is now claimed, was provided. . . . The policeman who remains on the force for 20 years less 5 days, and the one who retains his office for the full term, are paid *during active service*, precisely the same sum, if they are of like rank. This must be deemed proper compensation for

[74] State v. Love (1911), 89 Neb. 149, 131 N. W. 196, Ann. Cas. 1912 C. 542.

[75] State v. Ziegenhein (1898), 144 Mo. 283, 66 Am. St. R. 420. The constitutional provision above given had a proviso that it should not be construed so as to prevent "the creation, maintenance and management of a fund for pensioning crippled and disabled firemen." The court did not seem to rely on the rule "expressio unius, exclusio alterius," as it might have done. 1 Mo. Ann. Statutes (1906), p. 195.

the time *actually devoted to the public service*. Nothing is withheld from the person who may serve 20 years, to be paid to him after he may be placed upon the retired list, and after retirement he is no longer subject to police duty and cannot be earning a salary. If he has been paid the same as other officers of shorter terms, for the time devoted to public duties anything in addition thereto can only be regarded as a mere gratuity. The argument of the relator would establish the proposition that it is a mere matter of legislative discretion to give a salary after retirement to all officers of the State and its municipalities, provided they shall be elected or appointed after the passage of an act to that effect." The court seems to admit that if something had been withheld from the salary during service the act might have been valid; so too it apparently admits that it would be valid if it applied to those who continued in the service for 20 years after the law took effect. The cogency of the court's reasoning against the *policy* of granting pensions is manifest, —but as to the *legislative power* to do so is not so clear, and upon that point stands alone upon the same facts. The court relies upon *Mead* v. *Acton*,[76] but in view of the later Massachusetts decisions, misapplies the doctrine of that case.

From the foregoing it is clear that the overwhelming weight of authority is that the grant of pensions to those who are in the service, as firemen or policemen, at the time the act takes effect to be paid after the service terminates, out of public funds raised by taxation, is valid as for a *public* purpose,—there being only two cases to the contrary.[77] There are no teachers' pension cases to the contrary. New York enforces her teachers' pension law, except when it undertakes to give a pension to those who had retired before the law went into operation.[78] There seems to be no other teachers' pension case on this point. In view of the large number of states having teachers' pension funds derived from taxation this indicates they are considered valid.

(b) Do such grants or payments violate the constitutional provisions that "property shall not be taken without due process of law," nor shall the states "deny to any person within its jurisdiction the equal protection of the laws," or "government is instituted for the equal benefit of all the people"? As has been said above taxation for a private purpose is confiscation, and deprives one of his prop-

[76] Mead v. Acton (1885), 139 Mass. 341; Opinions of Justices (1900), 175 Mass. 599; (1912), 211 Mass. 608.

[77] Aetna Ins. Co. v. Jones (1907), 78 S. C. 445, 125 Am. St. R. 818; State v. Ziegenhein (1898), 144 Mo. 283, 66 Am. St. R. 420.

[78] Moore v. Board of Ed. (1907), 106 N. Y. S. 983; Matter of Mahon v. Board of Education (1902) 171 N. Y. 263, 89 Am. St. R. 810.

erty without due process of law.[79] It is sometimes said that the taxpayer must consent to the tax, or he must be benefited by it in order to make it valid, under these provisions. Of course the consent here is not individual consent, but political consent through representatives acting within their lawful authority.[80] So, too, in the case of *benefit,* unless the tax is an assessment for a special purpose, the benefit need not be specific and individual, but only that *political benefit* which arises from "promoting the general objects of government."[81] There can be no doubt but that if teachers' pensions will in any substantial degree promote the public welfare, they are within the general objects the government has in establishing and regulating an educational system, and appropriating money raised by general taxation thereto. Taxation therefor deprives no one of his property without due process of law, nor violates any right or equity, any more than taxation to pay salaries, or for any need of the government, does, because the payment is made to private parties and becomes their private property.[82] Whether compulsory contributions by teachers to such fund is special taxation or not, and requires a showing of special benefits to be derived by such teacher in order to be "due process," or secure "equality" is considered below in the discussion of Section VIII.

(c) Does the proposed act grant or loan the credit of the State "to or in aid of any person, association or corporation public or private."[83] This section II, says: "there is hereby appropriated out of the general fund in the state treasury such additional sums as may be necessary to pay the retirement salaries and expenses herein provided for. The auditor general shall add to and incorporate in the State tax every year a sufficient amount to reimburse the general fund for the amounts appropriated by this act." The provisions here as to appropriation and levying the tax sufficiently conform to the practice under the constitution upon those matters.[84]

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[79] Sharpless v. Mayor (1853) 21 Pa. St. 147; People v. Salem Twp. (1870), 20 Mich. 452; Loan Ass'n v. Topeka (1874), 87 U. S. 655; Bay City v. State Treasurer (1871), 23 Mich. 499, 502.

[80] Gray, Limitation on Taxing Powers, p. 131.

[81] Cooley, Taxation, 2d ed., p. 24; Boyd, Workmen's Compensation, §§ 89, 90; Gray, Limitations of Taxing Power, pp. 131, 132.

[82] Borgnis v. Falk Co. (1911), 147 Wis. 327, 133 N. W. 209. A statute requiring municipalities to levy a tax to pay all workmen for injuries received while in the employ of the public, does not deprive taxpayers of their property without due process of law. This is true although the municipality would not be liable at all except for the statute.

[83] Art. X, § 12, Const. Mich. 1909.

[84] Art. X, § 12, also provides: "No money shall be paid out of the state treasury except in pursuance of appropriations made by law." Art. X, § 6, provides that: "Every law which imposes, continues or revives a tax shall state the tax and the objects to which it shall be applied." See People v. Mahoney (1865), 13 Mich. 481, 498; Westing-

The typical case of loaning the credit of the State to or in aid of any person forbidden by the constitution is one in aid of some private business, or one under private control, such as *People* v. *Salem*,[85] or *Taylor* v. *Commissioners*,[86] and the numerous other cases referred to in the previous article on what is not a public purpose.[87] "Loaning credit" means primarily supporting the credit of a person by guaranties, indorsements, and contracts, but it also is usually held to include donations which involve creating a debt for the benefit of such person.[88] However the appropriation of the revenue, before its receipt, and its replenishing by taxation, if the purpose is a proper public one is not loaning the credit of the State.[89] In *Trustees* v. *Roome*, the Court by FINCH, J., ruled that the appropriation of the "money of the state," for firemen's pensions was not giving or loaning it "to or in aid of any association, corporation or private undertaking," as is fully set forth above, although there was an association of firemen to whom it was given.[90] That the case of *Matter of Mahon* v. *Board of Education*,[91] holding that the giving of pensions to teachers *who had been retired before* the pension law went into operation, violated the constitutional provision against granting *extra* compensation, is not in conflict with the *Roome* case is made clear by the fact that it is neither overruled nor criticised, that the same constitutional provision was then in effect, and subsequent cases in New York have uniformly enforced the pension laws which grant pensions from public funds to those who have been in the service after the pension law went into operation, and that the court expressly approved[92] "the able opinion delivered by the learned court" below, which made this distinction as follows:[93] "Pension

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hausen v. People (1880), 44 Mich. 265; Trowbridge v. Detroit (1894), 99 Mich. 443; Union Trust Co. v. Wayne Probate Judge (1901), 125 Mich. 487.

[85] People v. Salem (1870), 20 Mich. 452.

[86] Taylor v. Commissioners (1872), 23 O. S. 22.

[87] Mich. L. Rev., May, 1913, pp. 462, 472.

[88] Green v. Dyersburg (1879), 10 Fed. Cas. No. 5756, p. 1099 on 1103; Jarrott v. Moberly (1878), 13 Fed. Cas. No. 7223, p. 366 on 368; Gibson v. Mason (1869), 5 Nev. 283, 300. Compare Johnson City v. Railroad (1897), 100 Tenn. 138.

[89] Stein v. Morrison (1904), 9 Idaho 426, 75 Pac. 246; French v. Millville (1901), 66 N. J. L. 392, 67 N. J. L. 349.

[90] 93 N. Y. 313, on 325; Supra p. 33; See also Boehm v. Hertz (1899), 182 Ill. 154, 48 L. R. A. 575, 54 N. E. 973; Bullock v. Billheimer (1911), — Ind. —, 94 N. E. 763; Hanley v. Sims (1911), — Ind. —, 93 N. E. 228, 94 N. E. 401; Hager v. Kentucky Children's Home (1904), 119 Ky. 235, 67 L. R. A. 815, 83 S. W. 605.

[91] Matter of Mahon v. Board of Education (1902), 171 N. Y. 263; People v. Partridge (1902), 172 N. Y. 305; Taylor v. Mott (1899), 123 Cal. 497.

[92] See 171 N. Y. 263, on pp. 265, 267.

[93] Matter of Mahon v. Board of Ed. (1902), 68 App. Div. 154; Moore v. Board of Education (1907), 106 N. Y. S. 983, 195 N. Y. 614; Hodgins v. Bingham (1909), 196 N. Y. 123.

laws, so-called, are now quite common, both in State and Federal legislation. These annuities, after the expiration of the period of active service, are not gratuities, but are in the nature of compensation for the services previously rendered for which full and adequate compensation was not received at the time of the rendition of the services. In other words, it is in effect pay withheld to induce long-continued and faithful service. Such statutes are designed to benefit the public service in two ways: *First,* by encouraging competent and faithful employees to remain in the service, and refrain from embarking in other vocations; and *second,* by retiring from the public service those who, by devoting their best energies for a long period of years to the performance of duties in a public office or employment have by reason thereof or of advanced age, become incapacitated from performing the duties as well as they might be performed by others of more youthful or in greater physical or mental vigor. Provision is thus made for the partial support of such teachers when their retirement without such provision was deemed inequitable, and but for such provision would not be enforced. These and other considerations will sustain such legislation from successful attack where the legislature has limited the application of the law to those who are in the public service or employ at the time of the enactment. As to those, however, who have passed out of the public service at a time when no such obligation had been assumed toward them, retroactive legislation of this character becomes obnoxious to the constitution. In such case the annuity becomes a mere gratuity, the giving of which is prohibited by § 10 of Art. 8 of the constitution" ("no city shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation").

So also in the *Love* case[94] above referred to where the statute required cities to pension firemen after more than 21 years' service, a fireman who had served more than 21 years, only 9 years of which were after the act went into operation, the court says: "We do not understand that by enforcing the provisions of the statute the credit of the state is given or loaned in aid of any individual or corporation. Section 3, Art. XII of the constitution ("the credit of the state shall never be given or loaned in aid of any individual, association or corporation") was intended to prevent the State from extending its credit to private enterprises. *Oxnard Beet Sugar Co.* v. *State,* 73 Neb. 66."

[94] State ex rel Haberlan v. Love (1911), 89 Neb. 149, on 153. To same effect is Commn. v. Walton (1897), 182 Pa. St. 373.

Inasmuch as the constitutions of 39 states[95] have such a provision the absence of decisions holding pension laws in conflict therewith indicates the concensus of opinion that such laws do not loan the credit of the State to individuals. As will be shown below the Board created by the statute to administer the retirement fund is not an "association or corporation, public or private," within the meaning of such provision.

(d) Whether the pension to be paid is *extra compensation,* contrary to constitutional provisions is considered below.

The proposed act also satisfies the constitutional requirement that every act levying a tax shall specify the purpose for which it is levied.[95a]

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(To be continued.)

[95] See Stimson, Fed. and State Constitutions, § 326.

[95a] Art. X, § 6, Const. Mich.; Tyson v. Board of Trustees (1910), 139 Ky. 256; Westinghausen v. People (1880), 44 Mich. 266; Trowbridge v. City of Detroit (1894), 99 Mich. 443; Union Trust Co. v. Probate Judge (1901), 125 Mich. 487.

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NOTE AND COMMENT.

THE LAW SCHOOL.—As a result of the increased requirements for admission, which are now in their second year of operation, the attendance at the Law School is less than that of last year, though the decrease is less than was anticipated at the time of the adoption of the higher requirements. The entering class (the second under the new standard) is about thirty larger than that of last year. There are no changes in the teaching staff, and none of great importance in the curriculum.

DEPOSITORS' CHECKS IN PAYMENT OF MATURED OBLIGATIONS HELD BY DRAWEE BANK AS PREFERENCES.—Since the case of *New York County Bank* v. *Massey*, 192 U. S. 138, there has been no doubt as to the right of a debtor of a bankrupt's estate to exercise the right of set-off as preserved by § 68a of the Bankruptcy Act. In that case it was laid down clearly that such right of set-off may be exercised despite the provisions of § 60a, which covers the matter of preferences. The question very frequently arises when bankers apply deposit balances upon matured obligations of customers. If such

application is made within four months of the time when the customer goes into bankruptcy, the contention that a preference has resulted is almost inevitable. The *Massey* case decided that under such circumstances there was not a voidable preference. There the deposits were made in the ordinary course of business, and the court carefully guards against expressing an opinion as to what the result would be in case of fraud or collusion between the depositor and bank.

In *Studley* v. *Boylston National Bank*, 33 Sup. Ct. 806, decided June 9, 1913, the Supreme Court had under consideration the same general question under facts somewhat different. In that case notes had been paid, within the four months' period, by the depositor by his own checks drawn upon his account with the payee bank. It was contended that the drawing of the checks made the case one of "payment" instead of set-off. But the court held that the transaction in essence was the same whether the matured notes were charged to the account or "paid" by means of checks signed by the depositor-borrower. The opinion is so worded as not to include within the doctrine of the case those cases where deposits are made by the borrower not in the ordinary course of business, but for the purpose of effecting a preference. Where it is shown that the deposits were made for the purpose of creating a fund so that the bank might exercise the right of set-off it seems clear from the cases referred to that the transaction would be declared a preference, and therefore voidable within § 60. Such seems to have been the situation, in the view of the court, in *Re Starkweather & Albert*, 206 Fed. 797, decided by one of the District Courts, April 25, 1913, and reported Oct, 9, 1913.

In the last mentioned case the bankrupts had on deposit, on the day their note matured, just a little more than sufficient to cover the amount due thereon, but there were then outstanding unpresented checks, to pay which there would not have been sufficient funds in the deposit account if the note were charged off. It was therefore agreed between the bank and depositor that the latter's check on the account should be given to cover the said note, post-dated four days in order that the outstanding checks might be paid when presented and other funds brought in to make up the shortage in the account caused by honoring said checks. At the expiration of the four days the note was retired and the check charged to the account. On application by the trustee to set aside the transaction as a voidable preference the court held, at least so far as the deposit was made for purpose of taking care of the post-dated check. and not for general purposes, it was tantamount to a payment direct to the bank. and was voidable as a preference. The court, however, went further and declared that the entire transaction, so far as it affected the payment of the note, was preferential and voidable. The court said that "the bank did not stand upon its right of set-off. It simply threatened to exercise that right. The matter terminated, however, on the basis of voluntary payments by Starkweather & Albert, in giving checks which were received by the bank as payments. While the distinction seems narrow between a payment resulting from the exercise of the right of set-off and a payment by check given in the presence of the power by the bank to exercise this right of set-off and application, yet the legal distinction exists, in that in the one instance

the act is that of the bank, and in the other that of the debtor." That the court was wrong on this feature of the case is clear from the *Studley* case. So far as there was money deposited for the particular purpose of paying the note, even though it may have been in the indirect manner of providing a fund to meet the check which paid the note, there would seem to have been a preference. But in going beyond that the court was wrong. R. W. A.

USE OF THE WRIT OF PROHIBITION TO PREVENT THE ENFORCEMENT OF A RESOLUTION BY A COMMISSION UNSEATING ONE OF ITS MEMBERS.—It is a well established principle of law that the writ of prohibition is in its nature a preventive and not a remedial measure. Though the principle itself seems plain and clear its application to a particular state of facts is fraught with no little difficulty and, as is well illustrated by a recent case in the Supreme Court of Michigan (*Eikhoff* v. *Charter Commission of City of Detroit,* 142 N. W. 746), is a frequent source of disagreement.

The Charter Commission of the City of Detroit, chose one Eikhoff to fill a vacancy in its membership, caused by the resignation of one of the commissioners. The appointee qualified and entered upon his duties as a member of the Commission. Because of certain statements made by him which tended to disgrace and humiliate the Commission and its members, a resolution proposing to vacate the seat of Eikhoff was introduced and taken under consideration by the Commission without any notice to or preferment of charges against him and without any hearing had. Pending the action of the Commission on this resolution Eikhoff filed a petition in the Supreme Court for a writ of prohibition to restrain the Commission from ousting him. Before the court acted on this petition and before any writ issued the Commission passed a resolution declaring the seat of the petitioner vacant and ousting him from membership in the Commission. Later a writ of prohibition enjoining the Commission from ousting the petitioner from membership therein, from depriving him of his rights as a member of the Commission and from interfering with the execution by the petitioner of his duties as a member of the Charter Commission was issued, and respondent, the Charter Commission, was required to show cause why the writ should be vacated. By a divided court (six justices favoring and two opposing the action) the writ was continued in force.

The main reason given by the dissenting justices for their disagreement with the majority of the court is that the act which the writ was issued to restrain had been done before the issuance of the writ, and that as the writ had not and could not perform any proper office it should have been vacated. These justices base their argument on the ground that the writ, though in form a continuing one enjoining interference with the petitioner in the performance of his duties, is really "dependent upon, and an elaboration of, the prohibition against taking action to unseat him," for to compel the Commission to recognize the petitioner as one of its members is in effect setting aside, by means of the writ, the judgment of the Commission.

As has been said, the writ of prohibition is preventive rather than reme-

dial in its nature and as a general rule it will not lie when the act proposed to be restrained has been done. It is issued for the purpose of arresting proceedings and cannot be used as a remedy for acts already completed. *State ex rel. Bassetti* v. *Judge*, 44 La. Ann. 1093, 11 So. 872; *State* v. *Judges*, 48 La. Ann. 1166, 20 So. 678; *State* v. *Potts*, 50 La. Ann. 109, 23 So. 97; *Hull* v. *Superior Court*, 63 Cal. 179; *Dayton* v. *Paine*, 13 Minn. 493; *People ex rel. Gould* v. *Commissioners*, 61 How. Prac. (N. Y.) 514; *United States* v. *Hoffman*, 4 Wall. 158, 18 L. Ed. 354. In the general principle that the writ is not the appropriate means to secure the annulment of proceedings already had, the dissenting justices were correct. *More* v. *Superior Court*, 64 Cal. 345, 28 Pac. 117. Their mistake arose in treating the act as wholly completed by the Commission when the writ was issued. It is true that the Commission had passed a resolution to oust the petitioner, but they had not put it into effect and it was really to prevent them from so doing that the writ was issued. The general rule is that even though the judgment has been rendered, if anything remains to be done by the body or person rendering the same to carry out or enforce it whereby the petitioner's interests may be prejudiced, a writ of prohibition will be granted to prevent such action. *State ex rel. Rodgers* v. *Rombauer*, 105 Mo. 103, 16 S. W. 695; *State ex rel. Ellis* v. *Elkin*, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037. In the principal case the writ would still prevent the Commission from refusing the petitioner the right to attend its meetings, to vote, etc. The fact that this will have the same practical effect as a reversal or suspension of the resolution of ouster should not defeat the application for the writ. *Cosby* v. *Superior Court*, 110 Cal. 45, 42 Pac. 460; *Havemeyer* v. *Superior Court*, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192; *State ex rel. Wynne* v. *Lee*, 106 La. 400, 31 So. 14; *People* v. *District Court*, 33 Colo. 293, 80 Pac. 908.

There is also an intimation in the dissenting opinion that the dissenting justices were not inclined to regard the removal of an officer for cause as a judicial act. There is some authority to support such a view. *Donahue* v. *County of Will*, 100 Ill. 94; *People* v. *District Court*, 6 Colo. 534; *Burch* v. *Hardwicke*, 23 Gratt. (Va.) 51; *State* v. *Bright*, 224 Mo. 514, 123 S. W. 1057. The courts of Michigan have clearly settled the question for their state in a contrary manner. *Speed* v. *Common Council*, 98 Mich. 360, 57 N. W. 406, 22 L. R. A. 842, 39 Am. St. Rep. 555; *People ex rel. Clay* v. *Stuart*, 74 Mich. 411, 41 N. W. 411, 16 Am. St. Rep. 644. The same view is taken by the courts of other jurisdictions. *State ex rel. Hart* v. *Common Council*, 53 Minn. 238, 55 N. W. 118; *People ex rel. Wheeler* v. *Cooper*, 57 How. Prac. (N. Y.) 416; *People* v. *Sherman*, 66 App. Div. (N. Y.) 231, affirmed (1902), 171 N. Y. 684. G. S.

How to Beat the Rule Against Perpetuities.—Many people seem to think that the lawyer's problem is not so much to know what the law is as to know how to get all they want while obeying the law to the letter. In the case of perpetuities the history of nearly a thousand years of our law shows an almost unbroken series of disastrous failures of the best-laid schemes to violate the public policy of freedom of alienation.

It is true that one victory was won against this policy by the aid of the legislature in 1285 through the Statute De Donis, soon restricted by application of the doctrine of warranties, and finally overthrown by common recoveries; and a temporary advantage was gained in *Scholastica's Case* (*Newis* v. *Lark & Hunt*, 1572, Plowd. Com. 403) through an oversight of the judges in applying the law of conditional limitations. But it was reserved to the lawyers of the present generation to point the sure and safe way, by invoking the law of charitable trusts, covenants, etc.

Many a man has left a fortune to preserve his memory green. Lord COKE was of opinion that these graveyard trusts could be supported as public charities; since monuments serve public uses in preserving proof of pedigrees, putting the living in mind of their end that they may live uprightly, and by wise counsel pointing out the good to follow and the evil to eschew. 3 INST. 202, 203. But the courts later declined to accept these views, and these decisions have been followed by many American courts. The legislatures have in many cases intervened to modify the rules thus established; and in some recent cases gifts of substantial sums to admitted charities, burdened with trifling charges for maintenance of the donor's grave, though of an uncertain amount, have been sustained. *Smart* v. *Town of Dunham* (N. H. 1913), 86 Atl. 821; *Burke* v. *Burke* (Ill. 1913), 102 N. E. 293.

But why should ambition be restrained to expenditure of trifling sums? Why not give the whole estate to trustees under strict orders to use the whole of it in erecting a university, hospital, public library, or the like, to be forever known as the John D. Girard College, where instruction shall forever be given, among other things, concerning the life and works of the benefactor? To this might be added commands to have masses regularly and publicly said for the repose of his soul, and suggestions as to erection of a tomb for him and keeping it in order. These the courts of chancery would assist rather than restrict, within reasonable terms. But if this does not satisfy, why not direct the executors to pay the whole estate to the city of the testator's selection, *if* it should happen, within one year from testator's death, that *anyone*, by use of his own funds without any aid from the estate of the testator, should see that the latter's body was properly and decently buried, and a substantial monument of marble, suitably inscribed as directed, and not less than one hundred feet in height, should be erected over his grave. This is not an attempt to bequeath any part of testator's estate to that purpose, and yet it would be safe to say that the monument would be erected if the estate were large enough. Now, to insure that the monument would be properly cared for and preserved after it was erected, it could easily be provided that the proceeds and profits of the estate should be devoted to the uses of the city until such time as this monument should fall into decay, and then should be returned to testator's executors or their successors, and become a part of his estate to be distributed as intestate residue according to law. Surely a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction cannot be said to be invalid or contrary to the policy of the law. *In re Bowen* [1893], 2 Ch. 491. If there is fear by the testator that the

beneficiary and the testator's next of kin might get together and free the fund of the incubus of supporting the monument, he might direct that if the monument should fall into decay, then from such time as it should be put in repair until it should again fall into decay the fund should be devoted to some other public charity named, thereby furnishing the inducement to the friends of the other charity to see that the tomb was repaired. In this way a chain of charities might be set up, each as a watch-dog upon the preceding, to see that the wishes of the testator, however whimsical, should be observed to the letter. This would seem to be clear and easy. *Christ's Hospital* v. *Grainger*, 1 Macn. & G. 460; *In re Tyler* (1891), 3 Ch. 252. It has even been held (strangely enough) that the residue thus created could be given over to a private beneficiary on such a remote contingency. *In re Randell*, 38 Ch. D. 213, 58 L. T. 626, 57 L. J. Ch. 899, 36 W. R. 543; *In re Blunt's Trusts*, [1904], 2 Ch. 767.

What has been said of perpetuities to preserve tombs, could as well be applied to establish any other perpetuity. Why not give the whole estate to trustees to pay the income to the Home for Superannuated Ministers for such time only as some good hearted soul should, out of his own purse, provide board, lodging, medical attendance, clothes and $50 per day as pin-money to each of testator's descendants, and then to some other charity? This is no attempt to tie up any part of testator's estate in any private perpetuity. Indeed, no part of his estate could lawfully be devoted to anything but the public charity. It is merely creating indirectly an inducement to the rest of mankind to do it "for the love of charity."

Since the law of perpetuities applies only to property and not to contracts (*Woodall* v. *Clifton*, [1905], 2 Ch. 257), would it not be safer for persons desiring to accomplish such purposes to abandon their attempts to do it by means of a will, and instead make a contract with some substantial trust company to make specified payments through all the ages to come. It is now pretty well agreed that one for whose benefit a contract is made can sue on it, though he was not a party to it. Furthermore on this subject see articles by Prof. A. M. KALES in 5 ILL. L. REV. 47, 251. J. R. R.

POWER OF THE BENEFICIARY TO TERMINATE A SPENDTHRIFT TRUST FOR A STATED TIME.—The question as to whether the beneficiary of a spendthrift trust for a stated time can, upon reaching his majority, compel the trustee to put him in possession of the trust fund has been passed upon by the Supreme Court of the United States for the first time in the recent case of *Shelton* v. *King*, (1913), 33 Sup. Ct. 686.

A testatrix made three minor relatives the beneficiaries of a fund of $75,000, of which they were to receive the income until the youngest of them had attained the age of twenty-five years, when they were to receive the fund absolutely. The oldest is now past twenty-one years and all three joined in a bill to have the trust terminated and the legacies paid to them absolutely. The court in deciding the case followed the present trend of the American state courts, and in direct contrast with the courts of England upheld the

trust and denied the petition of the plaintiff, declaring that no rule of public policy or law was violated by such a trust and that in such case the desire of the testator must be carried out.

In the opinion, which was written by Justice LURTON, it was held that no rule of law or principle of public policy was violated by a postponement of the passing of the legal estate to the legatees; no rights of creditors were involved, and no circumstances had arisen, not provided for by the testatrix in her will, hence when the disposition of the property directed by the testatrix contravenes no rule of law or public policy it is the duty of the court to uphold the trust. In support of its reasoning and conclusions the court cited *Claflin* v. *Claflin*, 149 Mass. 19, 14 Am. St. Rep. 393, 3 L. R. A. 370, 20 N. E. 454; *Nichols* v. *Eaton*, 91 U. S. 716, 23 L. Ed. 254, and *Broadway National Bank* v. *Adams*, 133 Mass. 170, 43 Am. Rep. 504, with others, and seems to rely most strongly on the rule as laid down in these three cases. Of the three the first is the only one which seems exactly in point, and the rule as laid down in it is followed exactly in the principal case. In it the testator gave $30,000 to a trustee in trust for his son; $10,000 was to be paid the beneficiary at the age of twenty-one, $10,000 at the age of twenty-five and $10,000 when he was thirty. Shortly after receiving the first payment the beneficiary sued to get the whole amount. It was held that he could not have it and the trust was held to contravene no public policy or rule of law and it was therefore the duty of the court to carry out the will of the testator. The other two cases involve the same general principle but are not exactly in point. In *Nichols* v. *Eaton* the assignee in bankruptcy of the beneficiary was suing to get the fund, and the trust had been established in such terms that the estate of the beneficiary ended when he became a bankrupt. The decision of the court on the question involved in the principal case was uncalled for in *Nichols* v. *Eaton* as it was unnecessary to a decision of the case, consequently Justice MILLER'S discussion of the validity of a proviso in a will postponing the possession of the legatee is worth only the consideration which dictum from so eminent a jurist commands. It is, however, the clearest statement of the theory of the American courts in regard to such trusts, in any decision heretofore rendered.

Broadway National Bank v. *Adams* was also an action brought by a creditor of the beneficiary to subject the trust funds to the payment of his debts, but the court held that a testator could make what disposition he liked of his property in order to provide for those in whose welfare he had an interest, and the law would enforce whatever provision he made provided it contravened no rule of law or public policy and that such a trust did neither.

The English courts lay down the rule that when a trust is created to pay the rents and profits or income of either real or personal property to the beneficiary for a fixed time and then to convey it absolutely to the beneficiary, the latter may elect to take it immediately upon coming of age, or upon attaining the capacity to execute a valid discharge to the trustee, and can compel the trustee to convey the legal estate to him. *Saunders* v. *Vautier*, 18 Eng. Ch. 240, Cr. & Ph. 240; *Josselyn* v. *Josselyn*, 9 Sim. 63; and *Wharton* v. *Masterman*, [1895] A. C. 186.

These English cases cited as authority on this point give no very satisfactory reasons for holding such a trust void. Professor GRAY suggests (RESTRAINTS ON THE ALIENATION OF PROPERTY, § 256), in support of the English rule that freedom of alienation is as much an incident of equitable as of legal estates: that when trusts of this character were first developed, equity, following the law, stepped in and prevented the restriction by compelling the trustee to convey the legal estate to the beneficiary. Further when a man owns property and receives its benefits, public policy requires that it should be subject to his debts and liable to the satisfaction of his obligations. Any contrary rule encourages fraud and allows the beneficiary to contract debts with no liability to answer for them out of the trust estate.

On the other hand it is insisted in support of the American doctrine, in KALES, FUTURE INTERESTS, §§ 288-296, and in the decisions of the American courts above cited, that the trust is not a dry trust but is active, and the care of the funds is committed to the discretion of the trustee, hence the court should let it remain where the testator put it. Moreover, the beneficiary is less liable to waste and dissipate the funds than if he had possession of them. It is further pointed out that this holding does not make the interest inalienable, for the beneficiary can alienate his interest and make it subject to his debts, though unable to dispose of the fund itself. For these reasons such trusts are not contrary to public policy and rules of positive law, and the court should see that the desires and wishes of testators should be carried out. The courts seem to think that such a restriction is not a fraud on creditors, because gifts and legacies of this character may be put on record and no person need be ignorant of how far the legatee's rights in the property extend. It is also said that the court is unwilling to admit such a limitation on the power of the testator to provide for the objects of his affection and generosity as this would imply. This reasoning as set out in *Nichols* v. *Eaton* is adopted and applied by the court in the principal case.

It would seem that if under the rule against perpetuities a man could suspend the ownership and alienation of an estate for a life or lives in being and twenty-one years thereafter, it should not be contrary to any rule of law or public policy to allow the testator so to dispose of that which is his own, that the person intended to be benefited thereby may not be enabled to dissipate it and, though holding the equitable title, yet should not be able to control the bare legal estate for the time limited in the will, so long as that does not offend against the rule against perpetuities. The following states have upheld the validity of such trusts: *Wagner* v. *Wagner*, 244 Ill. 101, 91 N. E. 66; *Kimball* v. *Blanchard*, 101 Me. 383, 64 Atl. 645; *Lanius* v. *Fletcher*, 100 Tex. 550, 101 S. W. 1076; *Stier* v. *Nashville Trust Co.*, 85 C. C. A. 423, 158 Fed. 601; *Ballantine* v. *Ballantine*, 152 Fed. 775; *Bronson* v. *Thompson*, 77 Conn. 214, 58 Atl. 692; *Reulings* v. *Reulings*, 137 Ky. 637, 126 S. W. 151; *Rector* v. *Dalby*, 98 Mo. App. 189, 71 S. W. 1078; *Fisher* v. *Taylor*, 2 Rawle 22; *Smith* v. *Towers*, 69 Md. 77; *Houghton* v. *Tiffany*, 116 Md. 655, 82 Atl. 831.

L. P. L.

THE MINNESOTA RATE CASES.—Few decisions in recent years have created more popular interest and comment than this decision by the Supreme Court of the United States. (*Simpson* v. *Shepard*, 33 Sup. Ct. 729.) But a close examination of the decision of the court will clearly show that there is nothing contained therein which does not have a sound basis in previous decisions of that court.

This decision is the outcome of suits begun by stockholders of the Northern Pacific Railway Company, the Great Northern Railway Company, and the Minneapolis and St. Louis Railroad Company questioning the constitutionality of certain acts of the Minnesota Legislature and orders of the Minnesota Railroad and Warehouse Commission which reduced rates for the transportation of freight and passengers between points within the state of Minnesota. These acts and orders were attacked on the grounds that: first, they interfered with interstate commerce and thereby violated Art. I, Sec. 8 of the Constitution of the United States; and, second, they were confiscatory, thereby violating the Fifth Amendment relative to taking of property without due process of law. In order to understand how these cases arose, it is necessary to bear in mind that the North Dakota-Minnesota boundary line and the Wisconsin-Minnesota boundary line run between pairs of adjoining cities, one city in each pair being in Minnesota and the other in the adjoining state; from their natural position these cities are competitors in the handling and distribution of freight, and the railroad companies have always put each city of a pair upon a parity with the other in the matter of rates. The lowering of intrastate rates would thus naturally have the effect of lowering interstate rates, as the carrier is bound to keep these cities upon a parity or necessarily impair its power to transact an interstate business. And the carriers, upon the taking effect of the new intrastate rates, actually made the same reduction with reference to those cities without the state and along the border, as was made in the intrastate rates by the acts and orders.

With reference to interstate commerce the Court holds, first, that, where Congress has failed to act upon the subject each state is free to establish maximum intrastate rates for carriers which may be interstate, provided that these rates are reasonable, even though these rates established by the state necessarily disturb the relation existing between intrastate and interstate rates as to places within zones of competition crossed by the state boundary line; second, that, Congress has the power to regulate intrastate commerce in those cases where intrastate and interstate commerce are so commingled that regulation of intrastate commerce is necessary to the full, complete and adequate regulation of interstate commerce.

In its opinion, which was written by Mr. Justice HUGHES, the court, after referring to the plenary power of Congress over interstate commerce, in the words of *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, continues as follows: "It has repeatedly been declared by the court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress

does act, the exercise of its authority overrides all conflicting state regulation. *Cooley* v. *Port Wardens,* 12 How. 299, 319."

And after referring to the powers which are left for the state to exercise in the absence of Congressional action, the court sums up this phase of the question as follows: "Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature, belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible." And as an illustration of this principle cases are cited and approved by the court where such questions were considered as local action with respect to pilotage, *Cooley* v. *Port Wardens,* 12 How. 299, 319, and with respect to quarantine, *Morgan's L. & T. R. & S. S. Co.* v. *Board of Health,* 118 U. S. 455.

The court in considering the doctrine of concurrent powers failed to do that which was expected, the removing of the confusion which resulted from prior expressions by the courts. This confusion is the result of the decision in *Willson* v. *Blackbird Creek Marsh Co.,* 2 Peters 245, 8 Curtis 105. In that case the plaintiff, a sloop owner, had torn out a dam built by the defendant corporation, which was authorized to reclaim marsh land and had power to build dams across the creek, which was navigable and tidal. The plea to an action of trespass was that the act of defendant, sanctioned by the state, was an interference with commerce, and therefore unconstitutional. The decision of the court was rendered by MARSHALL, C. J., who said:

"The repugnancy of the law of Delaware to the Constitution is placed entirely upon its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not been so exercised as to affect the question.

"We do not think that the act empowering the Blackbird Creek Marsh Co. to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state or as being in conflict with any law passed upon the subject."

This case has been considered as the first case announcing the doctrine of concurrent powers. But by many this decision is considered to be a slip on the part of MARSHALL, C. J. It seems though that this case stands only for the proposition that the state can act with regard to interstate commerce where Congress has not acted and where a local police measure is expedient. An expression by the court, in the principal case, to a certain extent clears

up the confusion, by pointing out the difference in the source and nature of the powers exercised by the state and nation over commerce, and by showing that the state does not have jurisdiction over interstate commerce as such. And upon principle, it would seem that commerce among the several states and with foreign nations is exclusively within the control of Congress, although police regulations of a state may indirectly affect such commerce.

As to the first ground of attack, the objection that the state can not so regulate rates for intrastate commerce as to affect interstate rates fixed by the carrier, the court rejects the contention in the following words: "To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those which are fixed by the carrier for interstate transport is to maintain the power in name while denying it in fact. It is to assert that the exercise of the legislative judgment in determining what shall be the carrier's charge for the intrastate service is itself subject to the carrier's will. But this state-wide authority controls the carrier and is not controlled by it; and the idea that the power of the State to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying an interstate rate to places across the State's border, is foreign to our jurisprudence."

It is evident that if the contention of the carrier were to prevail a state would be rendered powerless to fix rates for intrastate commerce, as such rates would be fixed by the interstate rates established, perhaps arbitrarily, by the carrier. This conclusion of the court is supported by the following cases decided prior to the principal case. *Dow* v. *Beidelman,* 125 U. S. 680; *St. L. & S. N. R. Co.* v. *Gill,* 156 U. S. 649; *Smyth* v. *Ames,* 171 U. S. 361, 365.

This conclusion is further supported by the provision in the first section of the Act to Regulate Commerce , (Act of June 29, 1906, chap. 3591, 34 STAT. AT L. 584, U. S. COMP. STAT. SUPP. 1911, p. 1288). "Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country, from or to any state or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one state, and not transmitted to or from a foreign country, from or to any state or territory as aforesaid."

With reference to the authority of Congress to regulate intrastate rates where the interstate and intrastate rates are so blended that it is necessary to regulate intrastate rates in order to exercise the federal authority completely and effectively, the court says: "To suppose, however, from a review of these decisions, that the exercise of this acknowledged power of the state may be permitted to create an irreconcilable conflict with the authority of the nation, or that, through an equipoise of powers, an effective control of interstate commerce is rendered impossible, is to overlook the dominant operation of the Constitution, which, creating a nation, equipped it with an authority, supreme and plenary, to control national commerce, and to prevent that control, exercised in the wisdom of Congress, from being obstructed or destroyed by any opposing action. But, as we said at the outset, our system

of government is a practical adjustment by which the national authority, as conferred by the Constitution, is maintained in its full scope without unnecessary loss of efficiency. It thus clearly appears that, under the established principles governing state action, the state of Minnesota did not transcend the limits of its authority in prescribing the rates here involved, assuming them to be reasonable intrastate rates. It exercised an authority appropriate to its territorial jurisdiction, and not opposed to any action thus far taken by Congress.

"The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. * * * But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon, nor, in the absence of Federal action, may we deny effect to the laws of the state enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power."

Although this expression was not necessary for a decision of the case it can not be denied that it is of great importance as showing the views of the court upon the question of the regulation of intrastate commerce by the Federal government. The following passage from the opinion shows very conclusively the reason for such an expression by the court:

"The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, 426; *The Daniel Ball*, 10 Wall. 557, 565."

The decision of the court is not in the least surprising when the following cases are considered: *St. Louis and Southwestern Ry. Co.* v. *Arkansas*, 217 U. S. 136; *Interstate Commerce Commission* v. *Illinois Central Ry. Co. et al.*, 215 U. S. 452, 474; *Southern Ry. Co.* v. *U. S.*, 222 U. S. 20, and *Interstate*

Commerce Commission v. *Goodrich Packet Co.*, 224 U. S. 194. Of these cases the last is probably the best illustration of the principle involved in the dicta of the principal case. The Packet Co., an interstate carrier, refused to comply with a statute requiring a full disclosure of its business, on the ground that the business which it did was to a great extent intrastate and that a Federal statute requiring that all its business be disclosed was unconstitutional as being an infringement upon the power of the state to regulate intrastate commerce. But the court held that, as a complete disclosure of the carrier's business, both interstate and intrastate, was necessary to obtain complete and necessary information as to the interstate business done, the statute was constitutional, being clearly within the power of Congress to regulate interstate commerce.

It is hardly possible upon principle and authority to conceive how the court could have come to any different conclusions upon the question presented in the principal case. For to hold otherwise would result in a dual system of control over commerce by which Federal action would be rendered ineffective by state action. The court does not deny that the state may act in such a way that interstate commerce may be affected. But the question as to whether or not the state shall so continue to act where interstate and intrastate matters are commingled is by this decision left to the sound judgment and discretion of Congress. And the inevitable result of the broad view taken of the Federal power to regulate commerce, will be to greatly increase the Federal power and to narrow the power of the state. G. E. K.

RECENT IMPORTANT DECISIONS.

ADOPTION—RIGHT OF PARTY NOT LEGALLY ADOPTED TO INHERIT.—The plaintiff claims the right to inherit the entire estate of X, by whom she had been virtually adopted under an agreement between X and plaintiff's natural mother, though no statutory adoption had ever taken place. *Held*, a parol promise to adopt the child of another, followed by a virtual adoption, and acted upon by both parties during the promisor's life, may be enforced upon the death of the promisor by adjudging the child to be entitled to the property of the deceased promisor. *Crawford et al.* v. *Wilson*, (Ga., 1913), 78 S. E. 30.

At first glance this case does not seem to harmonize with the statements of text-writers, such as: "If any substantial requirement of the statute is omitted the proceedings are ineffectual and the legal relationship of the child remains unchanged." (PECK, DOM. REL. 248), and "As the right to adopt depends upon the statute its provisions must be strictly complied with." (TIFFANY, DOM. REL. 243.) These propositions are undoubtedly true where the party claims to inherit by reason of having been legally adopted. They are not correct when applied to cases like the principal case, where the party claims by reason of an agreement of adoption that has been fully executed on the part of the child. In such cases the equities flowing from the agreement that has been acted upon are enforced. This of course does not interfere with the right of the alleged adopting parents to dispose of their property by will. *Healey* v. *Simpson*, 113 Mo. 340, 20 S. W. 881; *Wright* v. *Wright*, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196; *Chehak* v. *Battles*, 133 Iowa 107, 8 L. R. A. (N. S.) 1130, 110 N. W. 330; *Burns* v. *Smith*, 21 Mont. 251, 69 Am. St. Rep. 653; *Flannigan* v. *Howard*, 200 Ill. 396, 93 Am. St. Rep. 201, 59 L. R. A. 664. The following cases seem to be in conflict with the principal case: *Davis* v. *Jones*, 94 Ky. 320, 42 Am. St. Rep. 360, 22 S. W. 331; *Gill* v. *Sullivan*, 55 Iowa 341; *Tyler* v. *Reynolds*, 53 Iowa 146.

ATTACHMENT—PROPERTY IN CUSTODIA LEGIS.—A sheriff, having property in his hands by virtue of an attachment and a levy thereunder, consented to a levy by a constable on complainant's writ of attachment issued out of another court, but retained possession of the property so levied upon. Complainant obtained judgment and an order for the sale of the property, and on the sheriff's refusal to turn the same over to the constable, filed a bill to have the property applied in satisfaction of his claim. *Held*, the constable's attempted levy was void. *Remington Typewriter Co.* v. *Hall*, (Ala., 1913), 63 South. 74.

It is a general rule that property in custodia legis can not be attached. *Brewer* v. *Hutton*, 45 W. Va. 106, 72 Am. St. Rep. 804; *McLemore* v. *Benbow*, 19 Ala. 76; *Curtis* v. *Ford*, 78 Texas 262, 10 L. R. A. 529; See 11 MICH. L. REV. 599. In numerous cases this rule has been applied to various classes of legal custodians, among others to sheriffs as in the principal case; ROOD, GARNISHMENT, § 27; *Turner* v. *Gibson*, (Texas) 151 S. W. 793. The reason for

this doctrine lies in the fact that the officer holding the property is the mere "hand of the court; his possession is the possession of the court" to whose orders and by whose judgments he is bound. To permit the officer of another court to take that lawful possession of the property which is essential to a valid levy would be to permit an unwarranted interference of one tribunal with the possessions and over the representatives of another, and would lead to serious collisions and conflicts of jurisdiction. *In re Cunningham,* Fed. Cas. 3478; *Hurst* v. *Saginaw Circuit Judge,* 114 Mich. 116, 68 Am. St. Rep. 465, 47 L. R. A. 345; *Williams* v. *Dismukes,* 106 Ala. 402, 17 So. 621. It follows logically, therefore, that the assent of the sheriff to the levy should not militate against the applicability of the general rule and so it was held in the principal case. To permit otherwise would in many cases divert the property from the very end or purpose for which possession had been taken, and this at the instance of an officer whose powers are ministerial and not judicial, and who would thereby subject himself not only to liability on his official bond but to punishment for contempt. See *Payne* v. *Drewe,* 4 East 523; *Hartleib* v. *McLane,* 44 Pa. St. 510, 84 Am. Dec. 464; 35 Cyc. 1681, 1924.

ATTORNEY AND CLIENT—ATTORNEY'S LIEN.—Where the statute provides that an attorney shall have a lien on the judgment superior to all but tax-liens, *Held,* that the attorney's interest in the pending suit could not be defeated by any settlement made without his consent. *Payton* v. *Wheeler,* (Ga. App., 1913) 79 S. E. 81. But even after judgment the lien cannot be impounded and subjected to an indebtedness of the attorney by garnishing the judgment-debtor. *Modlin* v. *Smith,* (Ga. App., 1913) 79 S. E. 82.

It is well settled that the attorney or solicitor has a charging lien for compensation for his services on the proceeds of the judgment obtained by him. *Read* v. *Dupper,* 6 T. R. 361; WEEKS, ATTORNEY AND CLIENT (2nd Ed.) § 370; *Stewart* v. *Flowers,* 44 Miss. 513, 7 Am. Rep. 707. This lien, unknown to the common law as was the possessory lien, now exists in most jurisdictions by force of statute or judicial legislation. 4 Cyc. 1004; *Andrew* v. *Morse,* 12 Conn. 444, 31 Am. Dec. 752. In general it is regarded as in the nature of an equitable assignment of the judgment to the extent of the services rendered. *Terney* v. *Wilson,* 45 N. J. L. 282; *Wright* v. *Wright,* 70 N. Y. 98; *Hobson* v. *Watson,* 34 Me. 20, 56 Am. Dec. 632. It gives the attorney an interest which is assignable, and is superior to the rights of third persons whose claims arise subsequent to the judgment. *Day* v. *Bowman,* 109 Ind. 383; *Sibley* v. *County of Pine,* 31 Minn. 201; *Hargett* v. *McCadden,* 107 Ga. 773, 33 S. E. 666; JONES, LIENS, § 226 and cases cited. In some jurisdictions it is held superior to the rights of the adverse party to a set-off. *Roberts* v. *Mitchell,* 94 Tenn. 277, 29 L. R. A. 705; *Diehl* v. *Friester,* 37 Oh. St. 473; *Perry* v. *Chester,* 53 N. Y. 240; but contra *Nat. Bank* v. *Eyre,* 8 Fed. 733. Again it is such an interest as can not be defeated by any settlement between the client and his opponent. *Ex parte Lehman,* 59 Ala. 631; *Coughlin* v. *N. Y. C. H. R.,* 71 N. Y. 443, 27 Am. Rep. 75. Especially if the settlement is fraudulent. *G. R. & I. Co.* v. *Cheboygan Circuit Judge,* 161 Mich. 181, 126 N. W. 56, 137 Am. St. Rep. 495. And this has been held even in those states

which adhere to the view, followed in the majority of jurisdictions, that the lien does not attach until after judgment. *Jackson* v. *Stearns*, 48 Ore. 25, 84 Pac. 198, 5 L. R. A. (N. S.) 390; *Hanna* v. *Island Coal Co.*, 5 Ind. App. 163, 51 Am. St. Rep. 246; *Stearns* v. *Wollenberg*, 51 Ore. 88, 92 Pac. 1079; 14 L. R. A. (N. S.) 1094 and notes. But where the view is taken that the lien attaches the moment suit is instituted there is much stronger reason for not permitting the lien to be defeated by a settlement. This is the view taken in the first principal case, *Payton* v. *Wheeler*, *supra*. See *Robertson* v. *Shutt*, 72 Ky. (9 Bush) 659. But notwithstanding the view which is generally taken of the nature of the lien, and the protection which is afforded to it, courts are careful, when the occasion demands, to keep in mind the strictly equitable nature of the attorney's interest. "It is in its nature an equity, and in its protection and enforcement a court of law exercises its inherent powers to control its own process, often denominated the equitable powers of the court." *Mosley and Eley* v. *Norman*, 74 Ala. 422. It is merely a claim to an equitable interference of the court to have that judgment held as security. *Barker* v. *St. Quentin*, 12 M. & W. 451. See *Cairo R. Co.* v. *Tackney*, 78 Ill. 116. At best an inchoate right, it is too contingent an interest to be subject to garnishment. See the second principal case, *Modlin* v. *Smith*, *supra*. ROOD, GARNISHMENT, § 118. And this would appear to be the necessary view even in those jurisdictions which hold garnishment to be an equitable proceeding.

BILLS AND NOTES—BILLS OF EXCHANGE—FORM.—A writing in the following form "Spiketon, Wash., ————, 1911. Coast Coal Co. You are hereby authorized to deduct One Dollar per month from my monthly pay, to pay for the services of Dr. Sheets as mine doctor. Signed,————," held to be a bill of exchange within the meaning of the statute requiring an acceptance by the coal company before becoming effectual for any purpose whatever. *Sheets* v. *Coast Coal Co. et al.*, (Wash., 1913) 133 Pac. 433.

The decision is contrary not only to the great weight of authority, but to express terms of the statute upon which it is based. By that statute, which is but a legislative enactment of the definition of a bill found in the law merchant, an instrument to be a bill of exchange must: 1, contain an unconditional order; 2, to pay on demand, at a fixed or determinable future time; 3, a sum certain in money; 4, to order or to bearer. First, To have an order there must be some expression embodying a mandatory direction; authority given to pay an amount is not a bill. 1 DANIEL, NEG. INSTR., (5th Ed.) § 35. An order is conditional if payment is dependent upon a contingency or is to be made out of a particular fund, and not upon the general credit of the drawer. *Glidden* v. *McKinstrey*, 28 Ala. 408; *Henry* v. *Hazen*, 5 Ark. 401; *Mills* v. *Kuhhendall*, 2 Blackf. (Ind.) 47; *Strader* v. *Batchlor*, 47 Ky. 168; *Knowlton* v. *Cooley*, 102 Mass. 233; *Smith* v. *Wood*, 1 N. J. Eq. 74; *Morton* v. *Naylor*, 1 Hill (N. Y.) 583; *Gates* v. *Eno*, 4 Hun. 96; *Worden* v. *Dodge*, 4 Denio 159; *Andrews* v. *Harvey*, 39 Tex. 123. Second, A draft payable at an indefinite period of time is not a bill of exchange, *Smith* v. *Wood*, *supra*; nor where payable on a contingency that may never happen. *Brooks* v. *Hargreaves*, 21 Mich. 254; *Chicago Bank* v. *Trust Co.*, 190 Ill. 404; *Kelley* v.

Hemingway, 13 Ill. 605; *Tradesman Natl. Bank* v. *Green*, 57 Md. 602; *Sackett* v. *Palmer*, 25 Barb. (N. Y.) 179. Third, The sum is uncertain if it is to be determined by future sales or collections. *Legro* v. *Staples*, 16 Me. 252; *Fiske* v. *Witt*, 22 Pick. (Mass.) 83; *Jackson* v. *Tilgham*, 1 Miles (Pa.) 31. Fourth, An instrument payable to one and his assigns or to one alone, where that one is a real person, is not payable to order or to bearer. *Zander* v. *N. Y. Security Co.*, 81 N. Y. Supp. 1151; *Westberg* v. *Chicago L. & Co.*, 117 Wis. 589. It will thus be seen that the instrument in the principal case does not conform to the requisites of a bill of exchange as defined by the statute either as to time of payment, or the persons to whom it is payable. It is only an equitable assignment of wages that are to accrue in the future, and when they have accrued, the assignee, if notice of the assignment be given to the Coal Company, should be entitled to recover the fund. *Morton* v. *Naylor*, *supra*.

BILLS AND NOTES—HOLDER IN DUE COURSE—DEFENSES—INTOXICATION.—Under Negotiable Instruments Law (§ 1676-25, 1676-27) providing that a holder in due course holds the instrument free from any defect in title of prior parties, except where the title of the person negotiating the instrument is void on the ground of fraud, duress or other unlawful means, a holder in due course takes no title where the note was absolutely void in its inception because of the intoxication of the maker, destroying the rational faculties of the mind. *Green et al.* v. *Gunsten et al.*, (Wis., 1913) 142 N. W. 261.

On the other hand, it has been held that as against a bona fide holder intoxication is no defense. JOYCE, DEFENSES OF COM. PAPER, § 69; *State Bank* v. *McCoy*, 69 Pa. St. 204; *McSparron* v. *Neeley*, 91 Pa. St. 18; *Smith* v. *Williamson*, 8 Utah, 219, 30 Pac. 753. The reason for the rule announced in the principal case is that there can be no valid contract where there is no mind capable of contracting; that a person so intoxicated as to be deprived of reasoning faculties is, like an insane person, incapable of contracting, hence the note was void in its inception; and that the indorsee is charged with constructive notice of the mental incapacity of the maker of the note as in the case where insanity is pleaded. And the defense of insanity is recognized even by the courts that repudiate the defense of intoxication. See *Moore* v. *Kershey*, 90 Pa. St. 196. The difference between the two cases is pointed out in the case of *State Bank* v. *McCoy*, supra, in substance, that insanity is a permanent state of mind, not voluntarily produced, while drunkeness is a temporary state of mind, voluntarily produced; and that when men voluntarily deprive themselves of the use of reason, the law may refuse to treat them with the same tenderness that it does those unfortunate beings who are deprived of their understanding by some providential dispensation; and it may properly hold them to a different measure of responsibility for the consequence of their acts. On the question of making a distinction between the various degrees of intoxication, see *Caulkins* v. *Fry*, 35 Conn. 170, and *Miller* v. *Finley*, 26 Mich. 248, 12 Am. Rep. 306. The reasoning of the cases holding contrary to the rule of the principal case seems more in accord with justice, for it is unfair and at the same time very inconvenient to the public to hold

that the purchaser of commercial paper must ascertain at his peril whether the maker of the instrument was drunk or sober at the time of its execution.

COMMERCE—ORIGINAL PACKAGE DOCTRINE—APPLICABILITY TO FOOD AND DRUGS ACT.—The plaintiffs in error were convicted in the state court for violation of a Wisconsin statute providing for the exclusive use of specified labels upon food products of a certain kind sold or offered for sale within the state. WIS. LAWS, 1907, p. 646, ch. 557. They had conformed to an opinion given by the Secretaries of the Treasury, Agriculture, and Commerce and Labor, jointly, designating the form of labels required by the Federal Food and Drugs Act of June 30, 1906 (34 STAT. AT L. 768, ch. 3915; U. S. COMP. ST. SUPP., 1911, p. 1354). The goods in question had been removed from the original package. *Held*, that the statute was invalid as in conflict with the Food and Drugs Act. *McDermott* v. *State of Wisconsin*, (1913) 33 Sup. Ct. Rep. 431, reversing 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

The Food and Drugs Act was passed under the commerce clause of the federal constitution, and its validity upheld on that ground. *Shawnee Milling Co.* v. *Temple*, 179 Fed. 517; *Hipolite Egg Co.* v. *U. S.*, 220 U. S. 45. Congress has the power to determine what are fit articles of interstate commerce. *Lottery Case* (*Champion* v. *Ames*), 188 U. S. 321. But a state retains all police power, and is properly exercising this power by making criminal the adulteration or misbranding of food or drugs. *Barbier* v. *Connolly*, 113 U. S. 27; *Crossman* v. *Lurman*, 192 U. S. 189. Where, in exercising the police power, the enactments of the state legislature conflict with those of Congress, the state legislation inconsistent with the latter is invalid, even though it affects the matter but incidentally. *McCullough* v. *Maryland*, 4 Wheat. 316; *Reid* v. *Colorado*, 187 U. S. 137; *Asbell* v. *Kansas*, 209 U. S. 251; *N. P. Ry. Co.* v. *Washington*, 222 U. S. 370; *So. Ry. Co.* v. *Reid*, 222 U. S. 424. The original package doctrine was first squarely applied to interstate commerce in *Leisy* v. *Hardin*, 135 U. S. 100, although its origin was in the decision of *Brown* v. *Maryland*, 12 Wheat. 419. In substance it provides that articles of interstate commerce continue to be such until they have been sold or taken from their original package. Until that time they are not subject to regulation by the state. *Brown* v. *Maryland*, supra, *Leisy* v. *Hardin*, supra; *Low* v. *Austin*, 13 Wall. 29; *Heyman* v. *So. Ry. Co.*, 203 U. S. 270. While the federal government has plenary power until such time, it would seem that the converse of that proposition, given weight by some authorities, is considerably limited, in view of the decision in the principal case. The decision, however, seems to be based upon sound public policy, and is the only position that could be taken without in a large measure defeating the purpose of the federal Food and Drugs Act. It will be interesting to note the effect of the decision upon the future action of Congress with regard to other articles of commerce.

CONTRACTS—MISREPRESENTATIONS.—Plaintiff, a loan association, was induced to purchase stock of defendant trust company by the promise of the authorized agent of the latter, that within 30 days the defendant would furnish the plaintiff with money to loan on real estate. When called upon to perform the defendant refused. Plaintiff brought suit in equity to cancel the

contract. The evidence showed that the defendant never intended to keep the promise. *Held,* that though this contract was induced by a fraudulent promise, and the situation was parallel with cases where goods were purchased by insolvents and relief was given, yet the court is concluded by the decision of the Supreme Court on this point, and relief must be refused. *Missouri Loan & Investment Co.* v. *Federal Trust Company of St Louis,* (Mo. App., 1913) 158 S. W. 111.

The general rule is that an unperformed promise does not amount to fraud. To constitute fraud there must be a misrepresentation of a present or past fact. But a promise made to induce another to act upon it and with no intention of carrying it out, is a representation that the promisor intends to carry it out, and as such may be a misrepresentation of his present state of mind which is a present fact, and by the better rule is held to constitute fraud. There are two general lines of authority, one holding that a promise, made to induce another to act, and without intention to fulfil, is fraud; *Ansley* v. *Bank of Piedmont,* 13 Ala. 467; *Langley* v. *Rodrigunez,* 122 Cal. 580; *Ayres* v. *French,* 41 Conn. 142; *National Bank of Lancaster* v. *Mackey,* 5 Kan. App. 437; *Wilson* v. *Eggleston,* 27 Mich. 257; *Culbertson* v. *Young,* 86 Mo. App. 277; *Abbott* v. *Abbott,* 18 Neb. 503; *Goodwin* v. *Horne,* 60 N. H. 485; *Troxler* v. *Building Co.,* 137 N. C. 51; *Chicago, Texas & Mexican Central R. R.* v. *Titterington,* 84 Tex. 218; *Pollock* v. *Sullivan,* 53 Vt. 507; *Tanner* v. *Clark,* 13 Ky. L. Rep. 922; *Janes* v. *Trustees of Mercer University,* 17 Ga. 515. The following cases have held that a promise, though not kept, was not such a fraudulent representation as would be ground for relief, since it is not a representation of an existing or past fact:—*Hirsch* v. *Hirsch,* 21 Ark. 342; *Adams* v. *Schiffer,* 11 Colo. 15; *Haenni* v. *Bleisch,* 146 Ill. 262; *Day* v. *Fort Scott Investment and Improvement Co.,* 153 Ill. 293; *State Bank of Indiana* v. *Gates,* 114 Ia. 323; *Balue* v. *Taylor,* 136 Ind. 368; *Fouty* v. *Fouty,* 34 Ind. 433; *Long* v. *Woodman,* 58 Me. 49; *Dawe* v. *Morris,* 149 Mass. 188; *Hodsden* v. *Hodsden,* 69 Minn. 486; *Farrington* v. *Bullard,* 40 Barb. (N. Y.) 512; *Witt* v. *Cuenol,* 9 N. M. 143; *Orr* v. *Goodloe,* 93 Va. 263; *Milwaukee Brick & Cement Co.* v. *Schoknecht,* 108 Wis. 457; *Younger* v. *Hoge,* 211 Mo. 444, 111 S. W. 20, which last decision compelled the court to follow this rule in the principal case. The conflict is more in the language used than in the principles applied. Generally where there is a promise, made fraudulently and without intention to keep it, it will furnish a basis for the rescission of the contract. See also 14 Am. & Eng. Encyc. 53; *Cerny* v. *Paxton & Gallagher Co.,* 78 Neb. 134, 110 N. W. 882, 10 L. R. A. N. S. 640 and note.

Corporations—Liability for Slander by Employe.—Defendant corporation operated a theatre. Plaintiff attended one of the performances by virtue of a ticket duly purchased, and, while lawfully in attendance, was invited to the stage by a performer in the course of one of the acts. While plaintiff was on the stage the performer, in the presence and hearing of the audience, addressed insulting and defamatory remarks to him. *Held,* the corporation is liable for the slander. *Interstate Amusement Co.* v. *Martin* (Ala., 1913) 62 So. 404.

The decision is based upon the fact that the uttering of the words by the performer was a breach of a contractual duty between the corporation owning and operating the theatre and the plaintiff, and the principle involved is not at all settled. The earlier cases held that the corporation could not be held for the slander of its agent, on the ground that the corporation can act only by agent and there can be no agency in slander. The opposing views of the courts are well indicated by *Behre* v. *National Cash Reg. Co.*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320, and *Redict* v. *Singer Mfg Co.*, 124 N. C. 100, 32 S. E. 392, holding that the corporation is not liable for the slander of its agent unless it affirmatively appears that the agent was authorized to speak the words in question, even though the agent was at the time acting within the scope of his employment, and by *Rivers* v. *Yazoo etc. R. Co.*, 90 Miss. 196, 43 So. 471, 9 L. R. A. (N. S.) 931, and *Hypes* v. *Southern R. Co.*, 82 S. C. 315, 64 S. E. 395, holding that the corporation is liable though the words were uttered without the knowledge, approval, consent or ratification of the corporation. Probably the weight of authority inclines to the view that where the agent is acting within the scope of his employment the corporation is liable even though the slander was uttered without the knowledge of the corporation, or without its approval, and though the corporation did not ratify the acts of the agent. 5 THOMPSON, CORP. 5441; *P. W. & B. R. R.* v. *Quigley*, 21 How. 210. And even cases holding that a corporation is not generally liable for the slanderous words of its agent recognize the rule that the corporation is liable if the utterance constitutes a breach of duty imposed by contract, as was the situation in the principal case. *Singer Mfg. Co.* v. *Taylor*, 150 Ala. 574.

CORPORATIONS—STOCKHOLDER'S RIGHT TO RESCIND SUBSCRIPTION INDUCED BY FRAUD.—The respondent was induced by the fraudulent representations of the corporation's agent to subscribe for 40 shares of stock. On his discovery of the fraud he gave notice of his rescission to the officers of the corporation, but did not bring suit to annul the subscription. Upon suit being brought by the receiver of the corporation for the unpaid balance of the subscription, respondent set up the fraud as a defense. *Held*, that the defense was proper. *Johns* v. *Coffee* (Wash., 1913) 133 Pac. 4.

To sustain the decision it is necessary to hold that the equities of the defrauded subscriber are equal to those of the creditors of the corporation, and while the English courts and most of the earlier American decisions deny the right of the subscriber to set up the fraud as against the receiver the finding of the court in the principal case seems to be in accord with the trend of the modern decisions and with the thought of text-book writers. COOK, CORPORATIONS (6 Ed.) §§ 163-4. It is conceded that as between the defrauded subscriber and the corporation the subscriber has the right to rescind, and this right is only defeated by the intervention of superior rights of third parties. MARSHALL, CORPORATIONS, § 252; *Howard* v. *Turner*, 155 Pa. St. 349, 35 Am. St. Rep. 883; *Beal* v. *Dillon*, 5 Kan. App. 27, 47 Pac. 317. In many cases where the defrauded subscriber does not bring a suit to have his subscription annulled, but waits until the receiver sues to recover the

unpaid portion of his subscription, the courts have held that the creditors of the corporation have acquired rights which are superior to those of the subscriber, and consequently have refused to allow the defense. *Franty* v. *Wauwatosa Park Co.*, 99 Wis. 40; *Regener* v. *Hubbard*, 56 N. Y. S. 173; *Martin* v. *South Salem Land Co.*, 94 Va. 28, 26 S. E. 591; *Ross-Meehan Brake-Shoe Foundry Co.* v. *Southern etc. Iron Co.*, 72 Fed. 957. In the principal case, however, the court says that the subscriber is not barred from his defense, "merely because the action was delayed until after the corporation had gone into the hands of a receiver. If the respondent had a defense against a suit to recover on the unpaid balance by the corporation itself, he had a like defense against a suit by the receiver of this corporation, unless of course he has committed some affirmative act subsequent to serving his notice of rescission which would estop him from making the defense—no mere delay on his part would work that result."

ELECTIONS—QUALIFICATIONS OF VOTERS—GRANDFATHER CLAUSE.—In an action by one of African descent against election officers the question was as to the constitutionality of the provisions of paragraph 4a, of article 3 (§ 46, WILLIAMS' ANNOTATED CONSTITUTION OF OKLAHOMA) imposing an educational test as a prerequisite to the right to vote, for all persons except those who, at any time prior to January 1, 1866, were entitled to vote under any form of government, or who at that time resided in some foreign nation, and the lineal descendants of such persons. It was contended that these provisions were repugnant to the fourteenth and fifteenth amendments to the Constitution of the United States, and to the enabling act under which Oklahoma became a state. *Held*, constitutional, *Cofield* v. *Farrell et al.* (Okl., 1913) 134 Pac. 407.

There is some question as to the constitutionality of these so-called Grandfather Clauses which are found in the constitutions and legislative enactments of several of the Southern states, inasmuch as the United States Supreme Court has never directly passed upon them. In a case which came up in the United States Circuit Court for the district of Maryland, a very similar provision was held to be in contravention of the fifteenth amendment. The Maryland statute provided for the registration, among others, of all citizens who prior to 1868 were entitled to vote in any state of the union, and the lawful descendants of such persons. The court held that even though it did not in terms discriminate against the negro, yet it did in effect disfranchise him, and was therefore unconstitutional as being a discrimination on account of a previous condition of servitude, *Anderson* v. *Meyers*, 182 Fed. 223. There is little question that these provisions do violate the spirit of the fifteenth amendment. The only difficulty lies in determining whether the court should look behind the letter of the law and set it aside on account of its real purpose and effect. In a case arising in California, which involved the constitutionality of an ordinance that in effect, though not in terms, discriminated against Chinese laundrymen, the court held it could not inquire into the motives of legislators in enacting laws, except as they may be disclosed on the face of the act or inferable from its operation, considered with reference

to the conditions of the country and existing legislation, *Soon King* v. *Crowley*, 113 U. S. 703. See also *Williams* v. *Mississippi*, 170 U. S. 213, and *Pope* v. *Williams*, 193 U. S. 621.

EQUITY—INJUNCTION TO PREVENT DISCLOSURE OF SECRET PROCESS.—Plaintiffs, manufacturers of size by a secret process, sought to enjoin defendant, a former employee, from using the secret process or any part thereof himself, and from disclosing to any other person or firm any information with respect thereto. *Held*, that equity will enjoin an ex-employee from using or divulging trade secrets of his former employer which such employee has become acquainted with during a term of confidential employment. *Amber Size & Chemical Co.* v. *Menzel* [1913] 2 Ch. 239.

The law is well settled, both in this country and in England, that where there has been an express contract by the former employee that he will not disclose, equity will enforce performance of this contract by injunction. *Thum Co.* v. *Tloczynski*, 114 Mich. 149, 38 L. R. A. 200, *Taylor Iron & Steel Co.* v. *Nichols*, 70 N. J. Eq. 541, 65 Atl. 695. Where there is no express contract, but one is implied merely from the confidential relationship, there seems to be no doubt that the same rule applies: *Tuck & Sons* v. *Priester*, 19 Q. B. D. 629; *Mahler* v. *Sanche*, 121 Ill. App. 247; *Morison* v. *Moat*, 9 Hare 241; *Robb* v. *Green* [1895] 2 Q. B. 1. One of the defenses which the ex-servant interposed in the principal case was that the court should not enjoin the use of a secret process, the particulars of which it does not know, as it would have no means of enforcing the injunction, and if the secrets were disclosed during the trial, this would render the injunction nugatory, as suggested by Lord ELDON in *Newbery* v. *James*, 2 Mer. 446, and *Williams* v. *Williams*, 3 Mer. 157. Commenting on this defense, the court says that the plaintiff has made it more difficult for his opponents as well as the court, by not disclosing the secret processes. But if the defendant should disregard the injunction, the plaintiffs could then, under proper safeguards to protect them from disclosure, reveal the details of the processes to the court. In *Stone* v. *Goss*, 65 N. J. Eq. 756, 55 Atl. 736, the same defense was interposed, but the court met the difficulty by taking testimony *in camera*, and printing only enough copies of that portion of the evidence to supply the members of the court; the court held that such a disclosure was no publication to the world, and although it may have endangered the complainants' secret, it did not deprive them of the right to enjoin the defendants from making use of it. And in *Taylor Iron & Steel Co.* v. *Nichols*, *supra*, when the defendant, in cross-examining plaintiff's witnesses, asked questions, which, if answered, would have disclosed the secrets, the same court held that the questions need not be answered since completing the answers would defeat the very purpose of the suit. The desire of the complainants not to disclose the secrets should be respected, for the complainants need only satisfy the court that they have such a secret as equity should aid them in preserving. The court in the principal case evidently went on the same ground, for there the plaintiff was not forced to disclose the secrets, having proved to the court by a sufficiency of evidence that he had secrets which equity should aid him in keeping.

EVIDENCE—TESTIMONY AS TO STATEMENTS NOT REBUTTABLE BY COLLATERAL EVIDENCE.—Defendant, indicted for wife murder, pleaded that he committed the act in the heat of passion, alleging that deceased had confessed to illicit relations resulting in her pregnancy. To rebut the claim of such confession the state, over objection, introduced testimony to prove that in fact the wife was not pregnant, arguing that it was extremely unlikely that she would have confessed to such a condition when it did not exist. *Held,* the evidence should have been rejected on the ground that it raised collateral issues, *People* v. *Harris* (N. Y., 1913) 102 N. E. 546.

The Court of Appeals relied largely upon two cases in its decision, *People* v. *Webster,* 139 N. Y. 73, and *Shipp* v. *Commonwealth,* 124 Ky. 643, 99 S. W. 945, 10 L. R. A. (N. S.) 335. Neither of these is directly in point. In the former there was no issue as to the fact that the confession was made, the evidence being offered not to corroborate the claim of a confession but as justification for the killing, and it was rejected as incompetent for this purpose. In the latter case also it was admitted that the confession had been made and there being no issue on this point it was properly held that evidence as to the wife's reputation for chastity was inadmissible. On the other hand the question was ruled upon in *Knapp* v. *State,* 168 Ind. 153, and *Commonwealth* v. *Hourigan,* 89 Ky. 305, and the evidence held admissible. This is the view favored by Professor WIGMORE, (2 ILL. L. REV. 35), who says, "Assuming that for any purpose the objective fact has a bearing, the rule against contradicting a witness on a collateral point should not be allowed to stand in the way; for if the fact is relevant at all it is not any more collateral than the rumor of it." Undoubtedly such evidence has probative value, as is conceded by the New York court in the principal case, and, it seems, should be admitted as a strict matter of logic. So far the decided cases on this precise point are few, and it can not be said that the law governing it is definitely settled. The practical argument against the admission of such evidence however is strong; that it tends to raise collateral issues and produce confusion.

HUSBAND AND WIFE—NO RIGHT OF ACTION BY WIFE FOR LOSS OF CONSORTIUM.—Plaintiff's husband was injured through the negligence of defendant, and she seeks to recover for the loss of companionship, comfort, and support of her husband. The trial court rendered judgment for plaintiff and defendant appealed. The judgment was at first affirmed, but on a rehearing, the court *held,* that no personal right of the wife is violated in an injury to the husband caused by a mere negligent tort. *Gambino* v. *Manufacturers Coal and Coke Co.* (Mo. App. 1913), 158 S. W. 77.

At common law a husband can recover for the loss of consortium of his wife. *Guy* v. *Livefey,* 2 Cro. Jac. 501; *Hyde* v. *Scyffor,* 2 Cro. Jac. 538; 3 BLACK, COM. 140. Even under the modern statutes emancipating the wife, this right is still generally unimpaired, *So. Railroad Co.* v. *Crowder,* 135 Ala. 417; *Skoglund* v. *Minneapolis St. Ry. Co.,* 45 Minn. 330, though in Massachusetts and Connecticut neither spouse can now recover for the loss of the consortium of the other. *Marri* v. *Stamford St. R. Co.,* 84 Conn. 9, 33 L. R. A.

(N. S.) 1042, 78 Atl. 582; *Bolger* v. *Boston El. R. Co.*, 205 Mass. 420; *Feneff* v. *N. Y. C. & H. R. R. Co.*, 203 Mass. 278, 24 L. R. A. (N. S.) 1024, 89 N. E. 436. The common law never recognized any right of action in the wife analogous to the husband's action for loss of consortium, 3 BLACK, COM. 143; PECK, DOMESTIC RELATIONS 43; *Brown* v. *Kitselman* (Ind. 1912) 98 N. E. 631, 40 L. R. A. (N. S.) 236; *Stout* v. *Kansas City Terminal Ry. Co.* (Mo. App.) 157 S. W. 1019. Although it has come to be generally recognized that the wife can recover damages against one who maliciously alienates the husband's affections or who commits adultery with him. PECK, DOMESTIC RELATIONS 44; *Foot* v. *Card*, 58 Conn. 1, 6 L. R. A. 829; *Nolin* v. *Pearson*, 191 Mass. 283, 114 Am. St. Rep. 605, 4 L. R. A. (N. S.) 643, 6 Ann. Cas. 658; *Sims* v. *Sims*, 79 N. J. L. 577, 29 L. R. A. (N. S.) 842, 13 Harv. L. Rev. 490. And in *Flandermeyer* v. *Cooper*, 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. (N. S.) 360, a wife was allowed to recover damages for the loss of consortium of her husband against one who sold morphine to him in defiance of her wishes and with the effect of causing his insanity. *Clark* v. *Hill*, 69 Mo. App. 541 also allowed a wife to recover damages from a party who by persecution and threats caused the insanity of her husband. See also *Sims* v. *Sims*, 79 N. J. L. 577, 29 L. R. A. (N. S.) 842. It would seem that in no action based on negligence alone has the wife been allowed to recover for the loss of consortium. But where her injury flows from some affirmative act of the defendant her right to sue is being recognized.

MASTER AND SERVANT—CONSTRUCTION OF EMPLOYERS' LIABILITY STATUTES. —The Missouri Revised Statutes of 1909, § 7828, provide that belting, shafting, etc., when so placed as to be dangerous to employes while engaged in their ordinary duties, shall be safely and securely guarded. A belt in defendant's factory which was not guarded, broke, and plaintiff was injured by a blow from one of the loose ends. He brought an action based upon the statute. *Held*, the statute means that such dangerous appliances should be guarded only so as to prevent employes from being injured by coming in contact with them and not so as to prevent injury from accidental breakage. *Findlay* v. *Columbia Paper Box Co.* (Mo. 1913) 158 S. W. 22.

This is an original interpretation of such a statute, as other cases arising under similar statutes have all been decided upon a question of fact, namely: Was the unguarded appliance dangerous to employes while engaged in their ordinary duties? *Hindle* v. *Birtwistle*, 1 Q. B. 192; *Davidson* v. *Flour City Ornamental Iron Works*, 107 Minn. 17; *Snyder* v. *Waldorf Box Board Co.*, 110 Minn. 40; *Dillon* v. *National Coal Tar Co.*, 181 N. Y. 215. The principal case had been before the St. Louis Court of Appeals, and the court there intimated that the master was required to guard against breakage. *Strode* v. *Columbia Paper Box Co.*, 124 Mo. App. 511. Under similar statutes some courts have held that a liability arose from a failure to guard, even where the injury was caused by accidental breakage. *Davidson* v. *Flour City Ornamental Iron Works*, supra; *Richlands Iron Co.* v. *Elkins*, 90 Va. 249.

MASTER AND SERVANT—INJURIES TO SERVANT THROUGH NEGLIGENCE OF FELLOW SERVANT.—The plaintiff was working at the bottom of a clay pit with vertical walls, at the top of which other employees were engaged in prying off large chunks of clay. It was customary to warn the men below when these chunks were about to fall, but on one occasion the signal was neglected, which resulted in serious injury to the plaintiff. *Held,* that the negligence in failing to give the signal was the negligence of the master, and not that of the fellow servants, the operation being inherently dangerous. *Hanson* v. *Red Wing Sewer Pipe Co.* (Minn. 1913) 142 N. W. 804.

There is marked conflict existing as to the delegability of the master's duty to warn servants of the recurring dangers arising from the dislodging of earth or other heavy substances. *Anderson* v. *Pittsburg Coal Co.*, 108 Minn. 455, 122 N. W. 794, 26 L. R. A. (N. S.) 624. The courts which hold such duty delegable put it on the ground that the master is under an absolute duty only to provide a reasonably safe place to work and, by selecting a competent person to warn of recurring dangers, has done all that the law requires. Any negligence of such co-employee is the act of a fellow servant, for which the master is exempt from liability. *Herman* v. *Port Blakely Mill Co.*, 71 Fed. 853; *Ocean Steamship Co.* v. *Cheney,* 86 Ga. 278, 12 S. E. 351; *Mikoloczak* v. *N. A. Chemical Co.*, 129 Mich. 80; *McLane* v. *Head & D. Co.*, 71 N. H. 294. This view seems to be the weight of authority. COOLEY, TORTS, 1152. There are however many authorities supporting the case under discussion, on the ground that the master's responsibility extends beyond the selection of a competent agent and includes the warning itself, it being considered an absolute duty. But the non-delegability rule is in most cases applied only where the place of work is inherently dangerous. *Belleville Stone Co.* v. *Mooney,* 60 N. J. L. 323; *Evansville & T. H. R. Co.* v. *Holcomb,* 9 Ind. App. 198; *Brice-Nash* v. *Barton Salt Co.*, 79 Kans. 110; *Borgerson* v. *Cook Stone Co.*, 91 Minn. 91; *Anderson* v. *Pittsburg Coal Co.*, supra.

MUNICIPAL CORPORATIONS—LETTING TO LOWEST BIDDER.—A statute required certain municipal contracts to be awarded to the lowest responsible bidder. The city commissioners prescribed certain specifications for materials and advertised for bids for the repaving of a street. It was admitted that plaintiff's bid at $1.52 per square yard for Porter brick was the lowest; that this brick met in every way the requirements of the specifications, and that plaintiff was "responsible." But the commissioners, thinking that Metropolitan brick at $1.81 per square yard so much superior in quality to the Porter brick that its use would in the long run be better for the interest of the city, awarded the contract accordingly. Plaintiff, the lowest bidder, brings certiorari to review the award. *Held,* that since the commissioners' specifications fixed a standard to which plaintiff's brick conformed, plaintiff is entitled to the contract; and that because a brick submitted by a higher bidder was better for the higher price than the lower bid, furnished no justification for the award to the higher bidder. *Mc Govern* v. *Inhabitants of City of Trenton et al.* (N. J. 1913) 86 Atl. 539.

Under the particular circumstances there obtaining, the decision in the

principal case seems just. It is in line with earlier New Jersey cases which take the view that the term "lowest" means simply lowest in figures. *Faist* v. *Mayor of Hoboken*, 72 N. J. L. 361, 60 Atl. 1120. But in *Cleveland etc. Co.* v. *Commissioners*, 55 Barb. 288, the court, taking occasion to construe a statute which declared that contracts should be given to the lowest bidder, said: "It cannot be held that these words should be construed literally. * * * In determining whether a bid is the lowest among several others the quality and utility of the thing offered—in other words, its adaptability for the purpose for which it is required—must be first considered." Where the standard of materials is unavoidably elastic, with the result that two kinds of material both conforming to the standard are offered, it has been held that the contract may be awarded to a person not the lowest bidder, if the officer awarding the contract in good faith deems the material offered by that person better adapted to the work than that offered by a lower bidder. *Louchheim* v. *Philadelphia*, 15 Pa. Dist. 311. Again, it has been held that even under such a statutory provision the municipality is not compelled to award the contract to the lowest bidder. While it cannot give it to any other person, it may, if acting in good faith, refuse to award it to the lowest bidder, reject all the bids and readvertise. *Walsh* v. *Mayor etc. of New York*, 113 N. Y. 142; *Faist et al.* v. *Mayor, etc. of City of Hoboken*, 72 N. J. L. 361, 60 Atl. 1120. The last cited case also stands for the proposition that before the bid of the lowest bidder can be rejected on the charge that he is not responsible, or that other causes exist for the rejection of his bid, he is entitled to a hearing. If the words of the statute are "lowest and best bidder," the authorities uniformly hold that the award may be made to another bidder than the lowest. 28 Cyc. 663.

MUNICIPAL CORPORATIONS—LIABILITY OF MUNICIPALITY IN QUASI-CONTRACT.—Defendant city, having been given power by the legislature to establish and maintain a municipal electric light plant, entered into a contract whereby plaintiff company agreed to, and did, furnish 500 electric light poles, which were accepted by the city and used by it in the construction of the plant. The contract was invalid under the statute, owing to the failure of the council to advertise for bids. Plaintiff brought suit for the reasonable market value of the poles. *Held*, that even though the statutory requirements as to the making of a contract have not been carried out, if the city authorities are vested with the general authority to do the act for the performance of which the materials are supplied, the city is liable for the reasonable value of the property. *Nebraska Telephone Co.* v. *City of Red Cloud* (Neb. 1913) 142 N. W. 534.

The cases on the quasi-contractual liability of municipal corporations are many and seem irreconcilable. As an example of the view contrary to that of the principal case, see *McSpedon* v. *City of New York*, 20 How. Prac. 395; *La France Fire Engine Co.* v. *Syracuse*, 68 N. Y. S. 894. It is well settled, however, that no quasi-contractual liability can attach, if the municipality did not have power to make an express contract of the same general effect as the implied contract sought to be enforced. *Burril* v. *Boston*, 2

Cliff. (U. S.) 590, Fed. Cas. 2, 198; *Citizen's Bank* v. *Spencer*, 126 Iowa 101, 101 N. W. 643; *Cheeney* v. *Inhabitants of Brookfield*, 60 Mo. 53. Where general power exists to contract with reference to the subject-matter of an express contract invalid for some irregularity of its execution, but where the form and method of contracting does not violate any statutory restriction upon the power to contract, the municipality is liable for the benefits received under the invalid contract. Where, however, the statute or the charter subjects the municipality to "restrictions as to the form and method of contracting that are limitations upon the power itself, the corporation cannot be held liable by either an express or an implied contract in defiance of such restrictions." 3 McQUILLIN, MUN. CORP., § 1181. In some cases, though, recovery has been allowed on the theory that the municipality is estopped to deny that all of the statutory requirements have not been met. *Moore* v. *Mayor of New York*, 73 N. Y. 238; *Chicago* v. *Pittsburg, etc. R. Co.*, 244 Ill. 220. For an exhaustive analysis of the cases on this general subject of the quasi-contractual liability of the municipality, see 9 MICH. L. REV. 671. As to liability for services performed under void contracts, see 17 HARV. L. REV. 343.

PERPETUITIES—FUTURE ESTATES—TIME FOR VESTING.—K made a devise to A for life, after A's death to M for life with power of appointment by will to such persons as M wished, and in default of appointment, to M's children in fee. M left a will by which she gave her property to her husband, W, for life with remainder in trust for her children until they became 21 years of age, when they were to have the fee. P was M's only child, and having attained the age of 21, contracted to sell to D a lot of the land acquired through M's will. D later refused to accept the land, claiming that P did not acquire good title under M's will because of the rule against perpetuities. *Held*, that P's title was good. Future estates or interests must vest within a life or lives in being at the time of their creation and 21 years and a fraction to cover the period of gestation. To test the validity of the execution of a power, the devise of M must be read as if it were a part of K's will. When thus read, it is as follows: (1) to A for life, (2) to M for life, (3) to W for life, (4) in trust for M's children until they become 21 when they shall have the fee. The estate thus vests within the time prescribed by law. *Levenson* v. *Manly* (Md. 1913) 87 Atl. 261.

It is a well settled rule of law that the time in which an estate must vest is as stated above. It is also as well settled that the general rule is as laid down by GRAY, that in testing the remoteness of an appointment pursuant to a power, the length of time must be reckoned from the creation and not from the exercise of the power. GRAY, PERPETUITIES (2 ed.) § 473. There are exceptions to this, however. In the case of a general power where the donee can appoint whomsoever he wishes either by deed or will, the courts consider that the donee is *dominus* of the property, which is equivalent to owning the fee, and the validity of the exercise depends upon the distance of the interest from the exercise. GRAY, PERPETUITIES (2 ed.) § 524. The difficulty and conflict in the decisions arises when the power is general as to whom the donee may appoint, but the power can only be exercised by will. GRAY says that in

such a case the same rule applies as in the case of a special power. He supports his rule by the decision, *In re Powell's Trusts*, 39 L. J. (Ch.) 188, and says that this is the weight of authority. GRAY, PERPETUITIES (2 ed.) § 526b. This rule seems to have been followed in this country wherever the question has been raised, and this seems to have been done mainly because of the powerful influence which Mr. GRAY'S views have had. *Genet* v. *Hunt*, 113 N. Y. 158; *Thompson* v. *Livingston*, 6 N. Y. Super. Ct. 539; *Lawrence's Estate*, 136 Pa. St. 354, also the principal case, of which the facts are given above. In a recent note in 26 HARV. L. REV. 64, this rule as laid down by GRAY is very much questioned both upon principle and authority, and it is true that the case of *In re Powell's Trusts*, upon which the decisions of the American courts are, at least indirectly, based, has been entirely overruled in England. *Rous* v. *Jackson*, 29 Ch. D. 521; *In re Flower*, 55 L. J. Ch. 200; *Stuart* v. *Babington*, 27 L. R. Ir. 551.

PHYSICIANS AND SURGEONS—LIABILITY FOR UNAUTHORIZED OPERATION.—An infant aged eleven was operated upon for adenoids by defendant at the instance and request of an adult sister, but without parental sanction. The child never recovered consciousness after the administration of the anæsthetic, and died during the operation. The parents knew nothing of the operation until after the death of the child. *Held*, the surgeon was liable for the death in an action brought by the parents. *Rishworth* v. *Moss* (Tex. 1913) 159 S. W. 122.

That consent to a surgical operation is necessary except in cases of emergency, is uniformly the holding of the courts. Such consent must be given by the person himself if capable, or by some one with authority to consent for him if the person is incapable. Consent may be implied from the circumstances of the case. *Mohr* v. *Williams*, 95 Minn. 261; *Pratt* v. *Davis*, 224 Ill. 300; *State, use of Janney* v. *Housekeeper*, 70 Md. 162. Whether consent may be implied is ordinarily a question for the jury. So far as the writer has been able to ascertain, the question of a surgeon's liability for an unauthorized operation upon an infant has been before the courts in but one other case. In *Bakker* v. *Welsh*, 144 Mich. 632, an infant aged seventeen was operated upon without parental consent and died. He was accompanied to the offices of the surgeon by an adult sister. The court in its opinion held that it would be too harsh an application of the rule to hold the surgeon liable. The principal case says of the reasoning in *Bakker* v. *Welsh*, supra, "The decision of the court is entirely unsatisfactory and without valid reason for its rendition," and of the two cases logic would seem to be with the Texas Court. See, however, comment on *Bakker* v. *Welsh*, in 5 MICH. L. REV. 40. The question was attempted to be raised in *Luka* v. *Lowrie*, 171 Mich. 122, and in *Wood* v. *Wyeth*, 106 App. Div. 21, but these cases were decided on other grounds.

PLEADING—COMPLETE DEFENSE PLEADED AS A PARTIAL DEFENSE.—The complaint demanded the possession of, or the value of, certain fire apparatus installed by the plaintiff in the defendant's building. In his answer the defendant pleaded facts which, if true, would have been a complete defense,

but he pleaded them "as a partial defense." The plaintiff demurred. From an order sustaining the demurrer the defendant appealed. *Held,* that facts constituting a complete defense are not bad on demurrer because pleaded "as a partial defense." *H. G. Vogel Co.* v. *Wolff,* 141 N. Y. Supp. 756.

It is the general rule that a plea or answer purporting to be a defense to the whole cause of action, but which answers only a part, is bad on demurrer. *State Treasurer* v. *Holmes,* 4 Vt. 110; *Webb* v. *Nickerson,* 4 Pac. 1126; *Loder* v. *Phelps,* 13 Wend. 46; *Shortle* v. *Terre Haute & I. R. Co.,* 131 Ind. 338; *Illinois Central R. Co.* v. *Ludig,* 64 Ill. 151. Whether the converse of the above general rule is true is a disputed question, and one on which very few cases have been decided. Indiana and Maryland have held that a plea entitled "as a partial defense," though in itself a complete defense to the cause of action alleged, is bad on general demurrer. *Davis* v. *Bush,* 4 Blackf. (Ind.) 330; *Cram* v. *Yates,* 2 Har. & G. 332. On principle the case is properly decided. For if facts alleged are sufficient to constitute a complete defense, they must necessarily constitute a partial defense. The whole is greater than any of its parts. A liberal construction of pleadings demands that substance should not be sacrificed to form.

PLEADING—DEMURRER.—Plaintiff and defendant entered into a contract in regard to the purchase of tax-titles to certain property of a corporation in which the plaintiff was a stockholder. In his complaint, the plaintiff alleged the performance of all agreements on his part to be performed, and asked specific performance on the part of the defendant. The defendant demurred on the ground that the contract pleaded in the complaint was illegal and void, contrary to public policy and good morals, and could not be enforced. *Held,* that the demurrer was properly overruled, for the reason that it was unauthorized by any of the grounds of demurrer prescribed by the code. *Meyer* v. *Wright,* (Colo. App. 1913) 131 Pac. 787.

One of the grounds of demurrer specified in the code is, "that the complaint does not state facts sufficient to constitute a cause of action." Without using the exact language of the code, the demurrer pointed out specifically wherein the complaint was insufficient. Many courts hold with the above decision that the demurrer must be taken in the exact language of the statute, and that a substantial compliance therewith is not sufficient. *Mayberry* v. *Kelly,* 1 Kan. 116; *Harper* v. *Chamberlain,* 11 Abb. Prac. 234. To use the language of *Hanson* v. *Neal,* 215 Mo. 256: "In technical pleading technicalities count. It is well to keep within the statutory way as a beaten path." Other courts hold that a demurrer, though not in the precise language of the statute, is sufficient if it sets out substantially one of the statutory causes for demurrer. *Busher* v. *Knapp, Adm'r.,* 107 Ind. 340; *Lagow et al.* v. *Neilson,* 10 Ind. 183; *Hanna* v. *Hawes,* 45 Iowa 437. But even in the latter courts, if facts are not stated in the demurrer, it must conform to the provisions of the statute in terms. *Lane* v. *State,* 7 Ind. 426. In those cases where facts set up in the demurrer in disregard of the statutory form have been allowed, the demurrer has been held to be more specific, and "would not cover any objection other than that specifically pointed out, although

there be other necessary facts not stated, that would have been reached had the language of the statute been employed." *Robinson* v. *Leach,* 10 Ind. 308.

PUBLIC OFFICERS—SECRET PROFITS.—In an action against a city officer, who, while acting in an advisory capacity to a committee of the council charged with the selection of a site for a building to be used in connection with his department, purchased land with a view to selling it to the city, and conveyed it to a third person who, pursuant to the plan, sold it to the city at an advanced price, the court held that the officer became a trustee for, and liable to the city to the extent of the difference between the price paid by him and that paid by the city. *City of Minneapolis* v. *Canterbury,* (Minn. 1913), 142 N. W. 812.

This case applies to a public officer the doctrine of constructive trusts which is frequently applied in the case of those standing in the private fiduciary relation of principal and agent. *Gardner* v. *Ogden,* 22 N. Y. 327; *Greenfield Savings Bank* v. *Simons,* 133 Mass. 415; *Bunker* v. *Miles,* 30 Me. 431. The leading case directly in point is one that arose in the Canadian Chancery Courts. The mayor of a city having contracted to purchase at a large discount, certain debentures which the city contemplated issuing, was compelled to account for the profits which he realized from the transaction *Toronto* v. *Bowes,* 6 Grant 1. While this doctrine has not been very frequently invoked in this particular class of cases, yet it affords a very convenient remedy for the recovery of illegal profits where, as in the principal case, the contract is wholly executed on both sides, inasmuch as in such cases, according to the weight of authority, the city cannot rescind the transaction and recover the whole purchase price unless it is willing and able to place the other party in statu quo. He is entitled to the reasonable value of the thing contracted for, which in such cases is the purchase price less the profits. *Frick* v. *Brinkley,* 61 Ark. 397; *Macon* v. *Huff,* 60 Ga. 221; *Grand Island Gas Co.* v. *West,* 28 Nebr. 852; *Thomas* v. *Brownsville,* 109 U. S. 522. Other courts hold that such contracts are absolutely void, and that no recovery can be had on a quantum meruit. *Berka* v. *Woodward,* 125 Cal. 119, 73 Am. St. Rep. 31, and cases cited in the note.

SALES—NO IMPLIED WARRANTY OF FITNESS FOR PURPOSE INTENDED—Plaintiff sold defendant an engine of stated horse-power, the written contract containing an express warranty that it would develop such horse-power and further stipulations as to terms of payment and repairs. Plaintiff's agent had visited defendant's mill before the sale, examined the machinery, and therefore knew the use to which the engine was to be applied. Plaintiff sues on a note executed for balance of the price, and defendant, contending that there was an implied warranty that engine would run his mill, asks for damages. *Held,* there was no such implied warranty. *Middletown Mach. Co.* v. *Chaffin* (Ark. 1913), 157 S. W. 398.

It is well settled that, upon the present and executed sale of a definite ascertained and existing chattel, which is open to the buyer, and of which the seller is neither manufacturer nor grower, no warranty whatever as to quality or fitness is implied: *Parkinson* v. *Lee,* 2 East. 314; 2 BLACK, COMM.

*451; 2 MECHEM, SALES, § 1311; *Sweet* v. *Colgate*, 20 Johns (N. Y.) 196; *Mixer* v. *Coburn*, 11 Metc. (Mass.) 559; and it makes no difference that the seller knew that the buyer intended the chattel for a specific purpose, to which he erroneously supposed it to be adapted, for here the buyer relies on his own judgment, not on that of the seller. *Dickenson* v. *Jordan*, 11 Ired. L. (N. C.) 166, 53 Am. Dec. 403; *Hight* v. *Bacon*, 126 Mass. 10. But as was said in *Curtis & Co. Mfg. Co.* v. *Williams*, 48 Ark. 325, 3 S. W. 517—"there are exceptions to the rule as well established as the rule itself." One of these exceptions is in the case of a sale by a manufacturer of, or a dealer in, the goods sold. In this case the rule of caveat emptor does not apply. But even here a well defined and settled distinction prevails. "When a person contracts to supply an article which he manufactures, or in which he deals, to be applied to a *particular purpose* and under such circumstances that the buyer necessarily trusts to the skill of the seller, there is in that case an implied warranty that the article is reasonably fit for the purpose to which it is to be applied." ANSON, CONTRACTS (Knowlton's 2nd Ed.) *131, n[1]. *Hight* v. *Bacon*, (supra). 2 MECHEM, SALES, §§ 1343-4. 35 CYC. 402; *Jones* v. *Just*, L. R. 3 Q. B. 197; *Drummond* v. *Van Ingen*, 12 A. C. 294. But if the buyer, as in the principal case, orders a specific article, or a known described article, there is no warranty of fitness for a particular purpose, even though the manufacturer is informed of the purpose to which it is to be applied. This is the settled rule both in England and the United States. *Jones* v. *Just* (supra); *Ottawa Bottle & Flint Glass Co.* v. *Gunther et al.*, 31 Fed. 208; *Seitz* v. *Brewer's Refrigerating Mach. Co.*, 141 U. S. 510; *The Telluride Power Transmission Co.* v. *Crane Co.*, 208 Ill. 218.

SALES—RIGHT TO REJECT IN SALE ON APPROVAL.—Plaintiff contracted to sell defendant a player piano for $950 allowing $400 for defendant's old piano and pianola, and agreeing that the player piano should be satisfactory to the defendant. Defendant was not satisfied with the player piano, and demanded a return of his old piano and pianola. On plaintiff's suing for balance of price, defendant denies that there was a sale, and in a counter-claim seeks to recover damages for the alleged conversion of the old piano and pianola. *Held*, where a sale is made subject to the approval of the buyer, it suffices to defeat the sale that the buyer rejects the goods as unsatisfactory for any reason or no good reason. *Henley-Waite Music Co.* v. *Graniss* (Mo. 1913), 157 S. W. 817.

Where a contract contains a condition that one party must be satisfied with the performance, or be under no obligation, need that satisfaction be an *actual satisfaction* or merely a *reasonable satisfaction?* In case of contracts of sale, as distinguished from contracts for services rendered, a distinction must be made between "sale on trial or approval" and "sale or return." A "sale on trial or approval" is in the nature of an *option to purchase* the goods if they prove satisfactory, or in other words a sale upon "condition precedent." Here the contract is still executory, and property in the goods does not pass until the buyer has expressly or impliedly manifested his approval or acceptance. (*Hunt* v. *Wyman*, 100 Mass. 198) unless a differ-

ent intention appears, while a "sale or return," is in the nature of a sale with an option to return if unsatisfactory, or in other words a sale upon "condition subsequent." *Wind* v. *Iler*, 93 Iowa 316, 27 L. R. A. 219. Thus in case of a sale or trial on approval, "it is not enough that he ought to be satisfied, or that the article would be satisfactory to a reasonable man, or that a court and jury deem the article satisfactory. The contract is that the article shall be satisfactory to the vendee himself and not to someone else." 1 MECHEM, SALES, § 665; *Singerly* v. *Thayer*, 108 Pa. St. 291; *Gibson* v. *Cranage*, 39 Mich. 49; *McCarren* v. *McNulty*, 7 Gray 139. But in case of a "sale on approval with a warranty of quality, or where the contract is for "sale or return" (in which case title has already passed), in order to avoid the sale, the reasons required for dissatisfaction would necessarily be more stringent. In those cases appealing to taste, sentiment or artistic sensibility rather than to reason, "It would, of course, be the duty of the buyer to examine the article and not reject it unseen, but there could be no other test than his own convictions or sentiments." 1 MECHEM, SALES, § 667. In cases, however, requiring mechanical fitness, viz.: sale of machine to vendee's satisfaction, there is necessarily involved the duty on the part of the vendee to try it reasonably, in order to determine whether it will work or not, and no arbitrary rejection without a reasonable test would be consistent with the vendee's duty. *Buckley* v. *Meidroth*, 93 Ill. App. 460; *Hartford Sorghum Mfg. Co.* v. *John Brush*, 43 Vt. 528; *Garland* v. *Keeler*, 15 N. D. 548. For further illustrations see 54 Am. Rep. 711.

WILLS—EVIDENCE OF TESTATOR'S STATEMENTS AS TO REVOCATION.—The testator, after making the will which was offered for probate, made and executed other wills which if now in force would operate as a revocation of the former will. The latter wills, however, were not produced, and the proponent, seeking to establish the fact that they in turn were revoked and that the former will had thus been revived, offered evidence of declarations by the testator as to the revocation of the subsequent wills. *Held*, the evidence was admissible. *Aldrich* v. *Aldrich* (Mass. 1913), 102 N. E. 487.

There are three theories as to the admissibility of such declarations. One is that when they are not made in such close connection with the alleged act as to constitute part of the res gestae, they are mere assertions of an external fact offered as evidence of the truth of the assertion, are clearly within the hearsay rule, and are therefore inadmissible. *In re Shelton*, 143 N. C. 218, 10 Ann. Cas. 531; *Throckmorton* v. *Holt*, 180 U. S. 552; *Glass* v. *Scott*, 14 Colo. App. 377, 60 Pac. 186; *Stevens* v. *Stevens*, 72 N. H. 360, 56 Atl. 916; *Waterman* v. *Whitney*, 11 N. Y. 168. Another theory is that while such statements are clearly hearsay, they should be admitted as special exceptions to the hearsay rule. *Sugden* v. *St. Leonards*, 1 L. R. P. D. 203; *Weeks* v. *McBeth*, 14 Ala. 474; *Tyman* v. *Paschal*, 27 Tex. 300; *Patterson* v. *Hickey*, 32 Ga. 159. The courts following this theory, says Mr. WIGMORE, seem to be increasing in number. WIGMORE, EVID., § 1737. The third theory, that followed by the instant case, is that the testator's declarations are admissible not as special exceptions to the hearsay rule, but as circumstantial

evidence indicating testator's state of mind; or on the ground that they are direct assertions of the testator's belief and are therefore admissible under the *general* exception of statements of opinion and belief. *Johnson's Will,* 40 Conn. 587; *In re Page,* 118 Ill. 581, 8 N. E. 852; *Foster's App.,* 87 Pa. 75; *Steele* v. *Price,* 5 B. Monr. (Ky.) 63; *Valentine's Will,* 93 Wis. 45, 67 N. W. 12. Since by nature a will is peculiarly a creature of the testator's intent, the latter view seems to be the most logical.

WILLS—EXERCISE OF POWER—MALICE.—The testator left a will by which he appointed three trustees, (one of whom was his wife,) with general powers to look after his estate and with directions that they make such advancements to his children from their portions of his estate, as should be deemed advisable by his wife, such advancements to be deducted from the respective portions of the children. Upon the death of his wife, the property was to go to his children, or, in case of the decease of any of the children, then the parent's share to his children or descendants. During the life time of the widow she made, through the trustees, several advancements to one certain child. Plaintiff, the daughter of a deceased child of the testator, claimed this was not a valid exercise of the power under the will, and filed a bill for the construction of the will. *Held,* that since the wife of the testator had absolute right to make advancements to any of the children whenever she deemed it advisable, the court could not go back of this and inquire into the motive of the donee of the power. The fact that the advancements were made out of ill-will or spite will not invalidate the appointment, it appearing that there was no benefit to, or fraud upon the part of, the donee of the power. *Metcalf* v. *Gladding* (R. I. 1913), 87 Atl. 195.

The decision in this case, under the peculiar circumstances, would seem to be correct. The court remarked that while arbitrary powers are not to be favored, it is competent for a testator to create one, and if he does so it must be upheld. As SUGDEN says, if courts were to go into the motive of every exercise of a power, it would invalidate almost every appointment and lead to an interminable confusion. 2 SUGDEN, POWERS *193, and this same statement is laid down by the courts in *Vane* v. *Lord Dungenmore,* 2 Sch. & Lef. 117; *Supple* v. *Lowson,* Ambl. 729; *Topham* v. *Duke of Portland,* L. R. 5 Ch. 40; *Davis* v. *Uphill,* 1 Swanst. 129. This class of cases is to be distinguished from those in which personal interest or bad faith take part in the appointment. In the case of *Coffin* v. *Cooper,* 2 Dr. & Sm. 365, the court held that, in absence of bad faith, the fact that the donee of the power had a personal interest in making the appointment did not invalidate the power, since the power was a general one. This was regarded as an innovation in the law of power and was very much questioned in a later case in the same court, although it was unnecessary to overrule it. *Palmer* v. *Locke,* 15 Ch. D. 294. Although the question of motive is concerned indirectly in these two cases, it is motive in connection with something else, and the court in the Rhode Island case intimated that the decision would have been different had the donee obtained any personal benefits from the advancements.

WILLS—VESTED REMAINDER.—A testator devised lands to his son, "to be held by him for his use and benefit during his natural life, but at his death to be equally divided between the heirs of his body, but should he die without leaving a child or children, in that event he shall have the right to dispose of the lands herein devised to him and the heirs of his body in any manner he may see fit." The son died leaving surviving him two sons, the defendants. At the time of testator's death the son had also a daughter, Linda, who intermarried with the plaintiff. Of this marriage a daughter, Inez, was born. Linda and Inez died before the death of the son. Both defendants and plaintiff claim under the will, the defendants directly, and the plaintiff as heir at law of his wife through his daughter. In order to succeed the plaintiff must show a vested remainder in his wife at the time of her decease, and so the principal question is whether, under the will, the children of the son took a vested or a contingent remainder. *Held*, they took a vested remainder. *Duncan* v. *De Yampert* (Ala. 1913), 62 So. 673.

Although in the will the testator used the expression "heirs of his (the son's) body" twice and that of "children" only once, the court by a peculiar application of the maxim, *Nemo est haeres viventis*, arrived at the conclusion that the testator meant children and not heirs of his body. This ruling is important, for if the court had taken the contrary view, the question of whether plaintiff's wife took a vested or a contingent remainder would have been settled then and there, it having been decided in Alabama that a gift with remainder over to heirs of the body conferred a contingent remainder upon such heirs. *Elmore* v. *Mustin*, 28 Ala. 309. However, since the plaintiff in his brief agreed that the testator meant children, this point deserves no further attention. The majority of the courts in the United States are in accord with the decision in this case in holding that under a gift to children by way of remainder, the children in esse at the death of the testator take vested interests. *McArthur* v. *Scott*, 113 U. S. 340; *Johnson* v. *Weber*, 65 Conn. 501; *Phillips* v. *Johnson*, 14 B. Monr. (Ky.) 140; *Cole* v. *Keyes*, 143 Mass. 237; *Hovey* v. *Nellis*, 98 Mich. 374; *Campbell* v. *Stokes*, 142 N. Y. 23; *Bruce* v. *Bissell*, 119 Ind. 529, and cases cited. In a few jurisdictions the contrary opinion prevails. *Sanford* v. *Sanford*, 58 Ga. 259; *Blatchford* v. *Newberry*, 99 Ill. 11; *Nichols* v. *Guthrie*, 109 Tenn. 535. In the last case the court held that the remainder estate vests in the remaindermen as a class during the continuance of the life estate, and does not vest in the individual members of the class until the termination of the particular estate by the death of the life tenant.

WITNESSES—PRIVILEGE AGAINST SELF-INCRIMINATION.—A New York statute provided that any operator of a motor vehicle who, knowing that injury had been caused to property or person due to his culpability, or to accident, should leave the place without giving his name, residence and license number to the injured party or to a policeman, should be guilty of a felony. Defendant, arraigned for violation of this act, contended that it was invalid because in contravention of the constitutional provision that no man shall be compelled to be a witness against himself in a criminal case. *Held*, that this

was a valid exercise of the police power. *People* v. *Rosenheimer* (N. Y. 1913), 102 N. E. 530.

The contention of the defense was that inasmuch as the statute extended to cases in which the operator was culpably negligent as well as to those in which the injury was due to accident, to compel defendant to disclose his identity was to force him to testify against himself in a criminal case. His identity was one link in the chain of facts incriminating him and the constitutional privilege extends to any facts tending to incriminate. *Aaron Burr's Trial,* 1 Robertson's Repts., 208-244; WIGMORE, EVIDENCE, § 2261, and cases cited therein. The court concedes that this statute requires the disclosure of a material fact, saying "Undoubtedly it does require him to make known a fact which will be a link in the chain of evidence to convict him if in fact he has been guilty of a crime." For authority the court relies somewhat upon decisions in other states upholding statutes requiring the display of license numbers for the purpose of identification, (*People* v. *Schneider,* 139 Mich. 673, and *Frankford Ry. Co.* v. *Philadelphia,* 58 Pa. St. 119); and those requiring disclosure of identity in case of injury, (*Ex Parte Kneedler,* 243 Mo. 642); and upon the fact that the New York statute does not make the infliction of injury a crime nor provide for the use of any evidence the defendant may give in any subsequent criminal proceeding. If any crime exists, it is by force of some other statute than the one in question. The court evidently felt the weight of the defendant's contention, however, as after justifying its decision on the authorities and the reasons given above, it proceeded to develop an entirely new ground upon which the statute might be upheld; viz., that as the legislature might, in the exercise of the police power, exclude all motor vehicles from the highways, it could insist also that as a condition precedent to the use of the highways operators of such vehicles should waive the constitutional privilege. Undoubtedly the position of the defendant finds sanction in many decided cases; and the decision seems to justify Professor WIGMORE in his statement (WIGMORE, EVIDENCE, § 2266), that "the tendency today almost everywhere, is against the loose extension of the privilege—by way of just reaction against an inclination exhibited at one time to the contrary."

BOOK REVIEWS.

THE COURTS, THE CONSTITUTION AND PARTIES. By Andrew C. McLaughlin, Professor of History in the University of Chicago. Chicago: University of Chicago Press, 1912, pp. vi, 299.

This book is a series of five papers, four of which have appeared in as many magazines or learned reviews. The other paper which is much the longest and in some respects, the most important is now published for the first time. But the papers all relate to important phases of our constitutional government as it has developed with usage, and to the extra-constitutional machinery, by means of which the paper draft of the organic law, with its grants of power, its principles and its limitations, is made the instrument of actual government. The papers then not only relate to the same central theme, but they follow each other in logical development; and the importance of the subject with which they deal, and the scholarly ability and originality with which that subject is treated, amply justify their publication as a book.

The "power of a court to declare a law unconstitutional" is the subject of the first and hitherto unpublished paper. The author disclaims any purpose either to defend the courts in the exercise of this power, or to assert that they have assumed or usurped authority; rather he undertakes to trace in a broad way the historical facts which preceded and "which will explain, if it does not justify" the exertion of that power. After a brief review of Marshall's opinion in *Marbury* v. *Madison*,[1] Professor McLaughlin states the problem as follows: "But of course the mere fact that there was written constitution in America did not necessarily imply as a logical fact the right of the court to apply that constitution and ignore the interpretation of the Constitution by the legislative authority; that the Constitution was a law in the sense that it could be and must be maintained by the courts, even when Congress in exercising its legislative power had itself interpreted the Constitution, was the very point at issue. The thing then to be explained is why Marshall assumed that if the Constitution was law, the courts must place their interpretation on it and not recognize the right of the legislative body to determine its own rights under it." It is then contended that the Constitution itself does not explicitly or expressly answer the question, but that the explanation "must be sought in the historical background, not in mere logical disquisition on the Constitution alone." The antecedents (the author considers them antecedents rather than precedents) are then considered, and there are more of them than is generally supposed, and many other interesting facts are brought to bear upon the problem. Thus, as is well known, James Wilson of Pennsylvania, in lectures delivered in 1791 and 1792, "fully developed the doctrine that the court had a right to declare a law unconstitutional," and that this right is inherent in courts under a constitutional government with a separation of the great governmental pow-

[1] 1 Cranch 137 (1803).

ers. It is scarcely necessary to say that Wilson greatly influenced his contemporaries in legal and governmental matters. Moreover it is shown that there were several members of the Constitutional Convention, who as state judges had already officially declared statutes invalid. The author concludes his review of the earlier cases with a statement of the striking fact that the judges who decided those early cases were not acting strictly upon precedent, that commonly they did not even refer to precedents, but that "they thought *alike* and along *similar* lines," and this in many cases at least, without any knowledge of each other's or previous decisions. This condition was due of course to the delay in publishing reports and the scarcity of reports (blessed condition!) in those days. This is the foundation of the main thesis, namely that the history of the colonies and the states and particularly the philosophico-political theories entertained very generally by the leaders of our revolutionary and early constitutional periods made it very natural if not indeed inevitable that the possession by the courts of the power to declare legislation unconstitutional should be accepted as the natural and logical consequence of the nature of courts and of our form of constitutional government. The significance of the facts thus barely referred to, is nowhere else as clearly pointed out, as in Professor McLaughlin's paper. The importance of the provision in Article VI of the Constitution by which it is declared that the Constitution is the Supreme *law* of the land is also convincingly shown. How important to the *working* of our legal institutions this power is, had already been shown by Professor McLaughlin in his book on the Constitutional period.[2] The great influence of the revolutionary doctrines concerning "fundamental law," "natural rights," the "separation of powers" and the "compact" theory of the state in preparing men's minds for the application of the inherent power, and duty of courts to apply that which is law, and to refuse to apply that which is not, to litigation arising under the Constitution and our dual government is clearly and convincingly traced. It would be vain to endeavor to compress this scholarly and masterly argument into the brief space of a book review. The essay as a whole is not only a distinct contribution to the discussion of the resurrected political issue, but to the reviewer's mind, the "explanation of Marshall's position" (see p. 10) is a complete vindication of that position and as nearly conclusive of the existence, *de jure,* of the power in dispute, as it is possible to make.

The next two chapters, entitled, "The Significance of Political Parties" and "Political Parties and Popular Government" show the necessity for some dynamic force to put in motion and to operate the government which is outlined in the Constitution, and that this motive power has been found in our political parties, which from mere voluntary and shifting organizations have developed through extra-legal stages to their present definite though complex forms, not only recognized by law, but relied upon by it to express the will of the people, in short to furnish, to be, the actual government. This the author says (p. 113) was the great political and constitutional problem of the decades to come, and clearly enough, if we omit the tremendous

[2] McLaughlin, The Confederation and the Constitution, ch. XV.

struggle over slavery and secession, the development of these associations is the greatest fact in our constitutional history. It is a sorry thought that the development of this great democratic institution, the party, the "machine" if you please, should, even after a century and a quarter, be accompanied by such wretched and sordid spectacles as our Lorimers and Sulzers and our Tammany Murphys afford. But the reading of these chapters tends to give a philosophic tolerance of, and indeed a feeling of hopefulness about a system, which too often displays only its selfish and unpatriotic sides.

The final chapters, "Social Compact and Constitutional Construction" and "A Written Constitution in Some of Its Historical Aspects" discuss, to quote from the preface, "the changing theories of political philosophy, . . . which furnished foundations for differing theories concerning the Union, . . . and show that American legal order took its rise in the theory of compact and of individual right, and in the belief that imperial order itself should rest on law—two theories or principles that now confront the reformer seeking to readjust social systems and to make them conform to what he considers present social demands."

The book as a whole shows a sanity of judgment, historical scholarship and grasp of legal principles quite unequalled among other writers upon this phase of our historico-legal development. H. M. B.

THE FOURTEENTH AMENDMENT AND THE STATES. By Charles Wallace Collins, M.A., Sometime Fellow in the University of Chicago; Member of the Alabama Bar. Boston: Little, Brown and Company, 1912, pp. xxi, 220.

This is a valuable study of the Fourteenth Amendment to the Federal Constitution, and especially of the restraint clauses of section one. In an historical introduction which is not without some partisan bias, the conditions leading to the adoption of the Amendment are described and the purposes sought to be thereby accomplished by the Republican party are declared to be principally the complete subordination of the states to the federal government in all civil and political matters, the "punishment of the South," the "elevation of the negro to the plane of equality with the white race," and the perpetuation of the powers of the Republican party. Unquestionably the radical wing of that party desired to accomplish some and perhaps all of these purposes. At least such desire may be attributed to many individuals in the radical wing, but such motives cannot be truthfully ascribed to the North or even to the Republican party as a whole. The author then shows how the Supreme Court in the *Slaughter House Cases*,[1] in *U. S.* v. *Cruikshank*,[2] and in *Barbier* v. *Connolly*,[3] rejecting the extreme interpretation urged upon it, which would have vastly increased the centralization of government at the expense of, if not entirely obliterating local government as to civil and political rights, adopted the conservative view set forth in the

[1] 16 Wall. 36.
[2] 92 U. S. 542.
[3] 113 U. S. 31.

opinion of Mr. Justice MILLER in the *Slaughter House Cases*. These decisions as Mr. Collins well says transferred the sphere of activity under the Amendment from Congress to the forum of the Courts. "It was thus rendered peculiarly non-automatic. As a weapon of defense by a citizen against the activity of his fellow-citizens it was rendered null; as against the activity of his own State it was made ponderous and unwieldy. . . . The Supreme Court, and the public at large, thinking that the Amendment had to do only with the negro race, thought thus to render the Amendment practically inoperative" (pp. 23, 24). While this has been to a large extent the result so far as the negro race is concerned, it may be doubted if the Supreme Court was conscious of such a purpose. In another chapter and in a valuable table (Appendix C) the author shows that while the Amendment has been involved in 604 cases from 1868 to 1910, in only twenty-eight of those cases, was the negro race concerned directly.

The narrow operation of the Amendment, which the decision in the *Slaughter House Cases* seemed to forecast, soon became a thing of the past, as the book shows. The Supreme Court did its utmost to discourage litigation under the Amendment, but the seemingly indignant protests at the all-comprehending construction claimed for it by hordes of corporation lawyers and others, protests voiced by Mr. Justice MILLER in *Davidson* v. *New Orleans*,[4] and by Mr. Justice FIELD in *Mo. Pac. Ry.* v. *Humes*[5] were powerless to stem the tide of litigation which after the first few years rose swirling around the Amendment and the Court. During the years above indicated 313 cases were brought by corporations to invoke the aid of this amendment against legislation or other official action, (See Appendix C) and the ebb of the tide is not yet in sight. This condition of affairs and its highly unsatisfactory consequences are well described by Mr. Collins in the main portion of his book. The failure of the amendment as a "constitutional ideal" is vigorously demonstrated in Chapter X.

The final chapter is devoted to a discussion of proposed remedies. Those favored by the author are: 1. Limitation of the right of writs of error to the State courts, to those cases where the State Supreme Court is divided on the question; 2. Prohibiting the Federal district and circuit courts and judges from assuming jurisdiction of any injunction, habeas corpus, or any other extraordinary proceedings by way of restraint upon the activities of the State; 3. Providing that no State law or procedure shall be declared unconstitutional by the Supreme Court of the United States as being repugnant to the provisions of the Fourteenth Amendment, except by a unanimous opinion.

The statistical tables, analyzing and classifying the litigation which has arisen under the Amendment have been worked out with great care and are instructive and valuable in high degree. The book as a whole is a very stimulating contribution to the literature of its much-discussed subject.

H. M. B.

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[4] 96 U. S. 103.
[5] 115 U. S. 520.

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ON UNIFORMITY IN JUDICIAL DECISIONS OF CASES ARISING UNDER THE UNIFORM NEGOTIABLE INSTRUMENTS ACT.

WHEN the American Bar Association was formed in 1878, the first object stated in the call was "to assimilate the laws of the different states," and the first article of the Constitution stated that one of the principal objects of the Association was "to advance the science of jurisprudence, to promote the administration of justice and uniformity of legislation throughout the Union."

At the meeting of that Association in 1887 the Committee on Commercial Law, *inter alia,* recommended that Congress should enact a statute relating to negotiable instruments when used as instruments of interstate or foreign commerce.

In 1889 that Association appointed a Committee on Uniform State Laws, consisting of one member from each state, to prepare and report recommendations and measures to bring about the desired uniformity.

In 1890 an act[1] was passed by the legislature of New York, authorizing the Governor to appoint three commissioners for the promotion of uniformity of legislation, and "to ascertain the best means to effect an assimilation and uniformity in the laws of the states, and especially to consider whether it would be wise and practicable for the State of New York to invite the other States of the Union to send representatives to a convention to draft uniform laws to be submitted for the approval and adoption of the several States."

This Committee reported a recommendation to request each state and the Congress to follow the same course, it having been found impracticable to secure meetings of one member from each state. Other states, one after another, have appointed such Com-

[1] Chapter 205, Laws of 1890.

missions on uniform state laws, and there are now Commissioners from fifty-three States, Territories, the District of Columbia and the Insular Possessions.

These Commissioners meet in Conference each year, the week before the meeting of the American Bar Association. When so assembled in Conference they are therefore the official representatives of their various jurisdictions in the effort to secure uniform legislation.

In 1895 a conference of such Commissioners from a large number of states was held in Detroit and at that Conference the Committee on Commercial Law was instructed to prepare a codification of the law of bills and notes. This Committee, in turn, referred the matter to a sub-committee, the members of which employed John J. Crawford, Esq., of the New York bar, to draft the proposed law. The bill prepared by him was submitted to the Conference in 1896, and after consideration, section by section, with the draftsman, and the adoption of a few amendments, was adopted by the Conference and recommended to the state legislatures for passage. It has been adopted and is now the law in forty-six states and other jurisdictions forming the Union.

But something more is needed than a uniform law to bring about uniformity in the law of our States and other jurisdictions. There must also be uniformity in the decisions under the uniform law, and to ensure such uniformity in decisions, there must be examination of the decisions in these various jurisdictions, and counsel must cite on their briefs the various decisions in other jurisdictions as well as their own, in cases arising under the same sections of the same uniform law, and the courts must follow these decisions, unless shown to be erroneous, instead of following prior decisions in their own States, decisions arrived at before there was any uniform law, and superseded by the passage of the uniform law.

In the interests of jurisprudence and the formation of a new set of precedents as regards negotiable instruments, based upon uniform decisions of this uniform law, it is a grave and serious cause for regret that this is not being done, and the object of this article is to point this out by an examination of some of the cases.

The courts of the country know the origin and history of the Negotiable Instruments Law, that it is largely derived in its form and provisions from the English act upon the subject, that the great and leading object of the act, not only with the principal commercial states of the Union that have adopted it but also with the Congress of the United States in adopting it for the District of Columbia, was to establish a uniform system of law to govern negotiable instru-

ments wherever they may circulate or be negotiated. Our courts know that it was not only uniformity of rules and principles that was designed, but also to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions and the effect of mere local laws and usages that had heretofore prevailed. The great object sought to be accomplished by the enactment of the statute was to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it, to the prejudice and disappointment of innocent holders, as against all the parties to the instrument professedly bound thereby.

The object of this codification of the law with respect to negotiable instruments was to relieve the courts of the duty of citation of conflicting cases and discussion of the discordant views entertained by courts and text writers of the greatest ability upon these questions, and to render certain and unambiguous that which had theretofore been doubtful and obscure, so that the business of the commercial world, largely transacted through the agency of negotiable paper, might be conducted in obedience to a written law emanating from a source whose authority admits of no question.

Where a statute is intended to embody in a code a particular branch of the law, and has specifically dealt with any point, the law on that point should be ascertained by interpreting the language used, instead of doing as before the statute was passed—roaming over a vast number of authorities in order to discover what the law is by extracting it by a minute, critical examination of prior decisions. If such a statute is to have read into it the law prior to its enactment, the value of codifying the law on the subject of negotiable instruments will be greatly impaired, if not destroyed, and the very object for which it was enacted will be frustrated. Where the language of such an act is clear, it must control, whatever may have been the prior statutes and decisions on the subject. Where there is a substantial doubt as to the meaning of the language used, the old law is a valuable source of information.

While the general purpose was to preserve the existing law, so far as it was uniform, yet in many respects in which there was a conflict or doubt, under the authorities, the language of the statute lays down rules which are not to be ignored simply because in some respects a change in the law is effected.

The primary purpose of the adoption of the negotiable instruments code was to obtain uniformity of decision where before there was great diversity. The state legislatures having enacted the code in the identical language of each other (or nearly so) it

would be unfortunate, indeed fatal, to such uniformity, if courts, under the pretext of judicial interpretation or construction, were so to vary and violate the plain provisions of the code as to undo and overthrow the very purpose of the code.

The statute was enacted for the purpose of furnishing, in itself, a certain guide for the determination of all questions covered thereby relating to commercial paper, and therefore, so far as it speaks without ambiguity as to any such questions, reference to case law as it existed prior to the enactment is unnecessary and is liable to be misleading. The Negotiable Instruments Law is not merely a legislative codification of judicial rules previously existing in this state, making that written law which was before unwritten. It is, so far as it goes, an incorporation into written law of the common law of the state, so to speak, the law-merchant generally as recognized, with such changes or modifications and additions as to make a system harmonizing, so far as practicable, with that prevailing in other states.

Some of the provisions of the law are simply declaratory of the existing law, while others have altered or changed the law as heretofore declared. The purpose of the legislation is to produce uniformity on the subject among the several states, and to make certain and definite, by statute, the rules of the law governing negotiable paper. The Acts in the different states are very similar, many of their provisions being identical in language, and the manifest purpose of all is, as far as possible, to prescribe definite and fixed rules regulating the whole subject.

In all situations where the Negotiable Instruments Law conflicts with prior adjudications, as to instruments made subsequent to that time, the former should rule.

Prior to the adoption of this Act by the various states in which it is in force, there was a great lack of uniformity in the statutes of those states and in the decisions of the courts, with reference to the law merchant. A merchant engaging in business in one state and doing business with citizens in other states, would frequently find that a note which was negotiable under the law of his domicil was in fact non-negotiable at the place where is was executed or was to be paid. This led to great confusion in the conduct of commercial affairs. To obviate this difficulty, the Negotiable Instruments Act was passed by the legislatures of several states. The provisions of these various Acts are substantially the same, and they should be construed so as to maintain, as far as possible, the idea of uniformity. Where the Negotiable Instruments Act speaks, it controls;

where it is silent, resort must be had to the law merchant or to the common law regulating commercial paper.

The Negotiable Instruments Law is, in the main, merely a codification of the common-law rules on the subjects to which it relates. It was intended principally to simplify the matter by declaring the rule as established by the weight of authority. There are few innovations in the law merchant as before settled by the courts. Where it lays down a new rule, it controls; but where its language is consistent with the rule previously recognized, it should be construed as simply declaratory of the law as it was before the adoption of the act.

It is matter of common knowledge that the Negotiable Instruments Act was drafted for the purpose of codifying the law upon the subject of negotiable instruments and making it uniform throughout the country through adoption by the legislatures of the several states and by the Congress of the United States. The design was to obliterate state lines as to the law governing instrumentalities so vital to the conduct of interstate commerce as promissory notes and bills of exchange, to remove the confusion or uncertainty which might arise from conflict of statutes or judicial decisions among the several states and to make plain, certain and general the controlling rules of law. Diversity was to be moulded into uniformity. This Act in substance has been adopted by many states. While it does not cover the whole field of negotiable instrument law, it is decisive as to all matters comprehended within its terms. It ought to be interpreted in such a way as to give effect to the beneficient design of the Legislature in passing an Act for the promotion of harmony upon an important branch of the law. Simplicity and clearness are ends especially to be sought. The language of the Act is to be construed with reference to the object to be attained. Its words are to be given their natural and common meaning, and the prevailing principles of statutory interpretation are to be employed. Care should be taken to adhere as closely as possible to the obvious meaning of the Act, without resort to that which had theretofore been the law of any particular commonwealth, unless necessary to dissolve obscurity or doubt, especially in instances where there was a difference in the law in the different states.

By the enactment of the Negotiable Instruments Law the legislature intended to cover the whole subject of negotiable instruments and thus to set at rest questions touching the rights of the parties which had theretofore been left to be determined by a critical examination of the prior decisions of the courts.

Let it not be thought that this is the overwrought statement of

this law prompted by the vivid imagination of one of its admirers actively associated with its creation and with its subsequent adoption by the forty-six states, territories, districts and possessions of the United States in which it is now in force. It is not his work at all but is made up, generally in the very words used from decisions by the courts in their opinions in cases arising under the law, decided by them.[2]

Having been President of this Conference from 1901 until 1908, the writer has collected all the cases that have arisen under the Negotiable Instruments Law, and he has now a collection of one thousand and ninety-one such cases, each case on three cards for three sets, one set arranged alphabetically, one by states, and one by sections of the law in question. He regrets to be obliged to report that in three hundred and eighty-seven of these cases the Negotiable Instruments Law is ignored by the courts in the decisions, and (so far as the reports show) by the counsel in these cases, with the result that not one of the other seven hundred and four cases in which the Act was cited, is cited in any of these three hundred and eighty-seven cases.

It is submitted that it is no excuse or reason for omitting to cite the Act where it is in force, that the decisions are in accord with its

[2] These cases are: Brewster v. Schrader, 26 Misc. 480 (1899); Wirt v. Stubblefield, 17 A. C. (D. C.) 283 (1900); Baltimore & Ohio R. Co. v. First Nat. Bk. of Alex., 102 Va. 753, 47 S. E. 14 (1904); Am. Bk. of Orange v. McComb, 105 Va. 473, 54 S. E. 14 (1906); Vander Ploeg v. Van Zunk, 135 Iowa, 350, 112 N. W. 807 (1907); Rockfield v. The First Nat. Bk., 77 Oh. St. 311, 83 N. E. 392 (1907); Dollar Svs. Bk. v. Barberton Pottery Co., 17 Oh. Decs. 539 (1907); Columbia Banking Co. v. Bowen, 134 Wis. 218; 114 N. W. 451 (1908); Wisner v. First Nat. Bk. of Gallatin, 220 Pa. 21, 68 Atl 955 (1909); First Nat. Bk. of Shawano v. Miller, 139 Wis. 126, 129 N. W. 820 (1909); Mechs.' & Farmers' Bk. v. Katterjohn, 137 Ky. 427, 125 S. W. 1071 (1910); Campbell v. Fourth Nat. Bk., 137 Ky. 555, 126 S. W. 114 (1910); State Bk. of Halstad v. Bilstad (Iowa), 136 N. W. 204 (1912); Brophy Grocery Co. v. Wilson, 45 Mont. 489 (1912); Union Tr. Co. v. McGinty, 212 Mass. 205, 98 N. E. 679 (1912).

See also Mut. Loan Assn. v. Lesser, 76 App. Div., 614 (1912), which was an action against the maker of negotiable promissory notes, there was conflicting testimony whether the words "with interest," were on the notes when they were negotiated, or whether they were added afterwards. After dismissal of the complaint and upon appeal from judgment for the defendants, O'Brien, J., said:

"The fact clearly appears, however, and is not disputed, that the error which crept in upon the trial was in not drawing the court's attention to the provision of the Negotiable Instruments Law which changed the old rule as to the voiding of a note in case it is altered." (Citing Laws, 1897, c. 612, sec. 205.)

It is not claimed that the attitude of the New York courts is one of hostility or even of indifference to the Act. On the contrary, in the case of Shattuck v. Guardian Tr. Co., 204 N. Y. 200 (1912), reversing the same case, 145 App. Div. 734, 130 N. Y. Supp. 658 (1912), it was held that the Act is one of those general statutes that promulgate rules of substantive law rather than those of pleading or evidence. It is claimed, however, that the Negotiable Instruments Law now in force in 46 States and subdivisions of the United States and the decisions under it are not receiving due consideration by the lawyers and judges of the country generally.

provisions. It is true the Act, in the main, is but a statement in concise form, of well recognized principles of the law merchant governing negotiable instruments, except in those cases where divergent principles previously followed in many courts, called for the adoption of one principle and all the precedents under it, and for the rejection of the opposite or contrary principle. But whether the Act follows some principle concerning which there is no difference of opinion, or whether it follows one of two divergent principles and thereby negatives any contrary principle hitherto followed in some jurisdiction that has adopted the Act, it is confidently and strenuously insisted that when adopted the Act itself is the source and the only source of authority, and therefore it should be cited and followed and decisions under the same sections in cases under the same law are the only real precedents. Of course former decisions and old text books may be cited by way of illustration or explanation, or to explain the historical development of the principle involved, but the real authorities are the provisions of the Act and the decisions under it, whether in the state where the particular case is being argued or whether they be decisions in the courts of other states under the same sections of the same uniform law. It is only by following this course that uniform decisions under a uniform law can bring about uniformity throughout the nation.

It is a constant subject for marvel that the very courts that cite the Act in one case may ignore it in the next, although equally applicable. This shows that want of knowledge of the existence of the Act cannot be offered in explanation. Surely, by this time, whenever a case arises in any court in a jurisdiction where the Act is on the statute book, the first inquiry should be, what has the Act to say on the law of this case, and the next inquiry should be, what are the decisions under this Act, in the different jurisdictions in which it is in force.

This article is one of a series of similar articles, each one taking up a different set of decisions under this uniform law, the object being to arouse the attention of the profession of the law, judges as well as lawyers, to the necessity of a study of the decisions under the Act in all the jurisdictions where it is the law, if we would give effect to the uniform law, instead of ignoring the uniform law, as if it did not exist, and following old decisions in the particular jurisdiction, decisions arrived at before there was any uniform law. With this explanation we enter upon an examination of the following cases, not to show that some of them are erroneous, but to show that they ignore the uniform law on their statute books and the decisions under it.

In the case of *Briel* v. *Exchange Nat. Bank*,[3] the negotiable note in suit read: "We promise to pay" and was signed Briel Shoe Co., Fred C. Briel, Prest., J. H. Taylor, Mgr. It was held that the note imposes, *prima facie*, a personal liability upon the defendant, Fred C. Briel, subject however to be shifted by pleading and proof. The court cited the Negotiable Instruments Law, § 4977, Ala. Code, 1907, § 39 (20)[4] while admitting the fact that the note in question is, on its face, the obligation of the Briel Shoe Co. Therefore the question that arises when the name of a principal is disclosed did not arise here. The court says, it might "be observed that the body of the note does not disclose the identity of those intending to bind themselves thereby—that is to be learned from the signature or signatures." It is not usual to recite in a note "I, John Smith, promise to pay" * * * and to sign "John Smith."

The court said that this section of the Negotiable Instruments Law is in accord with these doctrines of the former Alabama decisions "and is declaratory of the law as it has always been in this state." It is submitted that this is misleading. The section had been passed on in several cases decided in states that had adopted the Negotiable Instruments Law before the case was decided, not one of which is cited, however.[5]

In the first two of these cases the Negotiable Instruments Law was cited, in the last two it was not cited. Eighteen cases have been decided in which this section is applicable and in seven it is not mentioned. In one case[6] although cited, the Negotiable Instruments Law is not applicable, for the note sued on was non-negotiable and the Act applies only to negotiable instruments.[7] Since the adoption of the Negotiable Instruments Law in Alabama, twelve cases have arisen in that state in which this law, the statute law of the state, is applicable. In ten of these twelve cases the law was not cited.

In *Gray* v. *Baron*,[8] the note sued on, with stock as collateral security, was placed in escrow with instructions to deliver the stock upon payment of the note within a year, or to deliver it proportionately as payments on account might be made within the year. No payments were made within the year, a contingency not provided for.

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[3] 172 Ala. 475, 55 So. 808.

[4] The Section numbers first given are those of the New York act, and the next (in brackets) are those of the Conference Draft.

[5] Chatham Nat. Bk. v. Gardner, 31 Pa. Super. Ct. 135 (1906); Germania Nat. Bk. v. Mariner, 129 Wis. 544 (1906); Dunbar & Co. v. Martin, 103 N. Y. Supp. 91 (1907); Dunham v. Blood, 207 Mass. 512 (1911).

[6] Daniel v. Glidden, 38 Wash. 556.

[7] Sec. 2 (191) defining "instrument."

[8] 13 Ariz. 70.

It was correctly held there was no delivery of the note and the plaintiff could not sue on it, but the Negotiable Instruments Law was not cited. Under § 90 (51) the plaintiff was not the holder, for under § 35 (16) there had been no delivery. The counsel for the defendant appellant stated correctly the principles involved, but instead of citing the Negotiable Instruments Law as the true source of authority, cited a number of cases decided before the adoption of the Negotiable Instruments Law. Failing to cite the statute of the state, they failed to cite any one of twenty-four cases decided under that law in other states under the same uniform law.[9]

Woodward v. *Donovan*[10] furnishes another striking illustration of neglect of or indifference to the Negotiable Instruments Law although it is the statute law of the state. The court says, in its opinion: "The mere possession of a promissory note or bond is *prima facie* evidence of the legal title to the instrument and of the right of the one in possession to sue thereon; and in the case of an instrument of that character, made payable to some person other than the one in possession, the presumption arising from possession is that the one in possession may sue thereon in the name of the person to whom it is made payable," citing three Illinois cases decided before Illinois adopted the Negotiable Instruments Law, instead of referring to the section of the Illinois statute, both counsel and court thereby ignoring forty-three cases that have been decided under this section. It is not meant by this that fault is found with the decision itself. It is endeavored to be pointed out to the members of the bar and to judges in the forty-six states that have adopted the Negotiable Instruments Law that they are neglecting to pay attention to the law that is on their statute books and also to pay attention to cases that are decided under that statute. For instance, out of the forty-three cases above alluded to, there are thirty cases in which this section of the Negotiable Instruments Law is not mentioned, although in some few cases other sections are cited. If the statute law, the Negotiable Instruments Law, is not cited, it is a

[9] Some of these cases are: Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Key v. Usher, 30 Ky. L. J. 667, 99 S. W. 325, in which the Negotiable Instruments Law was not cited; Linick v. Nutting, 125 N. Y. Supp. 93; Mass. Bk. v. Snow, 187 Mass. 159, 172 N. E. 959; Moak v. Stevens, 45 Misc. 147, 91 N. Y. Supp. 903 (a noticeable case); Niblock v. Sprague, 200 N. Y. 391; Paulson v. Boyd, 137 Wis. 241, 118 N. W. 841 (see comment in Branan, The Negotiable Instruments Law); Pfister v. Heins, 136 App. Div. 457; Schultz v. Kosbab, 125 Wis. 157 (the Negotiable Instruments Law not cited); Smith v. Dotterweich, 200 N. Y. 299 (the Negotiable Instruments Law not cited); Schiffer v. Felisher, 158 Mich. 270, 122 N. W. 543 (the Negotiable Instruments Law not cited); Stoughton v. Chu Fong, 130 N. Y. Supp. 228 (the Negotiable Instruments Law not cited); Strauss v. Citizens State Bk. of Elmhurst, 164 Ill. App. 520.

[10] 187 Ill. App. 503.

matter of luck whether the decision, although following former cases in the same state, will be in accord with it, with the chances in favor of such accord, because the Negotiable Instruments Law does not make radical changes in the law of bills and notes. Nevertheless, by not citing the actual statute law, the true source of authority is ignored, with the occasional result that the decision is wrong, because in conflict with that law and further, all the cases under that statute are also ignored.[11]

It is noteworthy that while cases decided before the adoption of the Negotiable Instruments Law are cited, as well as the Negotiable Instruments Law, none of the cases cited in the foregoing note refer to the numerous decisions in the courts of other states, under the same sections of the same uniform law, but again, unless lawyers and judges cultivate the habit of examining cases in the different state and federal courts arising under the same sections of the same law, how can uniform decisions be secured?

Again, in the case of *People's Nat. Bk. of Hackensack* v. *Rice*,[12] § 90 (51) the statute law of the state, was not cited. Consequently all the cases in the various states decided under this same section there in force also, some 87 in number, were ignored. The court cited three New York decisions of 1878, 1893 and 1901. In the last named case the Negotiable Instruments Law was referred to but without citing § 90 or any of the many cases arising under it.

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[11] The following are cases in which sec. 90 (51) was applicable, yet it was ignored: Am. Soda Fountain Co. v. Hogan, 17 N. Dak. 375; Bk. of Bromfield v. McKinley, 53 Colo. 279, 125 Pac. 493; Darden v. Holloway, 1 Ala. App. 661; Eddy v. Fogg, 192 Mass. 543; Fay v. Hunt, 190 Mass. 378; Hill v. Buchanan, 71 N. J. L. 301; Hillman v. Stanley, 56 Wash. 320; Hutchings v. Reinhalter, 23 R. I. 518; Jefferson Co. Svs. Bk. v. Interstate Svs. Bk., 5 Ala. App. 363, 59 So. 348; Jump v. Leon, 192 Mass. 511; King v. Bellamy, 82 Kans. 310; Lipscomb v. Talbott, 243 Mo. 1, 147 S. W. 798; Lowell v. Bicksford, 201 Mass. 543; Mertin & Garrett v. Mask, 158 N. C. 436; Milbank-Scampton Co. v. Packwood, 154 Mo. App. 204, 133 S. W. 667; Rhodes v. Guhman, 156 Mo. App. 344; Roller v. McKinney, 159 N. C. 319, 74 S. E. 966; Smith v. Bayer, 58 Ore. 526, 115 Pac. 148; Stanley v. Penny, 75 Kans. 179; Sykes v. Kruse, 49 Col. 560; Whidden v. Sprague, 203 Mass. 526.

Among the cases making proper reference to sec. 90 (51) of the Negotiable Instruments Law as the source of authority for the decision, are the following: Callaghan v. Louisville Dry Goods Co., 140 Ky. 712, 131 S. W. 995; Choteau Tr. & Bankg. Co. v. Smith, 133 Ky. 418, 118 S. W. 279; Craig v. Palo Alto Stock Farm, 16 Idaho, 701, 102 Pac. 393; Fishburn v. Loudenshausen, 50 Ore. 363, 92 Pac. 1060; Gen. Conf. Assn. v. Mich. Sanitarium, 166 Mich. 504 (but the note in suit was dated before the adoption of the Negotiable Instruments Law in Michigan); Home Land Co. v. Osborn, 19 Idaho 95, 112 Pac. 764; Johnson Co. v. Koch, 38 Pa. Super. Ct. 553; Melton v. Pensacola Bk. & Tr. Co., 190 Fed. 126; New Haven Mfg. Co. v. N. H. Pulp & Board Co., 76 Conn. 126; R. M. Owen & Co. v. Storms & Co., 78 N. J. L. 154, 72 Atl. 441; Poess v. Twelfth Ward Bk., 43 Misc. 45, 86 N. Y. Supp. 442; Rogers v. Morton, 46 Misc. 494; Schlesinger v. Kurzrok, 94 N. Y. S. 442; Swansby v. Northern St. Bk., 150 Wis. 572.

[12] 149 App. Div. 18 (1912).

In *Merchant's Nat. Bk.* v. *Wadsworth*,[13] it having been shown that the payee took the note relying upon representations of the maker that were fraudulent, in the absence of evidence to show that the plaintiff indorsee took the note in good faith, etc., the verdict and judgment for the defendant were upheld. No fault can be found with the principle thus relied upon—but why was not the actual statute law of the State, § 98 (59) cited as the court's real authority? The Supreme Court of this state has misapplied the Negotiable Instruments Law in *Gen. Conf. Ass'n.* v. *Mich. Sanitarium*,[14] and has failed to follow it in this case, *Merchant's Nat. Bk.* v. *Wadsworth*,[15] both in the same year.

In 106 cases in states that have adopted the Negotiable Instruments Law arising under the provisions of the section under consideration, it is remarkable to find that 34 have failed to cite the Negotiable Instruments Law nor does it appear that counsel drew the attention of the court either to the Act or to the decisions, in the courts of other states, of cases arising under the same section of the law identically the same in such states, although lawyers and judges refer to many cases, especially in their own jurisdiction, decided before there was any Negotiable Instruments Law. It is submitted that this is negecting the real source of authority and is setting up an incorrect one in its place. Nor does it seem to be any sufficient excuse to say that whether the Negotiable Instruments Law be cited or not, the result is the same, for the Negotiable Instruments Law is no radical revision or change of the law of negotiable instruments. Sometimes the result is not the same and then the decision of the particular case is not only at variance with the statute law of the state, it is at variance with the many decisions in other states of cases decided under the same sections of the same law, that are not cited because of the omission to cite the actual statute law of the state and the decisions under it, and that is a breach in the uniformity, not only of the law, but of decisions under the law, that the Commissioners on Uniform State Law are trying to bring about.

In view of this frequent neglect by lawyers and judges to cite the Negotiable Instruments Law and cases decided under it, and to follow them as the controlling authority, in those jurisdictions where the Negotiable Instruments Law has been adopted, it is refreshing to turn to the clear cut statement in *Brophy Grocery Co.* v. *Wilson*,[16]

[13] 166 Mich. 528 (1911).
[14] 166 Mich. 504 (1911).
[15] 166 Mich. 528 (1911).
[16] 45 Mont. 489, 124 Pac. 518.

that by the enactment of the Negotiable Instruments Law the legislature intended to cover the whole subject of negotiable instruments, and thus to set at rest questions touching the rights of the parties, which had theretofore been left to be determined by a critical examination of the prior decisions of the courts, and that in so far as its provisions are clear and unambiguous, they must control.

Occasionally we find a case like that of *American Nat. Bk.* v. *Lundy*,[17] in which not only the Negotiable Instruments Law is cited but also several of the one hundred and thirteen cases that have arisen under §§ 94, 95 (55, 56) of that law.

The case of *Strickland* v. *Nat. Salt Co.*,[18] suggests whether in the future no instrument can be negotiable unless it comports with the elements of negotiability stated in the Negotiable Instruments Law wherever that statute is in force. It was held in this case that a certificate of indebtedness promising to pay, but containing an agreement to keep free from incumbrance certain property on which depended the value of collateral held in pledge for the security of the certificate, is not a negotiable instrument. In the opinion by SWAYZE, J., the learned judge, after explaining § 24 (5), says: "Although this act was not passed until after the certificates in question were issued, it was in this respect intended as a codification of the common law.[19] Whether this contract is governed by the law of New Jersey, where it purports to have been made, or by the law of Ohio, where it was to be performed, or by the law of New York, where it is said to have been delivered, is immaterial. The New York Negotiable Instruments Law was passed in 1897 and contains the same provision. The Ohio act was passed in the same year (1902) and if the certificate is an Ohio contract, the common law must prevail; there is nothing to show that the common law of Ohio differs from the law of New Jersey. In any event therefore, the rule of law applicable is that set forth in the fifth section of the Negotiable Instruments Act. None of the exceptions in that section covers the present case. . . . We have dealt with the certificate in this respect in accordance with the common law as codified in the act of 1902, for the reason that this certificate was issued prior to that act. We are not to be understood, however, as holding that no instrument can hereafter acquire the elements of negotiability unless it answers the requirements of the statute. Mr. MACHEN in his excellent work on Corporations, at § 1740 A. calls attention to the danger of holding that the Negotiable Instruments Act prevents a

[17] 21 N. Dak. 167, 29 N. W. 99.

[18] 79 N. J. Eq. 182 affirming the same case 77 N. J. Eq. 328.

[19] He means, of the law merchant applicable to bills and notes.

further development of the law merchant, but that question is not now before us."

Turning now to MACHEN we find the section referred to to be too long for quotation, but in part he says: "Being in derogation of the common law, the act (meaning the Negotiable Instruments Law) should be construed strictly." And on the next page, after giving as an example the case of certain bonds of the city of Baltimore, he says: "Does the statute require that notwithstanding this clear and uniform usage, the instruments must be held to be non-negotiable? At common law, the mercantile custom might be recognized; and as the statute does not, in express terms, provide that the custom of merchants must be disregarded, it is submitted that the courts should adhere to the safe and beneficial principles of the common law."

The "danger" alluded to, can only arise when the Negotiable Instruments Law itself is disregarded, and this would seem to have been the case in this instance, for both Mr. MACHEN and the learned judge have overlooked § 196 (7): "In any case not provided for in this act the rules of the law merchant shall govern," by which it will be seen that instead of providing that "the custom of merchants must be disregarded," it is expressly provided, not only that they shall be regarded, but that they shall govern. If therefore by the custom of merchants, new elements of negotiability are recognized by merchants, they can be put in proof before the court, as they were before Lord MANSFIELD and his famous jury. Although the Negotiable Instruments Law provides tests by which to determine negotiability, it does not provide that no other test recognized by the custom of merchants shall constitute negotiability.

An earnest protest is here in order against the misleading use of the term "the common law of negotiable instruments" in the above quotations and elsewhere. We do not speak of the common law of admiralty, nor of the common law of equity; why should we speak of the common law of the law merchant? The law merchant is a separate system of law, just as equity, admiralty, the canonical law are. Indeed, as the learned judge above quoted says: "At common law, the mercantile custom might be recognized," that is to say, the common law recognizes the law merchant. But this does not mean there is a common law of negotiable instruments.

Phair v. *Stevens*,[20] is an interesting case, showing a change in Tennessee in consequence of the adoption of the Negotiable Instruments Law. Before then, in that state, an accommodation indorser

[20] 124 Tenn. 669.

before delivery was liable as maker, and as such was liable at maturity without notice of demand. But since the adoption of the Negotiable Instruments Law the Tennessee courts have held that such a writing of one's name on the back of a note makes him an indorser, at least unless it is shown that he intended to be bound in some other capacity. (See §§ 113, 114 (63, 64)). The court cites three cases to the same effect decided under these sections of the Negotiable Instruments Law. There are forty-three more of them, not cited by the court. An attempt was made by the court to distinguish this case from *Mercantile Bk. of Memphis* v. *Busby*,[21] in which the same court, notwithstanding these sections of the Negotiable Instruments Law, followed the rule in effect in Tennessee before the adoption of the Negotiable Instruments Law by citing § 186 (115) providing that notice of dishonor is not required to be given to an indorser . . . "3. Where the instrument was made or accepted for his accommodation," holding that the facts disclosed showed that the note in suit was really executed for the benefit of every person whose name appeared on it. But it would seem to be further necessary to show that the holder of the note or any subsequent indorsee took it with knowledge that the note was so executed, and the report of the case does not show this. This was not an action between the parties to the note, but by a holder taking without knowledge of the relationship between the parties expressed on the note when the parties put their names there, no matter whether on the face or on the back. If, when putting their names on the back of the instrument, they intended to become bound to some subsequent indorsee, only as makers and not as indorsers, they must say so in writing on the note, or write their names on its face.

Hunter v. *Harris*.[22] To give credit to a promissory note of one Hulse, the plaintiff and the defendant agreed to become accommodation co-makers with Hulse, the real party. The note was signed by the plaintiff and by Hulse as makers. Intending so to sign as a co-maker, but finding there was no longer room on the face of the instrument for his signature, the defendant wrote his name on its back. Upon its dishonor, it does not appear that notice thereof was given to the defendant. The payee brought suit on the instrument against the plaintiff and recovered whereupon this plaintiff brought suit against defendant for contribution, as co-surety on the note. It was held that the plaintiff was entitled to recover. The result reached is right, although hardly by the route followed by the court.

[21] 120 Tenn. 652, 113 S. W. 390.
[22] 63 Ore. 505, 127 Pac. 786.

Eliminating all but the two accommodation parties (the plaintiff and the defendant) what was the agreement between them when they put their names on the note (no matter where)? It was that each one should become equally liable *as between themselves.* This would seem to be enough to dispose of the case, especially as the note was paid and therefore this was not a suit on the note, which, indeed, the court stated. The note was used by the defendant as evidence to escape the consequences of his own agreement, in the attempt to exclude evidence of that agreement by claiming that no testimony was admissible to explain why his name was on the back of the note.

But further examination of the case is necessary because of the citation by the court of several sections of the Negotiable Instruments Law and of cases decided under that law and also before the adoption of that law. The sections cited are 55, 113, 114, 3, 118 (29, 63, 64, 192, 68).

§ 118 (68) provides that, as respects one another, indorsers are liable *prima facie,* in the order in which they indorse, but evidence is admissible to show that as between or among themselves, they have agreed otherwise. It is difficult to understand why the court cited this section, for there was but one indorser, the defendant.

Among the cases cited in the decision are: *Lumbermen's Nat. Bk.* v. *Campbell,*[23] *Cellars* v. *Meachem,*[24] *Murphy* v. *Panter,*[25] *White* v. *Savage,*[26] *Haddock* v. *Haddock,*[27] and *Deahey* v. *Choquet,*[28] all cases under the Negotiable Instruments Law. Let us examine briefly some of these cases.

In *Cellers* v. *Meachem*[29] an accommodation maker of a note who wrote "surety" after his signature, was held not to be relieved from liability by an extension of time of payment without his consent.[30] In *Haddock* v. *Haddock*[31] one who wrote his name in blank, before delivery, on the back of a bill payable to the drawer's order, was held to be an indorser, the draft having been accepted by the drawee.

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[23] 61 Ore. 123, 121 Pac. 427.

[24] 49 Ore. 186, 89 Pac. 426, 10 L. R. A. N. S. 133.

[25] 62 Ore. 522, 125 Pac. 292.

[26] 48 Ore. 604, 87 Pac. 1040.

[27] 192 N. Y. 49.

[28] 28 R. I. 338.

[29] 49 Ore. 186, 89 Pac. 426, 10 L. R. A. N. S. 133.

[30] But see the following authorities as to the liability of a surety, and quaere, whether, being a surety, he was primarily liable: Hubbard v. Gurney, 64 N. Y. 457; Eaton & Gilbert on Commercial Paper, 401, sec. 80, c.; Bigelow on Bills, Notes and Cheques, 43 and the vigorous dissenting criticism on this case in Law Notes, p. 105, Sept. 1905, by T. A. S. (Thomas A. Street ?).

[31] 192 N. Y. 49.

Parol evidence was held to be admissible to show whether such an indorser was an accommodation party and whom he accommodated.[32]

It is submitted that in order to carry out the beneficent purposes of the Conference of Commissioners on Uniform State Laws, the bench and bar of the country must do their part by looking to the Act as the source of authority in all jurisdictions where it is in force, and must further become familiar with and follow the decisions in other jurisdictions as well as their own, under the same sections of this uniform law. Only by so doing can we secure uniformity of decisions under this or any other uniform law.

We remember Morgan's "undigested securities." The decisions made without citation of the Act or of the cases under it, in whatever jurisdiction, will remain a mass of undigested decisions unless brought into co-ordination in the manner suggested and thus made a body of precedents for cases under the uniform law.

AMASA M. EATON.

PROVIDENCE, R. I., NOVEMBER, 1913.

[32] See note upon this case upon p. 78, 2nd Ed. of "The Negotiable Instruments Law, Annotated." Prof. Branan.

CONSTITUTIONALITY OF TEACHERS' PENSIONS LEGISLATION.

II. The Validity of the Proposed Michigan Law, Continued.

We considered the constitutionality of Sections I, and II, of the proposed act in the former paper.* Further provisions were as follows:

"Section III. *State Teachers' Retirement Fund Board.* The State Teachers' Retirement Fund Board shall consist of five members to be appointed by the Governor, as hereinafter provided. One of such members shall be, at the time of his appointment, a superintendent of schools; one shall be, at the time of his appointment, a high school teacher; one shall be, at the time of his appointment, a teacher engaged in teaching in a primary school, and one shall be, at the time of his appointment, a county school commissioner. At least one of such members shall be a woman teacher in the public schools. Such appointments shall be made within ten days after this act takes effect. The members of such board first appointed shall hold office for terms of one, two, three, four and five years from August 1, 1915, to be designated by the Governor when he appoints such members. Their successors shall be appointed for terms of five years. A vacancy occurring in the office of any member shall be filled, for the unexpired term, by action of the Governor."

"Section IV. *Officers of Board: Salaries and Expenses: Meetings.* There shall be a president, a vice-president and a secretary of said board, to be elected by a majority vote of the members of the board. The president and the vice-president shall be elected for terms of one year. The term of office of the secretary shall be fixed by the board, but not to exceed three years. The secretary shall not be a member of the board. His salary or compensation shall be prescribed by the board, not exceeding two thousand dollars a year. The members of the board shall serve without compensation, but they shall be entitled to their expenses actually incurred in attending the meetings of the board and in performing services as members thereof.

The Board shall meet annually at Lansing, on the first Friday in October, and shall have such other meetings as the board shall deem necessary.

If a member of the board be absent from two consecutive stated meetings without a reasonable excuse for such absence, accepted by the board, his office shall be declared vacant by the board, and such vacancy shall be filled as hereinbefore provided."

"Section V. *State Treasurer Ex-Officio Treasurer of Fund: Investments* The State Treasurer shall be ex-officio treasurer of the retirement fund and shall be the custodian thereof. The moneys belonging thereto shall be deposited by him in banks or trust companies and the law relating to the deposit of State funds in such banks and trust companies shall apply to the deposit of moneys belonging to the said retirement fund. The State Teachers' Retirement Fund Board shall determine from time to time as to what portion of the permanent retirement fund shall be invested. Such fund shall only be invested in those securities in which the trustees of a savings bank may invest the moneys deposited therein."

"Section VI. *Powers of Board.* The State Teachers' Retirement Fund Board, subject to the provisions of this act and of any other statute, shall have power:

1. To appoint and employ such officers and employees as may be necessary to carry into effect the provisions of this act, and fix their compensation and prescribe their duties.

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* See Mich. L. Rev., Vol. XII, p. 27, Nov. 1913.

2. To conduct investigations into matters relating to the operation of this act, and subpœna witnesses and compel their attendance to testify before it in respect to such matters, and any member of the board may administer oaths or affirmations to such witnesses.

3. To require boards of education, trustees and other school authorities and all officers having duties to perform in respect to contributions by teachers to the retirement fund, to report to the board from time to time, as to such matters pertaining to the payment of such contributions, as it shall deem advisable, and may prescribe the form of such reports.

4. To draw its warrants upon the State Treasurer for the payment of annuities to teachers who have been retired as provided in this act and for the purchase of such securities as the board shall have decided to purchase as provided in this act. No payment shall be made from the teachers' retirement fund except by warrant signed by the president of the board, drawn after resolution duly adopted at a meeting of the board by a majority of its members, which adoption shall be attested by the secretary of the board."

"Section VII. *Rules of Board.* The State Teachers' Retirement Fund Board shall make rules not inconsistent with the provisions of this act, which, when approved by the Superintendent of Public Instruction, shall have the force and effect of law. Such rules shall:

1. Provide for the conduct and regulation of the meetings of the board and the transaction of business thereof.

2. Prescribe the manner of payment of contributions by teachers to the retirement fund, and the payment of annuities therefrom.

3. Establish a system of accounts showing the condition of said fund, the receipts and expenditures.

4. Prescribe the method of making payments from said fund to annuitants.

5. Prescribe the forms of warrants, vouchers, receipts, reports and accounts to be used by annuitants and officers having duties to perform in respect to said fund.

6. Regulate the duties of boards of education, trustees, and other officers, imposed upon them by this act, in respect to the other contributions by teachers to the retirement fund, and the deduction of such contributions from teachers' salaries."

The foregoing provisions create an administrative body, and not a court contrary to the constitutional division into legislative, executive, and judicial functions. This body is similar to the railroad commissions,[96] tax commissions, and boards for administering workmen's compensation acts.[97]

Such administrative body is not "an association, or corporation, public or private," and consequently there is no gift or loan of credit to such, nor is there any *corporation* created contrary to the constitutional provisions that corporations shall not be created by special act, but only by general laws.[98] This constitutional provision applies

[96] Mich. Cent. R. Co. v. Mich. R. Comm. (1910), 160 Mich. 355; Oregon R. R. & Nav. Co. v. Campbell (1909), 173 Fed. 954; Minneapolis etc. R. Co. v. R. R. Comm. (1908), 136 Wis. 146, 17 L. R. A. (N. S.) 821, 116 N. W. 905; State v. Superior Court (Wash. 1912), 120 Pac. 861; Board of Trustees v. McCrory (1909), 132 Ky. 89, 116 S. W. 326, 21 L. R. A. (N. S.) 583.

[97] Borgnis v. Falk Co. (1911), 147 Wis. 327; Cunningham v. N. W. Imp. Co. (Mont. 1911), 119 Pac. 554.

[98] Art. XII, § 1.

only to private, and not to public, corporations. So too, "if this be a corporation at all, it is of a political character, constituting an arm of the public service to carry into effect public duties and powers."[99] And besides the law is a general one extending throughout the state dealing with the whole educational system of the state. We have also seen that the state can if that will be the better way to do, administer such a fund through the instrumentality of a private corporation in many of the states.[100]

"Section VIII. *Contributions by Teachers.*

1. All teachers, except those who are entitled to and take exemption under sub-section 3 of this section, shall contribute to the retirement fund according to the following provisions:

a. A teacher who shall have taught ten years or less shall contribute one-half per centum of his annual contractual salary, but not more than five dollars during any year.

b. A teacher who shall have taught more than ten years but not more than twenty years, shall contribute one per centum of his annual contractual salary, but not more than ten dollars during any year.

c. A teacher who shall have taught more than twenty years shall contribute one and one-half per centum of his annual contractual salary, but not more than fifteen dollars during any year.

2. In becoming a teacher in said public schools after the date of this act he or she shall be conclusively deemed to undertake and agree to pay such assessments, and to have such assessments deducted from his or her salary as herein provided.

3. Any person employed as teacher in said public schools, when this act takes effect, may have one year from the date of this act to elect to come within the provisions of this act, by notifying in writing the retirement fund board.

4. At the time of giving said notice to the retirement fund board, as herein provided, such teacher shall notify the local school board or any other managing body in writing of his or her election to come within the provisions of this act; and shall authorize said school board, as a part of said notice, to deduct from each payment of salary due him or her a sum equal to said per centum of such payment as provided in sub-section 1 of this section."

The validity of these provisions concerning contributions by teachers from their salaries depends upon the nature of such contributions. They have been the subject of considerable discussion. Several different views have been taken, some of which are: (a) They are *public funds retained* by the public authorities; (b) they are a part reserved under the contract between the teacher and the school authorities; (c) they are taxes imposed on teachers; (d) they are a taking of the teacher's property without due process of law.

(a) The nature of such contributions has been most fully worked

[99] Allen v. Board of New Jersey (N. J. 1911), 79 Atl. 101.

[100] Trustees v. Roome (1883), 93 N. Y. 313; Firemen's Benev. Ass'n v. Lounsbury (1859), 21 Ill. 511; Commn. v. Walton (1897), 182 Pa. St. 373.

out in the decisions relating to police pensions. One of the early cases is *Pennie* v. *Reis*.[101] The facts were:

On April 1, 1878, a California law provided that the compensation of policemen in the City of San Francisco should not exceed $102 per month, subject to the condition that the treasurer of the city should "retain from the pay of each police officer the sum of two dollars per month to be paid into the fund to be known as the 'police life and health insurance fund,'—from which there should be paid, upon the death of any policeman, $1,000 to his legal representatives. In 1889 the legislature repealed this act and enacted a similar one for the whole state, providing a fund from various taxes, license fees, penalties, etc., and contributions "retained from the pay" of policemen as before, and directing the transfer of the fund accumulated under the former act to the fund created by the act of 1889. This act provided for paying pensions to retiring and disabled policemen, and to their widows and orphans. The plaintiff was administrator of the estate of a policeman who had served in the police force from 1869, until his death in 1889, 9 days after the act of 1889 went into effect. Plaintiff claimed $1,000 due the estate under act of 1878,—on the ground the deceased had a vested property right in that amount at the time of his death, and of which the act of 1889, if enforced, would deprive him without due process of law, and further that the fund in the treasurer's hands (about $40,000, accumulated under the law of 1878) was not public money, but *private* money accumulated from the contributions of members of the police force, and was, like money due on a life insurance policy, property of the deceased's estate. The Supreme Court of the United States by FIELD, J., says:

> "The Court, looking to the statute sees that in point of fact, no money was contributed by the police officer out of his salary, but that the money which went into that fund under the Act of April 1, 1878, was money from the State retained in its possession for the creation of this very fund, the balance —one hundred dollars—being the only compensation paid to the police officer. Though called part of the officer's compensation, he never received it or controlled it, nor could he prevent its appropriation to the fund in question. He had no such power of disposition over it as always accompanies ownership of property. The Statute in legal effect, says that the police officer shall receive as compensation, each month, not exceeding $100, and that in addition thereto the State will

[101] Pennie v. Reis (1889), 80 Cal. 266, 132 U. S. 46.

create a fund by appropriating two dollars each month for that purpose, from which, upon his death a certain sum shall go to his legal representatives.

"Being raised that way it was entirely at the disposal of the government. . . . The direction of the State that the fund should be one for the benefit of the police officer or his representatives, under certain conditions was subject to change or revocation at any time at the will of the legislature. There was no contract on the part of the State that its disposition should always continue as originally provided. Until the particular event should happen upon which the money was or part of it was to be paid, there was no vested right in the officer to such payment.

"If the two dollars per month retained out of the alleged compensation of the police officer had been in fact paid to him, and thus become subject to his absolute control, and after such payment he had been induced to contribute it each month to a fund on condition that upon his death, a thousand dollars should be paid out of it, to his representative, a different question would have been raised, with respect to the disposition of the fund, or at least of the amount of the decedent's contribution to it. Upon such a question we are not required to express any opinion. It is sufficient that the two dollars retained from the police officer each month, though called in the law a part of his compensation, were in fact, an appropriation of that amount by the State each month to the creation of a fund for the benefit of the police officers named in that law, and, until used for the purposes designed could be transferred to other parties and applied to different purposes by the legislature."

This view has been affirmed in many cases. In *Matter of Friel*,[102] the statute provided that not less than "one per cent of monthly pay, salary or compensation of each member" of the police force "shall be deducted monthly by the comptroller." The court says: "The relator had no vested right in an act of the Legislature; the State, in the exercise of its sovereign authority, might have repealed absolutely the statute of 1888 under which he claims, and it might have abolished the office of policeman in the City of Brooklyn, or it might

[102] Matter of Friel (1905), 101 App. D. 155 Affd., 181 N. Y. 558; Matter of Mahon v. Board of Ed. (1902), 171 N. Y. 265, 89 Am. St. R. 810. See also, Head v. Jacobs, 150 Ky. 290, 150 S. W. 349; Gregory v. Kans. City, 244 Mo. 523, 149 S. W. 466; Folk v. Same, 244 Mo. 553, 149 S. W. 473; State v. Rhame, 92 S. C. 455, 75 S. E. 881.

have destroyed absolutely the municipal corporation, and the relator would have no legal right to complain." So too in *Macfarland* v. *Bieber*,[103] where the Act of Congress requires the commissioners of the District of Columbia "to deduct $1.00 each month from the pay of each fireman" for the creation of a relief fund from which a pension shall be paid firemen, the court held that "a fireman discharged from service therefor (disabled in line of duty) does not acquire a vested property right to his pension which cannot be divested by a subsequent Act of Congress." In *State* v. *Trustees*,[104] the statute read: "*There shall be paid into such fund by each and every member* during their term of service the following sums monthly," specifying them. The Supreme Court of Wisconsin says: "While the law of 1899 and similar laws, in form, require the officers to pay a certain sum per month out of their salaries into the pension fund, they in fact are not required to do so. The contribution to the fund *is made by the public out of public money*. It is not first segregated from the public funds so as to become private property and then turned over to the control of the pension board, but is set aside from one public fund and turned over to another regardless of the mere words of the law. The effect thereof is to scale down the salaries of the officers in form by so much as measures the contribution by each to the pension fund, but to really fix such salaries at the amount actually paid and to require the payment by the city into the pension fund of the amounts, per month, mentioned as being taken from salaries. Such amounts are no less public money after such payment than before." To the same effect are the cases in the Supreme Court of California.[105]

California, Colorado, District of Columbia, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Utah, Virginia, Washington, and Wisconsin, all have pension funds for policemen, firemen, teachers, or employees, derived in part from contributions retained or deducted from salaries to be paid and have considered them valid. Ohio is the only state that has held differently, and that will be considered below.

(b) Another view is that these contributions are part of the fund provided by the contract of employment between the teacher and the

[103] Macfarland v. Bieber (1909), 32 App. D. C. 513; Rudolph v. United States (1911), 36 App. D. C. 379.

[104] State v. Trustees (1904), 121 Wis. 44, 49; State v. Knowles (Wis. 1911), 130 N. W. 451.

[105] Pennie v. Reis (1889), 80 Cal. 266; Clarke v. Police Ins. Board (1898), 123 Cal. 24; Burke v. Board of Trustees (1906), 87 Cal. App. 421; Cohen v. Henderson, 124 Pac. 1037; Compare Kavanagh v. Board of Police (1901), 134 Cal. 50.

public authorities.[106] As has already been stated a public school teacher is a public employee; he has authority to teach in any particular school only by virtue of a contract made with those in control of such school. His relation to such is based upon the contract made. No one has any right to teach in the public schools except upon the terms prescribed by the state, and by those in whom the control of the public schools has been vested. The state certainly can name terms and conditions by statute, which will enter into and become part of any contracts to teach made afterward, just as fully as if they were expressly written into any formal contract signed by the parties thereto, just as the statute of frauds applies to every contract made. This seems too plain to need citation of authority. There are, however, excellent authorities directly in point.

In *Ball* v. *Board of Trustees*,[106a], the Act of 1896, provided that any teacher who had taught in the public schools for 20 years, and had become incapacitated, shall at his request be retired, and shall thereafter receive an annuity fixed by the law out of the fund made up partly by contributions from teachers and partly by gifts, etc. In 1899, the Act of 1896 was so amended that the retirement of a teacher should be dependent upon the approval of the board of trustees, and not merely upon request as before. *Held*,—the legal relation between public school teachers who accepted the Act of 1896, and the trustees of the fund was that of contract, the terms of which were the provisions of the act,—and this could not be altered without consent of both parties, upon sufficient consideration, and the Act of 1899 could not change the terms of the contract. So too, the later case of *Allen* v. *Board of Education*,[107] holds the same way. Here the plaintiff brought an action to recover $54.16 salary for April, 1910, and from which the Board of Education deducted $1.08, being 2%, claiming the right to do so under teachers' pension law of 1907. Plaintiff had entered into a written contract in May, 1909, and began her duties in September, 1909. The Teachers' Retirement Fund was created by statute in 1896, amended in 1899. In *Ball* v. *Trustees, supra*, it was held that under these acts the relation between the teachers and the Trustees of the Fund, was one of contract, and no teacher was a member of the fund unless he had elected to become so. The Act of 1907, provided that "Every person

[106] Atkin v. Kansas (1903), 64 Kans. 174, 97 Am. St. R. 343, — U. S. —, 24 S. Ct. 124.

[106a] Ball v. Board of Trustees (1904), 71 N. J. L. 64; see also Steinson v. Board of Ed. (1901), 165 N. Y. 431, 59 N. E. 300; Murphy v. Board of Ed. (1903), 84 N. Y. S. 380; Moore v. Board of Ed. (1907), 106 N. Y. S. 983; see Atty. Gen'l v. Board (1908), 154 Mich. 584.

[107] Allen v. Board of Education (N. J. 1911), 79 Atl. 101.

who shall be appointed to any position . . . on or after January 1, 1908, shall become a member of the fund by notice of that appointment."

"This statute was in force when the contract between the plaintiff and defendant was entered into, and it formed a part of such contract and was one of the terms of employment of the plaintiff. The creation of this fund was an important public measure, which may well be considered as tending to make the system of free schools established by the act both thorough and effective by rendering the position of the teacher a more desirable one, because of the advantages arising out of the fund. It was a public scheme designed for the betterment of a branch of the service. It was offered to persons seeking and desirous of becoming teachers, who were at liberty, at their option, to accept such positions, subject to the terms of the statute, or to refuse them. If they did accept, then the provisions of the act became by such acceptance binding upon them. We conclude therefore that the act aside from any constitutional invalidity, became a part of the contract entered into between the parties to this suit, and authorized the deductions of the percentage retained by the school board, and that the judgment of non suit was properly ordered.

"It is said to deprive persons of property without due process of law, by taking the property of one person and giving it to another, or if the use be considered a public use, then a taking without compensation. This argument loses sight of the fact that by the terms of the agreement of employment embodying the statutory terms, the salary to be paid was a net amount, and not a gross amount, and thus there was in fact no taking.

"Next objection is that it cannot be sustained as the exercise of the taxing power of the State. In answer it may be said the act is not intended to be, and is not in fact an exercise of that power.

"Another objection is that *it is special,* contrary to Const. Art. 4, sec. 7, par. 11, legislature shall not pass *private, local* or *special laws.* Argument is: Grant is to the Teachers' Ret. Fund—*a corporation or association,* exclusive privileges, and to those employed prior to January, 1908, the right to receive their entire salary, without deduction; which right is denied to those employed afterwards. The statute necessarily considered two classes—those employed before and those after its approval. It could not change the contracts of those employed before, and it was not possible to compel all teachers to be governed by the act,—*Ball* v. *Bd. of Trustees,*—but it gave these the option to come in. Its benefits therefore were not exclusively for those hiring afterward. Where all the objects that can consti-

tutionally be included in a class are included such legislation is general." . . . "Contracts relating to the employment of teachers under a thorough and efficient system of instruction, if they could be divorced from the system, certainly are not improperly related to it. From these contracts becomes established a fund available for disabilities and infirmities of old age, and therefrom flow inducements for long and continued service, with its consequent enlarged experience, and other numerous advantages readily recognized by every thoughtful person making for efficiency and thoroughness. The title of the act expresses a single object, and the creation thereby of the Board of Trustees of the Teachers' Ret. Fund is germane to and one of the products of the act."

An English case holds:[108] Where a school board, without statutory authority, established a pension fund, by a deduction of 2% from salaries of such teachers as consented, and to which a teacher consented and allowed the deduction for nine years, such teacher could not recover the money so paid although the board had no authority to create such a fund, if it actually did so, for there was no failure of consideration.

The following case[109] is inconsistent with the case just referred to, but only on the *ultra vires* character of the action of the school board. It is in general accord otherwise with the foregoing cases. The facts were:

The Board of Education of Minneapolis, without express legislative authority adopted rules to form a pension fund for teachers, by *requiring* teachers when they were employed to enter into a contract consenting that one per cent of their salaries should be deducted, and applied to such fund. *Held,* not authorized by the legislature. LEWIS, J.: "The conviction cannot be avoided that the effect of such a requirement, when applied to all teachers employed, must be to compel some of them, at least, to enter into the contract upon compulsion, and without any expectation of receiving any personal benefit therefrom. It is difficult, therefore, to sustain the validity of the act on the part of the *board of education* in thus withholding the 1 per cent of the salaries on the ground that such a plan was voluntarily entered into by the teachers in signing the contract." . . . "Here the board of education are not acting voluntarily, as individual members, but they have acted and are acting as a board claiming to be clothed with authority under the law to exact from the teachers employed a certain percentage of their compensation. It may

[108] Phillips v. London School Board (1898), 2 Q. B. 447.
[109] State v. Rogers (1901), 87 Minn. 130, 91 N. W. 430, 58 L. R. A. 663.

be admitted that the purpose to be accomplished in providing an annuity for those who have been faithful, and who have become incapacitated in the service, is a worthy one and, in a general sense, for the benefit of the schools. We do not wish to intimate that the care of those who have given their life work to a cause of such benefit to the public may not to some extent be provided for when the limit of activity is reached, *and the fund for that purpose be raised by taxation.* It certainly conduces to the welfare of the school system to make it profitable and attractive for persons to devote themselves to the work, and, if it would attract to the service a better class of teachers, is not such an object for the benefit and welfare of the school system? *Conceding therefore that the legislature might grant the power within proper limits to provide a fund for such purpose, it is very clear that it has not been done.*

"The board's authority is also questioned on the ground the money retained is public money. . . . If the entire salary had been paid to the relator, and he had then voluntarily relinquished or paid back 1 per cent thereof for the purposes expressed, it would clearly be private money; but 1 per cent never had been paid in fact, and it never was contemplated that it should be. When the relator entered into the contract he surrendered absolute control over that portion of his salary, and in effect, entered into a contract with the board that his salary should be 99 per cent of the amount nominally stated. So from this view it appears that the money never left the treasury, but remained public money, and the Board had no authority to divest it from the uses mentioned in the statute."

(c), and (d) Opposed to the foregoing doctrines that the moneys retained are public moneys, and the contributions are contracted to be paid by the teacher in order to obtain a pension from the State when he retires are some Ohio cases. The leading one takes the view that the amounts retained are either *taxes* imposed upon the teachers, and invalid because not uniform, or they are a taking of the private property of the teachers without compensation or without due process of law. In the light of the foregoing cases it seems impossible to hold these views, and the Ohio cases are unsupported by other authority.

The facts in the principal Ohio case were:[110]

Ward had been employed as a night teacher in the schools of Toledo at $24 per month, and had accepted such appointment after the pension law (92 O. L. 683) in "City districts of the 3rd grade

[110] Hubbard v. State (1901), 22 O. C. C. 252, 12 O. C. D. 87, 65 O. S. 574, 64 N. E. 109, 58 L. R. A. 654. See also State v. Kurtz (1901), 11 O. C. C. D. 705, 21 R. 261; 11 O. D. 266, 8 N. P. 152.

of 1st class" (Toledo) had been enacted, and was notified in writing that his appointment was subject to the provisions of the act. At the end of the first month he applied for his salary of twenty-four dollars ($24) and was offered this sum less 1% or 24c, being the amount authorized "to be deducted" from his salary under the law to be paid into the pension fund. He brings mandamus to compel the issuing to him a warrant for the full amount of his salary. The court in ruling for the plaintiff says in reference to such deductions being taxes:

"Sec. 26, Art. 2, provides "all laws of a *general nature* shall have uniform operation throughout the state."

"The common schools are provided for in the constitution and constitute an institution in which every community and citizen is interested. The subject matter therefore is of a general nature, and whether a law is of a general nature is determined by the subject matter. Sec. 2 of the Act provides that the board of education of such city shall *at its first meeting* after the act goes into effect, &c., and the teachers shall within thirty days do certain things. This clearly makes it impossible to be applied to future cities which may come within the third grade of first class, and therefore it cannot have an uniform operation throughout the state."

"Const. Sec. 2, Art. 12, "Laws shall be passed taxing by uniform rule all moneys, credits, &c." Now if pension legislation is for the benefit of the public,—for the public good,—then money raised for such purposes can only be regarded as taxes, and this money deducted from the teacher's salary is a tax. It is taking a certain percentage of the money or property they are entitled to, from month to month, for the public good, and if this pension legislation can be sustained, and if a tax to raise pensions can be levied, in our judgment that tax should be levied upon all of the property and citizens owning property in the school district where the pension law is in force. A law which imposes the burden of taxation upon one class of citizens, to-wit, teachers, cannot be called a law taxing by a uniform rule."

This reasoning certainly is incorrect if the sums retained are already public money,—since they are raised by taxation of property under general laws for school purposes, and not by *taxing* the teachers at all,—and the sums retained never became the property of the teachers, if in fact retained. And again if they were in fact paid to the teachers first and became part of their property, and were afterward paid back by the teachers into such a fund under an agreement to do so, they would not be *taxes* at all, but would be either voluntary *gifts* to the State,—and there is no law forbidding

such,—or payments made by the teachers to the State in consideration of its promise to pay such teacher a *pension* (contingent though it might be upon uncertain events) when he shall have served a certain length of time. This would be a *quid pro quo,* even though the State might repeal the pension law entirely before the right to the person vested by fulfilling all the other conditions.

The court continues as to the contributions being a *taking* of the teachers' property as follows:

"If on the other hand, the money so deducted is not to be regarded as taken for the public good, and as taxation, then it is the taking of the private property from one citizen for the benefit of another, without his consent and against his will," contrary to Sec. 19, Bill of Rights that "Private property shall ever be held inviolate." "It is argued in favor of this act that the 1% so taken and devoted to this purpose is not taken from the teachers or from their salaries, but is taken, and should be held to be taken, from the public funds; that the effect and result of the act is simply that the teachers are paid that much less in salaries; but this argument is contrary to the express language of the statute, which provides § 1, "One per cent of salaries paid to all teachers . . . shall be deducted, &c.," so that the statute by its own terms and express language provides that this money shall be deducted from their salaries; and that is in fact what was done in this city, and sought to be done in this case. Contracts were made with the teachers to pay them a certain salary, and from that salary as agreed to be paid one per cent was deducted and devoted to this purpose. A teacher's salary is his property. He has a right, under the constitution to use that salary for his own benefit or for the benefit of others as he sees fit. If he thinks it best to provide for old age, he may do so; but if he prefers to spend his money as he earns it, it is his right under the constitution, to do that."

It will be noted that the statute in this case reads the same as those involved in *Pennie* v. *Reis,* and the cases in New York, District of Columbia, Wisconsin, and California above reviewed, and is in direct conflict with them upon this point.[110a] No one of these cases was referred to in any of the Ohio cases. In the *Kurtz*[110b] case, in the Circuit Court, the court did not refer to this point, but held a similar law unconstitutional because it was a general law, and could

[110a] Pennie v. Reis (1889), 80 Cal. 266, 132 U. S. 46; Matter of Friel (1905), 101 App. D. 155; Matter of Mahon v. Board of Ed. (1902), 171 N. Y. 265, 89 Am. St. R. 810; Macfarland v. Bieber (1909), 32 App. D. C. 513; Rudolph v. U. S. (1911), 36 App. D. C. 379; State v. Trustees (1904), 121 Wis. 44, 49.

[110b] State v. Kurtz (1901), 11 O. C. D. 705.

not, under the constitution, be limited to the City of Cleveland, just as the court in this case holds the law is unconstitutional also because, being general, it is limited to Toledo,—this reason being abundantly supported by the Ohio decisions upon such legislation in regard to other matters. The law held unconstitutional in this case was amended in 1902, (95 O. L. 609) so as to read "All teachers hereafter appointed . . . shall be notified within 30 days after their appointment, and they shall be required to notify said board of education within six months thereafter whether they consent or decline to accept the provisions of this act." The circuit court of Ohio has said in a later case,[110c] that this amendment has removed both of the defects—non-uniform taxation of teachers, and taking their property without their consent,—in the *Hubbard* case. If the contributions were really *taxes,* it is difficult to see how *consent* of teachers would make them any more uniform; and if they are not *taxes* but matters of contract they do not have to be uniform;[110d] so too if they merely are part of the terms and conditions the State imposes upon all teachers who engage in teaching after the law goes into effect, for the general benefit of the school system, and the amounts contributed are based upon a reasonable classification, according to term of service, they would be valid under the principle of graded taxation of inheritances,[111]—for the right to teach school in public schools is no more of a private right than is the right to inherit or devise property. And even if such contributions are compulsory upon teachers entering the service after the law goes into operation, or upon such consenting old teachers as continue in the service, they are still valid under the decisions of the Supreme Court of the United States, on the principle on which are based the compulsory contributions in the bank guaranty cases,[112] and of the state courts, the compulsory contributions in the workmen's industrial insurance cases.[113]

The *Hubbard* case also further says: "Liberty to acquire property by contract can be restrained by the general assembly only so far as

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[110c] Venable v. Schafer (1906), 28 O. C. 202, on 205. The firemen's and police pension laws (Gen'l Code, Ohio 1910, §§ 4600 et seq.) require only such contributions from a member "as he voluntarily agrees to."

[110d] See note 74 above, State v. Love (1911), 89 Neb. 149, 131 N. W. 196, Ann. Cas. 1912 C. 542.

[111] Knowlton v. Moore (1900), 178 U. S. 41; State v. Frear (1912), 148 Wis. 456, Ann Cas. 1913 A, 1147; Keeney v. New York (U. S. 1912), 32 S. Ct. 105; Union Trust Co. v. Wayne Prob. J. (1901), 125 Mich. 487.

[112] Noble State Bank v. Haskell, 219 U. S. 104, 31 S. C. 299.

[113] Borgnis v. Falk Co. (1911), 147 Wis. 327, 133 N. W. 209; Cunningham v. N. W. Imp. Co. (Mont. 1911), 119 Pac. 554.

such restraint is for the common welfare and equal protection and benefit of the people, and such restraining statute must be of such a character that a court may see that it is for such general welfare, protection and benefit. The judgment of the general assembly in such cases is not conclusive. . . . The right to labor and enjoy the reward thereof is a natural right which may not be unreasonably interfered with by legislation. . . . Our Bill of Rights prohibits the granting of privileges to one which are denied to others of the same class, and the impositions of restrictions or burdens upon certain citizens from which others of the same class are exempt. . . . All laws of a general nature shall have a uniform operation throughout the State..... A statute therefore which imposes restrictions or burdens, or grants special privileges to persons engaged in the same business, under the same circumstances, cannot be sustained... In our judgment each individual has the right to draw his full salary, and spend it or save it as he sees fit, and that is his right as a citizen under the constitution."

This is not entirely clear; the court seems to hold that the right to acquire property by contract, includes the right to contract with the State to teach school, not on the terms fixed by the State, but on some terms inherent in the teacher beyond the control of the State. Such a doctrine cannot be sustained either upon reason or authority. It takes two to make a bargain, and the State has as much right to fix the terms upon which it will employ some one as any other employer has, and to name the terms is only to make an offer, and in no way deprives any one of his liberty to contract,[114] and especially to hold office or employment in the public service.[115] No case has been found following the *Hubbard* case in this regard. The substantial basis on which this Hubbard case can rest is that it was special legislation applying to only one City of the State contrary to the Constitution. The other objections to the law are untenable.

The Constitution provides the salary of no public officer shall be decreased after election or appointment.[116]This provision does not apply to any officer holding at the will of the appointing or employing

[114] Atkin v. Kansas (1903), 64 Kans. 174, 97 Am. St. R. 343, — U. S. —, 24 S. Ct. 124; In re Broad (1904), 36 Wash. 449, 70 L. R. A. 1011, 78 Pac. 1004; Byars v. State (Okla. 1909), 102 Pac. 804; Soliah v. Heskin (1912), — U. S. —, 32 S. Ct. 103. Compare People v. Coler (1901), 166 N. Y. 1, 52 L. R. A. 814, 82 Am. St. R. 605; Street v. Varney Co. (1903), 160 Ind. 338, 61 L. R. A. 154, 98 Am. St. R. 325; Withey v. Bloem (Mich. 1910), 128 N. W. 913.

[115] Atty. Gen'l v. Jochim (1894), 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. R. 606; Moore v. Strickling, 46 W. Va. 515, 50 L. R. A. 279; State v. Grant, 14 Wyo. 41, 116 Am. St. R. 982.

[116] Const. Mich. 1909, Art. XVI, § 3.

power, such as teachers or firemen.[117] As to such teachers (if teachers were public officers), or officers who commence to teach or accept office after such law goes into effect, it does not operate as a breach of contract or decrease compensation, if what is retained is public money, since the salary offered is actually only the net amount, and the agreement is to take the lower compensation. The same is true of those who have existing contracts, or who are in office at the time the act goes into effect, since the provisions do not apply to them unless they accept within a year. If they do accept, then there is no *decrease of salary,* but either donations by the one affected, or the purchase of a future contingent annuity from the State by him.

"Section IX. Boards of education, trustees and other school authorities, having duties to perform in respect to the payment of salaries to public school teachers who are under this act, shall cause to be deducted from each warrant or order issued to any of such teachers for the payment of such teachers, the amount due from such teacher to the teachers' retirement fund and forward the same to the treasurer of this fund in the manner prescribed by the retirement fund board.

Penalty for Neglect of Duty. Any teacher, member of a board of education, member of the Retirement Fund Board, or any other person who shall neglect to perform his duty as prescribed by this act, after due notice has been given defining such duty, shall be liable to a penalty of fifty dollars for each offense, to be recovered in an action of debt in the name of the people of the State of Michigan. And in case of any such liability, the attorney general, upon requisition of the retirement fund board, shall prosecute and recover the penalty herein provided, and when recovered pay the same into the state treasury to the credit of the primary school fund."

The provisions of this section need no comment further than what has been said concerning the provisions of Section VIII. They are within the power of the State in providing the necessary administrative machinery for enforcing the law.

"Section X. *Retirement of Teachers.* A teacher who has taught for a period of thirty years, at least fifteen years of which period, including the last five years immediately before the date of application for retirement, shall have been taught in the public schools in this state, shall, upon his retirement from actual service as a teacher, on or after August 1, 1913, be entitled to an annuity of a sum equal to one-half of the average annual contractual salary paid to said teacher during the last five years of service, provided that no annuity shall exceed the sum of five hundred dollars annually, nor less than two hundred and forty dollars annually.

2. A teacher who has taught for a period of twenty-five years, at least fifteen years of which period, including the last five years immediately before the date of application for retirement, shall have been taught in the public schools of this state, shall, upon his retirement from actual service as a teacher, on or after August 1, 1913, be entitled to an annuity which bears the same ratio to the annuity provided for on retirement after thirty years of service

[117] Ward v. Board of Ed., 11 O. C. D. 671; Somers v. State, 5 So. D. 321; State v. Johnson, 123 Mo. 43.

as the total number of years of service of said person bears to thirty years.

3. A teacher who has taught in the public schools of this state for a period of fifteen years, and who is either physically or mentally incapable of teaching and who is deemed deserving of an annuity by the Retirement Fund Board, may be retired and shall, upon his retirement be entitled to an annuity of as many thirtieths of the full annuity for thirty years as said teacher has taught years in the public schools of this state.

4. Such retirement may be had on request of the teacher, or upon the request of a board of education of a school district. A request for retirement shall be made in writing addressed to State Teachers' Retirement Fund Board, accompanied by evidence showing that the teacher named is entitled to retirement, and that he has complied with the provisions of this act and the rules of the board relating to the payment of annuities. The board shall pass upon all requests for retirement and shall determine whether such requests should be granted.

5. In computing the terms of service under this act, a year shall be a legal school year at the time and place where said service was rendered except that where the service was rendered in schools not included within the provisions of this act, a time less than a legal school year in this state shall not be included as a year, but only as such proportion of a year as the number of teaching weeks in each such year bears to the number of weeks required to constitute a legal school year in this state."

These provisions are so similar to those under consideration in the numerous cases reviewed herein, that but little more need be said. The objections made are: that such payments are not for a public but a private purpose; that they are mere gratuities; that they are granting of extra compensation. The first of these has been fully considered, and we found that if they were to be paid only to such teachers as were in the service at the time the act went into effect or entered it afterward, the payments were then for the public purpose of improving the service; but if they were to be made to those who had retired from the service before the act took effect, then by some decisions they would be mere *gratuities*, or extra compensation. According to the provisions of this section it was to apply to a teacher "upon his retirement from actual service as a teacher, *on or after* August 1st, 1913." The bill, if it had been enacted, would have gone into effect before that time. By § I a teacher is a "person employed"; by § VIII, "any person employed as a teacher when this act takes effect," has one year to elect to come under it; and by § XI, no one is eligible who "has not contributed" to the fund. Our schools open in the fall after August 1, each year. These provisions, with the general rules that laws are to have a prospective rather than retrospective operation, and be given such construction as will make them constitutional rather than unconstitutional, if that can be done without violence to the language,—make the proposed law applicable, in my judgment, only to those teachers who have been engaged in the actual work of teaching after the proposed act took effect. We have already seen that, by

all the cases except *State* v. *Ziegenhein*,[118] if this is true, then these payments are not mere gratuities for private purpose.

According to this interpretation however, it would apply to one who had served, say to make an extreme case, only through the month of September, all of his 30, 15, and 5 years of service except this one month being before it. Would the allowance of a pension to such a teacher, if he made up his 60 per cent contribution required by § XI, be *"extra compensation,"* "after the service had been rendered or the contract entered into," contrary to the constitution?[119] I do not think so. Our Supreme Court has ruled that "the superintendent of schools is not a contractor, and an increase of his salary —$4,000 to $6,000—after an appointment for a particular term,— 3 years from June, 1906, the increase to take effect in June, 1907,— looks to the future and not to the past, and hence does not violate" the similar provision in our old constitution.[120] It was held in *Pennie* v. *Reis*,[121] and in *State* v. *Love*,[122] that such payments are not *extra compensation* contrary to such constitutional provisions. The same view is implied in the New York and Pennsylvania cases already reviewed.[123] Even the Missouri case intimates that if any thing had been withheld from the salary, the pension to be granted would then not have been extra compensation,[124] and this provision has not generally been invoked in police and firemen cases, although it exists in most states.[125] In reason too, such a payment, in the case of a *new* teacher, would be a part of the compensation under the contract, and as to an old one it would be the offer of a new contract for a consideration paid by or to be paid by him to the State if the deduction were made from his salary, and agreed to by him. Such a provision was not designed to prevent the establishing of a pension system for poorly paid public servants, who contribute to the fund necessary, and could at most only apply to the grant of mere gratuities for private purposes.

That these payments to teachers do not have to be the same for

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[118] State v. Ziegenhein (1898), 144 Mo. 283, 66 Am. St. R. 420, supra Note 75.

[119] Const. 1909, Art. XVI, § 3; Art. IV, § 21, of the old constitution.

[120] Attorney Gen'l v. Bd. of Ed. (1908), 154 Mich. 584; see also, Hudson v. Atty. Gen'l (1907), 150 Mich. 67; Olds v. Commrs. (1903), 134 Mich. 442.

[121] Pennie v. Reis (1889), 80 Cal. 266.

[122] State v. Love (1911), 89 Neb. 149, 131 N. W. 196, Ann. Cas. 1912 C. 542.

[123] Matter of Mahon v. Board, 171 N. Y. 263, 89 Am. St. R. 810; People v. Partridge (1902), 172 N. Y. 305; Commn. v. Walton (1897), 182 Pa. 373; Commn. v. Baker (1905), 211 Pa. St. 610, 61 Atl. 253.

[124] State v. Ziegenhein (1898), 144 Mo. 283, 291, 66 Am. St. R. 420, 423.

[125] O'Connor v. Trustees (1910), 247 Ill. 54, 93 N. E. 124; Hubbard v. State (1901), 22 O. C. C. 252, 12 O. C. D. 87.

the same term of service,[120] or may be graded according to time of service and amounts of contributions is ruled by cases already reviewed and the workmen's compensation cases cited.[127]

"Section XI. *Payment of Annuities.*

1. A teacher shall not be entitled to an annuity who has not contributed to the retirement fund an amount equal to at least 60 per centum of his annuity for one year. But a teacher who is otherwise entitled to retirement and an annuity under this act, may become an annuitant and entitled to an annuity by making a cash payment to the retirement fund of an amount which when added to his previous contributions to said fund, will equal 60 per centum of his annuity for one year.

2. In case a teacher who shall retire or be retired, is unable to pay in advance the sum required to make up the said 60 per centum of the yearly annuity, the payment of such annuity may be withheld until the portion of the annuity withheld shall equal the sum required to make up said 60 per centum of the annuity.

3. Annuities shall be paid quarterly to the teachers entitled thereto, upon the warrants or orders signed by the president and secretary of the State Teachers' Retirement Board. Vouchers or receipts shall be signed in duplicate by annuitants upon receiving the money paid to them. Said duplicate receipts shall be returned to the secretary of the board, and one of them shall be retained in his office and the other shall be filed in the office of the State Treasurer.

4. Each annuity shall date from the time when the State Teachers' Retirement Board shall take action upon the request made as hereinbefore provided for the retirement of the annuitant."

There seems to be nothing invalid in the foregoing provisions. They have been covered in what has already been said. That teachers who have taught only a short time after the act goes into effect, are entitled to pensions as well as others is directly ruled by *O'Connor* v. *Trustees,* and *State* v. *Knowles,*—only two out of twenty years having been served after law went into effect.[128]

"Section XII. *Refunds.* Any teacher who shall cease to teach in the public schools of this state before receiving any benefit or annuity from the retirement salary fund, shall, if application be made in writing to the Retirement Fund Board within four months after the date of his or her resignation, or removal, be entitled to the return of one-half of the amount, without interest, which shall have been paid into the fund by such teacher. If such teacher should again thereafter teach in said public schools, he or she shall, within one year from the date of his or her return to the service in said public schools, refund to the retirement salary fund the amount so returned to such teacher, together with simple interest on said amount (but not to exceed six per centum per annum) for the time such amount was withdrawn from the fund."

"Section XIII. Any person retiring under this act may again enter upon the work of teaching in said public schools; during said term of teaching the

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[126] State v. Love (1911), 89 Neb. 149, Supra Note 74.

[127] Borgnis v. Falk Co. (1911), 147 Wis. 327; Cunningham v. Imp. Co. (Mont. 1911), 119 Pac. 554.

[128] O'Connor v. Board of Trustees (1910), 247 Ill. 54, 155 Ill. App. 460; State v. Knowles (1911), 145 Wis. 523, 130 N. W. 451. See Notes 71, 72, 73, and 74 above.

annuity paid to such person shall cease. Said annuity shall again be paid to said person upon his or her further retirement."

"Section XIV. A suitable office in the capitol with suitable furniture and office supplies shall be furnished the retirement fund board."

"Section XV. Nothing in this act shall be construed in such a way as to interfere with any existing fund for the payment of retirement salaries to public school teachers."

These provisions for refund seem to be entirely valid for two reasons: (1) it becomes a part of the agreement when one enters into the service after the law goes into effect; and (2) the amount deducted remains in the treasury as public funds,—and hence does not deprive any teacher of his property without due process of law, even if no part is to be repaid to him. This is covered by the cases already fully reviewed.[129]

From this study of pension legislation, and decisions, it is believed the proposed law under the rules above given, is valid in every particular, and the Ohio and Missouri cases stand alone and are in conflict with the great current of legislation and decision in all the other states and of the Federal government.

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[129] See Notes 101-109 above.

THE DEBT OF THE MODERN LAW OF GUARDIANSHIP TO ROMAN LAW.

THE Roman law of guardianship grew out of the family organization. It is also quite closely connected with the law of inheritance. The power of a guardian is that form of family power which ordinarily takes the place of paternal power when there is no one to exercise the latter. It was originally at Rome but an extension of the paternal power.[1] In this respect the conception of guardianship is different in English law,—English guardianship rests on the principle of protecting the bodily and mental immaturity of youth.[2]

Duties common to all guardians (*tutors or curators*). 1. Every guardian, whether tutor or curator, must give security for the faithful performance of his duties. This is also the rule in Anglo-American law.[3]

2. He must make an inventory of the property of his ward. The French, Japanese, and Anglo-American law are the same as the Roman.[4]

3. He was personally liable at Roman law for fraud, neglect, or waste of the ward's property. And he could also be removed for such malfeasance in office; this was known as removal on the charge of suspicion (*crimen suspecti*). If he wasted or alienated the ward's property in any way, not only may he be removed, but he was also liable to a double value fine, or to a restitution to the ward upon the ward's reaching majority or upon his own removal.

In German law it is provided that the guardian cannot dispose of or give away the property of the ward. Almost all his acts of an obligatory nature must receive the sanction of the family council.[5] In French law the guardian cannot contract an obligation or sell property for the ward without consent of the family council.[6] In England and America, alienation of the ward's property cannot be had without sanction of the proper court.

4. The guardian—tutor or curator—has charge of the person as well as the property of the ward.[7] This is also the rule of French, Spanish, German and Anglo-American law.[8]

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[1] See Maine, Ancient Law, ch. 5; Williams, Inst. of Justinian, p. 31.

[2] Maine, Ancient Law, ch. 5.

[3] Williams, Inst. of Justinian, p. 37, 42.

[4] Civil Code of France, 470; Japan 917.

[5] Civil Code of Germany, 1804, 1812.

[6] Civil Code of France, 450, 457.

[7] Inst. of Justinian, 1, 14, 3; Sohm, Inst. of Rom. Law (Ledlie 3d ed.) § 103, p. 488.

[8] Civil Code of France, 450; Spain; Germany 1794; England and United States—see Terry, Common Law, p. 690; Williams, Inst. of Just., p. 32.

5. The guardian—tutor or curator—must hand in a final account of his administration to the ward or his heirs upon the termination of his guardianship.

Modern law repeats the Roman on this point. The French civil code provides[9] that "Every guardian is accountable for his management when it has expired," and that "every guardian, other than the father and the mother, may be compelled, even during the guardianship to give . . . statements of the situation of his management . . . but not more than one in each year." The Japanese Law is the same as the Roman.[10] German, Spanish and Anglo-American law require, like the Roman, a final account to the ward.[11]

State control over guardianships generally. Although not so pronounced as in modern law, such control was present in Roman law. The State required the guardian to give security against maladministration. It punished him for failure to make an inventory. By the Emperor Severus in the year 195 was introduced the rule that no alienation of the ward's property could take place without the sanction of the State. In some cases the State might perform the duty of removing a guardian.

The two kinds of Guardianship. There were two kinds of guardianship in Roman law,—tutorship (*tutela*) and curatorship (*curatela*). These terms are used according to the guardian's authority, or, conversely, the relative incapacity of the ward. The ward was known in Roman law as a pupillus (pupil). The guardian was called in Roman law either tutor or curator.

I. Tutorship (*tutela*).

That form of guardianship known in Roman law as tutela was concerned with two classes of persons,—persons under puberty and women.

A. *The guardianship of persons under puberty* (*tutela impuberum*). Such persons are often called minors. But minor means here a person sui juris, independent of the paternal power but under the age of puberty. Puberty was fixed in the Justinian law at fourteen for males and twelve for females. Such a person must have a guardian, known as tutor.

Who may be a guardian (*tutor*). To be a guardian, a person must be twenty-five years of age, a citizen and not an alien. No woman could be such, save the mother or grandmother of the ward.

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[9] Arts. 469 and 470.

[10] Civil Code of Japan, 937.

[11] Civil Code of Germany, 1802, 1840; Spain, 279 et seq.; Robinson, El. Law, § 200.

In Anglo-American law no person under majority can act as a guardian,—a rule based on the Roman rule of making eligibility depend upon attaining the age of unlimited capacity.[12]

The tutorship (tutela) a public office; excuses relieving therefrom. The Roman law treated the duty of guardianship as a public burden (munus publicum). No one could refuse to act as a guardian unless relieved by certain legal excuses.

Some of these excuses in Roman law were: 1. Having three living children at Rome, or four in Italy, or five in the provinces,—children dying in military service for the state were counted as if alive. The Spanish is like the Roman law,—having five children is an excuse.[13]

2. Three burdens of guardianship at one time. In Spanish law one burden of guardianship on hand is an excuse from taking up a second.[14]

3. Having certain functions or duties requiring absence from home on business for the state. This is also an excuse in Spanish law,[15] but not in English law.[16]

4. Poverty. This is also an excuse in Spanish law,[17] and probably in English law.[18]

5. Ill-health. This is also an excuse in Spanish law.[19]

6. Illiteracy. This is also an excuse in Spanish law.[20]

7. Being over 70 years of age. The Spanish law reduces the limit to 60 years,—over 60 is an excuse.[21]

The classes of guardians (tutors). From the mode of their appointment guardians—tutors—were of four classes: testamentary guardians, statutory guardians, guardians appointed by courts, fiduciary guardians.

1. *Testamentary guardians (tutores testamentarii).* These are appointed by the father's will. To make the appointment valid the ward must be alieni juris until the father's death and become sui juris only by such death.

The English Common law allows as to minor children testamentary guardians, which however differ in some details from the Roman

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[12] Williams, Inst. of Justinian, p. 42.
[13] Civil Code of Spain, art. 244.
[14] Ibid.
[15] Civil Code of Spain, 244.
[16] Williams, Inst. of Justinian, p. 42.
[17] Civil Code of Spain, 244.
[18] Williams, Inst. of Justinian, p. 46, 43.
[19] Civil Code of Spain, 244.
[20] Ibid.
[21] Ibid.

law testamentary guardians.[22] In certain cases, too, in the modern law of England a mother may appoint a guardian by will.[23] In England and America, by force of statute a father (and in most places a mother if the father is dead) may appoint a guardian for a child by deed or will, which guardianship may be made to last until the child comes of age or for a shorter time. Such guardians are called, rather loosely, guardians by statute, but more properly, inasmuch as they are appointed by will, testamentary guardians.[24]

2. *Statutory guardians* (*tutores legitimi*). These are so called because appointed by operation of law when there was no testamentary appointment. By the Law of the XII Tables this appointment fell on the agnates, and, failing them, the cognates gentilice. In Justinian Roman law it fell on the nearest capable ascendant heir.

In French law, the guardianship of ascendants goes to the nearest ascendant, the paternal relative being preferred to the maternal relative.[25] The only partial counterpart in English law to the statutory agnatic guardianship of the Roman law is the ancient English law guardianship by nature and guardianship by socage,—both of which may have been suggested by the Roman law statutory guardianship of agnates.[26]

3. *Guardians appointed by the courts* (*tutores dativi*).[27] In default of testamentary or statutory guardians, the proper Roman magistrate—praetor, governor of a province, etc.—appointed guardians either temporarily or to fill a vacancy.

In Spanish law this class of guardians is found; they are appointed by the municipal judge on request of a family council held before him.[28] In Anglo-American law the guardian ad litem as well as the vast body of guardians of minors are judicially appointed guardians. The long standing jurisdiction of the English Court of Equity over infants—often delegated in the United States to a surrogate court or court of probate—is probably borrowed from the Roman praetor's jurisdiction over the same class of persons.[29]

4. *Fiduciary guardians* (*tutores fiduciarii*). Fathers had to act as guardians for their emancipated sons not of full age, and masters for their manumitted slaves. This is often called in the classic

[22] Williams, Inst. of Justinian, p. 32; Terry, Common law, p. 690.
[23] Williams, Inst. of Justinian, p. 33, 49 & 50 Vict. c. 27.
[24] Terry, Common law, p. 690.
[25] Civil Code of France, 402-405.
[26] Williams, Inst. of Justinian, p. 34; Stephen, Commentaries, vol. II, bk. III, ch. IV.
[27] Gaius and Ulpian call testamentary guardians by this name (Gaius I, 154), but in the law of Justinian it is used only to designate guardians appointed by magistrates.
[28] Civil Code of Spain, 231-232.
[29] Williams, Inst. of Justinian, p. 36.

Roman law[30] fiduciary guardianship, and the guardian, fiduciary tutor. In Justinian's time, the words "fiduciarius tutor" acquired a different meaning,—the children formerly in power of a deceased parent who in his lifetime emancipated a child: these children formerly in power become fiduciary guardians over their sons, brothers and sisters and the rest.

There is a survival of the Roman fiduciary guardianship of parents in Anglo-American and other modern law where the father or mother has a very limited amount of control over children set free or given their time.[31]

Powers and duties of guardians (*tutors*). These were determinable when the degree of incapacity of the pupillus is established,—the younger the ward the greater the authority of the tutor.

1. If the ward is under seven years of age (*infans*), the tutor acts in his own name for the ward. The pupillus cannot perform by himself, even with the tutor's consent, any legal act. The custody of the infans went to his mother.

2. After the ward is seven years old (*pupillus*) he has intellectus but not judgment. The tutor acts with him, adds his authority expressly or by ratification to the act of the pupillus, which makes it a juridical act binding both the ward and the person with whom he deals.

The English infant as well as ward corresponds to the Roman pupillus, provided it be borne in mind that English law has generally amalgamated the two ages of capacity and recognizes but one, except as to marriage and criminal responsibility.

As to his contracts the ward in Roman law binds himself, in any event, only so far as a transaction benefits himself: the ward can never make his condition worse. In English law the rule is practically like the Roman. By English law all contracts by infants made to his prejudice or disadvantage are void,—all others are voidable at his election.[32]

B. *The guardianship of women* (*tutela mulierum*). This guardianship was anciently declared "perpetual." The Roman jurist Gaius during the early Empire states[33] that "Whatever their age and notwithstanding their marriage, if they were females, according to our ancestors, even women who have reached their majority, on account of their levity of disposition, require to be kept in tutela." This

[30] For instance, in the time of the Roman jurist Gaius,—latter half of 2nd century, A D.

[31] Williams, Inst. of Justinian, pp. 35, 36.

[32] Ibid., pp. 31, 38; 2 Stephen, Comm., bk. III, ch. IV.

[33] Gaius, Institutes, 1, § 144.

tutela was either of her agnates or her husband. But this had become attenuated from the end of the Roman Republic itself,—a woman under guardianship at the beginning of the Empire can generally dispose of her property. And Gaius himself records how a woman's guardian may be forced to give his authority to her acts; and the Roman jurist Ulpian records that the Emperor Claudius[34] abolished the statutory guardianship of agnates over women. In the early imperial Roman law there was always another sure way of escaping the tutela: if a freeborn woman had three, or a freed woman four, children, legitimate or illegitimate.

Traces of the "perpetual" guardianship of women are found in a very shadowy attenuated form as late as the reign of Diocletian.[35] In the year 410—a little over a century prior to Justinian's era—the guardianship of women absolutely disappeared in consequence of a statute of the Emperors Honorius and Theodosius. It is not found at all in the Justinianean Roman law, nor does it exist in modern law.

II. Curatorship (*curatela*).

It was gradually recognized in Roman law that persons between fourteen and twenty-five need some protection. An individual of fourteen is fully sui juris, but needs counsel and help to prudently manage his affairs. A minor under twenty-five who was defrauded could, by the lex Plaetoria, bring a criminal prosecution against the person injuring him. The praetor would grant him a restitutio in integrum if the transaction injured the minor. Therefore a person would hesitate to deal with a minor under twenty-five, because he might avoid a transaction. The Emperor Marcus Aurelius enacted that a plea of minority would not be received by the courts if a curator were appointed for a minor on his application. This is the basis of the Roman law as to curators.

Curators are special or general. No person under twenty-five could be forced to receive a curator against his will, unless insane, or engaged in a lawsuit, or unless a debtor wished to compel him to receive payment. Curators in Roman law were general—appointed over the entire estate of the person in curatorship, or special—appointed for a certain affair or transaction.

In modern law curators are either general or special, as in Roman law. The guardian ad litem, although not called usually a "curator," is an excellent illustration of the special guardian in English law—a survival of the Roman special curator.

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[34] Reigned 41-54 A. D.
[35] 284-305 A. D.

To be eligible for appointment as a curator, a person in Roman law must be twenty-five years old completed. This rule was also applied to eligibility for appointment as tutor,—twenty-five being the age where full civil capacity could be obtained by a person sui juris. In modern law, the person appointed as guardian must have attained the full capacity given by majority.

Powers and duties of curators. The curator was not so powerful as the tutor, for the person under curatorship, unless insane or mentally incapacitated, could legally act without his consent, subject to restitution by the praetor if damaged in so doing. Generally however, as a matter of precaution, the consent of the curator was obtained.

The curatorship of insane persons, spendthrifts, and other naturally incapable persons. This curatorship owes its origin to the ancient Roman Law of the XII Tables. At first the agnates were such curators. In Justinianean Roman law these curators were appointed judicially, *i. e.,* by the magistrates. Ordinarily the nearest ascendant was appointed.

Survival of the guardianship of insane and incapable persons in modern law. This survival is world-wide. These unfortunate persons even when over the age of majority are protected by guardians, called generally "curators" in so-called Latin countries. And the Roman law protection of the deaf and dumb by guardianship is frequently to be found in modern law.

The German civil code provides[36] "That any person who is totally incapable by reason of mental infirmities of managing his affairs should be put under guardianship." By article 1899 the father of such incapable should be appointed; if not alive, the mother.

In French law "The adult who is in an habitual state of imbecility, dementia or madness, should be interdicted, even when this state presents lucid intervals . . . The interdiction or the appointment of an adviser shall take effect from the day of the judgment. All acts subsequently done by the interdicted, or without the assistance of the adviser, shall be null. A deaf and dumb person who cannot write must have a curator appointed to validly accept a gift."[37]

Spanish law similarly provides, like the Roman, for the guardianship of the insane, weak-minded, spendthrifts and deaf and dumb persons.[38]

By the Japanese civil code "A case for guardianship arises when

[36] Art. 1896.
[37] Civil code of France, 489, 502, 936.
[38] Civil code of Spain, 213, 220-221.
[39] Civil code of Japan, 900, 911, 912.

a person of full age has been adjudged incompetent. . . . Weak-minded, deaf, dumb or blind persons and spendthrifts may be placed under curatorship as quasi-incompetent. . . . A quasi-incompetent person must have the consent of his curator for contracting any obligation, bringing or defending a suit, and accepting or refusing an inheritance."[39]

In England at common law the King as parens patriae is the guardian of all idiots and lunatics, which function he exercises through some Court, *e. g.*, Chancery. In the United States the State takes the place of the King and acts through the courts of equity or of probate. If the insane person has property, a judicial inquiry into his sanity results in a guardian (or, to use the other names, "conservator," "committee") being appointed to take charge of his property and often his person.[40] In regard to spendthrifts (prodigi) the law of Scotland is the same as the Roman law; but English law does not take jurisdiction over such persons unless practically aberration of mind exists.[41] In most places a "guardian" (or "conservator," or "committee") may be appointed for the property of a person, who is a spendthrift and squanders his property.[42] Persons who are deaf and dumb are not ipso facto protected by guardianship in English law, as in Roman law.

Curatorship is combined with tutorship in modern law. As to sane and capable persons the jurisprudence of modern civilized countries has combined the minority of the curatorship with that of the tutorship—thus uniting minority and wardship, which are generally terminated by the ward reaching majority. In Scotch law the terms "tutor," "curator," and "pupil" are still technical terms used largely as in Roman law.[43]

Blackstone recognizes that the English guardian fills the offices of both tutor and curator.[44] The term "curator" has survived in the law of England for a special use.[45] In "England it is not uncommon for the full enjoyment of property to be to be postponed in a will or settlement until the person entitled attains the age of twenty-five."[46] This is curiously reminiscent of the Roman rule that at twenty-five, all guardianship—the curatorship—ceases.

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[39] Terry, Common law, p. 704.

[40] Williams, Inst. of Justinian, p. 41.

[41] Terry, Common law, p. 704.

[42] Williams, Inst. of Justinian, p. 31.

[43] 1 Blackstone, Comm., 460.

[44] "The person to whom the interest of a convicted felon in his property in some cases passes" (33 & 34 Vict. c. 23). See Williams, Inst. of Justinian, p. 31.

[45] Williams, Inst. of Justinian, p. 32, note 1.

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NOTE AND COMMENT.

WHAT IS A PUBLIC PURPOSE JUSTIFYING THE EXPENDITURE THEREFOR OF MONEY RAISED FROM TAXATION.—A recent Ohio case raises a question which is frequently discussed in connection with the activities of cities, i. e., what is a municipal or public purpose for the accomplishment of which city funds raised from taxation may be expended. The council of the city of Toledo passed an ordinance authorizing the expenditure of $1,000 for the purpose of establishing a municipal moving-picture theater. The auditor refused to pay over to the director of public service the fund thus appropriated and mandamus was sought by the city to compel him to do so. The auditor gave as the reasons for his refusal (1) that the provision of the Constitution relating to local government for municipalities was not then effective in Toledo and (2) that neither the Constitution nor the statutes of Ohio gave authority to municipalities to establish a moving-picture theater. *State ex rel. City of Toledo* v. *Lynch* (Ohio 1913), 102 N. E. 670.

The case is of general interest because of the question arising out of the second reason given by the auditor for his refusal to act, i. e., Does the

authority to exercise all the powers of local self-government authorize taxation to establish and maintain a municipal moving-picture theater? and by reason of the question discussed by the justices as collateral to this, i. e., Is a municipal moving-picture theater a public purpose?

In the majority opinion, written by Chief Justice SHAUCK, it is reasoned that a moving-picture theater is not a public purpose justifying the expenditure, in its establishment and maintenance, of funds raised by taxation; that the state itself cannot expend public moneys for such a purpose, and that as the municipalities get their powers from the state, it cannot be supposed that the makers of the new constitution of Ohio intended by the provision, "Municipalities shall have authority to exercise all powers of local self-government," to give cities power to expend public funds to establish a municipal moving-picture theater, which is not a public purpose. Justice NEWMAN concurred in this opinion and in the judgment denying the writ of mandamus. Justice JOHNSON concurred in the judgment, but not in that part of the majority opinion which declares a municipal moving-picture theater not to be a public purpose. Justice WILKIN concurred in the judgment, but wrote a separate opinion in which he concluded that the ordinance in question contemplated a moving-picture theater to be owned and operated for profit and for this reason was not a public purpose. Justice DONAHUE, who concurred in the judgment, dissented from the reasons given therefor in the majority opinion and indicated his belief that a moving-picture theater for the purpose of promoting the "education and patriotism of the citizens generally, and to advance the understanding and appreciation of the individual civic responsibilities of each citizen" is a public purpose for purposes of taxation. Justice WANAMAKER, who dissented from both the judgment and the opinion of the majority, argued that the municipal moving-picture theater in this case is a proper governmental purpose for the city even though it might not be such for the state, because while the powers of the state government are all powers delegated by the people and consequently if no clause in the constitution delegates the power to expend public money for a particular purpose the state government has no such power, the powers of the municipalities are inherent and as to their powers the constitution is merely a limitation and if no clause in the constitution takes away from cities the power to expend money for municipal theaters they have that power.

At this time, when the highest courts of practically every state have adopted as the settled doctrine the rule that state constitutions are limitations rather than delegations of power, it seems strange, indeed, to find a judge selecting for his premise the principle that the constitution of a state constitutes a delegation of power. There is, however, Ohio authority for this principle, *Railroad Company* v. *Commissioners of Clinton County* (1852) 1 Ohio St. 77, 84, though the almost universal holding is contra. *State* v. *Osborne* (Arizona, 1912), 125 Pac. 884; *State* v. *Cochrane* (1909), 55 Ore. 157, 179, 105 Pac. 884; *Ensley Development Co.* v. *Powell* (1906), 147 Ala. 300, 40 So. 137; *Harris* v. *Bond & Mortgage Co.* (1912), 244 Mo. 664, 687, 144 S. W. 603; *McGrew* v. *Missouri Pacific Ry. Co.* (1910), 230 Mo. 496, 132 S. W. 1076; *Munn* v. *Illinois* (1876), 94 U. S. 113, 24 L. Ed. 77; *City of Chicago*

v. *Hotel Co.* (1911), 248 Ill. 264, 93 N. E. 753. Another assumption which Justice WANAMAKER used as a basis of his argument, i. e., that the constitution is simply a limitation as to the powers of cities, is opposed to the uniform opinion of the courts. It is practically undisputed by the courts that a city has no powers except those expressly granted or implied in, or incident to, powers expressly granted or such as are indispensible to the very life of the municipal corporation. *Ottawa* v. *Corey* (1882), 108 U. S. 110, 121; *Barnett* v. *Denison* (1891), 145 U. S. 135, 139; *Ravenna* v. *Pennsylvania Co.* (1887), 45 Ohio St. 118; *Bell* v. *City of Platteville* (1888), 71 Wis. 139. Undoubtedly power may be conferred on a city by the constitution as well as by statute, but outside of a very few powers which are indispensible to the very existence of the corporation, the city has no power unless it can point to a statute or a clause of the constitution expressly or impliedly granting the same.

The broad conclusion of the majority opinion that the establishment and maintenance of a moving-picture theater is not a public purpose, though undoubtedly in accord with the majority of the decisions in this country on the general question of what constitutes a public purpose, is about as unsatisfying as the principles stated by Justice WANAMAKER are mistaken. No satisfactory definition of a public purpose that will fit all the cases in which the courts usually find the purpose to justify taxation for its accomplishment has ever been framed. The rule laid down by Justice COOLEY in *People* v. *Salem* (1870), 20 Mich. 452, that the term is merely one of classification "to distinguish the objects for which, according to settled usage, the government is to provide, from those which by the like usage are left to private inclination, interest or liberality" is unsatisfactory because it practically prohibits the growth of municipal and state activities without a constitutional amendment allowing new activities. If this rule had been strictly followed cities in the majority of our states very likely would still be unable to own and operate water, light and power plants and street railways. There seems also to be no satisfactory reason for drawing the line dividing those activities allowed from those prohibited between those which have an easement in the public streets and thoroughfares to lay pipes, stretch wires, etc., and those which do not, as has been done in a recent case. 2 NAT. MUN. REV. 339. In *People* v. *Salem*, supra, it was said that "the term 'public purposes,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow." This principle, however, has not been assented to by some courts. *Opinion of the Justices* (1903), 182 Mass. 605, 66 N. E. 25, 60 L. R. A. 592. In this instance the court indicated its opinion to be that if there were a fuel famine and a great public need which could not be supplied by private enterprise, the city might purchase fuel and sell it to its citizens.

So long as the term "public purpose" is not satisfactorily defined we may expect the conflicting and unsatisfying results that we have at present in this country to continue. These may be minimized, however, if the courts will keep in mind and conscientiously apply two principles concerning which there is no disagreement, i. e., (1) that within reasonable limits the legislative body is the judge of what constitutes a public purpose and that their

decision ought not to be overthrown except in a very clear case, and (2) that the question before the court in each instance is the question of legislative power and not of legislative policy. *Beach* v. *Bradstreet* (1912), 85 Conn. 344. In too many recent instances courts seem to have been largely influenced to decide against allowing a new city or state enterprise by the fact that in their personal opinion it would have been bad policy for the city or state to undertake it. Courts will do well to remember also that the present century is more socialistic in its tendencies than the last, and that consequently cities and states will be expected to undertake more activities than they have in the past. The term "public purpose," either as an expressed term of the constitution or as an implied limit on the power of taxation, is a broad term, and like other constitutional terms of the same nature its interpretation ought to change with the spirit of the age. G. S.

REMOVAL TO FEDERAL COURTS OF CASES AGAINST INTERSTATE CARRIERS FOR DAMAGE TO SHIPMENTS.—A novel, and, at first sight, a startling decision was handed down by the District Court of the United States for the District of North Dakota, in the case of *McGoon* v. *Northern Pacific Railway Company*, 204 Fed. 998.

That was a suit begun in a state court by a shipper against a railroad company to recover damages for injury to property while being transported from one state to another, the *ad damnum* clause as laid in the complaint being less than $3,000.00. Upon motion to remand the cause, upon its removal to the federal district court, the opinion in the above case was written.

This would seem to be a case of first impression upon the precise question, and it is strange indeed that this question had not before been passed upon. The court held that, although the allegations of the defendant's liability were not based, in words, upon § 20 of the Interstate Commerce Act, as amended by the Act of June 29, 1906, nevertheless the plaintiff's action was, in point of fact, based upon that section, for, said the Court: "That section abrogates all state and common law liabilities on interstate shipments." For this statement the Court relies upon the decision of the Supreme Court in the case of *Adams Express Company* v. *Croninger*, 226 U. S. 491. The language used by the District Court is, however, much stronger than that used in the *Croninger* case, but, upon a careful reading of the *Croninger* case, it is believed that its effect is as indicated in the *McGoon* case, and also to the same effect may be quoted the language of Judge Lurton as used in the case of *Kansas City Southern Railway Company* v. *Carl*, 227 U. S. 639, especially on pages 648 and 649.

The sole question it would seem to determine is—does the statute referred to abolish, in truth, all common law liabilities on interstate shipments, as well as all state statutes and regulations upon the subject,—and it is believed that such must be the effect of the Act, for, if there can be any divided authority over interstate commerce, and Congress has acted as it has by passing the Interstate Commerce Act, the jurisdiction thereupon has become vested exclusively in the federal courts, for, if the different state courts retain their

different rulings on the different state regulations and the different state courts' interpretation of the common law, we will have a divided authority which may only be defeated by the federal courts having the exclusive jurisdiction. *Kansas City Southern Railway Company* v. *Carl,* supra. As to the question when a suit may be said to "arise under" a law of the United States, besides those cases cited in the principal case, see *Ogden* v. *Bank,* 9 Wheat. 822; *Pacific Railroad Removal Cases,* 115 U. S. 2; *Mitchell* v. *Smale,* 140 U. S. 406.

The practical effect of the principal case is to allow a removal to federal courts of *all cases* against common carriers upon a cause of action for injury to property while in interstate commerce, and indeed if the doctrine of the principal case is not correct, or not accepted, the alternative must be that final decisions upon questions of federal law must be left to the courts of the several states, and this multitude of courts of final jurisdiction of the same causes arising upon the same laws, would, in the language of the Federalist, be a hydra in government, from which nothing but contradiction and confusion could proceed. *Federalist,* No. 80. W. W. M.

NATURE OF THE RIGHT TO A PUBLIC OFFICE AND THE USE OF INJUNCTION TO TRY THAT RIGHT.—The length to which some courts will go in attempting to abolish all distinctions between the different forms of action, in accordance with what is considered to be the spirit of the modern Codes of Civil Procedure, is well illustrated by a case recently decided by the Supreme Court of Wisconsin. A statute in Wisconsin provides that certain officers who are appointed by the Governor, by and with the consent of the Senate "May, for official misconduct, or habitual or wilful neglect of duty, be removed by the Governor upon satisfactory proofs, at any time during the recess of the legislature, and the vacancy filled by him until such vacancy shall be regularly supplied." § 970, WIS. STATUTES. In *Ekern* v. *McGovern,* (Wis. 1913), 142 N. W. 595, the complainant was the regularly appointed incumbent of the office of Insurance Commissioner, which said office was appointive within the provisions of the above mentioned statute. His term still had about three years to run when a factional struggle arose with reference to the office of speaker of the state assembly. Complainant, having openly indicated his preference for a candidate who was opposed by the Governor, was removed by the latter on the ground that he had served on a campaign committee contrary to the statute creating the office which he occupied. Apparently in order to get complainant out of the way before his power of removal should be lost by the coming together of the assembly which was to convene the next day, the Governor removed him summarily, giving him practically no opportunity to defend himself against the charges presented. Complainant, maintaining that he had been unlawfully ousted, refused to give up the office to his duly appointed successor whereupon the Governor and his friends threatened to seize the office by force. Complainant then applied for an injunction to prevent his forcible dispossession. A temporary injunction was granted and on appeal it was held by a divided

court (1) That the right to a public office, although not a vested property right in the ordinary sense of the term, is property in that broad sense which includes everything of pecuniary value, and comes within the protection of that clause of the constitution which provides that no one shall be deprived of life, liberty, or property without due process of law. (2) That the title to a public office may be determined in an equitable proceeding for an injunction where that determination is necessary to settle the whole controversy, provided the primary purpose in bringing the proceedings is not to try title, but to protect an officer de facto who in good faith claims the right to hold possession, in the exercise of the functions of that office pending the determination of the title de jure.

It seems the court in its decision has gone counter to the generally accepted doctrines with reference to the title to public office and the remedies available to establish that title. It needs no citation of authority for the principle that a public office is not property within the ordinary meaning of that term. The court of only one state in this country, viz. North Carolina, has ever affirmed such a doctrine and it has since reversed itself. *Mial* v. *Ellington*, 134 N. C. 131. That it is not property within the purview of the "due process of law" clause of the constitution, has not always been so definitely asserted. In a series of cases decided by the Supreme Court of the United States wherein the direct question involved was one of jurisdiction, the court intimated that the right to a public office did come within the protection of that clause. *Kennard* v. *Louisiana*, 92 U. S. 480; *Foster* v. *Kansas*, 112 U. S. 201; *Wilson* v. *North Carolina*, 169 U. S. 586. The first time that the question was squarely presented to the court was in *Taylor* v. *Beckham*, 178 U. S. 548. In that case the question was whether the court had the right to go behind the determination of the state assembly of Kentucky in regard to the right of one claiming the office of governor, and say whether or not he had been rightfully removed, where the determination of that question had been entrusted to the General Assembly. The court (HARLAN and BREWER dissenting) held it could not, saying, "The nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. It is clear that the court of appeals in declining to go behind the decision of the tribunal vested by the state constitution and laws with the ultimate determination of the right to office, denied no right secured by the 14th amendment." Other cases supporting this view are, *State* v. *Grant*, 14 Wyo. 41; *Rich* v. *Jochim*, 99 Mich. 358; *Taylor* v. *Beckham*, 21 Ky. L. Rep. 1735. It is submitted that the view taken by the Supreme Court of the United States in *Taylor* v. *Beckham*, supra, best subserves the interests of the public. It does not seem consistent with the spirit of our democratic institutions to regard a public office as in any sense the property of the incumbent. An office is in the nature of a public trust and it does not seem wise to make it difficult to bring about the removal of those who are not fulfilling that trust, by entrenching them behind the bulwark of a property right.

On the proposition that the title de jure to a public office can be determined incidentally in an equitable action where the court once has juris-

diction of the parties for the purpose of granting an injunction, the court in the principal case seems also to have arrived at its conclusion without following either precedent or authority. The court concedes that an action in equity will not lie for the primary purpose of trying title to an office, and this is the universal rule. *People* v. *Draper*, 24 Barb. 265; *Moulton* v. *Reid*, 54 Ala. 320; *Beebe* v. *Robinson*, 52 Ala. 66; *Neeland* v. *State*, 39 Kans. 154. It relies for its conclusion on the principle of equity jurisprudence that where a court once has jurisdiction of the parties and the primary subject-matter, it may proceed to settle the whole controversy. The general doctrine stated by the court is well established but the authorities deny its application to this kind of a case owing to the nature of the right to a public office. The right to public office being political in its nature it does not come within the cognizance of a court of equity whose jurisdiction is limited to questions involving property rights. 5 POMEROY, EQUITY JURISPRUDENCE, § 324. What is regarded as the better view in such cases is stated in HIGH, INJUNCTIONS in this language, "The actual incumbents of an office may be protected pending a contest as to their title, from interference with their possession, and with the exercise of their functions—and the granting of an injunction in such cases in no manner determines the questions of title involved, but merely goes to the protection of the present incumbent against the interference of claimants out of possession and whose title is not yet established." Vol. 2, Sec. 1315 (Third Ed.tion). This view is supported by authority. *State* v. *Superior Court*, 61 Wash. 893; *Barendt* v. *McCarthy*, 160 Cal. 680; *In re Sawyer*, 124 U. S. 200; *Blain* v. *Chippewa Circuit Judge*, 145 Mich. 59; *Guillotte* v. *Poincy*, 41 La. Ann. 333; *Goldman* v. *Gillespie*, 43 La. Ann. 83; *Hartt* v. *Harvey*, 32 Barb. 55; *Delahanty* v. *Warner*, 75 Ill. 185; *Sullivan* v. *Haacke*, 5 Oh. N. P. 26; *Brady* v. *Sweetland*, 13 Kans. 41; *Reemelin* v. *Mosby*, 47 Oh. St. 570. In *Scott* v. *Sheehan*, 145 Cal. 691, where the facts were practically identical with those in the principal case, the court in granting the injunction said, "It is of course well settled that in an action such as this, the title to the office is not involved and cannot be inquired into." In *Sullivan* v. *Haacke*, supra, the mayor of Cincinnati made an order removing a member of the board of supervisors, and appointing another to succeed him for the unexpired term. The court in granting a temporary injunction to the one in office to prevent his forcible dispossession pending the trial of his right de jure said, "The question of title to public office can not be tried in a proceeding in injunction, but can only be determined in a strict action at law." See to the same effect *Haffran* v. *Hutchins*, 160 Ill. 550 and *White* v. *Berry*, 171 U. S. 377. The court in the principal case justifies its decision on the broad ground that the ruling is in harmony with the spirit of the code which seeks to do away with the technical distinctions between the different forms of action.

The question as to whether it is wise to allow the determination of a purely legal proposition in an equitable action such as this, is not without difficulty, and the court which is confronted with it is placed in a dilemma.

If it refuses to settle the entire controversy when the parties are properly before it the court subjects itself to public criticism on the ground that its decision is over-technical. On the other hand if it does determine the matter a precedent is furnished which in some controversy of a different nature may result in depriving a litigant of some substantial right. G. C. G.

REMOVING A CLOUD ON TITLE TO PERSONALTY.—The jurisdiction of a court of equity to remove a cloud upon title in the case of real property is founded on the inadequacy of the remedy at law, and does not arise when the plaintiff has an adequate and complete remedy at law. *Munson* v. *Munson,* 28 Conn. 582, 73 Am. Dec. 693. This limitation on the right to maintain such an action must be kept in mind in a discussion of the right to bring a similar action in the case of personal property.

In the case of the *Central Savings Bank & Trust Co. et al.,* v. *Amalgamated Society of Carpenters and Joiners,* (Colo. App. 1913), 134 Pac. 1007, the plaintiffs had deposited a sum of money with the defendant, against which sum certain officers of the plaintiff society were empowered to draw checks. Later a split occurred in the plaintiff society which resulted in the withdrawing of a number of the members, among them being the officers who originally made the deposit. A dispute arose as to which set of members was entitled to the money, and the bank refused to honor any checks, or to pay over the money. Thereupon the Amalgamated Society brought an action to quiet title to the funds in the bank. In refusing relief, the court lays down the general rule that ordinarily an action to quiet title to personal property will not lie; and says that the few cases where the right to maintain the action has been upheld have all been of such a nature that the plaintiff had no sufficient or adequate legal remedy.

None of the cases cited by the court in support of the general rule laid down, are in point. In the case of *Fudikar* v. *East Riverside Co.,* 109 Cal. 29, 41 Pac. 1024, the property in question was held to be real property, and the remedy was refused because of defective pleadings. The case of *Red Diamond Clothing Co.* v. *Steidemann,* 120 Mo. App. 525, 97 S. W. 220, held that the action would not lie in the case of personal property in the possession of the plaintiff; but the cloud, to remove which the suit was brought, was a mere verbal claim by the defendants, and so not properly a cloud at all. In *State ex rel* v. *Wood,* 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596, there was a statement to the effect that such an action would not lie in the case of personal property, but the statement was mere dictum; for the court goes on to say that the bill showed on its face that the so-called cloud was made a personal charge against the plaintiff and not against his property.

There seems to be no doubt that the courts of a number of states think that the general rule is the one mentioned in the principal case; and in nearly every case where the right has been denied, will be found *dicta* to the effect that the action will not lie in the case of personal property. Yet we have been unable to find a single case where the court has denied the right *merely on the ground that the property in question was personal property.*

The court in the principal case, however, recognizes that there are exceptions to this general rule; and it refuses relief rather on the ground that the plaintiff here had an adequate remedy at law, than because the property was personal in its nature. In *Magnusen* v. *Clithero,* 101 Wis. 551, 77 N. W. 882, an action was brought to quiet title to a mortgage and certain notes in the possession of the plaintiff; and the relief was granted on the ground that the plaintiff had no adequate remedy at law. In *N. Y., N. H. & H. R. R. Co.* v. *Schuyler,* 17 N. Y. 592, it appeared that a number of counterfeit stock certificates of the plaintiff corporation had been issued; and even though the plaintiff could have defended, successfully, suits at law for the non-recognition of the false certificates, it was held that this remedy at law was not as adequate and complete as the circumstances of the case required. So the plaintiff was permitted to maintain his suit in chancery for the cancellation of the counterfeit certificates. Other cases where the right has been recognized are *Voss et al.* v. *Murray et al.,* 50 Oh. St. 19, 32 N. E. 1112, where plaintiff was allowed to remove a cloud upon attached property in the hands of a sheriff, the cloud being created by a recorded mortgage; and *Sherman* v. *Fitch,* 98 Mass. 59, where the cloud was created by a chattel mortgage. See also *Town of Springfield* v. *Teutonic Savings Bank,* 75 N. Y. 397; *Rosenbaum* v. *Foss,* 4 S. D. 184, 56 N. W. 114; *Stebbins* v. *Perry County,* 167 Ill. 567, 47 N. E. 1048; *Martin & Earle* v. *Maxwell et al.,* 86 S. C. 1, 67 S. E. 962. In the last case, the court says that it will allow suits to remove a cloud on personal property to be maintained, since any distinction between real and personal property in this respect would be purely artificial, and tend to hinder the practical administration of justice. Mr. POMEROY, in his EQUITABLE REMEDIES, § 729, says that there seems no good reason for thus restricting the jurisdiction of equity in such cases.

The cases are very few, if indeed there are any, where the court has refused to allow a party to remove a cloud on personal property merely because the property was personal. And the only other reason for refusing relief given in many other cases, such as *Sayre* v. *Tompkins,* 23 Mo. 443, as well as in the principal case, namely that the plaintiff had an adequate and complete remedy at law, applies as well to real as to personal property, as noted above.

The reason for the distinction between real and personal property in this respect is stated in *Fonda* v. *Sage,* 48 N. Y. 173, to be that a claim involving title to personal property will, it is supposed, inflict but little injury, while a claim involving the title to real property may seriously impair the value of the realty. This may have been true at the time when this rule was evolved; but it is obvious from an examination of such cases as *N. Y., N. H. & H. R. R. Co.* v. *Schuyler,* supra, and *Stebbins* v. *Perry County,* supra, that the reasons on which the above rule is based no longer exist. The reasons for the rule being gone, the rule, if, indeed, it still exists, should be disregarded also. A party should be allowed to remove a cloud from the title to either real or personal property alike, subject however to the restrictions and limitations on the right, which now exist in the case of real property. S. E. G.

DECLARATIONS AGAINST PENAL INTEREST.—It is settled by the uniform trend of cases that under the exception to the hearsay rule in favor of declarations against interest, statements adverse to declarant's pecuniary or proprietary interest may be admitted when he has become unavailable as a witness. Whether this exception should be limited to statements against pecuniary or proprietary interest is a question which has often been raised, and which was answered in the affirmative in the recent case of *Donnelly* v. *United States,* 33 Sup. Ct. 449.

Respondent, charged with murder, gave in evidence facts tending to connect one Dick with the crime, and then offered Dick's dying confession of the murder. The proffered evidence was excluded by the trial court, and on appeal the ruling was affirmed by the United States Supreme Court, Justice HOLMES delivering a forceful dissenting opinion in which Justices LURTON and HUGHES concurred.

Admittedly the decision accords with the generally accepted rule, but the dissent of three such Justices as LURTON, HOLMES and HUGHES is ample excuse, if any excuse is needed, for a brief review of the history and logical status of the rule.

During the formative period of the law of evidence, while the hearsay rule was beginning to be developed and applied, there gradually arose two exceptions to the rule, one in favor of account-entries of deceased persons charging themselves with the receipt of money, and the second admitting oral declarations in disparagement of title. These two exceptions, according to WIGMORE (EVIDENCE, § 1476), were originally quite distinct, and but little more than custom, but when later it was sought to justify their admission upon grounds of logic, they were recognized as resting on the same principle, the unlikelihood that one would falsely make declarations against his own interest. *Higham* v. *Ridgway,* 10 East 109; *Middleton* v. *Melton,* 10 B & C, 317. In the latter case the court says, "It is a general principle of evidence that declarations or statements of deceased persons are admissible when they appear to have been made against their interest." The rule is here broadly stated that *all* declarations against interest made by deceased persons are admissible, the sanction of the oath being deemed unnecessary where the statement is adverse to declarant's interest, and in the following cases declarations against penal interest were admitted. *Hulet's Trial,* 5 How. St. 1185; *Standen* v. *Standen,* Peake 32; *Powell* v. *Harper,* 5 C. & P. 590. The reason assigned in *State* v. *Kirby,* 1 Strobh. 156, that "it is not to be supposed that one will falsely accuse himself of a crime," was considered as bringing the proffered confessions within the exception to the rule.

The first case distinctly limiting the rule to those declarations against a pecuniary or proprietary interest was the *Sussex Peerage Case,* 11 Cl. & F. 109, in 1844, which was obviously a departure from the then established rule. Nevertheless this was accepted by text writers as stating the law on the subject, and is now, it seems, firmly imbedded in the law of evidence.

Returning to the principal case, we find a formidable array of authorities cited by the majority, among them: *West* v. *State,* 76 Ala. 98; *Davis* v. *Commonwealth,* 95 Ky. 19; *Hopt* v. *Utah,* 110 U. S. 574; *People* v. *Hall,* 95 Cal.

598; *Davis* v. *Wood*, 1 Wheat. 6; *Lyon* v. *State*, 22 Ga. 399; *Robison* v. *State*, 114 Ga. 445; *Siple* v. *State*, 154 Ind. 647; *State* v. *Smith*, 35 Kas. 618; *State* v. *West*, 45 La. Ann. 928; *Munshower* v. *State*, 55 Md. 11; *Com.* v. *Chance*, 174 Mass. 245; *State* v. *Hack*, 118 Mo. 92; *People* v. *Schooley*, 149 N. Y. 99; *State* v. *Beverly*, 88 N. C. 632; *State* v. *Fletcher*, 24 Ore. 295; *Peck* v. *State*, 86 Tenn. 259; *State* v. *Totten*, 72 Vt. 73. The case in Wheaton's reports and the citation in 110 U. S. relate to the exclusion of hearsay in general and do not decide the exact point herein raised, so that Mr. Justice HOLMES seems justified in his assertion that the question was still an open one in the federal courts. Many of the other cases, notably those in Vermont, Tennessee and Maryland, are weakened by the fact that declarant was not shown to be unavailable as a witness and it has never been contended that such declarations could be admitted except where declarant is deceased or otherwise unavailable. So far as the opinions in these cases relate to this particular question they can be accorded only such weight as is due to dicta from such sources. In the *Donnelly* case not only was there the circumstantial evidence in support of the declaration and the guarantee of truthfulness in that declarant was speaking adversely to his own interest, but there was another fact present always recognized by the courts as a substitute for the sanctity of the oath; *i. e.*, the sense of impending death. *Woodcock's case*, Leach Cr. L. (4th Ed.) 500; *Ashton's Case*, Lew. Cr. C. 147; *State* v. *Brunette*, 13 La. Ann. 45; *Tracy* v. *People*, 97 Ill. 106; *People* v. *Craft*, 148 N. Y. 631.

Indeed, as the law stood at the close of the eighteenth century Dick's confession would have been competent also as a dying declaration, as the consciousness of approaching death was held sufficient to guarantee the truth of such testimony. Subsequently the courts began to emphasize necessity as the ground for the admission of dying declarations, and as it was considered that there was no necessity for accepting the dying declarations of any save the victim of the crime, the rule was limited to his declarations made as to the cause of his own death. These considerations are significant in weighing the policy of the principal case, not because Dick's statement was offered as a dying declaration, but as showing that all the safeguards were present which are required by any exception to the hearsay rule.

A glance at the case of *West* v. *State*, 76 Ala. 98, cited in the majority opinion, shows the result of the modern rule. West, on trial for murder, attempted to introduce the confession of guilt made by a third party, since dead, and the state offered the dying declaration of the victim of the assault. Both were objected to as hearsay; the dying declaration was admitted and the third party's confession was excluded, not being against his pecuniary interest. Authority aside, the result is absurdly illogical. It is incomprehensible how the statement of the murdered man, who incidentally might have been mistaken as to the identity of his assailant, could possess greater probative value or relevancy than the confession of a third party, made without the slightest possibility of error, accusing himself of a capital crime. Add to this that in the *Donnelly* case the confession was made in the presence of approaching dissolution and it is impossible to point to any logical ground for the admission either of a dying declaration or a declaration against pecuniary

interest which could not with equal force be urged in favor of the confession of Dick, corroborated as it was. The nearness of death; the impossibility of error; the nature of the confession, adverse to declarant's interests; its probative value; all are present. As the exception is now limited its application reaches this peculiar result; the statement of a third party unavailable as a witness charging himself with financial liability in some paltry sum is admissible as against interest; his confession of guilt of the highest crime known to the law is excluded as hearsay.

The reasoning of the minority, as expressed by Justice HOLMES, possesses great weight. Briefly it is, that the rules of evidence are the rules of logic and good sense, unhampered in the main by precedent, and the case being res nova in the federal courts, that rule should be adopted which is most consonant with reason and justice. Says the learned judge, "The exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations which would be let in to hang a man, and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight."

S. S. W.

RECENT IMPORTANT DECISIONS.

ADVERSE POSSESSION—ACQUISITION OF RIGHTS BY PRESCRIPTION—RAILROAD RIGHT OF WAY.—Defendant company was compelled by statute to discontinue all grade crossings in the city of Philadelphia, and as a result elevated its railway, in doing which it was found necessary to use its entire right of way. Plaintiff had constructed a brick building, one corner of which extended over this right of way. Defendant removed this corner and plaintiff brought trespass, claiming title to the land on which her building was situated, on the grounds of continued adverse possession for more than 21 years. *Held,* that the right of way was not subject to loss by adverse possession, and plaintiff had acquired no interest therein. *Conwell* v. *Phil. & R. R. Co.* (Penn. 1913), 88 Atl. 417.

The court based its decision on the ground that the right of way becomes impressed with a public use as soon as acquired, and is held in trust for the public. Probably the weight of authority is to the effect that such railroad rights of way may be taken by adverse possession, except that some cases make a distinction between rights of way acquired by eminent domain or by purchase and those acquired by public grant, there being more reason for calling the latter a public trust than the others. In accord with the principal case are, *Southern P. R. Co.* v. *Hyatt,* 132 Cal. 240, 54 L. R. A. 522; *McLucas* v. *St. Joseph & G. I. R. Co.,* 67 Neb. 603, 93 N. W. 928; *Reading Co.* v. *Seip,* 30 Pa. Super Ct. 330; *Carolina Cent. R. Co.* v. *McCaskill,* 94 N. C. 746. *Contra, Northern Pac. R. Co.* v. *Ely,* 25 Wash. 384, 65 Pac. 505; *Donohue* v. *Ill. Cent. R. Co.,* 165 Ill. 640, 46 N. E. 714; *Pittsburg, etc. R. Co.* v. *Stickley,* 155 Ind. 312, 58 N. E. 192; *Pollock* v. *Maysville, etc., R. Co.,* 103 Ky. 84, 44 S. W. 359; *Paxson* v. *Yazoo, etc. R. Co.,* 76 Miss. 536, 24 So. 536; *Alexander-City Union Warehouse & Storage Co.* v. *Cent. of Ga. R. Co.* (Ala. 1913), 62 So. 745. Some courts, while professing to follow the rule that title in a railroad right of way can be acquired by prescription, have evaded it to a certain extent by holding that mere usage for agricultural purposes and the like was not adverse so long as the land was not needed for actual occupancy by the railroad company. *Va. & S. W. R. Co.* v. *Crow,* 108 Tenn. 17; *Northern Counties Invest. Trust* v. *Enyard,* 24 Wash. 366. The question has also been settled by statute in some states. *Littlefield* v. *Boston & A. R. Co.,* 146 Mass. 268; *Costello* v. *Grand Trunk R. Co.,* 70 N. H. 403; *Drouin* v. *Boston & M. R. Co.,* 74 Vt. 343, 52 Atl. 957.

BILL AND NOTES—CORPORATION'S LIABILITY FOR DRAFT EXECUTED BY PRESIDENT.—Where a draft was signed by one describing himself as "President" without further reference to a principal, but at the time of the transaction the true obligor was known and was intended by both parties to be bound, *Held,* parol evidence is admissible, in an action by the payee, to show who the principal was and that he was the real obligor. *Ocilla Southern R. Co.* v. *Morton* (Ga. App. 1913), 79 S. E. 480.

The general rule as to contracts other than negotiable instruments is that the true principal may be shown by parol: *New Jersey Steam Navigation Co.* v. *Merchants Bank,* 6 How. 381; *Huntington* v. *Knox,* 7 Cush. 371. But a stricter rule springing from the law merchant is applied to negotiable instruments, to the effect that, where one signs as "Agent," or "President" and the like, without sufficiently indicating on the instrument who the principal is, parol evidence is not admissible to charge the principal, though the party actually signing be an agent. This rule is founded on the reason that "each party who takes a negotiable instrument makes his contract with the parties who appear on its face to be bound for its payment. It is a courier without luggage, and its countenance is its passport." DANIEL, NEG. INSTR., § 303; CLARK & SKYLES, AGENCY, § 328a; *Anderson* v. *Pearce,* 36 Ark. 293; *Richmond etc.* v. *Morangue,* 119 Ala. 80; *Stinson* v. *Lee,* 68 Miss. 113; *Conner* v. *Clark,* 12 Cal. 167; *Bedell* v. *Scarlett,* 75 Ga. 56; *Prescott* v. *Hixon,* 22 Ind. App. 139; *Brown* v. *Parker,* 7 Allen (Mass.), 337; *Rendell* v. *Harriman,* 75 Me. 497; *Keokuk etc. Co.* v. *Kingsland etc. Co.,* 5 Okla. 32; *Tarver* v. *Garlington,* 27 S. C. 107; *Arnold* v. *Sprague,* 34 Vt. 402. The instant case bases its decision on an exception to the principle established by the law merchant, that as between the immediate parties to a bill or note, it may be shown by parol that the instrument was, to the knowledge of the parties, intended to be the obligation of the principal, and not of the agent, and that it was given and accepted as such. *Bank of Genesee* v. *Patchin Bank,* 19 N. Y. 312; *Metcalf* v. *Williams,* 104 U. S. 93; *Kline* v. *Bank of Tescott,* 50 Kan. 91; *McClellan* v. *Reynolds,* 49 Mo. 312; *Roberts* v. *Austin,* 5 Whart. (Pa.) 313; *Traynham* v. *Jackson,* 15 Tex. 170; *Kiedan* v. *Winegar,* 95 Mich. 430; *Megowan* v. *Peterson,* 173 N. Y. 1. Other courts deny the admissibility of parol testimony even in such cases. *Daniel* v. *Buttner,* (Wash.) 80 Pac. 811; *Tucker Mfg. Co.* v. *Fairbanks et al.,* 98 Mass. 101; *Sturdivant* v. *Hull,* 59 Me. 172; *Hobson* v. *Fassett,* 76 Cal. 203; *Tannatt* v. *Rocky Mountain Nat. Bank,* 1 Colo. 278; *Cahokio School Trustees* v. *Ratenberg,* 88 Ill. 219.

BILLS AND NOTES—CONDITIONAL DELIVERY TO PAYEE.—The maker of a note delivered it to the payee to take effect when a third party should give to the maker a warranty deed to a certain tract of land. In a suit on the note, brought by the payee, *Held,* parol evidence is admissible to show a conditional delivery or delivery in escrow to the payee, which prevents it from becoming a complete contract in praesenti, where there is a failure to perform or comply with such condition. *Jones* v. *Citizens State Bank,* (Okla. 1913), 135 Pac. 373.

The instant case accords with the provisions of the Negotiable Instruments Law as it has been enacted in the majority of states, *i. e.*: "As between immediate parties and as regards a remote party other than a holder in due course, . . . the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument." Negotiable Instruments Law, § 18. But apart from such statutes the decisions are not uniform on the question of giving evidence of a conditional delivery to the payee. The weight of authority

appears to be with the principal case. The admission of the parol evidence is justified on the ground that it is not evidence to vary the terms of a written agreement, which is not allowable, but that it is evidence to show there is no operative agreement in force. *McKnight* v. *Parsons*, 136 Ia. 390, 22 L. R. A. N. S. 718; *Burke* v. *Dulaney*, 153 U. S. 228; *Brown* v. *St. Charles*, 66 Mich. 71; *Burns & Smith Lumber Co.* v. *Doyle*, 71 Conn. 742; *Merchants Bank* v. *Luckow*, 37 Minn. 542; *Watkins* v. *Bowers*, 119 Mass. 383; *Beach, Receiver*, v. *Nevins*, 162 Fed. 129, 18 L. R. A. N. S. 288; *Hurt* v. *Ford*, (Mo.) 36 S. W. 671. But there are many states holding contra to the principal case. *Carter* v. *Moulton*, 51 Kan. 9; *Garner* v. *Fite*, 93 Ala. 405; *Stewart* v. *Anderson*, 59 Ind. 375; *Scott* v. *State Bank*, 9 Ark. 36; *Gaar* v. *Louisville Banking Co.*, 74 Ky. 180, 21 Am. R. 209.

CARRIERS—NECESSITY OF NOTICE OF CLAIM UNDER SPECIAL CONTRACT—APPLICABILITY WHERE LIVE STOCK HAS DIED IN TRANSIT.—Plaintiff sued carrier for value of live stock, which died in transit. The shipment was made under a contract stipulating that no recovery could be had, unless notice of claim was given by the consignee or shipper to the carrier at or before the time of delivery. Notice had not been given. *Held*, that the plaintiff could recover, the stipulation not applying to live-stock dying in transit. *Southern Ry. Co.* v. *Bacon* (Tenn. 1913), 159 S. W. 602.

The principal case is one of first impression in this state. Nor has the question been considered often elsewhere. Of the decisions cited by the court to sustain their position, but two are in point, *Kas. & Ry. Co.* v. *Ayres*, 63 Ark. 331, 38 S. W. 515, and *Pierson* v. *No. Pac. Ry. Co.*, 61 Wash. 450, 112 Pac. 509, which follows the former decision without discussion. The other decisions are in cases where the carrier had actual notice of the death of the stock. *L. & N. Ry. Co.* v. *Warfield and Lee*, 6 Ga. App. 550, 65 S. E. 308; *M. K. & T. Ry. Co.* v. *Frogley*, 75 Kas. 440, 89 Pac. 903; and *Patterson* v. *K. & T. Ry. Co.*, 24 Okla. 747, 104 Pac. 31. In fact the rule in Kansas seems to be in direct opposition to that stated in the principal case. *Wichita & Wes. Ry. Co.* v. *Koch*, 47 Kas. 753. As a general rule, such a stipulation as that in the contract in the principal case is considered reasonable and valid, because it tends to prevent injustice by giving the carrier an opportunity to inspect the stock in question before its identity is lost. In accordance with such reasoning, it has been held, under a contract similar to that in the principal case, that where the carrier's agent has removed cattle from the cars, notice of injury is not required. *Baker* v. *Miss. Pac. Ry. Co.*, 34 Mo. App. 98. And where the injury is not apparent, but develops later, notice is not required. 5 Cyc. (2 Ed.) 455. The carrier has an equal opportunity to discover dead stock and apparent injuries, and it seems that the rule that notice is essential to recovery, unless the carrier has actual notice, should apply in both cases.

CORPORATIONS—RIGHTS OF STOCKHOLDERS WHERE THE CORPORATION FRAUDULENTLY DISMISSES A SUIT.—Defendant Rossman, a director of plaintiff company, fraudulently caused stock in said company to be issued to defendant McAlpine and himself. The corporation commenced suit to have the

stock thus issued cancelled. The suit was later dismissed by the corporation in accordance with a collusive agreement with defendants. Certain of the stock-holders seek to intervene and continue the suit. *Held*, the stockholders can intervene, have the dismissal set aside and continue the suit. *National Power & Paper Co.* v. *Rossman et al.* (Minn. 1913), 142 N. W. 818.

The decision here involves the question as to the right of a stockholder to sue in his own name in behalf of himself and the other stockholders for a wrong done to the corporation. As a general proposition where there is an injury to the corporation, the corporation itself is the proper party to bring suit to obtain redress, *Meyers* v. *Bristol Hotel Co.*, 163 Mo. 59, 63 S. W. 96, and the stockholders have no right to intervene on the mere ground that they are stockholders and therefore the necessary parties in interest (*Gunderson* v. *Ill Tr. & Sav. Bk.*, 199 Ill. 422, 65 N. E. 326), and this is true even though the stockholder who brings the suit is the sole owner of all the stock (*Randall* v. *Dudley*, 111 Mich. 437, 69 N. W. 729). It was not until 1855 in this country (*Dodge* v. *Woolsey*, 18 How. (59 U. S.) 331), and 1867 in England (*Atwool* v. *Merryweather*, L. R. 5 Eq. 464) that the right of the stockholder to sue under any circumstances became firmly and definitely established. But it now has become the settled rule in equity that, where the necessary elements are present, the stockholder may sue in his own name and in behalf of himself and the other stockholders. These necessary elements are that the corporation has been requested, but has refused or neglected, to bring the suit, *Perkins* v. *Northern Pac. Ry. Co.*, 155 Fed. 455; *Savings & Trust Co.* v. *Bear Valley Irr. Co.*, 112 Fed. 693; *S. S. of O. of Sitting Hall* v. *Baker*, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210; *Home Min. Co.* v. *McKibben*, 60 Kan. 387, 56 Pac. 756; *Smith* v. *Buckley*, 18 Colo. App. 227, 70 Pac. 958; and demand must be made even though the corporation is dissolved at the time suit is brought, *Dillon* v. *Lee*, 110 Iowa 156, 81 N. W. 245; but demand need not be made where the corporation is controlled through its directors by a rival corporation, *Lowenstein* v. *Diamond Soda Water Mfg. Co.*, 88 N. Y. S. 313, 94 App. Div. 383, or where the situation is such that it could not be expected that the corporation would comply if it were asked, *Tillis* v. *Brown*, 154 Ala. 403, 45 So. 598; *Sheridan Brick Works* v. *Marion Trust Co.*, 157 Ind. 292, 61 N. E. 666, 81 Am. St. Rep. 207; *McCampbell* v. *Fountain Head R. Co.*, 111 Tenn. 55, 77 S. W. 1070, 102 Am. St. Rep. 731. Generally the stockholder must show that he has exhausted all available means of obtaining redress within the corporation itself, *Williams* v. *Erie Mountain Mining Co.*, 47 Wash. 360, 91 Pac. 1091, and that the act of the corporation in refusing amounts to a breach of trust such as neither a majority of the directors nor of the stockholders can ratify or condone, and that the stockholder himself is not guilty of laches, acquiescence or ratification of the acts of the corporation, 2 COOK, CORPORATIONS, (Ed. 6), §§ 646-7, *Kessler* v. *Ensley*, 123 Fed. 546. Almost exactly in point with the principal case are *Eagle Iron Co.* v. *Colyar*, 156 Fed. 954, and *Braham* v. *Gehl Co.*, 132 Wis. 674, 112 N. W. 1098, which hold in effect that where stock has been fraudulently issued, suit commenced by the corporation to cancel it and a dismissal of such suit because of the directors

being controlled by the holders of the stock, a stockholder may exercise the right to have such stock cancelled and may continue the suit commenced by the corporation. The corporation acts in a fiduciary relation toward the stockholders and must act in good faith. The board of directors has no absolute power of disposal of the property and rights of the corporation, but must serve the interests of the corporation in good faith. *Jones* v. *Morrison*, 31 Minn. 140, 16 N. W. 854; *Jamey* v. *Minn. Ind. Exp.*, 79 Minn. 488, 82 N. W. 984, 50 L. R. A. 279; *Wheeler* v. *Bank Building Co.*, 159 Fed. 391, 89 C. C. A. 447, 16 L. R. A. N. S. 892, 14 Ann. Cas. 917.

CORPORATIONS—ULTRA VIRES ACTS—WHO CAN COMPLAIN.—Plaintiff and defendant are both corporations engaged in the business of furnishing water to the same town. Defendant commenced the work of laying certain pipes, and plaintiff, alleging that defendant was thereby exceeding its charter rights, brings this suit for an injunction restraining the defendant from finishing the work. It was found that the defendant had not done, nor did it propose to do, any acts that had been or would be attended with any actual or serious damage to the plaintiff, or would interfere with it in the management and maintenance of its water system. *Held*, the plaintiff is not a proper party to raise the question of whether the defendant is exceeding its charter powers. *New Hartford Water Co.* v. *Village Water Co.* (Conn. 1913), 87 Atl. 358.

Generally, the question of whether a corporation is exceeding its charter powers can be raised only by the stockholders, or by the state, or by parties who have received some special damage by the alleged ultra vires acts, *Houston & T. C. R. Co.* v. *Shuley*, 54 Tex. 125; *Baker* v. *N. W. Loan Co.*, 36 Minn. 185, 30 N. W. 464; *Belchers Sugar Refining Co.* v. *St. Louis Grain Elevator Co.*, 101 Mo. 193, 13 S. W. 822, 8 L. R. A. 801. The principal case raises the question as to when a third party can object. Formerly a corporation could be attacked because of its ultra vires acts by private persons, but there has been a gradual development in the direction of holding that none but the state or a person directly interested in the corporation can question such authority. The doctrine of ultra vires is not favored in law and is never applied where it would defeat the ends of justice or work a legal wrong if such a result can be avoided, *Southern Pac. Co.* v. *U. S.*, 28 Ct. of Cl. Rep. 77, *Burke Etc. Co.* v. *Wells et al.*, 7 Idaho 42, 60 Pac. 87; and as the law stands now, to enable one to raise the question he must prove some actual damage, *De Camp* v. *Dobbins*, 29 N. J. Eq. (2 Stew.) 36; *Erie Ry. Co* v. *Delaware L. & W. R. Co.*, 21 N. J. Eq. (6 C. E. Green) 283; *Camblos* v. *Philadelphia & R. R. Co.*, Fed. Cas. No. 2331. Thus the question cannot be raised by a person not a stockholder, and interested only in competing for wharfage, *New Orleans M. & F. R. Co.* v. *Ellerman*, 105 U. S. 166, 26 L. Ed. 1015, nor can the act of a corporation taking land be questioned by one who has no right to the land himself, *Butte Hardware Co.* v. *Schwab*, 13 Mont. 331, 34 Pac. 24; *Case* v. *Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513; the only exception to the rule is where a right is expressly given by statute, *Martindale* v. *Kansas City, St. J. & B. R. Co.*, 60 Mo. 508; *Kimaly* v. *St. Louis K. C. & N. Ry.*

Co., 69 Mo. 658. *The Stockport District Water Works Co.* v. *The Mayor, etc., of Manchester et al.*, in the English Court of Chancery, 9 Jurist N. S. 266-7 is a case in point with the principal case; the court there says in effect that the plaintiffs have no interest in the defendants' action so as to maintain a complaint against them, neither are they qualified to represent the interests of the public; "and in one of these two capacities the bill, if it can be maintained, must be supported. In neither capacity do I think the plaintiffs are entitled to call upon the court for relief."

DAMAGES—MENTAL SUFFERING UNACCOMPANIED BY PHYSICAL INJURY.—Plaintiff was occupying, under a tenancy from month to month, a house owned by defendant. Defendant entered the house before the tenancy was ended, committed various annoyances, and tried to enter the room where plaintiff was confined by ill health. No physical injury resulted. Plaintiff alleged she was "greatly disturbed." *Held*, that damages might be recovered for mental suffering resulting from the wrongful act, even though no physical injury resulted, *Nordgren* v. *Lawrence* (Wash. 1913), 133 Pac. 436.

It is generally held that fright alone, not resulting in physical injury of a tangible and provable nature, is not a good ground for the recovery of damages. *Ewing* v. *Pittsburgh C. & St. L. Ry. Co.*, 147 Pa. St. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; *Nelson* v. *Crawford*, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; *Kalen* v. *Terre Haute & I. R. Co.*, 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; *Ohliger* v. *Toledo Traction Co.*, 13 Ohio Cir. Ct. 265; *Newton* v. *New York, N. H. & H. R. Co.*, 94 N. Y. S. 825, 106 App. Div. 415; *White* v. *Sander*, 168 Mass. 296, 47 N. E. 90. Humiliation is held to be a good ground of recovery in many jurisdictions, *Palmer* v. *Braun*, 123 Ill. App. 584; *Missouri K. & T. Ry.* v. *Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327; as well as sorrow, *Wadsworth* v. *W. U. Tel. Co.*, 86 Tenn. 695; and *Louisville & Nashville R. R. Co.* v. *Hull*, 113 Ky. 561, 57 L. R. A. 771. In the principal case the court fails to distinguish and state the ground on which this recovery is allowed. It must, however, from the circumstances reported, be placed either on the grounds of fright or of humiliation. If the latter, the holding is within the rule generally prevailing. If fright is the basis for the recovery, then the fact that a recovery is allowed though the fright was not accompanied by any actual injury resulting from the defendant's wrongful act, places the decision outside the rule now generally followed and shows a tendency of the court to break away from the common-law principle that there must be a palpable, physical injury which is capable of proof, before recovery can be had. Upon this principle the right to recover damages for injuries caused by fright and shock has always been predicated. See also 8 MICH. L. REV. 44, 11 MICH. L. REV. 250; and *Huston* v. *Freemansburg*, 212 Pa. 548, 61 Atl. 1022.

DIVORCE—HUSBAND'S LIABILITY FOR SUPPORT OF HIS MINOR CHILDREN AFTER DIVORCE.—Plaintiff, who had obtained a divorce for the fault of defendant husband and was awarded the sole care, custody, and control of their child, is suing to recover the amounts necessarily paid out by her for the

child's support since the decree. *Held*, defendant's duty to support his minor child was unimpaired by the divorce. *Desch* v. *Desch* (Colo. 1913), 132 Pac. 60.

The weight of authority is apparently opposed to the doctrine in the principal case. PECK, DOM. REL., § 258; *Hall* v. *Green*, 82 Me. 122, 47 Am. St. Rep. 311; *Husband* v. *Husband*, 67 Ind. 583, 33 Am. Rep. 107; *Brow* v. *Brightman*, 136 Mass. 187; *Johnson* v. *Onsted*, 74 Mich. 437; *Brown* v. *Smith*, 19 R. I. 319, 30 L. R. A. 680; *Ramsey* v. *Ramsey*, 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682; *Hampton* v. *Allee*, 56 Kan. 461, 43 Pac. 779; *Cushman* v. *Hassler*, 82 Iowa 295, 47 N. W. 1036. It would seem that, as the husband is the guilty party to the divorce, he should not be rewarded by being absolved from liability to support his children. And in *Spencer* v. *Spencer*, 97 Minn. 56, 114 Am. St. Rep. 695, 2 L. R. A. N. S. 851, 7 Ann. Cas. 901; *Pretzinger* v. *Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542; *Gibson* v. *Gibson*, 18 Wash. 489, 40 L. R. A. 587; *Zilley* v. *Dunwiddie*, 98 Wis. 428, 67 Am. St. Rep. 820; *Graham* v. *Graham*, 88 Pac. 852, 8 L. R. A. N. S. 1270; and *White* v. *White*, (Mo.) 154 S. W. 872, he is held liable. In the exhaustive note on this subject in 2 L. R. A. N. S. 851, the annotator declares the modern weight of authority is with the principal case. See also 7 Ann. Cas. 901 and 13 COL. L. REV, 645.

JURY—DENIAL OF RIGHT TO TRIAL BY JURY.—In the lower court a request for a verdict for the defendant had been denied. On exceptions the Supreme Judicial Court found that, on all the evidence, the request of the defendant should have been granted, and all the exceptions of the prevailing party overruled. St. 1909, c. 236 provided that in such cases the court may direct the entry of judgment for the party in whose behalf the request was made and erroneously refused. It was objected that such a statute was unconstitutional as the procedure provided for was an abridgment of the right of "trial by jury" given by the Bill of Rights, article 15. *Held*, that the statute was constitutional, as it was applicable only where a question of law was present and not one of fact. *Bothwell* v. *Boston Elevated Ry. Co.* (Mass. 1913), 102 N. E. 665.

The decision in this case is directly contrary to that of the United States Supreme Court in *Slocum* v. *N. Y. L. Ins. Co.*, 225 U. S. 364. The Massachusetts court expresses a vigorous disapproval of the holding in the *Slocum* case, and of the reasoning upon which it was based. The reasoning of the Massachusetts court is, in fact, along the same line as that of the dissenting justices in the *Slocum* case, that trial by jury is not a rigid and unchanging system but has a certain degree of flexibility in its adaptation of details to the changing needs of society without in any degree impairing its essential character. The decision in the principal case is in harmony with many other courts. *Hay* v. *Baraboo*, 127 Wis. 1, 105 N. W. 654, 3 L. R. A. N. S. 84, 115 Am. St. Rep. 977.

MASTER AND SERVANT—HABITUAL DISREGARD BY EMPLOYEES OF WARNING NOTICE AS CONSTITUTING WAIVER OF NOTICE.—An employee was killed while riding on a freight elevator, which was negligently constructed, on the em-

ployer's premises. There was a notice on the elevator reading: "Dangerous; Persons riding this elevator do so at their own risk." There was evidence that this notice was habitually disregarded by employees, and that such was known to the employer. *Held*, that such evidence was properly submitted to the jury, to determine if there was a waiver or abandonment of the prohibitory rule evidenced by the posted notice. *Selden-Breck Construction Co.* v. *Linnett*, (Okla.), 134 Pac. 956.

The vital point involved in cases of this description is whether the posting of such a notice shows such a performance by the employer of his duty of warning or cautioning the workmen, or such contributory negligence or assumption of risk on the part of the employee as will warrant the withdrawal of the case from the jury. As a general rule, whether the notice is sufficient to constitute the warning and caution, the duty of which is imposed upon the master, is a question of fact for the jury. And, as held in the principal case, it is also within the province of the jury to determine whether the continued disregard has been of sufficient duration to supersede or constitute a waiver of the rule; in other words, "a practical invitation to violate it." *Indermaur* v. *Dames*, L. R. 1 C. P. 274; *O'Donnell* v. *Allegheny Valley R. R.*, 59 Pa. St. 239; *Pa. R. R.* v. *Langdon*, 92 Pa. St. 21; *Wise* v. *Ackerman*, 76 Md. 375; *McNee* v. *Coburn Trolley Track Co.*, 170 Mass. 283; *St. Louis, I. M. & S. Ry. Co.* v. *Caraway*, 77 Ark. 405; *Wright's Adm'r.* v. *Southern Ry. Co.*, 101 Va. 36.

MUNICIPAL CORPORATIONS—PROPERTY ASSESSABLE—STREET-CAR TRACKS.—A statute gave cities power to locate sewers and to make, against the lots and parcels of land located within the territory benefited, special assessments for the purpose of paying the expenses incident thereto. The statute also expressly authorized an assessment against the city for benefits to its streets and public grounds. Defendant's street railway was within a district benefited by a sewer constructed under this statute, and an assessment was placed against the tracks and right of way of defendant. The latter contended that its property located in the street was not subject to this local assessment. *Held*, that the statute was not broad enough to warrant such an assessment against the tracks and right of way of the defendant; that street railways owning and operating railways in the streets do not hold any private easement or interest in the land upon which the tracks are located, but merely avail themselves of the public easement therein, and that since the statute provides that an assessment may be made against the city, such assessment, if made, would cover all benefits accruing to the easement of the public in the street. *Indiana Union Traction Co.* v. *Gough et al.*, (Ind. 1913), 102 N. E. 453.

This decision was inevitable in Indiana since the courts there uniformly hold that the construction and operation of street railways do not constitute an additional servitude for which compensation must be made. Besides the cases cited on this point in the opinion in the above case, see *Chicago, etc. Co.* v. *Whiting, etc. Co.*, 139 Ind. 297; *Magee* v. *Overshiner*, 150 Ind. 127, 40 L. R. A. 370. As to what use of a city's streets is an additional burden on the

street, the courts are not agreed. 6 MICH. L. REV. 84. But the weight of authority certainly is that when the street railway does not unduly interfere with the abutter's right of access, or exclude other means of travel, it is not an additional burden. *Elliot* v. *Fair Haven & W. R. Co.*, 32 Conn. 579; *Howe* v. *West End St. Ry. Co.*, 167 Mass. 46, 44 N. E. 386; *Finch* v. *Riverside & A. R. Co.*, 87 Cal. 597, 25 Pac. 765, 66 L. R. A. 109. Assuming that the street railway company has a property interest in the street other than the right to avail itself of the public easement, it is interesting to inquire whether a statute such as that referred to in the principal case is broad enough to justify the city in assessing such railway company. The fundamental rule of construction is that statutes delegating authority to make local assessments, being in derogation of the right of property, should be strictly construed against the exercise of the power. *Potts* v. *Cooley*, 51 Wis. 358. That such a statute would be broad enough may be inferred from such cases as: *In re North Beach & M. R. Co.*, 32 Cal. 499; and *State* v. *City of Passaic*, 54 N. J. Law 340. Where special assessments are authorized against land benefited by the improvements, the question sometimes arises, what is a "benefit"? As to this it has been held that it must be some advantage accruing from the construction of the work and immediately enhancing the value of the land; that the probability that the city some time in the future may construct a sewer to connect with the present sewer, which will benefit the land in question, is too remote to be called a benefit. *State etc.* v. *City of Elizabeth*, 37 N. J. Law 330.

MUNICIPAL CORPORATIONS — SEWER CONSTRUCTION — CHANGE OF PLANS. — The city council passed an ordinance for the construction of a sewer in a certain district, locating the line on which it was to be constructed, and providing that it should be built in acordance with certain specifications. The statute provided that contracts for street improvements should be let to the lowest and best bidder. Defendant was the only bidder, and was awarded the contract. Work was begun, and after defendant had reached a certain point on a street along which the line of sewer was to be laid, he encountered certain obstructions that could be surmounted only by much blasting, which would cause great expense and danger. Council then passed an ordinance changing the line of the sewer from the street to an alley where there were no obstructions. New bids for the work along the changed line were not asked for, defendant being allowed to finish the job. Defendant later presented certain tax bills against the property of appellant, who attacked the validity of the bills on the grounds that the improvement was not let to competitive bidding, and that the sewer as completed does not conform to the ordinance and specifications on which the bid was made. *Held*, that where the thing which the city officials allow to be changed was not and could not be known at the time of the letting of the contract, they should be allowed to exercise their judgment in dealing with a subject that develops unknown predicaments; and that the change here not being such a material one as to have defeated the right of the property owners to have competitive

bidding, they are bound to pay the tax bills. *Myers et al.* v. *Wood et al.*, (Mo. 1913), 158 S. W. 909.

The general rule that failure to advertise for bids, where such a proceeding is required by statute, will defeat an assessment to pay for the improvement is well settled. *Matter of Rosenbaum*, 119 N. Y. 24, 23 N. E. 172; *Tift* v. *Buffalo*, 164 N. Y. 605, 58 N. E. 1093. See also *Kneeland* v. *Furlong*, 20 Wis. 460. In *Trundy* v. *Van Nort*, 65 Barb. 331, where the facts were very similar to those of the principal case, it was held irregular to award a contract, which had been made upon proposals, to do the work in a different way from that which was contemplated when the notice was published for receiving such proposals, and that no assessment made under it would be valid. Even in the principal case it is recognized that changes which are "material" can not be made without a readvertisement, citing *City of Maryville ex rel. Bank* v. *Lippman*, 151 Mo. App. 447, 132 S. W. 47. In showing a willingness to draw distinctions between changes that are "material" and those that are not, the court, it would seem, is assuming a great burden—one, it might well be contended, that the legislature did not wish it to assume. It results, for example, in deciding that the change of the size of brick is material (*City of Maryville* v. *Lippman*, supra), but that the change from a route where construction is difficult to an alley where it is easy, is not material. As was well said in a Wisconsin case, "it is indispensable that bidders shall start on a common ground and bid for the production or accomplishment of the same identical result." *Bridge Co.* v. *Durand*, 122 Wis. 85, 106 Am. St. Rep. 931.

PARENT AND CHILD—PARENT'S LIABILITY FOR TORT OF CHILD.—Plaintiff was negligently injured while upon the highway by an automobile which defendant kept for the general use of his family and which at the time of the accident his daughter, who was alone, was using for her own pleasure. *Held*, the father was liable for the tort of his child. *Burch* v. *Abercrombie* (Wash. 1913), 133 Pac. 1020.

The decision in the principal case is placed squarely upon the ground that, as the child was carrying out the general purpose for which the machine was purchased and kept, the rule of respondeat superior applied. The case of *Doran* v. *Thomsen*, 76 N. J. L. 754, 19 L. R. A. N. S. 335, 131 Am. St. Rep. 677, 71 Atl. 296, 7 MICH. L. REV. 526, on parallel facts refused a recovery. It is believed that the only decision placed upon the same ground as that in the principal case is *Daily* v. *Maxwell*, 152 Mo. App. 415; 133 S. W. 351, and cited in the note in 41 L. R. A. N. S. 775. This doctrine appears never to have been recognized outside of automobile cases. In *Palm* v. *Ivorson*, 117 Ill. App. 535, the defendant furnished a shot-gun for the use of his son, who was competent to handle guns, but who, while on a hunting trip, shot the plaintiff's son; a recovery was denied. And in *Maddox* v. *Brown*, 71 Me. 432, 36 Am. Rep. 336, defendant, who allowed his son to use his horse and carriage without restriction and for his own pleasure, was held not liable for injuries to the plaintiff caused by the negligence of the son in using the same. In accord with these latter case are *Hagerty* v. *Powers*, 66 Cal. 368, 5 Pac.

622, 56 Am. Rep. 101; *Smith* v. *Davenport*, 45 Kans. 423, 23 Am. St. Rep. 737, 11 L. R. A. 429. At common law a parent was not liable for the torts of his child. *Moon* v. *Towers*, 8 C. B. (N. S.) 609; *Peterson* v. *Haffner*, 59 Ind. 130. And the authorities are unanimous in holding that the child must be the servant of the father and furthering his business at the time of the injury to render him liable. *McNeal* v. *McKain* (Okla.) 126 Pac. 742, 41 L. R. A. N. S. 775; *Joel* v. *Morrison*, 6 Car. & P. 511; *Loomis* v. *Hollister*, 75 Conn. 718, 55 Atl. 561. The principal case brings to mind an incongruous situation. A child, normally not a servant is held to be a servant under circumstances where an actual servant would be normally held not to be one. SHEARMAN & REDFIELD, NEGLIGENCE, 147; *Bard* v. *Yohn*, 26 Pa. St. 482. For a general discussion of the subject of the principal case see 7 MICH. L. REV. 180 and 526.

PARTNERSHIP—WHAT CONSTITUTES PARTNERSHIP AS DISTINGUISHED FROM AGENCY.—A contracted to work for B at a salary of $125 per month, and in addition thereto one-half the profits over $3,000. *Held*, that though the compensation was measured in part by the profits, the contract did not create a partnership. *Goodin* v. *Pitt* (Nev. 1913), 134 Pac. 459.

In another recent case there was a contract of mandate, providing that after defendant company had received its commission, and all the expenses had been paid, the profit, if any, was to be divided share and share alike. *Held*, to be no partnership; that the presumption of partnership arising from participation in the profits will yield to other provisions in the contract, and the evidence and circumstances surrounding same. *Bluefields S. S. Co.* v. *Lala Ferreras Cangelosi S. S. Co. et al.* (La. 1913), 63 So. 96.

These two cases, one arising under the civil law, the other in a common law jurisdiction, illustrate the prevailing state of the law, after the marked contrariety, which existed from the decision in *Waugh* v. *Carver*, (1793), 2 H. Blackstone 235, down to the case of *Cox* v. *Hickman*, (1860), 8 H. of L. Cas. 268. At the present time in this country there are only three states, (New York, Pennsylvania, and North Carolina), that adhere to the principle laid down in *Waugh* v. *Carver*, namely the arbitrary test of profit-sharing, and these courts in this regard are criticised as "like the Bourbons, who learned nothing and forgot nothing." The doctrine, as applied in these states, is found in *Leggett* v. *Hyde*, 58 N. Y. 272; *Wessels* v. *Weiss*, 166 Pa. St. 490; and *Southern Fertilizer Co.* v. *Reams*, 105 N. C. 283. The two principal cases seem to follow the reasoning of Judge COOLEY in *Beecher* v. *Bush*, 45 Mich. 188, in which it was observed, "that in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests, it was erroneous and mischevious." This idea departs from the principle laid down in *Cox* v. *Hickman*, in which it was recognized that an arbitrary test was necessary to insure an unambiguous and settled state of the law on such questions, and the test applied was that of mutual agency. Judge COOLEY remarks that there are but two ways of creating a partnership relation; by estoppel, and by express contract with the intention to form a partnership. The relation must com-

prise the essential elements of partnership; (1), Community of interest in some lawful commerce or business, and (2), mutual agency, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option, *to the extent of making one the sole agent of the other and of the business.* Applying these principles to the two principal cases it will be found that every essential element is present, except the intention to create a partnership. In fact there was a feature present, which Judge COOLEY does not consider, but which was the basis of the decision in *Waugh* v. *Carver;* namely, that of profit sharing. This necessarily resolves the question into the following proposition; given two states of facts, one containing all the elements of partnership, including intention to create same, the other consisting of all the elements except the intention, the result will be that one is a partnership, while the other is not.

PLEADING—CONTINUANCE.—Defendant moved for a continuance in order to get the attendance or deposition of a certain witness. Plaintiff filed a cross-affidavit, setting out that the witness was her husband, that he would not testify against her, that he could not without her consent, and that she would not consent. The continuance was, however, granted, and plaintiff applied for a writ of mandamus to compel the trial judge to set aside the continuance and proceed with the trial. The writ was denied on the ground that it did not appear to what the witness would testify, and COMPILED LAWS OF MICHIGAN, § 10,213, contained many exceptions which were not negatived by the cross-affidavit. *Snyder* v. *Berrien Circuit Judge,* (Mich. 1913), 142 N. W. 767.

The general rule is that the affidavit in support of the motion for a continuance should state the facts to which the witness will testify, and if it does not, it is not error to refuse a continuance. *People* v. *Jackson,* 111 N. Y. 362; *Hutts* v. *Shoaf,* 88 Ind. 395; *State* v. *Falconer,* 70 Iowa 416; *Commonwealth* v. *Winnemore,* 1 Brewst. (Pa.) 356; *Carthaus* v. *State,* 78 Wis. 560. The above rule would require that the defendant should have stated in his affidavit the facts to which the witness would testify, if present, and then, by reference to the statute it would appear whether, as husband of the plaintiff, the witness could testify against her. If it appears that the witness can not be compelled to testify to the facts set out in the affidavit, a continuance is properly refused. *Dungman* v. *State,* 48 Wis. 485. If the facts are set out, the other party may avoid a continuance by an admission that the witness, if present, would testify to the facts so stated. *Hubbard* v. *Kirby,* 38 Ark. 102; *Chicago City R. Co.* v. *Duffin,* 126 Ill. 100; *Hartford Ins. Co.* v. *Hammond,* 41 Colo. 323; *Pate* v. *Tate,* 72 Ind. 450; *Dial* v. *Valley Mutual Life Association,* 29 S. Car. 581; *Kitchens* v. *Hutchins,* 44 Ga. 620. The granting of a continuance is largely within the discretion of the trial judge. *Barrow* v. *Hill,* 54 U. S. 54; *Watts* v. *Cohn,* 40 Ark. 114; *Maynard* v. *Cleveland,* 76 Ga. 52; *Lewis* v. *Lamphere,* 79 Ill. 187; *De Grote* v. *De Grote,* 175 Pa. St. 50. Mandamus will not ordinarily lie in cases of discretionary acts. *Ex parte McKissock,* 107 Ala. 493; *Board of Com'rs. of Shoshone County* v. *Mayhew,*

5 Idaho 572; *Atkinson* v. *Riley*, 23 Ky. L. Rep. 731; *Whiley* v. *King*, 92 Cal. 431; *State* v. *Steiner* (Wash.), 87 Pac. 66. The Michigan court did not, in their opinion, deny the writ on this ground, but in contradition to the above general rule. The writ of mandamus was granted on a similar set of facts in *Dixon* v. *Field*, 10 Ark. 243.

PROSTITUTION—CONSTRUCTION OF WHITE SLAVE ACT.—The White Slave Act (Act June 25, 1910, c. 395), prohibits the transportation of women in interstate commerce "for the purpose of prostitution or debauchery or any other immoral purposes." The accused persuaded a woman to go from one state to another for the purpose of engaging in illicit intercourse, cohabitation and concubinage with accused. The indictment followed the language of the statute, and to this indictment the accused demurred. *Held*, that illicit cohabitation and concubinage are immoral acts analogous to prostitution, and come well within the letter of the statute, and that the commercial feature need not be present. *United States* v. *Flaspoller* (1913), 205 Fed. 1006.

This case is in accord with, *Hoke* v. *U. S.*, 227 U. S. 308, 33 Sup. Ct. 281, in which case the constitutionality of the act was sustained; and also with the case of *U. S.* v. *Bitty*, 208 U. S. 393, 28 Sup. Ct. 396, 52 U. S. (L. ed.) 543, which case arose under the Act of Feb. 20, 1907, c. 1134, prohibiting importation of any alien woman or girl for purposes defined by practically the identical language used in the White Slave Act. That the commercial feature need not be present to sustain a conviction under the act was also held in the recent *Diggs and Caminetti* cases. But Judge POLLOCK of the United States District Court for Kansas, in a recent case, instructed a defendant to change his plea from guilty to not guilty, intimating that he would instruct the jury to acquit if it did not appear that the girl was taken in another state to commercialize her immorality. From the cases cited above, it is evident that Judge POLLOCK's view, which has attracted a good deal of attention, was erroneous.

SALES—GOODS TO BE MANUFACTURED—REMEDY OF SELLER—POWER TO COMPLETE CONTRACT.—Plaintiff agreed to sell and defendant to buy certain bag holders to be manufactured by plaintiff and delivered to defendant at specified future dates. Before performance due, defendant notified plaintiff he would be unable to use the rest. Plaintiff sues on "open account" including therein 39,307 bags he did not manufacture. *Held*, he cannot sue upon an open account either for the purchase price of goods or for contract price less cost of manufacture. Before an action of this kind will lie, the seller must have put himself in a position where he could deliver and have actually delivered the goods or have stored and retained them for vendee. *American Mfg. Co.* v. *Champion Mfg. Co.* (Ga. App. 1913), 79 S. E. 485.

The ultimate decision here on the facts is correct, inasmuch as plaintiff did not manufacture the holders. But could the plaintiff proceed and manufacture against the express and unequivocal renunciation of the defendant? The court in coming to the conclusion above set forth said "The plaintiff could have declined to agree to the rescission, proceed with the manufacture

of the bag holders, and if at the time they were to have been delivered, the defendant refused to accept and pay for them the plaintiff then could recover under provision of the Code." This is not in accord with weight of authority. It is well settled that a vendor upon a breach of contract before performance due, may treat it as a present breach and bring action immediately. *Hochster* v. *De La Tour*, 2 El. & Bl. 678; *Frost* v. *Knight*, L. R. 7 Ex. 111; *Johnstone* v. *Milling*, 16 Q. B. Div. 460. In the United States the Supreme Court adopted the same rule in *Roehm* v. *Horst*, 178 U. S. 1. See also *Kadish* v. *Young*, 108 Ill. 170, 48 Am. Rep. 548; *Crabtree* v. *Messersmith*, 19 Iowa 182. MECHEM, SALES, § 1089: Contra,—*Daniels* v. *Newton*, 114 Mass. 530, (but see *Collins* v. *Delaporte*, 115 Mass. 159); *Riley* v. *Hale*, 158 Mass. 240; ANSON, CONTRACTS, *285 and note. See also *Barker & Stewart Lumber Co.* v. *Ed. Hines Lumber Co.*, 137 Fed. 300, 308. The vendor may elect to keep the contract open, and await the time the contract is to be performed and then hold buyer responsible. *Kadish* v. *Young* (supra), and authorities cited therein; *Stokes* v. *Mackay*, 147 N. Y. 223. See also, *Ault* v. *Dustin*, 100 Tenn. 366; *Johnstone* v. *Milling*, L. R. 16 Q. B. Div. 460. The same rule applies to sale of goods to be manufactured, *Cort* v. *Ambergate Railway Co.*, 17 Q. B. 127; *Butler* v. *Butler*, 77 N. Y. 472; *Collins* v. *Delaporte*, 115 Mass. 159. The contract is not rescinded, but broken and while the other party has the right to deem it in force, for purpose of recovery of damages, he has not the right to unnecessarily enhance the damages by proceeding, after the countermand, to finish the undertaking. MECHEM, SALES, § 1092; *Clark* v. *Marsiglia*, 1 Denio (N. Y.) 317; approved and followed in *Hosmer* v. *Wilson*, 7 Mich. 294; *Derby* v. *Johnson*, 21 Vt. 21. The same rule also laid down in *Danforth* v. *Walker*, 37 Vt. 239; *Dillon* v. *Anderson*, 43 N. Y. 231; *Unexcelled Fireworks Co.* v. *Polites*, 130 Pa. St. 536; see *Barker & Stewart L. Co.* v. *Edw. Hines L. Co.* (1905), 137 Fed. 300, 309. Such absolute refusal is to be considered in the same light, as respects the plaintiff's remedy, as an absolute physical prevention by defendants. ANSON, CONTRACTS, *285; *Derby* v. *Johnson*, 21 Vt. 21; *Haines* v. *Tucker*, 50 N. H. 311; *Smith* v. *Lewis*, 24 Conn. 624; *Clement* v. *Messerole*, 107 Mass. 362; *Collins* v. *Delaporte*, supra; *Clark* v. *Marsiglia*, supra; *Cort* v. *Ambergate Ry. Co.*, supra.

SALES—REMEDY OF SELLER—NOTICE OF INTENTION TO RESELL.—A vendee refused to take and pay for goods bought by him. One of the remedies given to a vendor by the Code is "He may sell the property, acting for this purpose as agent for the vendee, and recover the difference between the contract price and price of resale." *Held*, that before the vendee will be liable for such difference it must appear that he was notified of vendor's intention to sell at vendee's risk. *Felty* v. *Southern Flour and Grain Co.* (Ga. 1913), 78 S. E. 1074.

The cases on this point are in hopeless conflict. It is held in Illinois and elsewhere, that no such notice is necessary. MECHEM, SALES, § 1633. *Ulman* v. *Kent*, 60 Ill. 271; *Maulding* v. *Steele*, 105 Ill. 644; *Wrigley* v. *Cornelius*, 162 Ill. 92; *Clore* v. *Robinson*, 100 Ky. 402; *Kellog* v. *Frolich*, 139 Mich. 612;

Ingram v. *Mathieu*, 3 Mo. 209; *Van Brocklen* v. *Smeallie*, 140 N. Y. 70. See 3 BENJAMIN, SALES, 1023. On the other hand, in Indiana and other states, it is declared that such notice is indispensable, "a material element in the cause of action and must be stated in the complaint." *Dill* v. *Mumford*, 19 Ind. App. 609 and cases cited. (See also in accord: *Davis Sulphur Ore Co.* v. *Atlanta Guano Co.*, 109 Ga. 607, upon which the principal case was decided); *Bowsner* v. *Cessna*, 62 Pa. St. 148; *Granberry* v. *Frierson*, 2 Baxt. (Tenn.) 326; *Leonard* v. *Portier*, 15 S. W. 414 (Tex.); *American Hide Co.* v. *Chalkley*, 101 Va. 548; *Pratt* v. *Freeman Mfg. Co.*, 115 Wis. 648; *Hayes* v. *Nashville*, 80 Fed. 641, 26 C. C. A. 59. Mr. MECHEM, in his work on SALES, (§ 1624), states the rule as follows: "unless the goods are perishable, or other special circumstances would render notice impracticable or unavailing, notice of the seller's intention to resell must be given, if the seller intends to make the price realized upon the sale the basis of his recovery against the buyer." See *Penn* v. *Smith*, 98 Ala. 560; *Holland* v. *Rea*, 48 Mich. 218; *Green* v. *Ansley*, 92 Ga. 647; *Davis Sulphur Ore Co.* v. *Atlanta Guano Co.* (supra). Notice may be waived by the buyer, and such waiver will be presumed where the buyer tells the seller he may do what he pleases with the goods. *Wrigley* v. *Cornelius*, 162 Ill. 92. Notice of time and place of sale (as distinguished from intention to sell) need not be given. *Magnes* v. *Sioux City Nursery Co.*, 14 Colo. App. 219; *Van Brocklen* v. *Smeallie*, supra; *Leonard* v. *Portier* (Tex.), 15 S. W. 414; *Pratt* v. *Freeman Mfg. Co.*, 115 Wis. 648.

TORTS—MASTER'S LIABILITY FOR ASSAULT AS AFFECTED BY PROVOCATION OF SERVANT.—Plaintiff, a passenger on defendant street railway, engaged in an altercation with the motorman in which the latter used much profanity and vile language. Plaintiff sued for an assault and battery. Defendant introduced evidence to show that the plaintiff provoked the assault. Plaintiff proved no actual assault and battery, and the court *held* that the evidence as to provocation was sufficient to justify the jury in acquitting the defendant. *Binder* v. *Georgia Railway and Electric Co.* (Ga. 1913), 79 S. E. 216.

As a general rule the mere fact that a servant has been provoked into an assault will not excuse the master from liability, especially if the master be a carrier. *Baltimore & Ohio R. Co.* v. *Barger*, 80 Md. 23; *Central R. Co.* v. *Brown*, 113 Ga. 414; *Birmingham R. & Electric Co.* v. *Baird*, 130 Ala. 350, 54 L. R. A. 752; *Chicago and E. R. Co.* v. *Flexman*, 103 Ill. 546; *Birmingham R. and Power Co.* v. *Mullen*, 138 Ala. 614. The cases are collected and carefully examined in *Mason* v. *Nashville, Chattanooga and St. Louis Ry.*, 135 Ga. 741, 33 L. R. A. N. S. 280, and the rule there announced is that words may or may not amount to a justification according to the nature and extent of the assault, all of which will be determined by the jury. The cases holding that provocation by the plaintiff will furnish justification as a matter of law are not numerous, and as a rule are decided on the ground of contributory negligence on the part of the plaintiff. *Wise* v. *Covington & C. Ry. Co.*, 17 Ky. Law Rep. 1359; *Peavy* v. *Georgia Ry. & Bkg. Co.*, 81 Ga. 485, 12 Am. St. Rep. 334.

TORTS—LIBEL AND SLANDER—PRIVILEGED PUBLICATION.—Plaintiff brought an action for libel alleging that defendant newspaper published a complaint which had been filed in a civil suit against plaintiff, and which contained libellous matter. The defendant pleaded that this was a report of a judicial proceeding and as such entitled to privilege. *Held*, that the complaint was not a judicial proceeding within the rule granting privilege to reports of judicial proceedings. *Meeker* v. *Post Printing Co.* (Colo. 1913), 135 Pac. 457.

The case is interesting because it is common practice for newspapers to publish complaints or parts of complaints which have been filed. It announces no new rule, as it seems to be settled in this country that pleadings in a suit are not judicial proceedings such as may be published with immunity. To constitute such proceedings some judicial action must be taken thereupon. *Park* v. *Detroit Free Press Co.*, 72 Mich. 560; *Cowley* v. *Pulsifer*, 137 Mass. 392; *Metcalf* v. *Times Publishing Co.*, 26 R. I. 674; *Cincinnati Gazette Co.* v. *Timberlake*, 10 Oh. St. 548; I COOLEY, TORTS (3rd Ed.), 447. However the case seems to apply the rule more directly than has been done hitherto, as the cases cited above are all attended by other circumstances. For instance in *Cincinnati Gazette Co.* v. *Timberlake*, supra, the published report included comment on the allegations of the complaint. Pleadings are however, judicial proceedings from the standpoint of the party pleading, and any statements the party may make in such pleading, if material, are absolutely privileged. A different rule prevails in the case of *ex parte proceedings*, and it has been held that reports of such proceedings are privileged. *Metcalf* v. *Times Publishing Co.*, supra.

WATERS—DIVERTING FLOOD WATERS.—D was the owner of land bordering on a river. P owned adjoining land below that of D but was not a riparian owner, a third party owning a strip of land between P's lot and the river. The bank of the river opposite P's land was about four feet high but above this, on D's land, it was much lower and as a result the river, in times of a freshet, overflowed D's land and ran over P's lot, depositing sediment which was valuable for fertilizing purposes. D, in building a conduit, raised a bank of earth extending from the river bank along the upper line of P's land, which prevented P from getting the benefit of the overflow. D, in raising the bank, did not attempt to divert the water for any purposes connected with his own land but merely to carry it to a reservoir to make it available for sale. P sues D for resulting damages. *Held* that P could recover for damages arising from the diversion of the flood water, such damage not being *damnum absque injuria*. *Thompson* v. *New Haven Water Co.* (Conn. 1913), 86 Atl. 585.

The facts in this case are novel because they involve the right of a lower proprietor to have the natural flood-flow continued to his land, while in the other cases where the question of flood-water has been considered it has concerned the right of one proprietor to keep flood-waters from his land, thus throwing an additional amount upon the proprietor above, or upon the proprietor across the river, to his damage. However, the court seemed to apply the same rule which would have been applicable if either of the two latter

had been the case. The question as to what rule of law should be applied to cases involving flood-waters has been very widely considered, the English courts going to the full extent of treating the flood-water as part of the stream, *Menzies* v. *Breadalbane*, 3 Bligh. N. S. 414; *Rex* v. *Trafford*, 1 Barn. & Ad. 814, and this rule has been followed to some extent by courts in the United States. *O'Connell* v. *East Tenn. etc. R. Co.*, 87 Ga. 246; *Chicago etc. R. Co.* v. *Emmert*, 53 Neb. 237; *Spelman* v. *Portage*, 41 Wis. 144. Many courts have held that flood-waters are surface-waters, but having arrived at this conclusion were in most cases no nearer a final decision because then the question arises as to what rule applies to such surface-waters, and this must necessarily be determined by the particular facts in each case. *Cairo & V. R. Co.* v. *Stevens*, 73 Ind. 283, 38 Am. Rep. 139; *McCormick* v. *Kansas City etc. R. Co.*, 57 Mo. 433; *Morris* v. *Council Bluffs*, 67 Iowa 343, 56 Am. Rep. 343. On the other side there are a greater number of cases holding flood-waters not surface-waters. *Crawford* v. *Rambo*, 44 Ohio St. 287; *Gillett* v. *Johnson*, 30 Conn. 180; *Macomber* v. *Godfrey*, 108 Mass. 219; *West* v. *Taylor*, 16 Oregon 165; *Uhl* v. *Ohio River R. R. Co.*, 56 W. Va. 494, 3 Am. & Eng. Ann. Cases 201; *Shane* v. *Kansas, etc. R. Co.*, 71 Mo. 238, 36 Am. Rep. 480. Probably the best rule is that followed by this case, where it is stated that flood-water should be treated as forming a class by itself apart from surface-waters and natural water courses in determining the rights and liabilities arising therefrom. This is sanctioned by the note in 25 L. R. A. 527, 530, and in FARNHAM, WATERS AND WATER RIGHTS, § 879. This of course does not mean that one hard and fast rule can be formulated in respect to rights concerning flood-waters, because such a rule could not work justice in every case. A different rule would be applicable in the case of flood-waters flowing in one general direction, than would be applied in the case of flood-waters which lay spread about upon the land until they percolate through the soil or evaporate.

WILLS—CONTRACT TO DEVISE—STATUTE OF FRAUDS—PART PERFORMANCE.—Husband and wife, in accordance with an oral agreement that they would execute mutual wills and that such wills should be irrevocable except under certain conditions, executed wills simultaneously by which each gave his or her real and personal property to the other. *Held*, that the execution of the wills was not such part performance as to take the oral agreement out of the operation of the Statute of Frauds. *In re Edwall's Estate* (Wash. 1913), 134 Pac. 1041.

The decided weight of authority is with the decision in this case, and it is difficult to see how any other conclusion could logically be reached. The making of the will cannot be relied upon as an act constituting part performance, for a will, being ambulatory, is subject to revocation by various acts of the testator. There has been no transfer of real estate, for the property devised in the will remains, until his death, in the hands of the testator and subject to his own control. *Gould* v. *Mansfield*, 103 Mass. 408. One case, however, and a recent one, has held that the oral agreement and the execution of the reciprocal wills constitute a single transaction and therefore that

such a contract cannot be said to rest in parol; that the wills, in equity, are not ambulatory, and may not be revoked by either party so long as the other party continues to perform the contract; and that where either party to such a contract commits a breach of same by subsequently executing another will devising his property contrary to the terms of the contract, the other party is entitled to specific performance. *Brown* v. *Webster,* 90 Neb. 591, 134 N. W. 185, 37 L. R. A. N. S. 1196.

WILLS—GIFTS PARTLY VOID.—Testator devised the residue of his estate to the town to use the income forever to care for testator's burial place, and the balance to support public schools. It was claimed that the whole gift was void because an uncertain part was to be devoted to a private purpose (care of a burial place) as to which a perpetual trust would be void. But the court found that $3 a year would care for the burial place, reviewed the conflicting decisions as to the validity of trusts to maintain tombs in perpetuity, and succeeded in avoiding a decision on the point by holding the charitable trust to support the public schools was separable from the rest, or if not the whole might be devoted to the support of the public schools, charged with a "moral obligation" to maintain testator's tomb. *Smart* v. *Town of Durham,* (N. H. 1913), 86 Atl. 821.

In another recent case $500 out of an estate of $30,000 was given to St. Mary's Catholic Parish of Sterling in trust to keep testator's burial lot forever in repair and use the rest of the income in support of the parish school, and it was held that the whole gift was valid in view of the trifling amount of the bequest compared with the rest of the estate. *Burke* v. *Burke* (Ill. 1913), 102 N. E. 293. In this case contestants relied on the prior decisions of the court that trusts for perpetual care of a burial lot are void: *Mason* v. *Bloomington Lib. Assn.,* 237 Ill. 442, 85 N. E. 1044, 15 Ann. Cas. 603; and that the valid provisions of the will must be rejected with the invalid where the will manifests a connected plan destroyed by the invalidity of a part, where the good cannot be separated from the bad, or where enforcement of a part only would result in injustice. *Barrett* v. *Barrett,* 255 Ill. 332, 99 N. E. 625. The general rule is that the invalidity of a part of a gift or trust does not destroy the rest if the good can be separated from the bad, unless the result thereby produced is a disposition that the testator probably would not have made if he had known that part of his plan could not have effect. *Landram* v. *Jordan,* 203 U. S. 56, 27 Sup. Ct. 17; *Niles* v. *Mason,* 126 Mich. 482, 85 N. W. 1100; *Johnson* v. *Johnson* (Ky. 1904), 79 W. 293.

WILLS—TESTAMENTARY CAPACITY — SUFFICIENCY OF EVIDENCE.—The testator suffered at times from attacks of insanity, but all the witnesses present when the will was made, including the subscribing witnesses, a physician, and a nurse, testified that at the time of making the will the testator was of sound and disposing mind. The only evidence tending to prove mental incapacity was that the frequency of the attacks of dementia was increasing, and that before and after the will was executed the testator made declarations of intention contrary to that expressed in the will. *Held,* that at the time of

execution of the will the testator was of unsound mind. *In re Jones' Estate* (Cal. 1913), 135 Pac. 288.

This case, to say the least, goes to the extreme, especially if we remember that California is one of the states in which it is held that in questions of testamentary capacity the burden of proof is upon the party alleging incapacity. *In re Scott's Estate,* 128 Cal. 57, 60 Pac. 527. The fact that the testator, prior to the execution of the will, made declarations of an intent different from that expressed in the will does not require that the will be set aside. *Hays* v. *Moulton,* 194 Mass. 157, 80 N. E. 215. Such declarations, however, as well as declarations made subsequent to the will, are admissible to show testator's mental condition, provided that the time of making them was so near to the time of the execution of the will that the declarations tend to show the mental condition at that time. *Taylor* v. *Pegram,* 151 Ill. 107. In the principal case evidence of a declaration made twenty-six days after the execution of the will was held admissible. Perhaps the court would not have been justified in setting aside the verdict as contrary to the weight of evidence, yet the declaration of the testator, made twenty-six days after the will, of an intention contrary to that expressed in the will, and other evidence of that nature, should be given little or no weight. "A will cannot be rejected on account of insane delusions of the testator which are not operative in the testamentary act, and which do not relate to the persons or objects affected by it; and a verdict setting aside a will on the ground of insanity of the testator is not sustained by the evidence where the proof shows that he had business capacity and made the will intelligently without actions indicating a deranged mind as to its subject matter or execution, notwithstanding proof of his unfounded fancies and delusions as to other matters." *In re Redfield,* 116 Cal. 637, 48 Pac. 794. See also *In re Wilson,* 117 Cal. 264, 49 Pac. 172; *Thompson* v. *Ish,* 99 Mo. 160; *Blough* v. *Parry,* 144 Ind. 463; *Denson* v. *Beazley,* 34 Tex. 191; *Bice* v. *Hall,* 120 Ill. 597.

BOOK REVIEWS.

HISTORY OF THE SUPREME COURT OF THE UNITED STATES. By Gustavus Myers. Charles H. Kerr & Co., Chicago, 1912, pp. 823.

The preface to this book begins with the following sentence: "To a work such as this, avoiding as it does both theories and conclusions, and confining itself strictly to ascertainable facts, little or no prefatory note is required." The hope based upon this promise of a disinterested and impartial examination of the historical facts regarding the Supreme Court is utterly dashed before the reader has covered many pages of the book.

The truth is that while the author has probably made laborious examination of a great mass of facts he has written anything but a history or a dispassionate commentary. Mr. Myers had previously written books on the "History of the Great American Fotrunes" and a "History of Tammany Hall," and a learned colleague of the writer of this review has suggested that the author has translated his views of Tammany Hall into his account of the United States Supreme Court.

There is just one thesis in this book and that is that the constitution of the United States was framed, and its provisions and the law arising therefrom have been interpreted and fixed by the members of the Supreme Court, in the interest of corporate and other wealth and against the interest of the so-called working classes.

The first chapter, which is entitled "Conditions Preceding Establishment of the Supreme Court," concludes as follows: "All the conditions, the varied demands and contests and the laws and traditions put in force by the governing classes, as well as the traditional subjugation of the working classes, were later reflected in the personnel of the Supreme Court of the United States selected to enforce and augment the powers by which the ruling classes benefited."

The greater part of the book is given up to a consideration of the personnel of the court from its organization to the present time. A great mass of detail taken from almost every source, authentic and unauthentic, is marshalled for the purpose of showing that all of the members of the court, by reason of family connections, class or party bias, or actual monetary interest, were influenced to so distort or declare the law as to favor the so-called governing classes, even at the expense of violation of truth, law and equity.

Mr. Myers grudgingly admits that "in the case of men whose minds are already permanently moulded to such purposes, and whose character and station forbid the use of illicit means, immeasurable subservience can be obtained which crude and vulgar money bribery would hopelessly fail to accomplish." Most of the justices are therefore not corrupt in the sense that they received money bribes but they are nevertheless, according to the author, "able servitors of the ruling economic forces." (See pp. 8 and 9).

If any of the justices who most of us have believed were patriots have

escaped impalement at the author's hands that fact has escaped the present reviewer. Thus, in the chapter entitled "The Authentic John Marshall," the great chief justice is pictured as engaged in corrupt conspiracy with Justice Story, whereby Marshall traded off the decision of Fletcher v. Peck, 6 Cranch 87, in which Story is supposed to have benefited, for the decision in the case of Hunter v. Fairfax's devisee, 7 Cranch. 603, in which case Story gave the opinion which it is said enabled Marshall to obtain possession of the Fairfax estate. In fact all of the court at this time were corrupt, for each in turn was called upon, sometimes in collusive suits, to render an opinion whereby some other member of the court made dishonest gains. And so the dreary story continues to the end.

The remarkable investigation of insurance frauds in New York, conducted by Mr. Hughes, later Mr. Justice Hughes, far from being the public service which most of us had supposed it to be, was in reality, according to our author, a means of so depreciating the stock of the insurance companies that Thomas F. Ryan, a former client of Mr. Hughes' firm, was enabled to buy the controlling interest in these properties at artificially low figures. (See pp. 756 et seq.). Mr. Justice Harlan, it was admitted, died a poor man, nevertheless instead of being the champion of the people he appeared to be, he was "a reactionary regarding almost every question but that of the Negro race." (P. 779.)

It is true that the court occasionally has rendered just decisions in favor of popular rights, as in the cases upholding the Employers' Liability Act in 1912 and in the case regarding the Oregon Initiative and Referendum decided in the same year. But all such decisions were due to the pressure of public opinion brought home to the justices personally with a strength which they dared not resist. (See pp. 780-781.)

No one doubts that economic and social forces and economic and sociological doctrines have had much to do with governmental and legal institutions in all times. It could not of course be otherwise. Undoubtedly, too, judges like other men are influenced by their associations, their political theories and their own views of life. And while sometimes they are prejudiced and sometimes led to unwise or even unfair conclusions, on the whole it is as fortunate as it is inevitable that they are unable to divest themselves of human emotions and human ways of thinking. The fundamental fallacy in the kind of work of which Mr. Myers' book is an extreme type arises out of attributing sordid motives in all cases in which it is possible to suppose that such motives influenced the conduct of the persons whose work is being examined. Professor Beard's recent book entitled The Economic Interpretation of the Constitution is a much more scholarly and disinterested essay of the same general kind, and yet it too reaches some erroneous conclusions, as is shown by Professor Latané's review in the November number of the American Political Science Review.

Undoubtedly our Supreme Court justices have erred in judgment, and perhaps they have sometimes been even improperly biased, but conceding that this may be the case is by no means to justify such a book as that under review.

H. M. B.

THE LAW AND PRACTICE IN BANKRUPTCY UNDER THE NATIONAL BANKRUPTCY ACT OF 1898. By Wm. Miller Collier. Ninth edition, with amendments of 1903, 1906 and 1910, and with decisions to July 1, 1912. By Frank B. Gilbert, of the Albany Bar, Editor of Street Railway Reports, Annotated; Joint Author of Commercial Papers, etc. Matthew Bender & Co., Albany, N. Y., 1912, lxxvii, 1513.

FORMS, RULES, AND GENERAL ORDERS IN BANKRUPTCY, Collected, Revised and Annotated by Marshall S. Hagar, of the New York Bar, and Thomas Alexander, Clerk of the United States District Court for the Southern District of New York, and United States Commissioner. Matthew Bender & Co., Albany, N. Y., 1910, li, 747.

The publisher of these two admirable books claims that they make up a complete working guide to the law and practice in bankruptcy cases. And the claim is certainly well founded. The standard work of Collier is too well known to require comment; it has been recognized for years as an authority, and is constantly cited by the bench and bar on all points of bankruptcy law. In bringing out the new edition the editor has wisely retained the arbitrary statutory arrangement of the previous editions, which has become familiar to thousands of users and thus justified itself in spite of any possible doubts as to the comparative merits of a logical treatment of the subject. And by careful condensation and mechanical ingenuity it has been possible to retain the valuable feature of treating the whole subject in one volume.

An adequate form-book is a great addition to the tools of the bankruptcy lawyer. The official Forms in Bankruptcy, sixty-three in number established by the Supreme Court of the United States in 1898 (172 U. S. 667-723), were necessarily framed without knowledge of what the development of the law would be under the new statute, and were in many instances not even adapted to the new law. Naturally, additional forms have been framed by clerks and by practitioners, and many of these have found their way into the various works on bankruptcy. But the collection here presented is twice as large as any other with which this writer is familiar, and seems to include a form for nearly every situation that can be imagined. Moreover, most of the forms have actually been passed on in litigated cases, and all are adequately annotated, so that the path of the draftsman is smoothed and lighted and guarded for him. The arrangement of the form-book does not follow that of the text-book, but the different forms are readily found by means of a complete table of contents and an excellent index. E. H.

THE TWO HAGUE CONFERENCES. By Joseph H. Choate. Princeton University Press, Princeton, 1913, xiv, 109.

In appointing Mr. Choate as Stafford Little Lecturer on Public Affairs for 1912, Princeton obtained a worthy successor to Grover Cleveland and George B. McClellan, the previous holders of the lectureship. And whoever it was that chose the subject for Mr. Choate's lectures, he was happy in selecting a topic on which the lecturer could speak with authority, for, as is pointed out in the excellent introduction by Professor James Brown Scott, Mr. Choate

was an important contributing factor in the success of the second Hague Conference.

The lectures point out briefly the results of the two conferences of 1899 and 1907. The Conference of 1899, though resulting in the establishment of the permanent International Court of Arbitration and in the agreement as to special mediation in case of controversies between nations, was chiefly effective, in the opinion of Mr. Choate, in bringing about a better understanding among the nations of the world, and thus paving the way for the success of the second Conference. Indeed, Mr. Choate, in speaking of this phase of the work of the Conference, seems to have anticipated Lord Haldane's international sittlichkeit when he speaks of "that decent regard for the opinion of mankind, to which nations as well as men are bound to account for their conduct."

The results of the second Conference in 1907 are briefly set down. The agreement to submit to arbitration all questions of recovery of debts owing from one nation to the citizens of another, was a distinct achievement on the part of the representatives of the United States. The establishment of the International Court of Appeal in Prize Cases was another result of this Conference. And Mr. Choate points out that even the failures—or the unaccomplished attempts—of this Conference were of great effect in crystallizing international sentiment on important matters, and may bring about concrete results at the next Conference.

An appendix, largely bibliographical, adds to the value of the work. It is unfortunate that the otherwise excellent mechanical make-up of the volume is marred by slipshod proof-reading.

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DEFECTS IN OUR LEGAL SYSTEM.

THAT the practice of law and the administration of justice are under a fire of popular distrust and criticism of extraordinary intensity requires no proof. A fact of which there is evidence in numerous contemporary books, in almost every magazine, in the daily papers, in the remarks, or the questions, or it may be in the sneers, of one's friends, requires no further demonstration. The only questions of importance to be answered are to what extent this criticism and this distrust are well founded, what are the remedies for such defects as exist, and how and by whom should they be applied? Shall lawyers allow their just indignation at such of these criticisms as grow out of ignorance and prejudice to blind them to those that are true, or to steel them into an attitude of indifference to, or of assumed contempt for, this entire popular outcry? This would indeed be a course of folly, not to say of professional suicide, one which would inevitably result in the laying of alien and unskilled hands upon the temple of justice, in crude and ignorant efforts to repair the breaches in the temple walls and to remodel them to meet the new necessities of changed times and conditions. That this is no fancied danger we have had already convincing evidence. Our delay as a profession in correcting defects in our legal institutions, and in adjusting them to the needs of contemporary society, has afforded the opportunity, if indeed it has not actually invited from outsiders, countless suggestions of alleged reforms and some well organized and powerful efforts to accomplish them. These have ranged from the foolish and sometimes dangerous nostrums of ignorant quacks and demagogues to the well-meant proposals of serious minded and patriotic men. While some of these plans are utterly impracticable, or ineffectual or positively harmful, others contain suggestions of merit, which deserve the serious and respectful attention of the Bar.

But some of our profession are saying that lawyers have always

been the objects of criticism, that the present is but a flurry of a little greater than ordinary intensity, that the criticism is in the main unfounded, and that with perhaps a few minor changes in procedure, we can afford to "stand pat" and let the bluster pass over our heads. This, I fear, would be ostrich-like strategy exposing our plumage to the rude hands of ignorant vandals.

It is true that lawyers have never been and probably never will be exempt from attack. Literature from its very beginning has abounded in quip and quirk, in sarcasm and vituperation at the expense of our profession. In some primitive societies the profession of law was prohibited. Later Aristophanes satirized lawyers most bitterly, and the ironies of Shakespeare, Dickens and many other English authors are familiar to every one. All Utopias exclude lawyers as a matter of first principle. And notwithstanding the prestige and glory, which a little later they were destined to receive for their invaluable contributions to the formation and early development of our present form of government, lawyers were feared and hated in the heroic period of our history. Thus the citizens of Braintree, Mass., in 1786, in town meeting solemnly resolved that:

> "We humbly request that there may be such laws compiled as may crush or at least put a proper check or restraint on that order of Gentlemen denominated Lawyers, the completion of whose modern conduct appears to us to tend rather to the destruction than the preservation of the town."[1]

And the legislative representatives of Dedham were instructed as follows:

> "We are not inattentative to the almost universally prevailing complaints against the practice of the order of lawyers, and many of us now sensibly feel the effects of their unreasonable and extravagant exactions, we think their practise pernicious and their mode unconstitutional. You will therefore endeavor that such regulations be introduced into our Courts of Law, and that such restraints be laid on the order of lawyers as that we may have recourse to the Laws and find our security and not our ruin in them. If upon a fair discussion and mature deliberation such a measure should appear impracticable, you are to endeavor that the order of lawyers be totally abolished; an alternative preferable to their continuing in their present mode."[2]

[1] Warren, History of the American Bar, 215.
[2] Warren, History of the American Bar, 215.

Prof. J. B. McMaster says:

> "While, therefore, everyone else was idle, the lawyers were busy; and as they always exacted a retainer, and were sure to obtain their fees, grew rich fast. Such prosperity soon marked them as fit subjects for the discontented to vent their anger on. They were denounced as banditti, as bloodsuckers, as pickpockets, as windbags, as smooth-tongued rogues. Those who having no cases had little cause to complain, murmured that it was a gross outrage to tax them to pay for the sittings of courts into which they had never brought and never would bring an action."[3]

And during at least two other periods in our history, there seem to have been unusual outbreaks of criticism upon the law and the courts. Without attempting here to analyze the causes of popular distrust of lawyers in other lands, it is sufficient to say now that there is not great similarity between the earlier attacks upon the administration of law in our country, and the charges which are being preferred against our juristic system at the present time.

Thus the post-revolutionary period of antagonism to lawyers was due to a lingering hatred of all things English, and lawyers were trained in the traditions and practiced the principles of the English common law. Moreover, many of them were loyalists. Much of their business at this period consisted of the enforcement of contracts, mortgage foreclosures, and other suits upon debts.[4] All this added to the irritation felt by a people among whom were many whose spirit of independence and whose theories of individualism approached lawlessness and who fretted under legal restraints. A few decades later there was another outburst of hostility, but it was produced mainly by the denunciation by Jackson and his followers of the federal and nationalistic character of the decisions of the Supreme Court under the leadership of John Marshall. Again, just before the outbreak of the Civil War, the enforcement by the Courts of the Fugitive Slave Law, the Dred Scott decision, and other decisions involving questions which were then subjects of partisan controversy, brought the Courts, at least, into disfavor with a large portion of our people. In both of these later periods the seeds of discontent lay in political conditions, and the hostility to lawyers and law was largely political. In all three of these periods the special causes of antagonism were ephemeral in nature, much more so than those conditions and tendencies which are producing the present onslaught.

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[3] McMaster, 1. History of the People of the United States, 302.

[4] Warren, History of the American Bar, 214.

It is true that in the earlier periods as now criticisms of the courts and its officers were based in part upon some characteristics of law and some effects of its administration which not even the intelligent and thoughtful layman always understands, but which are inseparable and always must be, from any general system of law devised by human minds. Uniformity and certainty in law, which all lawyers and many serious minded laymen understand to be absolutely vital not only to successful and legitimate commerce and industry, but to the conduct of human affairs generally, but which nevertheless inevitably work hardships and injustice in individual cases; the restraints and restrictions and the conformities which a legal system must always impose; the refinements and technicalities which must, in some measure, ever exist in the jurisprudence of a complex and highly developed civilization; the duties and obligations of advocacy, incomprehensible to many high-minded laymen; these and many other characteristics of any workable legal system have always produced and to some extent always will produce suspicions and criticism of our profession. A system of ideal law could not possibly be devised, much less applied to our very imperfect human race. An ideal system of law, which is a very different thing, conceivably might exist; but even under it we could not hope wholly to escape strictures growing out of the general causes above referred to.

While, then, among the charges to which the Bar is now subjected, there are many to which it had long ago become accustomed, new grounds of complaint are also alleged, or at least a new and very different emphasis is given, so that the situation we meet is essentially a new one. The fact that the American Bar has survived previous assaults with unimpaired strength and prestige is by no means conclusive that it will emerge as fortunately from its present unpopularity unless it sets itself vigorously and thoughtfully at work to remove the causes. Earlier attacks upon the Bar finally wore themselves out, because the causes of their especial intensity, being ephemeral, disappeared of themselves; but for parallels to the present situation we must go back to experiences of our English brethren during certain critical periods in the history of English law. As Professor Roscoe Pound has pointed out,[5] in the sixteenth and seventeenth centuries the common law had become stratified and rigid. Then as now the conception of justice had become too nearly exclusively the legalistic one. The judgments of the Courts too often affronted the common sense of fairness and of justice. Then, as now, there came a rising protest against a rigid and artificial test

[5] 18 American Journal of Sociology, 333 et seq.

of justice. The protest then was against the lack of influence of the conscience, and the adherence to arbitrary and purely legalistic rules; now the alarm is struck because of an alleged failure of our courts and the Bar to perceive and be guided by the needs of society as such, and a too persistent clinging to the individualistic ideals of the eighteenth century, a period when the individual might safely be accorded more rights, less restricted privileges in the sparser populations, and the lesser social solidarity of those days. The danger of that day was met by a more or less forcible removal of the causes of complaint. The failure of the law courts to satisfy the national sense of justice resulted in an enormous expansion of the jurisdiction of equity, and an infusion of its principles into the common law, which not only materially affected the doctrines of the common law, but still more radically changed its attitude and spirit. Thus the danger was met by aid, forced upon the common law it is true, but fortunately aid furnished by lawyers and legal scholars, even though they were trained in a different juristic system. A century or so later the tremendous expansion of England's commerce found English courts and lawyers unable or unwilling to meet the necessities of an almost new development of the national resources and energy, and again the situation was saved by aid from without, by the grudging and reluctant absorption of the Law Merchant.

Is it not probable that the present unrest indicates a recurrence of these older phenomena, and that now as then, we must save the day, if it is to be saved, not by making a few reforms in procedure which ought to have been made long ago, or by puttering with the details of our judicial machinery, but by a frank and scientific consideration of the needs and the spirit of our day, and the absorption into our law of the established and proved principles of contemporary political economy, political and social science?

Much of the criticism of law and its administration is utterly unreasonable and unreasoning. Ignorance, prejudice, stupid or artful demagogues, and the weaknesses of the people themselves are responsible for many complaints. And it is the duty of the Bar, which they cannot too firmly or too often perform, to point out the error, the falsity of such indictments and to resist with the weapons of knowledge and reason the adoption of meretricious or unscientific measures proposed by the uninformed, or by wily demagogues seeking to ride into popularity and public office by appealing to popular prejudice or passion.

The prevalent criticisms of our juristic system may, for convenience sake, be traced to the following origins: (1) defects in procedure, in which I would include imperfections in the law relat-

ing to pleading, practice and evidence, and their actual administration by our courts; (2) imperfect and meager organization of our courts; (3) lack of adequate training and inefficiency of the Bar, considered collectively; (4) a certain sentimentality and a lawlessness on the part of great masses of our people, due to our political origin, our early history, and perhaps to our national temperament, if indeed we have one. A brief consideration of some of these may be helpful in the search for true remedies.

1. I shall make but passing reference to the subject of procedure, but we are all agreed, that as to the country as a whole, there is urgent need of greater simplicity and directness in pleading and practice, and an elimination of all unnecessary technicalities and delays, which at present are often the instruments of injustice and oppression. We should not hesitate to make our procedure conform to our changing conditions and needs in the effort to make justice speedy, certain and available to all. The lawyer, uninformed as to the history of his science, and thinking of it as rigid dogma, emanating from some mysterious source, unresponsive to the necessarily changing needs of society, a science which he practices as a trade, is prone to make a fetish of that particular form of procedure, to which he happened to have been apprenticed, and beyond which he has not permitted his vision or his imagination to penetrate. The law, substantive and procedural, is no sacred relic, the exclusive product of other ages or of mysterious and immutable principles, which would shrivel at the touch of human hands, or wither in the fresh air of reasonable inquiry by contemporary society. Rather it is a living, pulsating thing, the product of human conduct in a constantly changing environment which requires nourishing, and pruning as well, at the hands of succeeding generations. Procedure in most of our states, except as to some fundamental features common to nearly all juristic schemes, possesses little that has even the venerability of mere age. Yet in many of our jurisdictions, a contrary, erroneous view, or other cause is preserving a procedure whose archaic form and spirit will soon place it among the great and mysterious wonders of the world. Fortunately former President Taft, Senator Root, and many other public spirited leaders in our profession and many Bar Associations are leading the way in demanding reform in this matter.

2. We have paid little attention in this country to the vitally important matter of the organization of our Courts into an integral system, despite the instructive and brilliantly successful experiments of Great Britain during the last forty years. And yet we are surprised at the great expense of maintaining our courts, their inability

promptly to dispose of the mass of litigation which at present is clogging their machinery, the numerous conflicts between Courts of concurrent jurisdiction, and their lack of coherent, efficient administration as a system. This is no fault of our judges personally, nor do I mean to accuse our individual courts of inefficiency. Professor Pound has clearly delineated the characteristic judicial organization of this country and the unfortunate results of its many imperfections.[6] These may be summarized as follows: We have ordinarily at the bottom of our system, justice of the peace or magistrate's courts with jurisdiction in petty civil and criminal cases, and authority to bind over persons deemed guilty of the graver criminal offenses to a court of general jurisdiction. The most glaring defect in these courts is that they are too often presided over by laymen, who not infrequently are besides persons so lacking in character and general ability as wholly to fail to command the confidence of litigants and attorneys. This may be the reason why practically every case tried by these courts may be appealed to a superior court or courts, there to be tried *de novo*. This right alleviates one vice in the system at least for those who can afford the expense of an appeal, but in the majority of cases it imposes wholly unnecessary delay, expense and irritation upon litigants. The second rung in our judicial ladder, if indeed by any stretch of imagination our system can be considered as unified as a good dependable ladder, is usually made up of probate courts. The same objections, though in less degree, may be charged against these courts as against the justice of the peace tribunals.

We have next *nisi prius*, or trial courts of first instance, with general jurisdiction in civil and criminal causes, and again—the practically unlimited possibility of appeal to a higher court. There may be separate criminal, common law, chancery and other courts in this class, or the same result may be reached by corresponding branches or divisions of this general court. Finally there is the Supreme Court, with the major part of its jurisdiction purely appellate. Considering the system in its entirety these criticisms are suggested. There is no real co-ordination of the many parts of the scheme, no unity. Rather we find a series of courts, related it is true, but with no supervisory head to give coherence and unity to the activities of the component parts. The Supreme Court by its decisions establishes the law, binding on all inferior courts, but in the administration of the business, in procedure and in application of law to the cases coming before them, the Supreme Court in many

[6] Address before the Law Association of Philadelphia, Jan. 31, 1913.

states has very little power. It may, if the parties can afford to appeal, correct errors made below, but in many instances only after a series of expensive and time-consuming appeals, and often only after some measure of irreparable harm has been done.

Even in courts of the same grade and jurisdiction there is no integral relation. On the contrary the several Circuit Courts for most purposes may be likened to a series of separate compartments, and they in turn are divided into sections and then cross-sectioned, and woe betide the litigant who gets his case into the wrong compartment. Thus we are affronted with conflicts of courts of concurrent jurisdiction sitting even in the same city. The litigant who gets into common law when he should have gone into equity must back out as best he can and begin all over, and even this poor consolation is sometimes denied him by lack of funds or by a statute of limitations. Because of a lack of central supervisory authority the Circuit Courts in some counties may be submerged in a mass of litigation, while judges and their aides are idle in other counties for sheer lack of business. Finally as in Michigan and some other states we over-burden our Supreme Court by compelling it to take jurisdiction of almost any controversy no matter how small the amount involved and whether or not any right or principle at all is in issue. When we compel eight Supreme Court justices to hear arguments, read briefs and records in a litigation involving only the title to a hen-turkey something is wrong. I know it will be said the poor man as well as the rich is entitled to have the opinions of our highest tribunal upon his case; but this is a superficial and specious argument. It is the poor man who for obvious reasons is the most immediate sufferer from this situation. I know it will also be said that to raise the jurisdictional amount for the Supreme Court will destroy business and injure lawyers. Even if this were true, it is an unworthy consideration, for the interests of litigants, the welfare and interests of the state in avoiding litigiousness, in keeping down the expense of maintaining our courts, and above all in enabling its court of last resort to adequately study and rightly decide the cases that come before it, are of paramount importance.

But I seriously doubt the validity of the premise upon which even the unworthy argument of the selfish interest of the Bar proceeds. It is the mass of defects in and reproaches upon our system, which we have been considering, that is driving business men and others away from Courts and lawyers, that is leading people to compromise or to buy peace rather than settle even their genuine and substantial disputes by law, that is influencing those who are unable to keep out of the courts to confide their

interests and the conduct of controversies to trust companies, insurance and fidelity companies and other corporations. It is this sort of thing among other causes that is influencing the public, the state, to entrust more and more of its business to administrative commissions, like railway and warehouse boards, and public utilities commissions, rather than submit even its controversies to the care of lawyers and the arbitrament of law courts. In fact there is some measure of truth in the declaration recently made by a lawyer of standing in an article somewhat excitedly entitled "The Passing of the Legal Profession," that business corporations organized to practice law for profit, and government commissions are driving lawyers out of business.[7] These matters are all well known to our profession, and yet we are doing little about it. The pressure for improvement is coming altogether too much from outside, too little from our own ranks. Even if we were actuated by nothing higher than selfish motives, is it not apparent that it is high time we were setting ourselves seriously and vigorously to the task of setting in order our house, which we like to call the Temple of Justice.

So far as we in America have made effort, worthy of mention, to remove the clogging mass of delayed litigation in our courts, it has been by such ineffective methods as increasing the number of judges, and by organizing new courts for special purposes. In fact one of the striking phenomena in the contemporary history of our judiciary is the establishment of a large number of special courts and proposals to establish many others. The Juvenile Courts, Domestic Relations Courts, the Commerce Court, the many quasi-judicial bodies already referred to, and the proposed Midnight Courts, Sunrise Courts, are all symptoms of disease, and indicative of efforts to cure it. The theory of specialized courts is in accord with the general principle of division of labor, and is doubtless sound, but too often the realization of its possible benefits is partially frustrated by too great segregation, and by the foolish plan of rotation among the judges, a scheme which tends to prevent them from becoming expert.[8]

There is not space within the limits of a general paper to suggest in detail a plan of court organization, but the general principles upon which a system vastly superior to our own may be constructed, may be derived by a study of the modern English judicature act. We should have one single court, whose administrative head should be

[7] 22 Yale Law Journal, 590.

[8] For an effective discussion of some of the evils of our prevailing type of court organization, see a series of articles by Geo. A. Alger, of the New York Bar, beginning in the October, 1913, number of World's Work, vol. 26, p. 653.

a judicial officer with power to classify, distribute and assign the business of the court to the appropriate divisions or branches thereof, to assign the judges to the various divisions and localities, and as occasion may arise to re-assign them to meet the changing exigencies of the more or less regular ebb and flow of litigation, or the extraordinary and temporary needs caused by illness, or other accident. In short, this Chief Justice, if such he is called, should be given power to effectively control and utilize the entire judicial machinery of the state, and he should be made responsible for doing so. The court should probably have three main divisions; (1) a court of limited jurisdiction, civil and criminal, somewhat like the Municipal Court of Chicago; (2) a superior court of first instance with general jurisdiction, and (3) a Supreme Court which should be not only the court of last resort, but in which should sit, it seems to me, the supervising officer above referred to. The Municipal Court of Chicago affords convincing proof that such a scheme is well suited to the conditions in America.

The six annual reports of this court which have now been published are worthy of careful study, and it is perhaps not too much to say that they show it to be the most remarkable court in the United States. Because it was created largely to replace the old and scandalous system of justice of the peace courts which had long been a curse to Chicago, it has been supposed by some to be a merely petty tribunal. This, however, is far from being the fact.

The court has general jurisdiction of all cases in which the amount of plaintiff's claim does not exceed $1,000 and also a general magistrate's jurisdiction. But in addition it has unlimited jurisdiction of actions upon contract and in several of the important tort actions, including suits against carriers of passengers, to recover damages for personal injuries. Its jurisdiction to a large extent is concurrent with that of the circuit and superior courts. But its superior efficiency in many respects and the greater expedition in the dispatch of business have resulted in the preference by a large percentage of the suitors and their attorneys for the municipal as compared with the older and in some senses superior courts.

The most noteworthy features of the court are: (1) the centering of supervisory powers and correlative responsibility for the administration of the court and all branches in a chief justice who has power not only to assign and reassign as occasion requires judges to the different courts, thus making the best out of the peculiar abilities of the respective judges for certain types of business and putting those who are not well adapted to the performance of judicial functions where they can do least harm; (2) the fact that the court is not

impeded in its operations by a mass of statutory rules relating to practice and procedure, as it has but thirty-four standing rules framed and issued by the court itself, rules which are simple, direct and perspicuous; (3) the adoption of a system of simple pleadings resulting in the avoidance of the evils of over-technical pleading, and in the great expedition of the business of the court, thus saving time, expense and worry to litigants and to the bar; (4) the establishment by the chief justice of branches of the court and the distribution among them of that part of the business of the court which is of a special or peculiar nature. The following branches have already been created: Domestic Relations Court; a court for the trial of persons charged with violations of city ordinances; the Morals Court, the title of which sufficiently explains the nature of the court's jurisdiction, and which has already proved itself a great blessing to the City of Chicago; the Speeders' Court, in which are tried persons charged with violating the speed limit for automobiles, the improper placing or adjustment of lights, improper use of gasoline and other offenses of like nature; a branch in which are tried cases involving laws relating to child-labor, compulsory education, truancy and state laws or city ordinances for the protection of the health and safety of employees in factories and other establishments has also been created. All of this has proved of great value in giving to the judges assigned to these special types of work expert knowledge of the matters within their jurisdiction, in expediting business and in bringing to trial promptly persons charged with the types of offenses indicated. (5) There has been adopted a system of abbreviated records which it is said has resulted in the saving of upwards of $200,000 a year. (6) A bureau of information has been established and here litigants may learn how, when, and in what branch they should begin their actions or what steps they should take to defend if they are defendants. (7) Perhaps most important of all, there are no air-tight partitions between the various branches of the court. If a plaintiff files his suit in the wrong court or on the wrong theory the mistake can be corrected without material loss of time or expense. (8) The judges of the court have been guided by the belief that it is their duty to administer justice and not merely to apply hard and fast legal rules, and they have freely resorted to all social agencies which might contribute to the desired result. Thus in the sixth annual report we find public acknowledgment by the judges of their indebtedness to the Juvenile Protective Association, the Bureau of Personal Service, the Catholic Woman's League, the United Charities, the Legal Aid Society and the Chicago Law and Order League and others. The aid of fraternal and other social organizations has

been often invoked for the purpose of "bracing up" and otherwise helping members of such orders charged with violations of the law but who were paroled under suspended sentence.

It has taken a great deal more than a good law to develop this splendid court. Chief Justice Harry Olson, Judge W. N. Gemmill and others who have sat in this court have shown extraordinary wisdom, resourcefulness and a progressive but sane and intelligent attitude toward the question of social justice, and as a result of their painstaking and skilful work the Municipal Court of Chicago has already become a model for many others in different parts of the country.

The annual reports show the steady and remarkable growth of confidence of the people of Chicago in this court. The amount of money judgments in civil suits has grown from $1,501,460 in 1906-7 to $4,040,544 in 1911-12, the last fiscal year for which there is a report. In 1911-12 the total number of suits of all kinds filed in the Municipal Court was 159,900, while 162,608 causes were finally disposed of. The cost in judges' salaries per case was only $1.10, while that in clerks' salaries was $1.32 and in bailiffs' salaries $1.12.[9] This would suggest that in the matter of employment of clerks and bailiffs the court may not be wholly exempt from outstanding political influences, but the dispatch of business by the judges of this court and the low cost at which this enormous mass of litigation was disposed of speaks eloquently not only for the efficiency of the system but for the conscientious and intelligent discharge of their business by the judges under the brilliant leadership of the Chief Justice, Harry Olson.

The Chicago court which has been a model much referred to, is unfortunately menaced in a manner and from a quarter most discouraging to believers in unlimited democracy as applied to judicial officers. The court has, of course, experienced that loss in efficiency in its personnel which the exigencies of politics have inflicted in varying degrees upon almost all American tribunals. But this evil has been intensified in the Chicago court by the unfortunate working of the primary elections, by which candidates for the Bench are chosen. Apparently, experience, efficiency, learning in the law have counted for little with the Chicago electorate in its choices for this

[9] The data and other facts referred to herein have been taken from the Sixth Annual Report of the Municipal Court of Chicago, published in December, 1913. See especially pp. 78 et seq. The entire report is replete with information. The bare statement of what has been accomplished in the Domestic Relations Court and other special branches is a revelation of what can be accomplished by a court constructed, adapted and run to meet the requirements of contemporary society.

court. On the contrary, we find that every race, every nationality in that great international "melting-pot," every sect, every fraternal organization, every political faction and every locality is likely to put forward its "favorite son," with very little regard to his qualifications for impartial and effective service upon the Bench. These are the considerations that have counted heavily against many good candidates and in favor of some poor ones. But a reorganization of our courts on the basis of a plan combining the best features of the English system and of the Chicago court, with such other provisions as may be locally desirable, would do much to correct many so-called defects of procedure, and would result in a more prompt, accurate and efficient administration of justice. Lawyers, courts and the law would be greatly helped to regain their rightful hold upon the confidence and respect of the people.

3. The lack of adequate training of the Bar, the third cause of the defects in our legal system, is the most fundamental of all, though it has received little popular attention because it is less apparent to superficial observation, and because the removal of this cause involves the adoption of some remedies which run counter to certain false but rapidly disappearing prejudices, mistakenly associated with the splendid principles of true democracy and true Americanism.

We in America have notably failed to insist upon the possession of adequate general training, legal learning and sound character as a necessary condition of admission to the Bar. As compared with the legal profession in England, Germany and France, and with the medical profession in our own country, our requirements of qualification for the right to practice are conspicuously low. This is due principally to the conditions under which the profession of law originated and developed in the United States, in part to the survival of certain early prejudices, clustering around the erroneous assumption that any American, with or without training, can successfully do anything, and that to require proof of adequate education, general and legal, and of ability to apply one's learning to legal problems, involves closing the door of opportunity, and is therefore undemocratic and un-American. One hesitates to discuss the problem involved in these prejudices, because his spirit and motives, and indeed what he plainly says about it, almost surely will be misunderstood by some people and misconstrued by others not wholly disinterested. And the fact that many lawyers have achieved not only eminence at the Bar and distinction in public life, but also profound legal learning and insight, with little or no formal education, is sure to be, as it always has been, urged as proof that education is not necessary. The case of Abraham Lincoln, who laid the foundation of a distin-

guished legal career in the bare loft of a rude cabin, where, after his day's work, by the flickering light of a tallow candle or a pine knot, he pored over borrowed copies of Blackstone and a few elementary treatises on English Law, is cited as proof positive that school or college training is superfluous. This is a very shallow and partial view of the matter. We all glory in the career of Abraham Lincoln and the many other self-trained lawyers who have honored the Bar and served their country with distinction. No one with any understanding of American life could seriously propose any standards or rules of admission to the Bar which could possibly deny to an Abraham Lincoln his opportunity. Indeed the complete refutation of this whole argument lies in the simple fact that no rule or set of rules could bind an Abraham Lincoln, for he would find a way to meet all of them. Any strong man, even though he wholly lack the genius of Lincoln, can comply in these days with any standard seriously proposed for admission to the Bar. There is no danger in this country of an aristocratic or exclusive Bar. Such an organization would not be tolerated; it could not survive in free American air. The truth is that at present in most of the states it is easily possible for men of poor ability to go to the bar without having undergone any serious and sustained exertion, much less any sacrifice, to qualify themselves to begin the practice of law with even a respectable equipment of general training or professional attainment.

In medicine, on the other hand, in all but one state, the law or the rules of authorized boards provide that no one may be examined for a license to practice unless he is a graduate of an approved medical school; and an approved medical school is defined as one with adequate and specified laboratory and library facilities, a competent faculty, a four year course, and in some states as requiring some college work for admission to the school. No state in the country makes anything like equivalent requirements for admission to the Bar. As a result we have, as every candid man must admit, large numbers of ignorant, untrained, inefficient lawyers everywhere. The Bar is over-crowded, with a resultant cut-throat competition, which cheapens professional service, destroys *esprit de corps,* and subjects all but the stronger members of the Bar to cruel temptation to fall into undignified and even more censurable methods of getting a business and a livelihood. This "moral overstrain" as it has been called, is responsible for many unethical practices, and many a lawyer's down-fall. Despite the many brilliant men at the top of our profession, and the sound and effective men who make up its working majority, the fact that the lower ranks are largely filled up with half-baked men of small ability cannot be successfully

denied. This unquestionably makes the Bar less efficient than it should be, and among the results are slovenly and misleading legal advice to the very class of clients who can least afford to make mistakes, unnecessary litigation growing out of legal blunders, and frequent miscarriages of justice. On the public side, as lawyers constitute a large proportion of our legislative and administrative officers, and practically all of our judicial officers, the making, interpretation, application and enforcement of our law suffers to the manifest injury of the entire body politic. And this is all utterly needless, and productive of good to no one, perhaps least of all to the unqualified lawyer who should have been excluded from our ranks, if he were unwilling properly to prepare himself for his high calling.

It has been a favorite cry of the apologists for an easy and painless admission to the Bar of all who may apply, that society can be depended upon to weed out the unfit in the course of time. This is measurably true, but who can calculate the frightful cost to individuals, the economic waste to the community? How is this unintelligent process accomplished? By permitting the inadequately qualified barrister to hold himself out as a duly admitted member of a high profession, an officer of the courts, a minister of law, and thus to begin his experiments upon individuals and society. And what finally eliminates him from a service for which he is unfit is the contemplation by an injured and suffering community of his record of incompetency, of blunders, of clients perhaps irreparably injured in property, or reputation. Nothing could be more disastrous, more cruel to the unfortunate lawyer himself. For lack of intelligent supervision by the State he has been allowed to spend time and money in getting a sufficient smattering of law to admit him to the Bar, and there he has spent more precious years of his life and perhaps more money in the vain effort to establish himself as a lawyer, and too often he then turns hopelessly to other occupations for which perhaps he might have fitted himself worthily, a defeated, broken man. The loss to society is perhaps more difficult to trace, but in the aggregate it is enormous.

It is no answer to a plea for higher qualifications for the Bar to point out that a very large percentage of successful lawyers during our early history, and to a small extent even now, have had only meager and informal training. In the very beginning of our profession in America, the leaders of the Bar were for the most part men of the highest training, for which many of them went to English Universities, and the profession as a whole for a generation or more after the Revolution was in fact as in name a learned profession. But then followed a long period as our population spread westward,

when the exigencies of the national life, and the difficulty in the newer country of getting an education, general or legal, brought about a decline. Now in a community in which very few are well educated, obviously the entire practice must be adjusted to the attainments and standards of the many, and therefore the relatively high rank and the success of an individual lawyer in such a society affords no argument that in a succeeding generation a lawyer of equal ability and no greater training could attain success, in the more complex and difficult situation and with the more highly trained courts and competing lawyers of that day. That is the point. Our successors must meet a very different situation from that which we have faced. Our entire civilization is more complex, more difficult, and it is growing still more so. The welfare of our professional successors and that of the state demands that we equip them for the struggle with a more thorough and more scientific training than we ourselves had. We must not be sensitive about this. We are in our richer generation, able to do more for our successors than our predecessors could do for us.

Now such advances in the requirements for admission to the Bar as are being urged by those who are thinking most seriously about this problem are entirely reasonable and are within the reach of any American who has sufficient ability, energy and character to creditably perform the functions of a lawyer. The best law schools in the country, with only one or two exceptions, are now requiring one or more years of college work before the student may begin the study of law. The results have amply justified this requirement. It has produced increased efficiency and scholarship, a higher type of class room discussion, a better grasp by all students of legal principles. But it is not proposed to demand college work *for admission to the Bar*. We should, however, require a high school training or its equivalent, and the completion of a course in a law school, properly manned and equipped, with a three years course, to which the student must give his preponderant energy and most of his time. In these days of public schools within easy reach of everyone, with colleges and universities dotting the land, with the numerous opportunities for students to earn money in term time as well as in vacation, with scholarships and loan funds available for many, above all in a country prosperous beyond any in all previous history, there is no excuse for any worthy American boy, if he wants to become a lawyer, failing to get at least this minimum of training suggested for admission to the Bar. We need not worry about the few exceptional cases of those who through accident or misfortune find it difficult to get that far. Almost every rule of administration should provide

for the exceptional treatment of the really exceptional cases. But rules must be made for the many and not for the few.

There is now practically no dissent to the proposition that every law student should first have a high school training. The time has now come, in the judgment of those best qualified to speak, when we should insist, as have our medical friends in their field, that candidates for admission to the Bar must complete a course in a reputable Law School, and that term should be adequately defined in the statute or the rule of court making the requirement. The law office no longer affords a satisfactory means of acquiring a legal education. The conditions have so changed and the exactions upon the practicing lawyer are now so severe that it is impossible for him to give to the student the time and careful thought which legal education now demands. Moreover, the advances in the science and art of teaching law made by the better law schools during the last twenty or thirty years have revolutionized legal education, and the gap that exists between the best that the law office can do and that which the better law schools actually are doing is so great that the State is no longer justified in accepting the former as an equivalent for the latter, or as qualifying a man (exceptional cases excluded) for admission to the Bar. There is still a great field in legal training for the law office, a field which the law school can never fully and perfectly occupy, but that field consists of an apprenticeship in which the student, who has acquired his training in the theory of law, and who has had his powers of legal reasoning developed by the intensive methods now employed by the law school, is by the law office trained to apply what he has acquired to the actual work of practice. Ultimately, I hope we shall require, as they now do in Germany and some other countries, a period of apprenticeship in law offices, during which, however, the student may earn some money, before he is permitted to practice independently. But this experience should never be in lieu of the law school training. The two are entirely distinct and both are necessary under modern conditions to the production of a lawyer capable of beginning practice independently without acquiring his education at the expense of clients.

Moreover, law cannot be most effectively taught by correspondence schools or in those diploma mills mistakenly called law schools, run with a sole eye to profit and demanding only those remnants of the student's time and energy left after a full day's work in other fields. I do not by this mean to criticise proprietary schools or night schools as a class. While they necessarily labor under disadvantage as compared with the better law schools, many of them are conscientiously and intelligently conducted. I am speaking only of those

schools in which everything is subordinated to the making of money even at the expense of flooding the country with half-baked and unqualified lawyers.

The best interests of all our profession and of the administration of justice require, in my opinion, a close co-operation between the Bar Associations, the Boards of Law Examiners and the courts which they represent, and the Law Schools, and signs are not lacking that we have entered upon a period of such co-operation. The advancement of the welfare of the State and the great cause of social justice, new phases of which are appearing daily in our constantly changing society, all demand that we make specific advances in the production of a better trained and more efficient Bar. Important as are the functions of our medical friends, ours, it seems to me, are of still greater vital interest to individuals and to society, and if medical men are justified, as events have already proved they are, in raising the standards of admission to their profession, certainly we are justified in making equal advances. We are in this respect the trustees of a great and comprehensive social interest.

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The above article is based upon a paper read at the 1913 meeting of the Michigan State Bar Association.

THE TEACHING OF PRACTICE AND PROCEDURE IN LAW SCHOOLS.

CRITICISM of the law, the courts, and the legal profession is one of the popular customs of the day. So constantly and so insistently are we told of the shortcomings of the Bench and Bar that it is hard to hold one's footing against the sweep of the current. One might well suppose from all the clamor that the ancient respectability of the law had suddenly been discovered to be a monstrous pretense, a fraud on the innocence and trustfulness of the people, a cloak for injustice and a mask for oppression.

But the whole phenomenon is simply an instance of the overemphasis which always characterizes the human attitude. And this is not to be deprecated, for only in that way can social inertia be overcome and the impulse toward reform be given the necessary momentum.

Progress is an alternating, not a continuous, movement. In all phases of life a period of hopeful activity is normally succeeded by a period of critical retrospect. We push ahead with our work and our plans until something goes wrong, and then we stop, try to diagnose the trouble, revise our program in the light of experience, and go on again along new lines. This ebb and flow of thought and action is characteristic of life. Hegel, the greatest philosopher of modern times, found in it a basis for a theory of metaphysics in which he exhibited the world as a systematic self-development through the agency of this inherent tendency to intermittent movement due to the experimental nature of all rational progress. Such a philosophy is full of the sparkle of optimism, for it turns our mistakes into indispensable stepping stones to better things.

We are now in the midst of a critical stage in this process of social self-development. Things have not turned out as well as we anticipated, and we have stopped to analyze the situation and propose remedies. Disappointment and discontent are widespread and the spirit of unrest pervades everything. Nothing has entirely escaped.

It would be strange indeed if the law, which touches society so closely, were not included in the drag-net indictment which public opinion has found against modern social institutions. But the gist of the charge has been the administration of the law, and not the law itself. With popular legislative assemblies constantly employed in enacting statutes with the sole apparent purpose of pleasing every passing whim of the people, there could hardly be any plausible excuse for the complaint that the lawmaking power is not responsive to popular wishes. The people seem to have just the laws and all

the laws they want. Statutes appear quite fully abreast of current ideas.

But it is different with legal administration. Here the people act through a highly trained but conservative profession, the members of which are not directly responsible to the electorate. The legislature may formulate the standards for admission to the Bar, but the Bar fixes its own standards of professional conduct. Discretion necessarily plays so large a part in judicial administration, and personal capacity and skill are such determining factors in the complex problems of professional work of all kinds, that the legislature can do scarcely more than prescribe rules for the guidance of litigation. It can do little to control the manner of their use. But while the profession feels its independence, cherishes its ideals, honors its traditions, and pursues its way in comparative freedom from the fussy regulation of the legislature, it is subject to a power far more potent. The inexorable laws of supply and demand, of competition and the survival of the fittest, guide the destiny of the lawyer as well as the wage-earner or the business man. These are laws of nature which nothing can withstand.

Lawyers are quasi-public servants. They are licensed and employed to accomplish certain purposes. They exist for the benefit of the public. Those who offer what the public will not have must change their ways or go unemployed. The public has become convinced that there is gross inefficiency in the administration of the law. It has weighed current procedure in the balance and found it wanting. There is too much delay, expense and uncertainty about it. It does not produce results commensurate with the effort employed.

Many causes contribute to this. One is that there is too little regard paid to the finer ethical standards in the employment of the processes of the law. Technical rules are capable of a beneficent and a malignant use. The lawyer is much less likely to forget his duty to his client than to the court and the public. In the stress and strain of litigation he is too ready to resort to technicalities for the purpose of confusing the evidence, diverting the issues, and laying a foundation for a vexatious appeal, when success upon the merits seems out of reach. It is the "nuisance value" of the rules of procedure which then appeals to him, and it is their "nuisance value" that has discouraged and disgusted the public. No legislation can reach this problem. It is essentially ethical, and the solution lies with the Bench and Bar.

But concurrent with this perverted view of the function of procedure is an apparently inconsistent condition, namely, widespread lack of precision and effectiveness in the use of procedure. We lose our

respect for what we habitually misuse. Its logic is lost in the maze of its petty rules; its true purpose is forgotten in the stress of the case in hand.

But procedure, when rightly considered, is the very life of the law. It is that which renders litigation possible. Procedure is merely the means of co-ordinating effort, of harmonizing differences, of offering everyone equality of opportunity in offense and defense before the law. Without it there would be confusion, favoritism, and injustice. If the subject were viewed in this fundamental way, and were studied conscientiously as an incident and aid to the development and determination of the merits of controversies, the criticisms now so fiercely directed against it would largely disappear. In its use it is indispensable, in its abuse only does it cause trouble. A professional conscience to curb that abuse, and professional learning and skill to direct its proper use, are the two needs of the time.

Perhaps the law schools have a part to play in the attainment of both these ends. For law and ethics are twin sisters. But the primary problems of the schools is to develop true and comprehensive intellectual conceptions. So far as procedure is concerned, it seems clear that they have failed to appreciate the magnitude of the task and have done little to correct the deficiencies which the public is so insistently pointing out.

Procedure has always been a difficult and technical part of the law. In its primitive condition, law was not much more than a system of procedural forms. Gradually the law of rights obtained the ascendancy over the law of remedies, and procedure lost its claim to an independent valuation and became a means to the investigation and determination of litigated controversies.

Viewing procedure in this modern way, two aspects at once present themselves for consideration. It may be looked at as both a mechanism and a mode of operation. And this distinction is important. Let there be devised ever so good a system, yet its value may be destroyed by clumsy methods of use. On the other hand, with a crude and cumbersome system excellent results may be reached by operative skill. The system itself is a matter over which the legislature has assumed direct jurisdiction, while the mode and manner of its application has necessarily been left largely to the Bench and Bar.

Such a division of responsibility is unfortunate, for there is so close an inter-relation between the machinery and its operation that a constant and free co-adjustment should be at all times possible. The excellence of a procedural system is to be tested by the ease with which it lends itself to practical use. As practice discloses

weaknesses in its fabric, the practitioners themselves should be free to devise amendments and changes calculated to remedy such defects. The users should be also the designers and adjusters. Such is the case in England, where the judges enact and amend the rules which they themselves administer.

But the legal profession in the United States, though it may not have direct authority and control over the rules of procedure, is nevertheless charged with the duty of doing the best it can with the means at its command. If those means are thought to be not of the best, so much the more skill is called for on the part of the profession. Lawyers may not be immediately responsible for fancied imperfections in the system, but they are certainly chargeable with inefficiency in the use of it.

It must also be remembered that procedure is the one branch over which the legal profession is vested with a peculiar and exclusive jurisdiction. While the trained lawyer must understand legal relations in all their phases if he is to be a proper adviser for his clients, his professional characteristic is his authority, and presumably his ability, to use the procedural machinery of the law. Many lawyers never go into court, and confine themselves to a consultation practice. But their advice is predicated upon an understanding of what they might be permitted or required to do if they were to resort to the courts, and, though they do not themselves employ procedural processes, the value of their suggestions depends upon the accuracy with which they gauge the procedural possibilities in the case before them.

The legal profession in the United States has never taken procedure as seriously as has the profession in England, and it would hardly be amiss to ascribe our much-criticised inefficiency quite largely to this cause. The English professional system, with its division of functions between barristers and solicitors, is based upon the broad doctrine that procedure is of first importance. The barrister is the trial lawyer. He is also a consultation lawyer. A consultation practice is thus combined with the most technically exacting work of trial practice. Instead of freedom from court work being conducive to the development of ability as a giver of legal advice, just the reverse seems to be true. The barristers as a class are a most learned body of lawyers. From their ranks the English judges are drawn. To them is due the credit for English legal efficiency, because they are experts in procedure. Trials conducted by such men, gifted by native ability and rich in long and varied experience in the conduct of litigation, could not fail to be models of rapid and accurate work. To them the court room is the shrine of the law.

Instead of belittling procedure they exalt it as the method by which alone rights can be safely, quickly, and accurately determined.

I take it to be clear, therefore, that the professional equipment of the lawyer ought to include a reasonable familiarity with the fundamental rules under which remedies are obtained in the courts. And it follows that the law schools, which are established to prepare lawyers for professional work, ought to do what is reasonably possible to give them the necessary training in the principles of procedure.

There is, as I look at it, a striking and far-reaching difference in the functions of the colleges of liberal arts and the professional schools. Both are established in the public interest. But while the aim of the former is to develop individual character and mental strength, the latter are expected to produce efficient practitioners. It is of little concern to the college educator whether his students study mathematics, or Greek, or history, for he knows that all roads lead to Rome. He wants to develop the mental powers of his students and to bring them into contact with the best thought of the world's great minds. If he does this he does his duty, for he turns out men with the furnishings and training requisite to broad citizenship. Not so with the professional school. Its task is to train men to do well the technical work expected from their profession. It looks to skillful performance in certain lines of activity. The test of its success is the efficiency of its output. The gradually increasing entrance requirements among the better professional schools mean nothing else than a recognition of the truth that such schools are not a part of the general educational system, but are institutions into which the already educated man comes for special training to fit him for a special service. The law school does not justify its existence by contending that a legally trained mind makes a good citizen, though that may be entirely true. It justifies itself by asserting that the country needs well-trained lawyers and by showing that it can produce them. Accordingly, the law schools, in order to fully fill the place for which they have been created and maintained, should give their students a complete preparation for all that the practice of the profession will afterwards demand of them.

But the truth is that the schools have never taken hold of procedure in a thoroughgoing and comprehensive way. They have followed the beaten path and nothing more. The great foundation subjects of contracts, torts, and property have been developed with consummate skill, and are presented in the better schools with a breadth of philosophical insight which leaves little to be desired. Instead of being taught in isolated, fragmentary bits, the whole subject in its

logical completeness is unfolded before the student, so that he feels and understands its principles, its boundaries, its purposes, and its relations. Such a method of study develops a feeling or attitude toward a subject which becomes a sort of intuitive guide in the solution of its problems. Such a method produces results which time cannot destroy, and the student's knowledge does not melt away with the first lapse of memory.

Why is not procedure taken up in the same far-sighted way? It is not because of any want of importance, as has already been shown. Apparently the schools have not progressed far enough yet.

No school teaches procedure under that name. Few teach it at all. Most schools teach pleading and evidence, with a course on equity practice and another on criminal procedure. Such a division of subjects is like separate courses on consideration and promises instead of a course on contracts, in which the main thing would be left out, namely, the correlation of the parts, which is the real significance of each. But the case of procedure is worse. For if all the parts of a subject are taught even in fragments, there is at least no positive gap left unfilled. But the procedure subjects taught in most law schools do not cover procedure. Not only is the coordination of parts missing, but one of the chief parts is itself a fugitive and an outcast.

If procedure is looked at in a broad way, it is a single subject. Its aim, as already pointed out, is to supply a mechanism for litigation. One purpose runs through it all, and all its parts fit together like cogs in a gear. Pleadings are drawn to present issues for trial; trials are had to determine issues raised by the pleadings. Rules of evidence determine admissibility, but the foundation of the proof is the pleadings. The jury must base its verdict and the court its decision upon what the pleadings allege and the evidence tends to prove, and instructions are to be drawn within the scope of both. The same principles which limit evidence place restrictions upon the conduct and argument of counsel. Upon the relations between the pleadings and the evidence depends the right to take the case from the jury. Appeals and writs of error call in question principles of pleading, of evidence, and of trial practice. In truth, the writ, the pleadings, the trial, the verdict, the judgment, and the appeal are a connected series of elements each one depending upon the others, each comprehensible only through the others, each supplementary to the rest. To isolate pleading and evidence, take them out of their setting, treat them as absolute instead of relative, and ignore the rest of the subject, is misleading. Only when one understands the problems, the purpose, and the logic of procedure as a whole can he under-

stand the real significance of the rules relating to its separate branches.

The truth probably is that the most important as well as the most illuminating portion of procedure is trial practice, which the law schools largely ignore. The trial is the end and essence of procedure. It is the center about which all other procedure subjects revolve. To really understand the trial is to understand procedure. The pleadings lead up to it, the evidence is part and parcel of it, the appeal grows out of it. The trial is the heart of procedure.

A glance at the function of the jury in the modern trial at law will make the point clear. It is the jury which is the characteristic feature of the trial, coloring all its phases and determining most of its rules. This is the institution which has made common-law procedure what it is. There is scarcely anything about the trial, from the pleadings to the writ of error, which does not reflect the influence of this unique feature of English and American legal development. The pleadings are drawn to produce issues triable to a jury; the trial opens with the selection of the jury; the conduct of counsel, from opening statement to final argument, is hedged about with restrictions due to the presence of the jury; the rules of evidence are all devised to meet the peculiar requirements of the jury; the whole theory of nonsuits and directed verdicts arises out of the division of functions between court and jury; the difficult and important subject of instructions to the jury obviously rests upon the same conception; special interrogatories and special verdicts are merely devices for penetrating into the conscience of the jury; new trials, with their vastly complicated rules, were devised and are granted as a safeguard against perverse verdicts of juries; the verdict is the final decision of the jury and it fixes the character of the judgment; and the writ of error is sued out or the appeal is taken in most cases because the appellant believes he can convince the court that some error was committed in the presence of the jury which prejudicially influenced its verdict, and he prays for a reversal and another trial before another jury.

Equity procedure is much simpler. But with it I am not now concerned. It is usually taught in connection with equity pleading and gives little trouble.

Now, if the whole doctrine of civil procedure at law has been developed and is administered with a view to preserving the division of functions between the court and jury, segregating issues and questions of fact from issues and questions of law, that conception would appear to offer a logical center about which to group the various special subjects embraced within the general field. And that means

that Trial Practice, which concerns itself with the rules relating to the conduct of the trial itself, is the essential and significant title in procedure.

A well-balanced system of instruction in procedure ought therefore to group all procedure branches about the trial as the procedural center. They should be coördinated with a view to their purpose as ancillary and incidental to the trial, for their meaning, scope, and importance are strictly dependent thereon.

The teaching of trial practice has scarcely been attempted in most of the law schools of this country. And the reason probably lies in the failure to clearly distinguish between trial practice as a body of well defined and accurately developed principles of procedure and trial practice as a vague and shadowy discourse on success in advocacy. The law schools cannot undertake to teach men how to read character; how to cultivate an impressive manner; how to skillfully interrogate a witness; how and when to appeal to the emotions of the jury; how to delicately flatter or severely arraign. They cannot teach resourcefulness and tact. The art of expression and the skill of strategy are outside the proper scope of the schools of law. All of these things are as necessary in selling goods or teaching school as in practicing law. The art of advocacy is the art of life, and only life can teach what life is.

But if trial practice is viewed as the keystone of a systematic scheme of procedure, concerning itself with the principles by which the problems pertaining to the conduct of the trial are analyzed and solved, it becomes a very different thing. Such a subject is accurate, logical, and professionally technical. It concerns the very essence of procedure, and it is as solidly intellectual as any other branch of the law.

A glance at the subject-matter embraced by the notion of the trial will at once disclose its adaptability to law school instruction. It includes the scope, plan, and purpose of the statutory systems for obtaining venires, and the theory of their interpretation; the doctrines relative to the examination of jurors on their *voir dire,* and bias and challenges; the functions of the opening statement and the right to open and close; the principles underlying the different methods of withdrawing the case from the jury, such as nonsuit, directed verdict, and demurrer to the evidence; the theory and practice of preparing instructions for the jury; the purpose and propriety of special interrogatories and special verdicts; the doctrine of new trials and the conditions and limitations under which they may be granted; the rules regulating the conduct of counsel while in the presence of the jury.

All these subjects, with perhaps two or three others, are of primary importance to the lawyer who appears in court. They have been worked out accurately and comprehensively by the courts in a vast array of decisions. They are based on the closest logic and the broadest policy. They have called forth the best thought of able judges. They lie at the very heart of our judicial system, for of what value are rights if remedies fail.

The trial serves a single and perfectly definite purpose. Trial practice, which concerns its conduct, is not a mere collection of unrelated rules, but a closely articulated subject, in which every part bears a demonstrable relation to every other and to the whole. A study of it gives unity to procedure, and puts vitality into many a dry rule. Pleading and evidence can never stand forth in their true significance until they have been given their proper place as incidents of the trial.

Now, so far as concerns the question, how to teach practice, it is quite obvious that the principles of the subject can be taught in exactly the same way as any other branch of the law, except that I believe the case system is more imperatively necessary than elsewhere. In all procedure subjects the principles depend so intimately on the facts of the cases in hand that they mean little when divorced from the facts. And this is especially true of trial practice.

One common fallacy has perhaps done much to deter the schools from seriously taking up the subject, and that is the prevalent idea that trial practice is essentially local in its close dependence on statutes and court rules. But the reverse is more nearly the truth. The basic principles underlying the subject are absolutely general in their scope and application. Variations occur in minor points, but I believe there is no subject of the law, either in procedure or the substantive branches, where there is less diversity in fundamentals and in the principles of interpretation than in the trial practice.

If it be conceded that trial practice should be taught, another step logically suggests itself. The student of chemistry is taught the principles of qualitative analysis, but he is also taught how to put those principles to use in analyzing unknown combinations of chemical substances. The engineering student is taught in shop courses how to apply the principles learned in the books. Medical and dental students have clinical cases to work upon. Why should not the law student have cases in procedure? The practice court constitutes the affirmative answer of many law schools to this question. But I am inclined to think that the development of practice courts has been hampered by an incorrect conception of their true function.

A practice court is certainly not a mere imitation of a real court. It cannot survive amid the press of work in the brief period allowed for modern legal education unless it does something more than allow men to play they are lawyers. Going through the motions of a trial, even under the supervision and criticism of a competent teacher, is in itself a comparatively unproductive process.

On the contrary, the practice court should be a means and method for actually coördinating the various branches of procedure. It should furnish an opportunity for the students to marshal the principles of procedure as studied theoretically, and employ them in analyzing and solving specific problems of litigation. It should teach a method of attack. To do this it must provide much more than a court room, a judge, and a jury.

To produce a law school trial which shall serve a useful educational purpose, there must be two things; First, a set of facts must be developed analogous to the facts in a litigated controversy; and, second, there must be a thorough and technical preparation of those facts in all their legal possibilities, by students representing both sides of the controversy.

The first may be done by arranging actual transactions among students selected from the school, and carrying them out in such a way that issues of fact respecting them shall develop. Suppose a dozen men are called upon to serve as actors and witnesses in a case. The character under which each appears, such as that of a contractor or a bank cashier, is assumed. In that capacity each proceeds to take the part assigned, carrying on conversations, executing papers, writing letters, telephoning, or doing whatever is requisite to fill out the schedule of events which the instructor has devised to raise suitable issues of fact. It is easy for the actors to be coached as to what to do and say. After the words are spoken or the acts are performed, they become as properly the subject of future investigation as do any of those events which form the basis of actual lawsuits. The actors can truthfully testify as to what they did; the witnesses may relate what they saw and heard. The case exists only in the doings of those actors, and students assigned to the case as attorneys have access to the same sort of evidence that the practicing lawyer deals with. The case is in every sense an actual case, though artificially produced. It is not assumed. Practically everything that will be shown in the evidence will have actually happened.

Having created this foundation for the action, the preparation of the case proceeds along strictly professional lines. And it is here that the chief educational value of the work appears. The theory of the prosecution and defense must be worked out, the pleadings

must be drawn, the evidence must be arranged in proper form for orderly and logical presentation in court, the rules respecting proof must be carefully gone over to insure against exclusion at the trial, the probabilities of objections being raised at the trial must be estimated and contingencies prepared for, instructions properly covering the law of the case must be drawn, the feasibility of employing special interrogatories must be determined, the qualifications of the jurors must be investigated and grounds for challenge fixed upon. In doing all these things the student is really employing the principles of procedure. He is given a case at large. The entire responsibility for it rests upon him. He must work it out from beginning to end, and his work is essentially a lawyer's work. It calls in question all the knowledge of the principles of procedure which he has obtained in the course of his previous study. He draws his pleadings with a view to his evidence; he prepares his evidence in the light of his pleadings.

His case is no moot question of abstract right, but a living issue to be tried and tested in the delicate balances of the court room. Before him stretches the long road which leads to the jury's verdict, with its dangers and pitfalls, its sharp declivities, its sudden turns. To travel it successfully calls for all his knowledge and skill, all his foresight, alertness and sound judgment. He must weigh the possibilities involved in this choice or that, the advantages of success, the consequences of failure. And in every problem which throws its shadow across his path is involved a coördination of the rules of law and the rules of procedure—of the substance and method. Such a discipline is typical of the lawyer's tasks. To meet it successfully is the test of professional preparation.

This preparation may be easily supervised and criticised. A trial brief may be required, which shall contain the results of all the work done preliminary to the trial. Such a brief should contain a clear statement of the theory of the cause of action or defense relied upon, fortified by ample authorities, together with a close analysis of the pleadings filed, to demonstrate both the formal and substantial sufficiency of the pleadings under the theory adopted. It should contain a statement of the possible positions open to the other side, and an analysis of the adversary's pleadings to show their sufficiency or insufficiency, and a specification of the available methods for raising any objections which this analysis may disclose. It should contain a full outline of the evidence available in support of all the issues made in the pleadings, and the witnesses should be listed, each name to be followed with a schedule of the facts to be proved by him. There should be specific references to all doubtful points connected

with the admissibility of evidence, and methods of proof, with authorities in support of the position taken by counsel. There should be a full set of instructions to the jury, each followed by authorities and reasons in support of its form and substance.

Such a trial brief is just what every lawyer should have before him in every case which he tries. Te prepare it requires a close and intelligent study of every phase of the case, and represents legal effort highly beneficial to the student and strictly professional in its scope. No student will ordinarily fail to understand his case in all its phases after working out a satisfactory trial brief along these lines.

The trial itself, when it finally takes place, is merely the realization and execution of the plans prepared and exhibited in the trial brief. A jury of students can easily be had who will themselves derive a large benefit from their critical observation of the performances of their classmates. The case will proceed before the jury like an ordinary law case.

But the trial itself should not be looked upon as a mere imitation of an actual lawsuit. As an imitation it amounts to nothing. What the students need is an opportunity to put their knowledge of law and procedure to actual use, and to avail themselves beneficially of those principles about which they obtained a theoretical understanding in their classroom courses. To that end the instructor who presides in the court should not forget that he is instructing students, not impersonating a judge. He should keep the case moving along proper lines. He should criticize and correct freely. If mistakes occur and are not noticed by the men trying the case, they should be promptly suggested by the judge, and the point involved may be thus brought home very forcibly to the student, with all the flavor of a concrete setting. Frequent questions on the part of the judge as to principles involved in the various steps taken during the course of the trial will emphasize and direct sharp attention to the logical groundwork of the procedural development exemplified in the case. A general criticism of salient features of the trial may well follow the rendition of the verdict.

A practice court conducted along these lines is not an appeal to the spectacular, but a serious educational institution. It is pedagogically sound. It is entirely practicable under the conditions prevalent in modern law schools. It stirs the students to their best efforts, and gives them correct ideas about procedure. It is the only method so far devised for teaching the technique of the profession in a concrete way. It is to the law school what the clinic is to the medical school or the shop to the school of engineering. In short, it presents

a synthetic grouping of legal ideas about the trial as the logical center of legal activity.

The law schools have been too unsystematic with their whole procedural program. They have considered procedure courses as an unscholarly necessity—a form of surrender to popular demands. In common-law pleading, which is everywhere taught, the emphasis has been too much laid on the forms of action and the historical aspects of the subject, thus making it a sort of dumping ground for the history of the common law, instead of viewing it as a highly articulated and logical process for developing a foundation for the trial of issues. A broad curriculum would include pleading, both civil and criminal, evidence, trial practice, and appellate procedure, followed by practice court work as a summation or integration of the other branches Careful instruction along these lines ought to accomplish substantial results in preparing students to do the thing for which the bar primarily exists, namely to practice law. The law schools have an opportunity to do a great work in raising the standards of practice which all admit are low in the United States, and in doing something to compensate the American bar for the want of that procedural specializing which makes English legal administration the envy of the world.

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IF THE LINES OF A JUNIOR LODE LOCATION BE LAID ACROSS THE SURFACE OF A VALID SENIOR LOCATION, WILL THE JUNIOR LOCATION ACQUIRE EXTRALATERAL RIGHTS BASED ON A PORTION OF THE VEIN WHICH IS INCLUDED WITHIN THE SENIOR LOCATION, AS AGAINST ANOTHER EARLIER LOCATION COVERING THE DIP OF THE VEIN?

I. WHEN THE SENIOR LOCATION IS UNPATENTED AT THE TIME THE JUNIOR LOCATION IS MADE.

IT WAS decided in *Del. Monte M. & M. Co.* v. *Last Chance M. & M. Co.*,[1] that the lines of a junior lode location may be laid upon the surface of a valid senior location (if done openly and peaceably), for the purpose of securing extralateral rights on the dip of a vein the apex of which is within the second and outside of the first. But the court declined to decide whether the junior locator would acquire any extralateral rights based upon a portion of the apex covered by the senior location, saying:[2]

"Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance (the junior) to pursue the vein as it dips into the earth westwardly * * * and to appropriate as much of it as is not held by the prior location of the New York, and to that extent only is the question answered. The junior locator is entitled to have the benefit of making a location with parallel end lines. The extent of that benefit is for further consideration."

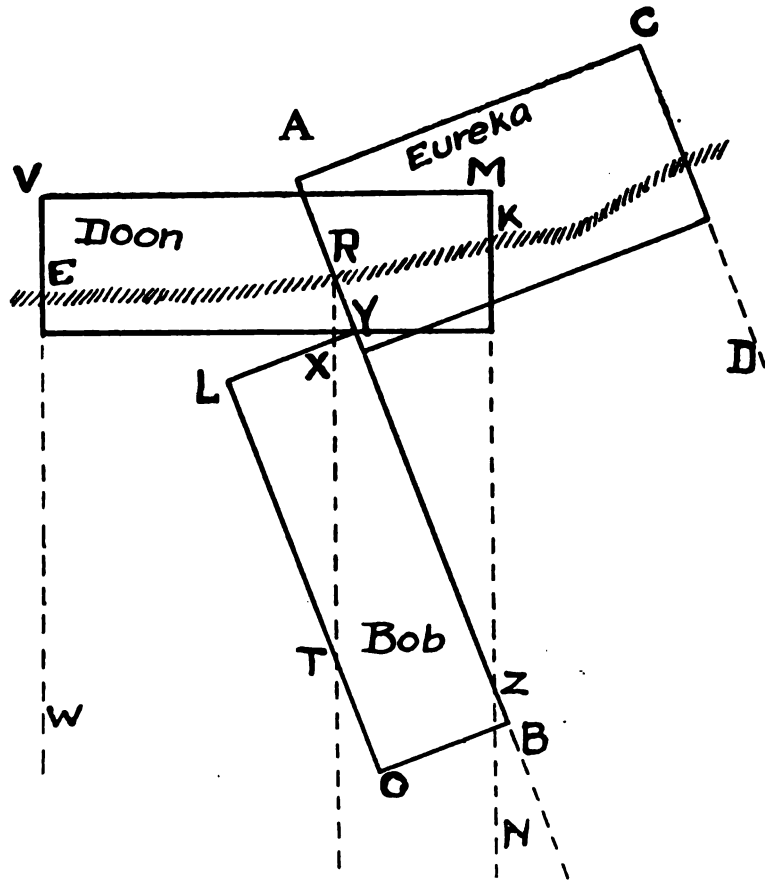
The diagram on the following page presents the question clearly:

The Bob claim was located in 1880; the Eureka in 1885, and the Doon in 1890. The Bob was patented prior to the location of the other claims; the Eureka and Doon are unpatented. The lines of the Doon claim were laid across the surface of the Eureka with the consent of the owner of the latter. Obviously the Eureka is entitled to full extralateral rights, i. e., between the line A-B and the line C-D. The Doon, in accordance with the Del Monte case, is entitled to extralateral rights between the line R-T and the line V-W. But would it also be entitled to extralateral rights between the line R-T

[1] 171 U. S. 55.
[2] Pp. 85-86.

and the line Z-N, as against the Bob claim? That question was left undecided in the *Del Monte* case. We shall endeavor to answer it.

If we keep in mind that the portion of the vein in controversy is beneath the surface of the Bob claim, which is prior in date to the others and is patented, it would seem that a correct solution of the



problem now under discussion would depend upon whether the owner of the junior claim, by laying his lines in part upon the surface of a senior claim, so as to include a portion of the apex within the senior claim, acquires any *estate,* either present or contingent, in that portion of the apex found within the senior claim.

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[8] 207 U. S. 1.

The Supreme Court in the *Lawson* case,[3] said:

"Title by patent from the United States to a tract of ground, theretofore public, *prima facie* carries ownership of all beneath the surface, and possession under such patent of the surface is presumptively possession of all beneath the surface. This is the general law of real estate. True, in respect to mining property, this presumption of title to mineral beneath the surface may be overthrown by proof that such mineral is a part of a vein apexing in a claim belonging to some other party. But this is a matter of defense; *and while proof of ownership of the apex may be proof of the ownership of the vein descending on its dip below the surface of property belonging to another, yet such ownership of the apex must first be established before any extralateral title to the vein can be recognized.* This suit was not in the nature of an ejectment, to put the defendant out of possession of the space beneath the surface of plaintiff's claims from which they had extracted ore, but to quiet the title of the plaintiff to the vein in which they had been working, and to restrain them from mining and removing any more ore."

And again:—"They (the apex claimants) must show that the ore was taken from a vein *belonging to them.* Was there a vein? Where was its apex, and *who was the owner of that apex?*"[4]

Referring to the diagram on page 199 it will be observed that the Bob claim has no part of the apex of the vein; but it is the owner of all ore beneath its surface until some one can show a higher right based on *ownership* of the apex and its location in such a manner as to cover the vein beneath the Bob claim. The owner of the Doon claim owns the apex E-R and therefore owns that portion of the vein beneath the Bob claim covered by the triangular surface L-X-T. But does the owner of the Doon *own* any interest in the portion of the apex R-K? If he does not, he has nothing upon which to base a title to the vein beneath the surface of that portion of the Bob between the letters X-Y-Z-N-O-T.

The case of *Belk* v. *Meagher,*[5] was decided in 1881 and from that time until 1898, when the *Del Monte* case was decided, the courts uniformly held to the letter of the decision in the *Belk* case, viz:[6]

"A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator,

[4] See also Iron Silver M. Co. v. Elgin M. & S. Co., 118 U. S. 196; St. Louis Co. v. Montana Co., 194 U. S. 235.

[5] 104 U. S. 279.

[6] 104 U. S. 279 at p. 284.

but all the world, because the law allows no such thing to be done."

As Mr. LINDLEY in the first edition of his work on MINES[7] put it: "Two locations cannot legally occupy the same place at the same time."

This rule was applied whether the junior discovery was made within or without the lines of the senior claim.[8]

But the decision in the *Del Monte* case changed the opinion of many members of the bar. While that case merely held that the junior locator could place his lines across the surface of a senior location for the mere purpose of securing parallelism of end-lines and for the purpose of appropriating any surface not included within the senior's lines, and while the Supreme Court expressly disclaimed any intent to decide that the junior claim would acquire any estate, either present or contingent, in the land embraced within the senior's lines, it was contended nevertheless by many that the logic of that decision would justify the conclusion that the junior would acquire certain residuary rights to use the apex within the senior location. In other words, it was contended that the very question which the *Del Monte* decision expressly left unanswered, was in fact answered by the logic of that decision.

Thus Mr. COSTIGAN in his MINING LAW,[9] says that the "judicial apex doctrine" seems to be a logical extension of the principles announced in that (the *Del Monte*) decision."

Mr. LINDLEY in his second edition[10] likewise expressed his belief that the *Del Monte* case required a modification of the conclusions stated in his first edition.

The Circuit Court of Appeals for the Ninth Circuit, in *Bunker Hill, etc. Co.* v. *Empire State, etc. Co.*,[11] likewise interpreted the *Del Monte* case as justifying the granting of extralateral rights based upon a portion of apex which presumably belonged to an older location, as against *junior* locators upon the dip or upon other portions of the apex.

Mr. ARNOLD pointed out several years ago in a discussion of this subject:[12]

"The exact holding of the Court in the *Del Monte* case, and the doctrine for which that case has been cited as authority, are two propositions of entirely different natures. The first merely affords a means of acquiring extralateral rights where otherwise there

[7] Lindley on Mines, (ed. 1) § 363.
[8] Oscamp v. Crystal River Co., 58 Fed. 295.
[9] Costigan on Mining Law, p. 435.
[10] Lindley on Mines (ed. 2) § 363.
[11] 109 Fed. 538, 131 Fed. 591, (the first Stemwinder case).
[12] 22 Harv. L. Rev. 288.

would be none, based on ownership of a previously unlocated part of an apex; the second seeks to give double extralateral rights or extralateral rights in two different directions from one and the same part of an apex. If it be granted that the right to pursue a vein on its dip must always be predicated on ownership of an apex, how can a right on the dip of a vein be granted to one who does not own a corresponding part of the apex? Would not this be to violate the elementary rule that a locator can have no more of the dip than he has of the apex?"

But while the decision in the *Del Monte* case did not decide the question under discussion, and we believe did not justify the conclusion which has been drawn from it, we must admit that some support was given by the case of *Lavagnino* v. *Uhlig*[13] to the contention that a junior locator is entitled to use for extralateral right purposes a portion of an apex which he does not own.

Indeed Mr. COSTIGAN[14] says that "the ultimate justification of the judicial apex doctrine must of course rest on the foundation furnished by the of *Lavagnino* v. *Uhlig*."

That case decided that a junior locator whose lines were laid across the surface of a senior valid location acquired such an eventual right to the area in conflict as against third persons that upon abandonment or forfeiture of the senior location the junior became the owner of the territory in dispute, and that it did not revert to the public domain. In other words, the Supreme Court held distinctly that the junior locator acquired certain contingent rights to the ground embraced within the senior valid claim. In so deciding, the Supreme Court ignored its own decision in *Belk* v. *Meagher*,[15] and the numerous federal and state decisions which followed that precedent.

If the *Lavagnino* case stated the law correctly, we should probably be compelled to admit that the Doon claim would be entitled to extralateral rights based on the portion of the apex R-K as against the Bob claim. But the *Lavagnino* case is no longer good law.

Shortly after that case was decided the same question came before the various state courts in the mining states. Some of those courts meekly followed the *Lavagnino* case; others followed it under protest, and a third class of courts absolutely refused to follow it. In this latter class is found the Supreme Court of Nevada, which court in *Nash* v. *McNamara*,[16] took issue with the Supreme Court

[13] 198 U. S. 443 (1905).
[14] Costigan on Mining Law, p. 436.
[15] 104 U. S. 279.
[16] 30 Nev. 114, 93 Pac. 405.

of the United States and pointed out that not only had the Supreme Court ignored an unbroken line of its own decisions but had also ignored numerous decisions in the state and federal courts in the mining states from the Mexican border to the Canadian line, which without exception had supported the earlier decisions of the Supreme Court of the United States.

In 1907 the question was again presented to the United States Supreme Court in *Farrell* v. *Lockhart*,[17] and its attention was called to the decisions by the Nevada Supreme Court and other courts. The Supreme Court gracefully overruled the *Lavagnino* case and decided that the case of *Belk* v. *Meagher* should be followed.

In *Swanson* v. *Sears*,[18] the court was urged to return to the rule announced in *Lavagnino* v. *Uhlig*, but the court refused, and said:

"The argument for plaintiff is a vain attempt to reopen what has been established by the decisions. *A location and discovery on land withdrawn quoad hoc from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right.* * * * This doctrine was not qualified in its proper meaning by *Del Monte Mining and Milling Co.* v. *Last Chance Co.*, 171 U. S. 55, for that case attributed effect to the overlapping location only for the purpose of securing extralateral rights on the dip of a vein the *apex of which was within the second and outside of the first*,—rights consistent with all those acquired by the first location. * * * The principle of *Belk* v. *Meagher* was reaffirmed. * * * It is true that there is reasoning to the contrary in *Lavagnino* v. *Uhlig*, * * * but in *Farrell* v. *Lockhart* * * * that language was qualified and the older precedents recognized as in full force. We deem it unnecessary to consider the distinction attempted by the plaintiff between location and relocation, voidable and void claims, etc., *as the very foundation of his right, the offer and permission of the United States*, under Rev. Stats., § 2322, *was wanting when he did the acts intended to erect it.* His entry was a trespass, his claim was void, and the defendant's forfeiture did him no good."

We believe that the foregoing review of the decisions of the Supreme Court shows conclusively that *ownership* of the apex is essential to the acquisition of extralateral rights; that the mere placing of the lines of a junior location over the surface of a prior valid location does not give the junior locator any estate in that part of the apex within the senior's claim; and therefore the junior locator is not entitled to extralateral rights based upon any part of the apex which is within the senior claim.

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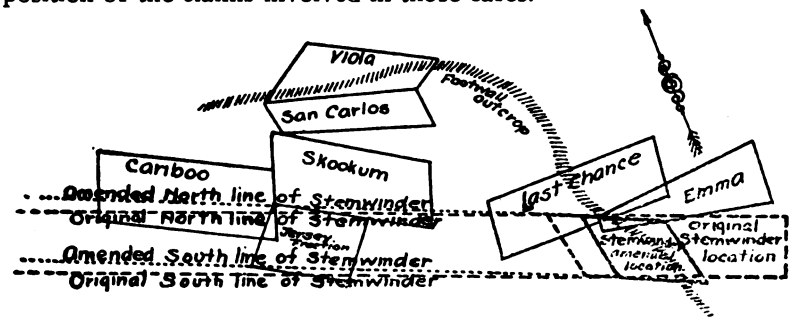
[17] 210 U. S. 143.
[18] 224 U. S. 180.

It has been contended that some courts in the mining states have recognized the "judicial apex doctrine." Among cases most frequently cited upon this subject, are what are known as the *Stemwinder* cases, decided by the United States Circuit Court of Appeals for the Ninth Circuit.[19] The following diagram shows the relative position of the claims involved in those cases.



The Emma claim was admitted to be prior in date of location to the Stemwinder, and the trial court found that the Stemwinder was older than the Last Chance.

In the first of the *Stemwinder* cases the owner of the Stemwinder sought to acquire extralateral rights between its side-end-lines extended westerly as against the Last Chance claim, less the extralateral rights of the Emma. The United States Circuit Court of Appeals held that the failure of the owner of the Stemwinder claim to file an adverse claim against the application of the Last Chance for patent amounted to a conclusive admission that the Last Chance claim was prior in date, notwithstanding that it was in fact subsequent in date. The court, therefore, held that as between the Stemwinder and the Last Chance claims the Stemwinder had no extralateral rights. The court, however, discussed the question whether the Stemwinder would have had extralateral rights, in view of its priority, against the Last Chance had it not lost such rights by failure to file an adverse claim, and the court, applying a principle which it believed to be a logical extension of the *Del Monte* case, expressed the opinion that the Stemwinder would have had such extralateral rights, notwithstanding the fact that its north line was placed across the surface of the prior Emma claim. But the court expressly stated that such extralateral rights would only be good as against other *junior* claims.

After the decision in the first *Stemwinder* case the owner of the Stemwinder commenced another suit asserting a right to all of the

[19] 109 Fed. 538; 121 Fed. 973; 131 Fed. 591.

vein between its end-lines extended westerly, after deducting the extralateral rights of the Last Chance and Emma. An injunction was granted to the owner of the Stemwinder and an appeal was taken from this order but the Circuit Court of Appeals affirmed the action of the trial court in granting the injunction.[20] Thereupon the case was tried on its merits. It was admitted at the trial that at the time the Stemwinder was located, its north line was placed upon the surface of the Emma claim.

Subsequently the Stemwinder lines were amended so that its legal end-lines had a course in a more northerly direction than had its original lines. After the location of the Stemwinder and prior to its amendment, the Skookum, Cariboo and Jersey Fraction claims, owned by defendant, were located so as to cover a portion of the dip of the vein within the end-line planes of the Stemwinder. Neither the Skookum, Cariboo, nor Jersey Fraction contained any portion of the apex. The Circuit Court of Appeals decided the case in favor of the Stemwinder and expressly held that as against *junior* locations upon the dip the extralateral rights of the Stemwinder claim might be predicted in part upon a portion of the apex which was within the lines of and belonged to the prior Emma claim. But the court in affirming the decree quoted that part of it which awarded to the Skookum, Cariboo, and Jersey claims, so much of the vein beneath their respective surfaces as was included between the original end-line planes of the Stemwinder and planes drawn through the amended lines of that claim. In view of the fact that the Cariboo and other claims contained no part of the apex there would have been no reason to deny the Stemwinder the right to take the vein to its amended north line extended, as against those claims, had such amended north line not been laid across the prior Emma claim; because it is elementary that a junior apex location covering only unappropriated public land is entitled to dip rights as against a senior location covering the dip but containing no part of the apex.

From a careful reading of the decision in that case, it will appear that the court did sanction the right of a junior locator to acquire extralateral rights based upon a portion of the apex which it did not own; but all that the court held was that such extralateral rights would be good against the United States and *subsequent* locators upon other portions of the apex *or upon the dip;* but prior locators upon the dip would have a right to the dip superior to one who included within his lines an apex belonging to another, to the extent of such inclusion.

[20] 121 Fed. 973.

Applying the decision in the *Stemwinder* case to the question which we are now discussing, it must be concluded that the Doon claim would not have extralateral rights based on that portion of the apex included within the Eureka claim as against the prior Bob claim located upon the dip, because the Bob claim occupies the same position that the Skookum, Cariboo and Jersey Fraction occupied with reference to that portion of the dip of the vein between the original and the amended north Stemwinder end-line extended in its own direction.

In the case of *Stenfjeld* v. *Espe*,[21] decided in 1909, the Circuit Court of Appeals for the Ninth Circuit again discussed the meaning of the *Del Monte* case and held that that decision, "sustained the right to so invade land already located *for the mere purpose of location.*" Again in *Becker* v. *Long*[22] the same court discussed the meaning and effect of the decision of the Supreme Court in *Swanson* v. *Sears*,[23] saying:

"It will not be necessary to review the number of cases in this and other courts where priority of location and discovery have been subjects of controversy with respect to overlapping areas in mining claims. We think the controversy in the present case is disposed of by the decision of the Supreme Court of the United States in the late case of *Swanson* v. *Sears*." After stating the facts in that case and quoting from the decision, the Circuit Court of Appeals says, "The decision of the Supreme Court of the United States in *Swanson* v. *Sears* broadly covers the whole question of location and discovery upon ground within a prior valid and subsisting location, and determines that such a location is absolutely void, whether the discovery in the junior location is within or without the overlapping area."

We have been unable to find a single case which upholds the right of the owner of an overlapping apex claim to predicate extralateral rights upon a portion of a vein which he does not own and thereby to defeat the presumptive title of the owner of a senior patented claim covering the dip. The Supreme Court of the United States in the *Del Monte* case, without deciding the question, intimated that *ownership* of the apex was essential to its use for extralateral right purposes; the same court in the *Lawson* case held distinctly that ownership of the apex must be first proved before any extralateral rights could be secured; that court in *Farrell* v. *Lockhart* and *Swanson* v. *Sears* expressly held that a junior locator by laying his lines

[21] 171 Fed. 826.
[22] 196 Fed. 721.
[23] 224 U. S. 180.

over the surface of a valid senior location, does not acquire any present or eventual title to the ground in conflict. Even the *Stemwinder* decisions protected a senior location covering the dip, against a junior location covering an apex belonging to a prior location.

The only real foundation which the "judicial apex doctrine" has ever had was the principle announced in the decision of *Lavagnino* v. *Uhlig;* that decision was overruled; the foundation of the doctrine was therefore destroyed.

II. WHEN THE SENIOR CLAIM IS PATENTED AT THE TIME THE JUNIOR LOCATION IS MADE.

We have heretofore assumed for the purpose of discussion that the Eureka claim was unpatented at the time the Doon location was located; let us now suppose that the Eureka claim had been patented prior to the location of the Doon claim. Would the Doon, by extending its lines over a portion of the Eureka, acquire any extralateral rights based on that portion of the apex within the Eureka lines as against the Bob claim? The argument which has been presented against the allowance of extralateral rights upon the assumption that the Eureka was unpatented, applies with equal, if not greater force, if we assume that the Eureka was patented before the location of the Doon.

While the Supreme Court of the United States has not so decided, it has been held by the Land Office that the lines of the junior claim may be extended across the surface of a patented senior claim, provided it be done openly and peaceably. In other words, the rule with reference to making the location is held by the Land Office to be the same whether the invaded claim be patented or unpatented. Without questioning this doctrine, it does not follow that because the junior locator may extend his lines upon the surface of a senior claim, that the junior thereby becomes entitled to use the apex within the senior for extralateral right purposes.

The only cases which we regard as being in point on this subject deny that any right to use the apex within the senior patented claim is acquired by the junior if he extends his lines across the surface of the senior claim.

The case of *State* v. *District Court*[24] presented such a question. There a junior locator made a discovery of a vein within a small fraction of ground lying between several patented claims; using this discovery as a basis, he extended the lines of his claim across the surface of several patented claims. The end-lines of the patented claims over which the junior locator extended his lines, pointed in such directions that the claims so located upon the apex did not

[24] 25 Mont. 504, 65 Pac. 1020.

cover all of the vein on its dip, but the latter was covered by other patented claims which contained no part of the apex of that vein. The junior locator asserted extralateral rights not only to that portion of the apex within the free ground embraced within his claim, but also claimed rights based on that portion of the apex within his exterior lines which was also within the prior patented claim of his neighbor. The Supreme Court of Montana, after stating the facts, commented on the *Del Monte* case, and said: "Nowhere in the opinion do we find any support for the contention that the junior locator acquires any right to any portion of the vein beneath the surface of the senior location by laying his lines upon, over or across his surface, except that by this means he may secure parallelism of his end-lines, and through this parallelism extralateral rights to the extent of the length of the vein found within the surface for which he may receive patent. We doubt seriously whether the court intended to be understood as declaring it to be the law that a junior locator may lay his lines in part or wholly upon and over the surface of claims already patented and secure any rights thereby. * * * So long as land is not patented the legal title is still in the government; and it might be argued with some force that while held under a location merely, it is still within the jurisdiction of the Land Department and for that reason it is within the province of its authority to say that the junior locator may lawfully go upon it and mark his boundaries and erect his monuments upon its surface in order to initiate rights in lands not covered by it." The court held that the junior locator had no extralateral rights excepting such as he was entitled to by virtue of the apex within his free ground.

In *McElligott* v. *Krogh*[25] a locator of a mining claim made a discovery on public land, but extended one end of his claim over and upon a Mexican grant and the other upon patented agricultural land. The Supreme Court of California held that such location was valid to the extent that the land when located was public land and the extralateral rights were limited to the apex within such free ground.

An interesting case arose in Nevada which is not directly in point but which is suggestive. The case is entitled *Round Mountain Mining Co.* v. *Round Mountain Sphinx Co.*[26] The Mining company owned certain unpatented mining claims known as Sunnysides No. 1, 2, and 3. Apparenty for the purpose of securing double extralateral rights on the vein within those claims that company caused to be located almost entirely within the limits of the three claims

[25] 151 Calif. 126, 90 Pac. 823.
[26] — Nev. —, 129 Pac. 308.

another claim called the Lost Gazabo, the discovery of the latter being within the limits of the former claims. The end-lines of the Lost Gazabo pointed in a northerly direction, while the end-lines of the Sunnyside claims pointed in a northeasterly direction. A single patent was issued to the Mining Company for the three Sunnyside claims and the Lost Gazabo, without determining the relative rights of the respective claims. The Mining Company brought suit against the Sphinx Company, claiming extralateral rights based upon the Lost Gazabo claim. The Sphinx Company contended that, notwithstanding the issuance of patent for the Lost Gazabo, the claim was void, having been located within the limits of prior claims. The Supreme Court of Nevada so held and denied the Mining Company extralateral rights.

The question embraced in the title should be answered in the negative.

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NOTE AND COMMENT.

INTERSTATE COMMERCE AND STATE CONTROL OVER FOREIGN CORPORATIONS.—Since *Bank of Augusta* v. *Earle,* 13 Pet. 519, there seems to have been no real occasion to doubt the power of a state totally to exclude foreign corporations seeking to engage in intrastate business only. The power to exclude being absolute, there has been no question as to the right of the state to allow the entrance of the foreign corporation for such business upon terms, and the terms may be of any sort, reasonable or unreasonable, except that the corporation seeking to enter cannot as a condition precedent to such entry be required to surrender a right or privilege conferred upon it by the federal constitution or statutes. For example, a condition that no case should be removed by the corporation to the federal courts was declared invalid, and the corporation was allowed to remove cases despite the condition. *Home Ins. Co.* v. *Morse,* 20 Wall. 445. But for breach of such condition a state was allowed to revoke the permit to engage in domestic business within its borders. *Doyle* v. *Insurance Co.,* 94 U. S. 535; *Security Mut. L. I. Co.* v. *Prewitt,* 202 U. S. 246. The terms of admission very often are in

the nature of requirements for the payment of a license fee, an excise for the privilege of engaging in business within the state, and such license fees may be of any amount, and measured by any standard, the questions of reasonableness and discrimination not being involved. *New York Life Ins. Co.* v. *McMaster,* 84 S. C. 495, 66 S. E. 877.

It must be considered as equally well settled that a state cannot refuse to allow a foreign corporation engaged in interstate commerce to come within its borders, nor may it impose terms or conditions upon such corporations. *International Text-Book Co.* v. *Pigg,* 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493.

Where a corporation seeks to enter a state for the purpose of doing both interstate and intrastate business the situation becomes somewhat more complex. Until a comparatively recent time it has been considered that the fact that a foreign corporation was to engage in interstate commerce along with its intrastate business did not prevent the state from imposing terms upon the right to engage in the latter or even to prohibit the same entirely; in other words, that there was no absolute right in a foreign corporation to engage in domestic business even though at the same time it was engaged, perhaps with the same instrumentalities, in carrying on interstate commerce. *Western Union Tel. Co.* v. *Alabama,* 132 U. S. 472; *Postal Tel. Cable Co. v. Charleston,* 153 U. S. 692; *Pullman Co.* v. *Adams,* 189 U. S. 420; *Allen* v. *Pullman Pal. Car Co.,* 191 U. S. 171; *Kehrer* v. *Stewart,* 197 U. S. 60. These cases clearly establish the proposition that foreign corporations engaged in interstate commerce may be taxed in respect of their privilege of carrying on domestic or intrastate business, and the power to lay such tax would, it seems, carry with it the power to prohibit.

In *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, 30 Sup. Ct. 199, 54 L. Ed. 355, and *Pullman Co.* v. *Kansas,* 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, the court had under consideration a Kansas statute which required a foreign corporation to pay a fee of one-tenth of one per cent on the first one hundred thousand dollars of its authorized capital stock, one twentieth of one per cent on the next four hundred thousand dollars, and for each million or major part thereof, two hundred dollars. The court declared the statute unconstitutional as violative of the fourteenth amendment and as burdening interstate commerce, the fee being considered as a tax upon the interstate business as well as the domestic business. Mr. Justic HARLAN in the *Western Union Case* said: "It is true that in many cases the general rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce." The cases hereinbefore referred to declared that a foreign corporation engaged primarily in interstate commerce could be subjected to a tax upon the privilege of doing domestic business, and the result of the Kansas cases would seem to be that while not denying entirely the right of the state to lay such privilege tax, in the case of corporations

engaged directly or regularly in interstate commerce the tax must not be of such character as to burden even indirectly the company's interstate business. In those cases the tax measured as the statute directed was deemed to be a burden upon interstate commerce. See also to the same effect, *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146; *Atchison, etc. R. Co.* v. *O'Connor*, 223 U. S. 280.

Two years after the decision of the Kansas cases the supreme court of California had occasion to pass upon the validity of a provision of the law of that state requiring foreign corporations to pay a "license tax" graduated in amount and measured by the total capital stock of the corporation. The provision was very much like the Kansas statute involved in the Kansas litigation. In the California case the validity of the law was attacked by a corporation organized in Pennsylvania and engaged in the business of manufacturing and selling tablets, pills, etc., some of its business being interstate and some intrastate. It was held, on the authority of the Kansas cases, that the tax was unconstitutional. *H. K. Mulford Co.* v. *Curry*, 163 Cal. 276, 125 Pac. 236. The principle of the Kansas cases was declared to be as follows: "The admitted power of the state to regulate and prescribe terms under which a foreign corporation may engage in intrastate or domestic business is subject to this limitation, that where such foreign corporation is engaged in interstate, as well as intrastate business, no such term, condition or requirement will be constitutional if it imposes any burden upon the interstate business of such corporation, whatever be its name or form. A license or privilege tax, for the conduct of such intrastate business, based upon the total capital or the total capital stock of such corporation, without just relation to the proportion which the capital or capital stock used in the state bears to the whole capital or capital stock, though in terms declared to be directed solely to the intrastate business of such corporation, is unconstitutional and void, (a) as being in violation of the commerce clause of the constitution by the imposition of an illegal burden upon interstate commerce, and (b) because violative of the fourteenth amendment of the constitution and its equal protection and due process of law clause, as an effort to tax the property of citizens of the United States, which property is situated beyond the jurisdiction of the taxing state and is not amenable to its revenue laws." Admittedly for the guidance of the legislature the court then proceeds to state its opinion as to the effect of the Kansas cases, and concludes: "It is but the indulgence of futile and unwarranted speculation to say that the Supreme Court of the United States would call in the fourteenth amendment to the aid of a foreign corporation doing an interstate business to overthrow a state tax law and would not invoke it in the case of a foreign corporation engaged in purely domestic business, notwithstanding that the tax upon the capital stocks of the foreign corporations (and thus the tax upon the property without the jurisdiction of the state) was in both instances identically the same. Nor can relief be found in a refusal to call such a license-fee a tax. A state court may call it a fee or an exaction or a regulation, but the Supreme Court of the United States will call it a tax if in its effect it partake of the nature of a tax."

That the California court was wrong in the statement last quoted and in its conclusion in the case before it is shown by the very recent cases of *Baltic Mining Co.* v. *Massachusetts* and *S. S. White Dental Mfg. Co.* v. *Massachusetts*, reported together with one opinion in 34 Sup. Ct. 15. In those cases the court considered the validity of a provision of the Massachusetts statutes providing that "Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver-general, for the use of the commonwealth, an excise tax, of one-fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of $2,000." The complaining corporations were organized in Michigan and Pennsylvania, and were engaged, the one in the business of mining and disposing of copper, and the other in the manufacture and sale of dental supplies; both had offices in Boston, and sold their products for delivery in Massachusetts and also outside the state, but only a relatively small portion of their property was in that state. It was held that the statute was valid; the Kansas cases were distinguished on the ground that in the present cases the "local and domestic business, for the privilege of doing which the state has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved," that the capital stock was used simply as a means of measuring the license fee; while in the earlier cases the business of the complaining companies "was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character," there being "no attempt to separate the intrastate business from the interstate business by the limitations of state lines in its prosecution," and the real nature of the tax, under the facts, was to burden interstate commerce and to reach property represented by the capital stock of the companies, which was duly paid in and invested in property in many states, and therefore beyond the taxing jurisdiction of Kansas.

In two cases decided within the last year the Supreme Court of the United States has declared that despite the Kansas cases it is within state power to exact a license fee of a foreign corporation for the privilege of engaging in domestic business, and in both of those cases the complaining companies were engaged primarily in interstate commerce and were organized for the purpose of carrying on commerce. *Williams* v. *Talladega*, 226 U. S. 404, 33 Sup. Ct. 118; *Ewing* v. *Leavenworth*, 226 U. S. 464, 33 Sup. Ct. 157. In the *Williams* case it was really the Western Union Telegraph Company that complained of a conviction of its agent Williams for having carried on domestic telegraph business in Alabama without having paid a license fee imposed by an ordinance of the City of Talladega. It appeared from the evidence that the domestic business of the company at Talladega for eleven months of the year 1908, the last quarter's license of which Williams had refused to pay, was conducted at a net loss of eighty-six cents. The following language of the Supreme Court is deeply significant: "It is contended that the result of the tax upon the intrastate business conducted at a loss is to

impose a burden upon the other business of the company and is therefore void. The Supreme Court of Alabama, however, reached the conclusion that the attempted test for eleven months, showing a loss of eighty-six cents, is not a sufficiently accurate representation of the business of the company conducted at Talladega to render the tax void. With this view we agree, and we are not satisfied that the tax is such as to impose a burden upon interstate commerce, and therefore make it subject to attack as a denial of Federal right."

A careful examination of the cases seems to establish that the law as to the matter herein considered has undergone a process of development and definition. From the cases decided prior to the Kansas cases the conclusion was inevitable that a state had the power to tax a foreign corporation for the privilege of engaging in domestic business, even though such corporation was at the same time engaged in interstate commerce and even though the business of the corporation was in a strict sense commerce, and that the power to tax such privilege, carried to its logical extent, meant also the power to prohibit such business. The corporation had its choice, either to pay the tax and abide by the terms and conditions imposed—subject to the limitations before pointed out, or to give up its domestic business. The Kansas cases declared that if the tax upon the privilege of doing intrastate business is measured by the total capital stock of the corporation and the corporation is one engaged directly and wholly in commerce, i. e. transportation, then the tax is in reality a burden upon interstate commerce and void as such. In the Massachusetts cases, however, the court now holds that a tax upon the privilege of doing domestic business measured on the basis of a percentage of the entire capital stock of a foreign corporation engaged in both interstate and domestic business, but which is not engaged in transportation itself, is a valid tax. It is believed that there is no sound distinction between the two groups of cases on the ground suggested. Interstate commerce which is protected by the federal constitution from state interference is not limited to transportation. The interstate business of a corporation engaged in manufacturing and selling its products should be as much protected from state interference and annoyance as the interstate business of a corporation engaged in transportation. The reason for guarding interstate commerce from state control is believed to be found not in any desire to extend any special indulgence to the *persons* engaged in such business, but for the protection of the *interstate business*. There may be a difference between the interstate business that is transportation and the interstate business that is not transportation in that state interference may be more immediately and directly felt by the public when the state action affects corporations engaged in the first, but it cannot be contended that the difference is other than of degree. It is submitted that the court's ground of distinction between the two groups of cases is not legally sound, that if the Kansas cases were correctly decided the Massachusetts cases are incorrect, or *vice-versa*. It is perhaps too late to protest against the conclusion in the Kansas cases, the court though divided five to four at the time the *Western Union* case was decided has since unanimously applied the rule of the case in later litigation involving the same

question. See *Atchison, etc. R. C.* v. *O'Connor,* supra. It is believed that the decision in those cases was erroneous, and that the correct doctrine is that laid down in the Massachusetts cases. However, the court has committed itself to the recognition of the two classes of cases.

The cases of *Williams* v. *Talladega* and *Ewing* v. *Leavenworth,* above referred to, show clearly that the court does not consider the Kansas cases as denying to the states the right to exact a tax upon the privilege of doing intrastate business even in the case of a corporation engaged primarily in interstate commerce in the way of transportation. Such tax, however, must be of such a character and of such an amount as not to be a burden upon the corporation's interstate commerce, and the intimation is strong in *Williams* v. *Talladega* that it is proper and important to inquire into the profits from the domestic business with a view to determining whether or not the tax imposed can be paid out of such profits. R. W. A.

THE CONSTITUTIONALITY OF SEGREGATION ORDINANCES.—A legal writer in an article published just a year ago ventured the prophecy that the subject of the constitutionality of municipal segregation ordinances would be one of live interest in the near future. (See article by Mr. James F. Minor, 18 *Virg. L. Reg.* 561). How well-founded the prediction was, is evidenced by the very recent and very interesting cases of *Town of Ashland* v. *Coleman* (nisi prius case reported in 19 *Virg. L. Reg.* 427), and *State* v. *Gurry,* decided by the Court of Appeals of Maryland. 88 Atl. 546.

The facts of the latter case were in brief these: The city of Baltimore passed a penal ordinance, the object of which was to "preserve peace, prevent conflict and ill-feeling between the white and colored races in Baltimore city, and promote the general welfare of the city by providing, so far as practicable, for the use of separate blocks by white and colored people for residences, churches, and schools." The means for carrying out this purpose were that blocks which at the time of the passage of the ordinance were occupied by colored people exclusively should continue so to be occupied; and that blocks occupied exclusively by white people should so continue to be occupied by them. In the instant case, John Gurry, a colored man, was indicted for violation of the ordinance. The main question on appeal was whether the provisions of this measure conflicted with article 23 of the Maryland Bill of Rights and the first section of the Fourteenth Amendment of the Federal Constitution. *Held,* first, that race segregation—the object sought to be accomplished by this ordinance—was an object which properly admitted of the exercise of the police power; but, secondly, that since the ordinance prohibited a person who owned a dwelling when the ordinance was passed from moving into it simply because he was of a different color from other persons using that block as residences, it wholly ignored vested rights, and was therefore unconstitutional.

While the result of the decision is, perhaps, unexceptionable, the opinion of the court contains certain statements that are confusing if not contradictory. Grouping these, and for the sake of convenience numbering them, we have the following: First,—"the city has the power under its charter to pass ordi-

nances in the exercise of the police power, equal to legislative enactments—." Secondly, "If, then, the Legislature could pass a statute under the police power of the state, providing for the segregation of the races, as we think it could, there would seem to be no doubt that the mayor and city council of Baltimore can pass a valid ordinance having the same end in view." Thirdly, "The absolute control of property by an owner may be subject to reasonable regulations under the police powers of the state." Fourthly, "If the welfare of the city, in the minds of the council, demanded that the two races should be thus, to this extent, separated, and thereby a cause of conflict removed, the court cannot declare their action unreasonable."—"How can it be contended that the city council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power, when it enacts a law which, in their opinion, will tend to prevent the conflict?" Fifthly, "Without deeming it necessary to consider whether it would be possible for the Legislature itself to thus take away such vested rights, we deem the provisions as they were passed too unreasonable to permit us to assume that the Legislature intended to confer on the municipality the power to thus affect vested rights." Sixthly, "it would be difficult to conclude from the ordinance itself that the mayor and council were so convinced of the necessity for such an exercise of the police power as would justify such interference with vested rights." The fifth statement seems directly contrary to the first. If the city's ordinance is equal to legislative enactment, and that ordinance is invalid, how can it be profitable even to inquire whether the legislative enactment would be valid? Again, if the third and fourth statements are sound,—that property may be controlled by reasonable regulations, and the matter of their reasonableness as determined by the council cannot be gainsaid by the courts—, then the fifth, in which the court declares the provisions unreasonable, seems inconsistent. And the last statement seems to imply that even vested rights would fall, if the court thought the situation justified so drastic a use of the police power, though one would be warranted in inferring from statement four that the question of reasonableness was to be settled "in the minds of the council."

In justice to the able judge who wrote the opinion, it should be said that these isolated excerpts are set out merely because they furnish concrete illustrations of the inherent difficulties in any discussion of police powers and constitutional guarantees, which subjects, viewed as governmental theories, are essentially conflicting. No court yet has furnished a broad rule for determining in all cases the precise point where the police power ends, and the taking of property begins. *Gas Light Co.* v. *Hart,* 40 La. Ann. 474, 477. On the one hand, it is argued that property, within the meaning of the Fourteenth Amendment, includes both the title and the right to use; that when the right to use in a given way is vested in a citizen, it cannot be taken from him for the public good without compensation. *State* v. *Walruff,* 26 Fed. 178, 196. On the other hand, it seems clear that the Fourteenth Amendment did not take from the states their police power, or in any way weaken that power as to property rights. *Barbier* v. *Connolly,* 113 U. S. 27, 31. In answering the question whether a law deprives one of liberty or property with-

out due process of law, we must, as Justice HOLMES said, "be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown easily enough to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights." *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110. It is familiar law that the use of private property may be restricted when the city is authorized, either by charter or by statute, to preserve the public peace, if such regulation is reasonable. *City of Taunton* v. *Taylor*, 116 Mass. 254; *Bowes* v. *City of Aberdeen*, 58 Wash. 535. Moreover, a police regulation is not invalid simply because it may incidentally affect the exercise of constitutional rights. *L'Hote* v. *New Orleans*, 177 U. S. 587. As was said in a recent Nebraska case, "in all matters within the police power some compromise between the exigencies of public health and safety and the free exercise of their rights by individuals must be reached." *Anderson* v. *State*, 69 Neb. 686, 96 N. W. 149. The mere fact that a law takes away from the owner of property the right to use that property in a way which was legal at the time of its acquisition, but which the law subsequently declares to be illegal, does not necessarily render that law invalid. *Cole* v. *Village of Culbertson*, 86 Neb. 160, 125 N. W. 287.

Whatever may be said as to the view of the court in the principal case as regards "vested rights," the decision that the object of the ordinance—i. e. race segregation—may be lawfully effected, seems thoroughly sound. The enforced separation of the races by separate coach laws and separate school laws has already been sustained as a valid exercise of the police power. *Plessy* v. *Ferguson*, 163 U. S. 537. In the last cited case, it had been urged that the principle of race distinction once recognized, there would be no end to the resulting evils; that this would be to authorize legislatures "to enact laws requiring colored people to walk upon one side of the street and white people upon the other." As to this, the court said: "The reply to all this is that every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." An example of unreasonable segregation is afforded by the case of *In re Lee Sing*, 43 Fed. 359, where the court declared unconstitutional a law that made it unlawful for any Chinese to locate, reside or carry on business within the city of San Francisco, "except in that district of said city and county hereinafter prescribed."

The decisions of the courts in recent years show unmistakably a tendency to increase the scope of the police powers. *Jacobson* v. *Massachusetts*, 197 U. S. 11. Sir William BLACKSTONE'S statement—"so great is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community" (1 COMM. 139), sounds quaint indeed to modern ears. With racial conditions in our large cities becoming more and more acute, who can say that, as time goes on, the principle enunciated in *Anderson* v. *State* (cited supra) may not be considered as better adapted to twentieth century needs, and the decision in the Maryland case denounced as ultra-conservative? D. F. M.

REFORMATION OF INSTRUMENT BECAUSE OF MISREPRESENTATION AS TO A MATTER OF LAW.—The law on the subject of the right to reform a written instrument is fairly well settled, but occasionally a decision appears which seems to lay down principles contrary to the generally accepted rules. Thus in a recent case in the Idaho Supreme Court, the plaintiff sought the reformation of a deed, given him by the defendant. It appeared that the defendant agreed to purchase certain mortgaged lands from the plaintiff, and to assume the mortgage. It was agreed by the parties that this assumption of the mortgage by the defendant should be omitted from the deed. The defendant, at the plaintiff's request, drew up a deed in which no mention of the mortgage was made, and the defendant duly executed it. The plaintiff prayed that a clause be inserted in the deed to the effect that the defendant take the premises subject to the mortgage. The court held that the deed should be thus reformed. *Wollen* v. *McKay*, 135 Pac. 832.

To entitle a party to the decree of a court of equity reforming a written instrument, he must show that the material stipulation, which he claims should be inserted or omitted in the instrument, was omitted or inserted contrary to the intent of both parties, and under a mutual mistake. *Nevius* v. *Dunlap*, 33 N. Y. 676. It must appear that the precise terms of the contract had been orally agreed upon between the parties and that the instrument afterwards signed fails to be an execution of the previous agreement, but expresses a different contract, and that this is the result of a mutual mistake. *German American Insurance Co.* v. *Davis*, 131 Mass. 316; *Story* v. *Conger*, 36 N. Y 673; *Jackson* v. *Andrews*, 59 N. Y. 244; *Purvines* v. *Harrison*, 151 Ill. 219, 37 N. E. 705; *Green* v. *Stone*, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577; *Chute* v. *Quincy*, 155 Mass. 189, 30 N. E. 550.

The only exception to this rule is that an instrument may be reformed when there is a mistake on the part of one party, and fraud on the part of the other. *Welles* v. *Yates*, 44 N. Y. 525, and cases cited; *Bales* v. *Hunt*, 77 Ind. 355; *Bush* v. *Merriman*, 87 Mich. 260, 49 N. W. 567; *Kyle* v. *Fehley*, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866. "It must not be a mistake of judgment in that one party relied upon performance by the other of the provision omitted, instead of insisting on its being reduced to writing and put in the written instrument. If the instrument is executed in conformity with the agreement as to the terms that were to be incorporated in it, then there is no mistake, and if it is in conformity with the intention of one of the parties then there is no mutual mistake." *Doniphan, K. & S. R. Co.* v. *Mo. & N. A. R. Co.*, 104 Ark. 475, 149 S. W. 60.

The evidence to show that a mutual mistake has been made in a written instrument, or that a mistake has been made by one of the parties, and that such party has been induced to execute the instrument through the fraud of the other, must be clear and strong. It has been repeatedly held that such proof must be clear, unequivocal and convincing. *Sawyer* v. *Hovey*, 3 Allen 331, 81 Am. Dec. 659; *Andrews* v. *Ins. Co.* 3 Mason 6; *Turner* v. *Shaw*, 96 Mo. 22, 8 S. W. 897; *Sable* v. *Maloney*, 48 Wis. 331, 4 N. W. 479.

In the principal case, the court in allowing a reformation of the deed, says "there can be no question but that where a party agrees to sell and con-

vey to another party real property, and the purchaser agrees to assume and pay a mortgage upon said property executed before the contract of sale is entered into, and thereafter a deed is executed conveying the property, and the condition of payment of the mortgage existing before the time the contract and deed are made *was omitted from the deed by agreement of the parties,* for the reason that it might affect the credit of the party who agrees to pay the mortgage, *the omission of the contract to pay from the deed, was a fraud and * * * * may be reformed* by inserting the omission in the deed, upon alleging the facts."

This rule is, to say the least, entirely too broad. Under this rule a deed could be reformed even where the parties knew that such an agreement must be in writing, and yet the one party was willing to trust to the other's honesty in his oral promise to pay. This is practically what the court said in the *Doniphan* case, above. If both parties agree that a condition such as this shall be omitted from the deed, and it is actually omitted, the omission is, on its face, valid; the parties have the right to make such an instrument if they so desire, and in the absence of proof that the agreement to omit was procured by fraud, the instrument should be upheld as executed. A rule allowing a reformation where the agreement to omit is entered into bona fide and with full knowledge, is clearly too comprehensive.

In order to allow a reformation here, it should have been shown by clear and convincing proof that the agreement to omit was procured by fraud on the part of the defendant. The decision discloses no such fraud. The court says "the contract was made and the deed was drawn by the grantee, and at his request, for his own personal reason and benefit, which was no benefit to the grantor but a great injury, the grantee omitted the assumption and agreement to pay the mortgage." This is a decidedly different thing from saying that the agreement was procured by fraud.

The fraud alleged in the complaint was that the plaintiff was unskilled in the manner of transferring real property or making contracts, and that the defendant falsely and fraudulently informed the plaintiff that it was unnecessary to put the assumption of the mortgage in the deed, and that so long as the same was understood it need not appear in the deed.

These allegations were put in issue by the answer, and as far as appears from the opinion, the allegations were not found to be true. This renders unnecessary a discussion of the question as to whether or not there was a fiduciary relationship between the parties, granting that there would have been one established, had these allegations been true.

There being no fiduciary relationship established, we may admit the allegations of the complaint to be true for every other purpose, and still refuse to allow a reformation of the deed in this case. Even if there was a misrepresentation, it was as to a matter of law. No principle is better settled than that every person is presumed to know the law, both civil and criminal; and no one can, therefore, complain of the misrepresentations of another respecting it. *Reed* v. *Sidener,* 32 Ind. 373, and cases cited; *Fish* v. *Clelland,* 33 Ill. 238, and cases cited; *Upton* v. *Tribilcock,* 91 U. S. 45. The exception to this rule, that parties may reform where one has been mistaken as to his antece-

dent existing legal rights, has no bearing on the principal case. It seems to be settled that a representation with reference to the legal effect of a written instrument, cannot be fraudulent in a legal sense: *Smither* v. *Calvart*, 44 Ind. 242, and cases cited. Fraud cannot be predicated upon such statements or representations.

Hence it seems impossible to admit that there is any fraud in this case, and without fraud, the decision cannot be upheld.

As bearing on the general rule given in the principal case the most recent case in point is the case of *Weinhard* v. *Summerville*, 46 Wash. 127, 89 Pac. 490, 13 L. R. A. N. S. 1089, which the court in the principal case does not seem to have considered in its decision. In that case, the court says: "The mere fact that the appellant wanted all mention of the lease omitted from the deed could not constitute fraud in the absence of some word or act deceiving or intending to deceive the respondent in regard to the contents of the deed." Here there was not only no act of deception but the plaintiff knew of the omission in the deed.

The only case cited in the principal case in support of the rule which it lays down is *Kilmer* v. *Smith*, 77 N. Y. 226. This case seems to be distinguishable from the principal case on the very points in which the court in the principal case admitted the two to differ. In *Kilmer* v. *Smith* provisions were inserted in the deed without the knowledge of the plaintiff grantee, who accepted the instrument and had it recorded without knowing that it contained such provisions. In the principal case the provisions objected to were put in the deed with the knowledge and with the consent of the plaintiff grantor. S. E. G.

THE CONSTRUCTION OF THE REPAIR CLAUSE IN A STREET RAILWAY CHARTER. —Whether a clause, in a charter, ordinance or statute, which imposes an obligation upon a street railway to repair the street, carries with it the obligation to repave, is a question upon which the authoirties are in conflict. In a recent Maryland case, the city, after repaving the entire street, brought suit against the railway company for the cost of the pavement between the tracks, and for two feet on either side, the area which the company was bound to repair. The court held that "to repair" did not include repavement, and dismissed the action. *United Rys. & Elec. Co.* v. *Mayor, etc. of Baltimore*, (Md. 1913) 88 Atl. 617.

It may be well to note here that the principal case involves only the question of repavement under the clause "to repair." It is distinguishable from cases in which circumstances outside the contract reveal the intention of the parties, where the question is one of pavement, rather than repavement, and where the franchise is assessed as property for the improvement. While probably not supported by a majority of the states, this last proposition has been the means of compelling the company to pay for its share of the improvement in a number of jurisdictions. *Chicago Cy. Ry. Co.* v. *City of Chicago*, 90 Ill. 573; *Chicago* v. *Baer*, 41 Ill. 306; *City of Columbus* v. *Col. St. Ry. Co.* 45 Oh. St. 98, 32 Am. & Eng R. R. Cas. 292; *Cy. of New Haven*

v. *Rd. Co.*, 38 Conn. 422. It is also well settled that a street railway company, bound "to repair," "to keep in repair," or "to keep in permanent repair," can not be compelled to pay its share of the paving of the street upon which it operates, as distinguished from paying the cost of repaving. *Chicago* v. *Sheldon*, 9 Wall. 50; *State* v. *Jacksonville St. Ry. Co.*, 29 Fla. 390; *Farrar* v. *St. Louis*, 80 Mo. 379; *Blair* v. *Chicago*, 201 U. S. 400.

As in other contracts, the intention of the parties governs the construction of the clause, and their acts often decide what was really meant. *Chicago* v. *Sheldon*, supra, *Kansas Cy.* v. *Corrigan Consol. St. Ry. Co.* 86 Mo. 67; *Collins* v. *Lavelle*, 44 Vt. 230.

Upon the question presented in the principal case, directly contrary views are taken. In New York a clause such as this has been construed to include the duty of repaving, when the municipality decides that it is necessary. The court reasons that the parties at the time they made the contract, foresaw that there would be progress, and with progress, the necessity of repavement, and that it would be taking too narrow a view to hold other than that the company took upon itself the duty to pay for its part of the street. *Conway* v. *Cy. of Rochester*, 157 N. Y. 33; *City of Rochester* v. *Roch. Ry. Co.*, 182 N. Y. 99; *Mayor, etc. of N. Y.* v. *H. B., M. & F. Ry. Co.*, 186 N. Y. 304, 78 N. E. 1072. Other propositions may be advanced to strengthen this position. A company, operating upon city streets, is bound to repair the area occupied by its tracks, without an express obligation to that effect. *Worster* v. *Forty-second St. etc. Ry. Co.*, 50 N. Y. 203; *Call* v. *Portsmouth, K. & Y. St. Ry.* 69 N. H. 562, 45 Atl. 405; *Maloney* v. *Natick & C. St. Ry. Co.*, 173 Mass. 587, 54 N. E. 349. The natural presumption is that the repair clause was intended to impose an obligation, rather than that it is declaratory of the common law liability. Moreover, in case there is any doubt as to the construction of the clause, all reasonable intendments are to be taken in favor of the city. *Canal Comm.* v. *People*, 5 Wend. 423, 459; *State* v. *Morgan*, 28 La. Ann. 482; *Storey* v *Woolverton*, 31 Mont. 346, 78 Pac. 589.

The courts which take the opposite view do so upon the ground that the word "repair" refers to a previously existing condition, and that the duty is continuous. They hold that "repair" in no sense means repave, and that it is contrary to the intention of the parties to hold that such a duty is imposed. *Morristown* v. *Ry. Cos.* 148 Pa. St. 87, 23 Atl. 1060; *Phila.* v. *Hestonville*, 177 Pa. St. 371; *Coast Line R. Co.* v. *Savannah*, 30 Fed. 646; *Dean* v. *Paterson*, 67 N. J. L. 199. In Pennsylvania, where the question seems to have been most litigated, an exception has been engrafted upon the general rule. After it had apparently been well settled in that jurisdiction that the company was not bound to repave, the Supreme Court, in *Reading* v. *Traction Co.*, 202 Pa. St. 571, decided that where the company had allowed its part of the pavement to fall into such a state of dilapidation that it presently would have to be repaired, and since such repairs must conform to the new pavement, it was but reasonable to require the company to make the entire improvement at that time. This departure from the general rule seems also to be a departure from the basic principle that contracts are to be construed according to the intention of the parties. A. V. B. Jr.

RECENT IMPORTANT DECISIONS.

APPEAL AND ERROR—"PERSONS AGGRIEVED."—Where a statute provided that "any person aggrieved by any final judgment or decision of any district court" etc. "in any civil case" might take an appeal or sue out a writ of error, the question was whether an administrator de bonis non, who was not a party to the record in the original suit, was entitled to prosecute an appeal from a final judgment therein. *Held* he might appeal upon making a showing by evidence dehors the record, that his rights were injuriously affected by the judgment. *Bass* v. *Occidental Life Insurance Co.* (N. M. 1913) 135 Pac. 1175.

In the absence of statutory extensions of the right to prosecute an appeal the general rule is that it is limited to one who was a party to the original suit or a privy to the extent that his privity of estate, title, or interest appeared of record. *Hunt* v. *Houts*, 62 Ala. 36; *Norton* v. *Walsh*, 94 Cal. 564; *Fischer* v. *Hanna*, 21 Colo. 9; *Swift* v. *Thomas*, 101 Ga. 89; *Ferguson* v. *Lucas Co.*, 44 Iowa 701; *Reid* v. *Quigley*, 16 Oh. 445; *Ex Parte Cockcroft*, 104 U. S 578; *Ex Parte Cutting*, 94 U. S. 14; *People* v. *Lynch*, 54 N. Y. 681. Likewise where the statute specifies that appeals may be brought by "parties aggrieved" it has been quite generally held that only parties to the original record are contemplated. *Stewart* v. *Duncan*, 40 Minn. 410; *Investment Co.* v. *Kennedy*, (Tex.) 123 S.W. 150; *Burleson* v. *Henderson*, 4 Tex. 49; *Matter of Bate*, 56 Cal. 135; *People* v. *Pfeffer*, 59 Cal. 89; *Cecil* v. *Cecil*, 19 Md. 72; *Penniman* v. *French*, 2 Mass. 140: Contra; *Stevenson* v. *Shriver*, 9 Gill & J (Md.) 324; *Hall* v. *Zack*, 32 Md. 253. Where, however, the statute uses the word "person" instead of "party" the weight of authority is with the principal case. The courts hold that by "person aggrieved" is meant anyone who can show that his interests have been injuriously affected by the judgment in the original action. *Nolan* v. *Jones*, 108 Mo. 436; *Wilson* v. *Wallace*, 64 Miss. 13; *Wentworth* v. *Trainor*, 31 N. H. 528; *Pierce* v. *Gould*, 143 Mass. 234; *Andress* v. *Andress*, 46 N. J. Eq. 528; *Henry* v. *Jennes*, 47 Oh. St. 116, 24 N. E 1077; *Weer* v. *Gand*, 88 Ill. 490; *Mutual Life Ins. Co.* v. *Houchins*, 52 La. Ann. 1137; *Dickerson's Appeal*, 55 Conn. 223. Other courts hold that in contemplation of law no person can be deemed to be aggrieved who is not a party to the original proceedings, either directly or indirectly. *Gannon* v. *Doyle*, 16 R. I. 726; *Culpeper* v. *Gorrell*, 20 Grat. (Va.) 519; *Southern Railroad Co.* v. *Glenn*, 102 Va. 536; *Parker* v. *Reynolds*, 32 N. J. Eq. 290; *Veazie Bank* v. *Young*, 53 Me. 555; *Labar* v. *Nichols*, 23 Mich. 310. It is submitted that the cases last cited announce the rule which is technically correct for the reason that one not a party to the record is not concluded thereby and therefore has lost none of his rights by reason of the judgment. On the other hand the more liberal construction has the advantage of furnishing to an interested party a more simple, direct and adequate remedy.

BANKRUPTCY—LIQUOR LICENSE—RIGHT TO RENEWAL PASSING TO TRUSTEE.—A bankrupt owned at the date of his adjudication a liquor license expiring May 31, 1913. The receiver on March 31, 1913, sold the license ending May 31, 1913, and also the license for the term beginning June 1, 1913. At the time of the adjudication in bankruptcy, no application for a renewal of the term ending May 31, 1913, had been made by the bankrupt. The question in the case was, therefore whether the bankrupt's right to a renewal should pass as a part of his estate. *Held,* it did not, and that the bankrupt could not, therefore, be required to join with a purchaser of the balance of the current license in an application to the state authorities for a renewal thereof to such purchaser. *In re Doyle et al.,* (1913), 205 Fed. 543.

A liquor license, being in its nature a trust personal to the licensee and not transferable except with the approval of the licensing authorities, is not an asset which can be subjected to the claims of his general creditors. *Quinnipiac Brewing Co. et al.* v. *Charles Hackbarth et al,* 74 Conn. 392; *Wharton* v. *King,* 69 Ala. 365. But in many states, this is provided for by statute, and in such states the holder transfers his rights to the license under the assignment. *In re License of Jonathan A. Umholtz,* 191 Pa. St. 177. Then it follows that in states where the transfer of such license is allowed, the license is available as assets in bankruptcy. *Fisher* v. *Cushman,* 103 Fed. 860. And the right to sell the license passes to the trustee. *In re Becker,* 98 Fed. 407. Thus far, the courts seem agreed, and cases which at first blush seem contra will be found to be based upon the liquor laws of their own jurisdiction. The real question comes as to whether the mere intangible right of renewal is such as will pass as property to the trustee. Where the bankrupt has applied for a renewal of his license prior to the adjudication in bankruptcy, it is held the rights of the bankrupt under such application pass to the trustee in bankruptcy. *Wiesel* v. *Knaup,* 173 Fed. 718, 23 A. B. R. 59. The court in the principal case expressly distinguished cases like these, and seems to be supported by previous decisions in Pennsylvania. Accordingly, it has been held that the license was to operate *in futuro,* and the bankrupt had no property until it was granted. *Whitlock's License,* 39 Pa. Super. Ct. 34. As is seen from other decisions, however, it is the intangible right that makes the license property, and the right of renewal is part of the intangible right which forms the current license. This right passes to the trustee and may be disposed of by the latter. *In re Brodbine,* 93 Fed. 643; *Wiesel* v. *Knaup,* supra.

BANKRUPTCY—PARTNERSHIP—PROPERTY OF PARTNER.—A firm, of which Francis was a partner, was adjudicated bankrupt, and an order was entered subjecting the individual estate of Francis to administration in bankruptcy, although Francis had not been adjudicated bankrupt. Francis resisted this order on the ground that a partnership is an entity separate and distinct from the partners composing it, by virtue of § 5 Bankruptcy Act 1898, and that such Act does not provide for the administration in bankruptcy of the estate of a person not adjudicated bankrupt. *Held,* the individual liability of partners for debts of the firm is primary and direct, and an individual partner,

even though he has not been adjudged a bankrupt, may be required to turn over his separate estate for administration to the trustee in bankruptcy of the firm, when the partnership and individual estates together are not enough to pay partnership debts. *Francis* v. *McNeal,* (1913), 33 Sup. Ct. 701.

This case finally settles the controversy that has raged over the "entity theory of partnership" based on the vague wording of § 5 of the Bankruptcy Act of 1898. § 5a provides that "a partnership, during the continuance of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt." § 5h, provides that "in the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt." To follow this statute literally, it would seem that Congress thereby conferred upon partnerships a distinct entity, and that they should be considered separate and apart from the individuals composing the partnership. And many of the earlier cases took this view. *Chemical National Bank* v. *Meyer,* 92 Fed. 896; *In re Stein,* 127 Fed. 547. The courts holding that this was the evident purpose of the act say that if, where one or more of the partners are adjudged bankrupt, those that are not so adjudged may administer the partnership property, *a fortiori* they should control their individual property, and the court cannot do so without their consent. *In re Bertenshaw,* 157 Fed. 363; *In re Junck & Balthazard,* 169 Fed. 481. However, other courts took exactly the contrary view and held that, even though the firm was a distinct entity, the trustee had power to compel the unadjudicated members to turn over their property to be applied as assets of the partnership. *In re Meyer,* 98 Fed. 976; *Dickas* v. *Barnes,* 140 Fed. 849. The principal case argues that it could not have been the intention of Congress to change one of the fundamental principles of partnership. The result of the court's reasoning is practically to explode the "entity" of partnerships as an effective principle of bankruptcy law. For a full discussion of the conflicting holdings in the lower courts see 10 MICH. L. REV. 215; 8 COL. L. REV. 599.

BIGAMY—WHAT CONSTITUTES A COMMON LAW MARRIAGE.—The defendant went through a marriage ceremony with X in New York. They then removed to Illinois and cohabited there for almost ten years. Eight years before this marriage the former husband of X obtained in California a divorce that was void by the law of New York, but valid by the law of Illinois. Defendant now marries K. *Held,* (by a divided court) that, although common-law marriages are recognized by the law of Illinois, defendant is not guilty of bigamy. *People* v. *Shan* (Ill. 1913) 102 N. E. 1030.

This case presents the question, Does a common-law marriage result where the parties in good faith for years have treated and held each other out as husband and wife after the removal of an impediment which rendered their marriage contract void? The principal case declares that a common law

marriage does not result and that the continued relation of the parties is pursuant to the void marriage contract. It would seem that this point has never previously arisen in a criminal case. On principle *Manning* v. *Spurck* 109 Ill. 447, 65 N. E. 342, is directly opposed to the principal case; there the parties joined in an invalid ceremonial marriage in Illinois and lived there until after the removal of the impediment. It was held that a common law marriage resulted after the removal of the impediment, although there was no new affirmative act by the parties. In accord with this case are: *DeThoren* v. *Atty. General*, 1 App. Cas. 686; *Eaton* v. *Eaton*, 66 Neb. 676, 1 Am. & Eng Ann. Cas. 109; *Teter* v. *Teter*, 88 Ind. 494; *Chamberlain* v. *Chamberlain*, 68 N. J. Eq. 414 and 736, 62 Atl. 680, 3 L. R. A. N. S. 244; *Rose* v. *Clark*, 8 Paige 574. It was held in *Travers* v. *Reinhardt*, 205 U. S. 423, that a marriage, invalid where contracted, did not prevent the forming of a common-law marriage in a state where such marriages were recognized although good faith could be credited to only one party. The defendants in *Bynon* v. *State*, 117 Ala. 80, and in *State* v. *Gonce*, 79 Mo. 600, were convicted of bigamy and the evidence of the first marriages was solely that of cohabitation and reputation. In accord with the principal case are *Collins* v. *Voorhees*, 47 N. J. Eq. 555, 14 L. R. A. 364, 24 Am. St. Rep. 412, and *Hunts Appeal*, 86 Pa. 294; and in the recent case of *Melton* v. *State* (Tex. Cr. App.) 158 S. W. 550 the court held that in order to constitute a valid common-law marriage sufficient to support a prosecution for bigamy there must be not only the assent of the parties to the marriage but also a continuous living together as husband and wife. For a general discussion of this subject see 8 MICH. L. REV. 325; 20 HARV. L. REV. 576 and 633.

BILLS AND NOTES—AMOUNT OF RECOVERY—ATTORNEYS' FEES.—A stipulation in a note for the payment of attorneys' fees is not against public policy or void, especially in view of the provisions of the Negotiable Instruments Act (Mills Ann. St. 1912, Sec. 5052) that the sum payable is a sum certain so as to render the instrument negotiable, although it is to be paid with costs of collection or an attorney's fee in case payment shall not be made at maturity, which impliedly recognizes such stipulations as valid. *Florence Oil & Refining Co.* v. *Hiawatha Oil, Gas & Refining Co.* (Colo. 1913) 135 Pac. 454.

The weight of authority seems to be with the holding of the principal case, i. e., that the stipulation in a note for the payment of attorneys' fees in case of nonpayment of the note at maturity is valid and enforceable, and this because no rule of law or public policy is invaded. *Dorsey* v. *Wolff*, 142 Ill. 589; *Jones* v. *Radatz*, 27 Minn. 240; *First National Bank* v. *Larson*, 60 Wis. 206; *Chase* v. *Whitmore*, 68 Cal. 545; *Bowie* v. *Hall*, 69 Md. 433; *Brahan* v. *First National Bank*, 72 Miss. 266; *Peyser* v. *Cole*, 11 Ore. 39, (But see *Commercial National Bank* v. *Davidson*, 18 Ore. 57); *Miner* v. *Paris Exchange Bank*, 53 Tex. 559. In other states such stipulations are by statute void, *Hartford Security Co.* v. *Eyer*, 36 Neb. 507; *National Bank of Commerce* v. *Fenney*, 9 S. D. 550; in others void as evasions of the usury laws, *Booser* v. *Anderson*, 42 Ark. 167; *Meyer* v. *Hart*, 40 Mich. 517; *Tinsley* v. *Haskins*, 111 N. C. 340; as against public policy and as providing for penalty

or forfeiture. *Witherspoon* v. *Mussleman,* 14 Bush (Ky.) 214; *Bullock* v. *Taylor,* 39 Mich. 137; *Rixey* v. *Pearre,* 89 Va. 113. But whatever may be the view of the particular court as to the validity of a provision of this kind, it is now well established by the Negotiable Instruments Law that the negotiability of the instrument is not affected thereby. The basis of this statute is the reason found in those cases that followed this rule prior to the statute, i. e. that the requisite of certainty of the sum payable continues till maturity, which satisfies the rule as to certainty of the sum. See *Oppenheimer* v. *Bank,* 97 Tenn. 19; *Morrison* v. *Ornbaum,* 30 Mont. 111.

BILLS AND NOTES—BONA FIDE PURCHASER—HOLDER FOR COLLECTION.—Where a bank habitually credits a depositor's account with negotiable instruments indorsed to it by him, but charges against the account all such instruments as are not paid, the bank is a bailee for collection, and not a bona fide holder for value. *Third National Bank of St. Louis* v. *Exum.* (N. C. 1913) 79 S. E. 498.

The general rule is that where the bank discounts a note for a customer, crediting the proceeds thereof to his account, it is not a bona fide holder for value unless such credit was drawn upon before the maturity of the note and before notice of facts invalidating it in the hands of the payee. *Drovers Bank* v. *Blue,* 110 Mich. 31; *Albany Co. Bank* v. *Peoples Ice Co.,* 92 N. Y. App. Div. 47; *City Deposit Bank* v. *Green,* 130 Ia. 384; *Manufacturers National Bank of Racine* v. *Newell,* 71 Wis. 309; *Thompson* v. *Sioux Falls National Bank,* 150 U. S. 231; *First National Bank* v. *Nelson,* 105 Ala. 180. The instant case, however, does not consider whether or not the proceeds credited to the account of the customer had been drawn upon, but bases its general rule that the bank becomes a mere bailee for collection on the habit adhered to of deducting unpaid instruments from the account of the customer. From the breadth of the doctrine as expressed, it would make no difference that the customer had drawn upon the account and the proceeds credited to same, provided only he has made later deposits from which the unpaid instruments might be deducted at their maturity. This would be contrary to expressed decisions and, it would seem, to the general rule before announced. *Fredonia Nat. Bank* v. *Tommei,* 131 Mich. 674; *Morrison* v. *Farmers and Merchants Bank,* 9 Okla. 697; *Dreilling* v. *National Bank,* 43 Kan. 197; *Fox* v. *Bank of Kansas City,* 30 Kan. 441; *Warman* v. *Bank,* 185 Ill. 60; *Dymock* v. *Midland National Bank,* 67 Mo. App. 97. To the contrary, see *Citizens State Bank* v. *Cowles,* 180 N. Y. 346.

CHATTEL MORTGAGE—UNPLANTED CROPS.—A chattel mortgage on cotton described as located in W. County, Texas, two miles southeast of V. and being "My first, second, third, seventh and eighth bales of my crop of cotton being produced this present crop on the lands owned by J. T. Dunson." *Held*: sufficient to confer a lien on the first, second, third, seventh and eighth lots of cotton baled for mortgagor regardless of whether such lots matured, were picked or ginned first or last; *Houssels* v. *Coe & Hampton,* (Tex. 1913) 159 S. W. 864.

The case presents a question upon which there has been a hopeless con-

flict. On the one hand it is held that where mortgages are given upon crops, the seeds to produce which have not been sown, they are void as being mortgages of future property. *Hall* v. *State* (Ga. 1907) 59 S. E. 26; *Stowell* v. *Blair*, 5 Ill. App. 104; *Hutchinson* v. *Ford*, 9 Bush (Ky.) 318; *Shaw* v. *Gilmore*, 81 Me. 396; *Merchants Sav. Bank* v. *Lovejoy*, 84 Wis. 601. In other states they are upheld on the theory that the crop has a potential existence sufficient to give the mortgages validity. *Wilkerson* v. *Thorp*, 128 Cal. 221; *Norris* v. *Hix*, 74 Iowa 524 (but see *McMaster* v. *Emerson*, 109 Iowa 284); *Gandey* v. *Dewey*, 28 Neb. 175 (but see *Cole* v. *Kerr*, 19 Neb. 553); *Cumberland Bank* v. *Baker*, 57 N. J. Eq. 231; *Meyer* v. *Davenport Elec. Co.*, 12 S. D. 172; *Watkins* v. *Wyatt*, 9 Baxt. 250; *Silberberg* v. *Trilling*, 82 Tex. 523; *Butt* v. *Ellet*, 86 U. S. 544; *Senter* v. *Mitchell*, 16 Fed. 206. In Missouri and New York such mortgages have been held bad at law but good in equity; *Littlefield* v. *Lemley*, 75 Mo. App. 511; *Rochester Dis. Co.* v. *Rasey*, 142 N. Y. 570; *McCaffrey* v. *Woodin*, 65 N. Y. 459. In Arkansas they were formerly invalid at law, but good in equity. *Tomlinson* v. *Greenfield*, 31 Ark. 557. But since the act of February 11, 1875, they are good at law. DIG. OF STAT. 1904, § 5405, *Senter* v. *Mitchell*, supra. In North Carolina they are valid only as liens on crops planted or about to be planted in the next year succeeding the execution of the mortgage. *Hahn* v. *Heath*, 127 N. C. 27. In other states, these mortgages are made valid by statute. *Pierce* v. *Langdon*, 2 Idaho 878, 28 Pac. 401; *Betts* v. *Ratliff*, 50 Miss. 561. (See also *White* v. *Thomas*, 52 Miss 49); *Cudworth* v. *Scott*, 41 N. H. 456; PUB. ST. 1891 c 140, No. 1; *Schweinberger* v. *Great W. Elec. Co.*, 9 N. D. 113; N. D. REV., CODE, § 4681; REV. LAWS OF NEVADA, 1912, § 1080; CIVIL CODE (S. C.) 1902 § 3005. Some states limit the time of planting. "Mortgages of unplanted crops more than one year before the seed shall be sown are forbidden and void—unless given to secure the price of the land on which crops are planted." *Plano Mfg. Co.* v. *Hallberg*, 61 Minn. 528; MINN. GEN ST. 1894, § 4154. See also REV. LAWS OF MINN. 1905, § 3475. In Alabama "no mortgage of an unplanted crop is valid to convey legal title if executed prior to the first day of January of the year in which the crop is grown." CODE 1896, § 1064. New Mexico Territory provided that a mortgage of growing crops, before the same are matured and gathered is null and void and of no effect. COMP. LAWS 1897, § 2360.

CONTRACTS—PUBLIC POLICY—SPLITTING FEES BY DOCTORS.—Plaintiff, who was recommended and introduced to defendant by the latter's family physician, performed a surgical operation upon defendant, and was assisted in the operation by the family physician. Plaintiff sued to recover his fee, which was shown to include the value of the services of the family physician as assistant. Defendant knew nothing of the agreement by the surgeon to pay part of his fee to the family physician. *Held* that the agreement between the surgeon and the physician to divide the fee was against public policy and void as placing the physician, who was in a fiduciary relation with the defendant, in a position which exposed him to temptation to commit a breach of the defendant's trust and confidence. *McNair* v. *Parr* (Mich. 1913) 143 N. W. 42.

The cases cited as authority for this decision are all cases involving questions of agency or brokerage. *Flint & P. M. Ry. Co.* v. *Dewey*, 14 Mich. 478; *Scribner* v. *Collar*, 40 Mich. 375, 29 Am. Rep. 541; *McNamara* v. *Gargett*, 68 Mich. 454, 36 N. W. 218, 13 Am. St. Rep. 355; *Wilbur* v. *Stoepel*, 82 Mich. 344, 46 N. W. 724, 21 Am. St. Rep. 568; *Cleveland* v. *Miller*, 94 Mich. 97, 53 N. W. 961; *Friar* v. *Smith*, 120 Mich. 411, 79 N. W. 663, 46 L. R. A. 229; *Hannan* v. *Prentis*, 124 Mich. 417, 83 N. W. 102; *Hogle* v. *Meyering*, 161 Mich. 472, 126 N. W. 1063. The principle here applied has hitherto had its chief application to agency and brokerage law. *Byrd* v. *Hughes*, 84 Ill. 174, 25 Am. Rep. 442. The relation between physician and patient was regarded by the court in the principal case, as one of a fiduciary character, to which the principle above stated readily lent itself. So far as the writer has been able to ascertain, this is the first instance in which this doctrine has been applied to the situation arising when one physician, acting for his patient, recommends and employs another to give surgical attention or treatment to the patient and, without the patient's knowledge or assent, agrees with such other physician to divide the forthcoming fee. Fee-splitting is a practice which has excited much criticism and adverse comment among many of the medical profession, and the doctrine adopted by the court in the principal case presents a solution for a difficulty which at least one other state (Wisconsin) has found it necessary to remedy by statute, § 4431b, WISCONSIN LAWS 1913.

CONVEYANCING—WHO SHOULD PAY TAXES UNDER A DELIVERY IN ESCROW.—Under a written contract for the sale of land, the plaintiff was to make a second payment on Dec. 1, 1909, and the defendant was then to execute a warranty deed and deposit it in the bank until March 1, 1910, on which date, upon full payment of the balance of the purchase money, the deed was to be delivered and possession surrendered to the plaintiff. After performance by both parties the plaintiff found that the taxes for the year 1909 had not been paid, whereupon he paid them and sued the defendant to recover the amount. By provision of the Code the lien of taxes on real estate attached as against purchasers on Dec. 31 of each year. *Held*, the legal title remained in the defendant until performance of the conditions by the plaintiff, and because the defendant retained both the legal title and possession until Mar. 1, it was his duty to pay the taxes. *Mohr* v. *Joslin*, (Iowa 1913) 142 N. W. 981.

Some of the earlier cases made much of a distinction laid down in SHEPPARD'S TOUCHSTONE and in COKE, between a delivery of the deed to the escrow as the grantor's deed—when it is his deed presently—and a delivery to the escrow as a writing, to be delivered over later as the grantor's deed—when it becomes effective on the second delivery. *Wheelright* v *Wheelright*, 2 Mass. 447; *Hathaway* v. *Payne*, 34 N.Y. 92. But this distinction was discarded as almost entirely nominal in view of the other rules resorted to. *Hatch* v. *Hatch*, 9 Mass. 307. The general rule has long been recognized that an escrow, with conditions to be performed, takes effect from the second delivery. *Wheelright* v *Wheelright*, supra; *Taft* v. *Taft*, 59 Mich. 185, 26 N. W. 426. But there are equally well recognized exceptions, said to be based on necessity

or required by justice, where the nominal title is allowed to relate back to the first delivery to avoid an intervening incapacity in the grantor and thus to sustain the deed. *Jackson* v. *Rowland,* 6 Wend. 666; *Price* v. *Pittsburgh R. Co.,* 34 Ill. 13, * 32; *Bostwick* v. *McEvoy,* 62 Cal. 496; *Davis* v. *Clark,* 58 Kas. 100, 48 Pac. 563. PEARSON, J. pointedly said: "When it can make no difference the deed takes effect from the second delivery, but if it does make a difference, it takes effect from the first delivery." *Hall* v. *Harris,* 5 Ired. Eq. (40 N. C.) 303. But the relation back is not allowed any more effect than is necessary to sustain the deed. *Taft* v. *Taft,* supra; *Prutsman* v. *Baker,* 30 Wis. 644. And the intervening claims of the grantor's creditors are saved. *May* v. *Emerson,* 52 Ore. 262, 96 Pac. 464, 1065. The rule now generally followed is that the deed is not to take effect to pass title to the grantee until he performs the conditions, *Coe* v. *Turner,* 5 Conn. 86; *Regan* v. *Howe,* 121 Mass. 424; *Wolcott* v. *Johns,* 7 Colo. App. 361; *Hull* v. *Sangamon R. D. Dist.,* 219 Ill. 454, 76 N. E. 701; unless the intention of the parties, as manifested by the language of the instrument and their acts, is contrary. *Hathaway* v. *Payne,* supra; *Hall* v. *Harris,* supra; *Gammon* v. *Bunnell,* 22 Utah 421. Such intention was shown when the vendee paid interest on the purchase price from the date of the contract of sale. *Scott* v. *Stone,* 72 Kan. 545.

CORPORATIONS—CONVEYANCE OF CORPORATE PROPERTY AS AFFECTING THE RIGHTS OF CREDITORS.—The president and sole stockholder of defendant corporation was indebted to defendants C and M, to whom the whole property of the corporation was conveyed in satisfaction of this debt of the president. Plaintiff bank, a creditor of defendant corporation, brought this suit to have the conveyance set aside. Defendants appeal from a decree for plaintiff. *Held,* that the conveyance was void as against parties who were creditors of the corporation at that time. *Bear Creek Lumber Co. et al* v. *Second Nat. Bank of Cumberland,* (Md. 1913) 87 Atl. 1084.

It is well settled that corporations and their officers cannot divert the corporate property from the payment of debts, and any transfer of the assets of a corporation not made in the usual course of business and for value will be set aside in equity at the suit of creditors. *Wilkenson* v. *Bauerle,* 41 N. J. Eq. 635, 7 Atl. 514; *Boulton* v. *Smith,* 113 Ill. 481. Thus the corporation has no right, as against its creditors, to apply its assets in satisfaction of debts which it is under no obligation to pay, and there is no distinction between directly giving away its property and using it in the payment of the private debts of its officers (*Nat. Tube Works Co.* v. *Ring etc. Co.,* 118 Mo. 365, 22 S. W. 947); and the authorities make no distinction where the debtor is the sole owner of all the stock of the corporation. For though the ownership of all the stock of the corporation virtually dissolves it (*Bellona Co. Case,* 3 Bland (Md.) 442), yet such sole ownership does not render the corporation dormant or forfeit its charter where its business is continued in the same corporate name, by the same agents, and continues to use the same books, stamps, brands, etc. (*Newton Mfg. Co.* v. *White,* 42 Ga. 148), and in no legal sense can the individual members be considered as the owners. The corporation is a distinct legal entity apart from its members whether there

be only one member or more, and the property of the corporation remains security for the corporation's debts and not for the individual's debts. It is manifest, therefore, that to convey the corporate property in satisfaction of the debts of an owner of stock, whether he be owner of a part or of all, is to prejudice the rights of the corporation's creditors, and such a conveyance will be set aside in equity. *Hall* v. *Goodnight*, 138 Mo. 576, 37 S. W. 916; *Singer Piano Co.* v. *Barnard Walker & Co.*, 113 Ia. 664, 83 N. W. 725; *Wheeler* v. *Home Sav. Bank*, 188 Ill. 34, 58 N. E. 598, 80 Am. St. Rep. 161; *Washington Mills Co.* v. *Sprague Lumber Co.*, 19 Wash. 165, 52 Pac. 1067; *Stewart* v. *Gould*, 8 Wash. 367, 36 Pac. 277.

CRIMINAL LAW—ASSAULT WITH INTENT TO MURDER.—The defendant was indicted for assault with intent to murder. The indictment alleged that the defendant maliciously put broken glass into food with the intent that the food should be eaten by another, and that death should result. The defendant demurred to the indictment on the ground that the facts stated therein were not sufficient to constitute the offence charged. The lower court overruled the demurrer, and the defendant sued out a writ of error. *Held*: the demurrer was well taken. No assault was alleged in the indictment, for it did not state that the glass was administered. *Leary* v. *State*, (Ga. 1913) 79 S. E. 584.

If assault be defined as the putting of another in reasonable fear of immediate personal violence, there is difficulty in making out an assault with poison, unless some of the poison be taken by the prosecutor. The idea of an outward demonstration of violence as an element of assault is prevalent in many jurisdictions. *Morton* v. *Shoppee*, 3 C. & P. 373; *U. S.* v. *Myers*, 1 Cranch (C. C.) 310; *Engelhardt* v. *State*, 88 Ala. 100; *Yoes* v. *State*, 9 Ark. 42; *People* v. *Ryan*, 55 Hun. 214; *Barnes* v. *Martin*, 15 Wis. 240. This accounts for the holding that there is no assault in poisoning cases unless the poison is administered. *La Beau* v. *People*, 34 N. Y. 323; *Blackburn* v. *State* 23 Oh. St. 146; *Rex* v. *Hartley*, 4 C. & P. 369; *Sumpter* v. *State*, 11 Fla. 247. But the Georgia Criminal Code of 1911, § 97 following in substance the common statutory definition, defines assault, not as a putting in fear, but as "an attempt to commit violent injury on the person of another." There is no substantial difference between an attempt to murder and an assault with intent to murder. *Groves* v. *State*, 116 Ga. 516. The question then is whether the facts of the case make up a criminal attempt "to commit a violent injury on the person of another." The Georgia Code defines "attempts" in terms which are declaratory of the common law. *Groves* v. *State*, 116 Ga. 516. Administering poison is committing a violent injury. *Com.* v. *Stratton*, 114 Mass. 303; *Johnson* v. *State*, 92 Ga. 36. An attempt to administer poison is therefore an attempt to commit a violent injury, and should be regarded as an assault under the Georgia Code. But what is an attempt to administer poison? Here we meet the difficult problem concerning the extent to which one's acts in the execution of a criminal design must go in order to pass from mere preparation into criminal attempt. Buying poison is clearly not enough. *Hicks* v. *Com.* 86 Va. 223. The mere mixing of poison with food intended to be taken by another, without, at least, placing it where it would naturally be

taken and eaten, is not enough. As the indictment in the present case alleges no more, the decision is satisfactory. But the position of the court that, "in cases of this character there can be no assault unless the poison is administered to the victim, and there can be no administration of it unless the victim partakes of the substance containing the poison," seems unwarranted under the code definition of assault. Smearing poison on the side of the cross bar of a "moustache cup" with the intent that the owner should swallow it, and consequently die, was held to be an attempt to murder in *Com.* v. *Kennedy*, 170 Mass. 18. Justice HOLMES said, "Every question of proximity must be determined by its own circumstances, and analogy is too imperfect to give much help. Any unlawful application of poison is an evil which threatens death, and would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes." Whether we agree with these generalizations or not, we can hardly dispute Justice HOLMES' statement that, "Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd." The present case is, however, supported, as a matter of authority, by the case of *Peebles* v. *State*, 101 Ga. 585, which held that the act of putting poison into a well, with the intent that another should drink the water and be killed thereby, did not, without more, constitute the offence of assault with intent to murder, since the person for whom it was intended did not partake of it. It is interesting to note that the cases holding that an assault with poison cannot be committed without administration make it impossible to commit an assault by poison without involving a battery, the converse of the common doctrine that every battery includes an assault.

CRIMINAL LAW—BURGLARIOUS BREAKING.—The defendant found the door of a freight car open about an inch. He pushed the door open, entered, and took from the car certain articles. The only question in the case was whether this was a sufficient breaking to constitute burglary. *Held*: it was a sufficient breaking, on the theory that a breaking is the removal of an obstruction which, if left where found, would prevent an entrance. *State* v. *LaPoint*, (Vt. 1913) 88 Atl. 523.

The Vermont Criminal Code extends the common law burglary to include railway cars, but does not change the common law definition of breaking. The orthodox common law doctrine upon the problem here presented makes the question turn on the existence or non-existence of an implied invitation to enter. Under that doctrine the leaving of a door or window open, though not so far as to admit the body, has usually been held to constitute an invitation to enter so that opening the door or window further would not amount to a breaking. Authorities are gathered in notes in 2 Am. St. Rep. 383 and 139 Am. St. Rep. 1047. An actual invitation of course negatives criminality, and an invitation need not be expressed in words but may be implied from conduct, but the cases referred to would seem to involve an implication of an invitation where none in fact exists or is in common sense to be inferred.

The present case discards the doctrine of implied invitation to enter, and adopts as its test the removal of any obstruction which would otherwise prevent an entrance. It is supported by *Claiborne* v. *State*, 113 Tenn. 261, *People* v. *White*, 153 Mich. 617, and *State* v. *Sorensen*, (Iowa), 138 N. W. 411.

DAMAGES:—LOSS OF ABILITY TO LABOR.—Plaintiff, who had been incapacitated to perform his accustomed labor by reason of injuries received, was permitted to testify that the inability to work had worried him. The court instructed the jury that loss of ability to labor was pain and suffering. The only damages proved as claimed in the declaration were those included under the claim for mental pain and suffering. *Held*, the testimony was properly admitted and the charge was not erroneous. *City of Rome* v. *Ford* (Ga. 1913), 79 S. E. 243.

This case follows the doctrine laid down in *Atlanta Street Railroad Company* v. *Jacobs*, 88 Ga. 647; and in *Brush Electric Light & Power Company* v. *Simonsohn*, 107 Ga. 70, 32 S. E. 902; in which the court adopts the view that damages may be recovered for worry and mental suffering arising not only as the proximate result of the injury and the accompanying physical pain, but also for such suffering as arises from other causes, such as contemplation and reflection on the disfigurement and inability to labor and provide for self and family. This liberal view is entertained by the courts of several states, generally on the theory that it is no harder to ascertain the monetary equivalent of such suffering than it is to fix that caused by the physical pain itself, for which recovery is almost universally allowed. There is however a strong line of cases holding to the contrary on the ground that such suffering is too uncertain in nature to be compensated, and if allowed would tend to allow fraudulent claims. The situation is thoroughly reviewed in *Merrill* v. *Los Angeles Gas & Electric Co.*, 158 Cal. 499, 111 Pac. 534; the court there adopting the more liberal view of the principal case. That rule has been followed or countenanced in the following cases. *Citizens' Ry. Co.* v. *Branham* (Tex. Civ. App.) 137 S. W. 403; *Gray* v. *Washington Water Power Co.*, 30 Wash. 665, 71 Pac. 206; *Heddles* v. *Chicago etc. R. R. Co.*, 77 Wis. 228, 46 N. W. 115, 20 Am. St. Rep. 106; *Power* v. *Harlow*, 57 Mich. 1070, 23 N. W. 606; *The Oriflamme*, 3 Saury, 397, (Fed. Cas. 10572), *Atlanta & R. A. L. R. R. Co.* v. *Wood*, 48 Ga. 565; *Toledo, W. & W. Ry. Co.* v *Baddeley*, 54 Ill. 19, 5 Am. Rep. 71; *Ballou* v. *Farmun*, 11 Allen (Mass.) 73; *Western & A. R. R.* v. *Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; *McMahon* v. *Northern etc. R. R. Co.*, 39 Md. 438; *Webb* v. *Railroad Co.*, 51 App. Div. 194, 64 N. Y. Supp. 491; *Railway Co.* v. *Dobbins*, 60 Ark. 481, 30 S. W. 887; *Schmits* v. *R. R. Co.*, 119 Mo. 256, 24 S.W. 472, 23 L. R. A. 250; *Galveston R. R. Co.* v. *Clark*, 21 Tex. Civ. App. 167, 51 S. W. 276. The opposite view is entertained by the courts in the cases below, on the theory that the mental suffering must be the result of sensory impulses produced by the injury itself. *Chicago, R. I. & P. Ry. Co.* v. *Caulfield*, 63 Fed. 396, 11 C. C. A. 552; *Chicago, B. & Q. R. R. Co.* v. *Hines*, 45 Ill. App. 299; *Maynard* v. *Oregon R. & N. Co.*, 46 Ore. 15, 78 Pac. 983, 68 L.R.A.

477; *Linn* v. *Duquesne Borough*, 204 Pa. 551 54 Atl. 341, 93 Am. St. Rep. 800; *Southern Pacific Co.* v. *Hetzer*, 135 Fed. 274, 68 C. C. A. 26, 1 L. R. A. N. S. 288; *Johnson* v. *Wells Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245; *Planters Oil Co.* v. *Mansell*, Tex. Civ. App. 43 S. W. 913; *Indianapolis & St. Louis R. Co.*, v. *Stables*, 62 Ill. 313; *Augusta R. Co.* v. *Randall*, 85 Ga. 297, 11 S. E. 706; *Giffen* v. *City of Lewiston*, 6 Idaho 231, 55 Pac. 545; *Railroad Co.* v. *Chance*, 57 Kan. 41, 45 Pac. 60; *Bovee* v. *Danville*, 53 Vt. 183.

EXECUTION—SECOND EXECUTION WHERE JUDGMENT IN REM.—Where judgment against a nonresident is based on substituted service and seizure of property under an attachment, *Held*, that the judgment creditor has not such a lien against the attached property as will, after the sale thereof and redemption therefrom, support a second sale on execution for the deficiency. *Herron* v. *Allen*, (S. D. 1913) 143 N. W. 283.

It is the general rule that property redeemed from an execution sale may be sold under a second execution to satisfy any deficiencies left under the first sale. *Flander* v. *Aumach*, 32 Ore. 19, 51 Pac. 447, 67 Am. St. Rep. 504: *Wood* v. *Colvin*, 3 Hill 228; *State, ex rel Allen* v. *Sherill*, 34 Ind. 57; *Allen* v. *McGaughey*, 31 Ark. 252; *Bodine* v. *Moore*, 18 N. Y. 347; *Green* v. *Stobo*, 118 Ind. 332. It will be observed, however, that this rule and the different theories advanced in its support have all been predicated on the doctrine that the judgment creates a general lien. See *Flander* v. *Aumach*, supra; *Seaman* v. *Galligan*, 8 S. D. 277; *Campbell* v. *Maginnis*, 70 Ia. 589; *Clayton* v. *Ellis*, 50 Ia. 590. But where the judgment is one in rem and based on substituted service and attachment, it is evident that the above rule should have no application. There is by virtue of a judgment in rem no general lien but only a special lien. Whether we adopt the view that the judgment itself creates the lien, or that the lien is created by the attachment and exists in an inchoate state until fully established by the judgment, the essential nature of the lien is not altered. It is a distinct and special lien on specific property, and under the well established rule must be regarded as terminated by the sale of the specific property to which it attaches. In such case there can be no second execution and sale.

INJUNCTION—ENCROACHMENT OF BUILDING.—Defendant erected a brick building on his land immediately adjoining the land of plaintiff. Through a mistake of the building contractor, the side wall of the building was not exactly vertical and, beginning at a place eighteen feet from the ground and extending to the eaves, the wall overhung plaintiffs property about an inch and a half. Plaintiff brought suit in equity for a mandatory injunction to compel defendant to remove the overhanging part. *Held*, that an injunction was properly refused. *Combs* v. *Lenox Realty Co.* (Me. 1913) 88 Atl. 477.

The court laid stress on the fact that the encroachment was unintentional and that the damage to the plaintiff was much less than the damage which the defendant would suffer were he compelled to remove the wall. The question raised in this case is one upon which there is much conflict in the courts of the United States. In accord are,—*Lynch* v. *Union Inst. for Savings*, 159 Mass. 308; *Harrington* v. *McCarthy*, 169 Mass. 492; *Norton* v. *Elwert*, 29

Ore. 583; *L. & N. R. R.* v. *Taylor*, 138 Ky. 437; *Hunter* v. *Carroll*, 64 N. H. 472. Practically, the rule laid down by these courts works out more equitably than would a contrary doctrine, but in strict theory why should the plaintiff in this case be compelled to give up real estate for its value in money? Courts of equity grant specific performance of contracts to convey land, on the ground that the money value in damages is not equivalent to the land. The same proposition would seem to underlie the question involved in the principal case. The cases taking this view are: *Pile* v *Pedrick*, 227 Pa. 420; *Rahn* v. *Mil. Elec. R. & L. Co.*, 103 Wis. 467; *Hall* v. *Sugo*, 169 N. Y. 109; and all have been quoted approvingly in more recent cases in the same states. The court in the principal case remarked that the plaintiff had an action at law. This however would probably amount to no more than money damages because it is at least doubtful whether an action in ejectment could be maintained in such a case. *Wachstein* v. *Cristopher*, 128 Ga. 229, 11 L. R. A. (N. S.) 917. (Note). And even though the action was allowed, a sheriff might properly refuse to carry out the decree of the court. *Baron* v *Korn*, 127 N. Y. 224. The later New York cases have adopted what seems to be a very reasonable rule. In *Goldbacher* v. *Eggers*, 179 N. Y. 551, the court said that if defendant would pay certain damages to the plaintiff upon delivery of a deed by the plaintiff, then no injunction would be given; otherwise it would be granted. And in the lower court decision of *Crocker* v. *Manhattan L. Ins. Co.*, 66 N. Y. Supp. 84, the court decreed that defendant should remove the encroaching structure *as soon as* the plaintiff wished to build on the ground.

INSURANCE—ADDITIONAL INSURANCE—RENEWAL OF EXISTING POLICY.—Defendant's policy upon which plaintiff sued, provided that if the property was insured under other contracts, subscribed either before or after the execution of the said policy, the assured was bound to declare it (de le déclarer) and to mention it (de le faire mentionner) either in the policy or in a written endorsement thereon. The assured had at the time concurrent insurances which were duly recorded in the policy. Upon their expiration during the life of the policy in suit these insurances were replaced by insurance in another company for a slightly larger amount, the increase being due to an alleged addition to the value of the property covered. *Held*, That the condition in the policy meant only that the insured should declare the fact that the property covered was further insured, that the plaintiff had committed no breach of this condition, and was entitled to recover on the policy. *National Protector Fire Ins. Co.* v. *Nivert*, (Privy Council.) [1913] A. C. 507.

The decision in the principal case is largely based upon the wording of the policy sued upon. It was held that this did not require that the assured state the date, name of the company, or amount of the concurrent insurance. But in view of a somewhat similar provision in many American policies the case throws light on a question whether a renewal of existing insurance is "other insurance" such as to avoid a policy. The cases seem to be divided upon this point. In *Duclos* v. *Citizens Mutual Ins. Co.*, 23 La. Ann. 332, and in *Healey* v. *Imperial Fire Ins.* Co., 5 Nev. 268, it is held that a renewal is

other insurance such as to avoid a policy. The contrary is held in *Pitney* v. *Glens Falls Ins. Co.*, 65 N. Y. 6; *Lewis* v. *Guardian Ins. Co.*, 87 N. Y. Supp. 525, 93 App. Div. 157, confirmed in 181 N. Y. 392; *New Orleans Ins. Ass'n.* v. *Holberg*, 64 Miss. 51, 8 So. 175. In none of these cases, however, was the amount of the renewal in excess of the insurance existing at the date of the policy.

JUDGMENTS—COLLATERAL ATTACK.—In an action to quiet title to certain lands a decree rendered on service by publication was pleaded in the answer as an adjudication of the said title in favor of the defendant. The affidavit on which such service was based failed to conform to the statutory requirements, the insufficiency of the affidavit affirmatively appearing on the record. *Held*, a decree entered on such service was void and subject to collateral attack.—*Gibson* v. *Wagner*, (Colo. 1913) 136 Pac. 93.

It is the general rule that there must be a strict compliance with statutes providing for servce by publication, since they are in derogation of the common law. *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565; *Tunis* v. *Withrow*, 10 Ia. 305, 77 Am. Dec. 117; *Week* v. *Rea*, 54 Wash. 424, 103 Pac. 462; *Gilmore* v. *Lampman*, 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376. Every fact must be shown in the affidavit which is necessary under the statute to give the right to an order for service by publication, otherwise the judgment is void. *Lumber Co.* v. *Johnson*, 196 Fed. 56; *Norris* v. *Kelsey*, 130 Pac. 1088 (Colo. 1913) See 11 MICH. L. REV. 607. But on collateral attack defects in the affidavit are generally held not to be jurisdictional, and the judgment will be upheld. *Cooper* v. *Reynolds*, 10 Wall, 308; *Matthew* v. *Densmore*, 109 U. S. 216; *Russel* v. *Work*, 35 N. J. L. 316; *Clay* v. *Bilby*, 72 Ark. 101, 78 S. W. 749; *Salisbury* v. *Cooper*, 69 N. Y. S. 258, 58 App. Div. 524; *Burnett* v. *McCluey*, 92 Mo. 230. See 10 MICH. L. REV. 240. But there is a respectable minority holding contra. *Greenvault* v. *Farmers & Mechanics' Bank*, 2 Doug. 498: *Empire Ranch & Cattle Co.* v. *Coldren*, 51 Colo. 115, 117 Pac. 1005. See *Johnson* v. *The North Star Lumber Co.*, 206 Fed. 604. Were it not for the fact that Colorado is committed to the minority view, this might be classed as one of those anomalous cases in which courts have permitted collateral attack to prevent an injustice, for here it appears the want of a proper affidavit had prevented the defendant therein receiving a copy of the summons or learning of the suit. Even in such cases and although the defect in the affidavit appears in the record, considerations of public interests, which are best subserved by a confidence in the stability of judgments, should conduce to the upholding of their validity as against collateral attack. Where opportunity is given by appeal or motion to vacate to set aside a judgment for defects—preliminary in the instant case—and no advantage is taken of the opportunity, the party aggrieved should be precluded from again contesting the validity of the judgment in a collateral proceeding.

MASTER AND SERVANT—CONSTRUCTION OF COMPENSATION ACT.—A claimant under the Workmen's Compensation Act, 1906, was employed as a boatswain on a steam fishing trawler and was remunerated by wages, maintainence, and poundage dependent on the profits of the fishing expedition. It was provid-

ed in the Act of 1906 that, "This act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits, etc." *Held*, by EARL OF HALSBURY, LORD MERSEY, and LORD PARKER OF WADDINGTON, (EARL LOREBURN and LORD ATKINSON dissenting)—that the claimant was remunerated by a share in the profits within the meaning of the above provision, and was therefore excluded from the Act and was not entitled to compensation. *Costello* v. *Owners of the Ship Pigeon*, (1913) A. C. 407.

The question as to who is a "workman" within the meaning of the Compensation Acts, especially in cases where the employee shares in the profits, is unsettled. It is most probably due to the opposing theories in regard to the construction of these acts. On the one hand it is maintained that they are derogatory to the common law and should be construed strictly, while the contrary premise is that they are remedial and therefore should be construed liberally. The decision in the principal case is undoubtedly based on a strict construction of the statute and is justified by other English cases. *Boon* v. *Quance*, (1909) 102 L. T. 443; *Admiral Fishing Co.* v. *Robinson*, (1910) 102 L. T. 203; *Aberdeen Steam Trawling & Fishing Co.* v. *Gill*, (1907) 45 Scotch L. R. 247; *Whelan* v. *Great Northern Steam Fishing Co.* (1909) 100 L. T. 913. As opposed to this view, it has been held that the injured person will be held to sustain the relation of a workman where there is an absence of any proof of partnership or joint adventure in the course of trading. *Jamieson* v. *Clark*, (1908) 46 Scotch L. R. 73; *Carswell* v. *Sharpe et al.* (1910) 47 Scotch L. R. 335.

NEW TRIAL—COMMENTS OF COUNSEL.—In a personal injury action which was being tried for the third time, the case depended almost entirely upon the credibility of the witnesses. Plaintiff's counsel in his argument to the jury, in referring to certain statements made by the opposing counsel and which reflected on the veracity of plaintiff's witnesses, said that he had canvassed the neighborhood and talked with witnesses, and that if the case was framed up, he (plaintiff's counsel) and not the witnesses, was responsible for it; that defendant's counsel had been unfair in keeping out testimony, and that he had unduly prolonged the trial by making technical objections which kept plaintiff out of justice. *Held*, prejudicial misconduct notwithstanding the trial court sustained an objection to these statements at the time they were made and expressly directed the jury to disregard them. *Appel* v. *Chicago City Ry. Co.*, (Ill. 1913) 102 N. E. 1021.

The courts are not all agreed that a reversal is proper where the trial court has sustained an objection to the improper remarks and has done all in its power to counteract their influence upon the jury. Taken literally, the holding of some courts would absolutely prevent a reversal in such cases. *Ry. Co.* v. *Parker*, 127 Ga. 471; *Kern* v. *Bridewell*, 119 Ind. 471; *Greenlee* v. *Greenlee*, 93 N. C. 278; *Traction Co.* v. *Parks*, Tex. 97 S. W. 510; *Perkins* v. *Guy*, 55 Miss. 153; *Kearney* v. *State*, 101 Ga. 803; *Grubb* v. *State*, 117 Ind. 277; *State* v. *Emery*, 79 Mo. 461; *Alabama R. R. Co.* v. *Frazier*, 93 Ala. 45. This unqualified statement of the doctrine is hardly justifiable on principle and what is perhaps the true rule and the one supported by the great weight

of authority is stated in *Railroad Co.* v. *Burr*, 82 Oh. St. 133, in these words; "While it is true that courts of last resort have frequently, though not uniformly held the rule to be that the prejudice, if any, may be eliminated or cured by the prompt withdrawal of the objectionable statements made by counsel, accompanied by an instruction from the court to the jury to disregard such statements, yet this rule is recognized and applied by the courts in those cases only where it has been made to appear by the record from a consideration of the character of the statements made, that their prejudicial effect has probably been averted by such withdrawal and instruction." *German American Insurance Co.* v. *Harper*, 70 Ark. 305; *Murphy's Executor* v. *Hoagland*, 32 Ky. L. Rep. 839; *Florence Cotton Co.* v. *Field*, 104 Ala. 471; *Sullivan* v. *Railroad Co.*, 119 Ia. 464; *Greenfield* v. *Kennett*, 69 N. H. 419; *Dillingham* v. *Scales*, 78 Tex. 205; *Wagoner* v. *Hasle Township*, 215 Pa. St. 219. As is said in *Railroad Co.* v. *Pritschau*, 69 Oh. St. 447, "It is due to differences in the character of the misconduct rather than to differences of opinion in reviewing courts that it has in some cases been held that the effect of misconduct may be eliminated by instructions, and in others that it cannot be." Cases in which a new trial has been denied but which are distinguishable on this ground are the following: *Railroad Co.* v. *Johnson*, 90 Ga. 500; *Railroad Co.* v. *Johnson*, 116 Ill. 206; *Winter* v. *Sass*, 19 Kans. 556; *Burr* v. *Post*, 56 Nebr. 698; *Kingsley* v. *Finch*, 105 N. Y. S. 968; *Ruddy* v. *Ruddy*, 5 Pa. Co. Ct. 544; *Brennan* v. *Seattle*, Wash. 90 Pac. 434; *People* v. *Lee Ah Yute*, 60 Cal. 95; *Railroad Co.* v. *Moynahan*, 8 Colo. 56; *Hunton* v. *Cream City Co.*, 65 Wis. 323.

PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL IN EXEMPLARY DAMAGES FOR ACTS OF AGENT.—Plaintiff, a passenger, was wrongfully ejected from a train of defendant company by a train agent, who humiliated and insulted him. Due to the exposure following the ejection, the plaintiff became sick and died after this suit was brought. *Held*, in sustaining a verdict for plaintiff's administratrix for $11,115, that a principal is liable for exemplary damages for the wrongful, wanton, and oppressive acts of his agents when acting within the scope of their employment, although the particular acts were not authorized or ratified. *Forrester* v. *Southern Pacific Co.*, (Nev. 1913.) 134 Pac. 753.

It is well settled that a principal or master may be liable to exemplary damages for the acts of his agent or servant in proper cases, but irreconcilable conflict exists in determining the essential ingredients of a proper case. *R. R. Co.* v. *Hurst*, 36 Miss. 660; *Hopkins* v. *At. & St. Lawrence R. R.* 36 N. H. 9; *R. R. Co.* v. *Blocher*, 27 Md. 277. The better rule seems to be that a principal will not be held liable for exemplary damages unless he has previously authorized or subsequently ratified the tortious act of the agent, or was grossly negligent in selecting the offending agent. *The Amiable Nancy*, 3 Wheat. 546; *Burns* v. *Campbell*, 71 Ala. 271; *Grund* v. *Van Vleck*, 69 Ill. 478; *Cleghorn* v. *N. Y. etc. R. R. Co.* 56 N. Y. 44; *Hill* v. *New Orleans etc. R. R. Co.*, 11 La. Ann. 292; *Mace* v. *Reed*, 89 Wis. 440; *Hagan* v. *Providence & Worcester R. R. Co.* 3 R. I. 88; *Robertson* v. *Wylde*, 2 M. & Rob. 101. The

reason for the rule as stated is that since exemplary damages are not given as compensation to the party injured but by way of punishment to the offender, and warning to others, they should be awarded only in case of participation, authorization, or ratification of the wrongful act. Many authorities, however, take the view, as pronounced in the principal case, that the principal is liable in exemplary damages for any act of the agent done within the course of or in connection with his duties or employment, regardless of the question of authorization or ratification of the principal. *Goddard* v. *Grand Trunk Ry.* 57 Me. 202; *Southern Express Co.* v. *Brown,* 67 Miss. 260; *Atl. etc. R. Co.* v. *Dunn,* 19 Oh. St. 162; *Malloy* v. *Bennett,* 15 Fed. 371; *Hopkins* v. *At. & St. Lawrence R. R.* supra; *R. R. Co.* v. *Hurst,* supra; *R. R. Co.* v. *Blocher,* supra. It is significant that in most of the cases, in which the latter doctrine has been invoked, the defendant was a public service company, and, as such, owed a duty to the public. Judge WALTON, in the *Goddard* case, supra, the facts being practically the same as in the principal case, remarked that to overturn a verdict for exemplary damages against a railroad company would tend to encourage indifference to other travelers, indifference to the evil influence which such an example would have upon the servants of other lines of public travel, and would be most unfortunate and detrimental to the public interests. Such reasoning would incline to justify the rule on the broad ground of public policy.

PRINCIPAL AND SURETY—EXTENSION OF TIME—EFFECT OF SURETY'S INTEREST IN THE TRANSACTION.—The defendants, who were principal stockholders and also directors in a corporation, signed a note with the corporation to raise money for its benefit, intending to be bound only as sureties. They received no other benefit in the transaction. The corporation was granted a valid extension of time on the note without their knowledge. *Held*: The defendants were not entitled to the same liberality of treatment as a volunteer surety and they were not released by the extension unless they were actually injured thereby. *First Nat. Bank of Olathe* v. *Livermore,* (Kans. 1913) 133 Pac. 734.

Generally a surety is released by a valid extension of time granted to his principal without his knowledge, though he is not injured. *Tuohy* v. *Woods,* 122 Cal. 655, 55 Pac. 683, but in *United States* v. *U. S. Fidelity & Guaranty Co.,* 172 Fed. 721 it was held that a paid surety company was not released by such an extension unless it was injured thereby. A stockholder is not released from the statutory liability for the debts of the corporation by a valid extension of time granted to the corporation. *Harger* v. *McCulloch,* 2 Denio 119; *Boice* v. *Hoge,* 51 Ohio St. 236, 46 Am. St. Rep. 569. Contra: *Henson* v. *Donkersley,* 37 Mich. 184. The liability of a joint surety on a note of a corporation of which he is a stockholder is not discharged by his death with his co-surety surviving. *Richardson* v. *Draper,* 87 N. Y. 337. The decision in the principal case is based upon the analogy of the above doctrines. It seems to be a new application of the rule that where a surety has a beneficial interest in the transaction his promise is an original undertaking. The most familiar application of this rule is in connection with the Statute of Frauds,

Davis v. *Patrick*, 141 U. S. 489. By the weight of authority, however, a stockholder has not such an interest in a corporation that his promise to answer for its debts is an original one and not within the Statute of Frauds. *Turner* v. *Lyles*, 68 S. C. 392, 48 S. E. 301; *Harburg India Rubber Co.* v. *Martin* [1902] 1 K. B. 778; *Walther* v. *Merril*, 6 Mo. App. 370. The contrary to the principal case was held in *Home Nat. Bank* v. *Waterman*, 134 Ill. 161.

TORT—WHAT CONSTITUTES CONVERSION.—A liveryman let a horse to an infant to go to a certain place. He drove beyond and the horse died before it was returned, although not because of the extra driving. *Held*, that the defendant was not guilty of conversion. *Daugherty* v. *Reveal* (Ind. 1913) 102 N. E. 381.

The decision is a departure from the old rule that any intentional deviation from the agreed route or driving beyond the place specified in the contract works a conversion. *Woodman* v. *Hubbard*, 25 N. H. 67, 57 Am. Dec. 310; *Wentworth* v. *McDuffie*, 48 N. H. 402; *Homer* v. *Thwing*, 3 Pick. 492; *Perham* v. *Coney*, 117 Mass, 102, and *Fish* v. *Ferris*, 5 Duer. 49. The decision in the principal case was not placed upon the ground that defendant was a minor, and if it was *Freeman* v. *Boland*, 14 R. I. 39, 51 Am. Rep. 340; and *Churchill* v. *White*, 58 Neb. 22, 76 Am. St. Rep. 64 hold that the same rule applies to minors as to adults. In harmony with the principal case and perhaps representing the current of modern decisions are *Doolittle* v. *Shaw*, 92 Iowa 348, 26 L. R. A. 366; *Young* v. *Muhling*, 48 App. Div. 617, 63 N. Y. Supp. 181; *Harvey* v. *Epes*, 16 Grattan 76. It was held in *Penrose* v. *Cunen*, 3 Rawle 351, 24 Am. St. Rep. 356 that an infant was not liable for conversion although the horse died from the cruel excessive driving.

WILLS—CONSTRUCTION.—Testator devised land to his wife to hold during her life, and at her death to pass to his daughter for her life and after her death to become vested in her children in fee simple, and, in default of children, then in such persons as she might direct, and providing that *in no event should the fee simple of the land be vested in his wife or daughter. Held*, applying the rule of Shelley's Case the daughter took a fee simple estate, the subsequent provision being ineffective to prevent the operation of such rule, though the testator otherwise intended. *Lauer* v. *Hoffman* (Pa. 1913), 88 Atl. 496.

"The purpose in construing a will is to ascertain the intention of the testator so that it may be carried out in the disposition which he has made of his property. Technical rules of construction should only be resorted to and applied in the interpretation of wills when found to be necessary in determining the meaning of the instrument so as to effectuate the purpose of the testator. If the language employed by him in disposing of his estate is plain and clearly discloses his intention, the will interprets itself, and hence no rules of construction are necessary to aid in its interpretation." *Wood* v. *Schoen*, 216 Pa. 425. "All mere technical rules of construction must give way to the plainly expressed intention of a testator, if that intention is lawful. It is a rule of common sense as well as law not to attempt to construe that

which needs no construction." *Reck's Appeal,* 78 Pa. 432. The intent of the testator is to be deduced from the language of the will taken as a whole. The inquiry is not necessarily limited to a consideration of the particular devises but includes the whole instrument." *Miller's Appeal,* 113 Pa. 459. For similar decisions see: *Vandiver* v. *Vandiver,* 115 Ala. 328; *Gregory* v. *Welch,* 90 Ark. 152; *In re Hite,* 155 Cal. 436; *Russell* v. *Hartley,* 83 Conn. 654; *Wagner* v. *Wagner,* 244 Ill. 101, 18 Ann. Cas. 490; *Fenstermaker* v. *Holman,* 158 Ind. 71, 62 N. E. 699; *Mohn* v. *Mohn,* 148 Ia. 288; *Bradshaw* v. *Williams,* 140 Ky. 160, 130 S. W. 985; *Lydon* v. *Campbell,* 204 Mass. 580, 134 Am. St. Rep. 702; *Hardenbergh* v. *Ray,* 151 U. S. 112; and cases cited in note following *Grace* v. *Perry,* 7 Ann. Cas. 949. The decision in the principal case violates the rule laid down in these cases. It also violates the corollary rule that an estate of inheritance of real estate may be reduced to a lesser estate if the subsequent language of the instrument unequivocally shows that such was the intention of the testator. *Sheets Estate,* 52 Pa. 257; *Snyder's Appeal,* 95 Pa. 174; *Good* v. *Fichthorn,* 144 Pa. 287, 22 Atl. 1032; *Shower's Estate,* 211 Pa. 297; and cases cited in the note following *McIsaac* v. *Beaton,* 3 Ann. Cas. 612. In view of these cases it is evident that the decision is contrary to authority in the state where it was rendered, contrary to the general weight of authority, and contrary to a doctrine which is founded in sound reason and common sense. It is conceded that the rule of Shelley's Case, a rule springing from the incidents of feudal tenure, is a rule of law—a rule of property. *Trumbull* v. *Trumbull,* 149 Mass. 200. And it is true that among earlier decisions it has been held that it is not competent for the testator to prevent the legal consequences of its application by any declaration, no matter how plain, of a contrary intention. *Doebler's Appeal,* 64 Pa. 9. It is also true that the doctrine upheld by such decisions is as vicious as it is antiquated.

WILLS—MENTAL CAPACITY.—In a will contest the court instructed the jury that the law requires a testator to be of sound and disposing mind and memory, and that by soundness is meant that the mind should be in such *vigor and power* and its faculties be in such working order that testator comprehends the nature and effect of his will. *Held,* the instruction was misleading as causing the jury to believe that a more active mind was required to execute a will than the law contemplates. *Brainard* v. *Brainard,* (Ill. 1913), 103 N. E. 45.

This case falls under what is probably the most difficult and uncertain subject in the whole range of the law of wills, and it is interesting because it adds one more to an innumerable list of cases which are almost as unlike as they are numerous. There is no formula in which judges are bound to charge upon the degree of mental capacity requisite to make a will. *Lawrence* v. *Steele,* 66 N. C. 584. The test of capacity now generally adopted requires that the testator have strength and clearness of mind and memory sufficient to know in general, without prompting, the nature and extent of the property of which he is about to dispose, the nature of the act which he is about to perform, and the names and identity of the persons who are the proper objects of his bounty, and his relation towards them. *Converse* v. *Converse,*

21 Vt. 168, 52 Am. Dec. 58; *Kinne* v. *Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Campbell* v. *Carnahan*, (Ark.) 13 S. W. 1098; *Thompson* v. *Ish*, 99 Mo. 160; *Lee's Will*, 46 N. J. Eq. 193; *Durham* v. *Smith*, 120 Ind. 463; *Spratt* v. *Spratt*, 76 Mich. 384; *Hudson* v. *Hughan*, 56 Kan. 152; *Schmidt* v. *Schmidt*, 47 Minn. 451; *O'Brien* v. *Spalding*, 102 Ga. 490; *Nicewander* v. *Nicewander*, 151 Ill. 156. In some jurisdictions a rule is stated to the effect that mental capacity consists in having a mind sound enough to know and understand the business in which one is engaged while making a will. *Sturdevant's Appeal*, 71 Conn. 392; *Steele* v. *Helm*, 2 Marv. (Del.) 237. This rule, however, is practically the same as the first stated. Since it is left to the discretion of the court in each case as to just what language shall be employed to convey this rule to the jury, the reason for the diversity in expressions used is obvious. In the principal case it seems that the use of the words "vigor and power" in expressing the rule would, as the upper court holds, have a tendency to cause the jury to apply a more rigorous test of mental capacity than the law requires.

BOOK REVIEWS.

REGULATION, VALUATION AND DEPRECIATION OF PUBLIC UTILITIES. By Samuel S. Wyer, M. E., Consulting Engineer, Columbus, Ohio. Columbus: The Sears & Simpson Company, 1913. pp. 313.

When the Supreme Court of the United States modified the doctrine of *Munn* v. *Illinois*, by holding that, although the fixing of rates was a legislative function, it was a judicial matter to pass upon their reasonableness, it is doubtful if anyone realized the nature and extent of the undertaking upon which the courts were about to enter. Judicial machinery, in many ways, is unfitted to deal with the administrative and engineering problems that have arisen with a rapidity and a complexity that could scarcely have been anticipated. The result has been a union of the work of the engineer and the lawyer, which has required on the part of the engineer a legal knowledge, and on the part of the lawyer an engineering knowledge, of at least the fudamentals of all the complicated problems that have been involved in the valuation of our immense public utilities, and in the determining of whether current rates would yield a proper return upon the value of the plant. It is still and always will be necessary in questions of this kind for the expert engineer and the expert lawyer to work together, but neither can understandingly work together without such a general knowledge of the other's field.

This is well brought out in Mr. Wyer's book, which is written primarily from the point of view of the engineer, but which has to make use of a great number of legal decisions, in the main from the Supreme Court of the United States, but to a less extent from various other federal courts and from a considerable proportion of the courts of the several states. The point of view of the book is perhaps best given in the author's own language. "This book is not a partisan appeal for the rights either of the Public or the Public Utilities. Rather it is an unbiased discussion and concise compilation of the pertinent economic, engineering and legal facts relating to both. My aim is to establish a code for both, rather than an ex parte argument for either interest. The book is limited to the discussion of basic principles. Therefore, no reference is made to the kaleidoscopic and ephemeral regulation enactments of the different States and Municipalities. Neither can blanket rules be given that blindly applied—without expert legal or engineering knowledge of the local conditions—as a test for the cost of Utility service or regulation standards in any given case. My own argument is fortified with numerous digested opinions of experts and judicial decisions, many of the latter being from the United States Supreme Court."

This purpose the author has so well carried out that the book will be of real value to every lawyer engaged in a case involving the question of public utilities. It is also doubtless of value to engineers as a pocket hand-book, full of useful matter, but somewhat elementary from the engineering point of view.

The book covers the definitions, economics, public control and protec-

tion of public utilities; depreciation, valuation, and engineering data necessary in determining questions of regulation and valuation of such utilities; and finally a chapter of valuable reference data, mostly engineering, and an extended selected bibliography,—engineering, economic, and legal, including such contributions as the valuable paper before the American Society of Civil Engineers (Transactions, Vol. 72, p. 1), by Professor Henry Earl Riggs, of the Engineering Department of the University of Michigan. The work contains numerous cuts and tables, illustrating especially the effects of various kinds of depreciation, and the engineering and economic problems involved in the construction and operation of public works.

The law to be found in the book is too meager to be of any particular value to a lawyer, but the engineering information he can understand and needs, and this covers the greater part of the work. If any criticism is to be made, it might be urged that the legal side of the question is rather briefly treated even for the engineer, but it is certainly a valuable reference hand-book from his point of view, and, in any case, he will have to rely largely upon the lawyer for legal matters, just as the lawyer must rely upon the expert engineer for engineering knowledge.

The book is printed on very thin paper, and is well bound in leather, so that it is in convenient form for use as a hand or pocket book. E. C. G.

BOOTH ON STREET RAILWAYS, Second Edition, by Isaac C. Sutton and Paul H. Denniston, of the Philadelphia Bar. Philadelphia: T. & J. W. Johnson Co., 1911., pp. cxi, 922.

If to the writer of olden time it seemed that to the making of books there was no end, we may add at the present time that to the size of law books there seems to be no end. When Story wrote his classical work on Bailments and Carriers, the first on the subject, he gave a small portion of the closing part of the book to carriers. Even the early editions of the next classic, Hutchinson on Carriers, were all one volume editions, but it has now stretched out to three volumes. Meantime, more than twenty years ago, Mr. Booth regarded the subject of street railway law as important enough to justify separate treatment. The present work is a second edition, and although it has extended from the 749, xvii, pages of the first edition, to the 922, cxi, pages of the present, the editors are to be commended for their restraint in keeping the work within a single volume. The additional matter is due in part to a very large increase in the notes and citations of cases (The first edition cited about 1,400 and the second cites something like 2,500), but there is also a considerable expansion of the text, and a whole new chapter in addition on interurban railways, a subject which had hardly made its appearance at all when the first edition was printed.

Many of the changes in the text illustrate how the mechanics of street railways as well as the law, have been developing in the last twenty years. For example, in the first edition, the street railway is defined as one in which "cars are propelled by animal or other power." The second edition has this,—one in which "cars are propelled by electrical or other power." In the first

edition under, "Who May Acquire the Right," the right is usually conferred on corporations, but often on natural persons. Under the same title in the second, it is said that the right is usually conferred upon corporations, but often upon natural persons, or upon municipal corporations. Changes are especially noticeable in such parts of the work as chapter six, "Electric Street Railways." At the time of the first edition electricity was so promising as to "render it highly probable that it will soon be the most common motive power in use." Railways of this class are still upon the threshold of the prolonged litigation through which every new use of the public thoroughfares must pass. In the new edition, electricity is so efficient "as to make it the most common motive power in use" and "railways of this class were long engaged in protracted litigation through which every new use of the public thoroughfares must pass....the law has now largely been settled both by statute and decision."

The first edition was long the standard work on the special subject of street railways. The new edition has retained the desirable features and the excellencies of the old and has brought the work down to the present. While the book no longer has the field to itself, it will no doubt, in this new form, retain its position as an important reference text on the law of street railways, embracing as it does a treatment of urban, suburban and interurban, surface, subsurface and elevated railways, whether operated by animal power, electricity, cable, or steam motor. E. C. G.

HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW. By Henry Campbell Black, St. Paul: West Publishing Company, 1912. pp. xv 768.

In view of the present widespread interest in the general question of the efficiency of the courts, and in view of the further fact that there is a disposition, manifest in some quarters at least, to attribute the claimed lack of efficiency to the conservatism of both bench and bar, their unwillingness to adjust themselves to what may be called the "changing order," the publication of Mr. Black's book is timely.

The task the author set for himself was "to write a real and complete treatise on the science of case law at once theoretical and practical." One may not be entirely clear as to the author's idea of a "real" treatise as distinguished from some other sort of treatise, but our admiration is compelled for the courage of one who claims "completeness" in this day for his book on any topic of the law.

We are persuaded, however, that our author has come nearer the accomplishment of the appalling task set before him than any predecessor in this general field, and has given to the profession a very useful book.

There are portions of the work, notably some parts involving more particularly the historical and theoretical phases of the general subject, which may have been as well done before.

The discussion of the questions as to the authority of precedents as between the courts of the same and different states, and between the different

State courts and the Federal courts is well elaborated upon authority ample in citation.

The author disclaims any contention that his citation of authorities is exhaustive, but his claim to have "gathered together a number of examples great enough to serve all the purposes of a practical exposition of the subject and to supply the student with pertinent and useful citations" is well justified.

V. H. L.

THE PANAMA CANAL CONFLICT BETWEEN GREAT BRITAIN AND THE UNITED STATES OF AMERICA. By L. Oppenheim, M.A., LL.D., Whewell Professor of International Law in the University of Cambridge. Cambridge: Cambridge University Press, second edition, 1913, vi, 57.

This short study, whose timeliness is attested by the fact that a second edition has already been called for, comes from the hand of a leading English authority on international law and constitutes perhaps the clearest statement of the British position in the controversy concerning the Panama Canal. In the large, it is a criticism of the memorandum which President Taft appended to the Panama Canal Act upon giving it his signature. After a preliminary consideration of Article III of the Hay-Pauncefote Treaty, which is the chief bone of contention, the author proceeds to show that a construction of that article as a declaration on the part of the United States to grant "a conditional favoured-nation treatment" to all nations is in conflict with the historical facts lying back of the treaty in question and with the "general principle of neutralization," enunciated by the Clayton-Bulwer Treaty and reaffirmed by the Hay-Pauncefote Treaty. Attention is further drawn to the "unheard-of extension" of the term, "coasting-trade," by the United States, and it is intimated that any exemption in favor of this trade would for this reason result in a discrimination against the vessels of other nations.

Evidently the crux of the whole controversy lies in the fact that the United States has acquired "dominium" as well as "imperium" over the Panama Canal Zone,—a contingency which is not explicitly provided for by the Hay-Pauncefote Treaty. It is perhaps in view of this fact that some American writers have found it rather difficult to understand quite clearly why the United States, in virtue of its internal sovereignty, is not to grant subsidies to its own vessels, by exemption from Canal tolls as well as otherwise, provided that the proportionate tolls upon the vessels of other nations are not thereby increased. This, baldly stated, is the British attitude. It is to be hoped that, as Oppenheim suggests, the difference may be submitted to arbitration as the most fitting method of solution, if diplomacy fails.

H. E. Y.

THE LAW OF COMMERCIAL EXCHANGES. By Chester Arthur Legg. Baker, Voorhis and Company, New York, 1913, pp. xxxiv, 381.

The ordinary legal practitioner would hardly have supposed that there was, today in the world of substantive law an unplowed part large enough to constitute a field of itself. Yet Mr. Legg has produced a book of nearly 400 pages on a branch of the law which appears not heretofore to have been the subject

of a text-book. Nor does the author seem to have padded his material for the purpose of filling a volume. His work is a comprehensive but exclusive discussion of the powers, duties and liabilities of "Commercial Exchanges," as associations of individuals, whether incorporated or otherwise, in relation to their own members, the public, and the State.

Coming just when there is a renewal of agitation for the enforced incorporation of the New York Stock Exchange, its subject might be particularly timely. It does not, however, deal at all with the laws and regulations which particular exchanges have put into effect, or even as generally existing, but only with the rules which they *may* impose; and while it has some discussion of the responsibility of the exchange to the State, it does not devote any space to treatment of the power of the State to make rules and regulations actively controlling the conduct of exchanges and their members. In consequence, it is of interest only to those who are in some way immediately concerned with the exchanges or affected by their regulations. As such persons are for the most part not lawyers, the author has, as he says, endeavored to avoid purely technical discussion and legal formulae so far as possible without injuring the book as primarily a legal treatise. The reviewer does not believe that legal writing, reasonably used, has a technical terminology or abstruse diction of its own, but, at any rate, the author has succeeded in putting his subject in a form that will not strain the comprehension of his readers, be they lay or legal.

The book has an historical introduction concerning the development of Commercial Exchanges which, though brief, is extremely interesting. Beyond that, it will be of interest only to those directly concerned with the rights and rules which such associations may enforce. J. B. W.

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THE BASIC DOCTRINE OF AMERICAN CONSTITUTIONAL LAW.

THE two leading doctrines of American Constitutional Law before the Civil War, affecting state legislative power, were the Doctrine of Vested Rights and the Doctrine of the Police Power. The two doctrines are in a way complementary concepts, inasmuch as they represent the reaction upon each other of the earlier conflicting theories of natural rights and legislative sovereignty. But the older doctrine is the doctrine of vested rights, which may be said to have flourished before the rise of the Jacksonian Democracy. Furthermore, if Constitutional Law be regarded from the point of view of its main purpose, namely, that of setting metes and bounds to legislative power, it is the more fundamental doctrine.

Judicial review, we are told repeatedly, rests only upon the written constitution. We shall find ample reason presently to impugn the accuracy of this assertion, particularly for that most important formative period when the tree of Constitutional Law was receiving its initial bent. But letting it for the moment pass unchallenged, the question still remains, what is a constitution for—does it exist to grant power or to organize it? The former of these views is undoubtedly the older one, not only of the national Constitution, but of the state constitutions as well. For the written constitution, wherever found, was at first regarded as a species of social compact, entered into by sovereign individuals in a state of nature. From this point of view, however, governmental authority, wherever centered, is a trust which, save for the grant of it effected by the written constitution, were non-existent, and private rights, since they precede the constitution, gain nothing of authoritativeness from being enumerated in it, though possibly something of security. These rights are not, in other words, fundamental because they find mention in the written instrument; they find mention there because

fundamental. Suppose then the enumeration of such rights to have been but partial and incomplete, does that fact derogate from the rights not so enumerated? Article IX of the Amendments to the United States Constitution answers this question. The written constitution is, in short, but a nucleus or core of a much wider region of private rights, which, though not reduced to black and white, are as fully entitled to the protection of government as if defined in the minutest detail.

And by the other view of the written constitution, whether the so-called "natural rights" were enumerated or not was also a matter of indifference, but for precisely the opposite reason. By this view too the constitution was in a certain sense a grant of power, since government always rests upon the consent of the governed. The power granted, however, was not simply this or that item of specifically designated power but the sum total of that unrestrained sovereignty which in the state of nature was each man's dower. By the very act of calling government into existence, or more accurately, the legislative branch of government, this vast donation of power was conferred upon it, and irretrievably too, save for the right of revolution. Thus, whereas by the first view a constitution is wrapped about, so to say, by an ocean of rights, by this view it is enclosed in an enveloping principle of sovereign power. It thus follows first, that the mere co-existence of three departments within a written constitution leaves the legislature absolute, and secondly, that a mere enumeration of rights in the written constitution leaves them subject to legislative definition. Only by pretty specific provision of the written constitution is the legislative power, by this view, to be held in leash, even with judicial review a recognized institution, and the maxim that all doubts are to be resolved in its favor is to be taken for all that it seems to mean.

But let us consider the effect of these two theories of the nature of the constitution upon the question of the scope of judicial review more directly. The two theories were brought into juxtaposition in the classic case of *Calder* v. *Bull*,[1] which was decided by the Supreme Court in 1798. In that case an act of the Connecticut legislature setting aside a decree of a probate court and granting a new hearing for the benefit of those claiming under a will was denounced by the heirs at law as *ex post facto* and so void under Art. I, § 10 of the United States Constitution. The court rejected this view, holding partly upon the authority of BLACKSTONE, partly upon the *usus loquendi* of the state constitutions, and partly on that of the

[1] 3 Dall. 386 (1798).

United States Constitution, that the prohibition in question did not extend to all "retrospective" legislation, but only to enactments making what were innocent acts when they were done criminal or aggravating the legal character and penalty of past acts. The prohibition was intended, said Justice CHASE, "to secure the *person* of the subject from injury or *punishment*, in consequence of such a *law*." It was not intended to secure the citizen in his *"personal rights," i. e.*, "his *private rights*, of either *property* or *contracts*."

Whether this construction of the *ex post facto* clause of Art. I, § 10 met the intentions of the framers of the Constitution is an open question.[2] But it is certain that it did not entirely satisfy the court that made it. Said Justice PATERSON: "I had an ardent desire to have extended the provision in the Constitution to retrospective laws in general. There is neither policy nor safety in such laws." Justice CHASE's condemnation was hardly less sweeping. He admitted that there were "cases in which laws may justly and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement, as statutes of oblivion, or of pardon," but statutes taking away or impairing *"rights vested*, agreeably to existing laws," were also "retrospective," "generally unjust," and "oppressive." Nor was it at all his intention to throw open the doors to such legislation. True the *ex post facto* clause bore a narrow technical meaning, but other clauses of the same section were of broader application: the clause prohibiting states from making laws impairing the obligation of contracts and that prohibiting them from making anything but gold or silver a legal tender. Furthermore there were certain fundamental principles of the social compact and republican government.

"I cannot subscribe," wrote Justice CHASE in a passage which must be regarded as furnishing American Constitutional Law with its leavening principle, "to the *omnipotence* of a *state legislature*, or that it is *absolute* and *without* control, although its authority should not be *expressly* restrained by the *constitution or fundamental law* of the state. The people of the United States erected their constitutions . . . to establish justice, to promote the general welfare, to secure the blessing of liberty, and to protect persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide the proper objects of it. The *nature* and *ends* of *legislative*

[2] See Farrand, Records of the Federal Convention, II, 368, 375, 378, 448, 571, 596, 610, 617, 656; III, 165. See also note by Johnson, J., in 2 Pet. 681 (1829).

power will limit the *exercise* of it. . . . There are acts which the federal or state legislatures cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power. . . . An *Act* of the legislature (for I cannot call it a *law*) contrary to the great principles of the social compact cannot be considered a rightful exercise of legislative authority. . . . A law that punishes an innocent action . . .; a law that destroys, or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes *property* from A and gives it to B: it is against all reason and justice for a people to entrust a legislature with *such* powers; and therefore it cannot be presumed that they have done it. The *genius,* the *nature,* and the *spirit* of our state governments amount to a prohibition of such acts of legislation; and the *general principles of law and reason* forbid them." To hold otherwise were a "political heresy" "altogether inadmissible."

This appeal from the strict letter of the Constitution to general principles CHASE'S associate IREDELL, on the other hand, flatly pronounced invalid. True, "some speculative jurists" had held "that a legislative act against the natural justice must, in itself, be void," but the correct view was that if "a government composed of legislative, executive and judicial departments were established by a constitution which imposed no limits on the legislative power . . . whatever the legislative power chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void. . . . Sir William BLACKSTONE, having put the strong case of an act of Parliament which should explicitly authorize a man to try his own cause, explicitly adds that even in that case 'there is no court that has the power to defeat the intent of the legislature'" when couched in unmistakable terms.[3] Besides, "the ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject; and all that the court could properly say in such an event, would be that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of justice."

Now which of these two views of the range of judicial power under the constitution has finally prevailed? In appearance, IREDELL'S has, but in substance, as I have already hinted, it is CHASE'S theory that has triumphed. The evidence for both these

[3] 1 Comm. 91.

propositions is to be found in COOLEY'S CONSTITUTIONAL LIMITATIONS.[4] Dealing with the subject "of the circumstances under which a legislative enactment may be declared unconstitutional," COOLEY writes: "If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, *unless it shall be found that those principles are placed beyond the legislative encroachment by the Constitution.* . . . Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a *spirit* supposed to pervade the Constitution, *but not expressed in words.*" Farther along but still dealing with the same topic, he continues: "It is to be borne in mind . . . that there is a broad difference between the Constitution of the United States and the constitutions of the states as regards the power which may be exercised under them. The government of the United States is one of *enumerated* powers; the governments of the states are possessed of all the general powers of legislation . . . We look in the Constitution of the United States for *grants* of legislative power, but in the constitution of the state to ascertain if any limitations have been imposed upon the complete power with which the legislative department of the state was vested in its creation."

And thus far the victory seems to rest with IREDELL'S view,—but it is in appearance only, as we immediately discover. For whatever terms he may use at times, it is as far as possible from COOLEY'S intention to admit in any real sense the principle of legislative sovereignty. Thus he proceeds: *"It does not follow however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important when they are in the nature of exceptions to a general grant of powers; and if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done."* But he has just said that a state constitution exists to limit the *otherwise plenary* power of the legislature. How explain this apparent contradiction? An explanation has already been supplied by a quotation from the New York decision of *Sill* v. *Corning*.[5] The object of the constitution, runs the passage quoted, "is not to grant legislative power, but to confine and restrain it. Without constitutional

[4] Cooley, Constitutional Limitations (ed. 1) 169-173; (ed. 7) 237-242.

[5] 15 N. Y. 297, 303 (1857). See also Weister v. Hade, 52 Pa. St. 474, 477 (1866).

limitations, the power to make laws would be absolute. These limitations are created and imposed by the express words, *or, arise by necessary implication. The leading feature of the constitution is the separation and distinction of the powers of the government. It takes care to separate the executive, legislative and judicial powers and to define their limits.*" In a word the power which is conferred upon the legislature is the *legislative* power, and no other. This single phrase tells the tale. It is no longer good form, because it is no longer necessary, for a court to invoke natural rights and the social compact in a constitutional decision. But the same result is achieved by construing the very term by which "legislative power" is conferred upon the legislature. Such doctrine plainly has nothing in common with that of IREDELL. His theory was that in a constitution which should stop short with creating the three departments of government, the legislative power would be absolute. The doctrine espoused by COOLEY, on the other hand, reposes the main structure of Constitutional Law upon the simple fact of the coexistence of the three departments in the same constitution. Natural rights, expelled from the front door of the constitution are readmitted through the doctrine of the separation of powers. And what does this fact signify for judicial review? The answer is self-evident. Once it was recognized that to define "legislative power" finally and authoritatively lay with the courts, the power of judicial review became limited only by the discretion of the judges and the operation of the doctrine of *stare decisis*. The history of judicial review is, in other words, the history of constitutional limitations.

Preliminary, however, to entering upon this story, it is necessary for us to turn back a little way to supply a phase of the topic just under discussion. The date of the decision in *Sill* v. *Corning* was 1857 and COOLEY's great work did not appear until 1868. Such recognition moreover as is accorded the principle of legislative sovereignty in these places, slight and banal as upon investigation it is seen to be, was due to developments lying this side the formative period of American Constitutional Law, in fact to developments that brought that period to a close. Despite therefore his tone of disparagement for the views of "speculative jurists," if we are to judge of views from their comparative success in establishing themselves in practice, it was IREDELL himself who was "speculative." The fact of the matter is that IREDELL's tenet that courts were not to appeal to natural rights and the social compact as furnishing a basis for constitutional decisions was disregarded by all the leading

judges and advocates of the early period of our constitutional history. MARSHALL, it is true, had imbibed from BLACKSTONE's pages much the same point of view as had IREDELL. But on the crucial occasion of his decision in *Fletcher* v. *Peck*,[6] he freely appealed to "the nature of society and government" as setting "limits to the legislative power," and putting the significant query, "How far the power of giving the law may involve every other power," proceeded to answer it in a way that he could not possibly have done had he not, for the once, at least, abandoned BLACKSTONE. The record of others has not even this degree of ambiguity. Justices WILSON, PATERSON, STORY and JOHNSON, Chancellors KENT and WALWORTH, Chief-Justices GRIMKE, PARSONS, PARKER, HOSMER, RUFFIN and BUCHANAN all appealed to natural rights and the social compact as limiting legislative powers. They and other judges based decisions on this ground. The same doctrine was urged by the greatest lawyers of the period, without reproach. How dominant indeed were Justice CHASE's "speculative" views with both bench and bar throughout the period when the foundation precedents of constitutional interpretation were being established is shown well by what occurred in connection with the case of *Wilkinson* v. *Leland*,[7] decided by the Supreme Court of the United States in 1829, at the very close of this epoch. The attorney of defendants in error was Daniel WEBSTER. "If," said he, "at this period, there is not a general restraint on legislatures, in favor of private rights, there is an end to private property. Though there may be no prohibition in the constitution, the legislature is restrained from acts subverting the great principles of republican liberty and of the social compact." To this contention his opponent William WIRT, responded thus: "Who is the sovereign? Is it not the legislature of the state and are not its acts effectual, *unless they come in contact with the great principles of the social compact?*" The act of the Rhode Island legislature under review was upheld, but said Justice STORY speaking for the court: "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred." Forty-five years later, Justice MILLER, speaking for an all but unanimous bench in *Loan Association* v. *Topeka*,[8] makes the same doctrine the

[6] 6 Cranch 87 (1810).
[7] 2 Pet. 627, 646-7, 652, 657 (1829).
[8] 20 Wall. 655 (1874).

basis of a decision overturning a state enactment, while IREDELL'S view receives reiteration in the lone dissent of Justice CLIFFORD.

But now was it the intention of these men to leave it with the courts to draw the line between legislative power and *all* rights which might be designated "natural rights"? We speedily discover that it was not, and in so doing discover at last IREDELL'S vindication. *A priori,* it is difficult to see how our judges, having set out to be defenders of "natural rights," were in a position to decline to defend, and therefore to define, all such rights whether mentioned in the constitution or not. The difficulty is disposed of, however, the moment we recollect that our judges envisaged their problem not as moral philosophers but as lawyers, and especially as students of the *Common Law.* "Natural rights," in short, were to be defined in light of Common Law precedents.

But there was also a second consideration limiting and easing the task of the judges. In his chapter on "The Absolute Rights of Individuals" BLACKSTONE had written thus: "These may be reduced to three principal or primary articles . . . I. The right of personal security" consisting "in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. . . . II. . . . the personal liberty of individuals . . ." consisting "in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, *unless by due course of law.* . . . III . . . The absolute right, inherent in every Englishman . . . of property: which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land.*"[9] As we have already seen BLACKSTONE regarded Parliament's power as legally unlimited. His subordination of the "Absolute Rights of Individuals" in each case to the law signifies therefore their plenary control by the legislature and so for our purpose must be ignored. What *is* to our purpose is the definition given in the above quotation of the rights pronounced "absolute." For these are the rights precisely which, with judicial review based upon the social compact and directed to keeping legislative power within its inherent limitations, the courts were called upon to protect against legislative attack.

But were all these rights in fact exposed to legislative attack? The right of *personal security* certainly was not. On the contrary from the very beginning we find the courts characterizing the legislative power as calculated to safeguard that right by assuring the

[9] 1 Black, Comm. 129-137.

prevalence of the maxim of the Common Law: "*Sic utere tuo ut alienum non laedas.*" Again it was little likely that the right of *personal liberty* would be infringed under a republican form of government. This was a right that all were capable of enjoying equally merely by virtue of their being persons. Furthermore, the rights of accused persons were safeguarded in both the federal Constitution and, for the most part, the state constitutions by elaborate and detailed specification; and the decision in *Calder* v. *Bull* had not weakened these safeguards. The right meant to be safeguarded by the appeal to the social compact and natural rights was therefore the Property Right. This was the right which, the old DIALOGUE OF DOCTOR AND STUDENT informs us, was protected by the "law of reason," by which term those "learned in the law of England" were wont to designate the "law of nature."[10] More than that, it was the right precisely which, in the estimation of the fathers, representative institutions had left insecure.

We are now prepared to consider the underlying doctrine of American Constitutional Law, a doctrine without which indeed it is inconceivable that there would have been any Constitutional Law. This is the Doctrine of Vested Rights, which—to state it in its most rigorous form—setting out with the assumption that the property right is fundamental, treats any law impairing *vested rights,* whatever its intention, as a bill of pains and penalties, and so, void.

The fundamental character of the property right was asserted repeatedly on the floor of the Convention of 1787.[10a] It is therefore no accident that the same doctrine was first brought within the purview of Constitutional Law by a member of that Convention, namely, Justice PATERSON in his charge to the jury in *Van Horne's Lessee* v. *Dorrance,*[11] the date of which is 1795. "The right of acquiring and possessing property and *having it protected* is one of the natural, inherent and unalienable rights of man. Men have a sense of property: property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact and by the late constitution of Pennsylvania was made a fundamental law. . . . The legislature therefore had no authority to make an act divest-

[10] C. H. McIlwain, The High Court of Parliament and its Supremacy, 105-6.

[10a] Farrand, loc. cit. I, 424, 533-4, 541-2, II, 123. cf. ib. I, 605. See also Federalist No. 10.

[11] 2 Dall. 304, 310 (1795).

ing one citizen of his freehold and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance, in every free government; and lastly, it is contrary both to the letter and spirit of the constitution." On the basis of this reasoning an act of 1789 is pronounced "void, . . . a dead letter and of no more virtue or avail than if it never had been made."

A full decade earlier, however than *Van Horne's Lessee* v. *Dorrance,* the doctrine of vested rights is simply assumed by the Supreme Court of Connecticut in the *Symbury Case.*[12] Again in 1789 in the case of *Ham* v. *McClaws and wife,*[13] the Supreme Court of South Carolina had invoked similar principles to give to a particular statute such construction as would "be consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law." Three years later, the same court pronounced invalid an act of the assembly passed in 1712, transferring a freehold from the heir at law to another individual. The court announced itself as "clearly of the opinion that the plaintiffs could claim no title under the act in question, as it was against common right, as well as against the Magna Charta to take away the freehold of one man and vest it in another, . . . without any compensation, or even a trial by the jury of the country, to determine the right in question; that the act was therefore *ipso facto*[1] void; and that no length of time could give it validity, being originally founded on erroneous principles."[14] It is a striking fact that in at least half of the original fourteen states, to include Vermont in the reckoning, the doctrine of judicial review was first recognized in connection with cases involving also an acceptance of the doctrine of vested rights.[15] We are able therefore to comprehend the significance of a remark by Justice CHASE in 1800 to the effect that the court ought to accord different treatment to laws passed by the states during the Revolution and those passed since the Constitution of the United States had gone into effect, since "few of the revolutionary acts would stand the rigorous tests now applied."[16]

[12] Kirby 444 (1785).

[13] 1 Bay 93, 98 (1789).

[14] Bowman v. Middleton, 1 Bay 252 (1792).

[15] Besides the cases just mentioned, see the case described by Jeremiah Mason in his Memories, pp. 26-7, in which the New Hampshire court pronounced an Act unconstitutional, in 1784. The same case is referred to by Wm. Plumer's Life of Wm. Plumer, p. 59. See also Proprietors, etc. v. Laboree, 2 Greenl. (Me.) 275, 294 (1823); Emerick v. Harris, 1 Binn. (Pa.) 416 (1808); Whittington v. Polk, 1 Harr. & J. (Md.) 236 (1802).

[16] Cooper v. Telfair, 4 Dall. 14, 19 (1800).

1. by that very fact

This assertion soon received striking confirmation. In 1802 the Virginia Court of Appeals, after having in 1797 given the most sweeping possible interpretation to the law forbidding entails,[17] proceeded to the very verge of overturning laws disposing of the Church's lands, which was saved by the mere accident of Justice PENDLETON'S death the night before the decision, leaving the court equally divided. And even the judges who affirmed the constitutionality of the statute under review took pains not to traverse the doctrine of vested rights, one of them, Judge ROANE, going so far as to say that the constitution itself could not validly impair such rights.[18]

But the acceptance of this doctrine by the courts one after the other is but the beginning of the story. We must see how the progress of the doctrine was aided by the obscuration on the part of the courts of essential distinctions, or even their deliberate obliteration; how the doctrine attracted to its support other congenial principles; how it vitalized certain clauses of the written constitution; how in short it gradually operated to give legal reality to the notion of governmental power as *limited power*.

Of the distinctions above referred to the one whose disappearance we should first note is that between "retrospective laws," in the strict sense of laws designed "to take effect from a time anterior to their passage," and laws "which though operating only from their passage affect vested rights and past transactions." The distinction is recognized by STORY in *Society* v. *Wheeler*,[19] but only to be thrust aside. "Upon principle," he declares, "every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective." In support of his argument he cites *Calder* v. *Bull*, and warrantably. The distinction in fact was not so much obscured as entirely ignored from the first. Of more vital necessity, however, to the doctrine of vested rights, was the elimination of the distinction underlying the decision in *Calder* v. *Bull* between legislative enactments designed to punish individuals for their past acts and enactments which in giving effect to the legislature's view of public policy incidentally affected private rights detrimentally. Doubtless, this result was facilitated by the oft-expressed reluctance of the courts to enter into the question of the motives of the legislature, *i. e.*, of its members. And this question

[17] Carter v. Tyler, 1 Call 165 (1797).
[18] Turpin v. Locket, 6 Call 113 (1804).
[19] 2 Gall. C. C. 105, 139 (1814), Fed. Cas. 13, 156.

1. To limit the inheritance of to a specified line of heirs.

and that of the intention underlying the legislature's acts, though two quite different matters, it was easy to confuse. Hence it became doctrine in many quarters that the validity of statutes must depend upon external tests, particularly upon their actual operation upon private rights. The matter is one that will receive further attention later on.

But if the obliteration of one distinction is thus sufficiently explained, that of another is by the same line of reasoning made the more difficult of palliation. This is the very obvious distinction between *special* acts and *general* acts. The mischief of what has been called "prerogative legislation," that is, legislation modifying the position of named parties before the law, was one of the most potent causes of the general disrepute into which state legislatures had fallen before 1787.[20] For such measures, furthermore, rarely or never could the justification be pleaded of an imperative public interest. When accordingly such measures bore heavily upon the vested rights of particular, selected persons it was not strange that the courts should have treated them as equivalent to bills of pains and penalties. But the case of general statutes is obviously different. To enact these is of the very essence of legislative power. Their generality indeed furnishes the standard of legislation from which special acts are condemned. It is true that such measures will often bear more particularly upon some members of the community than others, but this fact is perhaps but the obverse of the necessity for their enactment. Notwithstanding these considerations the courts, building upon the Common Law maxim that statutes ought not in doubtful cases be given a retrospective operation, laid down from the first the doctrine as one of constitutional obligation, that in no case was a statute to receive an interpretation which brought it into conflict with vested rights.[21] So far as a statute did not impair vested rights, it was good, but so far as it did, it was a bill of pains and penalties and void, not under Art. I, § 10 of the United States Constitution,—for the actual precedent of *Calder* v. *Bull* still held, despite protests from eminent judges,—but under the general principles of Constitutional Law held to underlie all constitutions.

We turn next to consider the support which the doctrine of vested rights drew from other principles. In this connection our attention is first drawn to the decision of the Massachusetts Supreme Court in *Holden v. James*[22], in which the sentiment of equality before the

[20] See, e. g., Federalist No. 48 (Lodge's Ed.).

[21] Cf. Elliott v. Lyell, 3 Call 268, 286 (1802) and Turpin v. Locket, 6 Call 113 (1804). See also Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 498 (1811).

[22] 11 Mass. 396 (1814). See also Lewis v. Webb, 3 Greenl. (Me.) 326 (1825).

law, given its classic expression in the Declaration of Independence, is forged into a maxim of Constitutional Law. More specifically it was held in this case that, notwithstanding the fact that the twentieth article of the Massachusetts constitution expressly recognized the power of the legislature to suspend laws, such suspensions must be general and not for the benefit of a particular individual or individuals, it being "manifestly contrary to the first principles of civic liberty, natural justice, and the spirit of our constitution and laws that any one citizen should enjoy privileges or advantages which are denied to all others under like circumstances." The converse of this doctrine was stated by Chief Justice CATRON of the Tennessee Supreme Court fifteen years later in the much cited case of *Vanzant v. Waddell*.[23] There it was declared that the kind of legislation which the legislature was created to enact was "general, public law equally binding upon every member of the community . . . . under similar circumstances." The final clause of the first section of the Fourteenth Amendment takes its rise thence.

But of all principles brought to the support of the doctrine of vested rights, the one destined to prove, at least before the Civil War, of most varied and widest serviceability was the principle of the separation of powers. I have already touched upon the matter a few pages back. At this point I wish to review briefly some historical phases of the subject. Our starting point is the case of *Cooper v. Telfair*,[24] decided by the Supreme Court of the United States in 1800 on appeal from the United States Circuit Court for the District of Georgia. The measure under review was the act of the Georgia legislature of May 4, 1782, inflicting penalties on, and confiscating the estates of, certain persons declared guilty of treason. In opposition to the statute it was urged especially that it transgressed Art. I of the Georgia Constitution of 1777, which provided that "the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." The act was nevertheless upheld as valid. Said Justice CUSHING: " The right to confiscate and banish, in the case of an offending citizen, must belong to every government. It is not within the judicial power, as created and regulated by the constitution of Georgia: and it naturally, as well as tacitly, belongs to the legislature." Said Justice PATERSON: "The legislative power of Georgia, though it is in some respects restricted and qualified, *is not defined* by the constitution of the state." To the same

[23] 2 Yerg. (10 Tenn.) 259 (1829). See also Wally's Heirs v. Kennedy, 2 Yerg. (10 Tenn.) 554 (1831) and Jones' Heirs v. Perry, 10 Yerg. (18 Tenn.) 59 (1836).

[24] 4 Dall. 14 (1800).

effect were the words of Justice CHASE: "The general principles contained in the constitution are not to be regarded as rules to fetter and control, but as *matter merely declaratory and directory.*"

At first, in other words, the doctrine of the separation of powers, even when formulated in the written constitution, was not deemed precise enough to admit of its being applied by courts as a constitutional limitation. The other point of view, however, was not long in making its appearance. In *Ogden* v. *Blackledge*,[25] which was certified to the Supreme Court from the United States Circuit Court for the District of North Carolina in 1804, the question to be determined was whether the state statute of limitations of 1715 had been repealed in 1789, the North Carolina legislature having declared in 1799 that it had not been. Said attorneys for plaintiff: "To declare what the law is, or has been, is a judicial power; to declare what it shall be, is legislative. One of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial." "The Court," runs the report, "stopped counsel, observing that it was unnecessary to argue that point." Without recurring to the constitutional question, the court held that "under all the circumstances stated," the act in question had been repealed in 1789. Fifteen years later, the New Hampshire Supreme Court, in the leading case of *Merrill v. Sherburne*,[26] brought the principle of the separation of powers squarely to the support of the doctrine of vested rights. There was henceforth no apology or evasion on the part of judges in the manipulation of this principle.

The doctrine of vested rights was at last within reach of the haven of the written constitution; in fact it had already found anchorage there, in certain jurisdictions. The reflex effect upon it of its new security was what might have been anticipated: it became a yet more exacting and rigorous test of legislation than ever before. Henceforth, accordingly, it becomes necessary to recognize two varieties of the doctrine of vested rights, the milder and more flexible, the more abstract and rigorous. Courts which continued to appeal to natural rights were compelled by their own logic to consider constitutional questions not simply in their legal aspects but in their moral aspects as well. We thus find Chief Justice PARKER in *Foster v. Essex Bank*[27] declaring, with reference to the immunity claimed by the defendant corporation under its charter, from action for

[25] Cranch 272 (1804); see also Ogden v. Witherspoon, 2 Haywood 227, 3 N. C. 404 (1802).

[26] 1 N. H. 199, 204 (1819).

[27] 16 Mass. 245, 273 (1819); see also State v. Newark, 3 Dutcher (27 N. J. L.) 185, 197 (1858).

debt, that "there is no vested right to do wrong." A little later, Chief Justice HOSMER in *Goshen* v. *Stonington*[28] sustained on the ground of its reasonableness and justice a statute the retrospective operation of which he admitted to be "indisputable" and "equally so its purpose to change the legal rights of the litigating parties." The decision of the United States Supreme Court in *Livingston* v. *Moore*[29] was to like effect. Those courts, on the other hand, which sought to effect an absolute separation of legislative and judicial powers regarded any enactment disturbing vested rights, whatever the justification of it, as representing an attempt by the legislature to exercise powers not belonging to it and *ipso facto* void. This attitude is well represented by the New Hampshire Supreme Court in *Opinions of the Judges*,[30] but it also became in time the attitude embodied in the conservative doctrine of New York.

This differentiation of two varieties of the doctrine of vested rights brings us to a highly important branch of our subject: namely, the effect of this doctrine upon the acknowledged prerogatives and functions of government. As we have already seen, the doctrine of vested rights takes its origin from a certain theory of the nature and purpose of government. But political theory is not Constitutional Law, though often the source of it. The doctrine of vested rights, however, is Constitutional Law; indeed in one disguise and another it is a great part of it. Its protean faculty of appearing ever in new forms and formulations is, however, to be of later concern. What we need to do now is to see it at work in the forms which it assumed from the first, shaping the great uncontroverted powers of the American state, the power of taxation, the power of eminent domain, and what is today designated "the police power."

Mention has been made of the conservative New York doctrine. The founder of this doctrine and so to no small extent the founder of American Constitutional Law was the great Chancellor KENT, whose COMMENTARIES were and remain not only a marvel of legal learning but also of literary expression, and altogether one of the greatest intellectual achievements to the credit of any American. The work is divided into "Parts," which in turn fall into "Lectures." The opening Lecture of Part V, the 34th of the work, deals with "The History, Progress and Absolute Rights of Property" and to this Lecture, which was composed about the year 1825, we now turn.

KENT sets out by disparaging the idea of "a state of man prior

[28] 4 Conn. 209, 221 (1822). See also Booth v. Booth, 7 Conn. 350 (1829) and Welch v. Wadsworth, 30 Conn. 149 (1861).

[29] 7 Pet. 469, 551 (1833).

[30] 4 N. H. 565, 572 (1827).

to the existence of any notion of separate property." "No such state," he contends, "was intended for man in the benevolent dispensations of Providence. . . . The sense of property is inherent in the human breast and the gradual enlargement and cultivation of that sense from its feeble force in the savage state to its full vigor and maturity among polished nations forms a very instructive portion of the history of civil society. Man was fitted and intended by the author of his being for society and government and for the acquisition and enjoyment of property. It is, to speak correctly, the law of his nature: and by obedience to this law, he brings all his faculties into exercise and is enabled to display the various and exalted powers of the human mind." Nevertheless, "there have been modern theorists," KENT marvels, "who have considered separate and exclusive property and inequalities of property as the cause of injustice and the unhappy result of government and artificial institutions. But," he rejoins to such theorists, "human society would be in a most unnatural and miserable condition if it were possible to be instituted or reorganized upon the basis of such speculations. The sense of property is bestowed on mankind for the purpose of rousing them from sloth and stimulating them to action. . . . The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections." "The legislature," therefore, "has no right to limit the extent of the acquisition of property. . . . A state of equality as to property is impossible to be maintained, for it is against the laws of our own nature; and if it could be reduced to practice, it would place the human race in a state of tasteless enjoyment and stupid inactivity, which would degrade the mind and destroy the happiness of social life." And by the same token, "civil government is not entitled, in ordinary cases, ... to regulate the uses of property in the hands of the owners by sumptuary laws or any other visionary schemes of frugality and equality. . . . No such fatal union (as some have supposed) necessarily exists between prosperity and tyranny or between wealth and national corruption in the harmonious arrangements of Providence." *Liberty "depends essentially upon the structure of government,* the administration of justice and the intelligence of the people and it has very little concern with equality of property and frugality of living . . . ."

The interest and importance of these words of KENT arises from no novelty of doctrine advanced in them, but on the contrary, from their explicit formulation of a point of view that is so far from novel that it is ordinarily simply assumed. And so it would have remained with KENT, very likely, had he not deemed it necessary to meet and refute the levelling doctrines of HARRINGTON, CONDORCET and ROUSSEAU. But the matter of especial importance at this stage is to find out how this point of view manifested itself when brought into contact with those prerogatives which KENT freely accorded government.

As to taxation, KENT's theory is obviously the *quid pro quo* theory and this has remained the theory of American courts from that day to this. From it follows the maxim that taxation must be "equal in proportion to the value of property."[31]

With reference to the power of eminent domain, KENT but reiterates in his COMMENTARIES the views which as Chancellor he had earlier developed in the leading case of *Gardner* v. *Newburgh*,[32] to which therefore we turn directly. In this case, which was decided in 1816, the statute under review was one authorizing the trustees of the village of Newburgh to supply its inhabitants with water by means of conduits. As stated by the Chancellor, the statute made "adequate provision for the party injured by the laying of the conduits through his land" and also "to the owners of the spring or springs from whence the water" was to be taken. But no compensation was provided the plaintiff Gardner, "through whose land the water issuing from the spring" had been accustomed to flow. At this date there was no provision in the New York constitution with reference to the power of eminent domain. Nevertheless upon the authority of GROTIUS, PUFFENDORF, BYNKERSHOECK and BLACKSTONE, KENT developed the following propositions: 1st, that the legislature might "take private property for necessary or useful *public* [sic] purposes;" 2ndly, that such taking, however, did not involve the absolute "stripping of the subject of his property," but, in the language of BLACKSTONE, "the giving him a full indemnification," since "the public is now considered as an individual treating with an individual for an exchange;" 3rdly, that such indemnification was due not merely those whose property was actually appropriated by the state but also those whose property should be injured in consequence of the use made by the state of the property appropriated; 4thly, that the legislature itself was not the final judge of what sum

[31] 2 Kent, Comm. 332.
[32] 2 Johns. Ch. 162, 166-7 (1816).

1. one thing is taken for another.

was "a full indemnification" of owners whose property was taken or injured. The court thereupon isued an injunction against the trustees, "to see whether the merits of the case will be varied," it being a nuisance at the Common Law to divert a watercourse and an injunction being necessary to prevent an impending injury. In his COMMENTARIES ten years later KENT reaffirms all these propositions. His exposition of them furthermore makes it plain that he regards the requirement of a public purpose a true constitutional limitation, susceptible of judicial enforcement. In other words, not every purpose for which the legislature may elect to exercise the power of eminent domain is for that reason a *public* purpose. The legislature cannot even by the power of eminent domain transfer the property of A to B without A's consent.[33]

The third power of government touching property rights KENT describes in the following terms: "But though property be thus protected, it is still to be understood, that the law-giver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right to the injury or annoyance of others or of the public. The government may by general regulations interdict such uses of property as would create nuisances and become dangerous to the lives and health or peace or comfort of the citizens. Unwholesome trades, slaughter houses, operations offensive to the senses, the deposit of gunpowder, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interest of the community."[34]

But is the power thus described unlimited, that is, limited only by the discretion of the lawgiver? In the first place, be it noted, the power in question is described as a power of *regulation,* which, at least so it came eventually to be urged, is distinguishable from a power of *prohibition.* True KENT himself admits that there are uses of property which constitute *nuisances* in certain cases, and he says in another place, that there are "cases of urgent necessity" in which property may be destroyed, as for instance when houses are razed to prevent the spread of a conflagration.[35] But it is apparent from his citations that he regards such cases as already provided

[33] 2 Kent, Comm. 340, and notes. Cf. Paterson, J., in Van Horne's Lessee v. Dorrance, 2 Dall. 304, 310 (1795).

[34] 2 Kent, Comm. 340 and notes.

[35] 2 Kent, Comm. 338-9 and notes.

for in Common Law precedent, that he has no intention of recognizing in the legislature a power to define cases of nuisance and urgency, unrestrained by precedent. Again his doctrine of consequential damages must not be forgotten in this connection. For if it was incumbent upon the state to render compensation for damages resulting from its use of the power of eminent domain, why should it not also be the state's duty to pay private owners for damages resultant from the use of its police powers? Lastly, it is entirely apparent that KENT had not the least idea in the world of abandoning the doctrine which had received his repeated sanction, that a legislative enactment must never be so interpreted as to impair vested rights.[36]

For further instruction in the New York doctrine we turn to some New York decisions following KENT'S COMMENTARIES. The very year of the publication of the second volume of this work occurred the cases of *Vanderbilt* v. *Adams* and *Coates* v. *Mayor of the City of New York,* both to be found in the seventh volume of Cowen's reports.[37] In the former, plaintiff in error contended that a statute authorizing harbor masters to regulate and station vessels in the East and North Rivers did not extend to owners of private wharves; or that if it did so extend, it assumed to authorize an interference with private property in a way that was beyond the power of the legislature. The argument was founded upon *Gardner* v. *Newburgh, Dask* v. *Van Kleeck, Fletcher* v. *Peck,* and derivative cases. The court upheld the statute but in language significantly cautious. Said Justice WOODWORTH: "It seems to me that the power exercised in this case is essentially necessary for the purpose of protecting the rights of all concerned. It is not in the legitimate sense of the term a violation of any right, but the exercise of a power indispensably necessary where an extensive commerce is carried on. . . . . The right assumed under the law would not be upheld if exerted beyond what may *be considered* a necessary police regulation. The line between what would *be a clear invasion of the right, on the one hand, and regulations not lessening the value of the right and calculated for the benefit of all must be distinctly marked.* . . . Police regulations are legal and binding because for the general benefit and *do not proceed to the length of impairing any right in the proper sense of the term.* The sovereign power in a community, therefore, may and ought to prescribe the manner of

[36] Dash v. Van Kleeck, 7 Johns. 477, 498 (1811); see also 1 Kent Comm. 455-6 and notes.

[37] Vanderbilt v. Adams, 7 Cow. 349 (1827) and Coates et al. v. Mayor etc., 7 Cow. 585 (1827).

exercising individual rights over property. It is for the better protection and enjoyment of that absolute dominion which the individual claims. . . . ." The individual himself, as well as others, is benefitted by legitimate regulation.

But what is *legitimate regulation?* In *Coates* v. *Mayor,* the statute under review authorized the City of New York to make by-laws "for regulating, or if they found it necessary, preventing, the interment of the dead" within the city. In pursuance of this statute the city had passed a prohibitory ordinance, which plaintiffs in error claimed to be inoperative in their cases on account of certain grants of land held in trust by them for the sole purpose of interment. The argument against the legislative power in the premises again rested upon *Gardner* v. *Newburgh, Fletcher* v. *Peck,* and like precedents. "The public good," it was conceded, "is paramount. This is admitted in taking land for roads and canals. But land thus taken must be paid for. Is it not the same thing," it was asked, "whether the public good is to be promoted by taking the use of property for public benefit or destroying the property for the same purpose?" "The legislature cannot take away a single attribute of private property without remuneration." To meet these contentions the attorneys for the municipality were forced to resort to doctrine from an alien jurisdiction, doctrine which moreover bore in its origin no reference to the question before the New York court. Thus in his opinion in *Gibbons* v. *Ogden,*[38] Chief Justice MARSHALL had described the field of legislation left to the states *by the Constitution of the United States* in very broad terms. This description was now utilized to show the scope of legislative power *under the state constitution* in relation to the property right. Again, in *McCulloch* v. *Maryland,*[39] MARSHALL had construed the words "necessary and proper" of Art. I, § 8, of the United States Constitution as meaning "expedient," and it was now urged that the term "necessary" in the legislative grant of power to the municipality must be similarly defined. Finally, in *Martin* v. *Mott,*[40] the Supreme Court of the United States had held that where a discretionary authority was vested by the Constitution in the President, its use was not subject to judicial review. The same line of argument was now contended to be applicable to a state legislature in the exercise of its powers. "The power in question," declared defendant's attorney, "is a legislative power, which must, on the subject of regulation, be transcendent. The legislators are the

[38] 9 Wheat. 1 (1824).
[39] 4 Wheat. 316 (1819).
[40] 12 Wheat. 19 (1827).

judges and their decision must be conclusive. "Even a general law to prevent the growing of grain throughout the state, however despotic, could not be disobeyed as wanting constitutional validity."

The by-law, and the statute upon which it was based, were both sustained. Speaking of the question of the necessity of the former, the court said: "This necessity is not absolute. It is nearly synonymous with *expediency* or *what is necessary for the public good.*" To judge of that matter, however, is the function of the legislature; it being "of the nature of legislative bodies to judge of the exigency upon which their laws are founded." And the law itself is "equivalent to an averment that the exigency has arisen, been adjudicated and acted upon." The duty of the court is merely to see "that the law operates upon the subject of the power."

It would be easy to interpret this language in a way to release the legislature from all constitutional restraints. To do this, however, was as far as possible from the intention of the court. "We are of opinion," its decision proceeds, "that this by-law is not void, either as being unconstitutional, or as conflicting with what we acknowledge as a *fundamental principle of civilized society, that private property shall not be taken even for public use without just compensation.* No property has in this instance been entered upon or taken. None are benefitted by the destruction, or rather the suspension, of the rights in question in any other way than citizens always are when one of their number is forbidden to continue a nuisance."

Coates v. *Mayor* therefore seems to furnish authority for the following propositions: 1 The legislature is the exclusive judge of the expediency of exercising its powers; 2 Property can be appropriated by the State only for a public use and upon the making of just compensation; 3 The legislative power of regulation extends to the abatement of nuisances, existing or impending: 4 If in such cases, property rights are destroyed, no compensation is due their owner. The power of eminent domain and that of regulation are distinct and the doctrine of consequential damages does not apply in the case of the latter.

One question remains, however: Who is to say finally whether there *is* a nuisance? The plain inference from the whole line of argument taken by the court in this case is that, what is a nuisance is a question of fact to be judged of in the last analysis by the courts in accordance with Common Law standards. And this inference becomes certainty when we turn to a line of decisions, extending from 1837 to 1845, in which a statute authorizing municipal officers to

destroy buildings to prevent the spread of fire, is reviewed and applied by the Court of Errors and Appeals.[41] The language of some of the lay members of the court is especially significant. By Senator EDWARDS the statute is treated as merely defining and limiting a Common Law right of even private persons in such an exigency. By Senator VERPLANCK, the right assumed by the statute is described as "a natural right, arising from inevitable and pressing necessity, when [of] two immediate evils, one must be chosen and the less is voluntarily inflicted in order to avoid the greater." In support of this definition is cited COKE's language in *Mouse's case,* where it was said, with reference to baggage thrown overboard in time of storm, that "if the danger accrued by the act of God . . . everyone ought to bear his loss for safeguard of the life of man." In other words, since no right of action would lie for private trespass in such a case, neither could compensation be claimed against the state. The same course of reasoning is pursued by Senators SHERMAN and PORTER in *Russell* v. *Mayor.*[41a] The occasions, in short, when the state might legitimately press its power of regulation to the extent of actually destroying property rights were relatively few and were plainly indicated in the Common Law.

The New York doctrine invites comparison with that of Massachusetts. In the latter commonwealth the rejection of the doctrine of consequential damages and the resultant differentiation of the power of eminent domain from that of police regulation preceded, though it does not seem to have aided, the like development in the former. And once again, the starting-point was furnished by the law of private trespass. In the case of *Thurston* v. *Hancock,*[42] decided in 1815, it was concluded, from an exhaustive review of the precedents by Chief Justice PARKER, that where one dug so deep into his own land as to endanger a house on land adjoining, the owner of the latter had no right of action for the damage done the house, but only for the damage arising from the falling of the natural soil into the pit so dug. In *Callender* v. *Marsh,*[43] decided eight

[41] The ensuing quotations are from Stone v. Mayor, 25 Wend. 157 (1840) at pages 161 and 174. see also Hart v. Mayor, 9 Wend. 571 (1832); Van Wormer v. Mayor, 15 Wend. 262 (1836); Meeker v. Van Rensselaer, 15 Wend. 397 (1836); and Mayor v. Lord, 17 Wend. 285 (1837). In Van Wormer v. Mayor the court held that the finding of a board of health, that certain premises were a nuisance, could not be traversed in court.

The citation of Mouse's case is 12 Coke 62.

[41a] 2 Denio 461 (1844).

[42] 12 Mass. 220 (1815).

[43] 1 Pick. 417 (1823).

years later, it was held, on the basis of this precedent, that the tenth article of the Massachusetts Declaration of Rights gave "no right to compensation for an indirect or consequential damage or expense resulting from the right use of property already belonging to the public." Finally, in *Baker* v. *Boston*,[44] which was an action to prevent the municipality from filling up a creek which had become injurious to the public health, it was ruled that "police regulations to direct the use of private property so as to prevent its being pernicious to the citizens at large are not void though they may in some measure interfere with private rights without providing for compensation." KENT in his COMMENTARIES stigmatizes the doctrine of *Callender* v. *Marsh* as "erroneous" and in contravention of "a palpably clear and just doctrine," for which he cites his own decision in the *Newburgh case*.[45] At the same time he apparently approves of the New York decision in the *Coates* case. The explanation of the apparent contradiction is to be found in his recognition that the property right infringed in the New York case was a nuisance by Common Law standards.

This, however, is not to say that Common Law standards did not obtain in Massachusetts, in interpreting the Constitution, but only that they were applied in a rather more flexible fashion than in New York. To illustrate this point is therefore the second object of our comparison of the two doctrines. The relative flexibility of the Massachusetts doctrine was due in part, as we have already seen, to the retention of the natural rights theory as the foundation of the doctrine of vested rights. But a further reason for it is to be found in the very words in which legislative power is vested by the Massachusetts constitution in the General Court. This is described as the power "to make, ordain, and establish all manner of *wholesome and reasonable* orders, laws, statutes, and ordinances . . . as they shall judge to be for the government and welfare of the commonwealth."[46] Quoting this passage in the case of *Rice* v. *Parkman*,[47] Chief Justice PARKER ruled, in 1820, that the General Court must be deemed to have a parental or tutorial power over persons not *sui juris*, that is "minors, persons *non compos mentis*, and others," and upon that basis upheld a legislative act licensing the sale of the real estate of certain minors. In New Hampshire, where vested rights had been brought under the protection of the doctrine of the

[44] 12 Pick. 184 (1831). See also Com. v. Breed, 4 Pick. 460 (1827); Com. v. Tewksbury, 11 Metc. 55 (1846); and Com. v. Alger, 7 Cush. 53 (1851).

[45] 2 Kent, Comm. 340, footnote (page 526 of 14th edition).

[46] Part the Second, Chapter I, Section I, Article IV. Thorpe, III, 1894.

[47] 16 Mass. 326, 331 (1820).

separation of powers, similar legislative acts were overturned. The New York court in *Cochran* v. *Van Surley*,[48] accepted the Massachusetts doctrine, but at that date the doctrine of natural rights had not yet been decisively expelled from New York. Also the broader basis for the Massachusetts decision was not adverted to.

But another avenue for the entry of the doctrine that legislation must be "reasonable," in some sense or other, was afforded by the terms in which power is usually conferred by the state legislature upon municipal corporations. A case in point, in which the doctrine in question was turned against the legislation under review, is that of *Austin* v. *Murray*,[49] decided by the Massachusetts Supreme Court in 1834. The question at issue was the validity of a by-law interdicting the bringing of the dead into the town from abroad for purposes of burial, a prohibition which touched chiefly or exclusively Catholic parishioners. The court overturned the by-law as being "wholly unauthorized" by the act of the legislature, and as "an unreasonable infringement on private rights." Elaborating the latter point it said: "The illegality of a by-law is the same whether it may deprive an individual of the use of a part or of the whole of his property; no one can be so deprived unless the public good requires it. And the law will not allow the right of property to be invaded under the guise of a police regulation for the preservation of health when it is manifest that such is not the object and purpose of the regulation . . . [This by-law] is a clear and direct *infringement of the right of property without any compensating advantages, and not a police regulation, made in good faith for the preservation of health.*" In other words the ordinance is overturned, not simply because it impaired vested rights but because it did so without any good public reason. Had such reason been present, the measure would have been upheld. For then the individual whose rights were infringed would himself have benefitted as a member of the public. The police power, like the power of taxation, is controlled by the principle of a *quid pro quo*. The line of reasoning is the same as had been taken by the New York court in *Vanderbilt* v. *Adams*.[50]

But the question of the flexibility of the doctrine of vested rights involves yet another question. This doctrine, to restate it as compendiously as possible, is that the legislature cannot, at least except

[48] 20 Wend. 365, 373 (1838).

[49] 16 Pick. 121 (1834).

[50] 7 Cow. 349 (1827). For further illustrations of the Massachusetts doctrine, see Com. v. Tewksbury, 11 Metc. 55 (1846), and Com. v. Alger, 7 Cush. 53 (1851). See also Stoughton v. Baker, 4 Mass. 522 (1808); Vinton v. Welsh, 9 Pick. 87 (1829); and Com. v. Badlam, 9 Pick. 361 (1830).

for reasons of public policy, enact laws impairing vested rights. The doctrine has therefore two dimensions, so to say, the term "impair" and the term "vested rights." But the general significance of the former term we have already learned in our investigation of the operation of the doctrine upon the powers of government. And even of the second term we have supplied most of the materials for a definition, which only awaits our more circumstantial formulation.

Vested rights are rights vested in specific individuals in accordance with the law in what the law recognizes as *property*. But what for the purposes of the doctrine of vested rights, did the law recognize as property? What, in other words, was the objective of the rights which this doctrine treated as vestable?

In his ESSAY ON PROPERTY, composed in 1792, MADISON had written thus: "This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.' But in its larger and juster meaning, it embraces everything to which a man may attach a value and have a right; and which leaves to every *one else the like advantage*. In the former sense, a man's land, or merchandise, or money is called his property. In the latter sense, a man has property in his opinions and a free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. He has property very dear to him in the safety and liberty of his person. He has an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. . . . If there be a government then which prides itself on maintaining the inviolability of property, which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their person, and their faculties, nay more which indirectly violates their property in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the inference will have been anticipated that such a government is not a pattern for the United States. If the United States mean to obtain or deserve the full praise due to wise and just governments they will equally respect the rights of property and the property in rights."[51]

These words are important as showing the elasticity attaching to

[51] Madison, Writings (Hunt ed.) VI, 101 ff.

the term "property," as used by American statesmen, from the beginning. Such latitudinarian views, however, found little or no support from the Common Law, and had in consequence before the Civil War little influence upon judges. So far as the courts liberalized the legal notion of the property right it was chiefly by analyzing it into its constituent elements, the right of use, the right of sale, the right of control, and so on, which were sometimes recognized as property rights even when inhering in another than the legal owner.[52] But the objective of these rights remained for the most part, tangible property, property which could be taken by the power of eminent domain, hence especially real property.[53] Still there were some exceptions to this rule. Art. I, § 10, of the United States Constitution was regarded from the outset as placing the legal fruits of one's lawful contracts in the category of vested rights. By the same token, the *Dartmouth College* decision extended the concept to charter rights, a result which, however, had been anticipated at least in Massachusetts independently of the contract clause.[54] Finally in *Dash* v. *Van Kleeck*, Chancellor KENT, by treating the right to prosecute an action at law, already begun, as a vested right, entered a more controversial field. In a much stronger case some years later, Chief Justice PARKER declared the more usual view that "there is no such a thing as a vested right to a particular remedy."[55]

And doubtless attorneys and suitors would fain have extended the application of the term still further. Said Justice NELSON in *People* v. *Morris*:[56] "Vested rights are indefinite terms, and of extensive signification; not unfrequently resorted to when no better argument exists, in cases neither within the reason or spirit of the principle." Despite this tendency, however, the concept is soon seen, when we bring it into comparison with ideas that have become current since the Fourteenth Amendment was added to the Constitution, to have been kept, first and last, well within bounds. Certainly no one would have thought of suggesting before the Civil War that the right to engage in trade, the right to contract, the right —to employ MADISON's phrase—of the individual "in the use of his

[52] See some New York cases: Holmes v. Holmes, 4 Barb. 295 (1848); White v. White, 5 Barb. 474 (1849); Perkins v. Cottrell, 15 Barb. 446 (1851); Westervelt v. Gregg, 12 N. Y. 202 (1854).

[53] See McLean, J., in West River Bridge Co. v. Dix, 6 How. 507 (1848) at 536-7.

[54] Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (1819). The Massachusetts case referred to is Wales v. Stetson, 2 Mass. 143 (1806). Cf. Austin v. Trustees, 1 Yeates (Pa.) 260 (1793).

[55] Com. v. Commissioners of Hampden, 6 Pick. 501 (1828). See also Yeaton v. U. S., 5 Cranch 281 (1809).

[56] 13 Wend. 325, 329 (1835).

faculties," were "vested rights." To this fact MADISON's own antithesis between "rights to property" and "property in rights" is indirect testimony, but most direct evidence is by no means lacking. Especially pertinent are some of the utterances of Chief Justice PARKER in deciding the case of *Portland Bank* v. *Apthorp*,[57] in which the question at issue was the validity of a tax on the stock of an incorporated bank. Said the court: "The privilege of using particular branches of business or employment, as the business of an auctioneer, of an attorney, of a tavern-keeper . . . . etc." have been subjected to taxation "from the earliest practice," and this notwithstanding the fact that "every man has a natural right to exercise either of these employments free of tribute, as much as a husbandman or mechanic to use his personal calling. . . . . Every man has the implied permission of the government to carry on any lawful business, and there is no difference in the right between those which require a license and those which do not, *except in the prohibition, either express or implied,* where a license is required."[57a]

Nor is the logical implication of this language weakened when we turn to consider legislative measures designed not to tax but to regulate business. Many such measures were municipal ordinances, and while their validity was challenged again and again, it was never on grounds furnished by the doctrine of vested rights or any collateral doctrine. In Massachusetts the favorite argument against such by-laws was that they were in restraint of trade and that therefore the authority to enact them had not been conferred by the legislature. This was the argument in the case of *Commonwealth* v. *Worcester*,[58] where the ordinance under review forbade persons in charge of wagons, carts, etc., from driving their horses through the streets at a trot. The court rejected the contention, as also it did the like argument in *Nightingale's* case,[59] where the by-law before the court provided that no one not offering the produce of his own farm for sale should occupy any stand for the vending of commodities except by the permission of the clerk of the market. *Vandine's* case[60] was argued and decided on like grounds.

But of course when the objectionable legislation came from the

[57] 12 Mass. 252 (1815). See also Shaw, C. J., in Com. v. Blackington, 24 Pick. 352 (1837).

[57a] The point of view of Marshall, C. J. in Ogden v. Saunders is the same. The obligation of contracts which arose from the moral law, was protected by Art. I, § 10 of the Constitution, but the right to contract was subject absolutely to legislative control. 12 Wheat. 213, 346-49.

[58] 3 Pick. 462 (1826).

[59] 11 Pick. 168 (1831).

[60] 6 Pick. 187 (1828).

legislature itself, other principles had to be resorted to. Yet even in such cases, with a simple exception so plainly anomalous as not to merit comment in this connection,[60a] fundamental principles were conspicuously not appealed to. Two cases especially to the point are a Massachusetts case of 1835, *Hewitt* v. *Charier*,[61] and an Ohio case of 1831, *Jordan* v. *Overseers of Dayton*.[62] In these cases the statutes drawn into question confined the practice of medicine to members of certain medical societies and to persons qualified in other stipulated ways. In the Massachusetts case the protestant, who had continued in practice in defiance of the statute, based his case, not upon the ground that would seem most available today, that the statute operated to deprive him of his livelihood and chosen profession, but upon art. 6 of the Massachusetts Declaration of Rights, which forbids, in essence, special privileges to favored individuals. The court overruled the argument. Said Chief Justice SHAW: "Taking the whole article together, we think it manifest that it was especially pointed to the prevention of hereditary rank." But even in applying it according to its literal meaning, "it is necessary to consider whether it was the *intent or one of the leading and substantive purposes of the legislature* to confer an exclusive privilege on any man or class of men," or whether "this is indirect and incidental, ... not one of the purposes of the act," and therefore not "a violation of this article of the Bill of Rights." His conclusion was that the act under review was not "a violation of any principle of the constitution."

In the Ohio case, the argument of plaintiff in error was even more far-fetched, being based upon a patent which he held from the national government for certain drugs and concoctions. Said the court in response: "The sole purpose of a patent is to enable the patentee to prevent others from using the products of his labor except with his consent. But his own right of using is not enlarged or affected. There remains in him . . . . the power to manage his property or give direction to his labors at his pleasure, subject only to the paramount claims of society, which require that his enjoyment may be . . . . regulated by laws which render it subservient to the general welfare." The court concluded with a long list of

[60a] The reference is to Ex parte Dorsey, 7 Porter (Ala.) 293 (1838). The line of reasoning there employed was rejected by the same court and same judges in Mobile v. Yuille, 3 Ala. 137 (1841), where a municipal ordinance prescribed the price of bread.

[61] 16 Pick. 353 (1835).

[62] 4 Ohio 295 (1831). Some other citations of like import may be added: Furman v. Knapp, 19 Johns. (N. Y.) 248 (1821); People v. Jenkins, 1 Hill (N. Y.) 469 (1841); Com. v. Ober, 12 Cush. (Mass.) 493 (1853).

trades which were at that time regulated by statute in the state of Ohio.

Our conclusion then from these and similar cases must be that the doctrine of vested rights was interposed to shield only the property right, in the strict sense of the term, from legislative attack. When that broader range of rights which is today connoted by the terms "liberty" and "property" of the Fourteenth Amendment were in discussion other phraseology was employed, as for example the term "privileges and immunities" of Art. IV, § 2, of the Constitution. In his famous decision in *Corfield* v. *Coryell*,[68] rendered in 1823, Justice WASHINGTON defined this phrase to signify, as to "citizens in the several states," "those privileges and immunities which are in their nature, *fundamental*, which belong of right to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this union." "What these fundamental principles are," he continued, "it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following heads; protection by the government: the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the good of the whole."

But now of all the rights included in this comprehensive schedule, one only, and that in but a limited sense, was protected by the doctrine of vested rights, the right namely of one who had *already* acquired some title of control over some particular piece of property, in the physical sense, to continue in that control. All other rights, however fundamental, were subject to limitation by the legislature, whose discretion as that of a representative body in a democratic country, was little likely to transgress the few, rather specific, provisions of the written constitution.

To conclude:—The doctrine of vested rights represents the first great achievement of the courts after the establishment of judicial review. In fact, in not a few instances, judicial review and the doctrine of vested rights appeared synchronously and the former was subordinate, in the sense of being auxiliary, to the latter. But always, before the Fourteenth Amendment, judicial review, save as a method of national control upon the states, would have been ineffective and lifeless enough, but for the *raison d'etre* supplied it by

[68] 4 Wash. C. C. 371, 380-1 (1823), Fed. Cas. 3230.

the doctrine of vested rights, in one guise or other.[64] Furthermore, the doctrine represented the essential spirit and point of view of the founders of American Constitutional Law, who saw before them the same problem that had confronted the Convention of 1787, namely, the problem of harmonizing majority rule with minority rights, or more specifically, republican institutions with the security of property, contracts, and commerce. In the solution of this problem the best minds of the period were enlisted, WILSON, MARSHALL, KENT, STORY, and a galaxy of lesser lights. But their solution, grounded though it was upon theory that underlay the whole American constitutional system, would yet hardly have survived them had it not met the needs and aspirations of a nation whose democracy was always tempered by the individualism of the free, prosperous, Western World. That distrust of legislative majorities in which Constitutional Limitations were conceived, from being the obsession of a superior class, became, with advancing prosperity, the prepossession of a nation, and the doctrine of vested rights was secure.[65]

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[64] For the most important guise which the doctrine assumed in state courts, particularly the New York courts, see the writer's article on "The Doctrine of Due Process of Law before the Civil War" in 24 Harv. L. Rev. 366, 460. The most important guise which the doctrine developed in the federal courts is to be seen in their interpretation of Art. I, § 10. See Fletcher v. Peck. 6 Cranch 87 (1810), and Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

[65] See the discussion of the relation of government to the Property Right, in the Mass. Convention of 1820, Journal (Boston, 1853), pp. 247, 254, 275-6, 278, 280, 284-6, 304 ffg. The speakers are Webster, Story, John Adams, et al. Webster's Oration on the Completion of Bunker Hill Monument is a splendid statement of the theory that a democracy in which men are equal will inevitably want to protect private rights against governmental excesses. Writings and Speeches (National Ed., 1903) I, 259 ff'g. On Mar. 21, 1864 Lincoln addressed a committee from the Workingmen's Association of N. Y. He closed with the following words: "Property is the fruit of labor; property is desirable; is a positive good in the world. That some should become rich shows that others may become rich, and hence is just encouragement to industry and enterprise. Let not him who is houseless pull down the house of another, but let him work diligently and build one for himself, thus by example assuring that his own shall be safe from violence when built." Complete works (Ed. of 1905) 54. See also V, 330, 361.

THE ENGLISH JUDICATURE ACT OF 1873.

IT seems to be the general impression that reform in judicial procedure is a new and radical thing in the history of jurisprudence. This is far from the fact. It is as old as jurisprudence itself. From Solon to Justinian, from Justinian to the Magna Charta, from the Magna Charta to Bentham, from Bentham to Field, and in every civilized country, radical changes have taken place from time to time, touching both procedure and substantive law. Court systems have been codified, systematized and rearranged to meet advancing and changing social and industrial conditions. From the religious ceremonies, constituting the methods of legal procedure of the early Romans, to the wager of battle and of law in early English times; from these and other primitive methods to the intricate formalism of the thirteenth to the early part of the nineteenth centuries, and from that period until the present, constant changes have taken place.

As we look back through the centuries and follow the struggles of men for liberty according to law, we can see clearly that these changes have had, in the main, a strong, if not a controlling, influence toward the fulfillment of that desire. The trouble with most of us, when we consider this subject of reform, is that we do not look at it from the proper historical perspective.

When the perfect system of procedure is found and the book of Experience closed, I apprehend that the period of social decadence will be entered upon. It was so in Rome and other once-great nations, and may be so with us.

It is to be noted that in the great crises of the past and whenever any considerable change has been accomplished in the law, such reforms have been brought about by a minority of the lawyers supported by laymen. It is but natural that this should be so. In early manhood lawyers are taught the fundamental principles of both substantive law and of procedure in the necessary preparation for the work of their profession. To them these principles have a significance that has no parallel in any other study they may undertake. They become wedded to them, and they become a part of their habitual thought and conduct. As they engage in their work from day to day, they are concerned only in what is, and not in what might be. Their plans are formed upon conditions that exist; upon principles that have long been established; upon precedents on which they can safely rely and without speculation follow. These conditions, these considerations, make the lawyer the most conservative of men. It

is well that this conservatism exists; for it is one of the strong counter-acting forces of civilization, holding in check those extreme proposals for reform advanced from time to time, which, if given full effect, might lead to disaster.

During the early formative period of English jurisprudence, constituting the beginning of our common law, repeated, but unsuccessful efforts were made to incorporate the methods of the civil, or Roman, law into our procedure. Bracton, who wrote in the thirteenth century, was one of the later writers who made this attempt. But the judges of that early period sought to establish a distinct system of laws which should be especially adapted to the English people, and resisted strenuously all efforts at interference with that purpose.

It was this resistance that developed our jury system, and, through the jury system, our rules of evidence and methods of trial, wherein we differ materially from the methods of Roman procedure even to this day. Any one who will take the trouble to enquire into the methods of procedure as now applied by the continental countries of Europe, will note the wide divergence between that system and our own. Such investigation will also be illuminating in this: it will indicate the origin of many of our modern day reforms which have, either wholly or partially, failed because of the utter incongruity of the two systems.

Our early system of equity courts and jurisdiction, and particularly the practice in those courts, was, in large measure, an early adaptation of Roman or civil remedies and procedure by a common law country. The conflict of jurisdiction between courts of law and of equity, and the different methods of taking proof and of hearing, have continued through the centuries, and not until quite recently, in many common law jurisdictions, have these distinctions been either modified or entirely abated. Where equity courts are still maintained, as has been the practice through the years, the chancellor or judge takes all the evidence offered, as would be done under the Roman procedure, but, contrary to that practice, applies the common law rules of evidence and eliminates all incompetent, irrelevant, and immaterial matters from consideration in reaching his conclusion.

These matters have all been worked out and thoroughly discussed in the master-works of Sir Matthew Hale, Pollock & Maitland, Sir Henry Maine, and others, who devoted, in large part, the energies of their lives to the study of the history and philosophical development of our common law.

But it was not until Bentham's time, the latter part of the eighteenth and the fore part of the nineteenth centuries, that the real significance of the distinction between substantive law and procedure, or adjective law, was brought out with clear and proper emphasis. Blackstone, and all the writers before him, did not make the distinction as it has been understood since Bentham's day. These early writers and judges treated the form and ceremony by which substantive rights were established as of equal importance to the right itself. The form, the kind of writ, the rule, the absolute letter, it was contended, must be complied with. The one was as much law as the other.

I apprehend, however, that at this day we can all agree with Professor Holland when he says: "We have a law of persons; a substantive law, which explains the rights of those persons; and an adjective law, which describes the procedure by which redress is to be obtained when those rights are violated." And again: "So far as it defines, thereby creating, it is substantive law. So far as it provides a method of aiding and protecting, it is adjective law, or procedure."[1]

This distinction, first clearly voiced by Bentham, was undoubtedly one of his chief contributions to the cause of later procedural reforms in this country and in England, for it forms the underlying basis of all subsequent efforts in that direction and is the principle upon which all accomplished reforms are established.

But Bentham did not live to see his ideals, or any of them, either accepted or accomplished. His life's work seemed to be fruitless of any results, except the fugitive effort of Edward Livingston of Louisiana, one of his disciples, who framed a new code of procedure for that State in 1805. Livingston later, in 1820, at the request of the Louisiana legislature, accomplished a complete codification of the law, both civil and criminal, on lines mapped out by Bentham, but it failed of adoption. It became, however, the groundwork for much of the codification of many of our States, forty to fifty years later, and even influenced the work of the various commissions of England appointed from time to time between 1832 and 1869, whose united work culminated in the Judicature Act of 1873. But the conservatism of the bench and bar of England denied recognition to Bentham's genius during his life time and his chief work was brought out in France through the efforts of friends there.

It will not be necessary, nor will space permit me, to go into much, if any, detail concerning the various matters relating to com-

[1] Holland, Elements of Jurisprudence, 78, 348.

mon law pleading and practice. It will be presumed that my readers are all more or less familiar with this subject.

Michigan is still a common law State, so-called, and although many of the niceties, technicalities, and formalities of the early common law procedure have been either modified or entirely done away with by statute and otherwise, we still adhere in the main to that practice. A glance over the tables of contents of our practice books, both law and chancery, will show that in the former we still adhere to many of the forms of action and writs of an earlier period; and in the latter, that the methods of a century or more ago, in large measure, still obtain. The distinction between law and equity is still upheld. The fictions that had their origin in the early stages of common law development are, many of them, still retained, although they have long since lost their meaning and purpose. Until changed by recent rule we adhered to the "lost and finding" idea in trover and conversion, and still adhere to "implied promise" in assumpsit, and to certain feigned situations in ejectment; all of which arose out of a desire on the part of the early judges to establish certain substantive rights for which there was no convenient formula within the scope of some existing formula. Who of us realize when we write at the close of our declarations, "And, therefore, he brings suit," that originally, six or seven hundred years ago, the "suit" referred to was not the action about to be commenced, but the "suite," or train of suitors, a plaintiff was required to bring personally into court to vouch for the good faith of his cause, and, in a measure, to awe the defendant into submission. The larger the train and the more influential the suite, the more likely was the plaintiff to win his case. Such a meaning has become entirely lost to us, but we still use the form with a different meaning.

The distinction between personal and real actions is still maintained. Under the head of "personal actions" we still find assumpsit, trover, case, trespass, and replevin. Under "case" there are the various actions for damages, covering negligence, fraud, malicious prosecution, false imprisonment, and the like. The "real" actions are ejectment, summary proceedings to recover possession of lands, trespass on lands, nuisance, waste, and foreclosure of mortgage by advertisement. Special statutory legal remedies are provided for, which are contempt, mandamus, procedendo, quo warranto, habeas corpus, scire facias, proceedings against fraudulent debtors, proving execution of deed, discharge of mortgage of record, and vacating village plats. There are also special statutory proceedings against infants, corporations, certain municipal bodies, executors and admin-

istrators, and sheriffs, as well as proceedings to enforce liens and to recover penalties and forfeitures.

On the equity side of the court the various grounds for relief and subjects of jurisdiction are almost illimitable, and I will not attempt to mention them, simply saying in passing that relief in such courts is granted outside and beyond the jurisdiction of a court of law; for no court of equity is permitted to grant relief when there is an adequate remedy at law.

The volumes of our reports are full of cases where the suitor has mistaken his remedy, and has, in consequence, been denied relief. The misjoinder of causes of action and the hard-and-fast rules in relation thereto, find exemplification in many of our adjudicated cases. The rules as to both parties plaintiff and defendant in actions at law and complainants and defendants in suits in chancery, show that we still adhere, in the main, to the rules of several centuries ago. One has only to look through the work of Dicey on "Parties to Actions," or any similar work on procedure and practice, to find verification of this statement.

An examination of the prevailing forms, either at law or in equity, will show in many instances the needless prolixity of the pleadings still required.

Yet we are prone to believe, and we hear the sentiment generally expressed, that Michigan differs from the other States; that she needs no reform in her legal procedure; that her procedure already has been so simplified by statute that further simplification would be not only unnecessary but useless. This, again, is the natural expression of conservatism. We have become accustomed to our own procedure and are inclined to believe that, while other States may need reform in this regard, we do not.

The assumption still obtains, it is true, that we all understand these rules of pleading and, as lawyers, can apply them with accuracy and precision in establishing the substantive rights of our clients. But, is this assumption well founded? We have only to look through our digests on any subject relating to pleading and practice to find that it is not; that innumerable cases are reversed on account of defects in these particulars. Litigants are often carried from one court to the other on the wings of procedure to find at last that, instead of "kicking the goal," they have lost out completely because of some defective practice early in the game, and are thereupon "set back" or "penalized" to the point of beginning.

I recall with what interest and avidity I pored over Stephen on Pleading some thirty years ago. It seemed to me then—and I still

cherish the same feeling—that nowhere had I encountered so profound, so logical, and so clear an exposition of a single branch of the law as contained in that volume. Personally, therefore, I do not object to the system, and with Judge EVANS of the Supreme Court of Alabama, can say: "While as a citizen and a judge I deplore it, yet as a lawyer and dialectician I rejoice in it. As a means for the administration of justice its efficacy is to be doubted; while as an intellectual gymnasium its appointments could scarcely be improved upon."[2]

The first edition of Stephen on Pleading was published in 1824. Its close technical rules and formalisms constituted the practice of all English-speaking peoples at that time, except in the State of Louisiana where the first Livingston Code had been adopted in 1805, as already stated.

Bentham had radically attacked the conservative, though consummate and profound, exposition of the law by Blackstone, whose pupil he had been, from at least three standpoints. (1) As to the distinction which should be drawn between adjective and substantive law; (2) the futility and waste of having two separate and distinct systems of jurisprudence (law and equity) to administer substantive rights to a single people; and (3) the needless prolixity of all existing pleadings in proceedings at both law and in equity.

For many years Bentham was practically alone. But his vigorous attacks finally set men to thinking. Sir Henry MAINE, who wrote in 1874, said: "I do not know of a single law reform effected since Bentham's day which cannot be traced to his influence." Beginning with 1828 the English Parliament appointed a series of commissions to enquire into law procedure and other subjects and report such changes as should be enacted. Bentham died in 1831. It was in that year that the first commission so appointed made its report. The opinion was expressed by this commission that the existing rules of common law pleading were founded "in strong sense and closest logic, and so appear when well understood and explained."

It was believed by this commission that these rules could be adapted to the demands of modern times without impairing their integrity, and that any attempts to establish a new system would cause greater mischief than the retention of the old. The possible "fusion" of the administration of courts of law and equity was scarcely deemed a practical question at this time. It was still believed that the idea of the administration of legal and equitable

[2] 71 Cent. L. Jour. 327-9.

rights by distinct tribunals was founded upon the principles of eternal justice.

It was not until thirty years later that this question became a real live issue. The conservatism of the report of this first commission led, of course, to a no less conservative result. The so-called "Hilary" rules of court and some partial changes in chancery practice followed.

These rules, framed by the judges under authority granted by Parliament, but hardly touched the vital questions of reform then being agitated. Their chief aim was to remedy what were essential, but incidental, defects and faults of the existing system: the vagueness of general pleading; the prolixity of special pleading, and the necessity of certain formal allegations. They were an effort, it is said, "to stave off an immediate pressing difficulty by a patchwork scheme of modification and suspension," and operated to delay procedural reform at least twenty years. But, as stated by Sir Frederick Pollock, "the flood tide of 1832 had not yet ebbed. In letters, in science, in trade and industry, there was on all hands a consciousness of fresh vigor and an expectation of great results. As it must needs fall out, men's expectation was in some things beyond the mark, in some wide of it, in many far short of it."[3]

It was not, however, until the enactment of the New York Code of 1848 that the English legislators were again aroused to action. The radical and extensive aims of this Code, going far beyond the boldest designs of the English reformers, had a profound effect. Its practical workings were carefully watched, and its comparative success stimulated them to new efforts. Their movements, however, were more cautious than ours had been. In New York the prevailing system had been annihilated by a single blow, by a single act, and an entirely new and different system established in its place, comprising, so far as possible, many of the principal measures of reform advocated by Bentham and his followers.

England felt its way slowly. The enactment of their leading reformatory statutes continued through a period of twenty years (from 1852 to 1872), and in the end went even farther than any American code has ever gone—unless it be the recent New Jersey Code, passed in July, 1912. The first distinct change was marked by a series of statutes relating to both the law courts and the court of chancery. The first series, known as the "common law procedure acts," established a reform system of pleading at law and extended

[3] 3 Law Quart. Rev. 344 (1887).

through a period of enactment of eight years.[4] The second series established a reform system of equity pleading, and covered a period of ten years.[5] The first act of the first series contained 236 sections and two schedules of forms. Two years later it was followed by an amending and enlarging statute of 100 sections, and six years later by another, known as the "Common Law Procedure Act of 1860."

These statutes were not of sudden or ephemeral growth, but were based upon reports of distinguished law commissioners, led by no less profound lawyers and scholars than Lords Denman and Brougham. They were destined, however, to be short-lived, but they marked a great advance in the direction of reform. It was provided, among other things, "that causes of action, of whatever kind, may be joined in the same suit, provided they be by and against the same party." Forms of action were simplified and many fictions formerly required to be set forth in pleadings were abolished. Special demurrers were also abolished. But, more significant than all the rest, many equitable defenses were permitted in actions at law.

This act was largely followed by many of our American States, particularly Iowa, in establishing their several codes of procedure. But it fell far short of accomplishing the ultimate aim of the reformers in at least two particulars. The principle that a pleading, whatever the nature of the relief sought, should be a plain and concise statement of the material facts, had not yet been established. It was still possible to sacrifice substance to form. Nor had the wall which separated legal from equitable procedure been shaken materially. Some inroads had been made, however, and the general drift was clearly in the direction of ultimate fusion.

The second series of acts, relating to the court of chancery, began also in 1852. In that year two acts were passed, one to amend the practice and proceeding, and the other for the relief of suitors in that court. These were followed by another act in 1858, and four years later by the "Chancery Regulation Act of 1862."

By the Chancery Act of 1852 witnesses could be orally examined before the court itself. By the act of 1858 damages might be awarded in certain instances, and a jury might be called to assess such damages or to try questions of fact. On such trials the chancellor was given the powers of a judge sitting at *nisi prius*. The Act of 1862 went still farther, and provided that the court of chancery should try out every question of law and fact incident to the

[4] 15 & 16 Vict., c. 76; 17 & 18 Vict., c. 125; 23 & 24 Vict., c. 126.
[5] 15 & 16 Vict., c. 86 and 87; 21 & 22 Vict., c. 26; 25 & 26 Vict., c. 42.

relief sought. The court was permitted also, if more convenient, to transfer to the assizes the trial of questions of fact by a jury.

It is thus seen that these statutes also bore heavily against the barriers that still separated legal and equitable procedure and relief.

For nearly twenty years both these common law and equity acts flourished; but finally, under the leadership of Lords Cairns and Selbourne and many others of the English bench and bar, the fusion between law and equity was accomplished and the entire procedure of England placed upon a uniform basis by the Judicature Act of 1873. By this act the entire system of common law pleading was swept away. It was followed in 1875 by an amendatory and supplemental act, and both went into operation November 1, 1875. For nearly forty years it has been the sole guide of the English practitioner. Various amendatory acts have been passed from time to time, but these have all been in furtherance of the purposes of the original act and not in antagonism thereto. During this period of forty years it has been adopted by all the independent colonies of Great Britain. In 1879 Connecticut adopted it so far as practicable, and it has been in satisfactory operation there ever since. As already stated, in July, 1912, the Legislature of New Jersey passed a new practice act, incorporating all the fundamental principles of the English Judicature Act.

The various codes of the several States, beginning with the New York code of 1848, (and there are now about twenty-seven so-called code States) have much in common with the English judicature act. The chief aim of this act was to create and maintain a uniform law of procedure for all of the superior courts of England. This aim involved the general and fundamental principle that the whole controversy should be settled according to the substantive rights of the parties, completely, in one proceeding, by short and direct steps. To accomplish this aim it was provided:

1. That the great historical courts of the realm that had grown up through the centuries, having different and conflicting powers and jurisdiction, should be consolidated into one "supreme court of judicature." This was in effect but bringing together in modern form the original and ancient "king's court." There were two permanent divisions of this consolidated court, the "high court of justice," and the "court of appeals." For convenience the former was divided into several divisions, but each division had all the powers of the others. The appellate division possessed all the jurisdiction of the other divisions, and for the purpose of finally determining the substantive rights of the parties on appeal, the unusual right was given to this division to admit in its discretion new evidence orally

or by deposition, to the end that the controversy may be finally settled. This discretion, it is said, has been very seldom exercised. Nevertheless, upon the theory of the act that no judgment should be set aside or new trial granted for any technical error, or for any error in the admission or rejection of evidence, but only in the interest of justice, we can see that, where evidence has been improperly excluded at the trial, it does not become a very far reach for the appellate tribunal to supply such omission in order to enable it to pass finally upon the merits. Under this procedure no civil case can fail or be much delayed for want of power in the court to decide it completely.

In the provision requiring the court to administer all legal and equitable remedies in one and the same action, the English act avoided the mistake of the American codes wherein the latter attempted to abolish the distinction between actions at law and suits in equity but continued the old and distinctive methods of trial and remedies, such as injunction and specific performance. This has led to much hostile construction and criticism which was avoided by the provisions of the English act.

This act brought about an immediate unification of all the substantive law, and every division of the court was required by a single method of procedure to administer all the remedies that any party might have, whether at law or in equity, in every cause, action or dispute properly before it. Where there was any conflict between the rules of equity and the rules of the common law, the rules of equity should prevail. All old forms and distinct actions were abolished. A "statement of claim" was substituted for the declaration and bill in equity; a "defense" for plea and answer; and a "reply" for the replication. The pleadings ended here except by leave of court.

2. It was further provided that the courts themselves should make their own rules of procedure in amplification of and to carry out the spirit and intent of the act. This provision is significant. Parliament, it is true, reserved a veto power as to any rules so to be adopted, and this was believed to be a sufficient check upon the possible usurpation of power by the courts.

The act itself contains only about one hundred sections, while the rules of the court number from twelve to thirteen hundred. The practice act of Connecticut has only thirty-four sections, and the rules of court number three hundred and twenty-six. The New Jersey Act has only thirty-four sections.

It is assumed by this provision of the act relative to rules, that the courts, from their special training and knowledge in the admin-

istration of justice, are better qualified than a legislative body to prescribe such rules of procedure as will be conducive to a speedy hearing and determination of causes brought before them.

In this regard the judicature act differs from all the various American codes. This difference is vital. It has led to the failure of many of those codes to carry out the purposes originally intended, and has been the one thing above all others that has resulted not only in the apparent but the substantial success of the English Act. Here in our so-called code States the various legislatures, under constitutional authority, have prescribed not only the powers and jurisdiction of the courts, but their practice and procedure as well. This has led to a constant increase from year to year of procedural provisions, many of which are antagonistic to the purposes of the initial act; many with only a local or temporary application, and many to meet some pending or anticipated legal action. The result has been that the New York code has grown from four hundred sections in the beginning to the ponderous compass of four thousand sections. True, the courts here in both codé and common law States may, and do, under authority granted, prescribe rules for their own guidance and that of practitioners, but a single act of the legislature may nullify any one or more of them. In our own State, a common law State, our Supreme Court is authorized to prescribe rules governing the conduct of our courts, and we have a somewhat elaborate system so made. But an act of the legislature may abrogate the rule in whole or in part, or require a new rule to interpret or supplement the act itself. This is illustrated by Chancery Rule 37 supplementing the chancery appeals act of this State of 1907.

A system which permits two jurisdictions, one legislative and the other judicial, to prescribe rules of court procedure necessarily leads more or less to confusion, to uncertainty, to apparent antagonism, and creates prolixity of practice and prevents uniformity of decisions. In our own State we have only to examine the statutes relating to the procedure in attachment, garnishment, and many other statutory proceedings for a verification of the conclusion here stated and a demonstration of the superiority of the English method over our own.

3. The English rules are designated as "Orders" with various subdivisions, each order, however, covering the rules relating to a single topic.

I will briefly summarize the scope of these Orders, or such of them as have a bearing upon our own practice, with such brief comment as may seem pertinent.

Order 1 supplements the general purpose of the judicature act to unify the procedure, by providing for a single form of action. When we compare this method with our own, with its numerous forms of action and of defense at both law and in equity, we are led to ask why so many, and what sufficient reason, aside from their historical character, can be advanced in their support. If the various provisions of our own statutes regulating the practice and procedure in our courts of record were eliminated, I apprehend that their bulk would be reduced very materially. Under the English system every step in the cause is under the discretionary control of the court. A slip, therefore, in procedure will neither defeat nor delay the action.

Orders 64 and 70 provide, in substance, that the court or any judge shall have power to enlarge or abridge the time appointed by any rule for doing any act, upon such terms as justice may require, and this although the application therefor be not made until after the expiration of the time appointed or allowed. Non-compliance with any rule of practice shall not render any proceeding void unless the judge shall so direct, but such proceeding may be set aside in whole or in part or amended or otherwise dealt with in such manner and upon such terms as the judge shall direct. No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of such irregularity.

These provisions are significant and most conspicuous. Their enlargement of the discretionary power of the common law court cannot be doubted. It is, however, in harmony with the general trend of statutory enactments in both England and this country for the past seventy-five years, beginning in the former country with the Hilary rules of 1832. Our own statute of amendments and its predecessors illustrate the increasing authority given to the courts in this regard.

When it is thoroughly understood that adjective laws and adjective rights are only incidental to substantive rights and that the latter are more likely to be aided and protected by the tribunals especially prepared and empowered to administer them, the unrestricted discretionary power of these tribunals to direct their own procedure will not be seriously doubted. Both the federal and State constitutions in this country provide certain safeguards to personal liberty and to property rights. Under these provisions the jurisdiction of the several courts is defined. Neither property rights nor liberty can be taken without due process of law, and the right of trial by jury is preserved. All courts must proceed within these constitu-

tional limitations. They must have jurisdiction over the subject matter; parties must have a reasonable legal notice with an opportunity to be heard, and judgment must be confined to the issues presented. These limitations are fundamental to the rights and liberty of every citizen. They are substantive rights. Legislatures are equally bound to respect them. The question is as to whether this discretion in the matter of procedure only, shall be exercised by legislative or by judicial authority alone, or by both.

It seems to me on principle that, inasmuch as these constitutional rights must be observed by the courts, the means and methods of such observance, or the procedure, must necessarily come within the exclusive discretionary control of the courts alone and not jointly with any other body. Under our present practice, as we all know, our procedure is fixed by rules or by statute, or by both. The court is bound by them, and either party may invoke these rules or statutes to hinder or defeat the pending action. Our statute of amendments touches but feebly and inadequately the outer hem of the garment of procedural difficulties.

It must not be assumed, however, that questions of practice do not frequently arise in the English courts. They do; but they rarely defeat the pending action save only in cases of lack of jurisdiction or of such neglect as to constitute a forfeiture of a right to be heard on the merits.

Orders 16, 18 and 19 relate to the joinder of parties in causes of action and to counterclaims. Order 16 provides, in substance, that all persons may be joined in one action as plaintiffs in whom any right arising out of the same transaction or transactions exists, whether jointly, severally or in the alternative. On application, however, if it is deemed expedient, the court may order separate trials without amendment. If the cause is commenced in the name of the wrong plaintiff, the court may order the right person substituted or added upon such terms as may be just.

The rule as to parties defendant is equally as broad. Any one interested in whole or in part, or in the alternative, may be joined, and the judgment will be joint or several according to the respective rights or liabilities of the parties. Trustees, executors and administrators are permitted to sue or be sued in their representative capacity without bringing in the parties beneficially interested who, however, may be brought in on the order of the court. Where several parties are interested in the same way in a cause, the court may authorize one to prosecute or defend in behalf of all the others. No cause shall be defeated by reason of non-joinder or misjoinder of the parties. These may be either struck out or added, on the court's

own motion at any stage of the proceedings. Persons so added shall be duly summoned. Whenever contribution is claimed from a third party, such party may be brought in on leave of court and due notice.

Order 18 relates to joinder of causes of action. Several causes, whatever may be their nature, may be united in the same action; but if the court deems it more convenient to try them separately, he may so order.

Some limitations are placed upon this right; as, in actions to recover land, only questions growing out of the detention can be joined; also actions by trustees in bankruptcy cannot, without leave of court, be joined with an individual claim of such trustee. On the other hand, claims by or against husband and wife may be joined with claims by or against either of them, and personal claims by or against executors or administrators, when sued as such, may also be joined whenever they arise with reference to the estate.

Order 19 relates to defendant's counterclaim. Such defense may be made which arises out of the same or a different transaction in tort or contract, subject to the same limitations of convenience of trial as before stated. It also provides that the opposite party may demand particulars or a more definite pleading on short notice. Defective statements are either amended or struck out immediately.

Any abuse of the rights given under these orders is checked by the power of the court to correct such abuse and award commensurate costs.

The principle that the action shall proceed by short and direct steps is carefully safeguarded. There are no fictions.

Order 2 provides that the summons shall command the defendant to enter his appearance within a stated time and warn him that on his default judgment will be entered against him. The summons must be endorsed with a statement of the true nature of the claim and the true amount claimed when known. The pleadings must contain only a concise statement of the actual substantive facts (not the evidence) to be proved. Facts cannot be pleaded according to legal effect. Proofs are confined to the statements in the pleadings.

Under Orders 19 and 28 the court has unlimited power to grant amendments. Every step is a short and direct step to a given end.

A defendant may be called upon, on the application of a plaintiff, to satisfy the court at once that his defense is not a sham. If it is suspicious, terms may be imposed or the defendant forced to immediate trial. (Order 14).

Order 25 provides that there shall be no demurrers. Points of

law are to be raised in the answer and disposed of either on motion or at a trial.

The jury is usually required to find the disputed facts, special questions being submitted to them in writing for that purpose. Judgment is entered for the party entitled thereto by the trial judge upon such findings. This practice naturally lessens the grounds for granting new trials. Compare it with our own where new trials are frequently granted on grounds which have no relation to the facts. By the English method the court of review is enabled in the proper case to reverse the judgment and enter judgment for the party entitled thereto without a new trial.

Order 40 provides for motions for judgment, which are always made in the appellate court on the findings of facts by either court or jury in the court below.

Order 58 provides for appeals. All appeals are in the nature of a rehearing. Procedure by bills of exception do not exist. Notice of appeal is given which states the points of appeal. As already stated, the appellate court may take additional proof for the purpose of determining the substantive rights of the parties, and judgment is entered such as should have been entered in the court below.

Points of procedure are settled summarily. Questions on which final judgment depends must be raised at the first opportunity, or they are waived. On such questions an appeal may be taken immediately and has preference in the appellate court over appeals from final judgments.

Orders 50 and 53 provide that orders or judgments of the court shall be used in place of injunctions and writs of mandamus.

There are many other provisions, but enough have been referred to to fairly determine the general purpose and scope, as well as the general merits, of the English procedure.

That it has been successful is unquestioned, for it still receives the support of the leading members of both bench and bar of England and such of her colonies as have adopted it. Cases reversed on points of procedure or without due regard to the merits are rare, if not unknown. The leading principles of this act were adopted by Connecticut in 1879, as I have stated, and no member of the bench or bar of that State has been heard to say, so far as I am aware, that that State should abandon it or go back to the old methods of procedure.

This should be a sufficient demonstration that at least the underlying principles of the act can be adapted to American conditions

and life. The successful application of the principles of the act to the procedure of the Municipal Court of Chicago is significant.

The new Equity Rules of the Federal Court also follow closely the language of the rules of the English Judges framed under the Judicature Act.

That the system still has its opponents is also true, both in this country and in England. This is evidenced by a recent article, and the conclusions the writer reaches.[6] These conclusions, however, are wide of the mark, for nothing suggested in the article indicates that England proposes to change the fundamental principles of her procedure, but only to provide for certain incidental matters as must necessarily arise from time to time in a great growing country concerning so vital a subject.

That the system is not yet perfect, and probably never will be, must be conceded. Nor is it probable that a perfect system can ever be devised. But, in my judgment, there are many principles of the English procedure which, with proper limitations as to their application, we may adopt in our own practice to our advantage.

We may come to this subject of procedural reform to scoff, but, as the full light of a century of purposeful effort is thrown upon us, we remain to pray.

WILLIS B. PERKINS.

GRAND RAPIDS.

[6] 75 Cent. L. Jour. 402.

LEGISLATING THE INCUMBENT OUT OF OFFICE.

UNDER the English common law the officer's right or interest in the office which he held was regarded as a property right, an incorporeal hereditament.[1] Largely because of the inherent difference between the nature and incidents of the public office at common law and those of the public office in this country, this conception never gained general acceptance here.[2] In a few cases,[3] and particularly in the decisions of the courts of North Carolina,[4] offices have been asserted to be the property of the rightful incumbent. In these decisions the officer's right has been regarded as less absolute, perhaps, than that of BLACKSTONE'S conception, but these courts have insisted that it is none the less a property right. Nevertheless they have recognized the power of the legislature to abolish an office[5] and to decrease,[6] though perhaps not to abolish,[7] the compensation thereof during the term of the incumbent. They have further limited the officer's property in the office and its perquisites by recognizing his lack of power and authority to sell or assign the office or to delegate to another the performance of its duties.[8]

A consideration of these limitations on the meaning of the word "property" as a designation of the right which the lawful incumbent has to the office and the incidents thereof leads one to the conclusion that the value of the term as descriptive of the relation is

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[1] Blackstone's Comm. 36. See article on Recovery of Salary by De Facto Officer, 10 Mich. Law Rev. 291.

[2] Taylor and Marshall v. Beckham (1899), 178 U. S. 548; Conner v. Mayor of New York (1851), 5 N. Y. 285; Donahue v. County of Will (1881), 100 Ill. 94; State v. Henderson (1910), 145 Iowa 657, 124 N. W. 767; State v. Hawkins (1886), 44 Ohio St. 98, 109; State v. Dews (1835), R. M. Charlton (Ga.) 397.

[3] Wammack v. Holloway (1841), 2 Ala. 31, 33. With regard to this case Justice Sanford of the New York Superior Court, 4 N. Y. Sup. Ct. Rep. (2 Sanf.) 355, 370, said, "In that case, this remark (that the right to exercise office is as much a species of property as any other thing capable of possession) is rather a figure of speech than a judgment, determining an office to be property. It was a strong mode of expressing the right which one elected to an office has to hold and enjoy it, as against all intruders and unfounded claims; which is as perfect a right, beyond doubt, as the title of any individual to his property, real or personal. But the nature of that right, and its liability to control by legislative action, is quite a different thing."

Mayor and Aldermen of Memphis v. Woodward (1873), 59 Tenn. (2 Heisk.) 499, 501; Dodd v. Weaver (1855), 34 Tenn. (2 Sneed) 669, 670; Cameron v. Parker (1894), 2 Okla. 277.

[4] Hoke v. Henderson (1833), 15 N. C. 1, 25 Am. Dec. 677; King v. Hunter (1871), 65 N. C. 603, 609; Bunting v. Gales (1877), 77 N. C. 283, 285; Wood v. Bellamy (1897), 120 N. C. 212, 217.

[5] Wood v. Bellamy (1897), 120 N. C. 212.

[6] Cotten v. Ellis (1860), 52 N. C. (7 Jones) 545.

[7] Cotten v. Ellis (1860), 52 N. C. (7 Jones) 545.

[8] Wood v. Bellamy (1897), 120 N. C. 212, 217.

practically destroyed by the exceptions or limitations, and that its use in this connection is consequently unfortunate. It is rather singular that the inappropriateness of using this term to describe a relation which, by his own definition, lacked so many, and bore so few, of the characteristics of property as we commonly know it did not occur to the learned justice[9] who first announced the doctrine in this country. That a term so inappropriate and so misleading and which the courts of North Carolina recognized for so long a time[10] should not have led to more frequent mistakes in construing the law of officers than it did, is remarkable but fortunate. Except for the instance furnished by the case in which the relation of the officer to his office was first designated as that of the owner of property and in which it was decided that the law-making body cannot legislate an officer out of office without abolishing the office,[11] only one or two instances of the deleterious influence of the term on the law of officers can be found in the decisions of the courts of North Carolina. The most evident of these is a principle which is the natural corollary of that established in the case of *Hoke* v. *Henderson,* i. e., that though the legislature may reduce the salary of an office during the term of an incumbent, it cannot wholly abolish it, as this would be doing by indirection what the court in the *Hoke* case held the legislature could not do directly.[12]

When the Supreme Court of North Carolina in the case of *Mial* v. *Ellington*[13] refused to recognize the doctrine of property in an office and therefore to deny the power of the legislature to remove the officer without abolishing the office, and in so doing expressly overruled the *Hoke* case, it seems that this case should have been rendered incapable of further harm in this country as a precedent, but that this has not been the result we shall attempt to show further along in this article.

In general, as has been hereinbefore said, the doctrine that a public office is the property of the lawful incumbent has found no support in this country. Our courts have been equally unanimous in their refusal to accept the doctrine that on the election or appointment of a citizen to an office and his acceptance thereof, a contract arises between him and the state which in a measure restrains the

[9] Chief Justice Ruffin in Hoke v. Henderson (1833), 15 N. C. 1.

[10] The officer's right to his office was regarded as property by the North Carolina courts until 1903, when the case of Mial v. Ellington (1903), 134 N. C. 131, was decided overruling Hoke v. Henderson and the North Carolina cases following it.

[11] Hoke v. Henderson (1833), 15 N. C. 1.

[12] Cotten v. Ellis (1860), 52 N. C. 545.

[13] (1903), 134 N. C. 131.

legislature from interfering with the office or officer.[14] As a result of these views as to the nature of the officers's right to office, the legislature has been conceded practically unlimited authority and control over offices, except in so far as their power is limited by the constitution of the state where it is called in question. Many limitations are placed on the power of the legislature in this respect by the constitutions of the various states. The commonest of such provisions are those which forbid the increase or decrease of the compensation of an officer during the term for which he has been chosen,[15] and those which prohibit a shortening or lengthening of the term of office during the incumbency of one chosen to office before the passage of the act.[16] These and other less common constitutional provisions[17] accomplish what the North Carolina courts attempted to do by decision. Although the prevalence of constitutional restrictions of the sort mentioned above have occasionally led persons who have examined the law hastily to regard these limits as inherent characteristics of an officer's right to the office, it is manifest that in the absence of constitutional restrictions the legislature has absolute control over statutory offices and may abolish them,[18] may change the salaries thereof by increasing, diminishing or abrogating them,[19] may lengthen or shorten the terms thereof,[20] may add to or take away from the duties either with or without

[14] Newton v. Commissioners (1879), 100 U. S. 548, 559; Conner v. Mayor of New York (1851), 5 N. Y. 285, 296; City Council of Augusta v. Sweeney (1871), 44 Ga. 463; Butler v. Pennsylvania (1850), 10 How. 402; Commonwealth v. Bacon (1821), 6 Serg. & Rawle 322; Locke v. City of Central (1878), 4 Colo. 65; City of Hoboken v. Gear (1859), 27 N. J. L. 265; Farwell v. Rockland (1872), 62 Maine 290, 299; Barker v. City of Pittsburgh (1846), 4 Pa. St. (4 Barr) 49; Harvey v. Board of Com'rs (1884), 32 Kan. 159; Loving v. Auditor of Public Accounts (1882), 76 Va. 942.

[15] Iowa Const., Art. V, sec. 9; Kansas Const., Art. I, sec. 15, Art. III, sec. 13; Illinois Const., Art. V, sec. 23.

[16] This is accomplished where the Constitution prescribes the length of the time of office. Iowa Const., Art. IV, sec. 2; New York Const., Art. IV, sec. 1; Michigan Const., Art. VI, sec. 1.

[17] For citations to constitutional provisions of various sorts, see Stimson, Federal & State Constitutions of the United States.

[18] City Council of Augusta v. Sweeney (1871), 44 Ga. 463; Farwell v. Rockland (1872), 62 Maine 296, 299; People v. Auditor (1838), 2 Ill. (1 Scammon) 537; Prince v. Skillin (1880), 71 Maine 361, 36 Am. Rep. 325; Bryan v. Cattell (1864), 15 Iowa 538; Reid v. Stevens, (1910), 126 N. Y. S. 379, 70 Misc. 177.

[19] Butler v. Pennsylvania (1850), 10 How. 402; Commonwealth v. Bacon (1821), 6 Serg. & Rawle 322; Farwell v. Rockland (1872), 62 Maine 296, 299; Barker v. City of Pittsburgh (1846), 4 Pa. St. (4 Barr) 49, 51; Conner v. Mayor of New York (1851), 5 N. Y. 285; County of Douglas v. Timme (1891), 32 Neb. 272; Harvey v. Board of Com'rs (1884), 32 Kan. 159; Fredericks v. Board of Health (1912), — N. J. L. —, 82 Atl. 528.

[20] Farwell v. Rockland (1872), 62 Maine 296, 299; Taft v. Adams (1854), 69 Mass. (3 Gray) 126; State v. Ure (1912), — Neb. —, 135 N. W. 224.

increasing or diminishing the salaries thereof,[21] and all of these changes may be made to take effect during the terms of the incumbents who were serving when the acts were passed as well as at the close of such terms.[22]

In the face of so many decisions conceding to the legislature such a broad power over offices which that body has created, it is difficult to understand how any further question of the right of legislative control could have arisen. There are, however, a few comparatively recent cases which have questioned the right of the law-making body to legislate an incumbent out of office by abolishing the office and in the same or a concurrent act re-creating the office under a different name with substantially the same duties.[23] If the courts in these cases mean to assert that by abolishing the office under one name and re-creating it under another no legislative intent to remove the incumbent of the old office is exhibited, and that consequently the incumbent of the old office becomes the incumbent of the new for the remainder of his term, we agree that their interpretation would be reasonable under certain statutes. But if they mean to say, as they undoubtedly do, that, in the absence of limitations imposed by the state constitution, the legislature has not the power by a properly worded statute to remove an officer before the end of his term and appoint or provide for the appointment of a person to immediately succeed him, they are in error. If the power to remove and appoint another without cause be conceded to the legislature, it is clear that it can accomplish this result by a properly worded statute abolishing an office under one name and re-creating it under another. So long as the North Carolina courts took the view that an office is the property of the lawful incumbent, they were consistent, at least, in holding that the legislature could not summarily and without cause remove an incumbent from office without in good faith abolishing the office. The change in the current of authority in that state caused by the overruling in *Mial* v. *Ellington*[24] of the case of *Hoke* v. *Henderson* and the later North Caro-

[21] State v. Dews (1835), R. M. Charlton (Ga.) 397; Atty. Gen. v. Squires (1859), 14 Cal. 13; State v. Board of Com'rs (1899), 23 Mont. 250.

[22] Taft v. Adams (1854), 69 Mass. (3 Gray) 126; Commonwealth v. Bacon (1821), 6 Serg. & Rawle 322; Barker v. City of Pittsburgh (1846), 4 Pa. St. (4 Barr) 49, 51; Conner v. Mayor of New York (1851), 5 N. Y. 285; State v. Dews (1835), R. M. Charlton (Ga.) 397; Board of Com'rs (1899) 22 Ind. App. 60; Touart v. State (1911), 173 Ala. 453, 56 South 211.

[23] Malone v. Williams (1907), 118 Tenn. 390; State Prison v. Day (1899), 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295; Wood v. Bellamy (1897), 120 N. C. 212, 27 S. E. 117.

[24] (1903), 134 N. C. 131.

lina cases following it[25] should have put an end to the use of those earlier cases as authorities in the support of the principle of limited legislative control over offices. This has not been the result, however, as is shown by the case of *Malone* v. *Williams*,[26] decided in 1907. In this case the court held that the legislature could not abolish, during the term of the incumbent, an office which they had created and in the same act re-create it under another name with practically the same duties as it had borne before, and require it to be filled by a special election. This amounts to saying that an officer cannot be legislated out of office, *i. e.*, removed from office by the legislature, unless the office is abolished with a bona fide intent to discontinue it. The court referred to no clause of the constitution of the state which limited the power of the legislature over the office in question, and there appears to be none having that effect. In reaching its conclusion the court relied on certain Tennessee cases[27] as authorities for the principle that an office is the property of the lawful incumbent. Though certain loose statements to that effect are found in the opinions in these cases, all that is really decided by these cases is that the lawful claimant to an office who is kept out of it by another claimant has a right thereto which may be enforced[28] in a civil proceeding[29] and may sue and recover the salary which he would have received had he served.[30] There is nothing in the facts or opinions in these cases to indicate that anything further was meant by these loose statements than simply to express in an emphatic way the right which the lawful claimant has to the office as against one who has intruded therein.

In *Malone* v. *Williams* the court lays great stress on the decisions of the North Carolina court, on the question of an officer's right to office, from *Hoke* v. *Henderson*[31] down to and including *State Prison* v. *Day*,[32], without mention, however, of *Mial* v. *Ellington*.[33] And

[25] State Prison v. Day (1899), 124 N. C. 362, 32 S. E. 748, 46 L. R. 295; Wood v. Bellamy (1897), 120 N. C. 212; King v. Hunter (1871), 65 N. C. 693; Cotten v. Ellis, (1860), 52 N. C. (7 Jones) 545.

[26] (1907), 118 Tenn. 390.

[27] Dodd v. Weaver (1855), 34 Tenn. (2 Sneed) 670; Memphis v. Woodward (1873), 59 Tenn.(12 Heisk.)499, 27 Am. Rep. 750; Moore v. Sharp (1896), 98 Tenn. 65, 38 S. W. 411; Nelson v. Sneed (1903), 112 Tenn. 36, 83 S. W. 788; Mahoney v. Collier (1903), 112 Tenn. 78, 83 S. W. 672. See also Boring v. Griffith (1870), 48 Tenn. (1 Heisk.) 456.

[28] Dodd v. Weaver (1855), 34 Tenn. (2 Sneed) 670.

[29] Mahoney v. Collier (1903), 112 Tenn. 78; Nelson v. Sneed (1903), 112 Tenn. 36. See also Boring v. Griffith (1870), 48 Tenn. (1 Heisk.) 456; and Anderson v. Gossett (1882), 77 Tenn. (9 Lea) 644.

[30] Memphis v. Woodward (1873), 59 Tenn. (12 Heisk.) 499, 27 Am. Rep. 750.

[31] (1833), 15 N. C. 1.

[32] (1899), 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295.

[33] (1903), 134 N. C. 131.

the court is correct in its conclusion that these decisions, with the exception of the last, uphold the principle which it asserts in this case. Thus the bad influence of these early North Carolina cases continues.

As further authority for its stand the Tennessee court cites certain cases decided by the courts of Utah, Kentucky and Louisiana.[34] In referring to these cases as authority the court overlooked the fact that in all but one of them the decision against the power of the legislature was based on the ground that the acts in question were in contravention of certain provisions of the state constitution protecting the term of the officer.[35] The court in *Malone* v. *Williams* made the same mistake with respect to a certain Tennessee case which it cites in support of its conclusion.[36]

A Utah case cited by the court in support of the principle asserted in *Malone* v. *Williams* is undoubtedly correctly decided and at first glance seems to uphold the Tennessee case.[37] In this case the city council of Ogden under legislative authority had created the office of captain of police, and the relator before the court had been appointed thereto. Subsequently an ordinance was passed discharging the relator and (as was claimed) abolishing the office. Within ten days thereafter an ordinance was passed making provision for the same office and for the appointment of an officer to fill the place. An officer was appointed under the second ordinance and a dispute arose as to which of the two claimants was entitled to hold the office. The Utah court held that the second ordinance was invalid and that the original officer was entitled to the office. In his opinion Chief Justice BARTCH said, "An officer whose term is during good behavior, or who can only be removed for cause, cannot thus be legislated out of office." The statute delegating the power to the city council to create the office and to provide for the appointment of an officer, also provided for the removal of such appointee for cause. The Utah court's decision rested on an interpretation of this statute and it construed the provision for removal for cause to exclude removal summarily. Manifestly the legislative delegation of power here bore much the same relation to the power of the

[34] State v. Wiltz (1856), 11 La. Ann. 439; Adams v. Roberts (1904), 119 Ky. 364, 83 S. W. 1035; Silvey v. Boyle (1899), 20 Utah 205, 52 P. 602.

[35] State v. Wiltz (1856), 11 La. Ann. 439; Adams v. Roberts (1904), 119 Ky. 364, 83 S. W. 1035. In both of these cases it was held that a constitutional provision fixing the term of office prohibited the legislature from removing the incumbent therefrom before the expiration of his term without in good faith abolishing the office.

[36] State v. Leonard (1887), 86 Tenn. 485, 7 S. W. 453.

[37] Silvey v. Boyle (1899), 20 Utah 205, 52 Pac. 602. See also to same effect, Wilson v. Mayor and Council of Dalton (1910), 135 Ga. 240, 69 S. E. 163.

council as a constitutional provision bears to the power of the legislature.

Summing up, it appears that the conclusions of the court in *Malone* v. *Williams* are supported by the decisions of the court of North Carolina alone. It is only fair to the Tennessee court to say that its judgment in this case was largely based on other reasons than those to which we have referred and there is consequently no quarrel with the result reached therein. The doctrine and principles of that case in respect to the law of officers, however, are entirely erroneous and are, and were, unsupported by any cases not overruled in the jurisdictions in which they were decided. It is to be hoped that the doctrine that the office is the property of the lawful incumbent and that the power of the legislature to deal therewith is limited by this principle will end with this case. The power of the legislature over offices, as it is in general, is absolute except as limited by constitutional provisions, and the motive inspiring the legislative act regulating an office should not be considered by the court[38] unless there is a veiled attempt to avoid some constitutional restriction.

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[38] State v. Lindsay (1899), 103 Tenn. 625, 630.

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NOTE AND COMMENT.

ADVERSE POSSESSION IN THE CASE OF THE RIGHTS OF WAY OF THE PACIFIC RAILROAD COMPANIES.—While the weight of authority is probably to the effect that railroad rights of way may be lost by adverse possession, the authorities are by no means agreed. See 12 MICH. L. REV. 144. The rights of way of certain of the Pacific Railroad Companies have been declared not to be subject to the ordinary rules as to adverse possession, on the ground that by the Congressional grants the four-hundred-foot-strips were conveyed only for railroad purposes with the ultimate possibility of reverter in the United States, which had the effect of making such lands inalienable by the railroad companies whether by voluntary deed or by lapse of time under the general statutes of limitation. *Northern Pacific R. Co.* v. *Smith,* 171 U. S. 267, 43 L. Ed. 160, 18 Sup. Ct. 794; *Northern Pacific R. Co.* v. *Townsend,* 190 U. S. 267, 47 L. Ed. 1044, 23 Sup. Ct. 671; *Northern Pacific R. Co.* v. *Ely,* 197 U. S. 1, 49 L. Ed. 639, 25 Sup. Ct. 302. Before the decision in the last mentioned case an act of Congress (April 28, 1904) was approved whereby it was declared "That all conveyances heretofore made by the Northern Pacific Railroad Company or by the Northern Pacific Railway Company,

of land forming a part of the right of way of the Northern Pacific Railroad, granted by the Government by any act of Congress, are hereby legalized, validated, and confirmed: *Provided,* That no such conveyance shall have effect to diminish said right of way to a less width than one hundred feet on each side of the centre of the main track of the railroad as now established and maintained." 33 Stat. 538, c. 1782. The court held that under the provision quoted occupants of the other one hundred feet of the right of way who had been in adverse possession thereof for the statutory period acquired ownership, the adverse possession being considered "as tantamount to a conveyance."

By an act of Congress approved June 24, 1912, (37 Stat. 138) it was provided as follows: "That all conveyances or agreements heretofore made by the Union Pacific Railroad Company," or certain other enumerated railroad companies, "of or concerning land forming a part of the right of way * * * granted by the Government * * * and all conveyances or agreements confining the limits of said right of way, or restricting the same, are hereby legalized, validated, and confirmed to the extent that the same would have been legal or valid if the land involved therein had been held by the corporation making the conveyance or agreement under absolute or fee simple title." If the act had concluded at that point, it would seem that its construction would have been essentially the same as that given to the act of 1904, and an adverse possessor of a portion of the right of way for the required period of time prior to the enactment of the statute would have acquired absolute ownership. But in the second paragraph it was further declared "That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporation, * * * by or through adverse possession of the character and duration prescribed by the laws of the State in which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee instead of being granted as a right of way." By § 3 of the Act it was provided that nothing in the act shall be considered as having the effect to diminish "said right of way to a less width than fifty feet on each side of the center of the main track."

In *Union Pacific Railroad Company* v. *Laramie Stock Yards Company,* 34 Sup. Ct. 101, it appeared that the railroad company had brought an action of ejectment to recover possession of certain lands which were within the limits of the original four-hundred-foot strip granted by the Government; that defendant company had answered setting up ten years adverse possession before action instituted and title thereby under act of June 24, 1912; that plaintiff had demurred to said answer; and that said demurrer had been overruled, judgment being entered that plaintiff "take nothing in said action." The Supreme Court reversed the lower court, holding that the second paragraph of the act of 1912 operated only prospectively, that said act did not have the effect of vesting title in an adverse possessor whose possession was prior to the passage of said act. Much weight was given to the fact that the first paragraph contained the expression "heretofore made," while nothing

of that sort appeared in the second paragraph. The two parts of the act of 1912 in question, the one dealing with "conveyances" and "agreements," the other regarding adverse possessions, were both contained in one section, though in separate paragraphs. The first paragraph used the expression "heretofore made," and under that provision, if Congress had stopped there, the court would have undoubtedly held, following the *Ely* case, that a prior adverse possession for the statutory period had conferred title upon the possessor. But Congress went on, in the same section, and mentioned expressly adverse possession, omitting the word "heretofore." No language, however, expressly looking to the future was used. Admittedly, as the court said, it was a question of construction as to whether the adverse possession paragraph was intended to speak to the past or to the future. By applying the general rule that statutes should, unless it appears that the intention was otherwise, be construed as operating prospectively, the court concluded that the provision in question looked to the future. It is submitted that the history of the legislation, the construction given to the act of 1904, and the wording of the whole of § 1 of the act in question showed a contrary intention, and that the lower court was right. R. W. A.

RECOVERY OF SALARY BY DE FACTO OFFICER WHERE THERE IS NO OTHER CLAIMANT.—In two recent cases, *State ex rel. Kleinsteuber* v. *Kotecki* (Nov. 8, 1913), 144 N. W. 200 and *State ex rel. Elliott* v. *Kelly* (Oct. 7, 1913), 143 N. W. 153, the Supreme Court of Wisconsin considered the question of the right of the de facto officer to recover the salary of his office, and held that where there is no other claimant and the de facto officer has taken possession of the office in good faith he is entitled to the salary attached to the office. In each case the question arose in a mandamus action to compel the disbursing officers of a city to take certain steps in payment of the salary attached to a city office. The opinion in the later case contains no general discussion of the de facto officer's right to salary. It contains simply an assertion of the right and refers to the earlier case for authority for the principle. In the earlier case, *State v. Kelly*, on this point Justice MARSHALL in his opinion said, "We agree with counsel that such (that the de facto officer who takes possession of the office in good faith, where there is no other claimant, is entitled to the salary) is the rule by the better, if not the weight of, authority. We decline to follow the lead of courts which deny the right to compensation to officers de facto who have, in good faith, performed the duties of a de jure office, when there is no other person who, under any circumstances, can properly claim the salary incident. The salary of an office is an incident thereto and not, necessarily, an incident to service by a de jure incumbent. Therefore, in case of the incumbency being, in good faith by an officer de facto, and (no) adverse claimant, there is no justice in denying to the occupant the compensation incident to the place during such incumbency if the corporation is willing to grant it."

The court, in this case, evidently disregards the quite generally accepted principle of the law of public officers that the basis of the officer's right to

salary is not services performed, not contract, but title to the office; the court disregards also the primary principle of the de facto doctrine that it is not a quality of the incumbent of the office and does not create any right in, or protect him, but that it is a doctrine for the protection of third parties, who deal with the incumbent in good faith as the de jure officer, adopted in order to facilitate the conduct of the public business.

The desire to reach a result in this particular case which would work no hardship on one who honestly and in good faith had performed services for the public undoubtedly influenced the court to decide for the plaintiff. If the incumbent was the de facto, rather than the de jure officer it was either because he was not a citizen of the state at the time of his appointment or because he negligently failed to qualify by filing his oath of office until after the termination of the prescribed period. If the statutes of the state should be interpreted as requiring either or both of these as requisite to the de jure officer (and this the court did not decide) the effect of permitting plaintiff to recover the salary of the office, which he thus wrongfully attempted to fill, is practically to override the will and intent of the legislature in prescribing such requirements. The tendency of such a decision will be, if not to encourage fraud, at least to invite carelessness on the part of candidates for office in looking after their eligibility and in qualifying for office after elected. Thus the purpose of the legislature in requiring rules of eligibility and certain steps to be taken in qualifying for the office will be defeated. No such result is reached by a correct application of the de facto doctrine, for when so applied it protects the public, but does not aid the honest though mistaken claimant of the office in asserting rights which are not his.

In this case the claimant, though perhaps honest, was not without fault for he negligently failed to file his oath. It is a novel doctrine, indeed, that one who, though acting with good intentions, has negligently failed to take certain steps necessary to complete his title may still recover as though he had title. In this respect the court here has gone much farther than the courts in those cases which have hitherto recognized the de facto officer's right to salary where there is no other claimant. Here the negligence which prevented the claimant from becoming the de jure officer was his own, in the other cases in which the same principle has been declared the negligence has been that of another. See *Peterson* v. *Benson*, (1910), 38 Utah 286, 112 Pac. 801; *Elledge* v. *Wharton* (1911), 89 S. C. 113, 71 S. E. 657; *Behan* v. *Davis* (1892), 3 Ariz. 399, 31 Pac. 521; *Adams* v. *Directors* (1895), 4 Ariz. 327, 40 Pac. 185; where the negligence was that of the appointing officers. But see *Cousins* v. *Manchester* (1892), 67 N. H. 229, 38 Atl. 724.

The courts in the cases just cited refuse to apply the generally accepted principles of the de facto doctrine and of the officer's right to salary to the facts before them because they felt that it would be "inequitable" (used in a popular sense) to do so as by so doing a hardship would be imposed on the claimants through no fault of their own. Now comes the Wisconsin Court and for the same reason of hardship to the claimant extends the application of this "equitable rule" to a case where the officer, though acting with good intentions, was negligent. Will the process go on? There are still many other

instances in the application of the de facto doctrine where it has worked hardship to the claimant in good faith to which the "equitable rule" might be extended without the application being more illogical than its present use. (See article—RECOVERY OF SALARY BY DE FACTO OFFICER—10 MICH. L. REV. 178-186, 291-299, for a general discussion of the subject.) These decisions do remove the hardship from the honest claimant but they place it on the public. The state's burden of enforcing rules regarding eligibility and qualification is made much heavier by removing the officer's self-interest in the matter. At a time when the sentiment for a higher standard of fitness for public office is growing in strength, any decision of our courts which tends to create a lighter regard for the laws by which we secure this standard is much to be regretted. It is an old saying that "hard cases make bad law" and the cases mentioned furnish an apt illustration of the maxim. It is to be hoped that other courts in examining these phases will see the uncertainty and ultimate injustice that they have injected into the law of the subject and will not be tempted to follow them in order to prevent a hardship to a well-intentioned though careless claimant. G. S.

THE RIGHT TO DIVERT WATER TO NON-RIPARIAN LANDS.—Though at one time in England there may have been some doubt as to the character of a riparian owner's rights in the waters of the stream, it must be considered as definitely settled by a series of cases that the doctrine of reasonable use by all the proprietors on the stream is the rule of the common law, and that the matter of priority of use or appropriation is, under that system, immaterial, unless, of course, a question of prescriptive right is involved. *Wright* v. *Howard*, 1 Sim. & S. 190; *Mason* v. *Hill*, 3 B. & Ad. 304, 5 id. 1; *Wood* v. *Waud*, 3 Exch. 748; *Embrey* v. *Owen*, 6 Exch. 353; *Sampson* v. *Hoddinott*, 1 C. B. (N. S.) 590, *Miner* v. *Gilmour*, 12 Moore P. C. 131. The American courts have generally adopted the view of the law early expressed by Chancellor KENT, which is the view approved by the English courts above referred to. See 3 KENT, COMM. *439. The rule of law is clear, the difficulties arise in its application to particular cases in the determination of the question as to whether a certain use is reasonable or not. In the second edition of his splendid treatise on IRRIGATION AND WATER RIGHTS, Mr. KINNEY has said: "Under the common law there are three classes of uses which the riparian proprietors may or may not make of the waters of a stream flowing by their lands. These are: First, natural or primary uses for which any riparian proprietor may take the waters of the whole stream; second, artificial uses or uses which are not classified as those for natural wants; and, third, uses of the water which may not be made at all; such, for example, would be the use of water by a riparian owner upon non-riparian lands." § 486.

In the first class of uses mentioned by Mr. KINNEY in which the water is used for the so-called primary or ordinary or natural purposes, it has been said by a great many courts that it is not unreasonable to abstract water to such an extent that in the case of small streams the supply is entirely exhausted. *Miner* v. *Gilmour*, supra; *Swindon Water Works Co.* v. *Wilts &*

Berks Canal Navigation Co., L. R. 7 H. L. 697; *Wadsworth* v. *Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Arnold* v. *Foot*, 12 Wend. 330; *Evans* v. *Merriweather*, 3 Scam. 492, 38 Am. Dec. 106; *Stanford* v. *Felt*, 71 Cal. 249, 16 Pac. 900; *Willis* v. *Perry*, 92 Iowa 297, 60 N. W. 727, 26 L. R. A. 124; *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 26 S. D. 307, 128 N. W. 596; *Caviness* v. *La Grande Irr. Co.*, 60 Ore. 410, 119 Pac. 731. In the second class of cases the amount of water that may be wholly diverted from the stream depends upon the volume of water and the effect of the diversion upon the proprietors lower down. *Embrey* v. *Owen*, supra; *Sampson* v. *Hoddinott*, supra; *Swindon Water Works Case*, supra; *Tyler* v. *Wilkinson*, 4 Mason 397, Fed. Cas. 14, 312; *Eliot* v. *Fitchburg R. Co.*, 10 Cush. 191, 57 Am. Dec. 85. Cases to the same effect are numerous. However, it is Mr. KINNEY'S third class of cases with which this note is particularly concerned.

Is it true, as stated, that a riparian proprietor has no right to use the water upon non-riparian lands? In the leading English case, which later English cases have referred to as practically codifying the law of rights in running streams, the doctrine is laid down that the rights of riparian ownership extend only to use upon and in connection with an estate which adjoins the stream, and cannot be stretched to include uses reasonable in themselves, but upon and in connection with non-riparian estates. *Swindon Water Works Co.* v. *Wilts & Berks Canal Navigation Co.*, L. R. 7 H. L. 687. And in *McCartney* v. *Londonderry & Lough Swilly Ry.* [1904] A. C. 301, the House of Lords made a declaration that the railway company, which had been taking water by a pipe from a river where the railway right of way crossed same to a tank about one-half mile distant for use in running the company's engines, had no right to continue such diversion of water as against the lower riparian proprietor. There the amount of water diverted was so small in relation to the whole volume of water in the stream that the lower riparian proprietor's mill could have been run by the diverted water only three minutes in each day. In both cases the suggestion is made that if the diverting upper owner had said, "We do not claim a right at all, but what we propose to do is such a trivial matter that it cannot do you any practical injury," the court might have thought fit not to interfere. The Lord Chancellor, in the *McCartney* case, said, "If the question were the reasonableness in respect of quantity, I should think it a most unreasonable thing that the use of a stream passing through a very small area of riparian land should be made to extend to forty miles of country. * * * Speaking of it simply in respect of quantity, I think it more unreasonable than supplying drinking water to an asylum built on the banks, which has been held to be unlawful. But, in truth, it is not a question of the quantity at all. * * * The use which they (in this case the railway company) claim to make of it is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream. * * * It is a confiscation of the rights of the lower owner."

In the English courts, then, it seems clear that whatever may be the right of a riparian owner to divert water and consume it upon his riparian lands, he has no *right* to abstract water for consumption or use upon non-riparian lands, whether owned by him or not, *and regardless of the amount used.*

In this country decisions to the effect that the diversion of water beyond the watershed or for use upon non-riparian lands is unreasonable and therefore unlawful as against lower riparian owners, are not infrequent. *Bathgate* v. *Irvine*, 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; *Williams* v. *Wadsworth*, 51 Conn. 277; *Anderson* v. *R. Co.*, 86 Ky. 44, 5 S. W. 49; *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *McCarter* v. *Water Co.*, 70 N. J. Eq. 525, 61 Atl. 710, 70 N. J. Eq. 695, 65 Atl. 489, 14 L. R. A. (N. S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116; *Garwood* v. *R. R. Co.*, 83 N. Y. 400, 38 Am. Rep. 452; *Penna. R. R. Co.* v. *Miller*, 112 Pa. St. 34, 3 Atl. 780; *Land Co.* v. *Clements*, 98 Tex. 578, 86 S. W. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653. It may perhaps be said, however, that in all of these cases the facts showed that the abstracted water sensibly diminished the supply in the stream and resulted in actual present or potential damage to the lower owner. Where the amount diverted was so small as to cause no injury to the present or future use of the lower riparian land it has been held that the diversion, though for uses unconnected with the enjoyment of riparian lands, was not actionable. *Harris* v. *Ry. Co.*, 153 N. C. 542, 69 S. E. 623, 31 L. R. A. (N. S.) 543, 138 Am. St. Rep. 686; *Gillis* v. *Chase*, 67 N. H. 161, 31 Atl. 18, 68 Am. St. Rep. 645; *Lawrie* v. *Silsby*, 76 Vt. 240, 56 Atl. 1106, 104 Am. St. Rep. 927; *Eliot* v. *Fitchburg R. R. Co.*, 10 Cush. 191, 57 Am. Dec. 85.

In accord with the cases last cited is the very recent case of *Stratton* v. *Mt. Hermon Boys' School*, (Mass. 1913) 103 N. E. 87. In that case the defendant, which owned a tract of riparian land, erected thereon a pumping plant and diverted water from the stream to other lands beyond the watershed where it was used to supply the manifold needs of a large boys' school. The defendant requested the court to rule, "in effect that diversion of water to another non-riparian estate owned by it, was not conclusive evidence that the defendant was liable, but that the only question was whether it had taken an unreasonable quantity of water under all the circumstances." The court refused the request, and instructed that "the defendant's right was confined to a reasonable use of the water for the benefit of its land adjoining the water course, and of persons properly using such land, and did not extend to taking it for use upon other premises, and that if there was such use the plaintiff was entitled to recover at least nominal damages even though he had sustained no actual loss." It was held that the instruction given was erroneous, and the doctrine laid down as applicable to such cases was substantially the charge requested by defendant. "If he diverts out of the watershed or upon a disconnected estate," said RUGG, C. J., "the only question is whether there is actual injury to the lower estate for any present or future reasonable use."

The doctrine of the courts of Massachusetts, New Hampshire, Vermont and North Carolina would seem, then, to be in conflict with the rule of the English courts. What the other courts of this country, even those above referred to, would hold in a case where the water abstracted for use on non-riparian lands was so small in amount as to cause no actual or potential injury to the lower owners in the reasonable exercise of their riparian rights,

is of course problematical. It is submitted that at least in those sections of the country where the supply of water in streams is abundant the doctrine of the Massachusetts court as expressed in the *Stratton* case is preferable to the strict rule of the English courts.

In streams nature has provided tremendous possibilities for public good, and it would seem a clear dictate of common sense and a wise public policy that all possible avail should be made thereof. The common law has declared that riparian owners, in respect of their riparian lands, shall have the primary and perhaps the sole right of use of the waters. For the present purpose it may be conceded that it is wise that such persons in respect of such lands should have the primary right, but it is believed that it is not wise to give them the *exclusive* right when thereby a portion of nature's gift is squandered. If the riparian proprietor is assured his primary right of use, he is amply protected therein by his right of action against any one above, whether riparian owners in the strict sense or not, who makes such a use of the stream as to result in actual or potential injury. It may well be that proof merely of such potential injury should not be sufficient basis for a cause of action. the reason for allowing the action when there is a showing only of possible future injury is of course to prevent the acquisition of a prescriptive right. To deny to some member of the public a use of a stream, perhaps to him very beneficial, merely on the ground that some riparian proprietor lower down would be injured thereby if he were to make a use of the stream which he would be entitled to make but which as a matter of fact he is not making, thus losing to all this gift of nature, may well be said by anyone but the precedent-worshipper to be absurd. If some theory is required to prevent such use ripening into a prescriptive right, why not imply a license on the lower owner's part, so long as his rights are not actually injured, thus meeting any claim of adverse user by the upper owner? In cases such as the principal case it might be well to consider a diversion of water to non-riparian land as presumptively injurious to the lower owner, thus casting upon the abstractor the burden of proving that his diversion was, under the circumstances, lawful. R. W. A.

THE AUTHENTICATION OF REAL EVIDENCE.—To what extent the various objects constantly proffered to the courts as real evidence must be authenticated before admission and how far proponent may rely on judicial notice to supply defects in authentication, is involved in the case of *State* v. *Pierce*, 88 Atl. 740, recently decided in the Supreme Court of Vermont.

Respondent, a physician, was on trial for failure to report a case of diphtheria to the proper authorities as required by a Vermont statute. Proof that respondent knew the nature of the ailment was necessarily circumstantial, one evidentiary fact being his knowledge that X, another member of the same family; had died of the same disease about two months before. Some ten days after the death of X, her body had been exhumed and the larynx removed in the presence of the respondent. On the trial the removed organ was shown to an expert witness who was allowed to testify, over respondent's

objection, that its condition was so plainly diphtheritic as to be apparent to the ordinary medical practitioner. No evidence had been given tending to show that the condition of the larynx at the trial was the same as when it was removed from the body. Though the specific ground of objection was not indicated, the Supreme Court treated the objection on appeal as if it had been well raised, and passed on the question of authentication of the organ. It was held that the admission of expert testimony based on the present condition of the larynx was without error although there had been no proof that its condition was the same as when it was removed from the body. Said the court, "We must assume that the organ had been in a preservative liquid since, for it is common knowledge, of which we may take judicial notice, that such is the means employed by the medical profession."

In general, before material objects of any kind are admissible as demonstrative evidence, the court must first be satisfied of the identity of the object and that it is in substantially the same condition as at the time in issue. This applies both to articles such as the clothing of a deceased person, weapons, mechanical devices, animals, or parts of an exhumed body presented for the inspection of the jury, and to photographs, maps and diagrams which are used by the witness as a part of, or as a graphic illustration of, his testimony.

It is settled law in regard to the use of photographs as evidence that they must first be identified as fair representations of the locus or thing in question, and proof given that they portray it in substantially the same condition that existed when the act complained of occurred: *Leidlein* v. *Meyer,* 95 Mich. 586; *Verrain* v. *Baird,* 150 Mass. 142; *Kas. City Ry.* v. *Smith,* 90 Ala. 25; *Cooper* v. *St. Paul Ry.,* 54 Minn. 379; *State* v. *O'Reilly,* 126 Mo. 597; *Locke* v. *Sioux City Ry.,* 46 Ia. 109; *Howard* v. *Russell,* 75 Tex. 176; *Cleveland Ry.* v. *Monaghan,* 140 Ill. 483.

The same principle applies to the authentication of other objects introduced for inspection by the jury. It is necessary that the object offered in evidence be identified, and proof should be given that it has not been tampered with nor its condition changed since the time in issue: *People* v. *Gonzales,* 35 N. Y. 49; *State* v. *Cadotte,* 17 Mont. 315; *Com.* v. *Bentley,* 97 Mass. 551; *State* v. *Hossack,* 116 Ia. 194. Thus in *Self* v. *State,* 90 Miss. 58, which was a prosecution for murder, the skull of the exhumed body was offered in evidence and excluded on the express ground that its condition had altered since the time of the homicide. The court says, "It ought to have been shown that the skull, granting it to be the skull of the deceased, was in the same condition at the time of its exhibition to the jury that it was at the time of burial. * * * All the proper preliminary evidence should be clear and satisfactory." The court also cites WIGMORE, § 1154 (6), with approval: "The present condition of an object may not be the same as at the time in issue nor so nearly the same as to be proper evidence of its former condition; accordingly autopic proference is allowable only on the assumption that the condition is the same or sufficiently similar." The case of *State* v. *Novak,* 109 Ia. 717, presented a similar question. Here the skull of the murdered man was admitted in evidence, the court passing on the question of authenti-

cation. The necessity for proof that the condition of the object was the same at the time of the trial as at the commission of the crime was recognized in the following language: "The record is such a disclosure as to put the matter beyond a doubt that the skull when in evidence was in the same condition in which it was found after the fire, in every essential particular."

In *State* v. *Goddard,* 146 Mo. 177, the door of a room in which a homicide had been committed was introduced for the inspection of the jury to show the location of pistol balls, no proof being given that its condition had remained unchanged. On appeal this was held error, the supreme court ruling that it should first have been shown that the door had remained in the same condition since the homicide.

In *French* v. *Wilkinson,* 93 Mich. 322, exhibition of an injured limb to the jury was held error, in the absence of proof that its then condition was the same as after the accident. This rule is also approved by WHARTON, in his work on CRIMINAL EVIDENCE. In speaking of the use of these species of evidence, he says, "If practicable they should be secured and brought into court, though before admitting them there should be evidence that they have not been tampered with since the commission of the crime."

In the principal case there was no evidence to show that the larynx was in the same condition at the time of the trial as it was when removed from the body. The question, then, comes to this: Can the court supply the omission of this preliminary evidence by judicially noticing the usual methods of preserving such organs? This question the court answered in the affirmative. It may be granted in passing that the use of such methods is a fact appropriate for judicial cognizance. Courts judicially notice the general course of business in the varied commercial and professional occupations, and such facts as form a part of the general knowledge of intelligent men: *La Rose* v. *Logansport Nat. Bank,* 102 Ind. 332; *Stephenson* v. *Allison,* 123 Ala. 439; *L. S. & M. S. Ry. Co.* v. *Miller,* 25 Mich. 274; *Moreno* v. *State,* 64 Tex. Cr. App. 660. But even so, the reasoning of the Vermont court is inconclusive. It involves not merely judicial notice of the methods of preserving such organs, but also an assumption that such methods were employed here, and that the condition of the larynx had remained unchanged. Testimony indicating that the usual method had been adopted or that the organ had been kept in some preservative, would have justified the court in judicially noticing the existence and efficacy of the method, but no testimony to this effect had been given. The case is analogous to that of photographs. Courts constantly take judicial notice of the accuracy of photographic reproductions; *Cowley* v. *People,* 83 N. Y. 464; *Luke* v. *Calhoun County,* 52 Ala. 115; *Udderzook* v. *Com.,* 76 Pa. St. 340; *Huston & T. C. Ry.* v. *Shapard,* 54 Tex. Civ. App. 596; yet this has never been held to dispense with the necessity for verification either as to their identity and fairness or as to change in the object in question. So in the principal case it is difficult to see how judicial cognizance of the medical practice could dispense with the necessity of proof that such method had in fact been employed, and that the condition of the larynx had not been either carelessly or designedly altered.

Although there is no difference in the admissibility of evidence in civil

and criminal actions, it is nevertheless noteworthy that the principal case is a criminal prosecution, and that the court supplied a serious omission of evidence not merely by judicially noticing the possibility of preserving the organ but also by assuming that it had in fact been so preserved. It is generally true that courts require much clearer proof in criminal than in civil actions, and it would seem therefore that the court here was influenced somewhat by the exigencies of the particular case and a desire to save it from reversal.

S. S. W.

THE USE OF INJUNCTION TO PREVENT A MULTIPLICITY OF SUITS AT LAW.—In the case of *Newell et al.* v. *Illinois Central R. Co.*, 63 So. 351, the Mississippi Supreme Court dealt with the right of a court of equity to enjoin the plaintiffs in a number of suits at law against the same defendant from further prosecuting them at law and to compel the merging of them into an equitable suit. In this case, a number of persons who had been injured in the wreck of an excursion train on the railroad of the defendant, had filed separate suits against the defendant to recover for injuries alleged to have been sustained. The railroad company sought an injunction against the further prosecution of the suits at law, asking the court of chancery to take jurisdiction of all the issues involved in the various suits. It was held that such an injunction would not be granted. The law in this country has been in an unsettled state, as regards this question, and the decision in the principal case shows the trend of modern authority.

Equity has jurisdiction, in certain cases, to restrain the bringing of a number of suits at law against the same defendant, and justifies the assumption of such jurisdiction on the ground that the law courts are inadequate to combine and adjust manifold and adverse claims and interests. By assuming jurisdiction, equity settles and disposes of the whole controversy in a single proceeding, and thus prevents a multiplicity of suits. Where a number of plaintiffs are suing a single defendant in several suits at law, the authorities agree that equity will decide the controversy in one suit in chancery, provided there is a community of interest between the plaintiffs. The question over which the authorities have differed is, what constitutes such a community of interest.

The view advanced by Mr. POMEROY and the courts which follow him is that in such cases, mere community of interest in the questions of law and fact involved in the general controversy is sufficient to justify equity jurisdiction. This proposition will be found in § 269 of Professor POMEROY'S work on EQUITY JURISPRUDENCE. One of the strongest cases in support of this view is the case of *Southern Steel Co.* v. *Hopkins*, 157 Ala. 175, 47 So. 274, 20 L. R. A. N. S. 484, 131 Am. St. Rep. 20, which overruled *Turner* v. *Mobile*, 135 Ala. 73, 33 So. 132. Another case holding this view is the case of *Whitlock* v. *Yazoo*, 91 Miss. 779, 45 So. 861.

The other view on the question is that community of interest in the questions of law and fact alone, will not justify equity jurisdiction. The case of *Tribbette* v. *Illinois Central R. R.*, 70 Miss. 182, 12 So. 32, 19 L. R. A.

660, 35 Am. St. Rep. 642, is the leading case supporting this view. This case stands for the proposition that before equity may order all the separate suits to be joined in one equitable proceeding, it must appear that there is some ground of equitable interference in the subject matter of the controversy, or common right or title involved, or there must be some common purpose in pursuit of a common adversary. The facts in this case were that sparks from a locomotive of the defendant had set fire to and destroyed the property of a number of owners, who had severally sued the defendant at law. The latter sought by injunction to have all the plaintiffs brought in, and the controversy settled in one suit in equity. The court refused to grant such an injunction, and found that Mr. POMEROY was not sustained in his "conclusions" stated in § 269 of his book, and that the cases cited there do not support the proposition that mere community of interest "in the questions of law and fact involved in the general controversy or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body" is ground for the interposition of chancery to settle, in one suit, the several controversies. Another case holding the same view is *Vandalia Coal Co.* v. *Lawson*, 43 Ind. App. 226, 97 N. E. 47. This case was decided shortly after *Southern Steel Co.* v. *Hopkins*, supra, and in its decision criticizes the holding in that case very strongly.

Extensive notes on this subject will be found in 131 Am. St. Rep. 30, in 20 L. R. A. (N. S.) 848, and in 126 Am. St. Rep. 991. All of the annotators agree in saying that the law on the subject is in a state of hopeless confusion. Recently, however, and since the notes above referred to were compiled, there have been decisions which seem to clarify the situation somewhat, and which indicate that the modern trend of authority, in the state courts at least, is toward the decision of the *Tribbette* case, and away from the doctrine advocated by POMEROY, in the section above referred to. It is the purpose of this note to show this modern tendency of decision.

The case of *Whitlock* v. *Yazoo*, referred to above as supporting Mr. POMEROY's rule, has been overruled by the subsequent Mississippi case of *Cumberland Tel. & Tel. Co.* v. *Williamson*, 101 Miss. 1, 57 So. 559. This case contains an extensive review of all the cases of importance in this question, decided subsequent to the *Tribbette* case.

The case of *Southern Steel Co.* v. *Hopkins*, also cited as being in support of the same rule, has been overruled in effect by the case of *Roanoke Guano Co.* v. *Saunders*, 173 Ala. 347, 56 So. 198, and expressly overruled by a later decision in the *Steel Co.* case, reported in 174 Ala. 465, 57 So. 11. This fact is especially significant when we consider that this case and the *Whitlock* case go far, if not further than any, in support of the view advanced by Mr. POMEROY.

In the latest edition of Mr. POMEROY's book, two new sections have been added, in which, while the editor criticizes, to some extent, the *Tribbette* case, it is admitted that the decision in that case was correct. One of the sections added, (251½) is peculiarly applicable to the principal case. There it is said "The equity suit must result in a simplification or consolidation of the issues; if after the numerous parties are joined, there still remain several issues to be tried between the several parties, nothing has been gained by the court of

equity in assuming jurisdiction. In such case, while the bill has only one number upon the docket, and calls itself a single proceeding, it is in reality a bundle of separate suits, each of which is no doubt similar in character to each of the others, but rests nevertheless upon the distinct liability of one defendant."

The *Tribbette* case rightly held that an injunction could not be granted, because in that case, even had an injunction been granted, nothing would have been gained by the court of equity in assuming jurisdiction. But is it impossible to suppose that a case might arise where, even without a community of interest in the subject matter of the litigation, there could be such a community of interest in the fact and law involved, that equity could take jurisdiction without being confronted with a situation where there still remained several issues to be tried between the several parties? We think not. Clearly if such a case should arise, something *would* be gained by the court of equity in assuming jurisdiction.

The most reasonable view in this whole question, seems to be that expressed by the editor in the sections mentioned above as added to POMEROY, EQUITY JURISPRUDENCE. The same view, in a little more detail, is to be found in the dissenting opinion of MARSHALL, J., in the case of *Illinois Steel Co.* v. *Schröeder*, 133 Wis. 561, 113 N. W. 51, where he says: "No common title as to one entire thing or community of rights in such thing, each party being interested in the one particular thing, title or right to be settled by litigation, is absolutely essential to an action to prevent a multiplicity of suits. It is sufficient if there are sufficient common points as to title, rights or questions of law or fact, to warrant the court in the particular situation in opening its doors." In other words, each case is to be decided on its own merits, and the question as to whether, to use the words of POMEROY, anything will be gained by a court of equity in assuming jurisdiction, or not, is to be left to the discretion of the judge. The United States Supreme Court lays down the same rule in *Hale* v. *Allison*, 188 U. S. 56. See also in this connection, the opinion of PITNEY, V. C., in *Inhabitants of Cranford* v. *Watters*, 61 N. J. Eq. 284. S. E. G.

THE EFFECT GIVEN TO FOREIGN JUDGMENTS NOT BASED ON PERSONAL SERVICE.—The well established rule that the courts of one jurisdiction will not enforce judgments obtained against its own citizens in foreign jurisdictions, in the absence of personal service, apparently received an important qualification in the recent case of *Phillips* v. *Batho*, [1913] 3 K. B. 25. In that case the defendant, an English subject, was named as co-respondent in divorce proceedings instituted in India, was served with process by registered post in England, and a judgment for damages was rendered against him ancillary to the decree for divorce, in accordance with a statute permitting the same. In a suit on the judgment in England a recovery was permitted.

In *Emanuel* v. *Symon* [1903] 1 K. B. 302, BUCKLEY, L. J., quoting from *Rousillon* v. *Rousillon*, 49 L. J. Ch. 338, enumerates five cases in which the courts of England will give effect to foreign judgments in personam, "(1) where the defendant is a subject of the foreign country in which the judg-

ment has been obtained, (2) where he was a resident in the foreign country when the action began, (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued, (4) where he has voluntarily appeared, and (5) where he has contracted to submit himself to the forum in which the judgment was obtained."

To the above enumeration the court, in *Phillips* v. *Batho*, supra, proceeds to add a sixth category. SCRUTTON, J., says in the course of the opinion. "It is not necessary for the purposes of this case to do more than say that the new class at least included judgments in personam ancillary or accessory to the dissolution of a marriage of persons domiciled * * * within the jurisdiction of the court pronouncing the decree, where both the court pronouncing the judgment and the court enforcing it are courts of the same sovereign, and where the court enforcing it cannot itself grant the relief because it has not jurisdiction over the marriage to whose dissolution the proceedings are ancillary, though it can grant similar ancillary relief in the case of dissolution of marriages which are assigned to its jurisdiction by the Sovereign." It will be perceived that this class is based upon the concurrence of two conditions, namely: (1) a judgment in personam ancillary to a judgment in rem, and (2) the fact that both courts owe allegiance to the same sovereign.

Judgments in rem bind the whole world. *Castrique* v. *Imrie*, 39 L. J. C. P. 350, L. R. 4 H. L. 414; *The Belgenland*, 114 U. S. 355. A decree for the dissolution of marriage, being a judgment affecting the status of the parties, stands on the same footing as a judgment in rem, and is binding even in the absence of personal service. *Bater* v. *Bater*, [1906] L. R. P. 209; *Harvey* v. *Farnie*, L. R. 8 A. C. 43, 5 P. Div. 153; *Atherton* v. *Atherton*, 181 U. S. 155, 45 L. Ed. 794, 21 Sup. Ct. 544; *Maynard* v. *Hill*, 125 U. S. 190, 31 L. Ed. 654, 8 Sup. Ct. 723; though in this country some confusion has been introduced by the case of *Haddock* v. *Haddock*, 201 U. S. 562, 50 L. Ed. 867, 26 Sup. Ct. 525; See 11 MICH. L. REV. 568. Where, however, in proceedings for the dissolution of marriage the decree goes farther than divorce, such extension is in its nature a judgment in personam. *Rigney* v. *Rigney*, 127 N. Y. 408, 28 N. E. 405, 24 Am. St. Rep. 462 (where the decree was for alimony): *Garner* v. *Garner*, 56 Md. 127 (where the defendant was prohibited from marrying again). So much of the decree therefore, in *Phillips* v. *Batho*, supra, as gives damages against the co-respondent, would appear on authority to be in personam—the efficacy of which, in the forum, is to be controlled by the considerations governing other foreign judgments in personam.

In *Pemberton* v. *Hughes*, 68 L. J. Ch. (N. S.) 281, 1 Ch. 781, the principles on which the English courts act in regarding or disregarding foreign judgments are thus stated. "Where no substantial justice, according to English notions, is offended, all that the English courts look to are the finality of the judgment and the jurisdiction of the court, in this sense and to this extent —namely, its competence to entertain the sort of case it did deal with and its competence to require the defendant to appear before it. * * * But the jurisdiction which alone is important in these matters is the competence of the court in an *international* sense—that is, its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any

other sense is not regarded as material by the courts of this country." Thus English courts will not investigate the propriety of proceedings in foreign courts, unless they offend against English views of justice, and the paradox may arise of a judgment void under the municipal law where rendered—e. g., where the court had no jurisdiction according to its own rules—yet upheld in an action in England. *Dakota Lumber Co.* v. *Renderknecht*, 2 Western Law Reporter (Canada) 275. And see, 24 LAW QUART. REV. 412.

The English views of substantial justice thus become of paramount importance. The old common law doctrine that the King's writ did not run beyond the sea has received important modifications through Rules of Court promulgated under statutory authority. These rules make distinct provision for service outside of the jurisdiction in certain classes of actions in personam, and under these Rules the English courts hold themselves bound to pronounce judgment against parties served with summons or notice abroad, even though they are non-residents and are not British subjects. *Robey* v. *The Snaefell Mining Co., Ltd.*, 20 L. R. Q. B. D. 152. See PIGGOTT, PARTIES OUT OF THE JURISDICTION, (2nd Ed.) 215. It appears, moreover, that default judgments rendered on such service are given full credit in the British colonies, though the courts of England themselves recognize the doubtful effect of such judgments in foreign jurisdictions. See opinion of Lord ESHER, M. R., in *Western National Bank* v. *Perez* (1891) 1 Q. B. at page 313. Also *Rayment* v. *Rayment* [1910] 1 P. 271. In *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1894] A. C. 670, the English courts refused to give effect to the judgment of the court of a native state of India, rendered on service *ex* juris against a non-resident foreigner, though that method of service was in conformity to a local provision similar to the Rules of Court. And foreign judgments rendered against Englishmen, on like service, are not regarded as binding in England. *Turnbull* v. *Walker* (1892) 67 L. T. 767.

Nor does the fact that the courts and parties owe allegiance to the same sovereign militate against the application of the rule denying credit to foreign judgments rendered against non-resident British subjects in the absence of personal service. In suits on their judgments the component parts of the British Empire are regarded as distinct foreign jurisdictions. *Emanuel* v. *Symon*, supra. Thus in *Gibson & Co.* v. *Gibson* [1913] 3 K. B. 302, where suit was brought in England on a default judgment in personam rendered in Victoria against the defendant, a British subject, resident in England and served without the jurisdiction, it was held that the Victorian court thereby acquired no jurisdiction so as to render the judgment recovered against the defendant, in his absence, binding upon him in England. In the decision of this case great stress was laid upon the fact that the defendant was a British subject, and therefore not a subject of Victoria nor bound by its laws to service. But if the reasoning of *Phillips* v. *Batho* were to apply, this fact—that the parties and the courts are the subjects of the same sovereign—would bind the defendant as to the Victorian laws of service, and would permit suit in England on the colonial judgment. In this respect the cases are inconsistent.

The conclusion must be that a personal decree pronounced in *absentiam* and on service *ex juris* against non-resident foreigners is offensive, in its *international* aspect, to the English view of substantial justice. It is difficult, therefore, to justify *Phillips* v. *Batho*. In the several grounds for its decision it is opposed to authority. To permit this sixth case to be added to those enumerated in *Rousillon* v. *Rousillon*, is to create a rule predicated on doctrines severally repudiated and which collectively do not, in reason, justify the principle advanced The possibilities in its application, too, would seem to enjoin on British subjects an onerous attention to the proceedings of the many courts of the Empire, and to augur rather for impeding than promoting justice.

But however doubtful the doctrine of *Phillips* v. *Batho* may be in England it is clear that it can have no application in this country. Though the "full faith and credit" clause of the Constitution would seem to enjoin on the courts of one state a stricter regard for the judgments of the courts of sister states, it is held not to forbid an investigation into the jurisdiction of the foreign tribunal. *D'Arcy* v. *Ketchum*, 11 How. (U. S.) 165. It is not only essential that the court rendering the judgment have jurisdiction over the parties and the subject matter—which is the English view—but it must appear that there has been personal service *within* the State. Nor is it material that the manner of service was that authorized by the State statute, or that the defendant was a subject of the state. "Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability." *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565; *Webster* v. *Reid*, 11 How. (U. S.) 437; *De La Montanya* v. *De La Montanya*, 112 Cal. 101, 44 Pac. 345, 53 Am. St. Rep. 165; *Behrens* v. *Brice*, 52 Texas Civil App. 221, 113 S. W. 782; *Bank of Horton* v. *Knox*, 133 Iowa 443, 109 N. W. 201. These views find substantial confirmation in *Ward* v. *Boyce*, 152 N. Y. 191, 46 N. E. 180, where a judgment rendered in Vermont without personal service within the jurisdiction, was pleaded in bar in a suit in New York. The court said, "If the proceeding involves the determination of the personal liability of the defendant, he must be brought within the jurisdiction by service of process *within* the state or voluntary appearance. The proceedings in Vermont were substantially in accordance with the statutes of that state. It is not enough, however, to show that the judgment was authorized by statute. In order to entitle it to full faith and credit in another jurisdiction, it must appear that the statute contemplated a judicial proceeding in conformity with the provision above stated." It follows, therefore that the courts of this country refuse to allow any validity to the default judgments of a foreign jurisdiction founded on service *ex juris*, even though the defendant be a citizen of such foreign state. *Shepard* v. *Wright*, 59 How. Pr. (N. Y.) 512. The doctrine of *Phillips* v. *Batho* could have no standing in this country. C. B. H.

RECENT IMPORTANT DECISIONS.

ADMINISTRATION—CORPORATE STOCK—SITUS.—Deceased, who at the time of his death was domiciled in Missouri, owned stock in a Kansas corporation. Application was made in Missouri for the appointment of an administrator of this corporate stock, but such appointment was refused on the ground that the situs of the stock was in Kansas. Application was then made to the Kansas court. *Held,* that the situs of the corporate stock was in Missouri and therefore that the Kansas court had no power to appoint an administrator. On petition for a rehearing it was argued that the refusal by the Kansas court to grant administration after the Missouri Supreme Court had also refused, was contrary to the provisions of the Constitution of the United States in that it deprived a creditor of the deceased of property without due process of law. A rehearing was nevertheless denied. *Miller's Estate* v. *Executrix of Miller's Estate,* (Kans. 1913) 136 Pac. 255, 136 Pac. 932.

The Kansas statute, in terms, provides that: "The stock of any corporation created under this act shall be deemed personal estate." GEN. STAT. 1909, § 1743. Adopting the common law rule that the situs of personal property is the residence of the owner, the court concluded that the situs of the corporate stock was in the state of the owner's domicile. The cases relied upon by the court in sustaining this view are: one which holds that in the absence of legislation the situs of corporate stock is at the domicile of the owner, *Covington* v. *First Nat'l Bank,* 198 U. S. 100, but in this case—and there are many like it—the question of the administration of the estate of a deceased stockholder was not involved, and so the court was not called upon to make such a sweeping statement; one which holds that the domiciliary administrator has authority to sell and assign stock of the decedent in a foreign corporation, and the corporation may *voluntarily* consent to its transfer, *Luce* v. *Railroad,* 63 N. H. 588, 3 Atl. 618, but the decision does not intimate what would be the result if the corporation did not voluntarily consent; and others which are to the effect that for the purposes of taxation, the owner's domicile is the situs of his stock, *Griffith* v. *Watson,* 19 Kan. 23; *Tappan* v. *Merchants' Nat'l Bank,* 86 U. S. (19 Wall.) 490; *Bradley* v. *Bauder,* 36 Ohio St. 28; *State* v. *Branin,* 23 N. J. Law 484. None of these decisions is confined to the question under discussion, which is, what is the situs of corporate stock for the purposes of administration of the deceased owner's estate? The law, as declared by the cases which are confined to the point, seems to be that the situs of the stock is the domicile of the corporation, and therefore that the appointment of the administrator lies within the jurisdiction of the courts of the state where the corporation exists. *Grayson, Adm'r* v. *Robertson, Adm'r,* 122 Ala. 330, 25 So. 229; *Warrior Coal & Coke Co.* v. *Nat'l Bank of Augusta* (Ala.), 53 So. 997; *Richardson* v. *Busch,* 198 Mo. 174, 95 S. W. 894, 115 Am. St. Rep. 472; *Murphy* v. *Crause,* 135 Cal. 14, 66 Pac. 971; *McCully* v. *Cooper,* 114 Cal. 258, 46 Pac. 82.

APPEAL AND ERROR—ORDER VACATING A DEFAULT JUDGMENT.—Where the defendant at a term of the court subsequent to the one during which a judgment by default had been entered against him, made a motion to vacate said judgment on account of alleged errors in fact, the question was whether an order setting aside the default and judgment was a final order from which an appeal could be prosecuted. *Held*, appealable. *Cramer* v. *Illinois Commercial Men's Association*, (Ill. 1913) 103 N. E. 549.

There is considerable conflict upon this proposition, but it is believed that in the absence of express statutory regulation of the subject the weight of authority is contrary to the decision in the principal case. *Thomas* v. *Thomas*, 10 Colo. App. 170; *Owen* v. *Going*, 7 Colo. 85; *Meloy* v. *Grant*, 4 Mackey (D. C.) 486; *Spaulding* v. *Thompson*, 12 Ind. 477, 74 Am. Dec. 221; *Masten* v. *Indiana Car Co.*, 19 Ind. App. 633; *Kermeyer* v. *Kansas Pac. R. R. Co.*, 18 Kans. 315; *Fortin* v. *Randolph*, 11 Mart. (La.) 268; *Woodcock* v. *Parker*, 34 Me. 593; *Wade* v. *DeLeyer*, 63 N. Y. 318; *Miller* v. *Tyler*, 58 N. Y. 477; *Reitmeir* v. *Siegmund*, 13 Wash. 624; *Carroll* v. *Vaughn*, 48 Ala. 352; *Hume* v. *Bowie*, 148 U. S. 245. The remedy of the opposing party under such circumstances is to proceed no farther, but suffer final judgment to be taken against him and appeal therefrom. *Domitski* v. *American Linseed Co.*, 221 Ill. 161; *Hirsh* v. *Weisberger*, 44 Mo. App. 507; *List* v. *Joeheck*, 45 Kans. 349; *Moore* v. *Hill*, 87 Ga. 91. Several courts, however, regard such an order as final and appealable. *People's Ice Co.* v. *Schlenker*, 50 Minn. 1; *Ballard* v. *Purcell*, 1 Nev. 290; *Deering* v. *Quivey*, 26 Or. 556; *Carney* v. *Railroad*, 15 Wis. 503; *Tidwell* v. *Witherspoon*, 18 Fla. 282; *Johnson* v. *Parrotte*, 34 Nebr. 26. In Ohio the same result has been reached by reason of the liberal construction of a statute covering the subject of appeals. *Braden* v. *Hoffman*, 46 Oh. St. 639. The decision in the principal case is especially noteworthy from the fact that it seems to overrule or at least to restrain within very narrow limits the case of *Walker* v. *Oliver*, decided by the same court in 63 Ill. 199, which case was cited with approval in the recent case of *People* v. *Wells*, 255 Ill. 450. The court attempts to distinguish the two cases on the ground that where the error for which the judgment is vacated is one of fact the order is appealable, whereas if the mistake is one of law, as in *Walker* v. *Oliver*, it is not appealable. The same distinction is pointed out in *Hirsch* v. *Weisberger*, 44 Mo. App. 507. This distinction does not seem to be well founded for the reason that the question as to whether an order is final and appealable depends upon its character with reference to the effect which it has upon the rights of the parties, and not upon the intrinsic nature of the error upon which it is predicated.

BAILMENTS—RIGHT OF BAILEE FOR HIRE TO STIPULATE AGAINST LIABILITY FOR NEGLIGENCE, NOT AMOUNTING TO WILLFUL MISCONDUCT OR FRAUD.—The defendant, for a suitable consideration, stored the automobile of the plaintiff, the latter assuming risk of injury to the machine. The pressure of snow, which the defendant negligently allowed to accumulate, caused the roof to give way, and fall upon the machine. The plaintiff brought suit for the damage. *Held*, that recovery could be had, the stipulation relieving the bailee

from liability for negligence being ineffectual. *Pilson* v. *Tip-Top Auto Co.* (Ore. 1913) 136 Pac. 642.

In reaching a decision, the court seems to have lost sight of the distinction between a common carrier and an ordinary bailee for hire. There is no doubt that a provision in a contract, attempting to relieve a common carrier from liability for its negligence is invalid: *Rd. Co.* v. *Lockwood,* 17 Wall. 357; *Pittsburg, etc. Ry Co.* v. *Higgs,* 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081. But, as a general rule, an ordinary bailee for hire can make a valid contract, excusing it from any liability, except that caused by its own gross negligence or fraud: *Gashweiler* v. *Wabash, etc. R. Co.,* 83 Mo. 112, 53 Am. Rep. 558; *Alexander* v. *Greene,* 3 Hill 9; *Wells* v. *Steam Nav. Co.,* 2 N. Y. 204; *Coffield* v. *Harris,* 2 Wilson (Tex.) sec. 315. The reason for the distinction is that the ordinary bailee, unlike the common carrier, is as fully at liberty to refuse employment as is a day laborer, and may, like him, settle the terms upon which his services shall be rendered, with the exception above noted. The instant case cites a number of authorities in support of the proposition advanced, but all except *Lancaster Co. Nat. Bk.* v. *Smith,* 62 Pa. St. 47, are cases where the party at fault was a common carrier. This last case, cited in 3 Am. & Eng. Enc. (2 Ed.) 750, for the same proposition, may be readily distinguished. The defendant there was a gratuitous bailee, and only liable for gross negligence, which it is admitted cannot be excused by contract. The principal case apparently takes a unique position, opposed to the general rule as stated above.

BANKRUPTCY—FALSE REPRESENTATION—WAIVER OF FRAUD—In a suit upon an account the defendants pleaded a discharge in bankruptcy. It was conceded that the plaintiff had proved its debt in a court of bankruptcy and received a dividend. The plaintiff offered evidence to prove that credit was extended to the defendants because of certain false representations made to it by the defendants at the time of the sale. *Held,* that the plaintiff, though it had chosen to enter the bankrupt court and take its place with the other creditors, and had received a dividend, did not thereby waive the fraud in the purchase of the goods and stand on the contract so that the discharge in bankruptcy was a bar. *J. K. Orr Shoe Co.* v. *Upshaw & Powledge* (Ga. 1913), 79 S. E. 362.

It must now be taken as settled that a creditor is not bound to elect which remedy he will pursue against the bankrupt on a contract where the right to sue in tort also exists; nor does he waive the right to sue on a tort for a balance of his claim by accepting his dividend under a composition. *Friend* v. *Talcott,* 228 U. S. 27. The court in the principal case based its opinion on that decision. But there have been conflicting views upon this question, and many of them in very recent cases. *Tindle* v. *Birkett,* 205 U. S. 183. The question arises under Sec. 17, (a), Bankruptcy Act 1898, which provides that a discharge in bankruptcy shall not release a bankrupt from liabilities for obtaining property under false pretenses or false representations. The argument that such a creditor, after proving his contract, voting in creditors' meetings, and thus influencing their actions to that ex-

tent, should not be permitted afterwards to sue in tort for the balance due him, has been given much weight by the court in several cases. See, under Act of 1841, *Chapman* v. *Forsyth*, 2 How. 202; under the Act of 1898 before the amendment of 1903, *Crawford* v. *Burke*, 195 U. S. 176; since that amendment, *Standard Varnish Works* v. *Haydock*, 143 Fed. 318; but the holding of the principal case is now well established

BILLS AND NOTES—WANT OF FUNDS AS EXCUSE FOR FAILING TO GIVE NOTICE OF PROTEST.—Where the maker had no funds or right to draw on the drawee bank, either at the time the check was drawn or when it was presented for payment and protested, such want of funds was prima facie an excuse for want of notice of protest to him. *Gibbs* v. *Hopper*, (Ark. 1913) 160 S. W. 879.

The decision of this case is correct as far as it goes, but it stops short of what is the law upon this subject. The drawer of a check or of a bill is a party secondarily liable, so that presentment and notice of dishonor is essential to fix his conditional liability. But there is a distinction between the liability of a drawer of a bill without funds in the hands of the drawee and the drawer of a check under the same circumstances. The drawing of a bill without funds in the hands of the drawee makes the drawer only presumptively liable as a primary party, his drawing being only prima facie fraudulent, and this presumption is capable of being rebutted, so that he is entitled to notice. But where the drawer of a check has no funds in hands of drawee, the drawing is conclusively presumed to be fraudulent, he is liable as a primary party and hence not entitled to notice. *Dolph* v. *Rice*, 18 Wis. 418; *Harker* v. *Anderson*, 21 Wend. 372; *First National Bank* v. *Linn, et al*, 30 Ore. 296; *Industrial Bank* v. *Bowes*, 155 Ill. 70; *Kinyon* v. *Stanton*, 44 Wis. 471; *Morrison* v. *McCartney*, 30 Mo. 183; *Gregg* v. *George*, 16 Kan. 546; *Thornberg* v. *Emmons*, 23 W. Va. 325; *Purcell* v. *Allemono*, 22 Gratt. 743. Hence the decision of the instant case that the want of funds was only prima facie an excuse for want of notice of protest to the drawer, does not observe the above distinction, and therefore is not broad enough in its statement of the legal principles governing the facts therein adjudicated.

BOUNDARIES—DESCRIPTION—PUBLIC HIGHWAYS.—In a controversy in a a street improvement case as to appellee's right to an award, it appeared that the deed by which she acquired title described the premises as follows: "Beginning at the northwesterly corner of Walnut St. and Second Ave.; thence running westerly along said street fifty ft.; thence parallel with said avenue one hundred ft.; thence easterly parallel with said street fifty ft.; to said ave.; thence southerly along said avenue one hundred ft. to corner aforesaid and place of beginning." The granting of the award depended upon whether the deed carried title to the center of Walnut St. or only to the exterior line. *Held*, the words were explicit enough to rebut the presumption of a grant to the middle of the street, and the deed only carried title to the exterior line. *In re Parkway in the City of New York* (N. Y. 1913), 103 N. E. 508.

The precise question raised in this case is one upon which there is much

diversity of opinion in the courts of this country. There seems to be no question that a grant of a lot abutting on a highway, with no words of description limiting the boundary at the edge of the street, passes title to the center of the street, when the fee of the street is in the grantor. 3 WASHBURN, REAL PROP. (4th ed.) 422 et seq. As to what expressions in a description will be sufficient to prevent the operation of the "center rule" the cases are not agreed. The decision in the principal case, it is submitted, does not enunciate the most politic rule, although it is supported by the decisions of a great many states. *Eng.* v. *Brennan,* 60 N. Y. 609; *Mead* v. *Riley,* 18 Jones & S. 20; *Grand Rapids & Ind. R. R. Co.* v. *Heisel,* 38 Mich. 62; *Severy* v. *C. P. R. R. Co.* 51 Cal. 194; *Hanson* v. *Campbell,* 20 Md. 223; *Buck* v. *Squiers,* 22 Vt. 484; *Hughes* v. *P. & W. R. R. Co.,* 2 R. I. 508; *Contra, Johnson* v. *Anderson,* 18 Me. 76; *O'Connell* v. *Bryant,* 121 Mass. 557; *Cox* v. *Freedly,* 33 Pa. St. 124. See 13 HARV. L. REV. 150. Some cases go so far as to say that the fee to the center of the street will pass even though the lot is described by measurements which can only include land to the edge of the street. *Newhall* v. *Ireson,* 8 Cush. 565; *Grant* v. *Moon,* 128 Mo. 43; *Geer* v. *Barnum,* 37 Conn. 229; *Durbin* v. *Roanoke Bldg. Co.,* 107 Va. 753. See 8 MICH L. REV. 330. Probably the most extreme rule is laid down by the Pennsylvania court in *Paul* v. *Carver,* 26 Pa. St. 223. The description in that case read, "Along the northerly side of said street," and the court in holding that the fee in the street passed to the grantee, laid down the doctrine, (1) that nothing short of an intention expressed *in ipsis verbis* to "exclude" the soil of a highway, can exclude it, (2) that it is doubtful whether such a contract would not be against public policy and void; and whether the highway to the center would not pass notwithstanding. This case was approved and followed in *Salter* v. *Jonas,* 39 N. J. L. 469. See 2 SMITH LEADING CASES, 165, (7th ed.)

BREACH OF PROMISE OF MARRIAGE.—Defendant promised to marry plaintiff in June, 1911. The marriage was postponed and in May, 1912, the defendant broke the engagement by letter. In this letter the defendant alleges as an excuse for his conduct that having prayed for guidance, he had received a command from above that it was God's will that the engagement be broken off. The court held that though this excuse might ease the defendant's conscience, it has no weight in law as a defense to plaintiff's claim for damages. *Hiveley* v. *Golnick,* (Minn. 1913) 144 N. W. 213.

The courts evidently regard conscience as an unsafe guide, once the compact has been entered into. The doctrine of the court in the principle case has sanction in the decision in the case of *Coolidge* v. *Neat,* 129 Mass. 146. The defendant admitted the promise made to marry the plaintiff but testified that long before he left her he concluded they could not be happy together and that he left her in the belief that it was for the happiness of both. It was held that the defendant's assumption of the right to recede from the contract when, for conscientious reasons alone, he felt disinclined to fill it, was not justified, and he must live up to the promise or pay damages.

CONSTITUTIONAL LAW—ABSOLUTE LIABILITY OF AUTOMOBILE OWNERS—DUE PROCESS.—*Subdivision* 3, *Section* 10, *Act* 318, of the PUBLIC ACTS of 1909 of Michigan provided as follows: "Liability of Owners.—The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation by any person of such motor vehicle, whether such negligence consists in violations of the provisions of a statute of the state or in the failure to observe such ordinary care in such operation as the rules of the common law require; but such owner shall not be so liable in case such motor vehicle shall have been stolen." The defendant owner had sent his automobile to a garage for repairs, in the course of which the employes of the concern in taking the machine out for a run in order to test it collided with the plaintiff, who thereupon sought to hold the owner liable for his injuries under the statute above quoted. The validity of this statute was questioned on the ground that it violated the fourteenth amendment to the federal constitution. *Held* that this statute was unconstitutional. *Dougherty* v. *Thomas*, (Mich. 1913), 140 N. W. 615.

There is no case which has gone so far as to sustain the rule adopted by the statute in the principal case. In *Camp* v. *Rogers*, 44 Conn. 291, a statute imposing a similar liability was under review, but the court adopted a construction which avoided the necessity of determining the constitutional question. This principal case follows the doctrine laid down in *Ives* v. *South Buffalo Ry.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912, B, 136, that it is unconstitutional per se to impose liability upon one who is without fault or negligence for injuries sustained by another. The better view is that imposition of absolute liability is not unconstitutional per se, but only unconstitutional where the regulation is unreasonable in view of the ends to be attained. *St. Louis R. R.* v. *Mathews*, 165 U. S. 1; *Chic. etc. R. R. v. Ternecke*, 183 U. S. 582.

CONTRACTS—MUTUALITY.—The defendant gave plaintiff the privilege of selling its motor cars in Waterbury, Conn., in consideration of which the plaintiff agreed to purchase twenty cars, making a deposit of $700 i. e. $35 for each car. The agreement was in writing and further stipulated that defendant should be under no liability for failure to deliver any cars ordered, and might either deliver, or return the deposit at its option. Plaintiff received from the defendant six of the cars. The plaintiff refused a new contract and sued the defendant for the balance of the deposit, $490. The defendant claimed that plaintiff had broken the contract of purchase by not taking all the 20 cars and could not recover. *Held*.. The contract did not bind the defendant to deliver any cars and was void for lack of mutuality. The plaintiff received no consideration, and was therefore guilty of no breach of contract and could recover. Two judges dissented on the ground that having made plaintiff their agent an implied contract to sell to the plaintiff arose which was binding on the defendant. Further that the plaintiff had acted as agent and made certain commissions, while defendant had received the benefit of his services and the contract was validated by performance on

both sides. *Goodyear* v. *H. J. Koehler Sporting Goods Co.* (N. Y. 1913) 143 N. Y. S. 1046.

Mutuality exists when each party to a contract is subject to an obligation which is enforceable. The defendant in the above case, by exempting itself from liability in express words, overreached itself, and freed the plaintiff from any obligation which defendant could enforce, for if the dissenting judge's construction be adopted, the court makes a new contract for the parties contrary to their express words. It would seem, however, that both parties having acted under the contract and, in a measure, having received that for which they bargained, the contract was completed, and was broken by plaintiff when he refused to take the remaining cars which he agreed to buy. A contract may be unilateral at its inception and become valid by the performance of it by the party originally not bound by it. *Storm* v. *United States,* 94 U. S. 76, 24 L. Ed. 42; *Fontain* v. *Baxley,* 17 S. E. 1015, 90 Ga. 416. A contract almost identical with that in the principal case was considered in the *Velie Motor Car Co.* v. *Kopmeier Motor Car Co.,* 194 Fed. 324; in which the plaintiff was the employer and the defendant was the agent who failed to act under the contract. The court held the contract unilateral and void. The principal case is distinguished from the last cited case, by the fact that both parties acted under the agreement in it. *Buick Motor Co.* v. *Thompson,* 138 Ga. 282, 75 S. E. 354; was the case of an offer by the Motor Company, the defendant, to sell to plaintiff, and make him its agent in that county. The plaintiff, though not bound to do anything by the words of the contract, accepted it, and sold some cars which defendant failed to deliver. The Court, by LUMPKIN J., held that though unilateral at its inception, the contract became binding when plaintiff acted under it, but only so far as he had acted. In so far as it was executory, it was probably still unilateral. If it were not that the dissenting opinion in the principal case would, if adopted, result in making a new contract for the parties, it seems that it would be the more equitable of the two opinions under the rule adopted where the party who is not bound, performs under a unilateral contract.

COVENANTS—PERSONS ENTITLED TO ENFORCE—COVENANTS AS TO USE OF LAND.—Complaints conveyed a lot to R, the grantee covenanting for himself and assigns not to erect any building within 30 ft. of the side line of the lot. R. conveyed the lot to his wife, who took with notice of the covenant. This bill was brought to enjoin the wife from violating the covenant. It was not shown that at the time of the first grant or at any later time complainants owned any land in the vicinity other than that conveyed. *Held,* that the defendant was bound by the covenant and should be enjoined from violating it. *Van Sant et al.* v. *Rose et al.* (Ill. 1913) 103 N. E. 194.

The precise question involved in this case has seldom been before the courts, either in this country or in England. It is well settled that, as a general rule, restrictive covenants, if not against public policy, will be enforced against subsequent grantees, if they take with notice, or as volunteers, even though the covenant is not such as would run with the land at law. WASH-

BURN, REAL PROP., (6th ed.) § 124 et seq. The cases in which this rule has been applied have been, with few exceptions, cases in which the covenant was made either for the benefit of other land owned by the covenantee, or else cases of general building plans where the restrictions were put on each lot for the benefit of the others. In such cases the covenant is not personal but is in the nature of an easement upon a servient tenement for the benefit of the dominant. GALE. EASEMENTS. 57. When, however, as in the principal case, the covenant is personal as to the covenantee and at the same time puts a burden upon the land conveyed, the question arises as to whether the entire covenant is not personal on both sides. If it is so considered, the result would logically follow that such an action as was brought here could not be maintained, even though the subsequent grantee takes with notice. The court answered this defense principally on the authority of *Hays* v. *St. Paul M. E. Church*, 196 Ill. 633. It is certain that the court in that case was not forced to pass upon the exact queston involved here, and it is not clear that even the dicta would support the inferences which the court in the principal case drew from it. Perhaps the only case in this country exactly in point is *Dana* v. *Wentworth*, 111 Mass. 291, which supports the defendants' contention, but neither reasons nor authorities were given by the court in that case in support of its decision. In the following cases decided in this country there have been dicta contra to the principal decision; *Hano* v. *Bigelow*, 155 Mass. 341; *Inhabitants of Middlefield* v. *Church Mills Knitting Co.*, 160 Mass. 267; *Los Angeles Univ.* v. *Swarth*, 107 Fed. 298. The question arose in England in the cases of *Catt* v. *Tourle*, [1869] 4 Ch. 654, and *Osborne* v. *Bradley* [1903], 2 Ch. 446, and was decided in accord with the principal case. There seems to be much doubt, however, as to whether they can be said to have settled the law on the point because of the dicta in later decisions. *Formby* v. *Barker*, [1913] 2 Ch. 539. See JOLLY, RESTRICTIVE COVENANTS. 21 et seq. That such decisions would not be approved were the question to come before the House of Lords is to be inferred from the dicta on the tied-public-house cases by some of the Lords in *Earl of Zitt* v. *Hislop*, 7 A. C. at page 447, and *Noakes* v. *Rice*, 27 A. C. at p. 35.

CRIMINAL PROCEDURE—CONTINUANCE.—A material witness was absent on account of illness. The defendant moved for a continuance, which was granted. Thereupon the state, through its attorney, proposed to admit that the witness, if present, would testify to the facts set up in the affidavit in support of the motion. Upon this admission, the court, over the objection of the defendant, ruled that the defendant should proceed to trial. This ruling was assigned as error. *Held*, that the accused has a right to every benefit from the presence of witness, and to deny him the continuance was to deny him his constitutional right to compulsory process for attendance of witnesses. *Tiner* v. *State*, (Ark. 1913) 161 S. W. 195.

This case followed the decisions in *Jones v. State*, 99 Ark. 394, and *Graham* v. *State*, 50 Ark. 161. These cases held that a continuance could not be denied unless the state would admit the truth of the facts set up in the affidavit. Nearly every constitution guarantees the accused the right to com-

pulsory process for the attendance of witnesses. Whether this provision is violated by the refusal of a continuance under the facts of the principal case is a mooted question. In some states a continuance has been so refused without a question raised as to its constitutionality: *Lock* v. *Com.*, 144 Ky. 232; *State* v. *Dickson*, 6 Kan. 209; *Pearce* v. *Territory*, 11 Okl. 438. In other states, such refusal of a continuance has been held constitutional where a reasonable time has been given the accused in which to compel the attendance of witnesses: *State* v. *Daniels*, 49 La. Ann. 954; *State* v. *Fairfax*, 107; La. 624; *State* v. *St. Clair*, 6 Idaho 109; *State* v. *Hoyt*, 140 Ill. 588; or in case compulsory process would be ineffective, as where the witness is outside the jurisdiction: *People* v. *Savant*, 112 Mich. 297; *Keating* v. *State*, 160 Ill. 480; *People* v. *Leyshon*, 108 Cal. 440. The constitutional right to compulsory process for the attendance of witnesses is not a guarantee that witnesses will be present, but only that a reasonable effort may be made to compel attendance; *Smith* v. *State*, 118 Ga. 61; *State* v. *Wilcox*, 21 S. D. 532; *Willard* v. *Santa Barbara Super. Ct.*, 82 Cal. 456. An attachment is properly refused where a witness is sick and unable to attend court: *Terry* v. *State*, 120 Ala. 286; *Gardner* v. *U. S.*, 5 Ind. Terr. 150; *State* v. *McCarthy*, 43 La. Ann. 541. The question then is, if the witness is within the state, but process is unavailable at the time application is made, has the accused the constitutional right to a continuance until it is available? *State* v. *Wiltsey*, 103 Iowa 54, holds that where a witness is sick, no question of compulsory process arises. "On account of the sickness of the witness, process did not avail to bring the witness into court, but the defendant was not thereby deprived of his constitutional right." *Hoyt* v. *People*, 140 Ill. 588, holds that the accused is entitled to a reasonable time for the execution of process to compel attendance of witnesses at the trial, but has no constitutional right to the continuance of causes for trial. Under such holdings, the question in the principal case would be one as to the abuse of discretion on the part of the trial judge, and not a question as to the constitutional rights of the accused.

CRIMINAL PROCEDURE—PRESENCE OF ACCUSED.—In a criminal trial, the jury had deliberated about four hours upon their verdict, and returned into court for further instructions. Thereupon the trial judge prepared and read them a written instruction. Defendant was absent, being confined in the county jail; his attorney was present, but made no objections' On noticing the absence of defendant, the court sent for him, recalled the jury and then read the identical instruction which had been given during his absence. *Held*: That the accused has the right to be present during every moment of the trial, that the giving of instructions in his absence is a part of the trial, and is such prejudicial error as cannot be cured by a re-reading of them in his presence. *State* v. *Beaudin*, (Wash. 1913) 136 Pac. 137.

It is a well established rule that in cases of felony, accused must be present during the entire trial. The courts are almost uniform in holding that the giving of instructions in the absence of accused is reversible error. *Wade* v. *State*, 12 Ga. 25; *State* v. *Myrick*, 38 Kan. 238; *Maurer* v. *People*, 43 N. Y. 1; *Jones* v. *State*, 26 Ohio St. 209. In early English law, when the

defendant was not permitted to have counsel, the doctrine was established that the accused must be present at every stage of the trial. This doctrine has since been followed in American courts without regard to the reason on which it was founded. *State* v. *Outs,* 30 La. Ann. 1155. The mere fact that one step of the trial was gone over twice, once in his absence, but in identically the same manner, and without a possibility of prejudice, hardly seems to justify the contention that the accused was not present during every stage of the trial. In the instant case, the accused did not even suggest that he was prejudiced. He relied solely upon a naked technicality for a new trial. *Meece* v. *Com.,* 78 Ky. 586, lays down an apparently more reasonable and satisfactory doctrine. The facts are identical with the instant case, except that the instructions were not re-read in the presence of the accused. A new trial was not granted. The court said, "One charged with the commission of a felony cannot be tried during his absence from the court-room, and when any step is taken during the trial in the absence of the prisoner, the record must show affirmatively that he could in no wise have been prejudiced by it, else this court will reverse the judgment." On facts in every respect identical with the instant case, the California court held in *People* v. *Soto,* 65 Cal. 621, that the repetition of the instructions in the presence of the accused cured the error. The court said, "Inasmuch as it was the jury's duty to bear in mind precisely the same instructions given while the defendant was in the court-room, it is manifest that no injury could have been done defendant by reason of what occurred while he was absent." This latter case gives the accused every safeguard, and denies him no constitutional rights. The granting of a new trial in the instant case seems an unwarranted delay and expense, and a fit cause for further public dissatisfaction with the machinery of justice.

INSURANCE—INSURABLE INTEREST—TIME OF RECKONING SAME.—A life insurance policy for a 10-year term provided that at the expiration of the term a new policy for an equal amount and for a similar term would be issued without medical examination provided the expiring policy were returned to the company. Upon the expiration of the term the policy was not returned but was renewed by a rider attached to it extending the obligation of the company for a period of 10 years. The beneficiary under the policy was the wife of the assured at the time it was issued. Prior to the renewal she obtained a divorce and paid all of the subsequent premiums herself. *Held.* The rider extended the old contract for another term of 10 years and did not create a new contract. The insurable interest of beneficiary was to be tested as of the date of the original contract and not as of the date of the renewal. *Marquet* v. *Aetna Life Ins. Co.* (Tenn. 1913) 159 S. W. 733.

Where one has an insurable interest at the time insurance is effected upon the life of another for his benefit the fact that his interest ceases prior to the insured's death will not deprive him of his right to recover under the policy. *Scott* v. *Dickson,* 108 Pa. 6, 56 Am. St. Rep. 192. Hence the subsequent divorce of a wife will not affect her right to recover under a policy upon the life of her husband. *Conn. Mut. Life Ins. Co.* v. *Schaefer,* 97 U. S. 457,

24 L. Ed. 251. Therefore the rights of the wife under the policy during the original term are clearly not affected by the divorce. But the case is novel in determining the rights of a beneficiary, whose insurable interest has been extinguished, upon the renewal of a policy according to its terms. The court held that the renewal of the policy by a rider was a continuation of the contract for another period of 10 years and that although the beneficiary had no insurable interest at the time of the renewal her interest at the time of the inception of the contract was sufficient to support her rights throughout the term of the renewal.

LIBEL AND SLANDER—PRIVILEGED COMMUNICATIONS—JUDICIAL PROCEEDINGS. —Defendant published a report that plaintiff had been indicted by a grand jury when in fact the person indicted was another of the same name. The mistake as to the identity was an honest one, there was no negligence on the part of defendant, the report of the grand jury proceedings was a fair one, and there was no malice on the part of the defendant. *Held*, that defendant was liable in an action for libel notwithstanding the circumstances enumerated above. *Sweet* v. *Post Publishing Co.* (Mass. 1913) 102 N. E. 660.

It is an established rule that malice must be shown in the case of qualifiedly privileged communications, at least between private persons, where the privilege is granted because of mutual interest or a duty to disclose. *Coogler* v. *Rhodes*, 38 Fla. 240, 21 So. 109, 62 Am. St. Rep. 675; *Bearce* v. *Bass*, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446; *Casset* v. *Gilbert*, 6 Gray (Mass.) 94. The principal case admits this but declares that the privilege attaching to reports of judicial proceedings rests upon a different ground. But that conclusion does not necessarily follow. Reports of judicial proceedings are privileged because it is to the interest of the community to know how justice is administered. *Cowley* v. *Pulsifer*, 137 Mass. 392, 50 Am. Rep. 318. It is sufficient to confer the privilege that the matter is of public interest to the community. *Kelly* v. *Tingling*, L. R. 1 Q. B. 699; *Palmer* v. *Concord*, 48 N. H. 211. So it would really seem that both sorts of privilege are based on interest. Such is the reasoning of the cases holding that where there is inaccuracy in the published statement it is the right of the defendant to show that there was no malice and that reasonable care was used, and that the inaccuracy arose notwithstanding it. *O'Connell* v. *Boston Herald Co.*, 129 Fed. 839; *Douglas* v. *Daisley*, 114 Fed. 628; 52 C. C. A. 324, 57 L. R. A. 475; *Belo* v. *Lacy* (Tex. Civ. App.) 111 S. W. 215; *Ferber* v. *Gazette & Bulletin Pub. Assn.*, 212 Pa. 367, 61 Atl. 939; *Briggs* v. *Garnett*, 111 Pa. 404, 56 Am. Rep. 274; *Bearce* v. *Bass*, supra; *Coleman* v. *MacLennon*, 78 Kan. 711, 98 Pac. 281, 7 MICH. L. REV. 351. *Park* v. *Detroit Free Press Co.*, 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am St. Rep. 544, apparently holds with the principal case, but can be differentiated, as the publication was not privileged in the first instance.

MASTER AND SERVANT—PAYMENT OF WAGES OF DISCHARGED EMPLOYÉ.— The South Carolina Civil Code, 1912, § 3812 provides that, when a corporation shall discharge a laborer whose wages are paid monthly or weekly on a fixed day beyond the end of the month or week in which the labor is per-

formed, the wages earned up to the time of discharge shall become immediately due and payable, and, if not paid within twenty-four hours after demand, the corporation shall be subject to penalty of five dollars a day. By virtue of this statute the plaintiff recovered $1.93 wages due him by defendant at the time he was discharged, and $95.00, the accumulated daily penalty of five dollars per day for delay in payment. *Held* that the statute did not deprive the corporation of its property without due process of law, or deny it the equal protection of the laws and the liberty of contract. *Wynne* v. *Seaboard Air Line Ry.* (S. C. 1913) 79 S. E. 521.

The decision in this case was predicated on the constitutional right conferred on the Legislature to alter or repeal all charters of incorporation, CONST. 1895, Art 9, § 2, and upon such foundation is supported by the weight of authority: *St. Louis etc. R. R. Co.* v. *Paul,* 173 U. S. 404; *Lawrence* v. *Rutland R. R. Co.* 80 Vt. 370; *Sinking Fund Cases,* 99 U. S. 700; *Commissioners* v. *Holyoke Water Power Co.,* 104 Mass. 446; *Greenwood* v. *Freight Co.* 105 U. S. 13; *Spring Valley Water Works* v. *Schottler,* 110 U. S. 347. But see *State* v. *Haun,* 61 Kans. 146; *State* v. *Goodwill,* 33 W. Va. 179; *Frorer et al.* v. *People,* 141 Ill. 171; *State* v. *Loomis,* 115 Mo. 307; *Godcharles* v. *Wigeman,* 113 Pa. St. 431. The court also sustained its decision under the power of the state to legislate for the common good,—commonly called the police power: *Chicago etc. Ry. Co.* v. *McGuire,* 219 U. S. 549; *Johnson* v. *Spartan Mills,* 68 S. C. 339; *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13; *Railway* v. *Mackey,* 127 U. S. 205. It is observed that the hardship attending the needy laborer by withholding his wages is far greater than the inconvenience to the corporation of departing from their custom or regulation in paying a just debt; and moreover, by such prompt payment, the laborer could use the money in seeking other employment, thereby preventing him from becoming a burden to the state. Besides this the statute tends to prevent dissatisfaction among laborers, and hence, tends to prevent agitation and strikes among them, which is a matter of grave public policy. See contrary theory in *Ritchie* v. *Illinois,* 155 Ill. 98.

MUNICIPAL CORPORATIONS—ACTIONS—CONDITIONS PRECEDENT.—A statute provided that no action should be maintained against a village for damages for personal injury, unless a written notice of the claim had been filed with the village clerk within 60 days. Plaintiff, an infant, five years of age, without complying with this statute in respect of notice, sued a municipality, which moved to dismiss the complaint upon the ground of plaintiff's failure to file the requisite notice. *Held,* that a child five years of age is not precluded from bringing suit by failure to file the notice specified in the statute; and further, that a child of that age should not be prejudiced by the failure of its father or mother to file the same. *Murphy* v. *Village of Ft. Edward,* (N. Y. 1913), 144 N. Y. S. 451.

This decision runs counter to many decisions both in New York and elsewhere. That the filing of the statutory notice is a condition precedent to the right to maintain an action is supported by ample authority in New York and in the states generally. *Winter* v. *City of Niagara Falls,* 190 N. Y. 198,

82 N. E. 1101; *Reining* v. *City of Buffalo*, 102 N. Y. 308, 6 N. E. 792; *Porter* v. *Kingsbury*, 71 N. Y. 588; *Carson* v. *Village of Dresden*, 202 N. Y. 414, 95 N. E. 803; *Postel* v. *Seattle*, 41 Wash. 432, 83 Pac. 1025; *Schmidt* v. *City of Fremont*, 70 Neb. 577, 97 N. W. 830; *City of Ft. Worth* v. *Shero*, 16 Tex. Civ. App. 487, 41 S. W. 704; *Trost* v. *City of Casselton*, 8 N. D. 534, 79 N. W. 1071. It is true that where the plaintiff is mentally or physically disabled to such a degree as to render him unable to file the notice within the time prescribed, he will be excused for his failure to do so. *Webster* v. *Beaver Dam*, 84 Fed. 280; *Barclay* v. *Boston*, 167 Mass. 596, 46 N. E. 113. But mere personal disability, though it renders plaintiff helpless, will not of itself, as a recent North Carolina case points out, relieve plaintiff of the duty of giving notice, where it is possible for him to utilize his friends for the purpose of notifying the city. *Hartsell* v. *City of Ashville*, (N. C. 1913), 80 S. E. 226. It is difficult to reconcile the decision of the principal case with the proposition laid down in *Winter* v. *Niagara Falls*, supra. It was there held that the provision of a charter with regard to the time for presenting a claim against a city was not a statute of limitation, the running of which would suspend during infancy; that such a provision did not relate to the commencement of an action, but was a bar to an action against the city. One of the judges in the principal case, referring to the *Niagara Falls* case, called attention "to the fact that plaintiff in that case was 18 years of age 'and so far as the complaint shows, presumably able to cause a claim to be filed.'" If this was intended as a distinction, it is submitted that the distinction is groundless. First, because there are no degrees of infancy; and secondly, because it appears from the facts of the principal case that the mother of plaintiff had been zealously protecting plaintiff's rights, a suit prior to this action having been prosecuted against a railroad company for the same injury, and that plaintiff might easily have filed the claim. This last fact, within the principal of *Hartsell* v. *City of Asheville*, supra, would be sufficient to hold plaintiff to the general rule.

MUNICIPAL CORPORATIONS—RIGHT OF TAXPAYER TO SUE ON CONTRACT MADE BY CITY WITH WATER COMPANY.—Plaintiff, as citizen of Albuquerque, sued defendant water company for loss sustained by reason of defendant's failure to provide the sufficient water pressure called for by the contract between defendant and the city. *Held*: A taxpayer has no such direct interest in the contract as will allow him to sue *ex contractu* for breach, or *ex delicto* for violation of the public duty thereby assumed. *Braden* v. *Water Supply Co.*, (N. M. 1913), 135 Pac. 81.

This case, one of first impression in New Mexico, adds another state to the already formidable list of states that deny the right of the taxpayer to bring action under such circumstances. It appears that but three states, Kentucky, North Carolina, and Florida, allow a recovery. In *Paducah Lumber Co.* v. *Paducah Water Supply Co.*, 89 Ky. 340, 25 Am. St. Rep. 536, plaintiff was allowed to recover on the ground that the benficiary of a contract has the power to sue in his own right, though no privity exists between him and the defendant. In *Fisher* v. *Greensboro Water Supply Co.*, 128 N. C. 375,

38 S. E. 912, and in *Mugge* v. *Tampa Waterworks*, 52 Fla. 371, 6 L. R. A. (N. S.) 1171, recovery was had on the theory of tort. This last ground, while it offers escape from the privity necessary to a contract action, has not met with approval by the courts generally. The inequity of allowing the negligent public service company to go free from liability for its failure to render service for which it receives large compensation is noticed by the court in the principal case; but the remedy is to be obtained, the court says, not "by a violation of the long-established legal principles, or by remaking the contract between the parties," but by legislation "designed to protect the public against the reckless granting of one-sided franchises under which the public has but little recognition." A convenient summary of authorities on this much controverted question is afforded by the case of *Ancrum* v. *Camden Water, etc. Co.*, 82 S. C. 284, 21 L. R. A. (N. S.) 1029. This general subject has received exhaustive treatment in two articles found in earlier numbers of this Review: "The Liability of Water Companies for Fire Losses," by Edson R. Sunderland, 3 MICH. L. REV. 442; and "The Liability of Water Companies for Fire Losses—Another View," by Albert Martin Kales, 3 MICH. L. REV. 501.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE OF THIRD PARTY.—Plaintiff went for a pleasure ride with X in the latter's automobile, and as they drove across a street intersection the machine was struck by a street car operated by defendant's servants. The proof showed that defendant was negligent, and also that X, who was driving the machine, was contributorily negligent. Plaintiff was injured and brought suit. *Held* that the negligence of the driver could be imputed to plaintiff, and that it barred her recovery. *Colborne* v. *Detroit United Ry.*, (Mich. 1913) 143 N. W. 32.

The case is against the great weight of authority in this country. The doctrine that the negligence of a third party can be imputed to one injured in a case of this kind, was first laid down in the case of *Thorogood* v. *Bryan*, 8 C. B. 115, and was there based on the ground that the plaintiff had in some way identified himself with the third party, whose contributory negligence must be considered the plaintiff's own. This case was criticized in *The Milan*, Lush. 388, and was finally expressly overruled in *The Bernina*, L. R. 12 P. D. 58, so the doctrine is no longer law in England. The American States have almost universally rejected the doctrine, declaring *Thorogood* v. *Bryan* to be decided contrary to both reason and justice. *Hot Springs St. R. Co.* v. *Hildreth*, 72 Ark. 572; *Met. St. R. Co.* v. *Powell*, 89 Ga. 601; *W. St. L. & P. R. R. Co.* v. *Shacklet*, 105 Ill. 364; *Nisbet* v. *Garner*, 75 Iowa 314, 1 L. R. A. 752; *L. C. & L. R. R. Co.* v. *Case's Adm'r*, 9 Bush (Ky) 728; *State of Maine* v. *B. & M. R. Co.*, 80 Me. 430; *Randolph* v. *O'Riordan*, 155 Mass. 331; *Chadbourne* v. *Springfield St. Ry.*, 199 Mass. 574, 85 N. E. 737; *Follman* v. *Mankato*, 35 Minn. 522; *A. & V. Ry. Co.* v. *Davis*, 69 Miss. 444; *Bennett* v. *N. J. R. R. & T. Co.*, 36 N. J. L. 225; *Chapman* v. *New Haven R. Co.*, 19 N. Y. 341; *Farley* v. *W. & N. C. R. Co.*, 3 Pennewill (Del.) 581, 52 Atl. 543; *Carlisle* v. *Brisbane*, 113 Pa. 544; *G. H. & S. A. Ry. Co.* v. *Kutac*, 72 Tex. 643; *Little* v. *Hackett*, 116 U. S. 366. The rule is different where both the

plaintiff and the third party are engaged in a common enterprise, *Payne* v. *C. R. I. & P. R. Co.*, 39 Iowa 523, and a distinction has sometimes been attempted to be made between riding in a public, and riding in a private carriage, but this latter idea is not generally sanctioned or heeded. *Mosterson* v. *N.Y.C.& H. R.R.Co.*,84 N.Y. 247; *Cuddy* v. *Horn*, 46 Mich. 596. In accord with the principal case are *Whitaker* v. *City of Helena*, 14 Mont. 124; *Omaha & Republican Valley R. Co.* v. *Talbot*, 48 Neb. 627; *Carlisle* v. *Sheldon*, 38 Vt. 440.

PRINCIPAL AND SURETY—CO-SURETIES DEFINED—CONTRIBUTION.—Several surety companies were bound by separate bonds on account of the same principal and to the same obligee. The bonds were all alike and each company limited its liability under them, in event of default on the part of the principal, to such proportion of the loss sustained by the obligee as the penalty named in the bond bore to total amount of bonds furnished to the obligee by the principal. The principal deposited collateral security with one of the surety companies to indemnify it against any loss which it might sustain on its bond. *Held*: The relationship of co-surety did not exist between the several companies and none of the other companies was entitled to any of the benefit of this security. *Assets Realization Co.* v. *American Bonding Co.* (Ohio 1913) 102 N. E. 719.

As a general rule sureties who undertake for the same principal and for the same debt are co-sureties although they are bound by separate instruments. *Deering* v. *Earl of Winchelsea*, 2 Bos. & Pul. 270; *Houck* v. *Graham*, 106 Ind. 195, 6 N. E. 594, 55 Am. St. Rep. 727; *Robinson* v. *Boyd*, 60 Ohio St. 57, 53 N. E. 494. The same rule has been applied in the case of surety companies, *National Surety Co.* v. *Di Marsico*, 105 N. Y. Sup. 272. But where the obligations are wholly distinct things, as a replevin bond and an appeal bond, though arising from the same principal indebtedness, the parties are not co-sureties. *Rosenbaum* v. *Goodman*, 78 Va. 121. In the principal case the court bases its decision entirely upon the provision in each bond limiting the liability of each company to its proportionate share of the total loss. This contract between the surety and the obligee curtails the latter's common law right to recover the entire amount of the loss from one surety and would seem to make contribution among the sureties unnecessary. The court holds that the right of contribution is destroyed by this provision and this, in its opinion, goes to the essence of the relation of co-suretyship; that the existence of the right of contribution is the test as to whether the parties are co-sureties, and there being no such right in this case all of the other rights of the sureties among themselves are absent. That the several companies assumed entirely separate and distinct obligations and no legal or equitable duty was owed by one to the other. There may be some doubt as to whether this result should follow from a contract entirely between the surety and the obligee, but the case is of interest in defining the rights of several sureties on such limited bonds.

PRINCIPAL AND SURETY—DISCHARGE OF SURETY—MISTAKE.—Several sureties executed a bond for the faithful performance of the terms of a lease by the principal. After the execution of the bond the name of one of the sure-

ties was withdrawn by the principal without the knowledge of the other sureties. The defendant then executed a separate instrument as surety for the same principal guaranteeing the payment of the aforesaid bond. He knew that the name of the surety had been withdrawn from the bond but did not know that it had been done without the consent of the other sureties. *Held,* That the other sureties on the bond were released, but the bond was not wholly void but was binding upon the principal, and that the defendant was liable on the guaranty since he was put upon inquiry from the knowledge which he had and should have ascertained the true facts. *Shepherd Land Co.* v. *Banigan* (R. I. 1913) 87 Atl. 531.

It is evident that the co-sureties on the bond who did not know of the withdrawal were released. *Smith* v. *United States,* 69 U. S. 219, 17 L. Ed. 788. But the question of the liability of the defendant who signed after the alteration is a different one, involving a question of mistake in the execution of an instrument rather than one of discharge of a surety. In the principal case there were two instruments involved. A similar question has arisen in several American cases in all of which, however, the parties had signed the same instrument. A surety who signs a bond in ignorance of the fact that the other sureties have already been released by an alteration of the bond without their knowledge is not bound, *Howe* v. *Peabody,* 2 Gray 556. The same was held where the release was by reason of the withdrawal of the name of a former surety. *State* v. *McGonigle,* 101 Mo. 353, 8 L. R. A. 735. In both of these cases the defendant was ignorant of the fact that there had been any alteration of the instrument, but otherwise knew what he was signing. The decision in the principal case is based upon the following cases, *State* v. *Van Pelt,* 1 Ind. 304 and *Mitchell* v. *Burton,* 39 Tenn. (3 Head.) 613. In these cases it was held that one who signs in the place of a surety whose name has been withdrawn, and with knowledge of this fact, is not relieved from liability on the instrument because he did not know that it had been done without the knowledge and consent of the other sureties on the instrument and that they were not liable with him as he had supposed. In the first of these cases the decision is put upon the ground that the mistake was as the legal consequences of the act and therefore did not affect the contract. This would not seem to be sound as the question of whether the other sureties had knowledge of the release is one of fact and not of law. The same reason would have applied to the two first cases cited. If the principal case is to be sustained it is upon the ground adopted in the Tennessee decision, constructive notice. There seems to be good reason to hold that from his knowledge of the fact that a surety's name had been withdrawn the defendant should be charged with notice of all the circumstances surrounding such withdrawal.

SALES—BONAFIDE PURCHASER—CONDITIONAL SALE—NOTICE OF CONDITION. —Action for conversion of machinery sold to a contractor, to be placed in an electric plant for defendant city, title being expressly reserved by vendor until payment. Vendor knew it was to be attached to the said realty. Defendant city disclaimed all knowledge that title was reserved. *Held,* in order to bind the city, it must have had actual notice of the reserved title, and its

rights were not affected without such notice. *Allis Chalmers Co.* v. *City of Atlantic,* (Iowa 1913) 144 N. W. 346.

It should be noted that the Code of Iowa required recording of such sales, but that the record in this case was not sufficient to amount to constructive notice because of the non-residence of the vendor and the contractor. The statement of the Court that actual notice would be required, on the ground of estoppel, and that constructive notice would be sufficient was therefore dictum. The question then arises what rights does an owner, sub-vendee or mortgagee of premises get, assuming that he is a bona-fide purchaser for value without notice, when personally sold upon condition is affixed to the realty? As between the immediate parties (vendor and conditional vendee) no difficulty arises in preserving the character of the chattels even if they are annexed to the realty with the seller's assent, so long as they remain distinguishable and severable, *Lansing Iron Works* v. *Walker,* 91 Mich. 409, 30 Am. St. Rep. 488; *Tyson* v. *Post,* 108 N. Y. 217, 2 Am. St. Rep. 409, *Rogers* v. *Cox,* 96 Ind. 157, 49 Am. Rep. 152. The same rule applies to creditors of the vendee. *Sturgis* v. *Warren,* 11 Vt. 433; *Sisson* v. *Hibbard,* 75 N. Y. 542. As to purchasers from conditional vendee of personalty, see *Harkness* v. *Russell,* 118 U. S. 663. But in the principal case the machinery was attached to the realty of a third person who had no notice of the conditions attached to the sale. As against subsequent purchasers of the land without notice (by the weight of authority) there is no action, as the chattels are deemed to have become realty. *Stillman* v. *Flenniken,* 58 Iowa 450, 43 Am. Rep. 120; *Hobson* v. *Gurringe,* 1 Ch. 182 (1897); *Prince* v. *Case,* 10 Conn. 357, 27 Am. Dec. 675; *Tibbets* v. *Horne,* 65 N. H. 242, 23 Am. St. Rep. 31; but see *Mott* v. *Palmer,* 1 N. Y. 564; *Ford* v. *Cobb,* 20 N. Y. 344. where it was held that the subsequent purchaser got no title but must rely on the warranties in his deed. The same general rule applies to subsequent mortgagees without notice. *Hopewell Mills* v. *Taunton Savings Bank,* 150 Mass. 519, 15 Am. St. Rep. 235, 6 L. R. A. 249; *Case Mfg. Co.* v. *Carver,* 45 Oh. St. 289; *Wickes* v. *Hill,* 115 Mich. 333, but see contra *Warren* v. *Liddel,* 110 Ala. 232, as to the rights of a prior mortgagee see 10 MICH. L. REV. 64.

SALES—MISREPRESENTATION.—Plaintiff purchased a stock of merchandise from defendant, who assured plaintiff that the value of the stock was $3500 and that the business was profitable. Plaintiff had an inventory taken, found the value of the stock to be $1682.16, and filed a bill asking for a return of the securities given for the purchase price. *Held,* Plaintiff could rescind for fraud even though he had had an opportunity to inspect. *Face* v. *Hall* (Mich. 1913) 143 N. W. 622.

Where parties deal at arms length and on an equal footing, it is well settled that a false representation concerning the worth or value of the goods will neither sustain an action, nor warrant a recission: *Van Epps* v. *Harrison,* 5 Hill. (N. Y.) 63, 40 Am. Dec. 314; *Deming* v. *Darling,* 148 Mass. 504, 2 L. R. A. 743; *Poland* v. *Brownwell,* 131 Mass. 138; *Page* v. *Parker,* 43 N. H. 363; *Chrysler* v. *Canaday,* 90 N. Y. 272; *Evans* v. *Gerry,* 174 Ill. 595. This is especially true where the merchandise is open to inspection and the buyer

was qualified to judge for himself: *Griffith* v. *Strand*, 19 Wash. 686; and where both parties were equally familiar with the facts and the buyer had ample opportunity to inform himself: *Weaver* v. *Shriver*, 79 Md. 530. Where, however, one party has peculiar means of knowledge, or where a special trust or confidence is reposed by one party in the opinion of the other, false representation or expression of opinion as to value, intended to deceive, is regarded as fraud and entitles the defrauded party to a remedy: *Graffenstein* v. *Epstein*, 23 Kan. 443, 33 Am. Rep. 171; *Byrne* v. *Stewart*, 124 Pa. St. 450; *Coles* v. *Kennedy*, 81 Iowa 360. 25 Am. St. Rep. 503; *Maxted* v. *Fowler*, 94 Mich. 106; *Braley* v. *Powers*, 92 Me. 203. Representations, however, respecting the *cost* of an article or the price at which it was *bought*, as distinguished from representations of *value* as in the principal case, stand upon a different ground, the better line of decisions treat them as representations of fact, and when falsely made they amount to fraud: *Fairchild* v. *McMahon*, 139 N. Y. 290; *Teachout* v. *Van Hoesen*, 76 Iowa 113, 14 Am. St. Rep. 206, 1 L. R. A. 664; *Sanford* v. *Handy*, 23 Wend. 260; but many courts apply the same rule extended to other opinions of value; *Gasset* v. *Glasier*, 165 Mass. 473; *Holbrook* v. *Connor*, 60 Me. 578, 11 Am. Rep. 212; *MacKenzie* v. *Seeberger*, 76 Fed. 108, 22 C. C. A. 83.

WILLS—INTERLINEATION SUBSEQUENT TO SIGNING—ACKNOWLEDGMENT.—Testator, after he had subscribed his name to a will, inserted an additional bequest by an interlineation. Subsequently the signature was acknowledged in the presence of witnesses. *Held*, that the will with the interlineation was signed by the testator. *In re Bullivant's Will* (N. J. 1913), 88 Atl. 1093.

The statute of New Jersey prescribes that all wills shall be in writing, and shall be signed by the testator, which signature shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in the presence of two witnesses. C. S. 5867 pl. 24. The court in construing this statute gave to the word "sign" its original meaning of signum or sign rather than its derivative meaning of sign manual or handwriting, and following out such interpretation held that the acknowledgment before the witnesses subsequent to the interlineation was equivalent to an adoption by the testator of his previous sign manual as his present sign. Such an adoption is conceivable but it can hardly be said that the makers of the statute had it in mind when they used the word "signed." The purpose of the statute which is very much similar to the English statute before 1837, was undoubtedly to prevent fraud, but it is obvious that to substitute acknowledgment, one of the safeguards against fraud, for signing, another safeguard, is to destroy one of of the safeguards. It is true that some cases have gone even further than this and held that the use of the testator's name in the beginning of the will, as, "I, John Jones, being of sound and disposing mind and memory," etc., is a sufficient signature, *Lemayne* v. *Stanley*, 3 Lev. 1; *Armstrong* v. *Armstrong*, 29 Ala. 538; *Adams* v. *Field*, 21 Vt. 256; but for contra decisions see, *In re Booth*, 127 N. Y. 109, 27 N. E. 826; *Warwick* v. *Warwick*, 86 Va. 596, 10 S. E. 843; *Ramsey* v. *Ramsey*, 13 Gratt. (Va.) 664.

WITNESSES—COMPETENCY OF WIFE TO TESTIFY AGAINST HER HUSBAND.—A statute provided that one spouse could not testify against the other "except in a criminal prosecution for a crime committed one against the other;" *held*, that a wife is competent to testify against her husband in a prosecution for wilfully failing to supply his children with necessary food, clothing, shelter and medical attendance. *Hunter* v. *State* (Okla. 1913) 134 Pac. 1134.

The construction given this statute is more liberal than that usually given similar statutes. In *Bassett* v. *U. S.* 137 U.S. 496, 11 Sup. Ct. 165, the appellant was being prosecuted for polygamy, and the court held the wife to be an incompetent witness, reversing the decision given in 5 Utah 136, 13 Pac. 240. In accord is *State* v. *Kniffen*, 44 Wash. 485. In *People* v. *Westbrook*, 94 Mich. 629, 54 N. W. 486, a wife was held incompetent to testify against her husband in a criminal prosecution for an indecent assault upon his nine year old step daughter. In *Overton* v. *State*, 43 Tex. 616, a wife was denied the right to testify against her husband in an action for the theft of her property. And she was held to be an incompetent witness in a prosecution for incest with his stepdaughter in *Compton* v. *State*, 13 Tex. App. 271, 44 Am. Rep. 703. In *McLean* v. *State*, 32 Tex. Cr. R. 521, 24 S. W. 898 the wife was not permitted to testify against her husband in a prosecution for adultery. In accord is *State* v. *Armstrong*, 4 Minn. 251. In accord with the principal case are *State* v. *Sloan*, 55 Iowa 217, 7 N. W. 552 where the legal wife was held competent to testify against her husband in a prosecution for bigamy, and *Lord* v. *State*, 17 Neb. 526, 23 N. W. 507, which allowed a wife to testify against her husband in a prosecution for adultery. *State* v. *Bennet*, 31 Iowa 24, held the husband was a competent witness against his wife in a prosecution for adultery. See 6 COLUMBIA L. REV. 469.

BOOK REVIEWS.

HANDBOOK OF THE LAW OF BANKS AND BANKING. By Francis B. Tiffany, St. Paul, Minn. West Publishing Co. 1912; pp. xi, 701.

I am bound to believe that one who essays to sit in judgment on the merits of a book should first of all ascertain the purpose of the author in writing it, the objects at which he aimed, the plan he adopted and last but by no means least, whether any useful purpose could be accomplished by the publication of such a book—that is whether the subject covered by the book had not already been as well and as completely covered by other publications. I take it that the function of the reviewer is not to condemn the work of an author because the author has not done it as the reviewer would have done it had he had it to do. I believe that the judgment of the reviewer should be based upon the fact whether or not the author has produced according to his purpose and according to his plan, (whether that plan is of his own choosing or is imposed upon him by the choice of others) a work of value to those whom it was designed to aid. Tiffany on Banks and Banking comes to us in the form made familiar to readers of this Review and to lawyers and law students generally through the thirty odd volumes of the Hornbook series which preceded it. The author did not design it to be and does not pretend that it is an exhaustive treatise on the law of banks and banking. His purpose was to present the law of the subject, in brief compass in accordance with the plan of the series of which his work is a part. His further purpose was to make his book serve the needs of those who are preparing to enter the practice and of practitioners as well—a purpose in most instances of doubtful accomplishment. The author recognizes, he says, that the subject is one that concerns practitioners rather than law students and for that reason he has covered many questions in the text and notes that might have been omitted, had the book been intended primarily for law students, and he has made a fuller citation of the decisions than he otherwise would have made. In this connection it is worthy of remark that the author has referred to something like three thousand cases in the course of his work from which in numerous instances he has made extended quotations in his notes. Notwithstanding the author's apparent opinion that this book will serve the needs of the practitioner better than it will serve the needs of law students, a fair examination of his treatment of the subject will, I am confident, force a different conclusion. The work is necessarily elementary. It could not be otherwise and conform to the plan of its companion volumes of the Hornbook series. Therein lies its chief value. The law student who desires to acquaint himself with the law relating to the creation and organization of banks, their powers and authority, their quasi-public functions, their obligations and duties, their rights and privileges will find in this book brief and ready means of satisfying his desire and will read the book with profit and with pleasure. This phase of the subject is treated by the author almost exclusively upon the basis of the National Bank

Act which is set out in an appendix as it appears in the Revised Statutes with the notes and annotations to the various sections thereof as they appear in the U. S. Compiled Laws, Supplement 1911.

The subject of carrying on banking, the conducting of the banking business—the relations between banks and their customers, the relative rights, duties and obligations, takes a wider range, and embraces banks organized under State authority as well as under National authority. Obviously an author must labor under some disadvantage and be subject to some restraint who must conform to a plan not of his own choosing. He must bring his whole work within limits set by others. He must restrict where if left to his own devices he might deem it necessary or proper to enlarge. He is subject to the constant restraint of conforming to prearranged limits. No judgment should in this case be passed upon the author or his book without due consideration of the fact that he labored under the necessity from the beginning of making his work "in accordance with the plan of the Hornbook series." In saying this I am not asserting that the Hornbook series is in any respect defective in plan or execution. I am simply affirming what I think must be conceded that an author is to no inconsiderable degree handicapped who is compelled to work under the restraint of a plan not his own, and that work done under such conditions cannot be fairly judged without taking into consideration the effect of the conditions, and making due allowance therefor. Nor am I intimating in the least that the book in question is too much limited in compass by the plan to which it was made to conform or otherwise. On the contrary I regard it as all the better because of its brief compass. That fact alone would attract hundreds of student readers where a more extended treatise would repel them. So. for the law student it is all the better because it is comparatively brief and for the practitioner it is just as well and perhaps better because what he wants of a textbook is the suggestion of a trail which for his special purposes he can best follow to the limits in his own way. My examination of this book in respect to both of the author's announced purposes leads me to conclude that it is no unnecessary or unwelcome intruder into the field of banks and banking but is a distinct aid to investigators of the law of that important and interesting subject. R. E. B.

IMMIGRATION AND LABOR—THE ECONOMIC ASPECTS OF EUROPEAN IMMIGRATION TO THE UNITED STATES. By Isaac A. Hourwich, Ph.D. (Expert Special Agent on Mining, United States Bureau of the Census) G. P. Putnam's Sons, New York and London, The Knickerbocker Press, 1912. pp. xvii, 544.

As the title indicates, this is an avowed attempt to treat of the economic effects of immigration on labor conditions in this country. The author undertakes to show that the usual charges made against unrestricted immigration, i. e. that it has resulted in the crowding out of native American laborers in many industries, in an increased rate of unemployment, in the lowering of the standard of living among American and older immigrant laborers, in a reduction of the rate of wages or in the prevention of an increase therein, in

retarding the movement for a shorter day and in delaying labor organization, are unfounded. His attack on these charges is spirited, his exposition of the fallacy of at least a part of them is clear, and his argument for unrestricted immigration, supported by the statistics which he includes in his book, is convincing.

The interest of the reader is challenged and held by the author's clear and penetrating analysis of the statistical evidence examined and the forceful statement of his deductions therefrom with which he refutes popular notions regarding the effects of immigration. Typical examples of this are furnished by the following excerpts. On page 21, in commenting on the living expenses of the American laborer, the author says, "Contrary to common assertion, the living expenses of the native American workman in small cities and rural districts are lower than those of the recent immigrants in the great industrial centers. It is therefore not the recent immigrant that is able to underbid the native American workman, but it is, on the contrary, the latter that is in a position to accept a cheaper wage." Again on page 11, in speaking of the displacement of native American laborers by immigrants from Southern and Eastern Europe, the author says, "The iron and steel mills are another industry from which the recent immigrants are popularly believed to have forced out the native workmen and older English-speaking immigrants. The fact is that in the earlier period of the industry, when immigration from Southern and Eastern Europe was negligible, the number of American employees increased very slowly; during the recent period, on the contrary, since the immigrants from Southern and Eastern Europe have been coming in large numbers, the number of American-born employees of every nationality has been more than doubled."

In pointing out the probable evil effects of discriminating against unskilled immigrant labor, the author calls attention to the fact that capital as well as labor immigrates and emigrates. The abundant available supply of labor, which is due in a great measure to immigration, is credited with having attracted large sums of European capital to industrial investments in this country and with the discouragement of investments of American capital in foreign industries. The situation, as the author believes, will be exactly reversed if a scarcity of labor is created in the United States. And a reversal of the situation will eventually react on and decrease the demand in this country for labor either American or foreign.

One of the most interesting of the author's comments is made apropos of his criticism of the report of the Immigration Commission, which he considers so defective in plan and statistical method as to render some considerable parts of it practically valueless or misleading, and of the recommendations of the Commission, which he regards as the result of immature deliberation and careless and imperfect analysis of the facts contained in the forty-two volumes of their report. He says, "There is no other nation in the world that expends so much for the collection of statistical data and so little for their analysis as the United States." This comment is especially worthy of note when one considers that the author of it has been in the em-

ployment of the United States for several years in one of its departments which is largely engaged in the collection of statistics.

The author's conclusion, from his survey of the whole question discussed, is that restriction of immigration, no matter how drastic, will render not one whit easier the solution of any of the labor problems that today confront the American public.

The book is a clear, readable, thoughtful and informing discussion of the problem suggested by its title. Even though one may not heartily agree with all of the conclusions which are set forth in the pages of the book, he cannot fail to respect the evident sincerity and conviction of the author. Its pages will furnish food for a long period of thought for those unreasoning theorists who blandly ascribe all of the evils of the present century, from industrial combination to race-suicide, to unrestricted immigration. G. S.

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ONTARIO COURTS AND PROCEDURE.

THE progress made in England under the Judicature Acts of 1873 and 1875, with occasional revisions of procedure, has a deep interest for the American lawyer in search of judicial efficiency. In recent years a number of our lawyers have studied the English courts at first hand and upon their return have spread the news of great accomplishments in the home of the common law. These enthusiastic reports have been subjected to incisive criticism, so that controversy has arisen, and it has been difficult to determine to what extent inference from undoubted facts would apply to our own unsettled conditions. Or, quite as commonly, conservatism has answered enthusiasm for an alien model by way of confession and avoidance. It is admitted that England administers justice with dispatch and certainty but asserted that legal and social traditions there are mainly responsible and we Americans could not avail through adoption of their administrative machinery.

The issue has been clouded. It has been impossible, for instance, to estimate the influence of the English bar in making a practical success of simplified procedure. Our country was the first to diverge from common law procedure, and the experience of many states has seemed to prove that formalism could not be abolished by enactment. We could account for the failure of minutely legislated procedure in New York on the ground that it was entrusted to disaffected agents, but this explanation hardly suffices for a number of younger code states. Somewhere we missed a large factor and have been groping while England has made conspicuous progress.

There is strong reason why a point should be made of the English bar with its social distinction, thorough training, narrow specialization and close attachment to the court. If it could be proved that England's solution depends mainly on this factor, rather

than upon frank recognition of the administrative side of the judicial function and wide latitude for the control of procedure by the courts, we would have to set our time for emancipation from formalism and inefficiency far ahead. And it is possible that the controversy thus naturally engendered might continue indefinitely if there were available no experience of the essential features of the English system under conditions similar and readily comparable to those of the typical state.

The success of unification of courts and simplification of procedure in England led to their adoption in all parts of the Empire. To ascertain to what degrees these principles may be presumed to be workable in our country we should observe results in a jurisdiction which presents conditions similar to those of the typical state and which has given the English system a thorough test.

Ontario probably meets these requirements more satisfactorily than any other such jurisdiction. This province is identical from the social and industrial standpoint with neighboring states. In character of population, resources, commerce, modes of living and transacting business, political divisions, popular government and social ideals, Ontario is very near to such states as Michigan and Ohio, and very remote from the mother country. It is more the type of an American state than are a number of the states themselves. Its resemblance to the typical state is everywhere seen; its difference, except in this one field of administering justice, is hard to detect.

Ontario had a population in 1911 of 2,523,000, making it the premier province. Its capital city, Toronto, according to the same census, numbered 376,538, but it has been growing rapidly since. Hamilton, the second city, has a population at present of about 100,000. The county organization of Ontario is practically the same as that of the typical state except that there are a few instances of a "union of counties" whereby a single county organization suffices for two counties lying contiguous. The vast northern region, extending to Hudson Bay, consists of districts not yet organized into counties.

The settlement of Upper Canada by English, Scotch and Irish settlers led in 1791 to its separation from the land of the habitant, and permitted recognition of the common law in Ontario while Quebec retained the civil law. Ontario is no pioneer province, though it has always had a frontier with its special difficulties in administering justice. In the main it is a long settled province with a distribution of population in city, village and country similar to the average northern state.

Some picture of the people of Ontario may be useful in establishing a background for the scheme of courts which will be presented. The average American needs to disabuse his mind of certain notions before he can appreciate the significance of this province as the home of a free people who are working out problems essentially the same as ours under especially favorable circumstances. We incline to think of Canada as a narrow strip of territory inhabited by expatriates who are to be pitied because they are neither English nor Americans. Our tacit monopolization of the word American illustrates well the insignificant role we accord them. And conceiving of the English mind as insular we give a far lower rating to the mind of the colonial.

Just so far as we do this we reveal a pitiable provincialism. The intelligent Canadian is in fact subject to influences more broadening than ours. He must not only know his own field but must keep in touch with developments of all kinds in both England and the United States, and his facilities for doing so are excellent.

Americans not aware of the birth of a Canadian national spirit are not abreast of the times. This sense of nationality is evinced not only by abhorence of annexation to the United States, but quite as much by insistence upon their divergence from the British type and their virtual independence. These people resent the implication that if they are not English they must be American. They are *Canadian* and are determined that this shall mean to the world something superior to any other designation. And in working out their ambitious programme their advantages are many. They possess greater political flexibility than the States; they are more free to choose from existing models on both sides of the Atlantic.

The people of Ontario, taking this as the typical province, are singularly fortunate. They are a fairly homogeneous stock, enriched by bounteous resources of timber, soil, and mine, strategically located to handle a continent's commerce, now fully possessed of a national ideal, who are consciously selecting and rejecting, and building into their political and social structure what they find of value. Nothing could be wider of the mark than to think of them as political dependents or isolated provincials.

These facts are significant because we must not think of Ontario as having had a ready-made judicial system forced upon it. No people were ever more free to work out their own ideals than the people of Ontario. The essentials of their system were taken only after being proved in England and with the fullest knowledge of developments in the States. Conscious deliberation governed in making use of the new material and only so much was adopted as

could properly be applied to conditions far different from those in England. Ontario had fewer immovable landmarks to resist the flow of new forms and so was able to make the system more uniform than the mother country.

What Ontario adopted consciously in the Judicature Act of 1881 was unification of the system of courts and a schedule of rules comprising the modern procedure. The several tribunals known as the Queen's Bench, the Chancery Court, the Common Pleas Court, and Court of Appeal, were fused into a single Supreme Court of Judicature possessing the utmost flexibility. This court was given the power to revise and amend the procedural rules, subject to the veto of Parliament. Several extensive revisions have been made under this power without interference by the legislative branch, so the automony of the court in this field is pretty well established. Of course considerable fundamental procedure exists in the Judicature Act and there is no question that Paliament can also alter procedure at will, but there is no prospect that there will ever be interference in the delicate and technical development of procedural authority. The Supreme Court rules are also the rules, as far as applicable, for proceedings in the inferior courts, except the lowest court of all, the Division Court, which has still simpler procedure.

Canada has always had expertly selected judges and judicial tenure had uniformly been for good behavior. As in England, no change was suggested with respect to the judicial office when the modernizing process was effected. Seen in the largest way it has been simply the recognition of the need for unification and administrative control together with businesslike procedure and freedom for developing this procedure to meet all needs.

Coincident with this movement was the merger of law and equity so that a single system of justice would prevail. In effect this gives to every court the fullest remedy in every case. Harmony is secured by the rule that in case of conflict the rules of equity shall prevail.

The structure of the court organization to meet the needs of people living in cities and villages and on farms is so rational as to appear to solve this problem for all time. Every county is provided with a County Court which has jurisdiction sufficiently high to take care of the greater number of causes arising, both civil and criminal. In form, the criminal causes are tried in a separate court, the Court of General Sessions of the Peace, but the County Court judge is *ex officio* judge also of that court. The jury list and time and place of sitting are the same in both courts. For the more important causes the trial judges of the Supreme Court go on circuit, holding court in forty-six assize towns outside of the capital. By

reason of having residence at Toronto, and being all of equal judicial authority, charged alike with responsibility for trying causes and hearing appeals, this court is given a solidarity which is unattainable under the system prevailing in nearly all of the States. It not only hears appeals from the County Courts, but from its own trial branches, so that final authority is vested in a comparatively compact body. There is no further appeal for causes brought in the County Court so that our fallacious freedom of appeal to successive courts for less important litigation is avoided.

Then, to bring justice near to every man, so that causes involving values too slight to permit of going to a center for trial may be economically adjudicated before a real tribunal, the County Court judge treats his county as a circuit, and goes to the various villages to hold Division court when there are matters to be adjudicated. In this way the absurdities of our justices of the peace, competing with each other under the fee system, are escaped. The smallest civil cause in Ontario is tried before a Crown judge, appointed for life after at least ten years service at the bar, and I believe that the cost is actually less than with us with our division of tribunals. The justice of the peace is retained in Ontario, but with only criminal jurisdiction, so as to afford always and everywhere a magistrate to enforce the peace. In the towns he is supplanted by the police magistrate, who is a professional, and ordinarily a lawyer.

With this brief glance at the system, and before presenting details, it may be well to mention the differences between a Canadian province and an American state. In the first place there is in Canada no such dual system of courts as we have. The judges are all officers of the Dominion, deriving their powers from the federal capital, Ottawa. The police magistrates, justices of the peace and examiners are provincial officers, but are never properly called judges.

For causes begun in the Supreme Court of Ontario there is appeal to the Supreme Court of Canada at Ottawa, and for certain causes to the Judicial Committee of the Privy Council in London. Such a cause appealed to Ottawa cannot be appealed subsequently to London without the consent of the Privy Council, and this is given so seldom as to be practically negligible.

While an Ontario litigant may eventually have to go a great ways with his appeal, it should be noted that only about ten appeals are taken each year to London, and not many more to Ottawa, so for the great bulk of business there is but one review and that under speedy and economical circumstances.

The other greatest difference between the neighboring countries lies in the fact that Canada, having no written constitution, neces-

sarily makes her legislature supreme. Canadian courts, like those of England, have no power to declare statutes unconstitutional. On the other hand, the advisory power with respect to proposed legislation, which was expressly disclaimed by the United States Supreme Court, is put to a practical use in Canada. Bills in Parliament are not infrequently submitted to two judges of the Supreme Court. The counsel given is as to whether it is outside the class of objects of legislation alloted to the particular parliament, whether provincial or of the Dominion. The judges may thus exercise an important function with respect to legislation, but as they decide only as to validity, and not as to advisability, they escape all responsibility therefor.

Correlative with this supremacy of the legislative branch is absolute adherence to the doctrine of *stare decisis*. The court cannot reverse itself. Relief must come through the legislature, however unsuited to changing times a precedent may be. These matters confessedly make the work of the Ontario courts more straightforward, and subject them to less political strain than can ever be the case in our country.

Personnel of the Bench.

Judges must have been ten years in practice at the bar before appointment. This implies not merely a degree of competency, but it means also that by the time he has been chosen by the state for this pre-eminent work, the judge has pretty clearly developed his moral bent. He must have been industrious and studious over a period long enough to indicate a fixity of characteristics. The element of hazard is reduced to a minimum. The candidate has been in a hard school and there has been every opportunity for his ability and habits to be observed.

The selection is made by the Minister of Justice for the Dominion and the ministry must approve. The commission is signed in the name of the King by the Governor-General. But in fact the choice is that of the official leaders of a party which is directly charged by the electorate with the government of the nation and is held responsible for results.

Vacancies to a judgeship in Ontario are filled from the Ontario bar. Ordinarily the choice is made from the party in power but there have been instances of appointments to the bench given to lawyers of the opposing party. While not common, this is no very sensational circumstance, which indicates the high respect paid to this office. Political lines are drawn very close throughout Canada and to place the office above the party in even a few instances is

strong proof of the responsibility felt as well as a signal tribute to the appointee.

Occasionally appointments are made from the County Court bench to the Supreme Court and in this connection it should be noted that there are instances of County Court judges declining this promotion because they have not wished to change their residence. The possibility of such promotion, carrying a large increase in salary and wider influence, may be regarded as a valuable spur to the ambition of the County Court judge. He does not feel upon acceptance of judicial position that he is forever barred from advancement. On the contrary he is directly on the road to the most exalted position in the Province.

The lesser judicial officers, masters, examiners, police magistrates and justices of the peace, are appointed by the provincial ministry upon recommendation of the attorney-general for the province.

All appointments for judicial office are for good behavior. While in practice this is almost equivalent to life tenure, it should be understood that there is always present a very simple and efficacious form of recall. Supreme Court judges may be removed upon an address of both Houses of the Dominion Parliament. Only two judges of the higher courts have been removed in the history of Canada and the last instance was over seventy-five years ago. While the system of recall is eminently workable there is assurance that it will not be invoked for partisan reasons and that it will not result in injustice. The worthy judge is certain of continuing and the undeserving is easily disposed of.

County Court judges are even more readily removed. Any person whatsoever can prefer charges informally to the Governor-General. Of course this official is not compelled to act upon these complaints, but the freedom for submitting charges keeps him informed of public opinion and presumably permits him to issue a warning if impropriety is alleged. If there appears to be valid cause for investigation he designates two High Court judges and a barrister to conduct the investigation. The barrister secures the evidence and presents it at a hearing at which the incumbent is permitted to be represented by counsel. The committee then report facts and their recommendations to the Governor-General, and an order is made by him and his council, either removing the incumbent or declaring him innocent. There have been three such removals in the past forty years.

The salary of a judge of the Supreme Court is $7,000 and an additional sum of $1,000 is paid by virtue of the statute which pro-

vides for submitting bills in Parliament to judges for their counsel. There are still five chief justices who receive each an additional $1,000, but in the case of three there will be discontinuance upon the retirement of the present incumbents, owing to the more thorough unification which has been effected since their appointment.

After fifteen years' service, or on being permanently disabled, a judge of the Supreme Court is entitled to a pension of two-thirds of his salary; after twenty-five years of service, if seventy years of age; after twenty years of service, if seventy-five years of age, or after thirty years of service regardless of age, to his full salary.

County Court judges receive a minimum salary of $3,000 with an additional $500 for the York County Court judge. But there is an additional salary for these judges for acting as surrogates, and they also receive pay as masters of the High Court, and for arbitrations, so that the average pay for this position is about $4,500. All judges on circuit receive besides railroad fares an allowance for lodging of $6 a day, and while in cities are allowed $10 a day. Retirement at the age of seventy-five is compulsory upon County Court judges. If service has been for thirty years the full salary is continued as a life pension.

The security of tenure enjoyed by Ontario judges, as compared with the uncertainty surrounding the office in most of the states, makes a comparison of salaries very difficult. But aside from this long average tenure and the retirement pension, it is clear that the Ontario judge is paid more for his services than the average American judge working in similar fields.

All the other differences accentuate this advantage enjoyed by the Canadian judge. The elected judge must ordinarily pay a considerable sum and expend much time and energy as a mere ante for the privilege of being named on the ballot. And after a term of six years, more or less, he must repeat this contribution. The direct primary has nearly or quite doubled the expense of campaigns for judges. The elected judge realizes that he must run the gauntlet periodically, whatever the character of his services, with the probability that sooner or later a vote influenced by matters entirely outside his realm will reject him. We proffer the candidate for judicial honor insufficient salary, a gambler's chance of winning and holding, and dependence in old age.

There are probably few Ontario lawyers who could not afford as a purely financial speculation, to commute their probable net earnings at the bar for a judge's salary and pension, and as the position carries with it security as well as the opportunity for distinguished service, it is evident that there is a wide range for choice among the

bar when a vacancy must be filled. But with accumulation of wealth under modern commercial conditions there is being evolved, though more slowly than with us, a class of specially talented and ambitious lawyers whose earnings are so great that acceptance of judicial honors would mean a financial sacrifice. This situation, hardly appreciable as yet, is recognized, and is made the basis for a proposal looking to higher salaries for judges.

To recapitulate: all agents of the department of justice are appointed, or, in other words, expertly selected; the appointment of judges is by the official heads of the party entrusted with government; their removal is simple and this power is exercised by elected representatives of the people; compensation is adequate and the choice of material is almost unrestricted; the chosen judges are relieved of uncertainty concerning their living and are charged with a single direct responsibility, that of administering justice; their own welfare and that of the public is thus made coincident.

Here we have real democracy. There is genuine popular choice exercised by a rational process as opposed to the lottery involved quite generally in elections. There is protection against unjust accusation. There is continuing discipline without embarrassment. There is every incentive to faithful service and absolute freedom while properly discharging the one responsibility implied by the office. The terms of employment are exceedingly simple compared with the highly involved relationship brought about by dependence upon election machinery with short terms and periodic elections as a form of discipline.

The Supreme Court.

Since the beginning of the year 1913 the Supreme Court has comprised nineteen judges who sit in the following divisions:

First Appellate Divisional Court, five judges;

Second Appellate Divisional Court, five judges, who are members of the

High Court, which comprises fourteen of the nineteen judges of the court, and has nine members regularly engaged in trial work.

All of the judges are on the same footing with respect to powers, and any one of them can exercise the authority of any other if necessary as a matter of convenience. The five judges of the First Appellate Divisional Court are permanently attached to this branch and cannot be compelled to try causes, but they may consent to engage in trial work. And as some variation in employment is occasionally desirable it is quite common for them individually to stop hearing appeals and go on circuit. Aside from the relief afforded

by a change it enables them to keep in touch with the life of the people.

The Second Appellate Divisional Court is made up from selections made by the High Court Division in December for the succeeding year's service. A judge who might strongly prefer trial work could probably escape this assignment, though he could be compelled to serve for the year if it became necessary to fill the Second Appellate Divisional Court. Or a judge preferring to spend a year at the capital could ordinarily be accommodated by selection for appellate work. An exchange of work between two judges by mutual agreement is very common. A very comfortable and economical adjustment is effected and this flexibility does not rest upon minute statutory regulation. The responsibility rests upon all and the freedom for fulfilling the obligation makes the burden lighter individually as well as conserving economy for the court as a whole.

The fact that half of the appellate judges are drawn from the trial division and that the remaining appellate court judges frequently participate in trial work, not only makes for an equitable distribution of the work and economy of administration, but also prevents the differences of experience and temperament which result from long continued specialization. The trial judges are of equal authority with those who will pass upon their work in review and they receive the same pay. This lends dignity to trial in the first instance which must always be the essential feature for the average litigant. The appellate judges, keeping in touch with trials, are less likely to develop an academic quality often seen in our appellate tribunals. The rights of individual litigants are not belittled in their minds by comparison with the great background of case law; they are not oppressed by the overwhelming need of developing the common law by decisions, as seems to be the case in the States.[1]

"One gets tired of hearing appeal cases day after day, and likes to get out and hear causes tried occasionally for relief," said one of the appellate judges, speaking on this point. "I would hate to have to hear appeal cases all the time for the rest of my official career. I like the stress and excitement of the trial courts.

"Now I must say most emphatically that I cannot perceive any possible harm in permitting a judge to vary his work in this manner —to try cases for a time and then to hear appeals for a time, or to participate in both kinds of work in any way that suits the convenience of the court and his own inclination. I do it myself. I see my brothers doing it. I cannot imagine any evil consequences.

[1] Vid. The Administration of Justice in the Modern City; by Roscoe Pound, 26 Harvard Law Review, 302.

I think it well for an appellate court judge to get in touch with trial work from time to time, and the trial judge can spend some time in reviewing with advantage to himself and to the work."

The High Court as a trial court has no divisions whatever. There are simply nine judges who try all the causes originating in their court. They have jurisdiction without limit up or down. But there is a penalty in costs if a cause which could be tried in County Court is begun in the High Court. By stipulation any cause, however great the subject matter, may be tried in the County Court, thus permitting occasionally of a saving of time, though the limitation upon appeals applies to such a trial. It cannot be appealed beyond the Ontario courts without express permission of the Judicial Committee of the Privy Council and this is practically never given.

The calendar provides for two terms per year for both jury and non-jury trials in each of the forty-six assize towns outside of the capital, and in Toronto a session is being held almost continuously. The Supreme Court also maintains its "weekly court" in Toronto, and the larger cities, in which all matters that can be disposed of without trial, stated cases, the interpretation of wills, and so forth, are heard. On Tuesdays and Fridays the judge in charge of the weekly court sits "in chambers" and dispenses with his gown. But the technicality does not prevent the moving of matters not in chambers. The judge will say, "Now consider that I have my gown on; proceed." Two clear days' notice is required for appearance in this court and the calendar is made up for each day's business the evening before. If a matter which should be "in court" is brought "in chambers," lesser costs must be taxed and if there is no appearance the moving party cannot proceed, as the other party is entitled to notice of hearing in the proper tribunal.

In Toronto two masters are regularly employed, holding sessions daily at eleven o'clock and once a week during vacation. One, the Master in Ordinary, specializes on matters submitted to him as referee. In the other counties the County Court judge is usually the master of the High Court.

The Supreme Court administers through a committee of five members the funds paid into court on behalf of infants and otherwise. With the aid of a trust company about $5,000,000 is kept invested and a uniform rate of interest approximating five per cent is earned for the funds of all such wards of the court.

The two appellate divisions ordinarily sit in alternate weeks. Causes appealed are all put upon a general calendar and from this the divisions in turn take each week as many causes as can be disposed of.

There is no appeal from the Second Appellate Divisional Court to the First, or *vice versa*. Each exercises the fullest jurisdiction of the Province. The one which first decides a question of law binds the concurrent division. If it be in a developing field of law it is simply a question of accidental priority as to which settles a doubtful point. The other division will accept the determination just as fully as if it had come from a higher tribunal.

Here we have an instance of the perfect working of a plan which might seem to incur hazards. It is of interest in connection with the reorganization of courts in our more populous states. A new state gets along admirably for a time with five Supreme Court justices. When the population increases the court is increased to seven and then before long it begins to fall behind. A court of seven hearing appeals as a single body cannot work as rapidly as one of five, nor one of five as rapidly as one of three.

When the increase in litigation in the state is evidenced by an increase of the supreme court to nine justices there is certain, under our rigid system, to be trouble. It has been common for such courts to get several years behind. The ordinary relief comes from the creation of intermediate courts of appeal. In this step new difficulties are encountered. If certain more important matters can be appealed as a matter of right from the appellate court to the supreme court, it becomes almost a matter of course, for in just such matters the opportunity for successive appeals is certain to be availed of to the limit. One of the litigants appeals as a right and the other is carried up willy-nilly. The intermediate court becomes little more than a hurdle. This greatly increases the cost of litigation, and the primary objects of the intermediate court, saving time and lessening the load of the supreme court, are defeated.

If, on the other hand, the second appeal for less important matters is arbitrarily cut off, there may arise a real question as to what may be the law of the state, so that provision must be made for the additional appeal in certain causes. In Illinois and Missouri, where there are such intermediate courts, a dissenting vote results in certifying the cause to the supreme court.

Again, if the capacity of the supreme court is increased by permitting it to work in divisions, as in Missouri, such is our instinct for contention, that we are not satisfied unless matters on which there is a dissenting vote, are referred to the entire court.

The whole matter of appeal in our great commercial states is in a wretched plight. One of the worst features arises from the fact that in the same suit the plaintiff and the defendant may alternately prevail and it is truly said that if there were still another appeal

beyond the supreme court there would in many cases be a different result. After such fluctuations in justice it is the finality rather than the essential correctness of the supreme court's decision that makes the law.

This last fact gives force to the demand that a second appeal be arbitrarily cut off unless some novel proposition of law can be raised.

It is evident that there must be a great restriction upon appeals or there must be devised some method of dividing an enlarged supreme court into two or more branches which can work independently and yet in harmony. While not "on all fours" with our situation, the Ontario Supreme Court throws some light for our guidance. If we should adopt a unification which would permit of increasing the supreme court temporarily by calling in trial judges no excuse would remain for long delay on appeal. A plan which would involve dividing the supreme court in two branches would work as well for any number of branches, and it could be raised numerically to meet emergencies.

In Ontario appeals are practically always argued orally. There is no need for argument in favor of this wholesome practice. It is a natural method which obtains in any appellate court which is not pressed for time. But when a supreme court has reached a membership of seven or more, if all members are to participate in all appeals, there must be resort to briefs. The practice is so common with us that we have all but lost sight of the advantages of the direct oral presentation of appeals. One of the things which immediately impresses the visitor in Toronto is the great merit of a face to face discussion of an appealed cause. Often for an hour or two the respective counsel must answer questions put by the judges. It is obvious that there is a much fuller hearing than is humanly possible when the printed page is relied upon for submitting the facts. The judges too perform most of their work in each other's presence benefiting to the utmost from the interchange of views.

Such hearings benefit alike the court, the counsel, and the litigants. If our overworked supreme courts were to sit in divisions of three or five and hear oral argument as a matter of course there would be more unanimity of decision and less need for certifying causes to a larger division or to the entire court. The matter of organic structure of the court and the method of procedure are linked together and in considering them as coequal factors there is a far better chance for agreement with respect to reform proposals.

In the Ontario Supreme Court four of the five judges in each appellate division make a quorum.

Causes may be appealed beyond the Ontario Supreme Court in the following cases:

When the title to real estate is involved.

On the validity of a patent.

When the matter in controversy exceeds $1,000.

Matters of annual rent or fee and like matters affecting future rights.

Any other cause by leave of the Appellate Divisional Court which entertains the first appeal, or by leave of the Supreme Court of Canada or the Judicial Committee of the Privy Council.

In the following cases the appellant has his choice between the Supreme Court of Canada and the Privy Council:

When the judgment is for $4,000 or more.

When the title to real estate is affected.

But if in such a cause the appellant elect for the Supreme Court of Canada there can be no further appeal to the Privy Council except by leave of the latter court. In ten years there were but fifteen such double appeals.

To avoid supposed local influences or prejudices, and reach a court of more conservative tendencies, the usual course is to appeal to the Privy Council if large corporate interests are involved, while causes of a private nature ordinarily go to Ottawa. Ontario sends from twenty to thirty appeals to Ottawa in the average year and about ten or twelve to London.[2] The percentage of appeals beyond Ontario is very low, and causes begun in County Court cannot be appealed a second time (regardless of subject matter), without special permission, which is rarely granted.

It is not uncommon for a cause to be commenced, tried, and appealed in Ontario, and settled finally in London within a year and

[2] The report of the Registrar of the Supreme Court of Canada "to a Select Committee of the Senate" (1913) shows fully the number of Ontario appeals since the establishment of the court in 1876. The following figures are totals for the ten year period from 1903 to 1912 inclusive:

Total number of appeals	299
Pending or not prosecuted	23
Quashed, settled or disposed of upon preliminary motions	37
Affirmed	187
Reversed	49
Modified	3
Average number of appeals per annum	29.9

The same report shows the appeals from the Supreme Court of Canada to the Privy Council. During the same period of ten years there were 33 applications, an average of 3.3 per annum, and only 15 were granted, an average of 1.5. Affirmed 7, reversed or modified 5, pending or not prosecuted 3.

a much longer time would cause remark. A comparison between this practice and our practice with respect to matters transferred from the state courts to the United States courts is a fair one, and probably will be found much to the advantage of the Canadian litigant in point of time involved.

The Ontario Supreme Court maintains a registry in each of the assize towns. The local registrar is ordinarily clerk of the local County Court.

County Courts.

There are forty-eight County Courts and seventy-four County Court judges. York County, in which the city of Toronto lies, leads with four judges who are known as the County Court judge, the Junior County Court judge, the Second Junior County Court judge, and so forth. With only one exception, the Surrogate Courts of the Province, one for each county (or union of counties) are presided over by County Court judges, who receive an additional salary for this service.

The County Courts have no jurisdiction in libel or crim. con. actions, but in other civil matters, jurisdiction is, by consent, and subject to considerations of taxing costs, virtually unlimited. The statutory limits are:

1. Contract causes involving $800.
2. Personal (tort) actions involving $500.
3. Recovering real or personal property to a value of $500.
4. Foreclosure and sale of property value of $500.
5. Causes involving equitable relief involving $500.

If suit is brought in the County Court for a greater amount than above specified there will be a trial unless the defendant expressly disputes the jurisdiction, in which case the plaintiff may transfer the cause to the High Court on *praecipe*.

The County Court judge exercises criminal jurisdiction as judge of the Court of General Sessions, to be referred to under a later heading. The terms of the County Court for trial of civil jury causes fall on the second Tuesdays of June and December; and for non-jury civil causes in April and October. The Court of General Sessions is set for the same time so that the same jury panel can be employed for both civil and criminal causes. The Assize jury terms are set so as to equalize the time between terms and the non-jury Assizes are set to coincide with the General Sessions, which permits of expedition in clearing the calendar of the more serious criminal matters.

The Division Court.

The way in which a competent tribunal is provided for the trial of the smallest civil matters, without resort to the notoriously inefficient lay justices of the peace with which the States are generally infested, is ingenious. The Province is apportioned among "divisions" which usually coincide with the township boundaries. The division gives the name to the Division Court, in which the County Court judge officiates in every division every sixty days or oftener.

The jurisdiction of the Division Court extends to

1. Personal actions (in tort) involving not over $60, or by agreement not over $100.

2. Contract actions not over $100 providing the whole of the unsettled account does not involve over $600. Where the amount is determined by the signature of the defendant, jurisdiction extends to $200. There can be no action to recover land.

If the suit in Division Court be in tort or replevin and for more than $20, or in contract and for more than $30, either party can demand a jury, but must give notice one week before trial and deposit a fee of $6. The jury consists of five members, but probably not in one case out of fifty is a jury demanded.

The pleadings in Division Court consist mainly in the summons, containing a brief statement of the claim, and the statement of defense, which the defendant must interpose to prevent summary judgment. Probably in half of these trials there is no counsel. No attorney fees are taxed except in cases in which more than $100 is recovered. A litigant may be represented by a non-professional agent.

If the judgment in Division Court is for less than $100 there is no appeal, but a motion for a new trial can be made to the judge of the Division Court. This stifles appeal of petty civil litigation, nearly all of which is heard without a jury, and appeal is seldom resorted to when more than $100 is awarded. Such appeal, when taken, is direct to the Appellate Division of the Supreme Court. On a recent calendar I found but one appeal from a Division Court out of seventy-five causes.

The details of the Division Court have thus been set forth because Ontario has solved completely the problem of adjudicating minor controversies with a minimum of cost to litigants and to the public. First rate judicial talent is provided for every cause. Sending a real judge to every hamlet to try petty controversies every two months or oftener might seem at first to be extravagance on the part

of the public. But it must be considered that the practical abandonment of juries is due directly to the employment of a competent judge. Instead of making a holiday for a jury and a half a dozen witnesses and virtually forcing litigants to employ counsel, the Division Court judge, a Crown judge who may be appointed at any time to the Supreme Court, disposes of these matters in actual conformity to law in a tenth of the time required under the haphazard sporting method which we generally employ. Such a judge justifies his high salary as compared to a cheap magistrate if only by the volume of his output obtainable through expertness and the freedom from vexatious delay incident to contentious trials. For this minor business which cannot stand the charges that heavier traffic can stand there is Oriental simplicity and dispatch.

But there is another great saving to the public to offset the judge's fair salary. It comes from the practical absence of appeals in this class of causes. As to the saving indirectly by virtue of dispensing real justice and discouraging the bulldozing that is incident to adjudication by haphazard methods in incompetent tribunals, there can be no arithmetical rendering.

There is a like saving by classification of causes in the county seat towns and cities. Speedy trial is effected by putting the small grist into the Division Court, which may be held as often as once a week. Following a custom which was a natural development under primitive conditions, we have preserved inferior judges for inferior jurisdiction in our cities. We need to assimilate the seemingly revolutionary view that wherever there is a sufficient population to justify maintaining a full-salaried judge, even the smallest litigants should have the benefit of his services. Only by such means can we get away from the use of juries with their attendant expense and uncertainty, and lessen appeals. It is easy to prove economy for the public as well as litigants through such a practice.

Trying petty causes without counsel would probably not be opposed by the better element of the American bar. A lawyer who is fit to express a disinterested opinion is only annoyed by such matters. He knows that if he takes such a case for trial either he or his client must lose. But unless a real judge is provided to hear these causes counsel must, in self defense, be retained, and the client is influenced further by the pernicious thought prevalent with us that trial in the inferior court is only the beginning of the trouble.

One will see these little matters tried thoroughly at the rate of twenty to thirty a day in Toronto. The impression is gained that precise justice is obtained just as fully as in more important litigation. The litigants do not have their day in court, it is true, for fifteen

minutes suffices in the hands of a capable judge to unravel their difficulties. When there is no counsel, and the parties are permitted to question each other, there is practically the "confrontation" which Arthur TRAIN[3] was inclined to commend as a feature of the Italian procedure. The trial is vociferous in spots but the truth comes out speedily. And while there is at first a despotic appearance, it is an appearance only. The jury and a full day's trial can be had by depositing $6, which is only a moiety of what it costs the Province. Or, subject to costs, the smallest cause can be thrashed out in County Court before a jury of twelve.

In this connection it should be added that it is the use of the jury rather than the presence of counsel that makes the small case cost more than it is worth. There is about equal dispatch before the Division Court judge when counsel appear. And in trial without jury, if the judge be first class, one litigant can afford to face the issue without counsel, even though his opponent be so equipped. The calling of the jury almost universally in our justice courts virtually obliges the parties to retain counsel, and jury and counsel combined prolong such trials.

It should be understood that there is no wish to alter the wise provisions which guarantee for us trial by jury, representation by counsel, or reasonable privilege of appeal, but to shape conditions for litigation which cannot stand to pay for all these frills so that there will be substantial justice. Providing competent judges would seem to be the only way and genuine economy would be one of the benefits.

In villages where Division Court is held there is a local clerk, usually a postmaster or storekeeper, and he is empowered to issue process. The Division Court has also its own bailiff, whereas the process of all other courts is served by bailiffs appointed by the sheriff and accountable to him. While on this subject it might be interesting to note that the County Court judge is the ranking officer of the county and the sheriff is next. It is to be understood that all ministerial as well as judicial officers are appointed and for good behavior. There is no pension for others than judges, but registrars who become superannuated are occasionally provided for by permitting others to do their work in their names.

The Criminal Side.

Ontario administers justice criminally under a Dominion code dating from 1892. The machinery for trying persons accused of crime

[3] Courts, Criminals, and the Camorra, p. 203.

seems at first glance rather complicated, but a closer study reveals the same rational spirit which prevails on the civil side and a real harmony underlying the criminal substantive law and the rules for its enforcement.

The old distinction between misdemeanors and felonies has been abolished. Offences which are the subject of indictment are "indictable offences" and all lesser ones are simply "offences."

It is easy to understand, as has been shown, how it is possible to afford for the most humble and isolated litigant a judge of high ability in adjudicating minor civil matters, for such matters can await trial for a week or a month. But criminal complaints may arise unexpectedly in the most remote places and for their consideration there must be provided everywhere and at all times a magistracy. This is the excuse for the retention of the justice of the peace. These officers are appointed on recommendation of the Attorney General by the Provincial government for life subject to *supersedeas* for misconduct. The fact that only one such *supersedeas* has been issued in the 122 years of provincial history probably does not justify belief in the sublimated character of the magistrate as much as in the sensible procedure which does not impose upon a lay official duties beyond his proper capacity. Still it does point to a higher type resulting from appointment than from election. It is still an honor to be a justice of the peace in Ontario and appointment is commonly employed as a means for recognizing political services. This is seen in the cities where the police magistrate has taken over the work of the justice of the peace, following the policy of providing expert officials as far as possible, so that the office of urban justice of the peace is purely honorary. To be sure a city justice can perform the work of the police magistrate if need occurs, but it is rarely so.

The process of eliminating the unprofessional element is further observed in the statute which permits of police magistrates for counties or portions of counties, which has been availed of to a considerable extent. These police magistrates, deriving their appointment from the same source as the justices, are usually lawyers, and are always upon salary. In rural districts they receive at least $600 a year, and in the towns the salary is normally $1,400, being less or great in proportion to the size of the town or city.

The jurisdiction of the justice of the peace to try causes is limited to specified offences of a minor character (virtually infractions of ordinances and with no real element of crime) and the penalty which he can impose is fixed by the ordinance or statute.

In higher offences the justice of the peace acts only as examin-

ing magistrate. The accused is presented on summons or warrant, or if arrested "upon sight" an information is drawn up and sworn to immediately upon presentation in court. The examination is similar to one conducted before a magistrate in the typical state, but if the justice discharges the accused there may be a proceeding which the writer has not heard of elsewhere. In such case the complainant may demand that he himself be bound over to prefer an indictment at the court at which the accused would have been tried if the magistrate had committed him. By this means the opportunity of the magistrate to go wrong, should he chance to be partisan or of the Dogberry type, is precluded.

Since 1897 all towns of 5,000 must have each a police magistrate and the system has worked so well that it has extended to the smaller cities. Where there is a population of more than 40,000 the police magistrate is provided with a deputy. These magistrates must not be called judges; they are addressed directly as "Your Worship," while the County Court judge is addressed "Your Honor" and the High Court judge "Your Lordship."

The Supreme Court, while able to try any indictable offense, has reserved to it exclusive jurisdiction in the following matters: treason and treasonable offences, taking oaths to commit crime, piracy, corruption of officers, murder, attempts and threats to murder, rape, libel, combinations in restraint of trade, bribery, and personation under the Dominion Election Act.

Aside from conducting examinations, the police magistrate can try by consent, involving a waiver of jury, any cause which the General Sessions can try. But without such consent his trial jurisdiction is much narrower. He has no power to impanel a jury.

Upon arraignment before a police magistrate, if the cause is one triable in General Sessions, the court asks the accused if he will be tried forthwith without a jury or will await trial in the next court of competent jurisdiction, stating which court it is, whether the Assizes or General Sessions, and when it will sit. Inasmuch as the General Sessions is quite commonly limited to two terms a year, and bail must be procured to avoid a period of incarceration, it is very common for the accused to submit to trial forthwith without a jury. It is estimated that police magistrates dispose finally of three-fourths of all the criminal causes arising in the towns and cities. The advantages offered the accused in exchange for a waiver of jury trial thus results in a tremendous saving to the Province which fully justifies the existence of the special magistracy as distinct from the County Court judge.

Within twenty-four hours after the arrival in jail of one commit-

ted for trial, if the offense is one triable by the General Sessions, the prisoner is brought before the County Court judge, told the nature of the charge against him, and given the option of a trial forthwith in "The County Judge's Criminal Court," without a jury, or of being tried in term by a jury. If he elects for a trial before the judge alone, a day is set; if not, he is remanded to await the first court of competent jurisdiction for trial by a jury of twelve. It is estimated that in fully half of the cases tried there is a waiver of jury. If there is no waiver, when the next General Sessions or High Court Assize comes, whichever may be first, a bill of indictment is laid before the grand jury of thirteen members, by the Crown Counsel. The indictment may be in popular language without technical averment, or it may describe the offence either in the language of the statute or in any words sufficient to give the accused notice of the offence with which he is charged. The following is a sample of the forms given in the statute:

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

Without leave of the court no bill can be laid before the grand jury for any offences except such as are disclosed in the dispositions before the magistrate. The grand jury has no power to cause indictments to be drawn up; it simply passes upon such bills as are presented by the Crown Counsel, the prosecuting official.

The accused has twenty peremptory challenges in capital cases; twelve if the offence is punishable with more than five years' imprisonment, and four in all other cases. Although the Crown has only four challenges, yet it may cause any number to stand aside until all the jurors have been called.

It practically never takes more than half an hour to make up a jury in the most serious cases and the individual jurors are practically never asked a question.

In case of conviction the respondent may ask a case upon any question of law to be reserved for the Appellate Division, or the judge may do so *proprio motu*. The Appellate Division may also, by leave of the trial judge, entertain an appeal for a new trial upon the ground that the verdict is against the evidence, but this is a rare proceeding.

No conviction can be set aside or new trial ordered, although some evidence was improperly admitted or rejected, or something was done at the trial not according to law or some misdirection given, unless, in the opinion of the Appellate Division, a substantial wrong or miscarriage was thereby occasioned at the trial. If the Appellate Division is unanimous against the prisoner, there is no further

appeal; but if the court is divided a further appeal may be taken to the Supreme Court of Canada at Ottawa. This is a very rare proceeding.

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

No more than five experts are allowed on each side. Very few murder trials consume more than two days even when medical experts are called.

Mention has been made of the Crown Counsel; following an old practice there is an appointment of counsel to represent the people in the criminal causes triable only in the High Court Assizes. A special appointment is made by the Attorney General for the Province for each Assize. The practice is to rotate these appointments among the prominent counsel of the ascendant political party, but the Crown Counsel practically always serves in another county than the one he is resident in. He receives $6 for drawing each indictment and $20 or more for each trial. The allowance is such as to make the work worth an average of $50 a day.

But there is a regular prosecuting official for each county who takes care of all the work not specifically allotted to the Crown Counsel, and this official is known as the County Crown Attorney. He is appointed for life by the Provincial Government and is made responsible for conducting examinations and prosecuting offenders in the General Sessions and inferior courts generally. He is permitted to engage in private practice but in the more populous counties his time is fully occupied with his official duties. He is not counsel to local officers on civil matters.

While the General Sessions Court is set for the same time as the terms of the County Court, so as to utilize the same jury for civil and criminal work, and has the same judge, it has a distinct set of officers. Its registrar is known as the "Clerk of the Peace." But lest this appear to be a needless multiplication of offices it should be noted that the County Crown Attorney and the Clerk of the Peace are in most counties one person.

The big feature of this machinery of criminal justice is the elimination of juries in many cases, brought about by the advantage to the accused of a speedy determination before the magistrate or

County Court Judge. The seeming indirectness of the machinery is thus seen to have full justification, for a very great saving is effected. The weak end of any system of courts is that projected into the rural community. In Ontario this is avoided to a remarkable degree by limiting the powers of the justice of the peace, as well as by making his tenure depend upon other than local influences. Just as far as is economically possible, the professional magistrate is utilized. By setting the jury Assize to alternate with the General Sessions a means is afforded for trying more speedily accused persons who are unable to give bail. Ordinarily when the accused is not in jail his case is allowed to wait the General Sessions. (The frequent use of the words "unusually" and "commonly" and "ordinarily" illustrates the facility afforded for stepping over the rules intended to suit the general run of litigation in the interest of economy or justice in the exceptional case).

The duplication of prosecuting officials is due to the ancient practice of the Attorney General or Solicitor General going out to represent the Province in the most important prosecutions. In time the work became greater than they could do, and the practice of appointing a substitute from the bar originated. The excuse for the retention of the system is that the County Crown Attorney has his hands full without undertaking to prosecute at the Assizes. There is a real advantage in having a non-resident to represent the people in the more serious matters.

The employment regularly for all the less important prosecutions of an official who is expertly selected and not dependent locally for his position is a tremendous step in advance of the usual American prosecuting attorney. The adoption by us of this one detail would do more than any other one thing to make our enforcement of criminal law effective. With us the office is a mere stepping-stone to practice for the young lawyer. It is seldom taken seriously. The tenure is so brief that there is no incentive to make a study of criminology, either as a science or to acquire full knowledge of its local characteristics. The weakness of our prosecuting officers more than anything else results with us in *law enforcement by local option*. We cannot put criminal statutes to any real test as long as the responsible prosecuting officer, often given absolute power to *nolle pros.*, is subject to be disciplined on election day by any considerable element of the local electorate.

HERBERT HARLEY.

CHICAGO.

(TO BE CONTINUED.)

PROPOSED REMEDIES IN COURT PROCEDURE.

IT is the judgment of the writer that the chief function of the legislature is to declare substantive rights. Court procedure being but the machinery by which substantive rights are determined, the responsibility for the effectiveness of that machinery should rest alone upon the courts. Unnecessary prolixity and confusion too frequently result from the present two-fold source of procedural law.

Delays cannot be avoided, and the courts are altogether too often compelled to dismiss legal proceedings because they do not conform to some statutory requirement. This might be equally true if court rules were substituted for statutory provisions; but if there is any ground for the general complaint of delays in legal proceedings, the responsibility for those delays, if any, should be fixed either upon the courts or upon the legislature, one or the other. If the responsibility is with the legislature, the remedy would be at once apparent and could be reached. The same is true if the responsibility rested upon the courts alone. But I submit that while the responsibility rests upon both the legislature and the courts, there can be no adequate remedy.

The responsibility should, clearly, rest upon the courts. They alone should provide the means of enforcing substantive rights. The object of all court procedure should be to speedily reach and determine the merits of each case. To this end, courts should be given, and when given should assume, authority, within constitutional limitations, to do or to require to be done any act necessary in the interests of justice and the speedy determination of every case tried before them. Any other purpose,—namely, either to delay or defeat justice—ought not to be made possible by our procedure. Yet it is often used to that end.

The legislature, meeting biennially, with its multitude of duties to perform and the review of thousands of bills, good and bad, presented for consideration at each session, is inherently not the logical body to consider, coherently and as a unit, the problem of procedure. Each session brings forth its quota of procedural law; but these acts are too frequently fitful, unrelated, and oftentimes only the expression of some individual, though influential, member to fit some existing case in which he may be personally interested.

The many different ways in which personal service may be obtained, the incongruities of our garnishee statutes, the various methods of condemning land, the varying modes of procedure relating to corporations, and many other instances that might be cited, show

the loose way in which the legislative rules of procedure are formed. Duplication, contradictions, inconsistencies, prolixity, are the rule, and, when combined, destroy both unity and continuity. This has been the result in the past, and must necessarily be the result in the future, of legislative attempt to cope with the problem of procedural law.

The difficulties encountered in the several code states, as well as in our own state, result, and have resulted, from this two-fold source of procedural law—the court and the legislature.

The legislature, I repeat, should declare only substantive rights, and the matter of procedure should be left alone to the courts, to be regulated by rules instead of by statutes. This has successfully been accomplished in England under the Judicature Act of 1873, and in her several colonies where that act has been adopted and followed.[1] It is also one of the fundamental principles of the recent New Jersey code. In Michigan, a so-called common law State, we still have this two-fold source of procedure, although we early started upon the other plan.

At the time of the adoption of the Constitution of 1850, influenced largely by the change which had so recently taken place in New York in 1848 and the changes that were rapidly being made in other states from common law to code procedure, unsuccessful efforts were made to bring Michigan in line with the prevailing reforms. A compromise was reached in the Constitutional Convention of that year, which was expressed in the following clause:

> "The supreme court shall, by general rules, establish, modify and amend the practice in such court and in the circuit courts, and simplify the same. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings. The office of master in chancery is prohibited.[2]

The office of chancellor had already been abolished by the legislature.[3]

In conformity with the Constitutional authority thus given the Supreme Court to regulate the practice of the courts in this State, and as an early interpretation of the extent and scope of that authority by the legislature itself, the legislature passed an act providing as follows:

> "The judges of the supreme court shall have power, and it shall be their duty within three months after this law shall

[1] For a discussion of this Act with some reference to its applicability to our own procedure, see 12 Mich. Law Rev. 277-292 (Feb. 1914).

[2] Constitution of 1850, § 5, Art. 6.

[3] Rev. Stat. 1846, ch. 90.

take effect, by general rules to establish, and from time to time thereafter to modify and amend, the practice in said court and in the circuit courts, at law and in equity, in cases not provided for by any statute; and they shall once at least in every two years thereafter, if necessary, revise the said rules with the view to the attainment so far as may be practicable of the following improvements in the practice:

"1. The abolishing of distinctions between law and equity proceedings, as far as practicable;

"2. The abolishing of all fictions and unnecessary process and proceedings;

"3. The simplifying and abbreviating of the pleadings and proceedings;

"4. The expediting of the decisions of causes;

"5. The regulation of costs;

"6. The remedying of such abuses and imperfections as may be found to exist in the practice;

"7. The abolishing of all unnecessary forms and technicalities in pleading and practice.

"8. To effectually prevent the defeat or abatement of any civil suit, ex contractu, for either any nonjoinder or misjoinder of parties where the same can be done consistently with justice;

"9. To provide for all necessary amendments of process, pleadings, or other proceedings in such case; and,

"10. To provide the manner in which a discontinuance may be entered against parties improperly joined in any suit, and by which parties improperly omitted may be joined in the suit and brought in to answer thereto, if within the jurisdiction of the court."[4]

The Supreme Court was also given power to compel discovery of books, papers, and other documents, to stay proceedings therein, and to make rules in relation thereto; to prescribe the practice in certain cases, and to prescribe rules relative to the practice in Circuit Courts.[5]

But more than this, and again anticipating by sixteen years the Judicature Act of England of 1873, which contains a similar provision, the Supreme Court was thus early given authority to require oral testimony to be given in that court in the furtherance of justice, as follows:

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[4] Compiled Laws 1857, § 3390; Compiled Laws 1897, § 196.

[5] Compiled Laws 1857, §§ 3391-3400; Compiled Laws 1897, §§ 197-206.

"The Supreme Court may at any time in accordance with, and for the speedy furtherance of, justice in any suit, either at law or in equity, call upon the parties to such suit, or any witnesses thereto, to testify orally in open court; and said court may by rule provide for a similar practice in the Circuit Courts. But no party or witness whose evidence may not be received under the Statutes of the State, shall be called upon to testify under the provisions of this section."[6]

It is also given authority to prescribe all forms and proceedings in chancery, as follows:

"The supreme court shall have power from time to time by general rules of court to establish, alter, modify, or amend the practice of the circuit courts in chancery, in the cases not provided for by statute; and said court shall, as often as it may be necessary, revise the rules of the said court with a view to the attainment, as far as practicable, of the following improvements in the practice:

"1. The abbreviating of bills, answers, and other proceedings.

"2. The expediting of the decisions of causes.

"3. The diminishing of costs.

"4. The remedying of such abuses and imperfections as may be found to exist in the practice in all cases or suits cognizable in chancery; and,

"5. The abolishing of all unnecessary forms and technicalities in the proceedings and practice of said courts."[7]

There are various other enumerated subjects wherein the Supreme Court is given power to prescribe rules.[8]

These several acts stand unamended to this day.

And in further confirmation of the authority thus given to the Supreme Court, the new Constitution of 1909 contains a substantial repetition of the clause in the Constitution of 1850, reading as follows:

"The Supreme Court shall by general rules establish, modify, and amend the practice in such court and in all other courts of record, and simplify the same. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings. The office of Master in Chancery is prohibited."[9]

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[6] Compiled Laws 1857, § 3405; Compiled Laws 1897, § 211.

[7] Compiled Laws 1857, § 3487; Compiled Laws 1897, § 445.

[8] Compiled Laws 1897, §§ 919, 921, 9988-9, 10221, 10245, 10259, 10263.

[9] Constitution of 1909, § 5, Art. 7.

It is scarcely necessary to say that the provisions in the Constitution of 1850 and the legislative enactments following it contain, in substance, the arguments of the code reformers of that day. But instead of adopting these arguments and incorporating them into a new system of practice at once by legislative enactments, as other states had done and were doing, Michigan took the wiser and more conservative course by turning the whole matter of reform in procedure over to the Supreme Court as the most competent body in the State to perform so delicate a task. In this both the Constitutional Convention of 1850 and the several legislatures following it were right, and anticipated the English Judicature Act of 1873 by over twenty years, and the New Jersey Act of 1912, as well as the present widespread conviction on the part of many serious-minded people that rules of court procedure should emanate from the court alone, by a period of over sixty years. It is undoubtedly by reason of these early provisions of our law that the practice in Michigan has been so remarkably free from popular as well as professional criticism during these years.

Progress, however, has been very slow and gradual. New rules of court have been adopted from time to time, and in 1899 the entire set of rules was completely revised. This revision was accomplished in the first instance by a committee appointed by the State Bar Association. The work of this committee was very thorough and satisfactory to both the bench and the bar, and, after its approval by the Bar Association, was adopted without change by the Supreme Court June 28, 1899, going into effect September 1, 1899. Mr. Frederick W. STEVENS, a member of the committee on revision of the Bar Association, afterwards annotated these new rules and the same were published as the Michigan Revised Rules of Practice, and are now in active use. In his preface Mr. STEVENS sets forth succinctly the changes adopted by the new rules, as follows:

> "In proceedings at law the form of a summons has been altered so as to have it mean what it says, and advise a defendant correctly as to the time within which he must appear. The time of his appearance is made to run from the date of service upon him, in analogy to suits begun by declaration, and the period of fifteen days is allowed, respectively, for appearance, service of copy of declaration, plea, etc. The fiction of losing and finding in a declaration in trover has been abolished. All affirmative defenses are required to be set forth in a special notice. The features of inquest have been extended to undisputed open accounts. Common rules and motions may be filed with the same effect as if entered, except

as required by statute (which happens only in the case of rules to plead in suits commenced by declaration). Default absolute is abolished; the regulation of notes of issue and demands for jury is made uniform throughout the State. The rules governing service of papers on attorneys are consolidated, made uniform in law and equity proceedings, and a provision inserted allowing service by mail where the attorneys reside in the same city, village or township. The practice on the settlement of bills of exceptions is made definite and simple. In chancery causes, it is required that bills of complaint and answers be divided into numbered paragraphs; the prayer for process, as distinguished from the prayer for relief, has been made unnecessary; the time of appearance is made to run from the date of service of the subpoena; the manner of appearance has been simplified; the period of fifteen days fixed for appearance, for service of copy of bill, for answer, replication, etc., respectively. The practice on answers in the nature of cross bills, heretofore confused, has been made definite. A simple and speedy method has been provided for the taking of testimony before commissioners. To save repetition, a large number of law rules have been made applicable to chancery causes. And generally in the law and chancery rules an effort has been made to arrange them by topics, so as to place together, as far as practicable, all provisions on a given subject. It will be found that the new rules will simplify pleadings and proceedings, abolish unnecessary proceedings, prevent surprises, and materially expedite the decisions of causes."

It would seem from the provisions of the Constitution and the Statutes referred to, that authority had thereby been given to the Supreme Court to fix and determine the procedure of our courts, and that this authority is broad enough and far-reaching enough to bestow exclusive authority upon that tribunal in the matters particularly specified. This authority, however, has been very sparingly exercised. The court at all times has submitted to the expressed will of the legislature in matters of procedure, as is shown by the many cases where the question of conflict has arisen.[10]

[10] Howard v. Tomlinson, 27 Mich. 169; Wyandotte Rolling Mills v. Robinson, 34 Mich. 428; Kegel v. Schrenkheisen, 37 Mich. 174; Hurst v. Hawkins, 40 Mich. 575; Granger v. Judge of Superior Court, 44 Mich. 384; Hake v. Circuit Judge, 99 Mich. 216; Voight Brewing Co. v. Wayne Circuit Judge, 108 Mich. 356; Reid, Murdock & Co. v. Benzie Circuit Judge, 115 Mich. 418; Griffin v. Wattles, 119 Mich. 348; Ismond v. Scougale, 119 Mich. 503; Van Bernschotten v. Fales, 126 Mich. 176; Detroit, etc., R. R. Company v. Circuit Judge, 128 Mich. 497; Byrne v. Gypsum, Plaster & Stucco Co., 141

At every session of the legislature some change is made or some new method adopted relating to some phase of our procedure. Seemingly, rules of court are unimportant or not controlling to the members of that body. If a change is desired, it is made without very much, if any, regard to court rules. This may be because the court has not as yet assumed its full responsibility as contemplated by the constitutional and statutory provisions referred to. Or it may be because the court has acquiesced in the assumed paramount authority of the legislature in these matters. Whatever the cause, it is manifest to all that because of the long-continued acquiescence in this paramount authority of the legislature in such matters, notwithstanding the provisions referred to, it is quite improbable that the court can soon again assert its constitutional authority.

Our statutes are permeated with rules relative to the procedure of our courts. It would seem unnecessary to specify instances of this class of legislation. A reference to almost any topic in the index to the statutes should suffice. Take at random the subjects of—Actions, Affidavits, Amendments, Answers, Appeals, Assessment of damages, Attachments, Bail, Bills in chancery, Bills of exceptions, Books, papers, etc., Capias, Certiorari, Challenges, Courts, and the Judges thereof, Costs, Decrees, Declarations, Garnishee proceedings, Discovery, Divorce, Ejectment, Error, Evidence, Executions, Foreclosure, Forms, General issue, Judgments, Legal process, Mandamus, Notices, Orders, Partition, Depositions, Pleadings, Proceedings, Process, Production of papers, Prohibition, Publication, Referees, Set-off and recoupment, Replevin, Special verdicts, Stays, Subpoenas, Summons, Supreme Court, Transfer of causes, Trials, Verdicts, Witnesses, Writs, and many others.

Compare the great number of references to statutes with the small number of references to court rules in GREEN'S NEW PRACTICE or STACE'S CHANCERY PRACTICE, and the result will show the importance of the former over the latter in our court procedure. I apprehend that if the provisions relating to procedure were eliminated, and only those provisions relating to the substantive rights of parties retained, the present great bulk of our statutes would be very materially decreased.

Taking, then, the constitutional authority granted to our Supreme Court to "establish, modify, and amend the practice and simplify

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Mich. 62; Woodworth v. Old Second National Bank, 144 Mich. 339; Selling v. Berger, 161 Mich. 526; Mintz v. Jacobs, 163 Mich. 283; Pruner v. Detroit United Ry., 173 Mich. 149. See also, State Tax Cases, 54 Mich. 372; Brown v. Buck, 75 Mich. 274; Lee v. Buck, 101 Mich. 406; Gravel Road Co., v. Hogadone, 150 Mich. 638.

the same," and apply the legislative interpretations thereto as shown by the several statutes referred to, and we find:

1. That the Supreme Court may by rule abolish, as far as practicable, all distinctions between law and equity. How may this be done? And how far is it practicable to go? These are matters that are left to the discretion and judgment of the court. The pertinent inquiry is, What has been done in this direction by the Supreme Court since authority was first granted in 1850?

The distinction between law and equity is still rigidly maintained. Few changes have taken place. The office of chancellor was abolished before 1850. By the provision of the Constitution, the office of Master in Chancery was also abolished. For more than thirty years chancery hearings have been held in open court before the same judge who tries actions at law. There have been various minor modifications by rule and by statute, it is true, but the same rules of evidence apply and the same pleadings are required now as then. The legislature in 1887[11] sought to give the right to trial by jury in chancery cases, but the act was declared inoperative by the Supreme Court.[12]

2. It may by rule abolish all fictions and unnecessary process in proceedings. The fiction as to the lost-and-found idea in declarations in trover was retained until the adoption of the new rules in 1899. It is now abolished. I am not aware of the elimination of any substantial process or proceeding by rule of court. They remain as they formerly existed except as to the various details referred to by Mr. STEVENS already quoted.

3. The Supreme Court may by rule simplify and abbreviate pleadings and proceedings. We still have substantially the same forms of declarations on the common counts in assumpsit, trespass, trover, replevin, and case in all its variant forms, with demurrers, pleas in abatement, pleas of the general issue, with notices thereunder of special defenses when not traversed by the latter.

4. Nothing has been done, so far as I am aware, toward expediting the decisions of causes.

5. The question of costs has been left largely to the legislature. The rules of court in relation thereto conform to the statute.

6. The new code of rules remedied many imperfections, it is true, but as to abuses made possible by those rules none have been recognized to exist by the court except such flagrant violations of duty as amounted to a virtual abrogation of some rule.

7. The new rules also simplified the form of the general issue,

[11] Laws 1887, p. 358.

[12] Brown v. Kalamazoo Circuit Judge, 75 Mich. 274.

replication, and in various other minor details, corrected certain palpable imperfections in the practice; but the general requirements of the common law rules as to pleading remain substantially the same.

8. The rule relative to abatement of an action at law for non-joinder or misjoinder of parties was early adopted; but the rule as to multifariousness, as to parties or subject matter, still obtains in equity cases.

9. The rule as to amendment of process was adopted prior to 1850. The statute of amendments was passed after that date.[13] But the rule of court as to amendments applies only to such amendments as are allowable to a party without leave of court; those which must be granted by the court are governed by the provisions of the statute. The statute of amendments has been very liberally construed by the Supreme Court in many cases, and as stated by Justice CAMPBELL[14] it "is the basis of all modern relaxation of rules of procedure, and the manifest object of the statute is to give parties who are met with such objections on the trial the right of amendment on reasonable terms and to make a verdict, where no point has been previously made at all, valid to rectify all defects that are not so radical as to leave nothing to amend and to treat the record as if it had been actually amended." This statute has stood the test of time and remains practically as originally passed.

10. Law rule 27 provides for discontinuances against parties improperly joined, and rule 6 for joining necessary parties who have been omitted. To this extent the purpose of the 10th subdivision has been fulfilled.

With these provisions of the statutes as to the authority of the Supreme Court to make rules, taken in connection with the statute of amendments and the liberal construction given it by the court, it would seem that every conceivable proposition advocated by any one for reform in procedure, here or elsewhere, now or at any time, had been fully and completely provided for, and that the responsible source of such reforms had been pointed out. At the last session of the legislature (1913) the Governor was authorized to appoint, and pursuant to such authority did appoint, a commission to consider this question of procedural reform, which commission is to report its conclusions at the next session of the legislature. That commission is now at work, and will no doubt formulate some plan looking toward the simplification of our procedure. But I respectfully submit that the provisions of law now upon the

[13] Compiled Laws 1897, ch. 248, §§ 10268-75.
[14] Schindler v. Ry. Co., 77 Mich. 154.

statute books are amply sufficient to meet every requirement for reform, if only they are carried out. The suggestion is pertinent that, if any changes are to be made, they be made by the Supreme Court by rules, instead of encumbering the statutes further with such provisions.

As is well known, the prevailing complaint amongst the laity is that proceedings at law are too often delayed by reason of the technicalities and formalities of our procedure. It is immaterial to the onlooker or the litigant whether these delays are caused by some statutory provision or by some rule of court. That delays frequently occur must be admitted by the most earnest advocates of our present system. Conceding, as is the fact, that by both the statutes and the rules of court referred to, as they have been and are now being interpreted and applied by the courts of this State, a marked advance in procedural law has been accomplished in Michigan since 1850, and that from a comparative standpoint our practice is far more comprehensive, simple, and more speedy than the practice in almost any other state in this Union. Nevertheless, there are many other matters worthy of serious consideration which, when applied, may better our present condition.

1. One of the sources of delay is the fact that the rules permit demurrers and special pleas to be filed in pending causes whereby some question of law is raised for the determination of the court. If a pleading is defective, there is no substantial reason that can be advanced against bringing the question of law thereby raised before the court on a motion for immediate disposition. The interposition of a demurrer to a declaration or bill of complaint now means the delay of the determination of the legal question involved many weeks, possibly months. At least this is true in most trial-court jurisdictions. To substitute a motion for the special proceeding would avoid such delay. This method should also be applied in all other matters where questions of law are to be raised. A simple motion, setting forth the grounds upon which it is based, should be substituted for all other special proceedings or writs, such as certiorari, mandamus, and the like. Such a method would raise directly the questions involved so they may be heard with the least possible delay and in the simplest and most comprehensive manner.

2. The writer is also convinced that there are certain changes relative to appeals that should be made, and which, when made, will greatly facilitate such matters. We have been so long accustomed to settling bills of exceptions and chancery cases in a particular way, that any suggested change in that method is likely to be looked upon with disfavor by many members of both the bench and the bar. On

the other hand, when we consider that present methods, with only slight modifications, are substantially the same as they were a hundred years ago, we might well hesitate to join with the more conservative members of the bar in saying that no change for the better is possible. There are at least two changes that should be made:

(a) There are many reasons why the present method of settling bills of exceptions should be radically modified or entirely abolished. There is no more fruitful source of delay than this. The common practice provided by statute and rule after a cause has been heard and determined in the trial-court, is for the attorney taking an appeal to prepare a proposed bill of exceptions or case setting forth in narrative form the evidence in the case. To do this, the stenographer's minutes of the testimony must be procured. After the proposed bill of exceptions or case has been prepared and served on the opposite attorney, the latter prepares amendments thereto and the matter is then presented to the trial court to allow or reject any or all of such proposed amendments, after which the whole matter with the amendments is stenographically written out and the trial-court's signature attached thereto with the proper certificate. If stenographic copies of testimony contained only a few pages, this method might not be cumbersome; but when it is considered that in the average case the stenographer's transcript covers hundreds of pages, the difficulty and the length of time required in reviewing this testimony and setting it forth in narrative form, becomes apparent. These difficulties and the length of time required to review the proposed bill of exceptions, compare it with the original transcript and prepare amendments, are much increased when the matter gets into the hands of the appellee's attorney. After the case is settled by the court and after a delay of several months, the record is made up and printed according to a rule of the court. Briefs are then prepared and printed and the cause is in readiness for hearing by the appellate court. The pertinent inquiry is, Why should it be necessary to go through these forms and this ceremony, and take up so much time and be to such great expense in settling bills of exceptions or cases in chancery when, after it is all over, the net result is but an abbreviation of what was in existence before, namely, the testimony in the case? True, the abbreviation may reduce the bulk of the record and its printing may make it more convenient for reference, but do these advantages compensate for the great loss of time, energy, and expense in their procurement? I submit that they do not. Few cases, indeed, will justify the usual or even a very low charge by the attorney for the time actually spent in the settlement of a bill of exceptions. In such cases the

services are usually largely gratuitous. The number of points in any one case is comparatively small, and generally relate to the admission or rejection of some testimony or to the instructions or rulings of the trial court. These points can be made by a reference to the pages of the stenographer's transcript of the testimony as well and as effectively as they can be made by reference to the pages of a printed record. The particular ruling or charge complained of may be set forth in the briefs of counsel with sufficient related testimony printed therein to show the points made and whether they are sound or not. The appellate division of the Supreme Court of Judicature of England hears all such cases upon the record as made in the trial court, and the stenographer's minutes of the testimony and the files in the case constitute the record. Bills of exceptions are abolished. That court by this method has a distinct advantage over those appellate courts where the testimony given at the trial is set forth in a printed record in narrative form. Where the credibility of a witness is involved, no narrative statement of his testimony can possibly give a correct notion as to its quality or character.

In criminal appeals these suggestions are particularly pertinent. Unfortunately many trial courts have acquired the habit of permitting persons convicted to be released on bail pending an appeal to the Supreme Court. In many. if not most, cases this is a pernicious practice, although permitted by statute; for, in such case, so long as the convicted person is at liberty, there is no particular need for haste in pushing the hearing in the appellate court. When this occurs, if the cause is in readiness for hearing in the appellate court within a year after the verdict of guilty has been rendered, counsel will consider that they have proceeded with all due diligence and speed. The result is, however, that if the judgment of the trial court is affirmed a year has been lost, and if reversed and a new trial granted, the State is at a great disadvantage on the second trial; for prosecuting officers may have changed in the meantime, witnesses may have become scattered, and the general interest in the case so subsided that the chances of a conviction on a second trial are at a minimum. And this is equally true whether the convicted person is released on bail pending the appeal or not, for the time now required to go through the process of settling bills of exceptions is so unreasonably great that a new trial, if granted, is seldom successful to the prosecution. And this result is not because the case is not meritorious, but because of the great delay and the consequent weakening of the People's case in the meantime for the reasons already stated.

Again, the rights of every person so convicted may be adequately protected by the shorter method of review, namely, by transmitting the transcript of the testimony given at the trial directly to the appellate court and requiring the alleged errors to be specifically assigned as shown by such record. How cumbersome and inadequate do our present methods appear when we compare them with the expeditious methods of the English practice! Four days after the verdict of the jury in the *Crippen* case, the appellate division of the Supreme Court of Judicature was engaged in hearing on appeal the alleged errors committed by the trial court. This was made possible by the rule which permitted such hearings to be had upon the record as made in the trial court, doing away with bills of exceptions and all other proceedings, which only stand for delay rather than efficiency.

But why submit a respondent in a criminal case to the unnecessary expense of settling a bill of exceptions and printing the record before he can have his case heard on appeal? There are only a few respondents who can afford this luxury. I have in mind one case[15] where the friends of the respondent raised the necessary fund to print the record and the attorneys practically volunteered their services in the preparation of the bill of exceptions in order that the case might be taken to the Supreme Court. Otherwise the case could not have been appealed. And in another case[16] on account of the poverty of the respondent, who had been convicted of murder, the Supreme Court on application permitted a hearing to be had on the stenographer's minutes of the testimony as constituting the bill of exceptions, and the original files in the case as the record. If this can be done on application in one case, it can be made the universal method of appeal in all others.

(b) Such a method would make unnecessary writs of error and certiorari, which are but formal writs in any event and are issued as a matter of course. There is no reason why a cause should not be transmitted to the appellate court at once on the application of appellant's attorney after specifying in writing the alleged errors of the trial court and the performance of other reasonable requirements, such as the payment of fees, etc. The point is that all unnecessary and superfluous proceedings to perfect appeals should be abolished and the simplest and most direct method adopted consistent with the dignity of the situation and the due administration of justice. For it is coming more and more to be the common conception that appellate procedure should be in the nature of a rehearing and

[15] People v. Salsbury, 134 Mich. 537.
[16] People v. Sartori, 168 Mich. 308.

that final judgment, when possible, should be rendered by the appellate court. To this end the statute permitting the Supreme Court "in accordance with and for the speedy furtherance of justice in any suit, either at law or in equity, may call upon the parties to such suit, or any of them thereto, to testify orally in open court," was passed and should be used whenever possible or necessary to make its judgments final between the parties. It has been invoked to this end in at least one case.[17]

3. The statute provides, "all cases in the Supreme Court shall be decided and disposed of before or during the first week of the term next succeeding the one when the same is argued or submitted."[18] Circuit Judges in chancery cases are required to render an opinion "within six months after the same shall have been finally submitted to them."[19] On account of the constantly crowded condition of the Supreme Court calendar, the requirement of the statute above quoted oftentimes presses the Judges of that court to the limit of hardship; but I know of no reason why, under ordinary circumstances, the Circuit Judges of the State should not comply strictly with the six months' limit mentioned in the statute. Yet I have known cases to be held longer than that, and the delicacy of the situation prevents the attorneys in the case from saying very much about it. The practice should be prohibited in some substantial and effective way.

4. All terms of court should be abolished and causes should be placed on the docket for trial or hearing as soon as issue is framed. This is particularly true in those circuits where the trial courts are in almost continuous session. In less populated circuits, where there are fewer cases and terms of court last only a few days or a few weeks at a time, it is folly and a useless expense to require four terms of court each year and four separate panels of jurors to be summoned. Why not leave the matter in the hands and under the control of the presiding judge to call a jury at such time or times as may be necessary to try and dispose of all cases at issue and upon the docket ready for trial? Notices of trial and notes of issue are unnecessary and superfluous requirements, even though terms of court be continued. They too often are used to delay the trials. At each call of the calendar at the beginning of a term of court there are many questions of notice raised by the attorneys who, too often, are seeking only delay by raising such questions. Unless the rules

[17] Schroeder v. Royce, 127 Mich. 33, note at end of case.
[18] Compiled Laws 1897, § 212.
[19] Compiled Laws 1897, § 558.

as to notice have been complied with, and the court so finds, when the question is raised, delay is inevitable.

5. Orders, judgments, and decrees of the court should take the place of all other writs, such as mandamus, injunction, execution, and the like. This change would simplify many proceedings that are now more or less complicated.

6. The question as to the absolute right to an appeal in any given case is, doubtless, a question which must be determined by legislative enactment, as it relates to a substantive right of the litigant; but to provide the manner of such appeal and the procedure in relation thereto, comes clearly within the power of the court.

Hearings in the Supreme Court should be had only on application to and leave granted by that court; and should be limited to those cases in which new questions, or questions of general importance to the state or the legal profession, are involved.

The prevailing practice in this state of indiscriminate appeals to the court of last resort has become almost a menace to the due administration of justice. So serious a charge, however, will not stand unchallenged, and merits at this time a brief analysis of the situation in justification.

An examination of the decisions reported in any one or all of the 175 volumes constituting the Michigan Reports will show that the vast majority of these cases involved no new or novel questions of law and were determined upon the application of some familiar and oft-repeated principle of the law to the facts in the particular case. It is apparent that such cases represent only the staying qualities of one of the litigants in the case to hold out to the bitter end. There are thousands of such cases printed at large in our reports, and the appellate judges are obliged, under the law, to write an opinion in each case, setting forth the facts in detail before stating their conclusions. This requirement and the consequent repetition of former rulings necessarily extend the bulk of our reports far beyond the measure of usefulness or necessity, and could be avoided by requiring leave to appeal to be first obtained. The appellate court would thereby be relieved of the unnecessary burden now imposed upon it in cases of the sort mentioned. Such a rule would enable that tribunal to confine its work to new and essential questions of law of interest to the whole people; it would give more time and greater opportunity for the investigation of these more vital questions on the part of both the members of the bar and the court; it would save thousands of dollars each year to litigants and the state, now expended in unnecessary and fruitless appeals and in the publication of hundreds of opinions that are of no particular use to any-

body; it would save to the members of the bar the necessity for buying and paying for the "dead wood" now published in the reports; it would condense the realm of research to a comparatively small number of leading cases; it would raise the standard of trial courts and result, I believe, in a more careful preparation and presentation of cases by the attorneys in and the more careful consideration of such cases by these tribunals; it would save shelf-room in every lawyer's office, which, with the multiplication of reports in our own and other states, is no inconsiderable item. Since 1872 the volumes of state and federal reports in this country alone have increased in number from 1517 to 5947. This is exclusive of the many series of reports of selected cases, digests, encyclopedias, etc., now indispensable in every lawyer's library.[20]

It has been suggested that the number of cases heard by our Supreme Court might be lessened by limiting the amount involved in appeal cases to $500. An examination of the cases in any one of our 175 volumes of reports, particularly the later ones, will show that the larger number involve less than $500; hence, such a limitation would undoubtedly have the desired effect. But the amount involved should not be made the determining question. It should be, rather, the principle involved that should control in this matter. A case having less than $100 at stake may involve a question of vital interest to the whole State, while a case having $100,000 at stake may not involve any new principle not already determined by the court in some preceding case.

That relief should be obtained from some source compatible with the due administration of justice is no longer a debatable question. Appeals only on leave first obtained will deprive no litigant of any just right to which he is now entitled. It will only bridle the license given under the present practice. Now the appellate court is not advised as to the points involved in any case brought before it until after all the money, time, and labor necessary in the settling of bills of exceptions, printing records, preparing and printing briefs have been expended. Should appeals be granted on leave only, the points involved may be raised immediately and directly by petition, and, without determining them, if they appear to be new, or otherwise worthy of further consideration, an appeal may be allowed.

In the suggestions here made we are not without precedent of the highest authority, for the Supreme Court of the United States hears only such cases on error or on appeal as come to it on leave first obtained; and the Appellate Division of the Supreme Court of

[20] 15 Law Notes, 125.

Judicature of England and several of her colonies pursue the same method.

Litigation should end somewhere. As a general rule trial courts pass finally upon the great bulk of litigation brought before them. Not over ten per cent of the cases there tried are carried to the appellate court, and in the greater number of these cases the determination of the trial court is affirmed. What has the litigant gained by an appeal in such a case? A substantial loss, however, has accrued to the State to maintain the machinery whereby a warring litigant has been enabled to carry the game one step further, to say nothing of the added expense and delay occasioned his opponent in securing those rights to which he was entitled in the beginning. The only justification for the present practice is found in the comparatively small number of cases reversed by the appellate tribunal. And many of these cases, in the last analysis, will be found to involve no new or novel questions of law or practice, and are of interest only to the parties immediately and directly involved.

Any or all of the changes here proposed could be made without sacrificing the fundamental principles of our practice or of the substantive rights of parties.

At least, I am convinced that, on a careful consideration of many of the methods now prevailing, it will be found that some of them can be either modified, entirely eliminated, or other and simpler methods adopted in their place that will hasten the progress of trials and lessen the expense of litigation to both the litigant and the state.

WILLIS B. PERKINS.

GRAND RAPIDS.

REGISTRATION OF LAND TITLES.

IT is proposed in this paper to consider some of the advantages and disadvantages of the older system of no registration, the later system of registering the instruments of conveyance, and the latest system of making the title depend entirely on a recorded adjudication that it is thus and so, which absolutely displaces all former titles, adjudicated or otherwise. It is also proposed to consider some of the reasons why the older systems persist.

No registration is the natural system, exists everywhere, probably, till displaced by statute, and has until very recently continued in most parts of England, each purchaser relying largely on the possession by the grantor of the prior assurances of title.

The system of recording the title deeds, and making neglect to do so postpone the negligent party to any subsequent purchaser in good faith from the same grantor, has been the system in vogue in this country from the earliest times; and now in the older parts of the country, especially in the larger cities, a proper inspection of the record often costs more than the land is worth; and as the record grows, such will tend to become the condition all over the country.

The third system, generally known as the Torrens system, originated in South Australia in 1858, and though adopted by statute in a number of the United States of America, is in all of them optional, and in none of them the predominating system. It would seem strange at first blush that a system which on the face of it appears to have such marked advantages over its predecessors, should make such slow progress against them. It will be worth while to examine this point a little before proceeding further. Why does not the recorded title immediately displace the practice of recording the evidences of title, or of making no record at all?

First of all there is the inertia. Until something is done the old system continues. Though there be statutory provision for a record title, owners of land will not take advantage of it till there is occasion for doing so, and they see the profit to them. It must be brought to their attention. There must be a need of making a transfer. And, most important of all, they must be persuaded that it is to their advantage to put it under the new system instead of leaving it under the old. Where the record is short it is usually cheaper and quicker to stick to the old system than to make the *initial* record under the new; and, of course, there can be nothing done under the new system till there is the initial record. It may be better in the end to have a record title; but "just for this time"

it will be cheaper and easier to stick to the old, and therefore many continue in the old way.

Then there are the beneficiaries of the old system. If you turn over a stone in the field, a lot of crooked wriggling creatures are distressed by being exposed to the light and deprived of their shelter. If you try to correct an old vice you find the same situation; and the recording system is no exception. When reformers attempt to obtain a law providing for the new system, the beneficiaries of the old order are on hand to block it by every means they can command, direct and indirect. They argue that it is unnecessary, impractical, unconstitutional, &c., &c. They are organized and interested, the other side is not. If they are unable by these means to stop the movement, they proceed to load down the law with amendments, to make it as dilatory, expensive, and complicated as possible; to restrict the field of its operation to a few counties, to make it depend on adoption in each county by special election, as in Illinois; or in addition to require the people first to tax themselves by a special election to erect a special building and fireproof vaults to keep the records, and vote to support a whole retinue of additional officers, as was done in Ontario; to load it down with a long list of large fees to attorneys, clerks, registers, sheriffs, publishers, abstract companies, and most unkindest cut of all, to require an abstract and a title insurance policy in at least the amount of the assessed value from the very abstract title guaranty companies the law was designed to displace, at a premium to be agreed upon *with the title guaranty company* in each particular case, as was done in New York.[1] By these and similar means they have been able in most cases to make the law unworkable and a dead letter. So successful were these handicaps in the New York law of 1908 that there had been only twenty-eight registrations in the whole state up to the summer of 1912.[2]

As an illustration of the extent to which the title guaranty companies of New York have gone to prevent use of the registration law, even as enacted, attention is called to the case of *Duffy* v. *Shirden*[3] (1910) which they were able to get into only as attorneys for the owner of land bounding on the rear of the lot sought to be registered, and that only for six inches at one corner. Being thus in the case, they proceeded to raise all manner of technical objections, and nothing to the merits, and did not cease to harass the parties in interest till their ability in that direction had been ex-

[1] See article on New York law by Gilbert R. Hawes in 23 Green Bag, 58-65.
[2] New York Bar Assn. Rep. 1912, p. 75.
[3] 139 N. Y. App. Div. 755, 136 id. 894 & 920.

hausted by three hearings and the denial of a motion for permission to take the case to the court of appeals. The case was finally decided against them on the ground that they had failed to show any financial interest entitling them to hearing in the case.

There is another advantage in these tactics. Whenever it is proposed to enact the reform in another state, the beneficiaries of the old system there are enabled to say two things: 1. There is no advantage in the system, for people do not use it where it is provided for by law. 2. If you just insist on enacting such a law, copy the law of the other state, with all these traps and fool provisions in it.

When it came to enacting a law for the Northwest Territories of Canada, where the land was all owned by the government and no abstract or title guaranty companies as yet existed, it was possible to get a fairly simple and workable system of adjudicated record title, as the only system; and in speaking of the working of the law there, Mr. Douglas J. THOM, of Regina, in his recent work (1912) on "THE CANADIAN TORRENS SYSTEM," says:

> "It may safely be said that it would be hard, if not impossible, to find anyone who would revert to the old system of registration of deeds. The fact of the growth of the system in Manitoba, where it is optional, the 'old system' existing side by side, is striking evidence of the value of the Torrens system, especially where administered in a liberal spirit, untrammelled by unnecessary technicalities. The expense of bringing land under the 'new system' has proven a barrier, as against the increased stability of land under that system. It is not infrequent in contracts for a purchaser to stipulate for a Torrens title. This is notwithstanding the fact that, while Manitoba cannot show titles going back one hundred years, it has yet been in existence long enough to have produced titles of some complication and containing a very large number of instruments. The matter of expense in bringing land under the system is intimately connected with another feature, namely, the attitude of the officers of the system toward technical defects. If that attitude be that the minutest objection unsatisfied is a bar to the register, and the assurance fund back of him, from accepting any responsibility, then the system becomes expensive and burdensome, and to this attitude may probably be attributed the failure of the system to advance in some of the older jurisdictions. But if, as is the case in practice in Manitoba, the register is at liberty to substitute moral cer-

tainty for legal certainty where the latter is not available, acting on the view that the purpose of the act, and of the assurance fund, is to *facilitate* (sic) *the transfer of land,* in that case the system becomes correspondingly advantageous and popular.

"It is also true that the expense attached to operation under the system is higher than under the old system, especially in Saskatchewan and Alberta, where a percentage is payable to the assurance fund on each transfer, instead of only on the first bringing under the system, as in Manitoba. But laymen who have had experience with both systems are found to be the first to appreciate that for this additional cost, they obtain in greater proportion greater security of title on the one hand, and a little more easily disposed of on the other. From the view of the legal profession the time saved in searching and searching over again is inestimable. The other side of this is, of course, that a class of work for which considerable fees were collected under the old system is largely abolished under the new. But as in every other legal reform the general rule holds that in the long run the legal profession does not suffer in pocket, and certainly not in reputation, by the clearing away of 'old lumber' and making access to the real benefits of the law more easy. Certainly the legal profession of these provinces would never willingly go back to the old, wasteful, and wearisome system of searches back to the beginning on every successive transaction.

"Another objection is sometimes made that operations under the new system are slower than under the old. Here again is a question of a balance of conveniences. The culminating point of a sale transaction so familiar to conveyancing practitioners in the older provinces, when with all due form the solicitor for the vendor attended at the registry office with the deed, and at the same time the solicitor for the purchaser with the money, and having made final searches, deed and money were exchanged and the deed handed to the registrar, with the assurance that such title as there was was thereby crystalized, has no counterpart under the new system. No matter how completely up to date a registry office under the new system may be, the necessity for examination of instruments, having regard both to the form and contents of the instruments themselves, and so the state of the register at the moment of registration, renders it in the

nature of things impossible for the purchaser in such case to know he is getting what he is paying his money for. Therefore a practice of holding money in trust, either with solicitors or in banks, pending registration, as agreed on, has grown up. It is true it is slower, varying from a day or two to as high as three weeks, a delay in such latter case which should be attributed to a poorly managed office where it occurs, and not put down as a necessary accompaniment of the system. But in any case, so satisfactory are the results of the unimpeachable title felt to be when obtained, that, as in the case of the cost, it is felt that the results justify the small disadvantage, and suggestions of reform are directed, where necesary, to the administration of the system, not to its abolition."

Another glimpse of the practical working of a title registration system where it has had a fair chance side by side with the old system of deed registration is seen in an address before the New York State Bar Association by Mr. Justice Charles T. DAVIS, of the Massachusetts Land Court, from which the following extracts are quoted:[4]

"In the country counties it does cost more to have a title registered than to proceed under the old system, but in the metropolitan district it costs as a rule rather less. There are consequently very few petitions for registration in the country counties. Most of our work lies in the metropolitan district. I do not think, however, that this is due to the matter of expense, I think it is due to the fact that most country titles are still readily marketable under the recording system. * * *

"So far as the profession itself is concerned, the act at first met with very bitter and hostile opposition from quite a large portion of our conveyancing bar. I think that today, however, this opposition has been not only largely reduced, but almost eliminated. There are still one or two leading firms of conveyancers who are strenuous in their opposition to land registration, but, on the whole, the change of sentiment in so short a time has been quite surprising. Among those who today insist on registration of title in matters in which a very large amount of money is involved, or in which business corporations are acquiring or building plans, or estates are being purchased, as to which there is likely to

[4] New York Bar Assn. Rep. (1908) pp. 400-418.

be a very rapid change in title, or who, under such circumstances advise their clients to register, will be found many who a very few years ago would have nothing to do with a registered title. The fact is that a conveyancer is seldom adequately paid for the work which he is obliged to do in the course of the examination of a title in the registry of deeds. He is compensated really more with regard to the amount of responsibility involved than in proportion to the actual labor or professional skill expended. We deal with registered land in exactly the same way as with unregistered land, except that the title passes by the act of registration.

"It is a popular fallacy that a layman can take a registration certificate of title and deal with it with perfect safety. He cannot. Counsel do not, it is true, have anywhere near as much work to do, and they incur nowhere near as much responsibility; but they do have to deal with the important phases of the matter immediately before them. A deed has to be properly drawn, instruments of trust considered, a mortgage transaction has to be properly attended to, and matters excepted from the certificate of title looked up before the title is passed into the registry of deeds. The elaborate labor of going over and over the same old ground and the same old title, which I suppose only those of us who have suffered under it can appreciate, and which has formed the chief cause of expense and annoyance, both to the profession and to our clients, has, however, been eliminated, and, on the whole, the compensation which can fairly and properly be charged for passing a registered title is, as a net result, larger than under the old system.

"In conclusion I want to say a word with regard to some of the objections to land registration. In the first place, it has had to encounter with us, and will always have to encounter wherever it is tried the great opposition of conservatism both in and out of the profession. * * * Another and still more formidable difficulty has been that of entire indifference on the part of the general public. In addition there are many purely theoretical objections. Gentlemen, I could think of endless theoretical objections to land registration besides those suggested and very well and fairly stated by Mr. PEGRAM. The only thing I can say in regard to them, however, is that as a practical matter of fact they do not exist. They do not happen. Land registration with us is speedy. Land registration with us is cheap. Land registration with us

is workable. The court is not a very large court. * * * The number of cases that we dispose of, however, compares more than favorably with the number of cases disposed of by any two sessions of our superior court. The character of our work has changed very much since the first act went into operation. At first we had very small and unimportant and usually defective titles. I should say that today the great bulk of our work is in titles involving a very considerable amount of money, and in which no real defect is present. We do not make the titles good. We simply adjudicate upon titles as they are presented to us finally proved. As to the great majority of titles as now existing and dealt with in Massachusetts, I think that there is no particular reason at the present time for their registration. I do not believe in a compulsory act. I should be exceedingly sorry to see ours made compulsory in any respect. * * *

"No re-examination of a registered title is ever made. The owner of a tract of registered land, after having found a purchaser, can place a mortgage for him, pass all the papers, and have the purchase money in his pocket all within twenty-four hours. This is the testimony of dealers who have handled hundreds of registered lots. Where a transaction happens to involve a very large sum of money, this saving of time and interest is of very real importance.

"The great, though somewhat general, objection urged against land registration appears to be that it is not wanted and is not used. * * * The growth of new business has thus far shown a moderate but absolutely steady increase, both in the number of applications filed and in the assessed valuation of the property registered. In 1899 it was $626,000; in 1902, $1,991,000; in 1907, $3,643,000. People who once apply for registration of title come back again. No suit has ever been brought against the commonwealth, nor have I ever heard of any claim being suggested that anybody has ever been cut off from any right or interest in land during the ten years in which the land registration act has been in operation. We have registered the title to over $20,000,000 worth of property at assessed valuations, and to a vastly larger amount of actual valuation as the same property stands today. We have some 8,000 instruments in existence in the metropolitan district alone. No claim, as I said, has been made, and no litigation of any kind has ever been brought that I have ever heard of by or against anybody because of

> his title having been registered. Nobody has been involved in any of these many theoretical difficulties which we have just heard described because he has had a registered title. There has never been a suit, there has never been a petition, there has never been even a question as to the meaning of a single clause of the land registration act as drawn by Mr. HEMENWAY, a singular tribute to his professional skill."

These rather extended quotations have been thought justified at this point as declarations of experience from those who have lived under the registered title system where it has had a fair chance, and after expert investigation, speak of what they have seen and know, rather than as a reformer of what he hopes and dreams.

Another thing that has tremendous power in delaying the reform, both in preventing enactment of a statute to enable it, and in avoiding avail of the law where it exists, is the natural conservatism of land owners, and especially of their legal advisers. This conservatism and its influence are well illustrated by the remarks of The Lord Chief Justice of England, Lord COLERIDGE, after listening to a lecture on the new system and its operation in Australia, by Sir Robert TORRENS in 1872, as follows:

> "I have never been able to perceive the obstacle to applying to land the system of transfer which answers so well when applied to shipping; but, as my learned brethren, one and all, have declared that to be impossible, I had become impressed with the belief that there must be something wrong in my intellect, as I failed to perceive the impossibility. The remarkably clear and logical paper which has been read by Sir Robert TORRENS relieves me from that painful impression; and the statistics of the successful working of his system in Australia amounts to a demonstration; so that the man who denies the practicability of applying it might as well deny that two and two make four."

In the United States there has been the further deterring doubt as to whether such a system would be or could be made legal under our written constitutions. Much was made of this objection for a number of years, especially by the beneficiaries of the old system. At first success seemed to attend these objections. The first Illionis law was held unconstitutional on the ground that it attempted to confer judicial powers on the registrar;[5] and the first Ohio law was held unconstitutional on the same ground, and for the further reasons that a mere publication of notice "to whom it may concern,"

[5] People ex rel. Kern v. Chase (1896), 165 Ill. 527, 46 N. E. 454.

the only way in which unknown claimants can be designated, was not due process of law to obtain jurisdiction to adjudicate on the title, and that the provision for an assurance fund was taking private property, not for public but for private use, and that without compensation, and on the other hand, the assumption that it would adequately compensate all whose titles might be cut off by the act was unwarranted, and even if it were adequate the property is not taken for public use.[6]

These objections if valid would seem to be insuperable; but soon the tide began to turn. The Illinois legislature immediately enacted a new law obviating the objections taken to the first; and the supreme court of the state sustained it, and declared the provision that the judgment should be a bar to all adverse claims after two years was valid as a statute of limitations.[7]

And whenever the Torrens acts of the other states have been attacked since in the state courts they have always been sustained.[8]

The first attempt to obtain an adjudication on the question in the Supreme Court of the United States failed, the judgment of the Supreme Judicial Court of Massachusetts sustaining their act being affirmed by the Supreme Court of the United States, and the writ of error dismissed, on the ground that the appellant had not shown any interest in the case entitling him to a hearing in court.[9] But when the law passed in California to quiet the titles left without proof by the burning of the records at the time of the earthquake in 1908 came before the same court, the judges met the situation squarely and sustained the law against every objection, thus putting an end to discussion on that ground by the final decision of the court of last resort.[10]

It is a terrible indictment of our boasted jurisprudence if it is incapable of inventing or enduring any improvement on the system which has enabled title guaranty companies and abstract companies all over our land, and often several in the same city, to put by millions in surplus, after paying immense dividends, salaries, and clerical expenses, all extorted as a tax on land titles and transfers,

[6] State ex rel. Att. Gen. v. Guilbert (1898), 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 105, 60 Am. St. Rep. 756.

[7] People ex rel. Deneen v. Simon (1898), 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175.

[8] Tyler v. Judges of the Court of Registration (1900), 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; State v. Westfall (1902), 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297; Robinson v. Kerrigan (1907), 151 Cal. 40, 90 Pac. 129; Baart v. Martin (1906), 108 Minn. 197, 108 N. W. 945; People ex rel. Smith v. Crissman (1907), 41 Colo. 450, 92 Pac. 949.

[9] Tyler v. Judges (1900), 179 U. S. 505, 21 Sup. Ct. 206.

[10] American Land Co. v. Zeiss (1910), 219 U. S. 47, 31 Sup. Ct. 200.

for what has been somewhat sarcastically put as insuring against everything but loss. If any man thinks it an exaggeration to say there is no real protection in a title guaranty policy let him read one through and ponder on the exceptions and limitations.

But whatever influence in preventing the establishment of a system of recorded titles has been exercised by the public inertia, lack of occasion for acting, interested opposition, labor and expense of making the first move, and natural conservatism of lawyers and land owners, it is believed that the one great deterring force that has stood in the way of the establishmen of a secure system of land titles, has been the failure of lawyers and laity to realize that a secure title under either of the old systems is an absolute impossibility, regardless of any care or cost that may be expended in preliminary investigation, abstract, title insurance, legal counsel, and gossip with the old ladies of the vicinity. The only thing that makes the system endurable is the real, immovable, indestructable, and visible nature of the land itself. The fact is that the path of the searcher for a safe title to land under either of the old systems is beset by more traps, sirens, harpies, and temptations than ever plagued the wandering Ulysses, the faithful Pilgrim, or the investor in gilt edged securities. To point out a few of these pit-falls is the principal purpose of this article. It is not designed to comment on the mistakes arising from improper interpretation of the recorded instruments, or from failure to make proper examination of them, but merely to show some of the dangers the record does not guard against.

It would be too long to enumerate, and very difficult for the imagination to conceive, the catalogue of pitfalls in the path of the man relying on an abstract and an examination of the public records under the instrument-record system to determine who owns any particular piece of land. But for our purposes a few common illustrations lying ready at hand will suffice. Let the reader remember the list increases in arithmetical ratio as the record lengthens. Multiply the following list by the number of instruments in the abstract, and then remember that the list is not complete but contains only a few illustrations. The purchaser gets no title unless his grantor had it or was in a position to pass it to the grantee as a bonafide purchaser; and the grantor appearing of record to have absolute title neither has it nor ability to pass it to a bonafide purchaser if anywhere in any of the links of the chain of title, in any of the preceding transfers, any of the following existed; unless the defect has been cured by adverse possession, of which later :

1. If any grantor, though of the same name, was not the same person as the prior grantee.

2. If persons conveying as heirs of a prior grantee were not such in fact; for example, they may be his children, but illegitimate because he had a prior spouse living, though perhaps never heard of by the children themselves, nor by anyone in the country where the land is situated, even though deceased had lived there all his life. The prior marriage may have been secret and the cohabitation very short.

3. If any grantor left an unprobated will. Conveyance by testator's heirs passes no title against the devisee; and the will may turn up and be probated and the land taken by the devisee after the supposed title had passed through a long chain of bonafide purchasers, and after a lapse of generations, and even after the property had been condemned by eminent domain against such supposed owner.[11]

4. If any of the instruments in the chain were forgeries. The original is not kept on record. There is no possibility of determining by examining the record whether all or any of the instruments are genuine, nor has the buyer necessarily any means of access to the original. The notary's acknowledgment may be genuine and bonafide and the instrument a forgery, as has happened when the forger has presented the deed with the acknowledgment form all filled out ready to sign, and has hurriedly presented it to the notary for signature, the notary thinking he was taking the acknowledgment of the forger. Under the statutes of Ontario the original instrument is retained by the recorder, and then in case of question as to forgery there is something to look to to determine the fact, and the instrument is surely in safer keeping for everybody concerned afterwards than in the hands of private parties, exposed to fire and loss. But with us not so.

5. If the property was a homestead at the time of any of the transfers and the wife was not a party and separately acknowledged the deed it is void in several states. Whether it was a homestead or not no examination of the record will disclose. It may purport to be acknowledged and signed by the wife, but if the wife was in fact some other person the deed is still void. Who is in fact wife depends on a marriage, and which marriage was first, and whether there was at that time a living spouse, and many other things not capable of being ascertained by inspecting the record, interrogating

[11] Haddock v. Boston & Maine Ry. Co., 146 Mass. 155, 15 N. E. 495; Currall v. Villars, 72 Fed. 330.

the grantor, talking with the neighbors, nor in any other certain way. It may be discovered by accident.[11a]

6. And if, in such cases, the person taking the acknowledgement was not a notary, or was for any other reason incompetent, the deed is absolutely void. As if he was a party in interest under the deed, though that fact did not appear on its face, and was not discoverable by any means at the disposal of a person inspecting the record; for example, the notary was a stockholder of the corporation grantee.[12]

7. Likewise if the wife was insane in such case, though she in fact joined in the conveyance and made acknowledgment of it, the instrument is absolutely void. A purchaser in reliance on the record which gave him no means of ascertaining the fact is not protected.[13]

8. Where the instrument is made by a woman, it may be she was married, though the fact does not appear on the deed, and is not capable of discovery by inquiry in the vicinity; yet, since married women's deeds were void except by force of statute, her deed not complying with the statute is void, though the fact does not appear of record; and the bonafide purchaser would get no title.[14]

9. Though one purchase direct from the patentee from the government, and there are no other instruments of record, he gets no title if the government had made a prior patent or grant, for these are good without being recorded.[15]

10. If the instrument was once well recorded the title of the holder under it is not affected by the subsequent loss, destruction, or theft of the record; and purchasers thinking there is no record, because none can be found, are not protected though they act after due search.[16]

11. If a deed is recorded in the county where the land then was situated, the holder under it is protected without further record, though such land was included in the county only for a few days, and public records do not show how or when the county line was changed, and others in ignorance of the record and county history purchased in good faith.[17]

[11a] Brewster on Conveyancing, § 392, and cases cited.

[12] Brewster on Conveyancing, §§ 282, 288 and cases cited.

[13] Brewster on Conveyancing, § 393; Thompson v. New England Mort. Co., 110 Ala. 400, 18 So. 315, 55 Am. St. Rep. 29.

[14] Brewster on Conveyancing, § 264.

[15] Moran v. Palmer, 13 Mich. 367; Sands v. Davis, 40 Mich. 14; Rogers Locomotive Wks. v. Am. Em. Co., 164 U. S. 559, 17 Sup. Ct. 188.

[16] Thomas v. Hanson, 59 Minn. 274, 61 N. W. 135.

[17] Stebbins v. Duncan, 108 U. S. 32, 2 Sup. Ct. 313; Koerper v. St. Paul & N. Ry., 40 Minn. 132, 41 N. W. 656.

12. If title is acquired from the record owner by adverse possession, such paramont title by adverse possession does not appear of record; and the record, instead of leading the searcher in the right direction misleads him. Suppose the holder of such adverse title leaves the country, and the land lies open common for a generation, till no one in the country can remember the adverse possessor. The most careful search would not reveal the real owner, who would prevail over one relying on the record in purchasing.[18]

13. At the common law dedication could be made by parol, and the statutes providing for dedication by deed are held to be comulative. If a dedication is made by parol, of course it does not appear of record. One buying after due search relying in good faith on the record, might later discover he had bought the public park from someone who had no interest in it.[19]

14. Partition may be made by parol to this day. One buying what appears of record to be a part interest may get nothing, because in parol partition it had been given to another.[20]

15. A deed duly signed and acknowledged is void till delivery, a fact not determined by anything on the deed, nor discoverable from the record. If any of the recorded instruments were not delivered, the purchasers relying on the record, though for value, gets no title.[21]

16. If adjoining owners have agreed on boundries by setting monuments, purchasers relying on the records in ignorance of the placing of any such monuments are bound by them though they certainly were misplaced.[22] And the same is true of many other rights by estoppel in pais, not appearing of record, but binding on purchasers in good faith.

17. Liens on land for labor and material often relate back for some time before the claim appears in any public office, sometimes going back two or three years; as for example under a statute requiring such claims of lien to be filed within sixty days after the *last* material was furnished or *last* work was done.

18. Rights of persons in possession of the land or any part of it are protected without recording their title deeds. Persons purchasing in reliance on the records, without careful scrutiny as to actual possession of the land do so at their peril; and often the

[18] McGregor v. Thompson, 7 Tex. Civ. App. 32, 26 S. W. 649; Thomas v. Burnett, 128 Ill. 37, 21 N. E. 352.

[19] Godfrey v. Alton, 12 Ill. 29; 52 Am. Dec. 476; Grandville v. Jenison, 84 Ill. 54, 47 N. W. 600.

[20] Byers v. Byers, 183 Pa. 509, 38 Atl. 1027, 39 L. R. A. 537, 63 Am. St. Rep. 765.

[21] Stone v. French, 37 Kan. 145, 1 Am. St. Rep. 237, 14 Pac. 237; Brewster on Conveyancing, § 306, and cases cited.

[22] Hall v. Eaton, 139 Mass. 217.

possession is such as not to be noticed, and yet sufficient to protect the rights of the possessor if proper inquiry would have discovered him.

19. If one is put to election by deed or will conveying land in different states or countries, the instrument being void by the law of one state or country and valid by the law of the other, title may be made to pass by an instrument apparently void on its face and on the face of the record, or not to pass by a deed valid on its face, by the mere act of election of the person subject to it, which fact might be very difficult to ascertain; but the election being once made is binding to the person electing, his heirs and assigns.[23]

The only thing that makes our old system of instrument registration endurable is the healing balm of the statute of limitations; but on this head also a word of caution is needed. The statute does not begin to run till a right is invaded. Therefore, if the land is wild and unoccupied, as much of our land is, the statute never operates. Again, if the right is merely to minerals, with right to use the surface to extract them, no possession of the surface, even for a hundred years, would set the statute running to bar the outstanding title to the minerals. The owner of the minerals could sue only when someone attempts to remove the minerals, then the statute would begin to run.[24]

Again, no adverse possession during the life of a tenant for life will operate to bar the remainderman, for the remainderman has no right to sue till his right of possession is disturbed. This rule applies whether the person setting up the title by adverse possession claims through the life tenant who has conveyed in fee in denial of any right of remainder,[25] or whether he claims against all persons, including the life-tenant and remainderman.[26]

In these pages no attempt has been made to give a complete catalogue of the decided cases on any point, because the law on most of them is undisputed, and the propositions are generally so manifest and plain that any citation of authority is almost superfluous. Moreover, most of the propositions stated are put by way of argument or illustration, and not intended to imply that there are not

[23] Pomeroy Eq. Jur. §§ 484, 514; Broadwell v. Merritt, 87 Mo. 95; Doty v. Barnard, 92 Tex. 104.

[24] Delaware Canal Co. v. Hughes, 183 Pa. 66, 38 Atl. 568, 38 L. R. A. 826, 63 Am. St. Rep. 743.

[25] Lumley v. Haggerty, 110 Mich. 552, 68 N. W. 243, 64 Am. St. Rep. 364; Porter v. Osmun, 135 Mich. 361, 98 N. W. 859.

[26] Lewis v. Bernhart, 145 U. S. 73, 12 Sup. Ct. 772; Gindret v. Western Ry. Co., 96 Ala. 162, 11 So. 372, 19 L. R. A. 839; Baker v. Oakwood, 123 N. Y. 16, 25 N. E. 312, 10 L. R. A. 287.

many other illustrations of the same truth, many of which will, no doubt, occur to the reader.

From the foregoing discussion it is apparent that there is no safety or security in a land title depending on record of the instruments of transfer, a complete abstract, a policy of title insurance, and counsel of land-title experts thereon. It is also apparent that a system of adjudicated title by the so-called Torrens System, is practical, workable, satisfactory, and increasing in favor, where given a fair opportunity. And it is submitted that this is the only system yet devised whereby titles to land can be made open to the public, easily and cheaply ascertainable, and safe and secure to the purchaser. Its chief merit is not its cheapness, but its security, though it does have the additional merit lacking under the old system, of not dragging a lengthening chain of expense, obscurity, doubt, and danger with every transfer.

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NOTE AND COMMENT.

THE RIGHT OF THE PATENTEE TO CONTROL THE RESALE PRICE.—Of the recent decisions of the Supreme Court of the United States, *Bauer and Cie.* v. *O'Donnell*, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. ed. 1041, the so-called *Price Maintenance Case*, was of vital importance to a large number of manufacturers of patented articles. That this decision had a great effect upon such manufacturers is evidenced by the various ingenious methods and devices which have since been adopted by numerous manufacturers to avoid the operation and application of the principles set forth in the decision of that case.

The firm of Bauer and Cie. of Germany, were patentees of a certain water soluble albumenoid known as "Sanatogen" and of the process of manufacturing the same. F. W. Hehmeyer, doing business in New York under the firm name of Bauer Chemical Co., became the sole agent and licensee for the sale of the product in the United States. It was agreed between these parties that Bauer and Cie. were to furnish the product to the Bauer Chemical Co. at cost, the Bauer Chemical Co. was to fix the price of sale to wholesalers or distributors, to retailers and to the public, and the net

profits were to be shared equally. The patented article was supplied to the trade and the public in sealed packages bearing the name "Sanatogen," the words "Patented in U. S. A., No. 601,995," a notice that the article was licensed for sale and use at a specified price of one dollar, that violation of this condition would constitute an infringement of the patent, that a purchase was an acceptance of this condition and upon violation all rights would revert to the licensee. Appellee, the proprietor of a drug store, bought of the licensee for his retail trade original packages with the aforesaid notice. The appellee sold the article for less than one dollar and as he persisted in such sales after repeated remonstrance, the appellant refused to continue to sell the product to the appellee. The appellee bought the article from jobbers and continued to sell the same at less than one dollar. It is claimed by the appellant that this action on the part of the appellee was an infringement upon appellant's patent rights.

It was decided that, although U. S. REV. STAT., § 4884, U. S. COMP. STAT., 1901, p. 3381, gave the exclusive right to the patentee, his heirs and assigns to make, use, and vend the invention or discovery, yet as to a purchaser from jobbers who had paid to the patentee's agent the full price asked, the price at which such patented article may be resold could not be limited by notice. And further it was decided that an otherwise unqualified sale could not be converted into a mere license by a notice attached to a patented article, stating that such article is licensed for sale and use at a certain price, and that the condition is accepted by purchase and upon violation all rights are to revert to the licensee.

This decision by the Supreme Court was unquestionably a very great surprise to many, as it is not only directly in conflict with an almost unbroken line of decisions of the inferior federal courts, and the decisions in England, but it is also nearly impossible to reconcile this decision with *Henry* v. *A. B. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, which case is attempted to be distinguished in the majority opinion in the principal case.

In the inferior federal courts, upon the very question under discussion, are many decisions worthy of notice, all of which are contrary to that of the principal case, *Heaton-Peninsular Button Fastener Co.* v. *Eureka Specialty Co.*, 77 Fed. 288, 47 U. S. App. 146, 25 C. C. A. 267, 35 L. R. A. 728; *Edison Phonograph Co.* v. *Kaufmann*, 105 Fed. 960; *Edison Phonograph Co.* v. *Pike*, 116 Fed. 863; *Victor Talking Machine Co.* v. *The Fair*, 123 Fed. 424, 61 C. C. A. 58; *National Phonograph Co.* v. *Schlegel*, 128 Fed. 733, 64 C. C. A. 594; *Rubber Tire Wheel Co.* v. *Milwaukee Rubber W. Co.*, 154 Fed. 358, 83 C. C. A. 336; *N. J. Paint Co.* v. *Schaeffer*, 159 Fed. 171; *The Fair* v. *Dover Mfg. Co.*, 166 Fed. 117, 92 C. C. A. 43; *Edison* v. *Ira M. Smith Mercantile Co.*, 188 Fed. 925; *Winchester Repeating Arms Co.* v. *Buengar*, 199 U. S. 786. The cases cited are all cases where there had been a sale to a jobber by the patentee with a limitation generally upon the resale price, a resale by the jobber, the purchaser having notice of the limitation, and a sale by the purchaser from the jobber at a price less than that which had been stipulated, and as against the purchaser from the jobber the courts held that a sale for less than the stipulated price was an infringement upon the rights of the patentee.

As to the validity of such limitation as against the immediate purchaser from the patentee there seems as yet to be no question.

Probably the best exposition of the reasoning upon which the decisions of the inferior federal courts are based is to be found in *Rubber Tire Wheel Co.* v. *Milwaukee Rubber W. Co.*, supra, in which BAKER, Circuit Judge, says:

"Under its constitutional right to legislate for the promotion of the useful arts, Congress passed the patent statutes. The public policy thereby declared is this: Inventive minds may fail to produce many useful things that they would produce if stimulated by the promise of substantial reward; what is produced is the property of the inventor; he and his heirs and assigns may hold it as a secret till the end of time; the public would be largely benefited by obtaining conveyances of these new properties; so the people through their representatives say to the inventor: Deed us your property, possession to be yielded at the end of 17 years, and in the meantime we will protect you absolutely in the right to exclude everyone from making, using or vending the thing patented, without your permission. Congress put no limitations, excepting time, upon the monopoly. Courts can create none without legislating. The monopoly is the invention, the mental concept as distinguished from the materials that are brought together to give it body. Use of materials, as noted above may be enjoined as injurious to the public, but that does not invade the monopoly. Use of the invention cannot be had except on the inventor's terms. Without paying or doing whatever he exacts, no one can be exempted from his right to exclude. Whatever the terms, courts will enforce them, provided only the licensee is not thereby required to violate some law outside of the patent law, like doing murder or arson."

The views of the English courts upon this question are best explained and set forth in the words of WILLS, J., in *Incandescent Gaslight Co.* v. *Cantelo*, 12 Rep. Pat. Cas. 262: "The sale of a patented article carries with it the right to use it in any way that the purchaser chooses to use it, unless he knows of the restrictions. Of course, if he knows of the restrictions, and they are brought to his mind at the time of the sale he is bound by them. He is bound by them on this principle: the patentee has the sole right of using and selling the articles, and he may prevent anybody from dealing with them at all. Inasmuch as he has the right to prevent people from using or dealing in them at all, he has the right to the lesser thing, that is to say, to impose his own conditions. It does not matter how unreasonable or how absurd the conditions are."

Before discussing the *Dick* case it probably would not be amiss to give some attention to the judicial history of that case in connection with the principal case. The *Dick* case was a four to three decision, Justice LURTON delivering the opinion of the court, and concurring with him were Justices M'KENNA, HOLMES and VAN DEVANTER. Those who dissented were Chief Justice WHITE and Justices HUGHES and LAMAR. Justice DAY was absent and took no part in the decision and at that time no successor to Justice HARLAN had as yet been appointed. The decision in the principal case was delivered by Justice DAY, and concurring with him were Chief Justice WHITE, Justices HUGHES, LAMAR and PITNEY, and dissenting were the very judges

who had concurred in the prevailing opinion in the *Dick* case. A detailed judicial history of the dissenting justices in the principal case upon price-maintenance and like questions, by Mr. Edward S. ROGERS, may be found in 10 MICH. LAW REV. 608.

It was generally thought that in the *Dick* case the Supreme Court had expressly committed itself to the doctrine that the patentee could require the user to comply with any conditions which he might choose to impose. But that case is attempted to be distinguished from the principal case upon the ground that in the former there was a qualified sale for less than value for limited use with other articles only. But this distinction does not seem very clear, sound or convincing, but appears to be an evasion of the real question. The test laid down as to whether or not a sale may be qualified is, has the vendor any further interest in the articles? Now why could not the limitation have been upheld in the principal case? For it is conceded by all that one of the best and most effective ways to establish a reputation and market for goods is to have a uniform price for these goods throughout the country. To say the least these two decisions are conflicting in spirit.

There does not seem to be any valid reason why the patentee should have broader rights with regard to imposing limitations upon the right to use than he should have with regard to imposing limitations upon the right to vend. The decision in the principal case is based upon *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 52 L. Ed. 1086, 28 Sup. Ct. 722, which arose under the Copyright Act. By analogy it was determined that the words, "Exclusive right to vend" found in the patent statute should have the same interpretation as the words "sole liberty of vending" found in the Copyright Act. As by statute the patentee is given broader rights than the owner of a copyright, it is difficult to see how the same construction is to be put upon these words. It is true that the rights to use and vend are separate and distinct but it does not seem that Congress ever intended to place different limitations upon the extent of the monopoly a patentee should have, as to these rights.

Since this decision some manufacturers have changed their methods of attempting to control the price the ultimate consumer is to pay and are now operating under agency contracts with retailers, and still others under a system by which the article is leased. The tendency of the Supreme Court seems to be to take the view that the monopoly enjoyed by the patentee was not meant by Congress to be without limitation, and consequently to make it practically impossible for the patentee to control the retail price. G. E. K.

THE EFFECT UPON A BILL OF EXCHANGE, OF A REFERENCE TO ATTACHED BILLS OF LADING.—A recent case in the New York Court of Appeals presents an interesting discussion of the principles involved in the determination of this question, and shows the correct application of the same.

A firm of cotton dealers in Decatur, Ala., drew a draft for $39,000.00 upon the plaintiffs, cotton brokers in New York, attaching thereto bills of lading for 600 bales of cotton. The only reference in the draft to the bills of lading was the word "cotton" lithographed or printed upon the draft. This

draft was discounted by a bank in Decatur, indorsed over to defendants, bankers in New York City, who took bona fide and presented to the plaintiffs, the drawees, who accepted and paid same. Subsequently the bills of lading were discovered to be forgeries, but this was unknown to any of the parties except the drawers. In this suit the drawees seek to recover back the money paid the defendants, and urge four theories to sustain their claim; 1. That the defendants guaranteed the genuineness of the bills of lading; 2. That the word "cotton" in the draft made it conditional on the genuineness of the bills of lading; 3. That the plaintiffs made payment relying upon the genuineness of the bills of lading, and hence their payment was made under a mistake of fact; 4. That defendants or their transferor caused the mistake of fact. The court held that the plaintiffs could not recover because the defendants were bona fide indorsers of the draft and the bills of lading were no part of it. *Springs et al.* v. *Hanover National Bank of City of N. Y.* (N. Y. 1913), 103 N. E. 156.

The court considers only the second and third of the four theories advanced by the plaintiffs, and to the third devotes the greater part of its opinion. In support of its holding that, though the draft was paid under a mistake of fact (which usually entitles one to recover back the money paid) yet the plaintiffs cannot recover back the money, the court quotes from the opinion of Judge COOLEY in the case of *First National Bank of Detroit* v. *Burkham*, 32 Mich. 328. The same question was involved there as in the present case, and part of the quotation is as follows: "If the mistake regarding the security will authorize the drawees to recall the payment made to the payee, no reason is perceived why a mistake regarding the responsibility of the drawer or regarding his honesty or integrity, or anything else upon which they relied for protection in their dealings, should not justify the like action. * * * But we think it would be an exceedingly unsafe doctrine in commercial law, that one who had discounted a bill in good faith, and received in its payment the strongest possible assurance that it was drawn with proper authority, should afterwards hold the money subject to such a showing as the drawee might be able to make as to the influences operating upon his mind to induce him to make payment." On this point then the above case seems conclusive, on reason at least, and the instant case being one of first impression in New York, the court stated its reluctance to disagree with the learned judge in the Michigan case as well as the like case of *Hoffman & Co.* v. *Bank of Milwaukee*, 79 U. S. (12 Wall.) 181, and *Goetz* v. *Bank of Kansas City*, 119 U. S. 551, even if it doubted the wisdom of the principle upon which they were based, which it did not, but entirely concurred with.

The reason of the rule is clear, for the drawee by accepting becomes primarily liable just as the maker of the note by the making becomes the party primarily liable; his engagement runs not only to each of the indorsees but to the drawer himself. *Heurtematte* v. *Morris*, 101 N. Y. 63. Prima facie the acceptance imports that funds of the drawer are in the hands of the drawee and is an appropriation of the funds to the payment of the draft. But if the drawer has no funds in the hands of the acceptor, the acceptor, in fact, pays the debt of the drawer, but as between himself and the payee, it

is not a collateral but a direct and original undertaking, *Raborg* v. *Peyton*, 2 Wheat. 385. He cannot as against a bona fide holder dispute the genuineness of the signature of the drawer, *National Park Bank* v. *Ninth National Bank*, 46 N. Y. 77; *Northwestern National Bank* v. *Bank of Commerce*, 107 Mo. 402, 15 L. R. A. 102; or the existence of the drawer, *Cooper* v. *Meyer*, 10 B. & C. 468; hence why, if not allowed to recover back money paid on the mistaken belief as to the genuineness of the signature of the drawer or as to his existence, should he be allowed to recover back money paid on a mistaken belief as to the genuineness of the security of the drawer?

The principle of the instant case is supported by the decisions of many other courts; in addition to the cases cited in the principal case, see *Hall* v. *Keller*, 64 Kan. 211, 62 L. R. A. 758, 91 Am. St. R. 209; and *Tolerton* v. *Anglo-California Bank*, 112 Ia. 706, 50 L. R. A. 777. In the former case the consignors of grain drew drafts upon the consignees for the price of same, and attaching the bills of lading for the grain to the drafts had them discounted by banks, which in turn presented the drafts for acceptance and payment and received the amount thereof. Afterwards it was discovered that the drawers had no titile to the grain shipped, and the consignees or acceptors sued the indorsers to recover back the money paid on the drafts. The *Tolerton* case presented a very similar situation.

But in both cases the courts refused a recovery on the ground that the indorsers were bona fide holders for value of the drafts and not affected by any want or failure of consideration between the drawers and drawees, the latter by their acceptance becoming primarily liable on the instrument, and after the payment of same not entitled to recover back the money from the bona fide holder.

These two cases as well as the instant case and cases cited therein are opposed by the cases of *Landa* v. *Lattin*, 19 Tex. Civ. App. 246, and *Finch* v. *Gregg*, 126 N. C. 176, 49 L. R. A. 679. In the first of these cases the consignees of the grain and the drawees of the draft had paid the amount of the draft to the payee, before an inspection of the grain was made. Afterwards discovering the inferior quality of the grain shipped, the consignors brought an action against the payee for the difference between the value of the goods in their damaged condition and the price paid. The court allowed a recovery upon the ground that the assignee of the bills of lading and the payee and indorsee of the draft stood in the shoes of the consignor, was the owner of the grain, and therefore liable for the damage suffered by the consignee because of the defective quality of the goods. The North Carolina case involves the same question and applies the same principle. But in both of these cases the courts overlooked and disregarded the principle of law really involved in them, and announced by the principal case, i. e., if a negotiable draft has been accepted or paid (or both) while in the hands of one who is a bona fide holder for value, and it later transpires that there is a total or partial failure of the consideration for the acceptance or payment, the acceptor, if he has not paid, is nevertheless liable to make payment, and, if he has paid, cannot recover back the money paid, notwithstanding the failure of consideration.

Therefore these two cases were decided on the wrong grounds. See note to *Finch* v. *Gregg*, supra, in 50 L. R. A. 679.

On the second theory advanced by the plaintiff to sustain its claim to a right of recovery, the court holds that the fact that the word "cotton" appears printed in the draft does not contain reference to the bills of lading attached thereto, so as to make plaintiffs' acceptance of the former conditional upon the genuineness of the latter, but that this word was evidently used for the purpose of advertising or characterizing the business in which the drawers were engaged. The conclusion of the court on this point is also correct. The Negotiable Instruments Act provides that an order is unconditional, though coupled with a statement of the transaction which gave rise to the instrument. BUNKER'S, NEG. INSTR., § 5. Hence under the statute law of New York, though the transaction giving rise to the instrument be stated therein the order would be none the less unconditional.

This rule of the Negotiable Instruments Act obtained at the Law Merchant as is well illustrated by the cases of *Preston* v. *Whitney*, 23 Mich. 260; *Siegel* v. *Chicago Trust & Savings Bank*, 131 Ill. 569; *Wells* v. *Brigham*, 6 Cush. (Mass.) 6; *Hereth* v. *Meyer*, 33 Ind. 511. In the *Siegel* case, supra, the action was on a note which recited, "On July 1, 1887, we promise to pay, etc., for the privilege of one framed advertising sign, etc." It was contended that this recital made the promise of payment conditional on the performance of an executory contract by the promisee. But the court held that the mere statement of the consideration or transaction in the instrument did not make the instrument conditional thereon, and that a bona fide holder is not affected by any failure of consideration as between the original parties.

The instant case is then decisive of this question of how far a bona fide holder is affected by the forgery of bills of lading attached to the drafts paid to him by the drawee, and if its decision were otherwise than it is, it would, as is observed by the author of the note to *Finch* v. *Gregg*, in 50 L. R. A. 679, "cause a revolution in commercial circles." J. S. K.

STERILIZATION OF CRIMINALS OR DEFECTIVES.—During the past few years there have been enacted many statutes, the express purpose of which has been the betterment of society. Among this class of statutes are those in California (Stat. 1909, p. 1093, c. 720), Connecticut (Pub. Laws 1909, c. 209), Indiana (Laws 1907, c. 215), Iowa (Laws 1911, c. 129), Michigan (Pub. Acts 1913, No. 34), New Jersey (Pub. Laws 1911, p. 353, c. 190), New York (c. 445, N. Y. Laws 1911), and Washington (See 2287, Rem. and Bal. Code), providing for the sterilization of criminals and defectives. With respect to such legislation the most important question is that of constitutionality. Although in but two of the above states, has the constitutional question been raised, it is nevertheless fitting to comment on such legislation in view of the fact that the only decisions we have upon the subject are seemingly in conflict.

The most recent case upon the subject is *Smith* v. *Board of Examiners of Feeble-minded*, 88 Atl. 96 (N. J.). The prosecutrix, since 1902, had been an

inmate of the State Village of Epileptics, but for the five years last past she had had no attack of the disease. Nevertheless, the Board of Examiners, acting in accordance with c. 190, p. 353 of the laws of 1911, had found that procreation by the prosecutrix was inadvisable and therefore ordered that the operation of salpingectomy be performed as the most effective means to prevent procreation. The act under which this order was made was held unconstitutional on the ground that the prosecutrix was denied the equal protection of the laws guaranteed by the fourteenth amendment to the Constitution of the United States. By express provision the whole statute was not rendered unconstitutional because held so as to one class.

Although the New Jersey court expressly limits its opinion to the very case before it, one cannot but read into the opinion a strong feeling of protest against any regulation of society by means of surgical operations. And then too the fact that the statute does not follow the very classification which it makes is given as the sole basis of this opinion. The particular vice of the statute is that a principle of selection is adopted which has no reasonable relation to the purpose of the act. The reasoning of the court is that the purpose of the act was the betterment of society, that all defectives are within that purpose, but by a subclassification the act becomes applicable to but a very small percentage of those within its purpose and is therefore unconstitutional by reason of denying to that small class the equal protection of the laws. And it is also said that there is no basis for such a classification as those who are within a public institution which is properly managed are so situated as to need no further regulation to better society.

For a time it was thought that *State* v. *Feilen*, 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N. S.) 418, 11 MICH. L. REV. 150, had determined that the so-called sterilization and asexualization statutes were constitutional. But since the New Jersey decision the opinion that the effect of the Washington decision had been destroyed has gained ground. In fact the opponents of such legislation have expressed the opinion that the New Jersey decision has completely destroyed the effect of the Washington decision and also are of the opinion that the states to be heard from on the question will follow the New Jersey court. But a close examination of these two cases will show such a number of distinguishing features that it will appear doubtful whether or not the Washington decision has been shaken even in the slightest degree.

The Washington case is one in which the objection was made that the punishment was cruel and unusual. The defendant had been sentenced to a term in prison for the crime of statutory rape, committed upon the person of a female child under the age of ten years, and in addition to this punishment the court ordered that the operation of vasectomy be performed. This operation is a simple operation and involves no serious consequences, and so the court decided that the punishment was not cruel and unusual. (The question at once presents itself as to whether a punishment is to be considered as not cruel and unusual, merely because it may be inflicted without pain.) This case decides nothing as to defectives nor as to females, although there are provisions in the statute which cover such cases. Close reading of this decision shows that the court limited its opinion to the very case before it and

gave no intimation of its opinion as to any situation other than that before it. The reasoning of the New Jersey court as to there being no reason for performing an operation upon one within a state institution is not entitled to any weight in considering a case like *Feilen* v. *State*, as the criminal, after serving his sentence, is allowed to go forth into the world while the defective is not. And the objection that such legislation does not apply to all of a class within the purpose of the statute is not tenable in a case involving a criminal of a certain type as all of that class are reached with but few exceptions.

Now *Smith* v. *Board of Examiners* is a case of the most extreme type. The person involved is one who is never to be allowed to go forth in the world, but is always to be confined in a well managed state institution. The argument that society is amply protected by confinement alone cannot be answered. That the purpose of the statute is fulfilled by the confinement without the necessity of an operation admits of no argument and the correctness of this reasoning cannot be assailed. Then too the operation ordered in this case is not a simple office operation but is denominated a heavy operation, one likely to result in the death of the patient. The facts of these cases being so different it is very difficult indeed to see any conflict. It is very interesting to note that *Smith* v. *Board of Examiners* is direct authority for the unconstitutionality of the act passed by the recent legislature in Michigan (Pub. Acts 1913, No. 34), the statutes being alike except that of New Jersey contains a provision applicable to criminals.

There is no doubt that some of the legislation for the betterment of society has been unreasonable and ill-advised, and for these reasons has created a storm of protest. It seems as if in this field there has been an attempt to accomplish too much at one time. The objections to such legislation may be summed up as follows: the facts upon which it is based are debatable; the remedy is of doubtful utility; and such legislation is unwise on constitutional grounds.

All such legislation is based upon the theory that heredity plays a most important part in the transmission of crime, idiocy and imbecility. In spite of the great amount of statistics gathered upon the subject, there is no convincing evidence that criminality is transmissible. This is apparent from the investigation of Dr. Edith R. SPAULDING, Resident Physician at the Reformatory for Women, South Framingham, Mass., and Dr. William HEALY, Director of the Psychopathic Institute, Chicago. The direct result of this intensive research, so conducted that development and environmental conditions were eliminated, is that it is yet to be proven that there is a direct inheritance of criminality per se. So the authority for the sterilization of criminals cannot come from the police power of the state but must be derived from the criminal law. As to idiocy and imbecility there are many scientists, worthy of the greatest respect, who express the opinion that these mental conditions are not transmissible and that the same are due to environment. In view of this state of affairs does it seem as if our legislatures are sufficiently informed and advised upon the subject of heredity to undertake the enactment of laws based upon that theory?

The reasoning of *Smith* v. *Board of Examiners* shows conclusively that as

to defectives nothing is accomplished by subjecting those who are confined to a state institution to such an operation. Even as applied to criminals (transmissibility of criminality being conceded), the beneficial result would be negligible. This fact is pointedly illustrated by Mr. Charles A. Boston in an excellent article, "A Protest Against Laws Authorizing the Sterilization of Criminals and Imbeciles," 4 Jour. Crim. Law and Criminology 326.

If it be admitted that such legislation is constitutional what is to prevent the legislature from enacting that other classes be sterilized in order to prevent the transmission of mental conditions possessed by those classes and deemed undesirable for the public good? Then too is such legislation in keeping with the spirit of the Bill of Rights found in our Constitutions. In view of the crude form of many of the statutes, using terms as yet undefined to classify persons, and providing little or no protection for the unfortunates selected as subjects, would it not be better for our law-making bodies to proceed more cautiously and conservatively in this field of legislation?

G. E. K.

The Effect of a Minimum Wage Ordinance Upon Special Assessments.—May a city, in making improvements and levying special assessments to pay therefor, pass a minimum wage ordinance whose effect is to charge the property owners twenty-five per cent more for labor performed than they would have had to pay had they contracted for the same work in their own behalf? The practical importance of this question is evidenced by a very recent Washington case, *Malette* v. *City of Spokane* (1914), 137 Pac. 496. The facts were these: The city of Spokane passed an ordinance prescribing a minimum rate of $2.75 for a day's common labor of eight hours on all city work. This rate was about twenty-five per cent higher than the current rate paid for similar labor by private persons. Later, the city provided for the improvement of a certain street along which appellant owned property, which improvement was to be paid for by special assessments against the property benefited. Appellant contended that since the cost of the work was not to be borne by the city, but by the property owners, the city, in respect of this improvement, acted merely as agent of the property owner, and was bound to do his work to the best advantage; that such work could not be done to the best advantage under the minimum wage ordinance, which empirically fixed a wage and compelled its payment by an independent contractor, thereby increasing the cost of the work; that the same violated the trust relation between agent and principal and was therefore void. *Held,* by a divided court, that the ordinance was valid.

In reaching its decision, which a dissenting judge denominated "judicial legislation, which is judicial tyranny," the court completely departed from the position it took when the case had its first hearing more than a year ago. 68 Wash. 578, 123 Pac. 1005. The theory of the court at that time was this: that the city in improving a street at the cost of the benefited property owners acts not in a governmental, but in a proprietary capacity and as the agent of the owner. Two difficulties connect themselves with such a theory. First,

can it be broadly said that the function of the city in improving its streets is proprietary? "The opening, construction, and maintenance of public highways," says DOYLE, J., in a recent Oklahoma case, "is purely a governmental function whether done by the state directly, or by one of its municipalities for which the state is primarily responsible." *Byars* v. *State*, 2 Okla. Cr. 481, 102 Pac. 804. See also *State* v. *Lake Koen, etc. Co.*, 63 Kan. 394, 65 Pac. 681; *State* v. *Atkin*, 64 Kan. 174, 67 Pac. 519. It is true that in relation to the city's liability for injuries due to defective streets, the courts sometimes speak of the city as acting in a proprietary capacity. *Denver* v. *Dunsmore*, 7 Colo. 328, 3 Pac. 705. But even if it does so act and is so liable, it is not because of the way in which the particular street was paid for, that is, whether by special or general assessment. *Colwell* v. *Waterbury*, 74 Conn. 568, 51 Atl. 530; *Sutton* v. *Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847. Secondly, is the situation one that readily lends itself to the concept of agency? It would seem not, for the fundamentals of that relation are not present. The person specially assessed does not, as the true principal does, confer authority, for the special assessment is levied in the exercise of the taxing power. *Holley* v. *Orange Co.*, 106 Cal. 420, 39 Pac. 790. Indeed, the supposed agent's act may be, and frequently is, against the property owner's will. Nor is the work that of the property owner. Nor can he control or discharge the supposed agent. In the light of these considerations, it is evident that the agency idea is neither accurate nor useful, and the court's own disinclination in the principal case to adhere to it is not to be wondered at.

Cases involving statutes and ordinances prescribing the hours of labor, rate of wages, and kinds of laborers, where the funds out of which payment is made are general and not special assessments, are numerous and conflicting. On the one hand, such legislation has been condemned as improperly restricting competition, as in *Atlanta* v. *Stein*, 111 Ga. 789, 36 S. E. 932, where it was held that an ordinance providing that all city printing should bear the union label was illegal because it tended to encourage monopoly and defeat competition, even though the charter did not require contracts for public work to be let to the lowest bidder. And in *Street* v. *Varney*, 160 Ind. 338, 66 N. E. 895, though there was no specific constitutional provision prohibiting this kind of legislation, a statute enacting a minimum wage to be paid unskilled labor employed on any public work of the state or any municipality, was held invalid on the ground, *inter alia*, that "the power to confiscate the property of the citizens and tax payers of a county, city, or town, by forcing them to pay for any commodity, whether it be merchandise or labor, an arbitrary price, in excess of the market value, is not one of the powers of the Legislature over municipal corporations, nor the legitimate use of such corporations as agents of the state." The principal case is the first one, apparently, touching the situation where the fund out of which payment is made is a special assessment on the benefited property holders, and where neither statute nor charter requires the contract for the improvement to be let to the lowest bidder. On principle it would seem that the circumstance of payment by a special, rather than general tax payer, ought not to vary the result. While the minimum wage measure may enhance the amount of the

special tax, it must also be remembered that the special tax payer gets a direct benefit from the improvement, while the general tax payer does not.

It is conceded to be a universal rule that the reasonableness of an ordinance passed under general, and not directory, powers may always be enquired into by the courts. *Northern Liberties Gas Co.*, 12 Pa. St. 318. What shall be the test of the reasonableness of the minimum wage ordinance? In the principal case the minority view was that an ordinance was unreasonable which called for any wage above the current rate. "Up to the present," said Judge GOSE, "it has never been held to my knowledge that a city may make a donation to a citizen under color of law and assess the bounty against the property of an objecting property owner." The view that any wage above the prevailing rate is unreasonable *per se* rests, it would seem, upon the assumption that the *prevailing* rate is reasonable. That it often is not, is an economic fact of common knowledge in these days of the high cost of living. That judicial notice may be taken of such facts has already been declared. *State* v. *Somerville*, 67 Wash. 638, 641, 122 Pac. 324, 326; *Muller* v. *Oregon*, 208 U. S. 412. On the other hand, it may be objected that if, in a case where the minimum wage is greater than the prevailing rate, the court is not bound to a presumption that the prevailing rate is reasonable, but may declare it unreasonable as inadequately reimbursing the laborer, then for the same reason the court would also have the power to declare invalid an ordinance providing that the minimum wage shall be the prevailing one. But there is obviously a difference between sustaining an ordinance as reasonable which prescribes a minimum rate in excess of the prevailing rate, and invalidating as unreasonable an ordinance providing that the minimum wage shall be the prevailing one; for the length to which the court goes in the latter case is much greater than in the former. Perhaps the most satisfactory answer to this theoretical objection is that it *is* theoretical. Such a contingency need cause little apprehension in a country whose courts are as conservative as their history shows ours to be. D. F. M.

CAN AFFIDAVITS OF JURORS TO SHOW MISCONDUCT BE ADMITTED FOR THE PURPOSE OF SETTING ASIDE A "QUOTIENT VERDICT?"—A recent Oklahoma case raises one phase of a question which has been perplexing the courts ever since jury trials were invented, and in regard to which there is a great contrariety of opinion. After a verdict had been rendered for the plaintiff in a personal injury suit, the defendant made a motion for a new trial on the ground of misconduct of the jury, and in support of his motion offered the affidavits of several of the jurors to the effect that the verdict was determined upon as the result of an agreement whereby each one of the jurors was to set down on paper the sum to which he thought the plaintiff entitled, the final verdict to consist of the amount obtained by dividing the sum of the respective amounts so set down by the number of jurors. The trial court refused to hear these affidavits and its ruling was sustained by the supreme court on the ground of public policy. *Tulsa Street Railway Co.* v. *Jacobson* (Okl. 1913), 136 Pac. 410.

While it is universally conceded that such a verdict is illegal and void where, as in the principal case, the jurors agree in advance to be bound by the result, yet in a great many courts the law will not, on a supposed ground of public policy, allow the fact to be shown by the only evidence by which in most cases it can be shown, viz., the affidavits of the jurors themselves. *Owen* v. *Warburton,* 1 Bos. & Pul. (N. P.) 326; *Burgess* v. *Langley,* 5 Man. & Gr. 722; *Vasie* v. *Delaval,* 1 T. R. 11; *Dana* v. *Tucker,* 4 Johns (N. Y.) 487; *Wilson* v. *Berryman,* 5 Cal. 45 (Now changed by statute); *State* v. *Desnoyer,* 1 Minn. 156, 61 Am. Dec. 494; *Pleasants* v. *Heard,* 15 Ark. 403; *Heath* v. *Conway,* 1 Bibb. (Ky.) 398; *Birchard* v. *Booth,* 4 Wis. 85; *Dorr* v. *Fenno,* 12 Pick. (Mass.) 521; *Sawyer* v. *Railroad,* 37 Mo. 240; *Handley* v. *Leigh,* 8 Tex. 129; *Sheppard* v. *Lark,* 2 Bailey (S. C.) 576; *Schwamb Lbr. Co.* v. *Schaar,* 94 Ill. App. 544; *Montgomery St. Ry. Co.* v. *Mason,* 133 Ala. 508. In Kentucky it has been held the affidavits of jurors may be received to show that a verdict was arrived at by lot but for no other purpose. *Gartland* v. *Conner,* 22 Ky. L. Rep. 920. "The grounds stated for the rejection of such affidavits have usually been, first, because they would tend to defeat the solemn act of the juror under oath; second, because their admission would open the door to tamper with jurymen after their discharge; third, it would furnish to dissatisfied and corrupt jurors the means of destroying the verdict to which they assented." *Chicago Sanitary District* v. *Cullerton,* 147 Ill. 385; *Taylor* v. *Garnett,* 110 Ind. 287.

It seems almost incredible that so many courts should still adhere to this antiquated belief in the sanctity of the jury, when justice and common sense combine to demand a more liberal interpretation of their functions. To make the apprehension of their misconduct dependent upon the chance discovery of some eaves-dropper is to perpetuate the very evils which the jury system was designed to eliminate. To be sure these affidavits must be received with caution, for a too liberal rule would lead to the same unfortunate result from the opposite direction. What is perhaps the true view and the one most consistent with sound principles of justice is that which prevails in a few of our courts, and which is to the effect that while affidavits of jurors will not be received to show any fact resting in the personal consciousness of the juror, they will be received to establish the commission of any overt act, whether done within or outside the jury room. The reasonableness and feasibility of this rule is well shown by the following statement of it in *Perry* v. *Bailey,* 12 Kans. 539. "Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority; to induce apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny it. One cannot disturb the action of the twelve; it is useless to tamper with one for the eleven may be heard."

This statement of the rule was quoted with approval by the Supreme Court of the United States in the case of *Mattox* v. *U. S.*, 146 U. S. 140, where it was held that the affidavits of jurors were receivable to show that a newspaper account of the trial was read by the jury before they rendered their verdict. Whether the rendering of a "Quotient Verdict" would be held to come within the rule as adopted by the Federal courts is somewhat in doubt by reason of a recent decision in one of the District courts wherein its application to such a state of facts was denied. The court in that case, while recognizing the rule, said that this was a matter inhering in the verdict itself, and was therefore not an overt act in the sense contemplated by the Supreme Court in the *Mattox* case. *McDonald* v. *Pless*, 206 Fed. 263. The state courts which have adopted this more liberal procedure have, however, come to a different conclusion and have held that the rendition of a "Quotient Verdict" is within the operation of the rule. *Joyce* v. *State*, 7 Baxt. (Tenn.) 273; *Hendrickson* v. *Kingsbury*, 21 Iowa 379; *Johnson* v. *Husband*, 22 Kans. 277. It is believed that the view taken by the state courts is sound, for this is an act necessarily known to all the jurors and consequently is capable of easy proof; it is not something present only in the consciousness of the individual juror and influencing the motives which induce him to find for the one party or the other.

In a few jurisdictions the rigor of the old practice has been modified somewhat by statutes which provide that the testimony of jurors may be employed to show that a verdict was obtained by chance. It is, however, seldom that the statutes have gone any farther than this, but the courts in construing them have quite uniformly held that a "Quotient Verdict" is a chance verdict within the terms of the statute. *Dixon* v. *Pluns*, 98 Cal. 384, 35 Am. St. Rep. 180, overruling *Turner* v. *Water Co.*, 25 Cal. 398; *Gordon* v. *Trevanthan*, 13 Mont. 387; *Flood* v. *McClure*, 3 Idaho 587; *Long* v. *Collins*, 12 S. D. 621; *Pawnee Ditch Co.* v. *Adams*, 1 Colo. App. 250; *Goodman* v. *Cody*, 1 Wash. T. 329. See also *Block* v. *Telephone Co.*, 26 Utah 451.

G. C. G.

RECENT IMPORTANT DECISIONS.

BANKRUPTCY—DISCHARGE—WHEN APPLICATION TO BE FILED.—Adjudication in bankruptcy was on September 18, 1912. Application for discharge was filed October 6, 1913. Affidavits were also filed, claiming to make it clear that the applicant was unavoidably prevented from filing said application within twelve months subsequent to adjudication. *Held,* that whether unavoidable prevention was made out or not, the application was made in time. § 14, Bankruptcy Act 1898, creates three limitations of time, all subsequent to adjudication: the first, one month thereafter; the second, "the next twelve months" after the first; and the third, the next six months after the second. So that "the next twelve months" begin to run, not from the date of the adjudication, but from the expiration of one month thereafter. *In re Walters* (D. C. Mont. 1913), 209 Fed. 133.

The doctrine thus announced is against previous decisions on the question involved. The application should be filed after one month, and within twelve months subsequent to the adjudication unless it be shown that the petitioner was unavoidably prevented from so doing. *In re Harris & Algor,* 15 A. B. R. 705; *In re Wolff,* 100 Fed. 430; *In re Anderson,* 134 Fed. 319. Where a proper showing of unavoidable delay is made by the petitioner, the discretion of the judge is limited, in express terms, to the six months following the expiration of the year beginning with the date of the adjudication. *In re Fahy,* 116 Fed. 239; *In re Wagner* 139 Fed. 87. Under the provisions of § 31 relating to the computation of time, a bankrupt has a year and a day from adjudication in which to apply for his discharge, unless, for unavoidable delay, the court extends the time. *In re Holmes,* 165 Fed. 225, 21 A. B. R. 339.

BILLS AND NOTES—GAMING TRANSACTION—EQUITABLE ESTOPPEL.—Although the statute declares that every contract in consideration of money won or lost in any game or wager shall be void, the makers of a note given for the payment of a gambling debt are estopped to assert its illegality, where they asserted the validity of the note and thus induced plaintiff, who had no notice of the transaction, to purchase the note. *Holxbog et al.*. v. *Bakrow* (Ky. 1913), 160 S. W. 792.

The general rule is that a promissory note made absolutely void by statute is unenforceable in the hands if anyone, even though he be a bona fide holder. *Jenkins* v. *Jones,* 108 Ga. 556; *Alabama National Bank* v. *Parker & Co.,* 146 Ala. 513; *Wyatt* v. *Wallace,* 67 Ark. 575; *The Western National Bank of Pueblo* v. *State Bank,* 18 Colo. App. 128; *New* v. *Walker,* 108 Ind. 365; *Nunn* v. *Citizens Bank,* 107 Ky. 262; *Morris* v. *White,* 83 Mo. App. 194; *Swinney* v. *Edwards,* 8 Wyo. 54. The reason of this rule is that the contract has no existence whatever, and hence there is nothing on which suit can be maintained; the defence is an absolute one or a defence against the thing—the res. On this ground then it is held that equitable estoppel cannot arise

in favor of one of the original parties as against the other so as to give validity to the contract. *Colby* v. *Title Ins. Co.*, 160 Cal. 632, 35 L. R. A. (N. S.) 813; *Embry* v. *Jemison*, 131 U. S. 336; *Ayer* v. *Younker*, 10 Colo. App. 27; *Brown* v. *First National Bank*, 137 Ind. 655; *Standard* v. *Sampson*, 23 Okla. 13; *Henry* v. *State Bank*, 131 Ia. 97. There is also the further rule that equitable estoppel does not apply to make good an act which is void by law. *N. Y. etc. R. R.* v. *Schuler*, 38 Barb. 534; *Battersby* v. *Odell*, 23 U. C. Q. B. 482; *Friedlander* v. *N. Y. Plate Glass Co.*, 38 N. Y. App., Div. 146. But in spite of the holdings that a note based on a gambling transaction is absolutely void (even in the hands of a bona fide holder), that there can be no equitable estoppel of the maker in favor of an original party or one standing in his stead, and that equitable estoppel does not apply to make good an act void by law, the courts seem uniformly to hold with the instant case that the maker may be estopped to assert the illegality of the consideration of the note against one who took without notice of the transaction and in reliance on the maker's word that it was a good and valid contract. *Fosdick* v. *Meyers*, 81 Ill. 544; *Hurburt & Sons* v. *Straub*, 54 W. Va. 303; and cases cited in principal case. But this doctrine aids that which the statute is intended to prevent, i. e., the enforcement of contracts founded on gambling transactions. It would seem that the evil can be remedied, not alone by making void the contract, but by preventing its circulation, in other words withholding the application of the doctrine of equitable estoppel even in favor of bona fide holders.

CARRIERS—RIGHT TO RECOVER FOR BAGGAGE NOT ACCOMPANIED BY HOLDER OF PASSAGE TICKET.—The plaintiff purchased a ticket from one point to another over the defendant carrier's line and checked his baggage thereon. The plaintiff did not accompany the baggage on the same train and in fact did not make the trip at all. In an action to recover for the loss of the baggage it was *held* that it is not necessary, in order to create the relation of carrier and passenger with reference to the baggage so as to render the carrier liable as such for the loss, that the passenger should travel by the same train as the baggage or at all. *Alabama Gt. Southern R. Co.* v. *Knox*, (Ala. 1913), 63 So. 538.

This question was previously considered in the MICHIGAN LAW REVIEW in a note to the case of *Larned* v. *Central R. Co.* (1911), 81 N. J. L. 571; 9 MICH. LAW REV. 707. The *Larned* case is entirely in harmony with the principal case and the reasoning invoked seems to be peculiarly applicable to modern transportation methods. However, these decisions are contrary to the older doctrine and the opinion of eminent text writers that baggage "implies a passenger who intends to go upon a train with his baggage, and receive it upon the arrival of the train at the end of the journey." *The Elvira Harbeck*, 2 Blatchf. 336; *Marshall* v. *Pontiac O. & N. R. Co.*, 126 Mich. 45; and note thereto in 55 L. R. A. 650; *Wood* v. *Maine C. R. Co.*, 98 Me. 98; *Carlisle* v. *Grand Trunk R. Co.*, 25 Ont. L. Rep. 372; *Hicks* v. *Wabash R. Co.*, 131 Ia. 295; *Kindley* v. *Seaboard Air Line R. Co.*, 151 N. C. 207; *Bradley* v. *Chicago & N. W. R. Co.*, 147 Ill. App. 397; HUTCHINSON, CAR-

RIERS, § 702; 2 REDFIELD, RAILWAYS, § 171. The only justification for the older view is that railroads do not hold themselves out to carry baggage unless same is accompanied by the owner, and where those who buy tickets misrepresent their intentions as to the purpose contemplated, the non-liability of the carrier would seem just and reasonable. When travel was chiefly by stage, and the baggage constantly under the passenger's eye, the reason for the rule is obvious; but under modern transportation methods the baggage is not within the passenger's custody even if he is on the same train, and no authority can be exercised by him over it. The risk of carriage on the carrier is no different whether the owner is on the same train or another, and moreover, it is common knowledge that in many cases (by the rules of the carrier) a passenger is not allowed to accompany his baggage. Such conditions have stimulated a tendency of the courts in recent adjudications to adopt a rule in keeping with the modern methods of transportation, as evidenced by the decision in the principal case. *McKibben* v. *Wisconsin C. R. Co.*, 100 Minn. 270; *Logan* v. *Pontchartrain R. Co.*, 11 Rob. (La.) 24; *Warner* v. *Burlington & M. R. Co.*, 22 Ia. 166; *Moffatt* v. *Long Island R. Co.*, 123 App. Div. (N. Y.), 719; *Adger* v. *Blue Ridge R. Co.*, 71 S. C. 213; *Larned* v. *Central R. Co.*, 81 N. J. L. 571; See also authorities cited in 9 MICH. LAW REV. 707.

CARRIERS—SAFETY APPLIANCE ACT—COUPLING BETWEEN ENGINE AND TENDER.—Plaintiff sued to recover for the death of intestate, a fireman employed by defendant. Death resulted from the breaking of a coupling between the engine and tender. It was contended that the failure of the defendant to affix an automatic coupling between the engine and tender imposed the liability, because of the Acts of Congress, providing for such couplings. (27 ST. AT L. 531, ch. 196, sec. 2, and 32 ST. AT L. 943, ch. 976.) *Held*, that the phrase "trains, locomotives, tenders, cars," etc., did not apply to the coupling of tender and engine. *Pennell* v. *Phila. & R. R. Co.*, 34 Sup. Ct. 220.

The case is one of first impression, and its decision is based on the legislative intent. The purpose of the act was to prevent injury to those coupling cars. Since the engine and tender are not coupled from the ground, as are other cars, the court seems to have made a proper exception, despite the inclusive words of the statute.

CORPORATIONS—RIGHT OF FOREIGN CORPORATIONS TO RECOVER ON CONTRACTS MADE WITHOUT COMPLYING WITH STATUTORY REQUIREMENTS.—Plaintiff, a Tennessee corporation, entered into a contract with the Louisville Realty Company in Kentucky to do certain work in the construction of a building, without complying with the Kentucky statute which requires foreign corporations, before doing business in the state, to file with the Secretary of State a statement giving the location of its office or offices and the name of its agents thereat upon whom process can be served, and which further provides that any corporation doing business within the state without complying with the statute shall be guilty of a misdemeanor. Suit is brought to recover the sum claimed to be due on the contract. *Held*, that the statute was passed to

prohibit foreign corporations from doing business in the state until the conditions have been complied with, and to provide for agents upon whom service can be made, and that the contract is therefore illegal and no recovery can be had upon it. *Oliver Co.* v. *Louisville Realty Co.* (Ky. 1913), 161 S. W. 570.

This case should be considered in connection with *Continental & C. F. & S. Bank* v. *Cory* (1913), 208 Fed. 976, where suit was brought to recover the sum claimed to be due on a contract for the construction of a dam, entered into between plaintiff, a Utah corporation, and the defendant, in Idaho without complying with section 2792 of the REVISED CODES OF IDAHO, which provides for the filing with the County Recorder and the Secretary of State of a duly certified copy of the articles of incorporation of all foreign corporations before doing business in the state, and which further provides that no contract made in the name of, or for the use of, any foreign corporation prior to the filing of such articles of incorporation can be sued on or enforced in any court of the state. It was held that the contract could nevertheless be enforced in the Federal courts. The general rule is that where the statute declares the contract void, no suit can be maintained on it. *Bank of Louisville* v. *Young*, 37 Mo. 398. But where the statute does not in terms declare the contract void but merely prohibits the foreign corporation from maintaining an action on it in any court in the state, it is generally held that since the contract is valid in other respects and harmless in itself and is non-enforceable in the state courts merely because of non-compliance with a state administrative regulation, it may be enforced in the Federal courts. 19 CYC. 1301; *Blodgett* v. *Lanyon Zinc Co.*, 120 Fed. 893; *Dunlop* v. *Mercer*, 156 Fed. 545; *Johnson* v. *New York Breweries Co.*, 178 Fed. 513. Where the statute merely prohibits the corporation from doing business within the state until the conditions have been complied with, without declaring that the transactions in violation of the statute shall be void and without prescribing penalty, it has been held that the purpose of such statutes is not to invalidate contracts but to provide agents upon whom service may be made, that such transactions are not void, but the only effect is to render the corporation subject to proceedings by the state to oust it from doing business, and until the state does interfere actions may be brought by the corporation on the contract. *Garrett Ford Co.* v. *Vermont Mfg. Co.*, 20 R. I. 187, 78 Am. St. Rep. 852; *Wright* v. *Lee*, 4 S. D. 237; and the same result is reached by other courts on the ground of estoppel. *Sherwood* v. *Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695; *Dearborn Foundry Co.* v. *Augustine*, 5 Wash. 67; *La France Fire Engine Co.* v. *Town of Mt. Vernon*, 9 Wash. 142, 43 Am. St. Rep. 827. The weight of authority, however, is that the object of the statute is to prohibit foreign corporations, on the ground of public policy, from doing business within the state until the conditions of the statute have been complied with and that this prohibition is absolute and renders illegal any transaction made in violation of it, and, being illegal, the doctrine of estoppel does not apply. *Cincinnati Mutual Health Ass'n Co.* v. *Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Diamond Glue Co.* v. *U. S. Glue Co.*, 103 Fed. 838; *Dudley* v. *Collier*, 87 Ala. 431, 13 Am. St. Rep. 55; *Rising Sun Ass'n Co.* v. *Slaughter*, 20 Ind. 520; *Seamans* v. *Temple*, 105 Mich. 400, 55 Am. St. Rep. 457; *Reliance Mutual Ins.*

Co. v. *Sawyer,* 160 Mass. 413; *Stuart* v. *Live Stock Ins. Co.,* 38 N. J. L. 436. In the principal case a penalty is provided for non-compliance with the statute and this raises a point concerning which the courts are almost evenly divided, but while a great number hold that such statutes are nevertheless intended as a prohibition against doing business before compliance with the conditions and that contracts made without such compliance and in violation of the statute are none the less illegal and unenforceable, *State* v. *Briggs,* 116 Ind. 55; *Thorne* v. *Travelers' Ins. Co.,* 80 Pa. St. 15, 21 Am. Rep. 89; *Cary-Lombard Lumber Co.* v. *Thomas,* 92 Tenn. 587; *Aetna Ins. Co.* v. *Harvey,* 11 Wis. 398, the weight of authority seems to be that the penalty so prescribed is exclusive and that contracts of foreign corporations made without complying with the requirements of the statute may be enforced. *R. R. Co.* v. *Evans,* 66 Fed. 809, 31 U. S. App. 432; *Fire Ins. Ass'n* v. *Stave & Heading Co.,* 61 Ark. 1, 54 Am. St. Rep. 191; *Kindel* v. *Lithographing Co.,* 19 Col. 310, 314; *Fire Ins. Co.* v. *Whipple,* 61 N. H. 61; *Garrett Ford Co.* v. *Vermont Mfg. Co.,* 20 R. I. 189, 78 Am. St. Rep. 852; *Edison Gen. Electrical Co.* v. *Navigation Co.,* 8 Wash. 370, 40 Am. St. Rep. 910; *Toledo Fire & Lumber Co.* v. *Thomas,* 33 W. Va. 566, 25 Am. St. Rep. 925.

EMINENT DOMAIN—WHAT CONSTITUTES A PUBLIC USE.—The plaintiff sought an injunction to restrain the condemnation of a strip of land. The land was to be subsequently resold by the city with building restrictions to preserve light, view, appearance, etc., for an adjoining public park. The condemnation was authorized by statute and ordinance. *Held,* that the legislative acts were unconstitutional, the property not being taken for a public use. *Penn. Mut. Life Ins. Co.* v. *Phila.* (Pa. 1913), 88 Atl. 904.

The instant case may be distinguished from *Atty. Gen.* v. *Williams,* 174 Mass. 476, 55 N. E. 77, the leading case on the condemnation of the right to light, air, etc. In the latter case, the court allowed the taking of the easement alone, while in the principal case, the council attempted to go further and take the property itself. Were the decision based upon the ground that more was taken than was necessary, it would undoubtedly be sound. *Shawnee Co. Commrs.* v. *Beckwith,* 10 Kas. 603; *Taylor* v. *Balt.* 45 Md. 576; *Clark* v. *Worcester,* 125 Mass. 226; *Wash. Cem.* v. *Prospect Park and C. I. R. Co.,* 68 N. Y. 591. But the court reaches its conclusion by defining a public use to be an actual use, or a right to actual use by the public. What constitutes a public use is a question which has provided a great variety of answers. The decisions may, however, be divided into two general groups, those taking the position above stated, and those declaring a public use to be that use which inures in any way to the public benefit or advantage. An excellent note on the general subject, and full citation of authorities for each of the above positions will be found in 22 L. R. A. (N. S.) 20 et seq.

EVIDENCE—PUBLIC RECORDS—PRIVILEGED COMMUNICATIONS.—X took out a policy in the relator Insurance Co. A few months later he was committed to the Michigan Asylum for the Insane. Immediately thereafter the Insurance company filed a bill in chancery to cancel the policy, alleging that it had been secured by false and fraudulent representations. X died while suit was

pending. The Insurance company then commenced mandamus proceedings against the Board of Trustees of the Asylum to compel them to open the medical records of the institution for its inspection, claiming that the information sought was necessary to prepare for trial of the above mentioned cause. *Held,* that these were not public records and were protected from disclosure by the statutory privilege accorded communications between physician and patient. *Mass. Mutual Life Ins. Co.* v. *Board of Trustees of Mich. Asylum* (Mich. 1913), 20 Det. Legal News, 980, 144 N. W. 538.

Act No. 76 of the public acts of 1903 provides that officers having custody of public records shall furnish proper and reasonable facilities for their inspection, but it was practically conceded by relator that the records of the medical superintendent of the asylum were without the purview of this enactment. The question decided was, therefore, whether, in the absence of statute, the records kept by the medical superintendent, containing information acquired by him in his professional capacity, were open to inspection. That the contents of such records would be within the statutory privilege unless they were public records, is clear, and it is immaterial that the services of the physician were rendered without the request and even without the consent of the patient. *Smart* v. *Kansas City,* 208 Mo. 162; *Renihan* v. *Dennin,* 103 N. Y. 573; *Meyer* v. *Supreme Lodge, Knights of Pythias,* 178 N. Y. 63; *Freel* v. *Market St. Ry.,* 97 Cal. 40. Emphasis is laid by the court on the fact that the records sought to be inspected by relator were not kept under a general law of the state. It has been frequently held that records kept under a city ordinance or local act, and containing information acquired by a physician in his professional capacity are privileged. *Sovereign Camp, W. O. W.* v. *Crandon,* 64 Neb. 39; *Davis* v. *Supreme Lodge, Knights of Honor,* 165 N. Y. 159; *Buffalo Loan Ass'n* v. *Masonic Aid Ass'n,* 126 N. Y. 450. When the duty to record is imposed by a general law of the state, a different situation arises. Seemingly, in such a case, the records should be public, and their contents not privileged. *McKinstry* v. *Collins & Lowell,* 74 Vt. 147; *Henessy* v. *Ins. Co.* 74 Conn. 699. See also *Krapp* v. *Metropolitan Life Ins. Co.,* 143 Mich. 369. In this case a certificate of death made and filed by the attending physician in accordance with a state law was held competent evidence, although the information it contained had been acquired by the physician in his professional capacity. The decision here rested, however, on § 4617 of the Revised Statutes of 1897, which in terms makes such certificates admissible in evidence. It is doubtful whether, in the absence of some statutory provision such as governed the *Krapp* case, the medical records of an insane asylum would be competent evidence in this state even if kept under a state law.

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR NECESSARIES.—Plaintiff, an attorney, was employed by defendant, who was charged with murder, to defend him in the criminal trial. Defendant's wife, after he had been committed to jail, became violently insane, and plaintiff rendered services in connection with her commitment to an asylum. *Held,* although the services were not expressly contracted for, they were necessaries for which defendant was liable. *Moran* v. *Montz,* (Mo. App. 1913), 162 S. W. 323.

This case is in harmony with the current of modern decisions. It was said in the older books that "Necessaries consist only of food, drink, clothing, washing, physic, instruction and a suitable place for residence." *Thorpe* v. *Shapleigh*, 67 Me. 235. The modern view is opposed to any arbitrary limitations by schedule, and recovery for legal services is commonly allowed. In *Conant* v. *Burnham*, 133 Mass. 303, 43 Am. Rep. 532, a husband was held liable for legal services rendered to his wife in successfully defending her against a complaint instituted against her by him for being a common drunkard. In accord is *Warner* v. *Heiden*, 28 Wis. 517, 9 Am. Rep. 515. But in *Ray* v. *Adden*, 50 N. H. 82, 9 Am. Rep. 175, an attorney who represented defendant's wife in an action brought against her for divorce, which was dismissed without prejudice, was not allowed to recover for his services. Where the wife sues for an absolute divorce her attorney commonly cannot recover from her husband, *Shelton* v. *Pendleton*, 18 Conn. 417; *Daw* v. *Eyster*, 79 Ill. 254. But where the proceedings are instituted upon reasonable grounds for a judicial separation only, recoveries for services are usually allowed. *Rice* v. *Shepherd*, 12 E. C. (N. S.) 332.

HUSBAND AND WIFE—CAN A MARRIED WOMAN BE A VAGRANT.—A married woman who lived with her husband about one-half of the time was convicted of vagrancy. On appeal the court said that the husband represents the "visible means of support" to which the statute refers and that although he is not shown to be able to support her and she is shown to be able to work and does not, yet she cannot be convicted of vagrancy. *Brown* v. *State* (Ga. 1913), 79 S. E. 1133.

This case emphasises the legal duty of the husband to support his wife. In the principal case the court said: "In the present state of the law the burden of supporting the family falls upon the husband, in return for which the law crowns him with the proud but meaningless title of 'head of the family.' If he would wear the crown he must bear the burden. Some day all this may be changed, but we are dealing with present-day law, and 'sufficient unto the day is the evil thereof.'" In *Taylor* v. *State*, 59 Ala. 19, it was held that a minor supported by her parents who have an honest occupation cannot be convicted of vagrancy although she may be a lewd woman. A common prostitute as such cannot be convicted of being a vagrant. Vagrancy is a statutory offense and the defendant must clearly come within the class named in the statute to warrant a conviction. *Forbes Case*, 11 Abb. Prac. 52.

INJUNCTION—TO PREVENT BREACH OF COVENANT NOT TO COMPETE.—Defendants were the owners of a bus line and sold it to the plaintiff. It was stipulated in the bill of sale of the property, that the defendants should not afterwards engage in the same business in the same town. Shortly after the sale had been completed, however, the mother of the defendants purchased other busses, and the defendants have been driving such busses, and practically carrying on the business, as managers for their mother. This bill is brought to enjoin the defendants from breaking their contract not to enter into the business again. *Held*, that an injunction should be granted. *Hollis-ton* v. *Ernston* (Minn. 1913) 144 N. W. 415.

There seems to be no doubt that an injunction should have been granted in this case. The court was, however, unfortunate in its selection of a case from which to quote as authority, and on which to base its decision. The case referred to is the case of *Andrews* v. *Kingsbury,* 212 Ill. 97, 101, 72 N. E. 11, 13, from the opinion in which the court in the principal case quotes the following: "Courts of equity will, and frequently do, interpose by injunction, thereby indirectly enforcing the performance of negative covenants by prohibiting their breach; and where there is an express negative covenant, courts of equity will entertain bills for injunctions to prevent their violation, even though the same will occasion no substantial injury *or though the remedy be adequate at law.*" The phrase in italics goes much further than do any of the cases or writers which *Andrews* v. *Kingsbury* cites as authority. One of the cases so cited is the case of *Hursen* v. *Gavin,* 162 Ill. 377, 44 N. E. 735. This case is not in point at all, for the question raised in that case was whether such a contract was invalid or not on the ground that it was in restraint of trade, and holding the contract there to be good as only a partial restraint of trade. The other case cited in support of the proposition is the case of *Consolidated Coal Co.* v. *Schmisseur,* 135 Ill. 371, 25 N. E. 795. The quotation above follows almost the exact words of this case until the last phrase is reached. But here, instead of the words in italics are the following:—"though the damages, if any, be recoverable at law." The difference in the two statements will clearly be seen. What the court meant in the *Coal Co.* case, was, that the fact that damages were recoverable at law would not bar the right to an injunction, for damages at law might not be an adequate remedy. Moreover the statement in the *Coal Co.* case was mere dictum, for the covenant in question was not an express negative covenant, but the plaintiff sought to enjoin the breach of an implied covenant. The whole basis of equity jurisdiction in such cases is the inadequacy of the remedy at law. POMEROY says in this connection, § 1344 (2nd Ed.), "Where stipulations are negative in form and where they belong to the class of which specific performance would be enforced if they were affirmative in form, an injunction to restrain their violation will be granted, as a general rule, and almost as a matter of course. *The inadequacy of the legal remedy is the criterion* * * *."

INJUNCTION TO PREVENT STRIKERS FROM INTERFERING WITH EMPLOYEES.—During a strike, a manufacturing concern secured an injunction prohibiting the defendant and other members of the labor union to which defendant belonged, from interfering in any way with the employees of such company. The evidence showed that defendant had stationed himself near the entrance to the works of the company, for the purpose of annoying and interfering with the employees thereof. *Held,* that such evidence justified the lower court in holding defendant guilty of contempt. *In re Langell,* (Mich. 1914), 144 N. W. 841.

The decision in this case seems to be in line with the weight of authority. Three of the justices, however, dissented from the majority holding. The ground on which the dissenting opinion was based was that under the accepted definition of picketing, as laid down in *Beck* v. *Teamsters' Union,* 118

Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 394, the evidence must show a deliberate, organized action on the part of at least more than one person, before such acts will constitute picketing. It is submitted that even conceding the truth of this objection, the holding of the majority should stand. The question in the case was whether or not the acts of the defendant were such acts as would violate the terms of the injunction, and so make him guilty of contempt. In HIGH, INJUNCTION, (3rd Ed.) § 1419, it is said: "Where proceedings in attachment are instituted to punish a defendant for breach of an injunction, the fact of his guilt must be clearly and explicitly established to the satisfaction of the court. But while the injunction must be implicitly obeyed, it is the spirit and not the strict letter of the mandate to which obedience is exacted * * *." The defendant here had not even obeyed the spirit of the injunction, much less the letter of it. The injunction in this case expressly prohibited picketing; but it also restrained all of the members of the union, including the defendant, as follows—"(a) From in any manner interfering with the employees of the complainant by way of threats, personal violence, intimidation or any other unlawful means calculated or intended to prevent such persons from entering or continuing in the employment of the complainant * * *." Why should the minority opinion confine its remarks to the subject of picketing, under such an injunction as this? Why could not the acts of the defendant have been considered as included under "intimidation?" *Vegelahn* v. *Gunter*, 167 Mass. 92, held that there might be a moral intimidation which is illegal. That, however, does not mean that for such intimidation to be illegal it must be picketing. Under the injunction in the principal case, intimidation by one of the members of the union was as much prohibited as was picketing or any other form of intimidation by the union as a body. This being so, the injunction was violated, and the defendant was rightly adjudged guilty of contempt.

INSURANCE—COMMENCEMENT OF RISK—CONSTRUCTION.—A fire insurance policy was issued to indemnify a railroad company from loss on cotton by reason of its liability as common carrier. The policy further provided that the insurance should attach from the issuance of the assured's bill of lading, and should terminate upon delivery. Cotton which was intended for immediate shipment was accepted by the railroad without the issuance of a bill of lading, the company holding the bales as they were delivered until a sufficient quantity should have been received to warrant a shipment. *Held*, that although the bill of lading was not issued until the cotton was burning, the insurer was liable, the railroad being liable as common carrier in the absence of the bill of lading. *Bennettsville & C. Ry.* v. *Glens Falls Insurance Co.* (S. C. 1913), 79 S. E. 717.

This remarkable result was achieved by the application of the rule that all ambiguities in an insurance policy are to be resolved in favor of the insured and against the insurer. *Liverpool, L. & G. Ins. Co.* v. *Kearney*, 180 U. S. 132, 45 L. Ed. 460. The court held that the provision as to a bill of lading referred to the delivery and acceptance of the goods by the carrier which they said could be proven in other ways than by a bill of lading. The case would seem to be an extreme one along the lines of liberal construction.

It is hard to see where any ambiguity existed. The provision with reference to the bill of lading by its express terms referred to the attachment of the insurance and although the carrier was already liable it was perfectly competent for the carrier to stipulate when its liability should commence.

INSURANCE—CONCEALMENT—RELEASE OF LIABILITY—SUBROGATION.—Plaintiff purchased from a railroad the lumber in a building which was to be demolished, and in the contract of sale he released the railroad from all liability for damage by fire caused by it. He insured his interest in the building in the defendant Company. The defendant thoroughly inspected the premises before writing the policy, but did not inquire as to the contract and the plaintiff made no statement of it. The policy provided that, "If the company shall claim that the fire was caused by the act or neglect of any person or corporation the company shall be subrogated to all the right of recovery by the insured for the loss resulting therefrom and such right shall be assigned to the company by the assured." Another clause in the policy avoided it if the assured concealed any material fact concerning the insurance or the subject thereof. *Held*, it was for the court to say whether the failure to mention the release was a material concealment under the terms of the policy, and under the facts of the case there was not sufficient evidence of bad faith to avoid the insurance. *Ensel* v. *Lumber Insurance Co.* (Ohio 1913), 102 N. E. 955.

The decision raises questions which are usually not necessary for the decision of such cases. An agreement, between a railroad company and the owner of property which stands on ground leased from the former, that the risk of all loss or damage by fire however caused is to be assumed by the insurer renders void a policy afterwards issued insuring such property and expressly stipulating for the right of subrogation. *Downes Farmers Warehouse Ass'n* v. *Pioneer Mutual Ins. Ass'n*, 41 Wash. 372, 83 Pac. 423; *Kennedy Bros.* v. *Ins. Co.*, 119 Iowa 29, 91 N. W. 831. See also *Fire Ass'n of Philadelphia* v. *LaGrange Compress Co.*, 50 Tex. Civ. App. 172, 109 S. W. 1134. The same has been held where the bill of lading under which the insured property was shipped stipulated that the carrier should have the benefit of any insurance carried. *Carstairs* v. *Mechanic's & T. Ins. Co.*, 18 Fed. 473. But see *Tate* v. *Hylsup*, L. R. 15 Q. B. Div. 368. In the principal case the court does not consider the above decisions but bases its holding upon the determination of the question whether there was such nondisclosure on the part of the assured as to avoid the policy. Under the pleadings it was necessary for the plaintiff to show actual fraud, of which there was no evidence, but the reasoning of the court involves the question of whether the failure of the assured to disclose the fact that the right of subrogation against any person has been destroyed amounts to the concealment of a material fact. The court held that it did not concern the risk directly but rather concerned the separate contract of subrogation, and whether it was a material concealment was a question for the court. The same question was directly involved in *Pelzer Manufacturing Co.* v. *Sun Fire Ins. Co. et al.*, 36 S. C. 213, 15 S. E. 562 on substantially similar facts. The court held that whether the failure to disclose the release was a concealment of a material fact was a question for

the jury. They also refused to distinguish between policies containing an express subrogation clause and those containing no such provision. See also the same case in 41 Fed. 271, and note in 29 L. R. A. N. S. 698.

INSURANCE—SUBROGATION—SPLITTING CAUSES OF ACTION.—Plaintiff insured an automobile against accident, the policy providing for subrogation. It was struck by defendant's street car and not only was the automobile damaged but the owner suffered personal injuries. Plaintiff discharged its liability under the policy and received an assignment of the owner's rights for the injury to the car. Thereafter the owner recovered against the defendant for his personal injury. *Held,* that the recovery of that judgment was not a bar to a subsequent recovery by the plaintiff under its assignment, for owing to the provision in the policy for subrogation two causes of action arose from the accident. *Underwriters at Lloyds Ins. Co.* v. *Vicksburg Traction Co.,* (Miss. 1913), 63 So. 455.

The question of whether an injury to person and to property by the same wrongful act gives rise to more than one cause of action is one upon which the courts are divided. By the weight of authority in America only a single cause of action arises, these courts considering the right of recovery as based upon the single wrongful act rather than the injuries resulting therefrom. *King* v. *Chicago, M. & St. P. Ry.,* 80 Minn. 83, 82 N. W. 1113, 81 Am. St. Rep. 238, 50 L. R. A. 161 and note The English and several well-considered American cases hold that there are separate causes of action for each injury and not a single indivisible cause arising from the wrongful act. *Brunsden* v. *Humphrey,* L. R. 14 Q. B. Div. 141, 53 L. J. Q. B. N. S. 476; *Ochs* v. *Public Service Co,* — N. J.—, 80 Atl. 495, 36 L. R. A. N. S. 240 and note. In an earlier decision the Mississippi court had adopted the former of these views, *Kimball* v. *Railroad,* 94 Miss. 396, 48 So. 230. The decision in the principal case endeavors to reconcile this doctrine with the principles of subrogation under a policy of insurance. The court held that, by reason of the contract of insurance with the provision for subrogation, the insurer had an equitable interest in the property insured; that upon the injury it had a like interest in the damages, which ripened into a cause of action when they indemnified the assured for his loss. Hence there were two causes of action arising from the injury to the property alone. This view enabled the court to disregard the effect of the judgment for the personal injury, but its soundness may be doubted on other grounds. It is difficult to see how an insurer has any interest in the property insured upon which he can base a separate cause of action. He has no right of action against a tort-feasor other than by subrogation to those vested in the assured at the time of the loss. *Phoenix Ins. Co.* v. *Erie Transportation Co.,* 117 U. S. 312. To hold otherwise would seem to overthrow the whole doctrine of subrogation. If the insurer has a right of action separate from that of the assured it would seem that no release by the latter could impair his rights, and yet the contrary has repeatedly been held. Even where the assured in his release excepts the claim of insurer it has been held that the rights of the latter were nevertheless cut off. *Packman* v. *Insurance Co.,* 91 Md. 517, 50 L. R. A. 828, 80 Am. St. Rep. 461.

MASTER AND SERVANT—RELATION OF EMPLOYER AND EMPLOYEE.—Defendant was the owner of an office building and operated an elevator for the benefit of the occupants and the public generally. Plaintiff's intestate, a stenographer in the employ of the defendant company, whose offices were on the fourth floor, was killed while riding to work on the elevator, through the negligence of the operator. *Held,* that plaintiff's intestate was a passenger at the time of the accident and the defendant owed her the same duty as a stranger rightfully using the elevator. *Putnam* v. *Pacific Monthly Co.* (Ore. 1913)., 136 Pac. 835.

The precise question as to the relation existing between an elevator owner and an office employee, invited to ride to work, has been of infrequent occurrence. In *McDonough* v. *Lanpher,* 55 Minn. 501, it was held that employees permitted to ride in their employer's elevator to and from their places of work are still employees while so riding, and not passengers. See note to *McDonough* v. *Lanpher* in 43 Am. St. Rep. 541; *Wise* v. *Ackerman,* 76 Md. 375; *Gilshannon* v. *Stony Brook R. R. Co.,* 10 Cush. 228; *Russell* v. *Hudson River R. R. Co.,* 17 N. Y. 134; *Walsh* v. *Cullen,* 235 Ill. 91. The principal case seems to be supported, in theory at least, by *Thompson* v. *Northern Hotel Co.,* 256 Ill. 77 (which ignores the reasoning of the same court in *Walsh* v. *Cullen,* supra.); *Gillenwater* v. *Madison etc. R. R. Co.,* 5 Ind. 339; *State* v. *Western Md. R. R. Co.,* 63 Md. 433. The prevailing opinion apparently was based on the fact that the plaintiff was riding on the elevator before the time set for the commencement of her daily work. This distinction was vigorously assailed in a dissenting opinion, in which two of the judges concurred, and which seems to be the result of more logical reasoning.

PUBLIC OFFICERS—REMOVAL FOR MISCONDUCT OCCURRING PRIOR TO RESIGNATION AND RE-ELECTION.—When proceedings were about to be commenced for the removal of a mayor for alleged intoxication he immediately resigned, whereupon the city council re-elected him to fill the vacancy so caused. After he had been duly installed under the new election, an action was begun to oust him on account of the misconduct occurring prior to his resignation. *Held,* such resignation and re-election were no defence to the subsequent proceedings. *State ex rel. Cosson* v. *Baughn* (Iowa 1913), 143 N. W. 1100.

Search has failed to disclose very many cases upon this particular situation, and such authorities as are to be found are in hopeless conflict. It is believed, however, that the tendency of the courts in the later cases is in accord with the principal case. In *People* v. *Ahearn,* 196 N. Y. 221, 26 L. R. A. (N. S.) 1153, it was held by a divided court that one removed from a municipal office under statutory authority, for misconduct, is not eligible for re-election for the remainder of the term. See to the same point *State* v. *Dart,* 57 Minn. 261, wherein it is said that "Such removal proceedings are not merely for the purpose of ousting the person holding the office; they include a charge that he has forfeited his qualifications for the office for the remainder of the term." In *State of Kansas* v. *Rose,* 74 Kans. 260, 6 L. R. A. (N. S.) 843 the same rule was applied, although the re-election was made by the electors of the city themselves, at a special election. Some courts

have gone so far as to hold that misconduct during a preceding term is ground for removal. *State* v. *Welsh*, 109 Iowa 19; *State* v. *Burgeois*, 45 La. Ann. 1350; *Tibbs* v. *City of Atlanta*, 125 Ga. 18. To the contrary are *Thurston* v. *Clark*, 107 Cal. 285; *Shulz* v. *Patton*, 131 Mo. App. 628; *People* v. *Weygart*, 14 Hun. (N. Y.) 546; *State* v. *Watertown*, 9 Wis. 254. The first case directly in point with the instant case was that of *State* v. *Common Council of Jersey City*, 25 N. J. L. 536 wherein the opposite doctrine was announced. In that case a member of the council was expelled for receiving bribes and was re-elected to fill the unexpired term. The court in its opinion said "When the council expelled him they had exhausted their power. . . . When the law annexes a disqualification to an office, it does so in express terms. The council have no power to expel a member for acts committed prior to his election." To the same general effect see *Sped* v. *Detroit*, 98 Mich., 360; *Advisory Opinion of The Florida Supreme Court*, 31 Fla. 1, 18 L. R. A. 594. It is submitted that the view taken by the New Jersey court is technically correct for the reason that the contrary holding is in effect adding a qualification for the particular office in question which is not provided for by statute. While on principle there is no doubt this qualification should be added, yet the remedy lies with the legislature; judicial legislation is always to be deprecated.

SALES—CONVERSION—WHAT CONSTITUTES.—Plaintiff delivered furniture to X, a dealer, not to be put in his place of business, but to be placed in a storage warehouse; X wrongfully placed the furniture in his place of business and sold it to the defendant, an innocent purchaser. *Held*, defendant was guilty of conversion of property in reselling it after notice of plaintiff's rights. *Davis* v. *Miller's Auction Rooms Inc.*, 144 N. Y. S. 672.

It should be noted that the dealer was engaged solely in the retail furniture business and that no facts existed which would put defendant on inquiry or arouse his suspicion as to whether the dealer had title or not, yet he was held guilty of conversion. Although this is an extreme case from the standpoint of the innocent purchaser, nevertheless it is founded on well settled and sound principles of law and justice. *Saltus* v. *Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541. Mere possession of chattels *by whatever means* acquired, if there be no other evidence or authority to sell, from the true owner, will not enable the possessor to give good title. *McNeil* v. *Tenth National Bank*, 46 N. Y. 325; *Cundy* v. *Lindsey*, 3 App. Cas. 459; *Wood* v. *Nicols*, 21 R. I. 537; *Leigh* v. *Mobile & Ohio Ry.* Co., 58 Ala. 165; *Baker* v. *Taylor*, 54 Minn. 71. The defendant contended that plaintiff gave possession of the furniture to a dealer, with apparent right to sell, and that therefore the dealer could give good title to an innocent purchaser. But *bare possession* of goods, by one even though he may happen to be a *dealer* in that class of goods, does not clothe him with power to dispose of the goods as though he were owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the rights of the real owner. *Levi* v. *Booth*, 58 Md. 305. It might be argued that the dealer has more than mere possession and that he has the indicia of title. This however is not sufficient. That indicia of

title or property which the dealer has *must be conferred on him by some words or act of the true owner*. In other words the true owner must do something so as to be estopped. *Pickering* v. *Busk*, 15 East. 38; *Smith* v. *Clews*, 105 N. Y. 283; see also *McNeil* v. *Tenth National*, supra; *Commercial Bank* v. *Kortright*, 22 Wend. 348; *Wood's Appeal*, 92 Pa. St. 379; *Calais Steamboat Co.* v. *Van Pelt*, 2 Black (67 U. S.) 372; *Nixon* v. *Brown*, 57 N. H. 34.

SALES—STOPPAGE IN TRANSITU.—Claimant sold goods to X, who later became insolvent. Under the terms of the sale, the vendor sent the goods to a bleachery for and on account of the vendee. The bleachery received the goods as the goods of the vendee, so entered them upon the books, bleached and finished the goods according to the directions of the vendee, held them subject to vendee's orders and shipped out some of the goods upon the vendee's order. The goods were bleached at the cost of vendee. *Held*, this was not such a delivery to vendee as to prevent the right to stop in transitu. *In Re Poe Mfg. Co.* (S. C. 1913), 80 S. E. 194.

This case makes an extreme construction in favor of the right of stoppage in transitu. Relying among among other cases on *Harris* v. *Pratt*, 17 N. Y. 249 and *Callahan* v. *Babcock*, 21 O. St. 281, the court said "It is not material whether the person in whose possession the goods are when the seller interposes his claim, be a carrier, a warehouseman, a wharfinger, packet or other depository or an agent for forwarding purposes, nor by which of the parties to the sale he was employed." This no doubt is true, when it is applied to a *forwarding* agent—and upon examination of the authorities upon which the principal case is founded it will be found that the place of stoppage was a steamboat, depot or warehouse connected with and ordinarily employed in the *forwarding* business—*Atkins* v. *Colby*, 20 N. H. 154; *Callahan* v. *Babcock*, 21 O. St. 281; *Mohr* v. *Boston Ry. Co.*, 106 Mass. 67. The true test to be applied is "Has the person who has custody of the goods, got possession as agent *to forward* from the vendor to the buyer, or as agent *to hold* for the buyer?" BENJAMIN, SALES, § 846; *Leeds* v. *Wright*, 3 B. & P. 320; *Scott* v. *Pettit*, 3 B. & P. 469; *Hoover* v. *Tibbits*, 13 Wis. 79. Applying this test to the principal case, the decision is clearly erroneous.

WILLS—CONSTRUCTION—DISTRIBUTION PER STIRPES OR PER CAPITA.—One item of the will in question was as follows: "I will and devise that at the death of my wife all of my said real estate shall be divided, share and share alike, between the nearest blood relation I may have living at that time and the nearest blood relation of my wife at the time of her death." This action is between the testator's sister and brothers, appellants, who contend that the distribution under the will should be per capita, and the widow's father, appellee, who contends that the distribution should be per stirpes. *Held*, that the distribution should be per stirpes. *Laisure* v. *Richards* (Ind. App. 1913), 103 N. E. 679.

The appellants in this case, attaching importance to the use of the words "share and share alike," insisted that the testator intended a per capita distribution among one class only, viz.,—"nearest relation both by blood and by

marriage," instead of a per stirpes distribution between two classes, viz.,—"nearest relation of testator and nearest relation of testator's widow." There are a number of decisions which afford a ground for this argument. *Everitt* v. *Everitt*, 29 N. Y. 39; *Stevenson* v. *Lesley*, 70 N. Y. 512; *Howell* v. *Knight*, 100 N. C. 254; *Dukes* v. *Faulk*, 37 S. C. 255, 34 Am. St. Rep. 745; *Kling* v. *Schnellbecker*, 107 Ia. 636; *Campbell* v. *Clark*, 64 N. H. 328, 10 Atl. 702; *Budd* v. *Haines*, 52 N. J. Eq. 488. On the other hand there are cases which are just as nearly in point as the ones above cited, which adopt the contrary view. *Young's Appeal*, 83 Penn. 59; *Bassett* v. *Granger*, 100 Mass. 348; *Ross' Ex'r* v. *Kiger*, 42 W. Va. 402; *In re Swinburne*, 16 R. I. 208; *Raymond* v. *Hillhouse*, 45 Conn. 467; *Rivenett* v. *Borquin*, 53 Mich. 10; *Records* v. *Field*, 155 Mo. 314, 55 S. W. 1021; *McLear* v. *Williams*, 116 Ga. 257. The cardinal rule to be followed in construing a will is to ascertain the testator's intention as gathered from all the language used, *Wood* v. *Ballard*, 151 Mass. 324, and doubtless these two conflicting views are to some degree reconcilable if we take into consideration the fact that the courts, in arriving at their decision in each particular case, did so in an effort to carry out the testator's intention as evinced by the whole will, instead of confining their scrutiny to any particular item. For further consideration of this question see note following *In re King's Estate*, 34 L. R. A. N. S. 945, 21 Ann. Cas. 412.

WILLS—NO UNDUE INFLUENCE BY CHILD TWELVE YEARS OLD.—In a will contest, it was alleged that undue influence had been exerted on the testator. On this point the court *held* as follows: "It will be seen that at the date of the execution of the will in question the contestee was but little past twelve years of age and therefore was not chargeable with the exercise of undue influence over his father." *Purdy's Adm'r* v. *Evans* (Ky. 1913), 160 S. W. 1071.

With this dogmatic statement the court dismissed the claim that the son had exercised undue influence over his father. The doctrine appears to be without authority. Its nearest parallel is the ancient rule of the common law that no party could testify who was under nine years of age. *Rex* v. *Traverse*, 1 Str. 700. But this has long been repudiated. "No rule defines any particular age as conclusive of incapacity," WIGMORE, EVIDENCE, 505. There is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility is to be collected from their answers to questions propounded by the court. *Rex* v. *Brazier*, 1 Leach Cr. L. 237. All modern decisions seem to declare intelligence and not age the proper test. *State* v. *King*, 117 Ia. 848, 91 N. W. 768. The holding of the court receives no support from the law of torts since infants of tender years are liable for their torts. *Huchting* v. *Engel*, 17 Wis. 230, 84 Am. Dec. 741; nor from the law of crimes since the common law rule is that between the ages of seven and fourteen an infant is presumed incapable of committing a crime but the contrary may be shown. *Allen* v. *U. S.*, 150 U. S. 551; nor from the law of contracts since the general rule is that the contracts of an infant are voidable. *Lansing* v. *Mich. Central R. Co.*, 126 Mich. 663.

WILLS — TESTAMENTARY CAPACITY — BURDEN OF PROOF. — *Held*, that the burden of proof is upon the proponent of a will to establish testamentary capacity of the testator by a preponderance of all the evidence. *Turner* v. *Butler* (Mo. 1913), 161 S. W. 745.

The decisions upon the question as to which side has the burden of proof in will contests involving the mental capacity of the testator are in irreconcilable conflict. The weight of authority is to the effect that upon proof of the due execution of a will which is in its nature not inconsistent with the sanity of the testator, the presumption of law makes out a prima facie case for the proponent and the burden is shifted upon the contestant to show incapacity. *Barnewall* v. *Murrell*, 108 Ala. 366; *McColloch* v. *Campbell*, 49 Ark. 367; *Matter of Motz*, 136 Cal. 558; *Steele* v. *Helm*, 2 Marv. (Del.) 237; *Johnson* v. *Johnson*, 187 Ill. 86; *Young* v. *Miller*, 145 Ind. 652; *Hull* v. *Hull*, 117 Ia. 738; *Woodford* v. *Buckner*, 111 Ky. 241; *In re Burns*, 121 N. C. 336; *Hoope's Estate*, 174 Pa. St. 373; *Allen* v. *Griffin*, 69 Wis. 529; *Bartee* v. *Thompson*, 8 Baxt. (Tenn.) 508. The contrary rule is that the burden of proof throughout the case is upon the proponent and does not at any time shift to the contestant. *Comstock* v. *Hadlyme Ec. Soc.*, 8 Conn. 261; *Evans* v. *Arnold*, 52 Ga. 169; *Robinson* v. *Adams*, 62 Me. 369; *Crowninshield* v. *Crowninshield*, 2 Gray (Mass.) 526; *Moriarty* v. *Moriarty*, 108 Mich. 249; *Hardy* v. *Merrill*, 56 N. H. 227; *Matter of Flansburgh*, 82 Hun (N. Y.) 49; *Beazley* v. *Denson*, 40 Tex. 416; *Williams* v. *Robinson*, 42 Vt. 658.

BOOK REVIEWS.

A Treatise on the Laws Governing the Exclusion and Expulsion of Aliens in the United States. By Clement L. Bouvé, of the District of Columbia Bar. Washington, D. C., John Byrne & Co., 1912, pp. xxvi, 915.

This treatise, of rather formidable size, deals with a comparatively untouched but limited field of our Federal law,—the rules governing the admission of aliens into the United States. As the author notes, it is designed to show that, apart from the administrative and international law aspects of the subject, "the acts of Congress the purpose of which was to regulate the admission and residence of aliens in the United States, together with the judicial decisions by which they have been enforced, form a distinct and important branch of our municipal law." The purpose and plan of the work, which is to be characterized as laboriously comprehensive rather than lucid, involves a lengthy review of these acts of Congress and the relevant cases and, as might be surmised, fits it particularly for those of the legal profession who are interested in the subject.

The first section of the text devotes itself to a consideration of the power and methods of expulsion. After a few brief and general statements as to the limitations imposed by international law upon the right to exclude, too brief in fact, the most significant portions of the several treaties and acts of Congress involving the admission of aliens are quoted and discussed. Special notice is given to the treatment of Chinese. A rather exhaustive running commentary upon the present immigration law in which the pertinent cases and opinions are cited, follows this section. In the next the question is viewed from a different angle,—that of status. A successive treatment is given to "international," "personal," "preliminary" and "municipal" status and then follows a valuable title upon the status of domiciled aliens. The final sections of the treatise touch upon deportation procedure. Some appendices, containing among other things a valuable summary of foreign laws relating to the exclusion of aliens, together with a useful index, complete the volume.

In general the treatise represents a careful consideration of the statute law and cases and at all events will be found quite exhaustive. Indeed, the difficulty is that there is so much redundancy of technical detail that the underlying principles of international and municipal law have been but insufficiently treated, and as a result the broad plan of the work is not as clearly defined as it might be. The strictures to be passed upon it concern not so much the faithfulness with which the materials have been gathered as the method and outline employed by the writer. The author's outline involves him in the necessity of repeating himself to a considerable extent and his practise of giving abstracts of a large number of the cases cited and of frequent quotation brings in a considerable amount of unnecessary material. Thus the first two chapters on "Power and Methods" and

on "The Existing Immigration Law" trench to a degree upon the two following chapters concerning status and the judicial review of administrative decisions. The sentence-structure also is complicated and turgid even for a treatise on law: it may be said in some cases almost to out-German the Germans in length and involution. In truth, the work can scarcely be said to approach that ideal of clear-cutness of outline and clarity of expression which it is so difficult and so needful to attain. The importance of this to a treatise even on law is obvious, for to a large extent the definiteness of the impression carried away by the reader is dependent upon the terseness and accuracy of the author's generalizations. The more refractory the matter the more necessary this is. It is altogether probable that this work would have been the better and not the worse for a rigid compression of the same subject-matter into a much narower compass.

The use of the following words is probably due to mistakes in proof-reading, "clear" p. 13, "important" p. 56, "principals" p. 144, "exclusion" p. 491.

H. E. Y.

ELEMENTOS DE DERECHO INTERNACIONAL PUBLICO.. By Manuel Torres Campos. Third Edition. Madrid. Libreria de Fernando Fe, 1912. pp. 570.

ELEMENTOS DE DERECHO INTERNACIONAL PRIVADO. By Manuel Torres Campos. Fourth Edition. Madrid. Libreria de Fernando Fe, 1913. pp. 502.

Professor Torres Campos has now made his elementary treatises on Public and Private International Law more available for use in College instruction, which is their main purpose, by bringing them up to date, and beyond that also, for he takes a forward as well as a retrospective look in dealing with each subject. In one respect it may be questioned whether the future may not show that he has pressed too far the theory of the absolute equality of nations, when met in international conferences of an official nature. The course of proceeding at that for the better regulation of radio-telegraphy, held in 1912, shows that small powers can be brought to admit their practical inequality with great powers, by conceding to the latter a plural vote. Of course, the ultimate acceptance of the results of such an assembly must remain a matter for the proper authorities of each government to determine. Whatever such international conferences vote must be adopted only *ad referendum*. But any rule recommended will carry weight internationally, in any country, even though it be a weak one, very much in proportion to the support it has received from the great powers.

The author brings in one new authority in international law, whose recognition as such will be heartily welcomed by all those on whom of late years the rigbt of suffrage has been conferred. This is Madame de Stäel. In her L'Allemagne, a hundred years ago, he says, she brought out first, and with her customary keenness of observation and brilliancy of effect, the necessity of having each State formed by a single nation, penetrated by a sentiment of unity, with a comon language, and the same customs and usages, in a word, the principle of nationalities, as a panacea against disorder and war.

We notice that Professor Torres Campos refers to Wheaton as an English writer. The United States would be sorry to lose its title to claim him as their own.

We remark also, that in discussing real and personal unions to form a State, the author observes that real unions are in their nature perpetual, while personal unions are temporary, and then cites, as an example of the former, enduring to 1905, Sweden and Norway. The word "perpetual" would seem here in need of closer limitation.

In emphasizing the necessity of religious freedom in every State that calls itself free, Professor Torres Campos attributes the earliest recognition of this right to an edict of an Indian king, Asoka, who, born a brahmin, became a buddhist two or three hundred years before the Christian era. Less importance, said this decree, is attributable to alms-giving, and external rites, than to a desire to see those virtues flourish which constitute the essential part of religions. But all these virtues have a common source: moderation in speech, not seeking to exalt one's own religion by discrediting others, not to detract from their authority without good reasons. On the contrary, upon every occasion it is needful to pay to other religions the honors which they deserve. Religion "consists in doing the least possible ill, doing much good, practicing piety, loving compassion, and truth; in short, purity of life."

A general bibliography of Public International Law in printed in an appendix to the volume on that subject. This, like the main works themselves, is designed especially for the aid of Spanish students, but will be found useful by American scholars. To many of them it will serve to introduce Spanish writers, little known on this side of the Atlantic.

SIMEON E. BALDWIN.

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TRUSTS BASED ON ORAL PROMISES TO HOLD IN TRUST, TO CONVEY, OR TO DEVISE, MADE BY VOLUNTARY GRANTEES.

WHERE a trust is claimed because a grantee has violated some oral promise in reliance upon which the conveyance to him was made, it is customary to say that he took upon an oral trust. That, however, is often not a correct statement of the situation unless an oral promise to convey or to devise to a third person, or to reconvey or to devise to the grantor, is necessarily to be deemed an oral promise to hold in trust. Many of the so-called oral-trust deed cases are really cases of contracts analogous to bailment contracts, made for the benefit of the promisee or of third persons and in consideration of the property conveyed, where the contract to convey or to devise is not enforceable as such by the promisee nor by the beneficiary because of the statute of frauds defense, or because of the statute of frauds and the statute of wills combined defenses. As to them, whatever may be true of the strictly oral-trust conveyances, the trust question arises solely because performance of the contract as such cannot be compelled. In the rare instances where the part-performance-of-oral-contracts doctrine can be relied upon to take such a case of oral promise out of the statute of frauds, some courts which would not enforce a trust except in the case of an actual fraudulent intent on the part of the promisor at the time he took title or of some peculiarly confidential relation between the parties, will hasten to enforce the promise as contractual.[1] Part-performance cannot make a promise contractual if it was not so at the start, but in the absence of part-performance many promises which if part-performance had taken

[1] Fitzsimmons v. Allen's Adm. & Heirs, 39 Ill. 440; McNamara v. Garrity, 106 Ill. 384; Simonton v. Godsey, 174 Ill. 28. See Gallagher v. Northrup, 215 Ill. 563, 572-573. Cf. Gay v. Hunt, 5 N. C. (1 Murphey's Law and Eq.) 141. But see Spaulding v. Collins, 51 Wash. 488; Godschalk v. Fulmer, 176 Ill. 64.

place would be called contractual are erroneously deemed purely oral-trust promises. The fact of the matter is that courts and writers, with the best of intentions and despite self-cautioning, too often confuse in thought or in expression the nature of the promise with the effect which the promisee, or the intended beneficiary of the promise, seeks to have chancery give to the breach of the promise. No doubt, it is customary to speak of one who is bound by contract to convey property as "a trustee" for the vendee, but there are substantial differences between the situation of such a person and that of a strict trustee.

The effect of the breach of a contract to convey and the effect of a repudiation of a trust may, however, be identical. It clearly is identical in those cases where the real property has been conveyed solely because of the oral promise of the grantee to convey or devise and in those cases where conveyance took place only because of the grantee's promise to hold the property in trust. The effect is just the same for the precise reasons that in each case the statute of frauds stands in the way of the enforcement of the express promise, as such, and that in each case there will be an unjust enrichment of the grantee if he is allowed to keep the property free from any obligation. If the unjust enrichment justifies equity in interposing in the one case, it justifies it in the other. Although in one case the grantee became expressly a contracting party and in the other case he became expressly a trustee, the consequence of the one grantee's breach of promise and of the other grantee's breach of trust, and of the reliance of both grantees on the statute of frauds, is to strip the grantees of their differences and to put their promises, or the beneficiaries of their promises, as complainants in equity, either in the privileged class of constructive *cestuis que trust* or in the unfortunate class of the remediless. In other words, a grantee who took title on an oral contractual promise to convey the property granted and a grantee who took title on an oral promise to hold in trust, where both grantees have pleaded the statute of frauds as a defense, are in precisely the same position in equity, i. e., each is either in the position of a constructive trustee or in that of one who has a complete statutory defense. On sound theory, it would seem that such a grantee who properly pleads the statute of frauds cannot be recovered against on the express oral promise in the absence of part-performance, nor on the express oral trust; and, if he is to be held, it must be for the very same reason that a vendor who has been paid part or all of the purchase money on an oral contract and who thereafter, in reliance on the statute of frauds, refuses to convey, must refund the payments made, namely, that the court,

while unable to enforce the express promise, will not tolerate the promisor's unjust enrichment.[2] This elementary truth is frequently lost sight of.

There are four general situations where the oral promises of grantees either give rise to or complicate the trust question. They are:

1. Where one person pays the purchase money and has the conveyance made to another, who at the time agrees orally to hold in trust for, or to convey to, or to devise to, the payer.

2. Where a grantor conveys without consideration other than the grantee's promise to hold in trust for, or to convey or to devise to, a third person.

3. Where one person pays the purchase money and has the conveyance made to another who agrees orally to hold in trust for, or to convey or to devise to, a third person.

4. Where a grantor conveys without consideration other than the grantee's promise to hold in trust for, or to reconvey or to devise to, the grantor.

SITUATION I.

Where one person pays the purchase money and has the conveyance made to another who at the time agrees orally to hold in trust for, or to convey to, or to devise to, the payer.

The case where one man pays the purchase money and the title is conveyed by absolute deed to another who is legally a stranger to the payer of the money, i. e., is not the payer's wife or child or a person to whom the payer stands *in loco parentis*, and who makes no express promise, is the typical instance of a resulting trust. Such a trust is one not manifested in writing and is not express, but instead is implied in fact for, while it is in a strict sense of the word an intention trust, it is a trust where the intention is inferable, and is actually inferred, from the conduct and lack of family relationship of the parties.[3]

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[2] For the quasi-contract doctrine see Keener, A Treatise on the Law of Quasi-Contracts, pp. 277-292, and Woodward, The Law of Quasi-Contracts, §§ 95-97.

[3] Since it is an intention trust, it presumably does not exist where the nature of the conveyance is such as to indicate that no trust was intended. In Wolters v. Shraft, 69 N. J. Eq. 215, 70 N. J. Eq. 807, it was accordingly held that where the payer of the purchase money had the deed made to him as "trustee" for a third person, habendum "to the only proper use, benefit and behoof" of the third person in fee, and the statute of uses vested the legal title in the third person, there was no resulting trust in favor of the payer against the third person. While it may be possible to disagree with the court's conclusion that to infer such a trust would necessarily contradict the conveyance, the holding against a resulting trust was clearly right because the payer was a party to the deed and not only did not insist upon having an express trust provision in his favor but instead had himself designated as trustee for the third person, and accordingly could

Not being an express trust but an inferred trust, a resulting trust would seem to be out of place—a logical impossibility—where there really is an express, even if only oral, promise or trust. An express oral or written promise or trust of course leaves no room for inference,[4] except the inferences involved in the construction of the express promise or trust. Accordingly, where one person pays the purchase money and the deed is made to another who at the time orally agrees to hold in trust for, or to convey to or to devise to, the payer, the oral agreement on principle leaves no chance for any presumption of a resulting trust even though the grantee who promises is a legal stranger to the payer. Many courts overlook that fact, however, and, disregarding the express oral promise, enforce a trust on the theory that there is a resulting trust.[5] The only

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not properly complain that a presumption of no trust for himself as intended was indulged. If a trust for the payer was actually intended, the burden of showing that fact affirmatively should be thrown upon him. In the instant case the third person to whose use the payer was to hold was one to whom the payer stood in loco parentis, so for that reason also that burden was clearly on the payer.

[4] This has been held in the case of a written memorandum of trust made at the time of the trust's creation. Leggett v. Dubois, 5 Paige 114; Anstice v. Brown, 6 Paige 448; Coleman v. Parran, 43 W. Va. 737. But where at the start there is a resulting trust, and later a written declaration of trust is given by the resulting trustee, the resulting trust will not necessarily change to express if such change will be to the prejudice of the cestui. Rogers v. Donnellan, 11 Utah 108.

[5] The typical reasoning of the courts is found in Barrows v. Bohan, 41 Conn. 278, 283, where Carpenter J. for the court said:

"That the petitioner paid a portion of the purchase money, as purchaser, before the deed was given, is not denied. The law raises a trust, therefore, in her favor to some extent, unless such trust is defeated by the parol agreement between the parties. The whole doctrine of resulting trusts rests upon a presumed agreement between the parties. When the actual agreement between the parties is identical with the agreement which the law will imply from the circumstances, as in this case, there can be no conflict and no danger that the real intentions of the parties will be defeated by operation of law. Such an agreement therefore will not defeat a resulting trust."

Where one person pays the purchase money and the deed is made to another who is not the payer's wife, legitimate child, or a person to whom the payer stands in loco parentis or is under a statutory duty to furnish support, practically all, if not all, courts regard the trust as resulting even though there is an oral promise to convey or to devise or is an oral-trust agreement, provided the oral agreement does not impose on the grantee duties which the law would not have imposed in its absence, i. e., provided the oral promise is merely to do that which the court of chancery would have compelled the promisor to do in the absence of the promise:

Tillman v. Murrell, 120 Ala. 239; Carlson v. Erickson, 164 Ala. 380; Crosby v. Henry (Ark.), 88 S. W. 949; Moultrie v. Wright, 154 Cal. 520; Gerety v. O'Sheehan, 9 Cal. App. 447, 99 Pac. 545; Booth's Appeal, 35 Conn. 165; Barrows v. Bohan, 41 Conn. 278; Ward v. Ward, 59 Conn. 188; Murrell v. Peterson (Fla.), 52 So. 726; Williams v. Brown, 14 Ill. 200; Smith v. Smith, 85 Ill. 189; Furber, v. Page, 143 Ill. 622; Brenneman v. Schell, 212 Ill. 356; Prow v. Prow, 133 Ind. 340; Franklin v. Colley, 10 Kan. 260; Rayl v. Rayl, 58 Kan. 585; (cf. Zellmer v. Koch (Kans. App.), 58 Pac. 1012); cf. Keller v. Kunkel, 46 Md. 565; Cooley v. Cooley, 172 Mass. 476 (semble); Davis v. Downer, 210 Mass. 573, 575 (semble); Thomas v. Thomas, 62 Miss. 531 (cf. Runnels v. Jackson, 1 How (Miss.) 358, and Robinson v. Leflore, 59 Miss. 148); cf. Hall

correct legal theory to sustain the enforcement of a trust against the plea of the statute of frauds would seem, however, to be that there is a constructive trust raised to prevent the grantee, who dishonestly seeks to retain as his the property which was conveyed to him solely because of his promise, from being unjustly enriched. Equity says in effect to the dishonest grantee:

"True, your agreement or trust was express and hence you were not a resulting trustee, and true, you have relied on the statute of frauds and so cannot be compelled to perform that express promise to convey or express trust, but chancery cannot permit you to retain the fruits of your dishonest act and so you must hold for and convey to the person who has in the eyes of chancery the best right to that which you cannot keep. That person in this instance is the payer of the purchase money, since your grantor, having been paid his price for the property, has no equity."[6]

What has been said above about the implication of a trust being impossible where an express promise or trust is proved applies in theory as much where the grantee is the wife or child of the payer of the purchase money as where the grantee is legally a stranger to him. Indeed, it applies there more, if anything, for where the grantee is the wife or child of the payer of the purchase money

v. Congdon, 56 N. H. 279; Converse v. Noyes, 66 N. H. 570; Warren v. Tynan, 54 N. J. Eq. 402; Reeves v. Evans (N. J.) 34 Atl. 477; cf. Levy v. Ryland (Nev.) 109 Pac. 905; McCoy v. McCoy, 30 Okla. 379 (semble); Arnold v. Harris (Tenn.) 52 S. W. 715; Herriford v. Herriford (Wash.) 139 Pac. 212 (semble); cf. Currence v. Ward, 43 W. Va. 367.

In the above list the compare cases are cases where the deed was made to the grantee to secure the grantee for money loaned to purchase the property conveyed. They are usually classed as absolute-deed-as-mortgage cases, but they are clearly a combination of the absolute-deed-as-mortgage situation and this so-called resulting trust situation, Borrow v. Borrow, 34 Wash. 684. Indeed the grant in such case is often spoken of as a resulting trust by way of mortgage. Reeve v. Strawn, 14 Ill. 94, 96-97; Watson v. Hoffman, (Miss.) 61 So. 699. As such, it has been deemed in one case to be affected by the statute abolishing resulting trusts. Crane v. Read, 172 Mich. 642.

Where the agreement is that the grantee shall hold for the payer for his life and then keep for himself or vice versa, the trust for the payer is enforced to the extent specified, the resulting trust being deemed rebutted except to the extent of the express trust for the payer. Milner v. Freeman, 40 Ark. 62; Larisey v. Larisey, (So. Car.) 77 S. E. 129. See Cook v. Patrick, 135 Ill. 499.

But while the courts in general treat the trust as resulting despite the oral agreement, there is an occasional judicial expression of misgiving on the point. For instance, in Hall v. Congdon, 56 N. H. 279, 281, Cushing, C. J., said in reference to the contention that the trust was express because of the express oral agreement:

"There is no doubt that the case lies very near the line and the distinction is pretty nice that places it outside instead of inside of the statute of frauds."

[6] A state statute which abolishes the presumption of a resulting trust for the payer of the purchase money, but makes an exception when there is an express oral trust for the payer, really recognizes by that exception the fact that the latter trust is not resulting. If instead of leaving it stand as constructive, however, the statute makes it an express exception to the rule that resulting trusts cannot be enforced, the statute follows the judicial tradition. See General Statutes of Kansas, 1909, §§ 9699-9701.

there is a presumption of fact of gift or advancement as intended, and hence a presumption or inference against a trust. If, then, the oral promise of the wife or child to hold for the husband or father payer of the purchase money rebuts the presumption of no trust,—and in all jurisdictions where the statutes do not abolish resulting trusts it does rebut that presumption,—it is apparent that inference has given way to demonstration and that the express promise has made a resulting trust no longer possible. Many courts seemingly think that the express oral promise exhausts itself in rebutting the presumption of a gift, and that in consequence the general presumption of a trust as intended is left to control the court's action, but that is obviously a fiction in all cases where an express oral promise to hold in trust for, or to convey or to devise to, the payer is proved.[7] No matter if the court does think that it is enforcing a resulting trust, what it really is doing is enforcing a constructive trust to prevent the grantee's unjust enrichment through his dishonest repudiation of his promise.[8]

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[7] Where no express promise is proved and a presumption of advancement is rebutted by facts giving rise to a presumption of no advancement, there inference has not given way to proved intent and accordingly an inference of trust indulged makes the trust strictly resulting. See Dana v. Dana, 154 Mass. 491, for an instance. See also Elliot v. Elliot, 2 Ch. Cas. 231; Woodman v. Morrel, 2 Freem. 33; Garrett v. Wilkinson, 2 De G. & Sm. 244; Stock v. McAvoy, L. R. 15 Eq. 55; Pool v. Phillips, 167 Ill. 432; Skahen v. Irving, 206 Ill. 597. Cf. Paddock v. Adams, 56 Oh. St. 242, where the presumption of advancement had to be weighed against a presumption founded on the fact that the deed named the grantee as "trustee" but did not disclose the trust. A trust found solely from weighing opposing inferences or presumptions is implied in fact or resulting, but one found because a proved promise overcomes a presumption of no trust is in no sound sense implied in fact or resulting.

[8] Where a man pays the purchase money and the deed is made to the payer's wife or child and an oral agreement to hold in trust for or to convey to the payer is shown to rebut the presumption of fact of a gift or advancement, the majority view is that the trust is nevertheless resulting if the oral agreement is no different in its terms from the agreement which would be implied if the grantee were legally a stranger to the payer of the purchase money, but there is a strong minority view to the effect that the trust is express. That the trust is resulting is the view in Smithsonian Institution v. Meech, 169 U. S. 398; Harden v. Darwin, 66 Ala. 55; Milner v. Freeman, 40 Ark. 62; Harbour v. Harbour, 103 Ark. 273; Corr's Appeal, 62 Conn. 403; Sherman v. Sherman, 20 D. C. 330; Dorman v. Dorman, 187 Ill. 154; Bachseits v. Leichtweis, 256 Ill. 357; Cooley v. Cooley, 172 Mass. 476 (semble); Howe v. Howe, 199 Mass. 598 (semble); Sherwood v. Davis, 168 Mich. 398 (semble); Price v. Kane, 112 Mo. 412; Curd v. Brown, 148 Mo. 82 (semble); Bartlett v. Bartlett, 15 Neb. 593; Bailey v. Dobbins, 67 Neb. 548; Lahey v. Broderick, 72 N. H. 180; Duvale v. Duvale, 54 N. J. Eq. 581; McGhee v. McGhee, (N. J. Eq.) 86 Atl. 406 (semble); Yetman v. Hedgeman (N. J. Eq.) 88 Atl. 206; Livingston v. Livingston, 2 Johns Ch. 537; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91, (but see Binkowski v. Moskielwitz, 128 N. Y. Supp. 803; Gould v. Gould, 51 Hun. 9; Jeremiah v. Pitcher, 26 N. Y. App. Div. 402, affd. 163 N. Y. 574); Short v. Short, 62 Ore. 118; Hickson v. Culbert, 19 So. Dak. 207; Shepherd v. White, 10 Tex. 72 (semble); Bickford v. Bickford's Estate, 68 Vt. 525; Watson v. Smith, 70 Vt. 19 (semble); cf. Borrow v. Borrow, 34 Wash. 684; Collinson v. Collinson, 3 De G. M. & G. 409;

The result in principle is that in situation 1 the oral agreement to convey, to devise or to hold in trust keeps the trust enforced from being resulting and makes it purely constructive. Accordingly the cases where a trust is enforced regardless of the good intent of the grantee at the time of his promise and regardless of the lack of a solicitation of the conveyance by him or of a special confidential relation between himself and the payer of the money at the time of his promise—and none of the resulting trust cases, so-called, make any of these things necessary to the trust's enforcement—are logically cases in point in favor of the enforcement of constructive trusts in situations 2 and 3 hereinafter discussed. Situation 2, the case of an absolute conveyance to a grantee on his oral trust for, or promise to convey to or devise to, a third person, is, indeed, exactly situation 1 with the exception that in situation 1 the grantor gets paid while in situation 2 he does not, and that in situation 1 the purchase money is paid by the *cestui* of the oral trust or by the oral promisee, while in situation 2, as no purchase money is paid, the *cestui* of the oral trust or the beneficiary of the oral promise to convey or devise is at most only a gift beneficiary. But while the fact of payment by the third person express-oral-*cestui* makes it perfectly clear in situation 1 that equity should make such third person the *cestui* of the constructive trust which it raises against the grantee, we shall see that in situations 2 and 3 a good argument can be advanced for even the gift beneficiary of the oral promise.

SITUATION 2.

Where a grantor conveys without consideration other than the grantee's promise to hold in trust for, or to convey or to devise to, a third person.

Where the oral promise to convey to or devise to, or to hold in trust for, some one other than the grantor is not accompanied by

Scawin v. Scawin, 1 Y. & C. C. C. 65; Williams v. Williams, 32 Beav. 370 (semble); Re Gooch, 62 L. T. N. S. 384 (semble); Devoy v. Devoy, 3 Sm. & G. 403 (semble).

That the trust is not resulting but express is the view in Kinley v. Kinley, 37 Colo. 35; Montgomery v. Craig, 128 Ind. 48; Murray v. Murray, 153 Ind. 14; Andrew v. Andrew, 114 Ia. 524; Hoon v. Hoon, 126 Ia. 391; Mullong v. Schneider, 155 Ia. 12; Chapman v. Chapman, 114 Mich. 144; Johnson v. Johnson, 16 Minn. 512 (semble); Ryan v. Williams, 92 Minn. 506 (semble); Gibson v. Foote, 40 Miss. 788 (semble) Johnson v. Ludwick, 58 W. Va. 464; Ludwick v. Johnson, 67 W. Va. 499. The jurisdictions that treat the trust as express do not take the next step of declaring that a constructive trust is enforceable against the grantee to compel him to give up the unjust enrichment due to his retention of the property in fraudulent breach of the oral promise to hold in trust, to convey or to devise. What the jurisdictions which call the trust resulting are doing, however, is taking, without realizing it, just that step. They do not realize it because the constructive trust which they enforce they label resulting.

the payment of the purchase money by that someone, there clearly is no resulting trust. But, as we have seen, the express promise would be enough, on principle, to keep the trust from being resulting even if the intended beneficiary had paid the purchase money. But while in situation 2 no resulting trust could possibly exist, a retention by the grantee of the granted land in repudiation of his orally assumed obligation would constitute unjust enrichment and to prevent that result equity ought to declare a constructive trust. Under the authorties it is a debatable question whether something more than fraudulent retention is not needed for such a constructive trust to be raised and that question we shall go into carefully shortly, but first it seems desirable to consider the question of the proper beneficiary of such a constructive trust if one is to be raised.

If a constructive trust is to be enforced where there is a conveyance on an oral promise by the grantee made to the grantor that the grantee will convey to or devise to, or hold in trust for, a third person who pays nothing, what person is properly to be designated constructive *cestui?*. Dean AMES was firmly of opinion that the correct rule or ascertaining the *cestui* of a constructive trust in the statute of frauds cases was to adopt and apply the principle of *restitutio in integrum,*[9] and on that principle he favored in this situation 2 the raising of the constructive trust in favor of the grantor.

But the cases of legacies and devises on oral trust, which are almost unanimous in enforcing a constructive trust in favor of the intended *cestui* regardless of whether the prospective legatee or devisee had or had not a bad intent at the time of promising, raise the question of whether that principle of *restitutio in integrum* is after all the most fundamental. In the case of legacies and devises on oral promises which are later repudiated by the legatees or devisees, it is well settled that the constructive trust raised will be enforced in favor of the intended beneficiary *cy pres* the testator's intentions. He did not express his intentions in proper form for them to be enforced as such, but he did create a trust situation and equity can give the *cestui*-ship to the intended beneficiary if it thinks him entitled to it, and it does give that *cestui*-ship to him just because it thinks such disposition of it more fitting than to give the equitable interest to the next of kin or heir, or even to the residuary legatee or residuary devisee.

[9] Ames, Lectures on Legal History, 425-431. See same passages in 20 Harv. L. Rev. 549, 550-55.

Dean AMES of course felt that the courts were in error in the legacy and devise-on-oral-promise cases in enforcing a trust for the intended *cestui* except in those cases where the legatee or devisee had an actual fraudulent intent at the time of making the promise, in which latter event he said that the repudiating grantee "is guilty of a tort and equity may and does compel the devisee to make specific reparation for the tort by a conveyance to the intended beneficiary"[10]; but is the theory of the specific reparation of a tort, even when applied to the case of actual fraud at the time of the promise, any easier to grasp or to assent to than is the occasionally advanced theory of the specific performance of the oral agreement in favor of the beneficiary awarded to prevent the successful consummation of the fraud?[11] And, in addition, is it true that where there is no actual fraudulent intent at the time and yet the legatee or devisee cannot be allowed to be unjustly enriched by retention of the property in repudiation of the promise on which the property was secured, and where restitution to the testator is impossible because he is dead, the heir, next of kin, residuary devisee, or residuary legatee, has any greater claim to chancery's appointment of him as constructive *cestui* than has the orally designated and agreed upon *cestui?* If the tort theory is preferable, then even though it be no legal tort for one to promise honestly and later to decide to retain dishonestly, why may not such action be deemed a tort in equity? In enforcing strict trusts equity makes its own law to fit its own creation, and it may recognize an equitable tort, i. e., a tort remediable only in equity, regardless of the fact that there is no corresponding legal tort. Specific reparation of what equity must call a tort because the law calls it one may be a higher principle

[10] Ames, Lectures on Legal History, 430-431. See same passage in 20 Harv. Law Rev. 549, 554.

[11] In a case of a deed on an oral promise, but in language equally applicable, it would seem, to a case of devise on an oral promise, it is said: "So where a trust is sought to be established from the violation of an oral agreement purporting to create a trust and a court of equity upholds the trust and enforces specific performance, the trust is not an implied or constructive trust within the statute [of frauds]. (See Bellasis v. Compton, 2 Vern. 294). The court in granting relief in case of an oral agreement proceeds upon the ground of fraud, actual or constructive, and enforces the agreement notwithstanding the statute, by reason of the special circumstances."—Andrews, J., for the court in Wood v. Rabe, 96 N. Y. 414, 423. The sounder view would seem to be that the court of equity neither repairs a tort nor enforces specifically the oral agreement, but that it enforces a constructive trust in favor of the party substantially damaged by the breach of promise and against the person unjustly enriched at his expense through that breach. If there is fraudulent intent at the start, the trust is constructive at the start because the unjust enrichment is coeval with the receipt of title. If the fraudulent intent comes later, the unjust enrichment begins when the promise is repudiated and the property is retained despite that repudiation.

than restitution, but specific reparation of what equity must call a tort because the law calls it one may be a higher principle than restitution, but specific reparation of what equity calls a tort even though the law does not call it one, is certainly a higher principle than that of restitution. If that were all that could be said, however, the charge of question-begging would of course be open, but the equitable tort argument is not the real one in behalf of the intended *cestui* as constructive *cestui*. It is only thrown in to emphasize the point that the *restitutio in integrum* principle is only to be resorted to where no other principle can be found, as, for instance, in the case of a deed on an oral trust for the grantor or in the quasi-contract cases.

But in the case of devises on an oral trust for third persons who pay nothing, just as in the case of conveyances on an oral trust for third persons who pay the purchase price, the *restitutio in integrum* principle need not be called into play, or, if it is called into play, has a very different application from what has heretofore been imagined. In order to make that clear, however, some elementary propositions must be stated.

It is well settled that equity will enforce an express trust, manifested in a properly executed writing and intended to be effective at once, even though the *cestui* is a volunteer. The trust is at once a completely existing trust and straightway the interest of the cestui is vested, in the view of equity, and, therefore, actually. It is also well settled that even though the statute of frauds requires an express trust of land to be manifested in writing, an oral trust of land is nevertheless not a nullity, for if the trustee sees fit to act under it and carry it out, it is as much entitled to the protection of equity as is any other trust.[12] Even the trustee's creditors cannot prevent nim from carrying out the trust if he wishes to do so and if the trust is for legal purposes.[13] Another way of stating the same proposition is that the oral trustee, while he lives, is the only one who can plead the statute of frauds. Now if an oral trust of land has been created and fully performed, what kind of a trust has been performed? It was not a resulting trust because it was not implied in fact or inferred but was express. It was not a constructive trust, because a constructive trust cannot exist without either actual or constructive fraud on the part of the party to be charged as trustee and, by our supposition, the trustee was honest at the start and all through. The trust then was an express trust. Not only so, it was

[12] See Ames, Cases on Trust, 2 ed. 178-181.
[13] Id.

an express trust which, even though repudiated, equity would have enforced affirmatively in the absence of a plea of the statute interposed in proper time by the trustee. And when was it an express trust? At the time when it would have been one if manifested from the start in writing, of course, for at that time, if applied to, equity would have affirmed its existence in the absence of a plea of the statute. It is apparent, therefore, that from the time of the creation of an oral trust for a third person down to the repudiation of the trust and the interposition of the statute of frauds defense to defeat its enforcement, the intended *cestui que trust* actually is *cestui que trust* with all the pecuniary interest and all the rights and privileges unto such a one appertaining. This is, of course, all on the supposition that the trustee was honest at the start and only decided to act dishonestly some time after the testator's death.[14]

The consequence of the considerations just advanced is that up to the time when the trustee relies on the statute of frauds to defeat the trust, which he honestly undertook, the *cestui que trust* of the oral trust is the only party having a property right which equity can or does deem paramount. It is that paramount property right which the trustee, by aid of the statute of frauds, cuts off and in practical effect, whatever may be true in strict theory, appropriates to himself. The legal title was, by supposition, honestly acquired by him but it was acquired burdened with the equitable duty to devote it to the *cestui's* benefit as per the terms of the trust. Now by the aid of the statute as a sword the trustee has terminated that equitable duty, obversely spoken of as the *cestui's* property interest, and has unjustly enriched himself. Where, before he used the statute in that way, he had the legal title and the *cestui* the so-called equitable title, after that use of the statute he had, so far as the express trust is concerned, the legal title and the *cestui* nothing. For a trustee to destroy the *cestui's* interest without compensation and thereby to increase his own estate,—for him to swell his own assets at the expense of the *cestui*, —is a gross breach of trust. In a real, though perhaps not in a theoretical sense, a trustee who destroys his *cestui's* interest by the aid of a statute acquires the *cestui's* interest and merges it in his legal title. Certainly in equity, where form is not important, it is to be regarded as an acquisition, and, moreover, a dishonest acquisition. There is both dishonest acquistion and dishonest retention. On a strict analysis there was honest acquistion of the legal title subject

[14] The case of a devisee, honest when he made the promise, but getting dishonest intent thereafter and before the testator died, seems not to have been adjudicated. It would, doubtless, be treated the way the case of dishonest intent at the time of making the promise is dealt with.

to an express trust, which was enforceable at the start and remained enforceable as an express trust while the trustee remained honest; then there was a dishonest acquisition of the so-called equitable title of the *cestui;* and lastly there was dishonest retention of the full title to the property in repudiation of all claims. In any case there was actual fraud.[14a] Under those circumstances, for whom ought a constructive trust to be raised? Not for the original creator of the trust, for he is dead. Not for the heir or the residuary devisee, for the honesty of the specific-devisee trustee lasted long enough to give the intended *cestui* a defeasible equitable interest and to make it clear that neither the heir nor the residuary devisee could ever have any valid claim, except in a court which should feel that to give the intended *cestui* the property on a constructive trust would be to go in the teeth of the statutes of frauds and of wills or of one of those statutes. The only man having any equity is the man defrauded and that man is the intended *cestui,* who for a time actually was a real express *cestui,* but who has been robbed of his equitable interest by his trustee to the latter's *pro tanto* enrichment. The constructive trust should be declared in favor of the man at whose expense the unjust enrichment of the trustee has taken place and that man is the *cestui* of the express oral trust. The principle of *restitutio in integrum* itself requires that he be designated as *cestui,* since the previous condition to be restored is the situation just before the unjust enrichment.[15]

[14a] In the bequest on oral trust case of Winder v. Scholey, 83 Ohio St. 204, 216, Summers, C. J., for the court, said: "It is conceded that in cases of actual intentional fraud equity will raise a trust, notwithstanding the statute of frauds or the statute of wills. In equity what difference can there be whether the fraudulent intention existed at the time the testator acted or not until it was time for the devisee to act? In either case the testator acted upon the faith that the devisee would keep his promise; the result of his refusal or failure to do so is the same in either case and equally fraudulent."

[15] But the argument just advanced must not be urged too far. Where it is certain that the devisee or grantee is to hold in trust for somebody and it is only a question of naming that somebody, the argument seems conclusive. But until it is decided that there is to be a constructive trust for some one, the argument is not very helpful. To make this clear it is only necessary to consider the case of an oral declaration of trust by the owner of realty in favor of, or his oral promise to convey to or to devise to, (1) a volunteer and (2) a purchaser. Where an oral declaration of trust is honestly made, one view of the situation is that a trust arises at the time of the oral declaration, and that, while the trust cannot be repudiated without the unjust enrichment of the trustee, such unjust enrichment is the very kind which the statute meant to permit in order that chancery might not be subjected to the risk of being induced by perjured testimony to enforce oral trusts which never were declared. Another view of the situation is that no trust arises at the time of the oral declaration, and that even in the eyes of chancery the oral declaration of trust is only a promise. On this second view, where the declaration is in favor of a volunteer, it is only a promise of a gift of the equitable interest, and hence revocable, and where the declaration of trust is paid for, it is only an oral contract to convey the equitable interest as to which usually no part-perform-

The statute of frauds expressly excepted constructive trusts from the writing requirement and it is no valid objection to a constructive trust raised on sound constructive trust principles that it will give the beneficial interest to the very person who was *cestui* of the express oral trust. When Parliament and the American legislatures said that constructive trusts could be enforced without the necessity of written evidence, they meant that they should be enforced in favor of the person having the best claim on constructive trust principles, and in the case supposed the intended *cestui* is the person having the best claim. So long as the express trust as such is not enforced, so long as only unjust enrichment is prevented and the party sought to be defrauded is given only that which will prevent the unjust enrichment, the legislative intent is satified. For any breach of the express trust that does not unjustly enrich the trustee, the statute of frauds is a defense, as it is to the attempted enforcement of any of the terms of the express trust as such. Those terms, however, may be considered in determining the extent of the enrichment and of the injustice. But to say that a constructive trust to the extent of the unjust enrichment cannot be raised for the party defrauded just because he was the *cestui* of the express trust is to defeat the legislative intent rather than to carry it out.

What has been said of devises on oral trusts is just as true of conveyances on oral trusts for third persons. If the grantee had a fraudulent intent at the time of taking title, there was a legal tort which equity could repair specifically and an express oral promise which it could enforce specifically by making the grantee hold for the intended *cestui*. In the eyes of a court of law the grantor is the one defrauded, but his damages are only nominal; and in a court of equity it is the party really damaged, the party at whose expense the fraudulent promisor is unjustly enriched, namely, the intended *cestui*, that should be given relief. The inadequacy of the legal remedy—indeed the absence of any satisfactory legal remedy—justi-

ance or other act making it specifically enforceable has taken place. Whichever view is entertained, it would seem clear that ordinarily the oral declaration of trust may be nullified by the declarer, but that any payment which he accepted for the declaration, whether the payment be money or property, must be refunded by him. The important thing to notice here, however, is that the argument which will serve to dictate the choice of a constructive cestui, where the repudiation of an oral promise on which a devise or grant in trust for, or to convey or to devise to, a third person was obtained necessitates a constructive trust for somebody, is not sufficient to cause the raising of a constructive trust where one who orally declared himself a trustee for another repudiates the trust. But when it is determined that the grantee must be made a constructive trustee for some one, so as to prevent the grantee's unjust enrichment, then the fact of the intended cestui's having been already a genuine though voidable cestui, seems persuasive of his right to be chosen constructive cestui.

fies equity jurisdiction and *cy pres* the intentions of the grantor equity makes the *cestui* of the oral trust, who, like the sole beneficiary of a contract, is the only person damaged more than nominally by the failure of performance, the *cestui* of the constructive trust.[15a] On the other hand, if the grantee had an honest intent at the time and became dishonest in intent only later, the express oral *cestui* clearly became a real *cestui* and remained one until the dishonest repudiation of trust defeated his interest as express *cestui* to the corresponding acquisition of unjust enrichment by the trustee, and, as the fraudulently deprived party, the *cestui* of the oral trust is entitled to be the *cestui* of the constructive trust based on that deprivation and that enrichment.

In confirmation of what was said of situation 1, it should be noted here that if the *cestui* of the oral trust is to be made the *cestui* of the constructive trust where he does not pay anything, clearly he should be *cestui* of that trust where he is the payer of the purchase money for the property conveyed on the oral trust. If the volunteer is to be given equity's countenance, the value-giver must be treated fully as well.

But the demonstration that the *cestui* of the oral trust is dishonestly dealt with by his trustee, and accordingly is entitled to be *cestui* of the constructive trust raised, applies strictly only when the oral arrangement is expressly one of trust. What of the case where the deed is simply on the grantee's promise to convey or to devise to a third person? That is more nearly a case of contract than of trust, but there again, in America at least, the contract principles lead us to favor the intended beneficiary. The oral contract is not a nullity. It is a good contract enforceable except when the statute is pleaded. And on that contract who can sue? In a large majority of the American jurisdictions, the beneficiary who is variously known as a "sole" or a "gift" or a "donee" beneficiary, may sue, and is the only one, indeed, who can recover substantial damages.[16] If, then, the beneficiary's right to sue is the only right worth while, and if that right is rendered ineffective by the grantee's unconscionable use of the statute of frauds as a defense, any constructive trust raised

[15a] The cy pres argument is a make-weight argument in favor of the intended cestui as constructive cestui. In the legacy and devise cases the cy pres argument has great weight because the testator clearly meant his next of kin, residuary legatee, heir, or residuary devisee, not to have the property. But in the deed cases where the conveyance is for the benefit of a third person, the grantor just as clearly means that he himself shall no longer have any interest and accordingly he should be given no interest in equity unless there are insuperable reasons against giving the intended cestui the interest which chancery has to confer. Such insuperable reasons appear not to exist.

[16] Wald's Pollock on Contracts, 3 ed., 242, 249-255.

against the grantee should be raised in favor of the beneficiary. A constructive trust raised against a wrongdoer should, of course, be raised in favor of the person at whose expense the enrichment has taken place, and in the case supposed that person is the beneficiary of the oral promise.[17]

But now for a further word on the question whether actual fraudulent intent at the time of making the oral promise should be made a prerequisite to a constructive trust. The first thing to notice is that no court adheres to that strict rule, for, in all courts, if there was between the grantor and grantee a relation of special trust and confidence the grantee's good intent at the time of making the promise will not enable him to keep the trust *res* with impunity.[18] But the important thing to remember is, what our discussion of the beneficiary problem has made clear, that the old view that fraud at

[17] In Ahrens v. Jones, 169 N. Y. 555, 560, Haight, J., for the court said:

"It is true there is no express trust created by the deed, or by the promise made by the defendant but, notwithstanding this, a court of equity is not bereft of power to act, for it may interpose to prevent a wrong, and for that purpose it may declare the grantee a trustee ex maleficio for the protection of the grantor's intended beneficiaries. Such a trust does not affect the deed, but acts upon the gift as it reaches the possession of the grantee, and the foundation for the trust is that equity will then interfere and raise a trust in favor of the persons intended to be benefited in order to prevent a fraud."

Even though the court was influenced in this case by the fact that the grantor made the deed in view of his approaching death, its reasoning is just as sound in its application to a deed on an oral trust for, or oral promise to convey to or devise to, third persons, made by a grantor who expects to continue alive.

[18] In the case of Gemmell v. Fletcher, 76 Kans. 577, 586-7, Graves, J., said of a broken promise that had been made by a husband to his dying wife that if the wife would not make a will, which she accordingly did not do, he would convey to the plaintiff certain land, the legal title to which was in the husband by mistake but the equitable title to which was in the wife as resulting cestui:

"In cases where a trust has resulted because of false and fraudulent representations used in obtaining a conveyance, and the grantee affirmatively and actively induced the execution thereof, the words 'actual' and 'positive' frequently occur in the opinions to characterize the fraud used. And in such cases it has been said that the fraud must have been present as a producing cause of the transaction. In cases like the present, however, where the fraud is perpetrated by the refusal to consummate the transaction, it is otherwise. In this case the defendant received the title to the land in controversy by mistake. He had no right or interest therein and claimed none. He recognized at all times the ownership of his wife. The promise made to her on her death-bed was a recognition of her title at that time. By this promise to convey the land to the plaintiff he prevented her from disposing of it by will. He knew that she permitted the situation to remain as it was because of such promise. Their relationship—that of husband and wife—was confidential in the highest degree known to the law. The refusal on his part to perform this promise, thereby retaining the property as his own, is a fraud upon his dead wife, and a fraud upon the plaintiff. The transaction on its face appears innocent on the part of the defendant prior to his refusal to convey, but in the absence of any indication to the contrary it will be presumed that when he made this promise to his wife he then intended to do what he finally did do (Larmon, et al., v. Knight, et al., 140 Ill. 232, 29 N. E. 1116, 33 Am. St. Rep. 229). Courts of equity do not permit persons thus to profit by their own perfidy. Justice, reason and authority concur in the conclusion that the facts here shown are sufficient to create a constructive trust, and we so find."

the time of making the promise was actual fraud, and that fraud at the time for performance was constructive fraud, is unsound. In both cases the fraud is actual fraud. Fraud in retention is just as much actual fraud as is fraud in acquisition, and, as actual fraud, calls just as strongly for redress in equity. It cannot be reiterated too often that "There is no law which requires a fraudulent undertaking to be manifested by writing"[19] and that equity will always enforce a constructive trust to prevent actual fraud. Those jurisdictions which have failed to enforce a constructive trust, to prevent fraudulent retention of the trust *res* of the oral trust, have done so because they have not realized that the fraud was actual fraud and because they have wondered what operation section seven of the statute of frauds would have if fraudulent retention were made a sufficient constructive trust test.[20] The fraud is, however, actual fraud, as we have seen, and as for the operation of the statute, it must be remembered that Parliament and our American legislatures expressly authorized the full enforcement of constructive trusts without the necessity of written evidence and, therefore, there can be no sound complaint as long as express oral trusts are not enforced against a plea of the statute. What the courts that have refused to make fraudulent retention of trust property by the oral trustee to his own unjust enrichment serve as a constructive trust basis have done has been to substitute their own conception of proper legislation for that of the legislature. Parliament and the American legislatures have meant by section eight of the statute of frauds to restrict section seven's operation in every way that the resulting and the constructive trust doctrines fairly require, and for the courts to refuse to allow that restriction to take place is for them to legislate unjustifiably.

Before stating the holdings of the courts it seems desirable to quote some clear judicial utterances on the fraudulent retention question, which is the same question whether the deed was on an oral trust for a third person or for his grantor.

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[19] Bleckley, C. J., in Brown v. Doane, 86 Ga. 32, 38.

[20] In Salter v. Bird, 103 Pa. St. 436, 447, Gordon, J., said of a conveyance by A to B on an oral trust for C, where C sought to have a trust enforced in the absence of evidence of B's solicitation of the conveyance or of his fraudulent intent at the time of promising: "If such a trust is not within the statute, then there can be none that comes within it." Such a statement overlooks oral declarations of trust by owners of land, who can go back on their declarations without being made constructive trustees of the lands which they thus orally promised to hold in trust, and ignores the fact that the statute necessarily protects an oral trustee from being recovered against for breach of any express provision of the oral trust, if only he pleads the statute. The statute of frauds will have plenty of operation even if it is not allowed to be used to promote unjust enrichment.

In *Becker* v. *Neurath*,[21] where the grantee agreed to hold on an oral trust for a third person, CARROLL, J., said for the court:

"It is true that the doctrine of constructive trusts rests upon the ground that the grantor has been induced to part with his title by the fraud of the grantee; but it does not follow by this that it is necessary to show by fact or circumstance actual intentional fraud practiced at the time by the grantee. When the grantee by act or word has induced the grantor to make the conveyance under an agreement or promise that certain parol conditions attached to it will be complied with, the law will imply a fraud from the failure of the grantee to perform the annexed conditions. If A tells B that he will take the title to property and hold it for the use and benefit of some other person, and by reason of this promise B is induced to and does convey the title, A will be deemed to have practiced a fraud upon B if he fails to observe the promise under which he obtained the conveyance. It is the end that the law looks at, and not the means by which this end is accomplished. If a grantee is enabled to obtain the title to property by an express promise to hold it for the use of another and he fails to observe the promise, he is in fact and truth as much guilty of fraud as if by deceit, persuasion, cunning, or other evidence of actual fraud he had obtained that which otherwise would not have come to him. No matter whether the grantee secured the property by what may be termed legal or constructive fraud, or by actual fraud, if he fails to make that disposition of the property that the grantor intended he should make, and that he agreed to make, the person who, except for the promise, would have been the beneficiary of the estate had [has] been defrauded of that which was justly due him.

"To say that a grantee, who by misrepresentation, deceit, or undue influence, obtains the title to property under a promise that he will hold it for certain uses, will be compelled by equity to perform the trust, but that the grantee who merely promises the grantor that he will hold the title for certain purposes and upon this promise the grantor is induced to convey it, will not be required to perform the trust, would be to make a distinction without a difference, and one that would often result in gross injustice."

While in Kentucky the seventh section of the statute of frauds is not in force, the fourth section of the statute and the parol evidence rule furnished the occasion for the foregoing language. That language is, however, just as apropos in a jurisdiction where the seventh section of the statute does exist.

[21] 149 Ky. 421, 427-8, 149 S. W. 857, 860.

In *Hall* v. *Linn*,[22] where in addition to agreeing to hold for the grantor the grantee agreed to reduce the terms of the trust to writing, HELM, J., said:

"What difference does it make in principle whether a trustee by fraud or deceit prevents the reduction of the trust agreement to writing at the time the trust is created, or with wrongful intent neglects and refuses to afterwards make a written declaration of material conditions thereof, in accordance with his promise so to do, which promise is also part of the original contract? The 'medium of fraud' exists in the latter as in the former case; and the effect produced thereby is equally disastrous in both."

As was said by HENSHAW, J., in *Taylor* v. *Morris*,[23] also an oral trust for grantor case:

"The statute of frauds is never permitted to become a shield for fraud, and fraud at once arises upon the repudiation by the trustee of any trust, even if that trust rests in parol."

In *Rochefoucauld* v. *Boustead*,[23a] LINDLEY, L. J., for the court, said:

"It is further established by a series of cases, the propriety of which cannot now be questioned, that the statute of frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself."

It would help some courts to understand that unjust enrichment found in unconscientious retention is just as fraudulent where the original acquisition was honest as where it was dishonest, if they would ask the question why it is remediably fraudulent for a grantee, whose deed by mutual mistake of the parties describes more land than he bought, to attempt to retain the unpurchased excess taken by him innocently enough but retained unjustifiably.[24] The equity of

[22] 8 Colo. 264, 275.

[23] 163 Cal. 717, 722.

[23a] [1897] 1 Ch. 196, 206.

[24] All jurisdictions seem to agree that the statute of frauds does not stand in the way of a reformation which cuts down the property described in the mistaken writing, but some courts refuse to grant reformation to make the writing called for by statute cover property and terms of the contract omitted by mistake. 2 Pomeroy Equity Jurisdiction, 3 ed., §§ 864-867; 34 Cyc. 927, note 61. For a late case, where reformation was decreed so as to include omitted matter, see Atwood v. Mikeska, 29 Okla 69. A leading case

reformation in such a case, while usually stated as an instance of mistake as distinguished from fraud, ought to be classed as fraud in retention[25] and mistake ought to be kept to apply to those cases where there is only mistake. Similarly, fraudulent retention is the sole justification needed for those cases where an absolute deed is deemed in equity a mortgage, because it was delivered and received as security for a debt, and is so deemed despite the fact that the grantee took in good faith and only subsequently decided to retain for himself the legal title conveyed, and despite the fact that the grantee proves that the mortgage arrangement was oral and relies on the statute of frauds.[26]

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for the view that reformation cannot properly be granted, as against the plea of the statute of frauds, if the court will thereby compel the inclusion of property omitted or will otherwise enlarge the scope of the instrument, is Glass v. Hulbert, 102 Mass. 24. The Massachusetts view is defensible only if the line is to be drawn between unjust enrichment and no unjust enrichment. If unjust enrichment is to be the test, then equity should reform contracts which cover too much, to prevent unjust enrichment from taking place through their enforcement, and should reform deeds which convey too much by compelling the restitution of the excess property which, however innocently acquired, is unjustly and therefore fraudulently retained. And if unjust enrichment is to be the sole test, i. e., if the equity jurisdiction is really because of a constructive trust which would or did arise out of the mistake, no reformation will be granted of an instrument required by the statute of frauds to be in writing unless the effect of such reformation will be to diminish the scope of the instrument reformed.

[25] "It is manifest * * * that there was a mutual mistake in the deed. Whether it was the result of fraud, as alleged in the bill, or an error in the description, the defendant fraudulently sought to retain the benefit of the mistake by refusing to cancel the deed."—Wilkin, J., in Cullison v. Connor, 222 Ill. 135, 138.

[26] In Hall v. Linn, 8 Colo. 264, 274, Helm, J., for the court, said of the equity doctrine that the statute of frauds will not prevent the enforcement of a constructive trust for fraud: "It was a reliance upon the foregoing principle that induced courts of equity to recognize the well known doctrine that a deed absolute on its face may be proved by parol to be only a mortgage." As Paine, J., for the court, said in Fairchild v. Rasdall, 9 Wis. 379, 391: "I can see no distinction between an express trust and a parol agreement making a deed a mortgage. If the refusal to abide by the latter is to be held, on principle, to be such a fraud as takes the case out of the rule, and justifies parol evidence, I can see no reason why a refusal to execute an express trust evidenced only by parol, should not be so held. The injustice, the wrong and the fraud are not only as great, but greater in the latter case than in the former. For in the former the party would only get the land for the money he had loaned, while in the latter he would get it for nothing." See Kimball v. Tripp, 136 Cal. 631, 634-635; Jasper v. Hazen, 1 No. Dak. 75, 81. While in Fairchild v. Rasdall, 9 Wis. 350, the court could see no difference between the oral trust case and the oral mortgage case, and accordingly deemed that equitable relief should be denied in both situations, it later adopted the oral mortgage doctrine. Plato v. Roe, 14 Wis. 490.

"The well settled jurisdiction of equity to declare a conveyance absolute in form, and given as security, a mortgage, and to compel a reconveyance, presents a close analogy to the case of a parol trust in favor of the grantor. The substantial basis of the jurisdiction is the inequitable conduct of the grantee in receiving the property for one purpose and using it for another, and equity, consequently, imposes upon the grantee, an equitable obligation to restore the property to the grantor upon payment of the mortgage indebtedness. The inequitable conduct of the grantee in retaining the property for his own purposes is sufficient to give equity jurisdiction to declare the deed a mort-

On this subject of a deed on an oral trust for a third person who pays nothing there is a conflict in the authorities. In some jurisdictions a constructive trust will be enforced for the intended *cestui* even though the grantee did not solicit the conveyance, even though there was no fraudulent intent on the grantee's part at the time of the conveyance, and even though there was no breach by the grantee of any confidential relationship other than a family relationship and than the express oral trust relationship.[27] In most jurisdictions, however, no trust whatever will be enforced in the absence of a showing that the grantee solicited the conveyance or that he had an actual fraudulent intent at the time of his promise or that he violated some special confidential relationship.[28] In all jurisdictions, however, a constructive trust will be enforced if any one of the last mentioned showings is made.[29] In practically all jurisdictions it is held that

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gage, despite the parol evidence rule, and the provision of the statute of frauds. That equity should take jurisdiction in such a case, and withhold it in a case where the express obligations of a trustee is repudiated by the grantee and rendered unenforcible by the statute is not only inconsistent, but gives countenance to gross fraud and oppression."—Dean Harlan F. Stone on Resulting Trusts and the Statute of Frauds, 6 Col. L. Rev. 326, 338-339.

[27] Lauricella v. Lauricella, 161 Cal. 61 (semble only, because in California, as ought to be true everywhere, husband and wife living amicably together are deemed to be in a relation of special confidence. Hayne v. Hermann, 97 Cal. 259); Crocker v. Higgins, 7 Conn. 342 (semble, but see Todd v. Munson, 53 Conn. 579 semble contra); Ruhe v. Ruhe, 113 Md. 595 (semble); Fox v. Fox, 77 Neb. 601; Ahrens v. Jones, 169 N. Y. 555; Albright v. Oyster, 19 Fed. 849.

The case of Albright v. Oyster, 19 Fed. 849, supra, was a decision on demurrer. For holdings on the merits, see Albright v. Oyster, 22 Fed. 628, 140 U. S. 493, and for subsequent proceedings, see Oyster v. Oyster, 28 Fed. 909, 140 U. S. 515.

See also the following decisions in accord in jurisdictions where the 7th section of the statute of frauds does not exist. Becker v. Neurath, 149 Ky. 421; Gay v. Hunt, 5 N. C. 141; Sykes v. Boone, 132 N. C. 199; Jones v. Jones (N. C.) 80 S. E. 430; Mee v. Mee, 113 Tenn. 453 (semble, but see Perkins v. Cheairs, 2 Baxt. (Tenn.) 194); Troll v. Carter, 15 W. Va. 567 (semble).

[28] Tillman v. Kifer, 166 Ala. 403; Chester v. Motes, (Ala.) 61 So. 267; Ammonette v. Black, 73 Ark. 310 (semble); Spradling v. Spradling, 101 Ark. 451 (semble); Hovey v. Holcomb, 11 Ill. 660; Smith v. Hollenback, 51 Ill. 223; Lantry v. Lantry, 51 Ill. 458; Scott v. Harris, 113 Ill. 447; Champlin v. Champlin, 136 Ill. 309; Davis v. Stambaugh, 163 Ill. 557; Ryder v. Ryder, 244 Ill. 297; Irwin v. Ivers, 7 Ind. 308; Wright v. Moody, 116 Ind. 175; Goudy v. Gordon, 122 Ind. 533; Pearson v. Pearson, 125 Ind. 341; Meredith v. Meredith, 150 Ind. 299 (semble); McClain v. McClain, 57 Ia. 167; Acker v. Priest, 92 Ia. 610 (semble); cf. Byers v. McEniry, 117 Ia. 499; Willis v. Robertson, 121 Ia. 380; Rogers v. Richards, 67 Kans. 706; Philbrook v. Delano, 29 Me. 410; Bartlett v. Bartlett, 14 Gray 277 (semble); Moran v. Somes, 154 Mass. 200; Calder v. Moran, 49 Mich. 14; Thompson v. Marley, 102 Mich. 476; Sheldon v. Carr, 139 Mich. 654; Longe v. Kinney, 171 Mich. 312; Randall v. Constans, 33 Minn. 329; Luse v. Reed, 63 Minn. 5 (semble); Metcalf v. Brandon, 58 Miss. 841; Arnwine v. Carroll, 8 N. J. Eq. (4 Halst. Ch.) 620; Salter v. Bird, 103 Pa. St. 436; Rogers v. Rogers, 52 S. C. 388 (semble); Whiting v. Gould, 2 Wis. 552. See Skett v. Whitmore, 2 Freem. Ch. (Eng.) 280.

[29] In the following cases it was held that there was a trust for the intended cestui because of solicitation of the conveyance, because of actual fraud at the time of the oral promise, or because of the breach of a special confidential relationship. McDonald v. Tyner, 84 Ark. 189; Nordholt v. Nordholt, 87 Cal. 552; Hayne v. Hermann, 97 Cal.

the constructive trust must be enforced for the intended *cestui,* if for anybody.[30] No jurisdiction, it seems, holds squarely that the trust must be enforced for the grantor.[31]

259; Lauricella v. Lauricella, 161 Cal. 61; Dieckmann v. Merkh, 20 Cal. App. 655, 130 Pac. 27; In re Fisk, 81 Conn. 433 (cf. Hayden v. Denslow, 27 Conn. 335); Holmes v. Holmes, 106 Ga. 858 (semble, but see McKinney v. Burns, 31 Ga. 295 semble contra that the trust should be for the grantor and not for the intended cestui); Fishbeck v. Gross, 112 Ill. 208; Larmon v. Knight, 140 Ill. 232; Stahl v. Stahl, 214 Ill. 131; Crossman v. Keister, 223 Ill. 69; Hilt v. Simpson, 230 Ill. 170; Ward v. Conklin, 232 Ill. 553; Newis v. Topfer, 121 Ia. 433; Pollard v. McKenney, 69 Neb. 742; Schneringer v. Schneringer, 81 Neb. 661; Goldsmith v. Goldsmith, 145 N. Y. 313; McClellan v. Grant, 83 N. Y. App. Div. 599 (aff'd 181 N. Y. 581). Compare Rollins v. Mitchell, 52 Minn. 41, and Gates v. Kelley, 15 N. D. 639, where, on conveyance obtained by the false representation that it was to benefit a third person, a trust in favor of that person was enforced.

[30] See cases in notes 27 and 29, supra. In most of the cases denying a trust for the intended cestui (see note 28, supra), it seems to be the silent assumption that if that cestui can't enforce a constructive trust nobody can. See Farrand v. Beshoar, 9 Colo. 291; Willis v. Robertson, 121 Ia. 380; Moran v. Somes, 154 Mass. 200. It was held that nobody could in Irwin v. Ivers, 7 Ind. 308, where the plaintiffs were both the heirs of the grantors and the intended beneficiaries.

[31] It has been supposed that certain cases from Colorado, Georgia and Missouri support the view that the trust should be decreed for the grantor (see 20 Harv. Law Rev. at p. 554, note; 1 Calif. Law. Rev. at p. 334) but in none of those states is there an actual decision in his favor as against the intended cestui. In Hall v. Linn, 8 Colo. 264, the grantor was suing for the balance due him after the grantee, a creditor of his, had paid himself out of the proceeds of the working and sale of a mine conveyed for that purpose and for the purpose of paying other creditors and returning the surplus to the grantor. It was not a case where the third parties—the other creditors—were seeking to enforce a trust, and as the court was not asked to consider the rights of those other creditors it would seem to be a fair inference that they had been paid by plaintiff prior to suit. Hall v. Linn seems to have been a case where an oral trust for the grantor was enforced in the grantor's favor because of fraud in the acquisition of title (8 Colo. at p. 275) and of the fiduciary relation between the parties (8 Colo. at p. 276), though the court apparently did think that fraud in retention would be enough (8 Colo. at p. 275). Von Trotha v. Bamberger, 15 Colo. 1, where a trust was not enforced, was not a case where the grantor could have any right, for he was paid in full for his conveyance. The only question there was whether the grantee, who paid the purchase price to the grantor, was a resulting trustee by way of mortgage, or a constructive trustee, of an undivided half interest in the property, or was bound by an oral contract to convey an undivided half of the property because of part-performance. It does not have any bearing on the question of the conflicting claims of grantor and of intended beneficiaries where the grantee takes on an oral promise to hold for, or to convey or devise to, third persons and then repudiates all obligation. McKinney v. Burns, 31 Ga. 295, which also has been cited in favor of the grantor, was a case where the intended cestuis and the grantor united as plaintiffs in the suit to enforce the trust and no conflict arose between them. The Georgia court now seems to recognize the superior claims of the intended cestuis in any case where a trust is enforceable. See Holmes v. Holmes, 106 Ga. 858, where the intended cestuis were also the heirs of the resulting or constructive cestui who had the deed made. In Peacock v. Peacock, 50 Mo. 256, 261, an express dictum supports the claims of the grantor as against the intended cestui. The case itself, however, was one of a conveyance on an oral agreement of the grantee to sell for the grantor and account to him.

In Newis v. Topfer, 121 Ia. 433, where a trust was enforced because of breach of special confidential relationship, the court said that there was a trust for the grantor and after her death for her heirs, (p. 441); but in that case the grantor's heirs and the in-

In Massachusetts it seems that a constructive trust will be enforced for neither the grantor nor the intended *cestui*.[32] There the grantor probably would be allowed to recover the value of the land.[33]

For any trust to be enforced for the intended *cestui*, it must be clear that all conditions precedent attached to the carrying out of the oral trust have happened.[34]

SITUATION 3.

Where one person pays the purchase money and has the conveyance made to another who agrees orally to hold in trust for, or to convey or to devise to, a third person.

The case where one man pays the purchase money and the title is conveyed by absolute deed to another who orally agrees to hold in trust for, or to convey or to devise to, a third person, is, like situation 1, only a variation of situation 2. It is more like situation 2

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tended cestuis were in fact the same parties, and the court later showed that its earlier remark was inadvertent by stating on p. 442 that "it is to be said that a confidential relation existed between the parties, and in such a case, even though there be no fraud on the part of a grantee in procuring a conveyance to be made to him, still equity will decree the existence of a constructive trust and enforce the same according to the understanding of the grantor as far as such can be ascertained" and by adding on p. 443 that because of the confidential relationship to the grantor sustained by the grantee "it follows that from the beginning his relation to the property and to the cestui que trust must be regarded precisely as though the terms of the trust had been declared in the deed itself."

[32] Moran v. Somes, 154 Mass. 200. That it will not be enforced for the intended cestui, is stated in Campbell v. Brown, 129 Mass. 23, 25, which, however, was not a case of conveyance on oral trust. The case of Howe v. Howe, 199 Mass. 598, is not even semble contra to the dictum in that case, for the grantor who conveyed on an oral trust for the third person was a resulting trustee of the third person, as the grantee knew, and, accordingly, the case was purely one of following trust property. The grantee was a constructive trustee, though the court called him a resulting trustee.

[33] See Basford v. Pearson, 9 Allen, (Mass.) 387; Twomey v. Crowley, 137 Mass. 84. Compare Logan v. Brown, 20 Okla. 334, 336.

[34] In Kimball v. Tripp, 136 Cal. 631, the grantee took title as agent of the grantor to make a certain disposition of the property, but the death of the grantor before the disposition was made ended the agency. Since the agent grantee could not be allowed to keep, the heir of the grantor was allowed to take as constructive cestui. In Arnwine v. Carroll, 8 N. J. Eq. (4 Halst. Ch.) 620, it was intimated that if there was an oral trust and if the oral trust was intended to be a spendthrift one, the court, which could not of course enforce the express trust and did not care to enforce the constructive trust cy pres the grantor's orally expressed intentions, to the exclusion of the intended cestui's creditors, would have to allow the trustee to keep for himself, since in any event the intentions of the creator of the trust could not be enforced. In the same case it is said that if the oral promise of the grantee is to pay the beneficiary a specified sum of money without restriction he should sue at law. But in Ahrens v. Jones, 169 N. Y. 555, the court allowed the beneficiary to recover in equity a specified sum of money promised by the grantee. See also Fox v. Fox, 77 Neb. 601. The New Jersey court did not regard the land conveyed as a trust res or as subject to an equitable lien to secure the payment of the money. For lack of a trust res, there is, of course, no trust where the grantee really gets nothing under the deed. Loomis v. Loomis, 148 Cal. 149.

than is situation 1, for in both situations 2 and 3 the third person for whom the grantee orally agrees to hold in trust or to whom he agrees to convey or to devise pays nothing, but it resembles situation 1, because in situation 3, as in situation 1, the payer of the purchase money may come forward in his own behalf or be put forward by the grantee as the proper constructive trust *cestui,* if one there must be.

In situation 3, as in situation 1, it is necessary to determine the nature of the trust. It would seem clear on principle that in situation 3, as in situation 1, the trust is not resulting but constructive. It cannot be resulting in principle because the arrangement was express at the start, with no room for presumption or inference; and since the express oral trust or promise cannot be enforced because of the plea of the statute of frauds, the only possible trust to enforce is a constructive trust. There is on sound principle a constructive trust or nothing, and as there would be just as much unjust enrichment of the grantee here as in situation 1, if he were allowed to keep for himself, it is properly a constructive trust.

But while the trust enforced is properly constructive, the question of whether that constructive trust should be enforced in favor of the intended *cestui* is not quite the same as in situation 2, for in situation 3 the payer of the purchase money—who, as such, is much exalted in the resulting trust cases—may set up a claim to the constructive *cestui*-ship. It seems reasonable to conclude, however, that the payer of the purchase money ought to stand in equity in no more favorable a position than if he had taken title himself and then had deeded to the grantee on an oral trust for the third person. If he had done that, the intended *cestui* ought to be deemed the constructive *cestui,* and, accordingly, he ought to be held to be such *cestui* in situation 3, despite any claim of *cestui*-ship put in by or for the payer.

Here, however, as in the preceding case, Dean AMES invoked the principle of *restitutio in integrum* to give the payer the better claim.[85] That principle could not be applied literally, of course, for the grantor could not be compelled to refund the purchase money to the payer—the grantor is not concerned in the grantee's default—but an approximation to it is possible. The principle of *restitutio in integrum* not being capable of literal application here, its nearest approximation, according to Dean AMES, would be to make the grantee hand over the property to the payer of the purchase

[85] Ames, Lectures on Legal History 433, note. See same passage in 20 Harv. L. Rev. 549, 556, note.

money.[36] That is not a necessary conclusion, however. The payer by his payment would seem to have put himself, as noted above, in no better position in equity than if he had gotten a deed from the vendor and had himself conveyed to the grantee on the oral trust for the third person, which was situation 2 *supra;* and we are forced to conclude, as with reference to situation 2 we concluded, that the fraud worked by the grantee is worked on the intended *cestui,* who, therefore, should be named as *cestui* of the constructive trust, and that even on the *restitutio in integrum* principle this should be true where the fraud was an afterthought of the grantee's. The payer of the purchase money in situation 3, and the grantor in situation 2, can make no sound complaint at that action because the result is in effect what each sought to accomplish, and the grantee, admittedly a grievous wrongdoer and as such to be whipped of justice, should not be allowed to dictate who shall be *cestui* of the constructive trust enforced against him.

As was to be expected, there is a conflict of authority as to the proper disposition of situation 3, and that regardless of whether a state statute abolishes resulting trusts. In some jurisdictions the intended beneficiary is allowed to enforce a constructive trust,[37] and in others he is not.[38]. In the jurisdictions holding that he is not to be allowed to enforce a trust, the statutes either abolish the presumption of a resulting trust or the trust itself, so presumably in such jurisdictions the grantee may keep free from any trust.[39] In one federal case the payer was given the benefit of a resulting trust on the theory that the intended *cestui,* if he had any rights, was *cestui* of a trust of which the payer, as resulting trust *cestui,* was trustee.[40] That the payer takes as so called resulting, but really constructive,[41] *cestui,* if the intended *cestui* cannot take and if there is no statute forbidding such taking by the payer, seems clear.[42]

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(To be concluded.)

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[36] Id.

[37] Sieman v. Austin, 33 Barb. 9; S. C. aff'd sub nom. Siemon v. Schurck, 29 N. Y. 598; Pfeiffer v. Lytle, 58 Pa. (8 P. F. Smith) 386; Smoke v. Smoke, 11 Va. Law. Reg. 747; Hardman v. Orr, 5 W. Va. 71. See Emmons v. Moore, 85 Ill. 304.

[38] Rooker v. Rooker, 75 Ind. 571; Randall v. Constans, 33 Minn. 329; Connelly v. Sheridan, 41 Minn. 18. See Shafter v. Huntington, 53 Mich. 310.

[39] But see Randall v. Constans, 33 Minn. 329, 336-338.

[40] In re Peabody, 118 Fed. 266.

[41] While really constructive, the trust may nevertheless have been intended by the legislature to be hit by a statute applying expressly to resulting trusts.

[42] In re Davis, 112 Fed. 129; Heiskell v. Trout, 31 W. Va. 810.

ONTARIO COURTS AND PROCEDURE.[a]

II.

The Bar.

I cannot cover this part of the subject better than by quoting literally:[b]

"There are two classes of practitioners, barristers and solicitors. A lawyer must belong to one; most belong to both. The barrister alone can conduct a case at trial; the solicitor alone files pleadings.

"Those in the practice of the law in Upper Canada in 1797 formed a corporation, The Law Society of Upper Canada, which body was reincorporated in 1822 and still exists. In 1794 the Governor was empowered by the legislature to grant licenses to practice law as attorneys; this was owing to the great dearth in the Province at that time of persons acquainted with the law of England. The power was not abused, only a half dozen or so were thus appointed; and the Law Society has been responsible for practically all the practitioners of law since Upper Canada began her legal career, and in all for more than a century.

"Every five years all the barristers in the Province vote by ballot for thirty Benchers, who with certain ex-officio members form the governing body, or Bench. Collectively, the Benchers form Convocation; they fix the standard of education, conduct examinations and call to the Bar. It is necessary for the candidate for call to have been an admitted student of law for five years or for three years if he has a degree of B. A. or LL.B. in some recognized university. After being called by Convocation the young barrister is presented by a Bencher to the Court; he is then sworn, and thereafter he has the right of audience. The Court does not call to the Bar, and has nothing to do with the curriculum or examinations. Nor can the Court hear anyone not "called" by the Law Society of Upper Canada except a party in his own case. Non-professional agents are allowed in the Division Courts but not in the higher courts.

"Convocation has established and maintains the Law School at Osgoode Hall, at which every student must attend; it appoints the principal, the lecturers and examiners. Convocation also fixes the education of solicitors; and upon examining them grants a certifi-

[a] The first part of this paper appeared in the March number of the Review.

[b] The Courts of Ontario; by the Hon. William Renwick Riddell, Justice of the Supreme Court of Ontario; 62 Univ. of Penn. Law Review, 17 (Nov., 1913).

cate of fitness. The same requirements as to time of service as an articled clerk are imposed as in a case of a barrister. Upon the certificate of fitness being presented to a judge of the High Court, he grants a fiat for admission of the candidate as solicitor, and the oath is administered before the judge. Thereafter the new solicitor may practice in all the courts as solicitor.

"Every barrister and solicitor pays an annual fee to the Law Society and is subject to discipline of the society at all times. Any member may be removed or disbarred for cause.

"There does not seem to be any advantage in retaining the distinction between barrister and solicitor, but as it does no harm, and as we Canadians are an essentially practical people making no pretense of and caring nothing for logical consistency, we do not change simply for the sake of change. If any practical disadvantage were felt from the distinction it would not last six months.

"In the profession of barrister there is also a division into King's Counsel and members of the Outer Bar. King's Counsel are appointed by the administration for the time being of the Province. They have the privilege of wearing a silk gown and a peculiar form of coat and waistcoat. All other barristers are "Stuff-gownsmen" and wear a stuff gown. King's Counsel sit in the front row in appellate and weekly courts and have occasionally the right of preaudience. This is of small value and the distinction of being a King's Counsel is not much of an advantage. It is a relic of English practice and of no practical use but it does no harm and is therefore not abolished."

The principal point I wish to make is that the bar of Ontario is far nearer to the bar of the typical state than to the bar of England. The word "barrister" is not used nearly as commonly as "lawyer." The practice of retaining special counsel for trial is no more common in Ontario than in the States. The only difference is the insignificant one of ceremony, for the barrister who engages special trial counsel temporarily lays aside his gown and foregoes his right to address the court directly. But in the very next cause on trial he may resume his gown and with it full privileges.

A sermon could be hung on the coveted letters "K. C." It seems eminently practical that the really distinguished members of the bar should be openly recognized as such. The King's Counsel do not constitute an order. They belong to the Law Society of Upper Canada on precisely the same footing as other lawyers. They are not restricted in their field as in England.

There was reason why our forefathers should have swept away all traces of hereditary privileges but their zeal became fanaticism

when they deprived us of the opportunity for recognition of social and official worth. We have lost one of the strongest incentives for public service. And while we have imagined that we were stifling all privilege and all class distinctions, there has grown up among us that worst and most blatant of orders, the class that derives its sanction from wealth.

That the need for distinction is real is evidenced by our free adoption and corruption of such titles as "professor," "colonel," and "honorable."

The eminent authority whom I have quoted omitted reference to the existence of the Bar Association of Ontario. The Law Society is a corporate body and is all inclusive. To be sure a "solicitor" as such is not included, but the free functioning of barristers has prevented the development of a class of solicitors to correspond with the solicitors of England. Chief among these factors of freedom are the rights of the Ontario barristers to form partnerships and to accept annual retainers. (Throughout Canada the compounding of retainers for an annual salary and the acceptance of a single client, whether a private or municipal corporation, is looked upon with disfavor as a step toward commercializing the profession.[5])

The Law Society is eminently the working organization of the bar. But there is a need in the bar for the expresion of opinion individually on public matters and for social intercourse. In Ontario this is properly recognized as quite different from the need for legal education and professional discipline. So the Bar Association with its exclusive and voluntary membership came into being. The fact that the Bar Association is identical with bodies of like name on our side of the line supports my view that our associations are entirely unsuited, by their very nature, for establishing or enforcing standards of conduct, in short, for the discipline of the bar. It seems to point with equal force to the conclusion that both kinds of organization are needed.

While admission to the bar is almost universally through the portals which the Law Society guard, it is of course possible for Parliament to make a candidate a barrister by a special act. The Law Society evidently holds that it has no power whatsoever to modify its requirements. I have in mind a mimeograph letter issued in 1913 by an unsuccessful candidate appealing to members of the bench and bar for their influence in support of such a private bill. The letter recites the fact that its author failed to pass "the

[5] See address of Robert C. Smith, K. C. of Montreal, in 1913 Report of Pennsylvania Bar Association, p. 219.

matriculation examination in an Ontario university," but as he is over fifty years of age and the examination was on subjects entirely outside of the law, he felt justified in asking Parliament to pass a special act to permit the Law Society to admit him on passing the "final." The letter was issued in advance of a third attempt to prevail on Parliament, a campaign extending over six years. There was no wish to escape the "final" examination, or to be admitted if he could not pass it.

This sort of thing would doubtless appeal to many American lawyers as nothing short of tyrannous. To become a lawyer in Ontario one must actually attend school and the course of instruction and examinations are just as stringent as the bar may choose to make them. It is impossible to be admitted to practice as a matter of courtesy and then learn the law at the expense of clients.

The aspirant to legal honors must indeed make sacrifices in Ontario. No greater of course than are made by students for medical or engineering degrees in all countries, but there must be fair ability, genuine application, and the expenditure of a considerable sum for tuition. But when admission is won finally there is compensation. The candidate finds himself in a profession which is looked up to. He is free from the demoralizing competition which dulls the conscience of the young practitioner in the States. He is not impelled by starvation to cruise along the ragged coast of impropriety.

It is estimated that in the United States only fifteen per cent of the men admitted to the bar come from the law schools. We have also some schools which are notoriously insufficient and in all but a few the entrance requirements are too low. The universal reply to these reflections is that many good lawyers result from our lack of system; it should be met with the axiomatic statement that any man with pluck and brains enough to win his way at the bar would not be kept out by such requirements as those imposed in Ontario.

In a few states where examinations for admission have been made adequate the applicants almost necessarily are forced to attend a good law school. We are arriving in a few states at much the same condition attained in Ontario, but by an indirect and painfully slow process. As a final argument against innovation, conservative lawyers will likely assert that giving the power of admission into the custody of the bar itself makes it a monopoly, but it will be hard to get the public to shed any tears over a monopoly calculated to restrict the number of lawyers. The lack of restriction and dependence wholly upon the natural law of survival of the fittest, which has

prevailed in the United States and nowhere else in the world, injures alike the profession and the public. In fact their interests are identical. It is impossible to improve the profession without conferring benefit upon the public.

The people of Ontario have the power to upset the status at any time they wish through suitable legislation but there could be no proposal less popular in the Province than one looking to the lowering of the requirements for admission for the sake of adding more lawyers. In this they are doubtless like the people of all other countries who are not to be converted to the silly doctrine that they need more lawyers or that a multitude of indifferent lawyers is better than a fair quota of educated and self-respecting lawyers.

Procedure.

"We have got rid of form," said Mr. Justice MIDDLETON of the Supreme Court of Ontario as an introduction to the subject of procedure. It was Mr. Justice MIDDLETON, known as an expert on procedure before his appointment to the bench, to whom was intrusted recently the revision of the rules of court. He succeeded in condensing the rules to about one-half of the space they formerly occupied.[6]

"We have got rid of form. We have chased the old hindrance to common sense out of the Province. No longer can a person suffer in the courts of Ontario because of a matter of mere form. We are absolutely free now to administer justice according to the substantial rights of the parties, unrestricted as to formalities. Form is no more with us!"

"Except we can still invoke it if necessary to avoid an injustice," broke in Mr. Justice RIDDELL.

The principles underlying Ontario procedure are those which have operated successfully in England and Wales for forty years. Inasmuch as the same statement applies to all parts of the Empire there is reason for the belief that these principles are the bed-rock of judicial administration.

The essential difference between procedure in the States, whether under code or common law, and procedure in Ontario is here: in the States we provide for the litigants a cockpit in which they shall conduct their fight; the rules are liberal; they can bite, scratch, kick, and hit below the belt; the original controversy suffices to gain admission, and after that fresh grounds for controversy arise at every stage of the proceedings.

[6] The new rules took effect in September, 1913. See Canada Law Journal, June, 1913.

In Ontario the issuance of process means that a powerful piece of machinery has gripped the dispute and the parties and will not release them until it has adjudicated their rights. A responsibility is assumed by the entire judicial department of the Province when original process issues. There is such a solidarity to this branch of government that it can act with entire singleness of purpose and so discharge its clear responsibility thus definitely assumed.

The litigant who applies for relief must first assume a responsibility and this he does by filing his statement of claim. The defendant then must make an affirmative showing that a justiciable controversy exists or submit forthwith to judgment. A condition of mutual responsibility between the court and each litigant is thus established. All that is needed then is sufficient freedom on the part of the court and the natural self-respect which flows from the exercise of high authority to warrant efficient management of the situation.

In a general way this freedom and power comes from the right of the court to make its own rules, which implies the disposition to treat them as rules and not as substantive law. The rules themselves confer the utmost freedom for amendment and for bringing in other parties or other phases of the controversy than that first presented, in order that complete justice may be done in a single proceeding.

It will be seen at a glance how far from the common law theory of procedure England and Canada have gone. That narrowing of the issue by a mechanical process which still elicits the admiration of the common law practitioner in the States often precludes the doing of real justice.

One of the significant developments of the new principles lies in the settling of all incidental and procedural questions in advance of trial. Under the system which prevails with us the litigant is encouraged to take advantage of any departure from ideal form, to tuck a card up his sleeve as it were, and hold it there until the game has progressed so far that there can be no correction without beginning anew.

Not only is the subject matter enlarged at any stage in order to do substantial justice to all concerned, but the court, by virtue of the merger of law and equity, possesses all power with respect to the remedy to be chosen. Conflict is avoided by giving the equitable rule precedence.

In the narrow field of pleadings there is also a complete divorce from common law philosophy. The old rule that the pleadings must sustain the judgment needs only to be understood historically to be

upset by any modern rational scheme. It had its origin when the record was a small strip of parchment. Obviously the pleadings noted thereon must sustain the judgment as a necessary check against venality. But the modern record of testimony makes the old rule unnecessary. The true philosophy now must be that the judgment rests upon the entire record.

The theory which supplants the ancient rule with respect to pleadings is that they exist, not as a foundation for the judgment, but to give notice to the court and to the adversary. In Ontario the question with regard to pleadings is limited practically to the sufficiency of notice.

This brings pleadings to a businesslike basis. Usually proceedings are begun by writ of summons indorsed with a short statement of the cause of action; and this is the case whether the action be in contract or in tort, legal, or equitable, for goods supplied, or on mortgage of for slander.

In certain cases the cause of action is such as to permit of a "special indorsement," as a debt or liquidated demand in money arising out of a contract. Upon appearance entered, if indorsement is special, the plaintiff may file an affidavit verifying the cause of action and saying that in his belief there is no defense, and serve the defendant or his solicitor with a notice to motion for judgment. Then unless the court is satisfied that the defendant has a good defense on the merits, judgment will be given. This procedure is similar to special indorsement under the English rules, which effects a summary disposal of matters that do not admit of successful defense.

Under the new rules, when a writ is specially endorsed, the defendant must with his appearance file an affidavit that he has a good defense on the merits, showing the nature of his defense, and the facts and circumstances which he deems entitles him to defend. He must serve forthwith a copy of this affidavit on the plaintiff and the appearance is not received without the affidavit. The plaintiff may treat this as a statement of defense—or he may examine the defendant on it, and if it be disclosed that the facts do not constitute a defense, move for judgment. In some rare cases, even before appearance, the plaintiff may obtain leave to serve notice of motion for judgment and if he shows special circumstances may obtain immediate judgment.

The procedure throughout gives the impression that it is intended to assist creditors. Much of our contentious procedure is nothing but procedure on behalf of debtors. As long as the majority of citizens were debtors, and the few powerful and wealthy were

creditors, there was little complaint. But now conditions are reversed; the most persistent and elusive debtors are the powerful and wealthy corporations; the average citizen is solvent and is a creditor and investor. He finds the procedure of an earlier national epoch adapted to the defeat of justice by delays of various sorts. This may in part explain the general dissatisfaction with the ways of courts.

One of the features of our typical procedure is a presumption that the defendant in every action will in time present a substantial defense, which is nothing less than an invitation to debtors to engage counsel and go into court to "stave off judgment." The felicitous result of this looseness is that the court, which monopolizes the road to relief, becomes a virtual protector of the malefactor. The court becomes a fence to which the debtor flies for protection from the consequences of his own acts.

The pleadings, consisting essentially of the statement of claim and statement of defense, set forth the respective claims of the parties in ordinary language with a statement of the relief claimed. There is no opportunity for a metaphysical analysis of pleadings. If they are sufficient as notice they are good.

The expectation is that the parties will settle pleadings, preliminary motions and objections, and time of trial, before a master, so that when the cause is called in court there will be no incidental issues to cause a waste of time.

One of the very important matters thus effected before trial is the opportunity afforded for examination and discovery. After approval of the pleadings either party may obtain an order to produce. Then either party may be examined on oath before a master or examiner generally upon the whole cause. This examination for discovery is resorted to in nearly every contested cause and results in amicable settlement of a considerable proportion.

Causes lacking merit are weeded out and no time in open court is consumed. If the defense is flimsy, plaintiff gets judgment forthwith at a minimum of expense to both parties. It is inevitable that many suits would never have been brought if all the facts were disclosed. Mr. Justice RIDDELL says:

"I have found that the examination for discovery leads to the settlement of at least one-third and perhaps more of the cases that would otherwise be tried, and I have found it exceedingly valuable."

We have also many settlements before trial but a settlement effected through dread of expense or the uncertainty or delay of judicial proceeding, in the absence of precise knowledge of the opponent's strength, rankles in the breast. A settlement effected

with full knowledge of the adversary's ability to educe proof is an automatic adjudication calculated to establish the substantial rights of the parties.

But in our practice neither side can afford to play the game face up. Too often the principal thing is to catch the other fellow napping. Where the contentious system is permitted to run mad there can be no truce while the parties parley, for neither side can afford to take the first step.

Coming now to trial it should be noted that the sane use made of the jury in Ontario constitutes the most striking difference. The presumption is in favor of the individual juror's qualification. Jurors are never catechized and a challenge for cause is a very rare thing. Even in murder trials it takes but a few minutes to make up a jury.

The court has the right to refuse a jury in any civil cause except in actions for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false improsonment, in which actions a jury will be employed unless the parties waive such trial. In causes arising from contract, juries are seldom called. The court of course reserves the right to call a jury at will and may do so even in a cause of an equitable nature if there be serious divergence as to fact and the cause may turn upon the credibility of witnesses.

The judge also has the right to discharge a jury at any stage if it be a cause *ex contractu*, or to disregard any verdict. Pettifogging tactics are squelched very easily.

Ten jurors may render a verdict. In most trials the jury is asked to give answers to questions of fact submitted to them in writing, and in such cases the jury have no right to give a general verdict. The judge enters the appropriate judgment upon the answers of the jury. If he considers that any answer has no evidence to support it, he disregards such answer; but he cannot order a new trial.

The number of causes tried by a jury is not large and it is steadily diminishing. Ontario has furnished for most trials a medium better in every way than the jury so that litigants voluntarily relinquish the outgrown method. In Quebec and in France, where there has long been opportunity for trial of civil actions by jury, the people prefer the judge because they distrust the common mind. Is it not a fair inference that our regard for jury trial evidences distrust of the judge, and that to wean our people from this species of trial by lottery, we must give them judges invested with such power that they can compete with jurors for the litigant's trust and confidence?

So in Ontario the jury has become what it was originally—an assistant to the judge. Seen in that light it is a sane and practical adjunct to the court and even for civil matters will probably never fall wholly into disuse.

The feature of Ontario trials which most surprises the visitor from the States is the informality in examining witnesses. It is quite common for witnesses to be held *incommunicado* and this makes it easy to unmask the liar. We should resort to this simple method far oftener than we do. A free use is made of leading questions until the nub of the story is reached and then the witness is encouraged to tell the affair in his own manner. A great deal of irritating and useless cross-examination is obviated by construing the testimony, in the absence of special grounds for suspicion, as the statement of a truthful and rational person. I will again quote Mr. Justice RIDDELL:[7]

"We do not have much bother about admission or rejection of evidence in our courts; unless we can see that the exclusion of evidence or the admission of evidence has led to some injustice, then we pass it by. Matters of law as a rule are the determining factors in the appellate court; although there are occasionally cases in which appeals succeed upon the ground of the non-admission of evidence or the admission of evidence which ought not to have been admitted. If a case is tried before a judge, and he has improperly admitted evidence—and I may say that is the rarest of all contingencies, because as a rule we admit the evidence subject to objection and then we never allow it to influence our minds, of course—if a judge has refused the evidence improperly, the Divisional Court does not as a rule send the case back for a new trial, but the court often says, 'We will sit on such a day; you can bring the evidence you desired the judge to hear and we will hear it here.' We hear the evidence and determine the case then and there, without sending it back with all the risk, expense, inconvenience, annoyance, and trouble of a new trial. If there is a row about the pleadings we say: 'Very well, we will amend the pleadings.' If a lawyer says: 'If that amendment had been made in the court below, we should have had other evidence,' we may say: 'Very well, what day will suit you? We shall hear your witnesses.' One of our substantial rules, and one of the rules more beneficial than perhaps fifty of the other rules is this, all amendments are to be made which are necessary in order that judgment shall be given according to the very right and justice of the case. No case in Ontario fails from the defect of form—that is one

[7] The Courts of Ontario; New York Bar Association Report for 1912, p. 806.

of our rules. Again, no disregard of forms laid down, or disregard of the time under which proceedings should be taken, no disregard of terminology, according to our practice, bars a man who has a right, of his right."

I saw a trial in the Toronto Assize which will illustrate the informal and flexible procedure and especially the opportunity for adding new parties in order to embrace the entire controversy. The plaintiff, Mary Smith, sued a certain broker. She had bought mining shares over a period of five years and on final accounting believed that she had been defrauded. Following the usual custom the broker had held the certificates in his vault and plaintiff had never had them in actual possession or even seen them. At the start it was explained that plaintiff's sister, Kate Smith, had also dabbled in stocks, had also employed the same broker, and had begun suit in her own behalf in the County Court of the same county. Counsel for defendant said that the controversy had arisen from a confusion of the two accounts, that his client had bought all the shares ordered by either or both of the customers, but could not say whether certain orders had been joint or individual, or whether he had delivered to each plaintiff the shares which each had intended to buy individually.

"I will move the case of Kate Smith from the County Court to this court," said his lordship. "During the lunch hour you will get the record of the case of Kate Smith and have it here at two o'clock. I will also join Kate Smith as a party to this action—with consent. Is it so understood?"

At two o'clock the court was prepared to ascertain the rights of all three. "It is understood now that Kate is a party to this action, and I have taken jurisdiction of the suit which she started in County Court. Proceed." With this foundation it was disclosed in less than an hour that a misunderstanding had arisen because one sister had at times acted for the other in buying shares. The broker had supposed these purchases to have been made jointly. The accounts had become so confused that it would have been impossible to ascertain the rights of the parties in two separate actions. The judgment was that Kate should transfer certain shares to Mary. No costs were allowed the broker, because, as the learned justice said, he should refuse to deal with women, or take the natural consequences.

With the lack of unification which is almost universal in the States it would be impossible to adjudicate a cause of this sort consisting virtually of two actions each in a different court.

A visitor will also be startled by directness of methods in the Appellate Divisions. I was once listening to argument on appeal.

In the afternoon, approaching time for the court to rise, it was found that the record did not disclose a certain fact which had become essential. Under our system nothing could have been done but remand case for retrial. The chief justice turned to one of the barristers and asked if he could ascertain the point in question.

"I can tell by asking my partner," he replied. The partner was at some distance in another city.

"Wire your partner at once," the chief justice directed, "and when the court sits tomorrow morning be prepared to give us the information." And on the following morning I attended court again, expecting to hear the opposing barrister emit a lusty roar. But instead two telegrams were handed to the judges, the decision was announced in acordance therewith, and there was not a single word of objection.

Ontario judges are inclined to attribute a great deal of their economy of energy to the rules governing amendment which read as follows:

> "The Court or a Judge may at any time amend any defect or error in any proceedings; and all such amendments may be made as are necessary for the advancement of justice, determining the real matter in dispute and best calculated to secure the giving of judgment according to the very right and justice of the case.
>
> "The Court or a Judge may enlarge or abridge the time appointed by these rules or any rules relating to time or fixed by any order for doing any act or taking any proceeding, upon such terms as may seem just; and an enlargement may be ordered although the application is not made until after the expiration of the time appointed or allowed."

Commenting on this point, Mr. Justice RIDDELL said:[8]

"The other theory is that Courts are instituted to do justice between man and man, to see that every one gets his rights irrespective of the way in which his lawyer asks for them. Accordingly, the present practice which we try to follow—and our rules are laid down specifically in that view—is to get out what the facts are, and if the pleadings do not enable the parties to prove or rely upon these facts, amend the pleadings. If one party is inconvenienced or put to disadvantage, make him who has made the mistake pay the costs. Amend your pleadings, get out all the facts that bear on the issue and determine the matter according to the very right and merits of

[8] Practice, Civil and Criminal, in Ontario; The Hon. William Renwick Riddell; New York State Bar Association Report for 1912, p. 806.

the case. It is the client, after all, who has to pay the shot, and it is the client that should be considered, what harm if the record does get a jolt now and then."

There is reasonable expedition in the courts of Ontario. No such pressure exists as in the English courts, where every minute must see progress. Generally speaking there is no reason why the litigant in an important matter cannot have his cause tried within six months from issuing of the writ, and usually in much less time. And his appeal can be disposed of within two months of the trial, unless the vacation intervenes. But so close do the Appellate Divisions keep to the trial branches that when vacation begins there are only a few appeals left on the docket.

It is this absence of glutting in the reviewing branches and the few instances of remanding for retrial that make the progress of litigation keep pace with wishes of suitors. Under such circumstances the prolonging of causes to suit the convenience of counsel, which subjects our courts often to unfair censure, cannot occur, because the Ontario barrister cannot shift the blame from his shoulders. The people know that the courts stand ready to perform the public service for which they exist. If there is vexatious delay they know whom to blame.

As for economy of time in the court-room, a matter which is of far greater concern to the public because of expense than to the individual litigants, there is a wholesome status arising largely from the fact that the jury is only an adjunct of the court, not a fetish to which the judge is tied, as with us. And as to this matter much depends on the temperament of the judge. It is the custom of some judges to encourage the dismissal of witnesses brought to substantiate allegations which should be admitted, to shorten cross-examination, to pare the case down to its essential facts and to discuss the precedents informally with counsel, so that there is very little room left for oratory. This is similar to the practice in London, and while it may permit of getting through three or four trials in a day, there is no lack of courtesy to counsel and no impression that the trial lacks thoroughness.

On the other hand another Ontario judge may refrain from exerting pressure on counsel so that trial progresses in the easy and comfortable manner of a hearing in chancery on our side, though with fewer exceptions raised. They have the practice of usually retrying a cause after a disagreement at the same term. This not only works to the advantage of the sincere litigant but also prevents the shading of testimony and loss of witnesses which may result from postponement to a later term.

The personality of the judge is a factor in trials which appears to lead to confusion of thought among observers. While law and its administration is not a science, there is such a thing as judicial art. Some judges and some lawyers make an art of their exacting work. They accomplish a great deal more with the same expenditure of energy. Seeing this, reformers exhort the struggling judges of the common garden varieties to do likewise. Then, when the advice goes unheeded, there is a clamor for legislation intended to make all judges on a par with those specially endowed by nature.

The courts of Ontario are not charged with the keeping of statistics. On the other hand they are far from being in the disorganized condition with respect to data which marks our courts. The work is in the hands of a Provincial official known as the Inspector of Legal Offices. An annual report is made showing the number of actions of every sort in every part of the province with especial regard to the financial side. It would be better if these statistics were collected by the registrar of the Supreme Court under the direction of the Minister of Justice. Some person more directly connected with the department would doubtless add to the bare figures deductions which would be of extreme value, and make the annual report a readable document instead of a mere collection of tables. No criticism of the Inspector of Legal Offices is intended because it would be invidious for him to publish more than the bare facts.

In General.

The writer may be accused of being wildly enthusiastic about Ontario courts and procedure. But it isn't so. I do not think that Ontario courts are a bit better than they ought to be. There is still room for improvement, and it seems plausible that the young men reared in the spirit of the new rules will continue the work of adaptation and simplification which has been in progress already for nearly a generation.

They have in Ontario a plain, straightforward, working organization with no dark alleys and no ornamental frills. Its success lies in its poise. Progress has been made to the point indicated by present needs. So thoroughly representative is it of the conscious, critical, efficient democracy of the Province that it is bound to keep pace with all future demands. There can never be a serious quarrel between the people of Ontario and their courts, for they are one and the same thing. The courts are the people, functioning in a particular manner, and the people are the courts.

It is not necesary to go to Ontario to get a pretty definite idea of its judicial system, but it is worth while if only to get a per-

spective upon our own courts. In Ontario one hears the confused sounds from across the border as chaotic notes. It is not that the instruments are out of tune. The trouble is that there is no director. The great orchestra is trying to render several airs at once.

A student of our system cannot avoid profound sympathy for our judges who are held responsible, though without having power and unity to acquit themselves. And after gaining the perspective afforded by pursuing his investigation in Ontario the student will enlarge his sympathies to include the American lawyer. One comes to think of his work as the production at a prodigious expenditure of cerebration of a cobweb which is so nearly perfect as to pass for genuine—but only a cobweb.

And here it may be timely to consider the natural attitude of the American bar toward such a comparatively simple and direct procedure as has been related. The first and the overpowering impression will doubtless be that any trend in this direction necessarily implies sacrifice on the part of the lawyer. But there is room for a second thought.

In the first place the lawyer gets considerably less than half of his total remuneration from the trial of litigated matters. Only a small proportion of all causes ever reach trial. Not many lawyers are paid on a *per diem* basis. And back of all and most important is the eternal verity that no profession in the long run receives pay on any basis except that of *quantum meruit*.

Our system is admirably designed to make work for the lawyer. If the pay was in proportion to the time and nervous energy consumed, our bar would be the best paid in the world. But it is not. We have exceptional cases, but the American lawyer on the whole is a poorly paid agent. Is there any connection between the low financial rating of the average lawyer and the halting and uncertain service which our system permits him to render?

"The people of Canada are satisfied with their judges and their administration of the law, and yet they have absolutely nothing to do with their selection or appointment."[9] I quote from a recent very able comparison of Ontario and Pennsylvania courts.

Surely the scholarly author of the foregoing would not wish to abide by the latter proposition! The people of Canada have everything to do with the selection of their judges. The people of Canada themselves select all their judges and they do it through a system which guarantees genuine popular selection. Any intelligent

[9] Canadian and Pennsylvania Procedure; by David W. Amram; 62 Univ. of Penna. Law Rev., 269, 277 (Feb., 1914).

Canadian, whether judge or layman, would be moved to ironic laughter if told that the people of Canada do not select their judges. And he would be likely to say something snappy and entertaining about the way the people of most of the States select their judges.

In Canada judges are chosen explicitly by the leaders of the party which is voted into power by a majority of the people. It is only by some form of delegation, by some method of representation, that the people can rightly select judges or do anything else involving conscious and deliberate choice. As compared with the election of judges in the typical American city it is the difference between selection in the hands of irresponsible persons, made in the dark, and selection by highly responsible representatives working in the open. As compared with election in the rural districts, it is the difference between a number of worthy people, acting under many disadvantages, and a few who have a free hand to do the best they can.

On the theory that this is not real democracy, that Canadians do not select their judges, we should have to say that the people of the United States do not make their own laws or execute them; that they do not government themselves except in the rare instances when a franchise or some definite proposition like a bond issue is submitted on referendum. Even in the adoption of our deified constitutions it is notorious that a comparatively small percentage of the electorate have anything to say as to the matter to be submitted, or are qualified to speak.

But democracy cannot rest on mass action of the entire electorate. This natural, inevitable, mechanical limitation when considered with reference to the exercise of special judgment as in the selection of such experts as judges, is preposterous.

It is not merely expert selection that is afforded by the Ontario scheme of delegated powers, but quite as much the fact that selection is by a person directly charged with responsibility for the administration of justice. We need closer thinking on this point. Objectors who point to certain unpopular selections for the United State Federal Court judgeships should realize that the choice is made by one or two senators, and senators are not remotely responsible for the administration of justice. They have responsibilities in fact which are competitive with their natural desire to see the office filled by a man acceptable to the people.

If we had an elected minister of justice he would be the logical person to select United States judges, because he would represent the people, would be accountable to them, and would be directly responsible for the administration of justice. It is not a long step to

the creation of a minister of justice for a state, because unification of courts implies a single administrative head, who will, despite his title, be far more a minister of justice than a chief justice. It would be a logical development to impose upon the chief justice, subject to reasonable check, the appointment of all such judicial officers that cannot, from the very nature of the office, and the inherent limitations upon mass action, be better chosen at the polls.

Long service has made so many fair judges from ordinary material that there is argument in support of the view that life tenure is more important than expert selection. At the present time we are not in a proper frame of mind to discuss tenure dispassionately. Curiously enough the most powerful reform influence has concerned itself, in a perverted way, with the question of abruptly terminating judicial tenure. Probably in time we shall realize the absurdity of balancing the egg on the small end, and then we may see that there has been some truth and some error on the part of both friends and foes of the judicial recall. The idea of recall in some form as a continuing potentiality, appears, from the Ontario experience, to be the correct solution of the great problem of discipline, for which problem frequent and periodic election is instinctively felt to be a failure. The ever present contingency of recall may be also the natural concomitant of what we call life tenure. But in recalling a judge, quite as much as in selecting one, there is need for deliberate choice based upon adequate information, and for this function the electorate should delegate its power to an open, recognized, accountable agency.

This is the case in Ontario. The Supreme Court judge may be removed upon an address of both houses of Parliament. The people of all parties are represented in Parliament and a resolution can be introduced by any representative willing to stand sponsor for it. It is sincerely believed in Ontario that no undeserving judge could avoid resignation if his name were merely mentioned in a hostile spirit on the floor of the house.

In the case of County Court judges the recall can be initiated by any person or group of persons, and no formality is required. They simply need to inform the Governor General of their complaints. If these complaints are obviously unfair or partisan or hysterical they serve at least as an outlet for feeling. If there is remediable fault it is easy to bring pressure to bear where it will avail. If the complaints make a *prima facie* case which warrants removal, the Attorney General can not long prevent investigation, even presuming him to have a personal or partisan interest, which is almost impossible. But there is assurance of intelligent pro-

cedure so that the individual judge will not suffer unjustly, and so that the public service will not lose an officer in whom a big investment has already been made. This is the recall in a practical form, one shorn of potential folly, not a piece of political buncombe.

The judge appointed for good behavior necessarily ceases to be a politician or a political figure, and this alone would seem to justify the long tenure. Such a judge remains through successive administrations so that there can be no continuing pull with the party in power. No pull is exerted either way. The judge is free to perform the duty for which he is accountable. It is the consummation of political wisdom when the incumbent of office has his personal inclination made to coincide with his public duty. There is nothing further or better.

"The people of Canada are satisfied with their judges and their administration of law." This is certainly the fact, though a meticulous and unfair critic could raise an issue. This is due to two causes. Canadians are intensely partisan. Their political system is all shaped to fan partisanship. They have no vacation between campaigns. As soon as a party is placed in power the campaign to displace that party is begun. There is freedom of speech there fully as great as ours. In fact their newspapers take the brunt of the fight and some of them seem to exist for no other purpose.

The Canadian political system is admirably adapted to meet new conditions but it has this dark side of perpetual misrepresentation, and the "outs" do not hesitate to criticize the judges along with all other officers. The intention is to embarrass the government for alleged sins of omission or commission, as the case may be. Everything done under judicial process, civil or criminal, is in open daylight. Let a politician be arraigned in court in British Columbia or in Prince Edward Island and the next morning the papers published in every city in the Dominion are commenting on the magistrate in terms vitriolic or emmolient according to their alignment.

Another reason why one could gather critical reports is the rather ludicrous one that the shadow of inefficiency in judicial procedure has been projected from the United States across the boundary. An instance was cited of a Toronto editor who wrote a long screed upon the delay and expense of litigation and later admitted that he had gained his ideas wholly from reading New York exchanges. The need for resisting this insidious foreign influence, to avoid being inundated by a more numerous people, is one of the causes for the growing solidarity among Canadians.

There is no reason why pride or injured vanity should stand in the way of according to Ontario all the credit which is due for effi-

cient administration of justice. The facts are that Canadians have done no better than they should do, and we have fallen short, not because we are inferior, but because our burden has been greater. We have been carrying such a load of transcendentalism that we could not see the road or properly identify the simplest real objects along our route. We have always as now been incumbered by an artificial and academic scheme. Our state constitutions are modeled upon a constitution which was intended to be static. If the world had continued in the beaten paths of the ages our system would still suffice, for it is designed wholly to preserve what has been attained, and in order to do this readjustment and change must be restricted or prevented. Opportunity for local experiment, which is the great merit of our federated nation, has been choked by the copying of old constitutions in new states. But the parent constitution leaves within the scope of state government sufficient freedom for development, and now that we are waking up we have but to exercise that power and it is ours.

The first inroads of modern rationalism against feudalistic procedure appeared in the FIELD code and we have reason for pride in this achievement. But it came too early. The seed fell upon stony ground. In the absence of experience and foresight, false theories were embedded in code procedure. The whole world of thought is now dominated by ideas and principles which came into being after the code movement was launched. It has well been said that the administration of justice, like all phases of government, depends after all only upon applied knowledge of human nature. Our fund of knowledge as to what people can do and cannot do, has been so augmented since the times when DARWIN and SPENCER were publishing that an academic system projected before that day is assumed, almost necessarily, to be full of errors.

Of course the law is the last field to react to new philosophy, but it is yielding at last. The lawyers and judges may be as well versed as any men in modern philosophy, but after their conversion it takes a long time to change the forms. We must first live the new philosophy and there are strong evidences that we have been doing so. The newer ideals in penology are evidence of the fact. The commercial lawyers's regard for results is another.

We have a strange timidity regarding delegated powers and this is naturally most expressed in the public attitude toward the courts. More so with us doubtless because courts mean more to us than to our neighbors. This has been called the Puritan jealousy of power. It seems to me to be rather the distrust and hesitancy which comes from a long series of disillusionments. Our constitutions guarantee

in a way liberty, equality, happiness, SUCCESS, and we are brought up to believe in them without stint. We are like children who have dwelt too long in fairyland and are distrustful of everything, including themselves, when disillusionment comes.

Nothing could more strongly argue the need for readjustment than this almost universal distrust. Where it is strongest, it will be in vain to ask the people first to make an apparent sacrifice of powers, however much to their practical interest. Public confidence must be won in such states by first achieving efficiency through better court organization and rational procedure. In certain other states these changes are all that are needed to make a modern system.

We have in every state inherent political power to shape an efficient organization and develop businesslike and sensible procedure without conflict with the Federal constitution. We do not need inventors or clairvoyants, muckrakers, or hair-shirt prophets; experience elsewhere is sufficient, so we need only to select and adapt. It seems reasonably certain that no effort in line with the tremendous economic pressure of the times will be wasted and that ultimate success will be ours.

HERBERT HARLEY.

CHICAGO.

NOTES ON SOME INTERESTING WILLS.

IN treating of this subject no attempt is made to deal with wills analytically or with much technicality. Rather is it the writer's aim to call attention briefly to some wills, ancient or modern, which stand out from the great mass for one reason or another. It would be easy to enlarge this into a treatise on the general theories of will-making; of the customs of different times and localities which sanctioned this or that form,—of nuncupative wills, holographic wills, and the secret or mystic testament provided for by the Louisiana Code,[1] which is sealed up by the testator and, so sealed, delivered by him to a notary in presence of seven witnesses, all of whom, and the notary, write their names on the envelope. But it is not the process of will-making which we are to consider; we are simply to note some unusual specimens of wills which have been made.

A will is popularly defined[2] as "the expressed wish with regard to the disposal of one's property after death," or in the more technical language of the law-writers, "a will or testament is a lawful voluntary disposition of property, to a competent donee, by anyone competent, and to take effect upon the death of the testator, unless sooner revoked." As we use it, the term "will" covers both the old English will, which disposed only of realty, and the *testamentum* of the Roman law which transferred personal property at death.

The many ways in which testators have twisted their plans, or had them thwarted by the Courts or by Fate, have given writers much material for discussion. HAZLITT in "TABLE TALK" says, "Few things show the human character in a more ridiculous light than the circumstance of will-making. It is the latest opportunity we have of exercising the natural perversity of the disposition, and we take care to make good use of it. This last act of our lives seldom belies the former tenor of them, for stupidity, caprice and unmeaning spite." Again he says, "An old man is twice a child; the dying man becomes the property of his family. He has no choice left, and his voluntary power is merged in old laws and prescriptive usages. The property we have derived from our kindred reverts tacitly to them: and not to let it take its course, is a sort of violence done to nature as well as custom. The idea of property, of something in common, does not mix cordially with friendship, but is inseparable from near relationship. We owe a return in kind, when

[1] La. Code (1900) § 1584.
[2] Century Dic.

we feel no obligation for a favor; and consign our possessions to our next of kin as mechanically as we lean our heads on the pillow and go out of this world in the same state of stupid amazement that ends where we came into it."

SHAKESPEARE did not deal much with wills; in the "MERCHANT OF VENICE" we find PORTIA restricted, in choosing a husband, by the will of her dead father,—a rather remarkable provision if we are to suppose it sanctioned by Lord BACON—and in one or two other places allusions to wills appear, but nothing of much interest. Don QUIXOTE, upon feeling the approach of death, dictated his will to a notary; it contains little of note except his charge that if his niece be inclined to marry "it shall be only to a man who, upon strict enquiry, shall be found to know nothing of books of chivalry"; if he do know such books, and the niece notwithstanding will marry him, she forfeits all bequests.

DICKENS, George ELIOT, TROLLOPE, Charles READE, Rider HAGGARD and STIMSON, all have touched upon wills, too, but without much that is noteworthy in the text of the instruments. They are part of the scenery, usually, although the last two deal with wills in a sensational way. We will recall HAGGARD's flight of imagination in "MR. MEESON'S WILL" when a shipwreck sets the beautiful heroine, and a man who is her lover's enemy, companions on a desert island; he, when about to die, becomes remorseful and makes a will, tattooing it across the young dame's back. Needless to say, it was approved by the court upon profert. STIMSON, in the "POSTHUMOUS JEST OF THE LATE JOHN AUSTIN," works out a pretty love story through a sealed codicil only to be opened on certain contingencies.

Hardly less curious than "MR. MEESON'S WILL" are reported instances of a will chalked by a man on a corn-bin, and of one inscribed on a bed-post; both corn-bin and bed-post are said to be filed in Doctors' Commons, London.

Of whimsical wills of modern times, we may note Jeremy BENTHAM'S,[3] which bequeathed his body to a hospital with instructions that it should be embalmed and his head preserved entire, and that he should,—when thus treated,—preside at the meetings of the hospital directors, and be present at banquets of his old friends. Whether his bones ever presided at directors' meetings is not recorded, but his body was kept in the hospital museum for many years. Even more extraordinary was that will of Solomon SANBORN,[4] of Med-

[3] XV Green Bag, p. 430 (1903). Bentham's body is now in University College, London. XIII Green Bag, 569.

[4] XV Green Bag, 432.

ford, Massachusetts, who left his body to Professor AGASSIZ and Oliver Wendell HOLMES, to be by them prepared and placed in the anatomical museum of Harvard, after having two drumheads made of his skin. Upon one was to be inscribed Alexander POPE'S "UNIVERSAL PRAYER" and on the other the Declaration of Independence. These heads were to be presented to the testator's friend, the drummer of Cohasset, but on condition that on June 17th, each year, the drummer should beat "on the drumheads at the foot of Bunker Hill the spirit-stirring strains of Yankee Doodle."

Among eccentric restrictions some may class that of Lewis MORRIS of New York, who declared, "It is my desire that my son, Gouverneur MORRIS may have the best education that is to be held in England or America, but my express will and directions are that he be never sent for the purpose to the colony of Connecticut, lest he should imbibe in his youth that low craft and cunning so incident to the people of that country, which is so interwoven in their constitutions that all their art cannot disguise it from the world, though many of them, under the sanctified garb of religion, have endeavored to impose upon the world for honest men." As Lewis MORRIS, the testator, was himself graduated at Yale, it is fair to assume that he had kicked against the pricks to his discomfort. His will was dated 1760.[5]

Edward Wortley MONTAGUE was a brilliant but flippant and depraved man, and showed his characteristics in his will, which I quote in part. After some bequests, "to my noble and worthy relation, the Earl of ———," he goes on, "I do not give his lordship any further part of my property because the best part of that he has contrived to take already. Item, to Sir Francis ————, I give one word of mine, because he has never had the good fortune to keep his own. Item, to Lord ———, I give nothing, because I know he'll bestow it on the poor. Item, to ———, the author, for putting me in his travels, I give five shillings for his wit, undeterred by the charge of extravagance, since friends who have read his book consider five shillings too much. Item, to Sir Robert WALPOLE, I leave my political opinions, never doubting he can turn them into cash, who has always found such an excellent market in which to change his own. Item, my cast-off habit of swearing oaths, I give to Sir Leopold D— in consideration that no oaths have ever been able to find him yet." After reading this we are scarcely surprised to learn that the brilliant Lady Mary Wortley MONTAGUE had disinherited the testator, who was her son.

[5] XIII Green Bag, 570.

We could go on almost ad infinitum in noting peculiarities about men who made wills giving property to those relations who wore no moustaches, about others who seized upon will-making as an opportunity to say spiteful things[5a] of their wives or friends, knowing there would be no chance for an answer, and about still others who have left, in the aggregate, vast sums for the care of horses, dogs, cats, parrots or other pets. Many, also, have jested in a cynical way—as in the case of a maiden lady of fifty, who disliked theatricals, and who was horrified by a bequest from a friend on condition that she obtain an engagement at a theatre and perform there one whole week;[6] or the instance of the old bachelor who left all his property to three ladies who had refused his offers of marriage, his will stating that he made them a gift because, "to them, I owe all my earthly happiness." But it would be profitless to multiply examples of this kind.

It might be added, however, that these examples of peculiarities are not confined to English or American testators. Among French wills noted by investigators[7] is found one, whose testator, a Frenchman, declared the French to be a nation of dastards and fools, and for that reason devised his entire fortune to the poor of London, and directed that his body be thrown into the sea a mile from the English coast. On contest a French Court declined to declare him insane. Another Frenchman directed that a new cooking recipe be pasted on his tomb every day; still another, who was a lawyer, left 200,000 francs to a lunatic asylum, declaring that many of his clients who paid him should have been inmates. One who was an enthusiastic card-player left to some of his card-playing friends, a legacy of a goodly sum on condition that they place a deck of cards in his coffin and stop on the way to his grave to have a quiet glass of wine at a favorite cabaret. Another left his estate to six nephews and nieces on condition that each nephew marry a woman named Antoine, and each niece a man named Anton.[8] Just after the Franco-Prussian war a Capuchin monk, noted for his charity, thus bequeathed[9] his entire property, consisting of—breviary, frock, cord, a volume of M. THIERS and a wallet—"First, to the Abbe MICHAUD, my breviary, because he does not know his own; secondly to M. Jules

[5a] This is not confined to men. In the Surrogate's Court in New York a woman's will was filed that had this provision: "Should Mrs. S. or any of her family attempt to approach me in any way, or to attend my funeral, I distinctly forbid it. I would not wish to be defiled by the presence of such black-hearted specimens of vile ingratitude."

[6] Harris, Ancient, etc., Wills, p. 162.

[7] X Green Bag, 162.

[8] Harris, p. 178.

[9] XIII Green Bag, 570.

FAVRE, my frock, to hide his shame; thirdly, to M. GAMBETTA, my cord, which will one day prove useful around his neck; fourthly, to M. THIERS, his own work, that he may read it over again; and fifthly, to France my wallet, because she may shortly have occasion to collect alms."

Breaking away from these rather abnormal developments in will-making, it may be of some profit to consider a few which are of historical interest. Whether anything has been found among the relics of ante-glacial civilization recently unearthed in France which would indicate that the right to dispose of property at death was recognized 50,000 B. C., has not been published. Within the past twenty-five years, however, a will has been found in Egypt that was made in the Fourth Dynasty (B. C. 2850).[9a] Others, of the time of AMENEMHAT III. (about 2,000 B. C.), were witnessed by two scribes, with attestation clauses closely resembling those now in use.[10] In 1902 the explorers for the French government found in Persia a stone monument on which was a copy of the code of HAMMURABI, King of Babylon, B. C. 2285, in which full provisions are made for both testate and intestate succession.[11] Wills were in use among the Hebrews too, as ABRAHAM willed his whole estate to his son ISAAC.[12]

Among the Greeks we find LUCIAN speaking of the will of EUDAMIDAS of Corinth. He was on terms of intimate friendship with two men, ANTHAEUS and CHARIXENES, and on his deathbed made this rather remarkable will:

"I bequeath to ANTHAEUS my mother to support, and I pray him to have a tender care of her declining years. I bequeath to CHARIXINES my daughter to marry, and to give her to that end the best portion he can afford. Should either happen to die I beg the other to undertake both charges." CHARIXENES died within five days after EUDAMIDAS, and the other legatee undertook both charges.

PLATO and ARISTOTLE left simple wills. VIRGIL, it is said,[13] by his will (made 10 B. C.), ordered the AENEID to be burned, but his executors having assured him that AUGUSTUS would never consent to this, he then directed that his verses should be published exactly as they were left, even if he had not completed some of them. It was by command of this will that his body was buried near the

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[9a] Breasted: History of Egypt, p. 82.
[10] 24 Irish Law Times, p. 223.
[11] Rood on Wills, § 124; Also 46 Amer. Law Rev. 648.
[12] 21 Genesis 10-14.
[13] Harris, p. 16.

road between Naples and Pozzouli, where one gets the best view of the Bay of Naples, with Vesuvius on the far side.

PETRARCH, who died about 1374 A. D., gave much thought to his burial place and by his will designates in different cities the particular spots he would choose for burial, providing he died in one of those named, which included Padua, Venice, Milan, Rome, and Parma. His personal belongings are carefully enumerated and divided amongst his friends; BOCCACCIO was bequeathed 200 gold florins of Florence to buy a winter robe suitable for his studious vigils.

A codicil to the will of COLUMBUS is preserved in Genoa, but the instrument itself is lost. Martin LUTHER'S is the subject of much dispute. Those of KATHERINE of Aragon, MARY, Queen of Scots, RABELAIS, and Hans HOLBEIN, the painter, are interesting only because of their makers, as they, together with most royal and distinguished personages, had much the same notions as common clay when it came to the disposal of estates.

The oldest Saxon-English will[14] on record is that of ALFRED the Great, in the original Saxon, which was recorded in Winchester about A. D. 1032. It says nothing of the Crown, giving lands and moneys to children and other relations, and is said to have nothing in it to distinguish it from that of a wealthy alderman. Of the other Kings of England, many of those early in the list were nuncupative—this is true of WILLIAM the Conqueror, WILLIAM Rufus, HENRY I, RICHARD I and others. Those which were written were usually lengthy testaments in Latin. That of EDWARD, the Black Prince, shows evidences of mature deliberation, and covers his epitaph, which was of fourteen lines of his own composition. He, by the way, was curiously rich in beds, of which he gave three to his son RICHARD, "namely the blue bed with ostrich plumes, the bed of red which is quite new, and a great bed embroidered with angels."—HENRY IV's will is noted as the first written throughout in English. As it is dated January, A.D. 1408,—only eight years after the death of CHAUCER—the language was just becoming fixed, and Norman-French was still the language of the courts.

Amongst these early wills of English people that of Lady Alice WEST,[15] dated July, 1395, A. D., and proved that same year, challenges notice because she bequeaths "to Johane my daughter, my sone is wyf, a masse book and all the bokes that I have of latyn,

[14] Green Bag, Vol. XII, p. 64.
[15] Harris, p. 30.
[16] Harris, p. 439.

englisch and frencsh, out take the forsayd matyns book that is bequeath to Thomas my sone." As this was more than seventy-five years before the first book was printed in England, it would be interesting to know what "bokes" were included in this library.

Of early American wills perhaps that of Stephen HOPKINS, who was one of the "Mayflower" importation, and who died at Plymouth, in June, 1644, may stand as a fair example. Quoted in part it is "The sixt of June 1644 I Stephen HOPKINS of Plymouth in New England being weake yet in good and perfect memory blessed be God yet considering the fraile estate of all men I do ordaine and make this to be my last will and testament in manner and forme following. . . . I do bequeath by this will to my sonn Giles HOPKINS my great bull which is now in the hands of Mris WARREN. Also I do give to Stephen HOPKINS my sonn Giles his sonn twenty shillings in Mris WARRENS hands for the hire of the said Bull—Also I give unto my daughter Deborah HOPKINS the brodhorned black cowe and her calf, and also the cow called Motley" and so on, including the disposition of a "Curld Cowe" and "an yearlinge heiffer without a tayle,"—winding up with a gift to each of his four daughters of "four silver spoons."

George WASHINGTON'S will has been made familiar by its repetition in various biographies; it is long and for the most part of little instructive value, except as bearing on WASHINGTON'S character. One clause in it recites "That as it has always been a source of serious regret with me to see the youth of these United States sent to Foreign Countries for the purpose of Education, often before their minds were formed,—contracting too frequently not only habits of dissipation and extravagance, but principles unfriendly to Republican Government, and to the true and genuine liberties of mankind, which thereafter are rarely overcome"; for these reasons, and others similar, the testator makes a bequest towards the endowment of a University to be established in the District of Columbia under the auspices of the Federal Government.

Patrick HENRY[18] gave his wife the bulk of his property and full power over his six sons, but ended by revoking all provisions in her favor if she married again, which she accordingly did. JEFFERSON'S principal conundrum was how to provide for his daughter and her family without making gifts vulnerable to attacks from creditors of his son-in-law, Thomas M. RANDOLPH, which he did by a simple trust. Thomas PAINE commends his soul to his God, a disposition

[18] Harris, p. 382.

which must have startled some who interpreted his "Age of Reason" as pure atheism.

Chief Justice MARSHALL'S[20] will was probated in Richmond, Virginia, in July, 1835, and is wholly in his handwriting, on two sheets of paper. In effect it is a common-sense division equally between his daughter and his five sons,—his wife having died several years before. The only striking thing about it is its evidence of his devotion to the memory of his wife; he makes a bequest to one of her friends "as a token of my wife's gratitude for long and valuable attentions," and a gift to his daughter, at his wife's request, saying, "my daughter will never forget that this is the gift of the best and most affectionate of mothers."

All of the foregoing are mentioned more as curiosities, or because of the personality of the makers, than because they are instructive or noteworthy from a technical test.

As might be expected, when we reach Benjamin FRANKLIN we find a departure from the ordinary in his posthumous plans just as we do in those of his lifetime. It is a codicil, made in June, 1790 (a month before he died), which has caused most comment, and has been attacked in court. This is as follows: "I have considered that, among artisans good apprentices are most likely to make good citizens, and having myself been assisted to set up my business in Philadelphia by kind loans of money from two friends there, which was the foundation of my fortune, and of all the utility in life that may be ascribed to me, I wish to be useful even after my death, if possible, in forming and advancing other young men that may be useful to their country in both those towns. [Boston and Philadelphia.] To this end I devote two thousand pounds sterling of which I give one thousand thereof to the inhabitants of the town of Boston, Massachusetts,—and the other thousand to the inhabitants of the City of Philadelphia, in trust, to and for the uses, intents and purposes hereinafter mentioned and declared.

"The said sum of one thousand pounds sterling, if accepted by the inhabitants of the town of Boston, shall be managed under the direction of the selectmen, united with the ministers of the oldest Episcopalian, Congregational, and Presbyterian Churches in that town, who are to let out the same upon interest, at five per cent. per annum, to such young married artificers, under the age of twenty-five years, as have served an apprenticeship in the said town, and faithfully

[20] Green Bag, Vol. VIII, p. 5.

fulfilled the duties required in their indentures, so as to obtain a good moral character from at least two respectable citizens who are willing to become their sureties, in a bond with the applicants, for the repayment of the moneys so lent, with interest, according to the terms hereinafter prescribed; all of which bonds are to be taken for Spanish milled dollars, or the value thereof in current gold coin; and the managers shall keep a bound book or books, wherein shall be entered the names of those who shall apply for and receive the benefits of this institution, and of their sureties, together with the sums lent, the dates and other necessary and proper record respecting the business and concerns of this institution. And, as these loans are intended to assist young married artificers in setting up their business, they are to be proportioned by the discretion of the managers, so as not to exceed sixty pounds sterling to one person, not to be less than fifteen pounds, and, if the number of appliers so entitled should be so large that the sum will not suffice to afford to each as much as might otherwise not be improper, the proportion to each shall be diminished so as to afford to everyone some assistance. These aids may, therefore, be small at first, but, as the capital increases by the accumulated interest, they will be more ample. And, in order to serve as many as possible in their turn, as well as to make the repayment of the principal borrowed more easy, each borrower shall be obliged to pay, with the yearly interest, one-tenth part of the principal, which sums of principal and interest so paid in, shall be again let out to fresh borrowers.

"And, as it is presumed that there will always be found in Boston virtuous and benevolent citizens willing to bestow a part of their time in doing good to the rising generation, by superintending and managing this institution gratis, it is hoped that no part of the money will at any time be dead, or be diverted to other purposes, but be continually augmenting by the interest, in which case there may, in time, be more than the occasions in Boston shall require, and then some may be spared to the neighboring or other towns, in the said state of Massachusetts, who may desire to have it; such towns engaging to pay punctually the interest and the portions of the principal, annually, to the inhabitants of the town of Boston.

"If this plan is executed, and succeeds as projected without interruption for one hundred years, the sum will then be one hundred and thirty-one thousand pounds, of which I would have the managers of the donation to the town of Boston then lay out, at their discretion, one hundred thousand pounds in public works, which may be judged of most general utility to the inhabitants, such as fortifications, bridges, aqueducts, public buildings, baths, pavements, or

whatever may make living in the town more convenient to its people, and render it more agreeable to strangers resorting thither for health or a temporary residence. The remaining thirty-one thousand pounds I would have continued to be let out on interest, in the manner above directed, for another hundred years, as I hope that it will have been found that the institution has had a good effect on the conduct of the youth, and been of service to many worthy characters and useful citizens. At the end of this second term, if no unfortunate accident has prevented the operation, the sum will be four millions and sixty-one thousand pounds sterling, of which I leave one million sixty-one thousand pounds to the disposition of the inhabitants of the town of Boston, and three millions to the disposition of the government of the State, not presuming to carry my views farther."

A like provision was made for Philadelphia.

For one hundred years this will was observed without question, but in September, 1890, Albert D. BACHE, a great-great-grandson of the testator, attacked it in the Orphans' Court of Philadelphia, on four grounds,—(a) because the accumulation was for a longer time than allowed by common law; (b) because the legacy to Philadelphia vested longer after the testator's death than allowed by Pennsylvania statute; (c) because the use of the funds after the first hundred years was not a charitable use; (d) because testator's purpose could not be fulfilled, as the trustees had not realized the anticipated sum. The Court, on demurrer, dismissed the petition, in an opinion by Judge PENROSE.[21] Another attack was made through an equity proceeding by another descendant two years later, on the same grounds, but it failed also.

Whether the same result would have been reached if it had been altogether a case of first impression in Pennsylvania courts is uncertain, but the arguments in this FRANKLIN case fell upon trained ears. Although FRANKLIN died over forty years before Stephen GIRARD, the will of the latter[22] had caused the law concerning charitable trusts to be ventilated by WEBSTER, BINNEY and others be-

[21] See 27 Weekly Notes of Cases, 545; affirmed on appeal, 150 Pa. St. Rep. 437. Benjamin Franklin's will was not the only "waiting will" to be found. Not long ago, it is noted by a writer in the "Green Bag," an eccentric German died who directed that his estate amounting to about $10,000, be turned into money and be put out at compound interest for 200 years; and Count Hardegg, who died some fifteen years ago, left $300,000 to the University of Vienna on condition that it be put at compound interest for 100 years, when he computed it would amount to about $18,000,000. (X Green Bag, 162).

[22] Vidal v. Girard's Executors, 2 How. 143; Girard v. Philadelphia, 7 Wall. 1; Philadelphia v. Girard's Heirs, 45 Pa. 9.

fore FRANKLIN'S descendants took their proceedings. This instrument, remarkable in some other respects, has been chiefly noted for its thorough-going provision for the foundation and endowment of Girard College. This was accomplished by a gift in trust to the Mayor, Aldermen and Citizens of Philadelphia, to build, equip and maintain this college along set lines; minute details are given as to the construction of the building itself, and the courses of instruction, and it is strictly enjoined that "no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station . . . in said college; nor shall such person ever be admitted for any purpose, or as a visitor, within the premises."

The point was made by those attacking the will that the devise was void because the City of Philadelphia had no power to administer the trusts; also that it was void because the plan of education is anti-christian and therefore repugnant to the law of Pennsylvania; also that beneficiaries are too uncertain. WEBSTER contended in the United States Supreme Court that it was "a cruel experiment to be made upon orphans to ascertain whether they cannot be brought up without religion" and that "the idea was drawn from PAINE'S AGE OF REASON." Justice STORY wrote the opinion upholding the will, saying that excluding all sectarians but leaving the instructors free to teach purest morality by all appropriate means was not against public policy, and would permit teaching the New Testament "where benevolence, the love of truth, sobriety and industry are irresistibly inculcated." The court also held that the charter of Philadelphia gives power for measures tending "to the suppression of vice, to the advancement of health and order, and to the promotion of trade, industry and happiness"; this is broad enough to authorize administration of this trust. The beneficiaries were easy to find, too.

The will of the late Samuel J. TILDEN failed to meet the requirements for a charitable gift in that under the limitation over to the Tilden Trust the gift did not necessarily vest by force of the will, on the happening of the event,—namely the incorporation of the trust. The corporation to be formed took nothing by virtue of the will. The estate was vested in the trustees, or was intended to be, and so to remain until by their discretionary action, if at all, the gift should be conveyed to the corporation.[23] As this is a noted instance of the fallacy that a lawyer can draw his own will it is perhaps proper to give a short synopsis of the case reported as *Tilden* v. *Green*.[23a]

[23] Remsen on Wills. Ch. IX § 4.

[23a] 130 N. Y. 42 (1891).

Samuel J. TILDEN died in 1886, leaving a will. The defendants BIGELOW, GREEN and SMITH, were by the will appointed executors. This action was brought by a nephew, George H. TILDEN, to obtain a construction of the will, of which certain articles were assailed. One of them gives the residue of the estate to the executors and trustees for a period not exceeding two lives in being, those of a niece and a grandniece; another directs the executors and trustees, as speedily as possible, to obtain the incorporation of the Tilden Trust to establish and maintain a free library and reading room in New York City, and to promote such scientific and educational objects as the trustees may designate, and instructs the trustees to give the residue, or "so much as they deem expedient" to that incorporated trust. Some detail is given as to the incorporation, and then it is provided that if the trust shall not be incorporated or if the trustees for any reason see fit not to convey the residue to it, then the testamentary trustees shall "apply the rest, residue and remainder . . . to such charitable, educational and scientific purposes as in the judgment of my said trustees will render the said rest, residue and remainder of my property" most widely beneficial to mankind.

The trust was incorporated and the trustees made a deed to it of all the residue. This was attacked on the ground that the broad power given the testamentary trustees was invalid as there were no parties who could enforce the trust. The court distinguishes the case from that under which the Roosevelt Hospital endowment was upheld,[24] saying that was a gift direct to the hospital to be incorporated, while this was an absolute gift to the testamentary trustees with power to give to the Tilden Trust if they thought best.[25] This decision resulted in a reconstruction of the statutes of New York,—a 'recall of the judicial decision,' if you please,—by the addition of a new law providing that a charitable gift otherwise valid should not be invalid by reason of uncertainty of beneficiaries.[26] This has since been followed by similar statutes in other states.

Turning somewhat abruptly to the mammoth estates of today, we find specimens of will-draughting that are models in their technique. They seem to divide themselves into the very long and the extremely short. Of the latter that of John W. MACKAY of the Postal Telegraph Company, probated in 1902, covers one sheet which is largely

[24] Burrill v. Boardman, 43 N. Y. 254 (1871); Charles O'Conor was of counsel for the Hospital.

[25] James C. Carter was one of the counsel upholding the will: Joseph H. Choate one of those opposed.

[26] N. Y. Laws of 1893. Ch. 701.

taken up with an enumeration of the powers of executors; it is made under the law of Nevada and declares that all of his estate is community property of his wife and himself, and gives his son all the interest therein of which testator can make testamentary disposition. Even more simple is the will of Edward H. HARRIMAN, the disposing clause of which contains only forty-eight words.

On the other hand we have public spirited wills of great length. Prominent among these is that of Marshall FIELD, which with a republication codicil after his marriage, covers more than sixty printed pages; beside the public gifts, it is noteworthy because of the shrewd way in which the testator protects his principal beneficiaries by dividing the trust gifts among various trust companies.

Another instrument of public interest is the will of John S. KENNEDY, [27] of New York, dated in 1909, which made forty-six gifts of considerable specific sums to educational institutions and charities, and in addition made residuary bequests to others.

Another of these long wills, which is both interesting and instructive, is that of Joseph PULITZER, proved in 1911. This challenges attention both because of the broad public spirit of the testator, and because of the careful planning of the instrument itself. The gifts include $20,000 for distribution among the employees of the "New York World", and a like amount for those of the "Post-Dispatch" of St. Louis; a bequest of $250,000 to Columbia College for the creation of scholarships benefiting needy, would-be students; the confirmation of the gift of $2,000,000 to Columbia College for the creation and maintenance of Schools of Journalism; and a gift to the Metropolitan Museum of Art of $500,000, the income of which is to be applied to the purchase of works of art. There are various other bequests for matters of public interest, including one of $500,000 to the Philharmonic Society of New York City; another of $50,000 for the location of a fountain at some suitable place in Central Park; another of $25,000 for the purpose of erecting a statue of Thomas JEFFERSON in the City of New York. These two latter are mentioned here as affording a contrast to the provisions in the will of the late James SCOTT of Detroit, to which reference is made hereafter.

This PULITZER will adopts an ingenious method for keeping control of the two newspapers, which were the pride of the testator, in the family as long as possible. It creates a trust in which is placed all of the stock of the newspapers mentioned, and which continues during the life of each of the two youngest sons of the testator,

[27] Died October 31st, 1909.

him surviving, with a clause substituting the youngest grandsons in case either son should predecease the testator. The period of two lives in being thus limited is made the trust term; during this trust term the stock is held in trust for the three sons of the testator, with the exception of one-tenth. These sons, or their male descendants, receive the income of the proportionate parts held in trust for them during the continuance of the trust term. Upon the expiration of the trust term, the stock of the companies held for the benefit of the sons shall be turned over to them, and if they die before that time the remainder is distributed among their male descendants. The remaining one-tenth of the stock is held by the trustees to distribute its income during the continuance of the trust term among the principal editors and managers of the two newspapers before mentioned, and upon the expiration of the trust term to be sold by the trustees to the principal editors or managers of the "World" and "Post Dispatch", considered by the trustees the most deserving in point of ability and integrity.

Of all American wills that of the late J. Pierpont MORGAN stands pre-eminent in many respects.[28] As an example of construction and draughting, it ranks with the best. It is, however, the evident spirit of the man making the will that brings the instrument into bold relief. The testator shows his appreciation of the solemn dignity of the occasion by a firm expression of religious belief in the beginning of the will, next makes generous provision for his immediate family, relations, friends and servants, then makes some allusions to charities, and finally in its short and unassuming Article XXXII disposes of his wondrous art collections by saying "it has been my desire and intention to make some suitable disposition of them . . . which would render them permanently available for the instruction and pleasure of the American people. Lack of the necessary time to devote to it has as yet prevented my carrying this purpose to effect . . . Should either my son or my grandson succeed to the ownership of these collections, I hope he will be able to make permanent disposition of them or of such portions of them as he may determine which will be a substantial carrying out of the intentions which I have thus cherished." The unaffected and sincere statement of faith in God and the unassuming allusion to the purpose to help in the uplift of the American people would stamp the testator as an unusual and noteworthy man even if we knew nothing else of him.

[28] Admitted to Probate in New York, April 22nd, 1913.

Michigan has also furnished wills in recent times which are worthy of study, as dealing with the disposition of large properties. Of these, the will of Charles H. HACKLEY of Muskegon, made in 1903, stands out prominently, as it makes public bequests of $775,000 for public institutions in Muskegon, such gifts taking immediate effect, and provides further residuary gifts to the city which will increase the amount eventually to something like $2,000,000.

Another Michigan will is that of Arthur HILL of Saginaw, who died in 1909, which makes large gifts to public institutions in Saginaw, and deals liberally with the University of Michigan.

The city of Detroit has not fared so well as some of the other large cities in the matter of gifts, nor has it fared so well as do Muskegon and Saginaw. For many years the gift of the late Chauncey HURLBURT, providing for the decoration and upkeep of a Water Works Park, stood alone as a public bequest of any size. By the will of James SCOTT, however, who died in 1910, a large sum will be realized by the city, the disposition of which is controlled by a peculiar provision. This has caused much comment and reads as follows: "All the remainder of my estate I devise and bequeath to the city of Detroit; with the proceeds thereof said city shall build a fountain on the island of Belle Isle; such fountain shall be built in accordance with a plan approved by my executors; said fountain shall be called the James Scott Water Fountain. There shall be placed on said fountain a life-size statue of myself, made in accordance with the direction of my executors". Another peculiar provision in this will is one requiring that the executors build a tomb on the testator's cemetery lot, which tomb shall have places for ten bodies; and then directing that the executors shall have placed in that tomb the remains of seven individuals, who are specified. It would seem that Mr. SCOTT did not like crowding.

A cursory article of this nature will not permit of any lengthy discussion of the many wills in which the purpose of the testator led to odd results through the operation of law. Two instances, which have come to the notice of the writer will suffice as examples.

One of them is shown in the Connecticut reports, when an executor was called to account about twenty-five years after his testator's death, and asked to divide the estate. He replied that the will provided that certain specified nephews of the decedent were to receive sums mentioned in case they went to college, and other like sums if they took degrees; further, that if brothers of the testator had other sons going to college they should receive like

amounts. As it was shown that the nephews specified were, at the time of the suit, over forty-five years old, and the two surviving brothers were, one a widower and the other a bachelor, and both nearly eighty, the court concluded that the executor need not keep the property in his hands longer to fulfill the wishes of the maker of the will.

The other is that set forth in the case of *Millsaps* v. *Shotwell*.[29] One of the sons of the testator, a young man, had deserted from the army during the Civil War and was known to be very dissipated. In 1872 the father gave all of his large landed estate to his other two sons reciting, however, that if the absent son, whose whereabouts were unknown, should be living and return and for five years continuously become and be a temperate and prudent man, he should have his interest in the estate. He came back years afterwards, and settled near his other brothers, and was even more dissipated than before, indignantly repudiating any suggestion of reformation. His brothers deeded him part of the land, and he improved it and borrowed money on it and for more than twenty-five years lived a very dissipated life until everyone had forgotten the terms of the will and much of the land had been mortgaged and sold. Suddenly he announced that he was going to quit and had "sworn off" from liquor. Everyone laughed at his resolution, but strangely enough, he stuck to it for five years, brought suit and recovered his one-third interest in a magnificent delta plantation.

Taking it all in all the changes that death makes in property disposition are worthy of much note, whether we try to follow the curious whims of an eccentric man nearing his end, or the wise provisions of a farsighted financier;; all simply serve to emphasize the short range of human vision trying to peer into the future.

SIDNEY T. MILLER.

DETROIT, MICHIGAN.

[29] 76 Miss. 923.

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NOTE AND COMMENT.

A PARTNERSHIP AS A FARMER IN BANKRUPTCY.—After much uncertainty and difference of opinion among the courts as to the position of partnerships under the Bankruptcy Act certain phases of the problem were set at rest by the Supreme Court in *Francis* v. *McNeal*, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029. By that case it seems to have been authoritatively settled (1) that in determining the solvency or insolvency of a partnership the individual estates available for payment of firm debts are to be considered, and (2) that an adjudication of the firm as such draws into the proceeding the administration of the estates of members though they have not been adjudicated bankrupts as individuals. In considering the theretofore much mooted question as to partnerships being entities for purposes of bankruptcy, Mr. Justice HOLMES, speaking for the court said: "No doubt these clauses [§1, §5a, §14a] taken together recognize the firm as an entity for certain purposes, the most important of which after all, is the old rule as to the prior claims of partnership assets and that of individual debts upon the individual estate." For purposes of proceedings in bankruptcy it seems that partnerships are deemed to have a suable existence as firms separate and apart from the members, for a petition in bankruptcy may well be filed against "A & Co." It is not neces-

sary that the petition be against "A, B & C, trading as A & Co."; and the firm as such may be adjudicated a bankrupt without affecting the individuals or their estates, except as above noted.

In *H. D. Still's Sons* v. *American Nat. Bank, et al.*, 209 Fed. 749, the Circuit Court of Appeals for the Fourth Circuit had occasion to pass upon a novel and interesting question affecting partnerships in bankruptcy. It appeared that the alleged bankrupt was a partnership engaged chiefly in farming. The court concluded that a partnership so engaged was exempt from involuntary bankruptcy. The following provisions of Bankruptcy Act are important in this connection.

§ 1 (19). "Persons shall include corporations, except where otherwise specified, and officers, partnerships and women, etc."

§ 4b. "Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any * * * corporation, except, * * * may be adjudged an involuntary bankrupt, etc."

§ 5a. "A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

The correctness of the court's conclusion would seem to depend entirely upon whether or not a partnership as such is covered by "*Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil.*" The exception of wage-earners and farmers is clearly a limitation upon "*Any natural person.*" So the question for consideration was, in short, whether a partnership as such is a natural person.

The expression "natural person" would seem to need no explanation; its meaning is obvious. If a partnership as such has an existence in bankruptcy separate and distinct from the natural persons composing the firm it would seem inevitably to follow that the firm as such is not a natural person. Congress has defined "person" as including a partnership, but in § 4b under the provisions of which a partnership engaged in farming must find its exemption, if any, from involuntary bankruptcy, Congress has used the expression "natural person," supposedly for some reason.

The court in the principal case seemed much influenced in arriving at its conclusion by the argument that there is no real reason why individuals when engaged in farming should be exempt while a partnership made up of those individuals should not be exempt when engaged in the same business. That argument addressed to the law-making body ought to be well nigh conclusive; but the court in deciding the principal case was concerned primarily not with what exemptions from involuntary bankruptcy *ought* to be recognized, but with what exemptions Congress had made. In view of the fact that in the present Bankruptcy Act Congress has apparently sought to provide a comprehensive treatment of the subject it would seem a proper rule of construction that no exemptions from bankruptcy proceedings should be recognized unless clearly within the exemptions provided for by Congress. It may perhaps well be doubted whether the court in the principal case was correct in its conclusion.

R. W. A.

THE ADMISSIBILITY OF ADMISSIONS BY AN INSURED AS AGAINST A BENEFICIARY.—An interesting case involving the use of an assured's admissions in an action by the beneficiary on an insurance policy is *Metropolitan Life Ins. Co.* v. *O'Grady*, 80 S. E. 743, (Virginia, 1914.) In this suit to recover the amount of the policy, the Insurance Company set up in defence that assured had falsely misrepresented his age and the condition of his health in his application for the policy, and in proof thereof offered in evidence his admissions made prior to the application. The court held that the admissions were incompetent against the beneficiary for two reasons; first, that the assured could not bind the beneficiary by his admissions, and second, that the admissions were not against the declarant's interest when made.

Resting upon the first ground assigned, the decision is unquestionably in harmony with the majority of adjudications. There is in general no privity of interest nor agential relation existing between the assured and the beneficiary by reason of which the latter should be bound by the former's admissions. *Lahrs* v. *Lahrs*, 123 N. Y. 367; *Bagley* v. *Grand Lodge*, 131 Ill. 498; *Richmond* v. *Johnson*, 28 Minn. 447; although some of the language in *Swift* v. *Mass. Mutual Life Ins. Co.*, 63 N. Y. 186, indicates the existence of the relation of agent; and the general rule is that admissions of the assured are not competent against the beneficiary in an action by the latter on the policy. *Union Central Life Ins. Co.* v. *Pollard*, 94 Va. 146; *Schwarzbach* v. *Protective Union*, 25 W. Va., 622; *Ins. Co.* v. *Morris*, 3 Lea (Tenn.) 101; *Hermany* v. *Fidelity Mut. Life Ins. Co.* 151 Pa. St. 17; *Penn Mut. Life Ins. Co.* v. *Wiler*, 100 Ind. 92; *Union Cent. Life Ins. Co.* v. *Cheever*, 36 Ohio St. 201; *Washington Life Ins. Co.* v. *Haney*, 10 Kas. 525. Various modifications arise under particular forms of insurance contracts. It has been held, for instance, that when the assured retains a dispositive power over the beneficial interest in the policy, his admissions bind the beneficiary. In such a case the beneficiary has, until the death of the assured, no vested interest in the policy, but only an expectancy; and claiming through the assured, is bound by his admissions. *Steinhausen* v. *Preferred Mut. Accident Ass'n.* 13 N. Y. Sup. 37; *Life Ass'n.* v. *Winn*, 96 Tenn. 224. And they may come in under the rule of res gestae although not competent as admissions, strictly speaking. *Sutcliffe* v. *Traveling Men's Ass'n*, 119 Ia. 220; *Henn* v. *Metropolitan Life Ins. Co.* 67 N. J. L. 310. Statements by the assured that the policy has been forfeited have also been held admissible, though it seems difficult to justify this exception on reason. *Manhattan Life Ins. Co.* v. *Myers*, 109 Ky. 372. If, however, the facts as to his health or age have been established by other evidence, assured's admissions are always competent to show his knowledge of the facts and fraudulent intent. This is recognized by the principal case. See also *Union Cent. Life Ins. Co.* v. *Pollard*, supra; *Rawson* v. *Ins. Co.*, 115 Wis. 641; *Towne* v. *Towne*, 191 Ill. 478.

The second reason given by the court, that admissions are incompetent which were not against interest when made is questionable. In support of this reasoning the court cites GREENLEAF, EVIDENCE, § 179, and two early Virginia cases, *Burton* v. *Scott*, 3 Rand. 399, and *Caines' Admin.* v. *Alexander*, 7 Grattan 257. So far as the decision rests upon the authority of GREENLEAF, it

is evidently the result of misapprehension of the rule stated in that work. The court quotes the following from GREENLEAF, § 179; "The admissions which are thus receivable in evidence must be those of a person having at the time some interest in the matter afterwards in controversy, in the suit to which he is a party." Reference to the context will show, however, that Prof. GREENLEAF had in mind only the use of admissions against one suing in a representative capacity made before his investiture with that trust, for in the next sentence the author puts the following illustration: "The admissions, therefore, of a guardian, or an executor or administrator, made before he was completely clothed with that trust, or of a prochein amy, made before the commencement of suit, cannot be received either against the ward or infant in the one case or against himself as the representative of heirs, devisees, and creditors, in the other." The case of *Gaines' Admin.* v. *Alexander,* supra, falls squarely within this principle, and the statement of the court that all admissions must have been against interest at the time is mere dictum. Examining Mr. GREENLEAF's work still further, it is found that he has not only not countenanced, but has on the contrary explicitly repudiated such a rule. In § 169 he says, "Plaintiff's statement at a prior time that he lent the defendant fifty dollars throws discredit on his present claim in the pleadings that he lent one hundred dollars. The evidential weight of the inconsistency may be greater if his prior statement was against his interest—as if he declared that he never lent the money at all—but that is not essential to its admissibility." And again in the same section he says of admissions, "There is nothing in their nature which entitles us to say that they are explainable only as made against the person's interest." Prof. GREENLEAF's view accords, moreover, with that of at least two other great commentators on the law of evidence. In WIGMORE, EVIDENCE, § 1048, subd. 2, the author says, "The subject of an admission is not limited to facts against interest at the time. * * * * * On principle it is plain that every prior statement of a party exhibiting an inconsistency with his present claim tends to throw doubt upon it, whether he was at the time speaking apparently in his own favor or against his own interest." And later on he characterizes the opposite rule as "a fallacy, in the fullest sense." To the same effect see CHAMBERLAYNE EVIDENCE, § 1383, in which the existence of adverse interest is treated as going to the weight, rather than to the admissibility, of such evidence.

The decision in *Burton* v. *Scott,* however, fully supports the principal case. In that case the court ruled that admissions, to be competent evidence, must have been against interest when made, saying, "The true meaning and sense of the rule that declarations of parties may be given in evidence against them is the reasonable presumption that no person will make any declaration against his interest unless it be founded in truth." It is believed that this decision is exceptional rather than the general rule, and that it is due to a confusion of the rules governing admissions and those in regard to the declarations against interest of third persons. Extra-judicial statements of third persons are mere hearsay, and are properly excluded unless against interest, because there can be no guarantee of their truth. An exception to this rule has arisen in favor of declarations against a pecuniary or proprietary

interest, a substitute for the binding effect of the oath being found in the presumption that no one would speak falsely against his own interest. That admissions of parties to a suit stand on an entirely different footing is evident from the fact that even where an adverse interest is required, it is never limited to a pecuniary or proprietary interest. They are received rather on the theory that any words or acts of a party inconsistent with his present position are relevant to the issue. Even if such statements were self-serving and false they should still be admissible as showing his disposition to depart from the truth to further his own ends.

Admissions not against interest at the time have been received in many cases. *Wilson* v. *Minneapolis etc. Ry. Co.*, 31 Minn. 481; *Shiland* v. *Loeb*, 69 N. Y. Sup. 11; *Smay* v. *Etmire*, 99 Ia. 149; *State* v. *Willis*, 71 Conn. 283; *State* v. *Anderson*, 10 Ore. 448; *State* v. *Mowry*, 21 R. I. 376. In some instances the courts have received such admissions only for the purpose of impeaching the bona fides of the present claim. *Skillman* v. *Leverich*, 11 La. 517; *Lord* v. *Bigelow*, 124 Mass. 185; *Glen* v. *Lehnen*, 54 Mo. 45. But these considerations go to the probative value of different classes of admissions, and not to their admissibility.

It would seem therefore that upon this point the principal case is in conflict with the understanding of the most eminent commentators and with a majority of the decisions in courts of last resort. S. S. W.

THE EXTRATERRITORIAL EFFECT OF EXEMPTION LAWS.—The case of *John H. Schroeder Wine and Liquor Co.* v. *Willis Coal and M. Co.*, 161 S. W. 352, recently decided by the St. Louis Court of Appeals, throws some light on the very confused subject of the extraterritorial effect of exemption statutes. The facts of the case are as follows:

A Missouri corporation was garnisheed in the courts of that state by the creditor, also a citizen of Missouri, for a debt owed by a citizen of Illinois. The fund attached was wages, owed by the garnishee to the debtor for labor performed in Illinois, and payable there. The debtor was summoned by publication and did not appear personally. Under the Illinois Statute the wages of the head of a family are exempt to the amount of $15.00 per week and the employer must pay that amount notwithstanding any writ of garnishment. Under the Missouri statute no one can be charged as garnishee for more than 10% of any wages.

Under these facts the Missouri Court applied the Illinois Statute. They based their decision entirely upon the principle of comity between the several states. The court said in part "the courts of our state commonly recognize the laws of another state when the general policy of the two states on the subject is alike. That this is the case with respect to the statutes of Illinois and those of our own state on the matter of exemption of wages from garnishment proceedings is clear. There is a difference in the amount of exemption; there is no difference whatsoever in policy. * * * Shall we applying the Illinois law by comity hold them exempt in our jurisdiction? We answer this in the affirmative."

The court cites several Missouri decisions as sustaining the principle of comity, but none of them concerned exemption statutes. All of them related to statutes which affected the cause of action directly as where they created a cause for action in tort or were made a part of a foreign contract.

The question of the application of the principle of comity to the exemption statutes of another state is one upon which there is a very decided conflict of opinion. Such statutes are usually considered to relate to the remedy simply and not to the obligation. For this reason most courts have never given to foreign exemption laws the recognition which they have given to laws that affect obligations, but have applied the lex fori in regard to exemption as in all other matters relating to remedy and procedure. *Morgan* v. *Neville*, 74 Pa. St. 52; *National Tube Co.* v. *Smith*, 57 W. Va. 210, 1 L. R. A. N. S. 195, 110 Am. St. Rep. 771.

This principle has been followed where all the parties were citizens of the same foreign state and the proceedings were brought in the forum for the manifest purpose of evading the exemption laws of that state. *Goodwin* v. *Clayton*, 137 N. C. 224, 49 S. E. 173, 67 L. R. A. 209, 107 Am. St. Rep. 479.

Many of the cases sustaining this doctrine were decided before the decision of *Harris* v. *Balk*, 198 U. S. 215, 49 L. Ed. 1023, 23 Sup. Ct. 625, settled the question of the situs of a debt for purposes of garnishment. Before this case decided that a debt could be attached where personal service could be had on the debtor and irrespective of the domicile of any of the parties, the law on this subject was in confusion, and courts in applying their own exemption laws against citizens of other states whose funds were garnisheed in their courts were not necessarily enforcing them in the other states under the full faith and credit clause as is the case since that decision. Most of the courts which refused to recognize foreign exemption laws also refused to recognize foreign garnishment proceedings against their own citizens when the debtor was sued by publication only. Since the decision in *Harris* v. *Balk*, the states can no longer refuse to recognize such judgments, and can therefore be compelled to apply the exemption laws of another state against their own citizens. States have sought to protect their exemption laws by means of penal statutes and injunctions but these are at best only an indirect way of accomplishing the result desired. Other states have met the question squarely by the statutes recognizing the exemption laws of a foreign state when a citizen of such a state is garnisheed in their courts. A typical statute of this kind is that of Illinois. The effect of such statutes is reviewed in *Re Flukes*, 157 Mo. 125, 51 L. R. A. 176, 80 Am. St. Rep. 619. See also note in note to 36 L. R. A. 582.

On account of the results following from the blind application of the lex fori in all such cases, some courts have taken this extreme position, but under certain circumstances have given effect to the exemption laws of other states. It is in this connection that the principal case is of interest. The leading case sustaining this view is *Drake* v. *Lake Shore & M. S. Ry.*, 69 Mich. 169. In this case the principal debtor and creditor were citizens of Indiana and the latter attempted to evade the exemption laws of that state by assigning his claim to a citizen of Michigan where the wages of the debtor were

not exempt. The assignee garnisheed the railroad in Michigan for the wages owed to the debtor. The Michigan court applied the exemption laws of Indiana on the grounds (1) that interstate comity would not permit a state to allow its courts to be used for the purpose of evading the laws of a sister state; (2) that when all the parties at the time of the creation of both debts reside in the same state the exemption laws of that state become an incident of the debt and a vested right in rem which follows the debt wherever it is considered to be situated. Other cases holding the same views are, *Macon* v. *Beebe*, 44 Fed. 556; *Ill. Cent. Ry.* v. *Smith*, 70 Miss. 344, 35 Am. St. Rep. 651; *Wright* v. *Chicago etc. Ry.*, 19 Neb. 175, 56 Am. Rep. 747; *Pierce* v. *Chicago etc. Ry.*, 36 Wis. 283; *Mo. Pac. Ry.* v. *Skarritt*, 43 Kans. 375; *Singer Mfg. Co.* v. *Fleming*, 39 Neb. 679, 23 L. R. A. 210, 42 Am. St. Rep. 613.

In some of these cases, as in most of the cases cited by them, the question of the extraterritorial effect of exemption laws is confused by the different views formerly held by the courts as to the situs of debts for the purposes of garnishment, a question which was settled by *Harris* v. *Balk*, supra. But in all of them the principle of comity is recognized with reference to exemption statutes. In all of these cases, however, the parties were both citizens of a state other than the forum and there was evidently an attempt to evade the laws of that state. In none of them was the law of another state enforced against a citizen of the forum. But in the principal case the creditor and garnishee were both citizens of the forum, Missouri. There was no attempt to evade the laws of another state, as the proceeding was brought in the logical court. There was no argument that the exemption law was a part of the debt itself. The court therefore applied the law of a foreign state relating to a remedy against the interest of one of its own citizens. It is believed that few if any courts have gone as far as this in recognizing the exemption laws of another state. The authorities do not sustain any such holding although the language in *Mason* v. *Beebe*, supra, is broad enough to cover the present case.

But however weak the case may be on authority, it suggests a solution to the difficulty into which the former doctrine has led the courts. The decision in *Harris* v. *Balk* has made the effect of ignoring the exemption laws of a sister state much more serious to that state than was formerly the case. Although among sovereignties the rule undoubtedly is that laws relating to remedies have no extraterritorial effect, yet in international law there is no full faith and credit clause, and a sovereign state need not recognize a foreign judgment that violates its public policy. This is not true among the states of the Union. The Missouri court evidently thinks that the principle of comity should not be confined to those classes of laws to which it is applied among sovereign states. P. B. B., Jr.

LIABILITY OF TESTATOR'S ESTATE FOR LIBEL CONTAINED IN HIS WILL.—It has frequently been said that the law of wills is so well developed that in examining cases involving that subject, one scarcely, if ever, meets with a case for which there is not somewhere a precedent. In *Harris* v. *Nashville Trust Company* (Tenn. 1914) 162 S. W. 584, which was a case involving a will, there

arose a question which, so far as the writer has been able to find, has never before been considered. The case is interesting not only because of the decision reached, but also because it is another example of the courts' attempting to apply settled principles of law to new exigencies as they arise.

The will contained matter which was libelous per se in that it designated some of the legatees as illegitimate children. The libel was published by the executor in probating the will, and the action for damages was brought against him by one of the legatees. In deciding the case the court arrived at a number of conclusions which deserve brief mention.

The Statute of Tennessee which provides that no actions shall abate because of death save those for wrongs affecting the character of the plaintiff, SHANNON'S CODE, § 4569, does not change the common law rule with respect to the class of actions to which the one in the present case belongs, *Hambly* v. *Trott*, 1 Cowp. 371. If then the rule that "actio personalis moritur cum persona" were applicable to this case, the decision obviously would have been that upon the death of the testator the action abated. But the libelous act was never completed in the lifetime of the testator. The publication of the libel, which was necessary to its completion as a tort, was not consummated until his death; and so, since no cause of action arose during his lifetime, the court concluded, logically, it seems, that the above rule did not apply, and that the action did not abate upon the testator's death. The court also concluded that since it was the duty of the executor to probate this will, the failure of the performance of which duty would result in his being criminally accountable, *Smith* v. *Harrison*, 2 Heisk. 230; SHANNON'S CODE, § 6565, the executor should not be held to any liability for the publication of the libel. This conclusion, too, is reasonable. Finally the court concluded that there existed between the testator and the executor a relationship of agency, that the executor in publishing the will was acting as the agent of the testator, and therefore the court decided that the testator's estate, which was the estate of the principal, should respond to the plaintiff for damages.

This last conclusion is absolutely illogical, indeed, so much so, that it approaches absurdity. How can it be said that the death of the testator resulted in the executor's being constituted his agent? What authority is there for saying that death can create an agency? The general rule is that death terminates the agency relationship, *Hunt* v. *Rousmanier's Adm'rs*, 8 Wheat. 174. There are some exceptions to this rule, *Nicolet* v. *Pillot*, 24 Wend. (N.Y.) 240; *Durbrow* v. *Eppens*, 65 N. J. Law 10, 46 Atl. 582; *Garrett* v. *Trabue*, 82 Ala. 227; but it is not asserted that there ever existed any such relation in the lifetime of the testator, and therefore the court could not have understood that this case came within one of the exceptions to the general rule. During the so-called principal's life there never existed any agency relationship to be terminated or not to be terminated by his death.

In *Davis* v. *Lane*, 10 N. H. 156, in which it was held that as a general rule the authority of an agent is terminated by the insanity of the principal, the court used the following language: "An authority to do an act for and in the name of another pre-supposes a power in the individual to do the act himself, if present. The act to be done is not the act of the agent, but the act of the

principal; and the agent can do no act in the name of the principal which the principal might not himself do, if he were personally present. The principal is present by his representative. * * * * But it would be preposterous, where the power is in its nature revocable, to hold that the principal was, in contemplation of law, present, making a contract, or acknowledging a deed, when he was in fact lying insensible upon his death bed, and this fact well known to those who undertook to act with and for him. The act done by the agent, under a revocable power, implies the existence of volition on the part of the principal. He makes the contract—he does the act. It is done through the more active instrumentality of another, but the latter represents his person and uses his name." How much more preposterous is it to conceive of a man's committing a tort when he is in his grave?

In *Moore* v. *Weston,* 13 N. D. 574, 102 N. W. 163, the court expressly held that an attempt to create an agency to become effective at the death of the principal is nugatory. In that case there was a memorandum upon the back of a note which provided that if it were not paid before the payee's death, the maker should expend the balance due, for funeral expenses and monument for the payee. It was held that the maker was the agent of the payee to carry out the provisions of the memorandum after his death, but that the agency never became operative as *the death terminated the authority which purported to create it.*

The executor is not an agent of the testator. He is a principal himself. He is part of an instrumentality which the law has provided to carry out the testator's will. It cannot be denied that the injury done to the plaintiff by the publication of the libel was one for which ample damages were justly due. As the court said, the libel will be republished and the plaintiff's character maligned every time the title to any land devised in the will is examined upon the records. And from one point of view the attempt by the court to adopt a seemingly tenable theory which, although it overthrew settled principles of law, would do justice to this particular case, is commendable. But the making of law is for legislative bodies, and any attempts by a court to usurp that function by distorting well-founded principles is inconsistent with our departmental form of government. W. F. S.

THE RULE OF HIGHER INTERMEDIATE VALUE.—What is the measure of damages, upon the conversion of, or breach of contract to deliver, goods of a fluctuating value? This was the interesting and by means settled question involved in the recent case of *Brewer et al.* v. *Neatherly et al.,* 162 S. W. 1185 (Texas), where the defendant contracted to deliver on or before November 20, 1912, two hundred bales of cotton at 10¾ cents per lb. On November 8, defendant gave plaintiff notice that he would not perform the contract; on that day cotton was worth 11⅞ cents, on November 12, it was worth 12 1-6 cents, and still increasing in price and had been so increasing since October 28th. No evidence was given as to the value on November 20, the agreed date of delivery, or as to the value at the time of trial. Plaintiff contended that he was entitled to the difference between the contract price and the value of cot-

ton on November 20, the agreed date of delivery. Defendant contended the damages should be the difference between the contract price and the value at the date of breach. The court held contrary to the contentions of both, that November 12 should be taken as the date for computing the damages, but did not undertake to state the rule of law involved. The earlier cases in England left the law in an unsettled state and it still seems to be undetermined. A leading case *Sheperd* v. *Johnson*, 2 East 211, was on a writ of inquiry to assess damages on a bond given by defendant, conditioned to replace on August 1, 1799, a quantity of stock lent him. The question was whether the damages should be calculated as of August 1, or as of the date of trial. It was held that the value at the date of trial was the true rule, and LAWRENCE J., in support of this view contended that if a bill in equity had been filed for specific performance, the court would compel a restoration as of that date, consequently the defendant cannot complain if he is compelled to pay that sum as damages. But in a later case in the Court of Exchequer, *Startup* v. *Cortazzi*, 2 C. M. & R. 165, Lord ABINGER refused to apply this rule to the sale of linseed, saying however that it might be applicable to stocks. This rule was then followed in *Owen* v. *Routh*, 14 C. B. 327 and *McArthur* v. *Seaforth*, 2 Taunt, 257. It seems therefore, that in England the courts apply the extreme rule in the case of failure to deliver stocks and give the value as of date of trial, while in the case of conversion of other chattels they go to the other extreme and arbitrarily take the date of conversion, while in cases of failure to deliver on a contract, it is left open and depends on the terms of the contract and the surrounding circumstances. The rule of higher intermediate value is not applied.

The leading case on the rule of higher intermediate value in the United States is *Romaine* v. *Van Allen*, 26 N. Y. 309, in which case the court tried to strike an equitable medium between the two extremes laid down by the English courts, and thereby actually compensate the plaintiff for his loss rather than to choose an arbitrary date. As a result of this attempt we had substantially the first so called rule of "higher intermediate value," which however was modified as shown below. In *Romaine* v. *Van Allen* the action was for the wrongful conversion of railway shares pledged with the defendant as collateral security for a loan. The court allowed "the highest value at any time" between conversion and date of trial. The court did not restrict the application of the rule to stocks, for as Justice ROSEKRANS said: "Although the general rule of damages in trover may be the value of the chattel at the time of its conversion, with interest, or that value when the chattel has a determinate or fixed value, yet when there is any uncertainty or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it at some period subsequent to the conversion; * * * * * that in such cases plaintiff is entitled to recover the market value of the property at any time intermediate the conversion and the trial." This decision was followed and reaffirmed in *Burt* v. *Dutcher*, 34 N. Y. 493, which was an action for conversion of merchandise and not of stocks. It was again affirmed in *Markham* v. *Jaudon*, 41 N. Y. 235, GROVER and WOODRUFF, JJ., dissenting.

The rule as laid down in *Romaine* v. *Van Allen* was permanently modified by the case of *Baker* v. *Drake,* 53 N. Y. 211, 217, 13 Am. Rep. 507, wherein the rule was restricted to the market value within a resonable time, after plaintiff received notice of the conversion. This modification was approved and affirmed in *Wright* v. *Bank of Metropolis,* 110 N.Y. 237, 6 Am. St. Rep. 356,, 1 L. R. A. 289. We then have from the foregoing cases in New York the so called "higher intermediate value" rule as stated at the present time: "In actions for the conversion of stocks, the measure of damages is the highest market value between the time of injury and the time when the plaintiff might with due diligence have replaced himself in the market." This rule applies to dealings in contracts for the failure to deliver chattels of a fluctuating value, viz, "cotton futures," *Hurt v. Miller,* 105 N. Y. Supp. 775.

The Supreme Court of the United States has adopted the New York rule as applied to stock transactions, but refused to extend it to other chattels. *Galigher* v. *Jones,* 129 U.S. 193, 9 Sup. Ct. 335, BRADLEY J. saying "Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time, and hence with regard to them the ordinary measure of damages is their value at the time of conversion, or in case of sale and purchase, at the time fixed for their delivery."

Texas, the state where the principal case was decided, seems to apply the rule as first laid down in New York in *Romaine* v. *Van Allen,* and without the limitation of *Baker* v. *Drake;* the Texas rule may be stated as follows, "Plaintiff is entitled to the highest intermediate value between the date of the injury and the time of trial, subject however, to the limitation that the plaintiff must bring his action seasonably, otherwise the plaintiff is restricted to the value at the time of injury. *Heilbroner* v. *Douglass,* 45 Tex. 402.

Mr. SEDGWICK, in his work on DAMAGES, gives his views of the rule as follows: "In most jurisdictions the rule is not recognized. Its existence can perhaps best be explained by saying that in its present form the rule of higher intermediate value represents the efforts of the courts in the direction of minimizing the effects of what was once a rule still more opposed to principle."

C. W.

RECENT IMPORTANT DECISIONS.

ATTORNEY AND CLIENT—EXEMPTION OF NON-RESIDENT ATTORNEY FROM SERVICE.—Where a non-resident plaintiff in an action pending in the United States Court for the Southern District of Iowa employed an attorney who resided in Illinois, the question was whether such attorney was exempt from service of process in a civil suit while in attendance on court and for a reasonable time thereafter. *Held*, that he was thus exempt. *Read* v. *Neff et al.* (1913) 207 Fed. 890.

At common law the rule was that an attorney while in attendance on court was exempt from arrest on civil process, but this exemption did not extend to the service of process which did not involve arrest. 3 BLACKSTONE, COMM. 289; *Greenleaf* v. *Peoples Bank*, 133 N. C. 298, 98 Am. St. Rep. 709, 63 L. R. A. 499. There are a few courts which have extended this exemption in the case of non-resident attorneys to the service of ordinary civil process. *Hoffman* v. *Bay Circuit Judge*, 113 Mich. 109; *Commonwealth* v. *Ronald*, 4 Call. (Va.) 97; *Whitman* v. *Sheets*, 20 O. C. C. 1, 11 O. C. D. 179. In *Central Trust Co.* v. *Milwaukee St. Ry. Co.*, 74 Fed. 442 it was held that a non-resident attorney was exempt from the service of a subpoena for witness duty. It is submitted that the cases which announce the contrary rule are more in accord with the theory upon which exemptions are founded. The courts have always maintained that exemptions were allowed because they were absolutely necessary in order that justice might not be impeded. It was for this reason that it was not permissible to arrest an attorney while engaged in court. On the other hand the service of ordinary civil process in no way prevents the attorney from performing his duties. It does not seem reasonable that one class of persons should be less amenable to the courts than other classes whose business within the state may be just as urgent and to whom freedom from suit in a foreign jurisdiction would be just as great a boon. For a full discussion of the subject see *Greenleaf* v. *Peoples Bank*, supra, Also *Tyrone Bank* v. *Doty*, 12 Pa. Co. Ct. 287; *Robbins* v. *Lincoln*, 27 Fed. 342.

AUTOMOBILES—RIGHT OF OWNER TO RECOVER FOR INJURY TO UNREGISTERED MACHINE.—In a suit to recover for the negligent injury to an automobile, the failure to have the machine registered was interposed as a defense. A statute made it unlawful for an unregistered automobile to be on the highway. *Held*, that failure to register is no defense. *Birmingham Ry., Lt. & Power Co.* v. *Aetna Acc. & L. Ins. Co.* (Ala. 1913) 64 So. 44.

The precise question is presented for the first time in this jurisdiction, although the court follows its earlier construction of a similar statute, making unlawful the presence of straying cattle on the highway. *A. G. S. R. R. Co.* v. *McAlpine*, 71 Ala. 545. The cases in the other states are in conflict. Those in accord with the instant case take the position that in order to bar recovery, the failure to register must have some causal connection with the injury. *Atlantic C. L. Ry.* v. *Weir*, 63 Fla. 69, 41 L. R. A. (N. S.) 307; *Lindsay* v.

Cecchi (Del.) 80 Atl. 523, 35 L. R. A. (N.S.) 699. The cases taking the opposite view hold that the occupants of the machine are trespassers, and can recover only when the injury is the result of recklessness or wantonness. *Dudley* v. *Northampton St. Ry. Co.*, 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561.

BANKRUPTCY—PREFERENCES—DUTY TO MAKE INQUIRY.—A partnership of which the bankrupt was a member was indebted to a bank in the sum of $19,117.99, secured by government bonds and personal property of the bankrupt amounting to $6,000. The bank refused to extend credit, and the bankrupt applied to the bank's president individually for a loan. A loan of $12,000 was given, and the bankrupt gave real estate as security. The proceeds of the mortgage were placed to the credit of the partnership and checked out to liquidate the partnership's debt to the bank. *Held*, that where a creditor of an insolvent takes security within four months prior to bankruptcy, he is bound to make inquiry as to whether a preference is intended, and is chargeable with knowledge of all that such inquiry, if made, would have disclosed. *Walters* v. *Zimmerman et al.*, (D. C. N. D. Ohio, 1913) 208 Fed. 62.

The rule as thus laid down is too broad, and is not applicable to the facts in the principal case. A mere suspicion of insolvency is not sufficient to put a creditor upon inquiry as to the insolvency of his debtor. *In re Eggert*, 102 Fed. 735; *Crooks* v. *People's Bank*, 72 N. Y. App. 331, 3 Am. B. R. 238. The creditor must have knowledge of such facts as would put a reasonable man on inquiry as to the solvency of his debtor. And where such inquiry, pursued to its legitimate conclusion, would disclose insolvency, such creditor has reasonable cause to believe his debtor insolvent. *Hackney* v. *Raymond*, 68 Neb. 624 10 Am. B. R. 213; *Bardes* v. *Bank*, 122 Ia. 443. On the whole, reasonable cause is a question of fact to be determined under all the circumstances of the case. *Crittenden* v. *Barton*, 59 App. Div. (N. Y.) 555, 5 Am. B. R. 775.

BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—MEDICAL PRACTICE.—An order in bankruptcy had been made directing the trustees to sell (among other things) "the medical and surgical practice and good will of said bankrupt, together with the leasehold interest of said bankrupt in and to the office formerly occupied by Dr. S. Lewin, and now occupied by said bankrupt as a doctor's and surgeon's office." *Held*, that the personal medical and surgical practice and good will of a bankrupt as a physician, are not subject to sale by his trustee, although his property interest in a practice and good will purchased from another may be sold. *In re Myers*, (C. C. A. 7th Cir. 1913) 208 Fed. 407.

This is in accord with the previous decisions. All kinds of property of a bankrupt, save such as is exempt, pass to the trustee in bankruptcy, as do likewise certain powers and rights and documents. BANKRUPTCY ACT, § 70a. The test is, could the property have been transferred by or levied upon and sold under judicial process against the bankrupt? *In re Burka*, 104 Fed. 326. Thus uncompleted contracts for personal services, or for the exercise of skill, wherein personal trust and confidence are reposed, or reliance had upon special skill, do not pass to the trustee, for such property is not transferable nor can it be

effectually seized by legal process. REMINGTON, BANKRUPTCY, § 994. But the decisions as to what constitutes such personal contracts are limited. A contract between a publisher and an author, whereby the former undertakes to publish and market literary productions of the latter, is not assignable. *Matter of McBride & Co.*, 132 Fed. 285, 12 Am. B. R. 81. Nor is the contract with a person for the manufacture by him of a particular commodity requiring special skill of the manufacturer. *Jetter Brewing Co.* v. *Scollan*, 96 N. Y. Sup. 274, 15 Am. B. R. 300. And a contract of agency between an insurance company and its general agent does not pass. *In re Wright*, 16 Am. B. R. 778. It has been held that a franchise to construct a turnpike road and to collect the tolls was a personal trust and did not pass to the assignee, since the person who had the franchise could not voluntarily assign it, the consent of the party conferring the franchise being necessary by reason of the personal character of the work to be performed. *People* v. *Duncan*, 41 Cal. 507. The distinction drawn by the court in the principal case between the personal practice of the bankrupt and the interest purchased by him from another physician appears to be sound.

BILLS AND NOTES—NEGOTIABILITY—REQUISITES—TIME OF PAYMENT.—A note due in three years and secured by a deed of trust, provided that if the interest, which was payable quarterly, should not be paid when due, the whole sum should become immediately due and payable at the option of the holder. *Held*, the note was not negotiable because made payable upon a condition not certain of fulfillment, contrary to the statute providing: "A negotiable instrument must be payable in money only and without any condition not certain of fulfillment." The vice was said to consist, not only in uncertainty as to whether or not the maker would default in the payment of interest quarterly, but in case he does, whether the holder would exercise his option to declare the principal due. *Smiley* v. *Watson*, (Cal. App. 1913) 138 Pac. 367.

The decision is based on the case of *National Hardwood Co.* v. *Sherwood*, 130 Pac. 881, which following *Meyer* v. *Weber*, 133 Cal. 681, holds that the note is non-negotiable for the reason stated in the instant case. The case of *McDonald* v. *Randall*, 139 Cal. 246, allowing recovery on such a note is said not to state state a contrary doctrine, for the reason that the question of the negotiability of the note was not raised. But the instant case overlooked the case of *Kinsel* v. *Ballou*, 151 Cal. 754, where a note in all respects like the note involved in this case and secured by a mortgage, was held negotiable and the holder was allowed to recover against an indorser immediately on exercise of his option to declare the whole sum due for default in payment of an instalment of interest and without a foreclosure of the mortgage. The decided weight of authority seems, as is observed by the writer of the opinion in the instant case, to be contrary to the doctrine announced therein. Prior to the Negotiable Instruments Act it was almost uniformly held that an option given to the holder to declare the whole sum due upon default in payment of an instalment of interest or of the principal, where the note was payable in stallments, did not make the note payable upon a contingency or at a time uncertain and hence did not affect

its negotiability. The reason of this rule is that the note contains a time certain for payment and any earlier date of maturity will depend on the act of the maker himself. *Mackingtosh* v. *Gibbs*, 81 N. J. L. 577; *Martin* v. *Jesse French Piano Co.*, 151 Ala. 281; *Roberts* v. *Snow*, 27 Neb. 425, 43 N. W. 241; *Clark* v. *Skeen*, 61 Kan. 525; *Cox* v. *Cayan*, 117 Mich. 599; *Hunter* v. *Clark*, 184 Ill. 158. The Negotiable Instruments Act has settled the question by providing that the sum payable is a sum certain although it is to be paid "By stated instalments, with a provision that upon default in payment of any instalment or of interest the whole shall become due". BUNKER, NEG. INSTR. § 4. The statute has changed the rule in Wisconsin, see *Thorpe* v. *Mindeman*, 101 N. W. 417; where the doctrine announced in the principal case obtained prior to the statute, see also *Kimball County* v. *Mellon*, 80 Wis. 133.

COLLEGES AND UNIVERSITIES—POWER TO REGULATE CONDUCT OF STUDENTS.—Plaintiff purchased a restaurant near the defendant college in the summer of 1911. During the summer the college faculty passed a rule that "eating houses . . . not controlled by the college must not be entered by the students on pain of immediate dismission". The rule was announced to the students at the opening exercises of the college, and several students were expelled for breach of the rule. Plaintiff applied for an injunction restraining the enforcement of the rule, alleging that his business, which depended almost wholly on student patronage, was completely destroyed. *Held*, That it was within the power of the college in guarding the health, morals, and general welfare of the students to pass and enforce the rule. *Gott* v. *Berea College*, (Ky. 1913), 161 S.W. 204.

The principal case cites *People* v. *Wheaton College*, 40 Ill. 186, with approval in which a similar private incorporated institution expelled a student for breach of a rule forbidding students to join any secret society. In the *Wheaton* case the action was brought by the father to have his son reinstated. Such a private educational institution has power to make and enforce reasonable rules to secure discipline, health, and welfare among the students. The state will not exercise visitatorial powers over such a private institution, *Koblitz* v. *Western Reserve University*, 21 Ohio Cir. Ct. R. 144. An institution controlled and supported by the state may pass reasonable rules and regulations for the control of students so long as it does not refuse to perform any of the duties imposed upon it by law, or refuse admittance to any person entitled to entrance, *Gleason* v. *University of Minnesota*, 104 Minn. 359, 116 N. W. 650, but its regulations are subjected to a closer scrutiny than are the rules of a private institution, *State ex rel Stallard* v. *White et al.*, 82 Ind. 278. In most of the cases reported the action is brought by a student or on his behalf. In *Jones et ux* v. *Cody*, 132 Mich. 13, 92 N. W. 495, an action for damages was brought against the principal of a public school by the keeper of a confectionery store, for compelling children to go directly home from school. It was alleged that the plaintiff's business was injured. It was held that the rule was reasonable and within the power of the school board in discharge of their duty to see

to the welfare of the pupils, and defendant was merely the instrument of its enforcement and not liable. The principal case is one of the most extreme to which this doctrine has been applied, but it seems to fall squarely within the rule of the cases and the injury to the plaintiff was damnum absque injuria.

COMMERCE,—INSURANCE,—STATE TAXATION.. Under a Montana statute every insurance company transacting business in the state was taxed upon the excess of premiums received over losses and ordinary expenses within the state. The tax under this statute was contested by a foreign life insurance company. *Held,* insurance is not commerce, interstate or intrastate, and may be taxed by the states although all the contracts are made at the home office, and great and frequent use is made of the mails in the transaction of the business. *New York Life Insurance Company* v. *Deer Lodge County,* 34 Sup. Ct. 167.

The decision in the principal case states no new doctrine, but confirms in the most positive way a line of decisions which has been the object of constant attack. The original case, *Paul* v. *Virginia,* 8 Wall. 168, 19 L. Ed. 357, involved the business of fire insurance. It was held that a policy of insurance was not an article of commerce but a mere personal contract incidental to business between the states and that a tax on an agent representing an insurance company domiciled in another state was not a burden on interstate commerce. The same is true of bills of exchange, *Nathan* v. *Louisiana,* 8 How. 73, 12 L. Ed. 992. See also *Fire Insurance Association of Phila.* v. *New York,* 119 U. S. 110, 30 L. Ed. 342. The rule was applied to marine insurance in *Hooper* v. *California,* 155 U. S. 648, 39 L. Ed. 297, 15 Sup. Ct. 207. In this case the court refused to make any distinction between the various kinds of insurance. Nevertheless the application of the doctrine to mutual life insurance was resisted, and in *New York Life Insurance Co.* v. *Cravens,* 178 U. S. 389, 44 L. Ed. 1116, 20 Sup Ct. 962, it was definitely applied to that branch of the business. The principal case reviews all of the previous decisions of the court and puts its decision squarely on the rule of "state decisis". The question must be considered as settled for the present at least.

COMMERCE UPON THE HIGH SEAS—IS IT FOREIGN COMMERCE PER SE?—The plaintiff, a steamship company, questioned the right of the state to regulate its rates, because of the fact that a part of its route was upon the high seas. The termini were in the state, and there were no stops made except those within the state. *Held,* that such commerce was not embraced by the commerce clause of the federal constitution, and was subject to direct regulation of the state. *Wilmington Trans. Co.* v. *Rd. Comm.,* (Cal. 1913), 137 Pac. 1153.

The decision is in direct conflict with *Lord* v. *S. S. Co.,* 102 U. S. 541 and *Pac. Coast S. S. Co.* v. *Rd. Comm.,* 18 Fed. 10. In departing from the rule of these cases, the court in the instant case relies on dictum in *Lehigh Valley Rd.* v. *Pa.,* 145 U. S .192, 12 Sup. Ct. 806, 36 L. Ed. 672. But, as is pointed out in *Hanley* v. *Kas. Cy. Ry. Co.,* 187 U. S. 617, 23 Sup. Ct. 214,

47 L. Ed. 333, the *Lehigh Valley* case merely states that it was unnecessary in *Lord* v. *S. S. Co.*, supra, to base the decision on the commerce clause, and comments upon this last case with approval. The court in the instant case has evidently mistaken the state of the federal authorities on the question. Recognizing the rule that transportation from one point in a state to another point in the same state comes within the purview of the commerce clause, *Hanley* v. *Kas. Cy. Ry.. Co.*, supra, the court in the principal case attempts to distinguish between the high seas and the territory of another state or nation. This distinction seems technical and unsound, and it is submitted that the position taken by the federal courts is the better. Navigation of the high seas is permitted citizens of this nation because of the fact that they are citizens of the nation as a nation, and because that nation has equal rights upon the high seas with the other powers. The federal government alone is responsible to the other powers for the conduct of its citizens, and its authority directly to regulate should be plenary.

CONSTITUTIONAL LAW—EIGHT HOUR LAW—MUNICIPAL CORPORATION.—OREGON LAWS 1913, p. 90, provide that eight hours shall constitute a day's labor in all cases where the state, county, school district, or any municipality, municipal corporation or subdivision is the employer of the labor, either directly or indirectly by contract with another. The constitutionality of this act was questioned upon an application for a writ of habeas corpus by one arrested for a violation of the act. *Held*, that the act was constitutional. *Ex parte Steiner*, (Ore. 1913), 137 Pac. 204.

There is a sharp conflict of authority as to the validity of statutes similar to the one upheld in the principal case. DILLON, MUN. CORPS. §118. The distinction is often made between direct and immediate employees of a city and those employed by a contractor on public works; *Ryan* v. *City of N. Y.*, 177 N. Y. 271, in which PARKER Ch.J. distinguishes *Rodger's Case*, 166 N. Y. 1; and in the same case O'BRIEN J. in a dissenting opinion attempts to distinguish between officers of a city and employees of a city, considering the latter as agents of the city. And so in *People Ex rel Cossey* v. *Grout*, 179 N. Y. 417, 72 N. E. 464; *Ex parte Kuback*, 85 Cal. 274, 24 Pac. 737, 20 Am. St. Rep. 226, 9 L. R. A. 482; *Cleveland* v. *Clement Bros. Constr. Co.*, 67 Oh. St. 197, 65 N. E. 885, 93 Am. St. Rep. 670, 59 L. R. A. 775. Statutes regulating hours of labor of those employed by contractors upon municipal work were held invalid upon the theory that they constituted an interference with the constitutional right of persons to contract with reference to their services, where such services are neither unlawful nor against public policy. In *People* v. *Matz*, 193 N. Y. 149, 85 N. E. 1070, 24 L. R. A. (N. S.) 20, it was held that the amendment of 1905 to the Constitution of New York gave the legislature the power to legislate as to those employed by contractors on public works. But in *U. S.* v. *Martin*, 94 U. S. 400, 24 L. Ed. 128; *Ellis* v. *U. S.*, 206 U. S. 246, 51 L. Ed. 1047, 27 Sup. Ct. 600; *State* v. *Atkin*, 191 U. S. 207, 48 L. Ed. 148, 24 Sup. Ct. 124; *In re Broad*, 36 Wash. 449, 78 Pac. 1004, 70 L. R. A. 1011; *State* v. *Livingston Concrete Bldg. & Mfg. Co.*, (Mont.) 87 Pac. 980, it was held that the legislature could impose

whatever condition it might will upon those who desired to contract to furnish labor for the city, a subdivision of the state, for which no one had an absolute right to perform labor. It would seem that the principal case is based upon logically sound legal principles.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—DUE PROCESS—"FULL CREW" ACT.—The Act of June 19, 1911, Pa. P. L. 1053, commonly known as the "Full Crew Act", provided for the management of trains requiring the crews to be composed of a certain number. The appellants filed a bill to enjoin the appellees, the Pennsylvania State Railroad Commission, from enforcing this act on the ground that it was unconstitutional and void, in that property would be taken without due process of law, a compliance with the act would necessarily result in a great expenditure of money, and also because it constituted an interference with interstate commerce. *Held*, that the act was constitutional. *Pennsylvania Railroad Co.* v. *Ewing et al.* (Pa. 1913) 88 Atl. 775.

The decision in the principal case that the act is within the police power of the State and not an interference with interstate commerce is in harmony with the holdings of the United States Supreme Court; *N. Y., N. H., & H. R. Co.* v. *N. Y.*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853, forbidding the heating of cars by stoves; *Smith* v. *Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352, requiring examination of engineers; and *Chic., R. I. & Pac. R. Co.* v. *Arkansas*, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290, which sustained a "full crew" act; and *Pitts., Cin., Chic. & St. L. Ry. Co.* v. *Indiana*, 223 U. S. 713, upholding, without opinion, a like statute of Indiana. That uncompensated obedience to laws passed in the valid exercise of police power is not a taking of property without due process of law, as held in the principal case, was decided by *New Orleans Gaslight Co.*, v. *Drainage Commission*, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831; *Chic. B. & Q. R. R.* v. *Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *Detroit, Ft. W. & B. O. Ry. Co.* v. *Osborn*, 189 U. S. 383, 23 Sup. Ct. 540, 47 L. Ed. 860; *N. Pac. Ry. Co.* v. *Minn. ex rel. Dutulh*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. Ed. 630. The charge is sometimes made that the courts have often in the past usurped the function of the legislature and declared invalid an exercise of police power because of unreasonableness and inexpediency in a particular case. Yet in the principal case, though the appellant clearly showed that large expenditures would be necessary to comply with an act of very doubtful efficacy, the court (although other courts have been led astray by far weaker arguments) did not deviate from the sound constitutional doctrine that the question of expediency is for the legislature. COOLEY, CONST. LIM., c. 7, § 4 (6th Ed. 1890, pp. 197-201); *Jacobson* v. *Mass.*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; *McLean* v. *Arkansas*, 211 U. S. 539, 29 Sup. Ct. 206, 53 L. Ed. 315.

CORPORATIONS—DISSOLUTION ON SUIT OF A MINORITY STOCKHOLDER.—Plaintiff, a minority stockholder of the defendant corporation, brought suit to have the corporation dissolved on the ground that circumstances had

arisen which rendered it impossible for the corporation to perform the purpose for which it was organized. *Held*, that on proof of facts which show clearly that it will be impossible for the corporation to carry out the purpose for which it was created, a court of equity will dissolve it and distribute its assets among those entitled thereto. *Decatur Land Co. et al* v. *Robinson*, (Ala. 1913) 63 So. 522.

The general rule is that a court of equity has no jurisdiction to dissolve a corporation and distribute its assets on the application of a stockholder, *Wheeler* v. *Pullman Iron etc., Co.*, 143 Ill. 197, 32 N. E. 420, and the reason given is that the corporation has the right to manage its own property according to its own judgment which is evidenced by the judgment of its directors, but this reason does not apply where the directors act illegally or fraudulently or otherwise outside the scope of their employment, *Manufacturers' Land and Improvement Co.* v. *Cleary*, 28 Ky. Law Rep. 359, 89 S. W. 248; *Heitkamp* v. *American Pigment & Chemical Co.*, 158 Ill. App. 587. The important point is whether it applies where it is impossible for the corporation to perform the functions for which it was organized. Mere non-user alone will not dissolve and is not grounds for dissolution, MARSHALL, CORPORATIONS, § 157; *Boston Glass Manufactory* v. *Langdon*, 24 Pick. (Mass.) 49, 35 Am. Dec. 292., and it was held in *Kinclad* v. *Dwinelle*, 59 N. Y. 548, that a corporation is not ipso facto dissolved by an injunction restraining it from the exercise of its corporate franchises; nor is it dissolved by other facts arising which render it unable to continue the business for which it was created, *Sleeper* v. *Goodwin*, 67 Wis. 577; but in *Rex* v. *Passmore*, 3 Term R. 245, it was said that "Whenever a corporation is reduced to such a state as to be incapable of acting or continuing itself, it is dissolved"; and it was held in *Moore* v. *Whitcomb*, 48 Mo. 543, that if a corporation suffers acts to be done which have the effect of destroying the end and object for which it was created, it is equivalent to a surrender of its right to exist. But whether or not the corporation is dissolved ipso facto, the courts seem to hold with the principal case that such facts are grounds for dissolution and distribution on a suit by a minority stockholder, *Ross* v. *American Co.*, 155 Ala. 258, 43 So. 817; *Minona Co.* v. *Reese*, 167 Ala. 485, 52 So. 523; *Schmidt* v. *Huntington*, 1 Cal. 55; *Reinhardt* v. *Tel. Co.*, 71 N. J. Eq. 70; *Stevens* v. *Empire Casualty Co.*, 180 Fed. 283; *Parr* v. *Coal Co.* (W. Va. 1913) 77 S. E. 894.

CORPORATIONS—SYNDICATE AGREEMENTS—CONSTRUCTIVE FRAUD AS AFFECTING THE RIGHTS OF SUBSCRIBERS.—Defendant Edenborn was one of the managing officers of a syndicate organized to take over the United States Iron Company and to buy other property. The corporation was reorganized, the property purchased, and the stock issued, when the plaintiff, one of the subscribers to whom stock had been issued, discovering that the defendant had a personal interest in the property purchased, tendered to him the stock received in the reorganized company and sued to recover the purchase price. *Held*, the contract having been fully executed, there remained no right in the individual subscriber to rescind, but such right must be worked

out through the reorganized purchasing company.. *Edenborn* v. *Sim*, (C. C. A. 2nd Circ. 1913) 206 Fed. 275.

In Old Dominion Copper Co. v. *Lewisohn*, 126 Fed. 915, 148 Fed. 1020, 210 U. S. 206, it was held that the syndicate managers, being the sole owners of all the stock at the time of the transaction, are the corporation, and therefore the corporation has acquiesced in the purchase, and the purchasers from the corporation are bound by its acquiescence, *Foster* v. *Seymour*, 23 Fed. 65; *McCracken* v. *Robinson*, 57 Fed. 375; *Barr* v. *N. Y., etc. R. R. Co.*, 125 N. Y. 263; *Blum* v. *Whitney*, 185 N. Y. 232; *Tompkins* v. *Sperry*, 96 Md. 560. But the authorities cited do not support that doctrine in its entirety, for it appears that in those cases all the capital stock was issued to the directors and promoters, and the transaction was therefore actually acquiesced in by all who it was contemplated should be interested in the corporation, except as to those who should acquire an interest from one of these parties. In such a case it may well be that such third parties are bound by the acquiescence of their vendors. But in the principal case not only was it contemplated that other shares would be put on the market, but the managers were under contract to issue stock to those plaintiffs as subscribers to the syndicate agreement. The agreement to purchase was not made to bind the old corporation, but to bind the reorganized company; and the acquiescence of the managers is not, in such a case, the acquiescence of the reorganized company, *Old Dominion Copper Co.* v. *Bigelow*, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218. Consequently, there being fraud on the part of the managers, and no waiver of, or bar to, the plaintiffs' rights, the defendant must be held liable. But the question arises, who is the proper party plaintiff, the individual subscriber or the reorganized company? If the individual subscriber is allowed to rescind and sue for the subscription price, the defendant cannot be placed in his original position; the entire operation may fail and the defendant be held liable for all, even though the value of the property sold to the corporation be relatively small. On the other hand, if the suit is brought in the name of the corporation, it may be that the holders of a very small percentage of the stock will be using the name of the corporation to assert rights that will inure to the benefit of the holders of a majority of the stock who, because of their knowledge of the fraud, are totally without claim. This was one of the reasons for refusing a recovery in *Old Dominion Copper Co.* v. *Lewisohn*, supra, but was held to be the proper way to bring the suit in *Erlanger* v. *New Sombrero Phosphate Co.*, supra, and in *Old Dominion Copper Co.* v. *Bigelow*, supra. As said in the principal case, "It may well happen that because of the peculiar situation of any particular case, no right of rescission exists in favor of one who has been led by fraud into a complicated agreement that has been fully executed. We think this such a case." The action must be brought in the corporate name, not to rescind the subscription, but to recover the secret profits made by the defendant, or any damage sustained by the company by reason of the fraud.

COVENANTS—PERSONS ENTITLED TO ENFORCE COVENANTS AS TO USE OF LAND.—The owner in fee of a hotel conveyed it to the plaintiff, the deed containing a restrictive covenant that neither the hotel nor the premises should at any time be used for any offensive, noisy or dangerous trade or business. At the time of the conveyance the grantor owned no other land in the vicinity. Defendant later agreed to buy land of the plaintiff, the plaintiff knowing that the defendant proposed to erect a music hall on the land. Defendant refused to fulfill his contract on the ground that the hotel was bound by the restrictive covenant in the deed to the plaintiff. Plaintiff asked for a decree for specific performance. *Held*, the convenant did not attach itself to the land and the hotel was not subject to the restriction. Decree granted. *Millbourn* v. *Lyons*, [1914] 1 Ch. 34.

If the covenant was not merely a personal one on the part of the covenantee, i. e., if at the time of the conveyance the covenantee owned other land in the vicinity to which the benefit of the covenant might pass, it is well settled that it would be binding in equity on anyone taking with notice. WASHBURN, REAL PROPERTY (6th Ed.) § 124 et seq. But when, as in this case, the covenant is personal on the part of the covenantee, it is not entirely settled as to whether it should not be personal on both sides. The rule laid down in the principal case is no doubt the better rule and is supported by the great weight of authority. The decision is interesting because it is not in accord with some earlier decisions in England. *Catt* v. *Tourle*, 4 Ch. 654; *Osborne* v. *Bradley* [1903] 2 Ch. 446. It can, however, probably be said to express what is now the law in England and would without doubt be sustained were the question to arise in the House of Lords. See the dicta in *Earl of Zitt v. Hislop*, 7 A. C. at page 447 and *Noakes* v. *Rice*, 27 A. C. at page 35. Also see JOLLY, RESTRICTIVE COVENANTS, 21 et seq. The courts of this country have seldom been compelled to pass upon this question and there is some conflict in the decisions. The Supreme Court of Illinois in a recent decision, *Van Sant et al* v. *Rose et al.* (Ill. 1913) 103 N. E. 194 held that such a covenant was binding upon a subsequent grantee taking with notice. See 12 MICH. LAW REV. 322. But the correctness of the decision can hardly be sustained either on reason or authority, and is not in accord with the other decisions on the subject in this country. *Hano* v. *Bigelow*, 155 Mass. 341; *Dana* v. *Wentworth*, 111 Mass. 291; *Los Angeles University* v. *Swath*, 107 Fed. 298.

EQUITY—LACHES AVAILABLE AGAINST A STATE.—The waters of a certain bayou or slough receded, and said bayou was gradually filled up by deposits of sediment. The State claimed the land so formed, under a grant from the Federal government, while the defendants claim the land by adverse possession. The State brings this suit to establish and quiet its title. Defendants argue that the State is estopped from asserting any title to the land, on the ground that it has for many years neglected to sue, and should not be allowed to sue now. *Held*, the State has seen fit to invoke the aid of equity, and the cause is to be determined on equitable principles. Laches will be recognized

against the State as well as against an individual, in a court of equity. *State of Iowa* v. *Livingston,* (Ia. 1914) 145 N. W. 91.

The early rule on this question seems to have been that laches is not imputable to the government, and it is not responsible for the laches of its officers. *United States* v. *Van Zandt,* 11 Wheat. 187, 6 L. ed. 450, failure to recall a paymaster for not rendering his vouchers for more than six months, as required by law; *United States* v. *Dallas etc. Road Co.,* 140 U. S. 632, 35 L. ed. 571, 11 Sup. Ct. 998, holding that laches cannot be set up against the government in suits brought to declare lands forfeited. In *United States* v. *Beebe,* 127 U. S. 338, where it was sought to set aside a patent for land obtained by fraud, it was said, "The principle that the United States are not bound by any statute of limitations or barred by any laches of their officers however gross, in a suit brought by them as a sovereign government to enforce a public right or assert a public interest, is established beyond all controversy or doubt." In *State of Iowa* v. *Des Moines,* 96 Iowa 534, the court recognized the rule of *United States* v. *Beebe,* but did not apply it, since the facts in the case did not bring it within that rule. The modern rule is laid down in *State of Iowa* v. *Carr,* 191 Fed. 257, to the effect that while mere delay does not either by laches or limitations, of itself constitute a bar to suits and claims of a state or the United States, yet when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judiciable by every other principle and rule of equity applicable to the claims and rights of private persons under similar circumstances. This rule is to be applied in the light of *United States v. Beebe,* and if so applied, it would seem to be the only logical view which a court of equity could adopt.

EVIDENCE—ADMISSIBILITY OF DECLARATIONS BY SELLER TO PROVE FRAUDULENT SALE.—X Grain Company held a bill of lading issued on a car load of oats, and assigned the bill to plaintiff for value. Defendant claims under a creditor of the Grain Company who had attached the car subsequently to the assignment. To prove the assignment fraudulent defendant offered in evidence admissions made by the Grain Company in letters written after the transfer. *Held,* that the declarations of the assignor made after the assignment were inadmissible. *Collins County Grain Co.* v. *Andrews,* (Ark. 1914) 162 S. W. 1098.

In general, admissions of an assignor made before the assignment are competent against the assignee. But when it is sought to use such admissions to prove the transfer fraudulent, other questions arise. As fraud on the part of the vendor would not avoid the sale against a bona fide vendee, it has been held that the vendor's admissions are not competent against the latter. *Peters Miller Shoe Co.* v. *Casebeer,* 53 Mo. App. 640; *Tretzevant* v. *Courtney,* 23 La. Ann. 628; *Foster* v. *Hall,* 12 Pick. 89. They are, of course, admissible against the declarant. *Toms* v. *Whitmore,* 6 Wyo. 220; *Hollingshead* v. *Allen,* 17 Pa. St. 275; *Parker* v. *Marston,* 34 Me. 386. And the declarations may be made in the presence of the vendee, under such circumstances that they become in effect his own admissions, and available against him as

such. *Bender* v. *Kingman*, 62 Nebr. 469. Or when evidence is introduced connecting vendee with the fraud, admissions of the vendor made in accomplishment of the fraudulent scheme are then competent, and bind the vendee as a co-conspirator. WIGMORE, § 1086; *Cuyler* v. *McCartney*, 40 N. Y. 221. When the declarations are made subsequent to the transfer, they are of course not binding on the transferee as admissions of a privy in title. *Meyer* v. *Munroe*, 9 Idaho 46; *Hart* v. *Brierly*, 189 Mass. 598; *Walden* v. *Purvis*, 73 Cal. 518; *Myers* v. *Kinsie*, 26 Ill. 36; *Buckingham* v. *Tyler*, 74 Mich. 101. They may still be admissible in some jurisdictions however. As the bad faith of the vendor is one essential in proof that the transfer was fraudulent, his admissions may be introduced to show bad faith on his part, although the transaction will not be avoided until the fraud is brought home to the vendee. *Carnahan* v. *Wood*, 32 Tenn. 500; *Satterwhite* v. *Hicks*, 44 N. C. 105. On the other hand such evidence may be rejected entirely unless the collusion between vendor and vendee is established, and this is the general rule. *Abney* v. *Kingsland*, 10 Ala. 355; *Partelo* v. *Harris*, 26 Conn. 480.

EVIDENCE—NON-EXPERT'S OPINION AS TO MENTAL CAPACITY.—To prove that testator was of unsound mind at the time he executed his will, a non-expert witness was called who stated that in his opinion deceased was insane at the time in question. The trial court allowed witness to express his opinion without first detailing the data upon which it rested, and on appeal this was held error. *Whisner* v. *Whisner*, (Md. 1914) 89 Atl. 393.

The decision accords with the generally accepted rule. Lay witnesses are, in the great majority of jurisdictions, allowed to state whether in their opinion testator was sane or insane, but before so testifying they must detail as accurately as possible the facts and circumstances upon which they base their opinion. *Bryan* v. *Walton*, 20 Ga. 480; *State* v. *Cross*, 72 Conn. 722; *Armstrong* v. *State*, 30 Fla. 170; *Furlong* v. *Carraher*, 108 Ia. 492; *People* v. *Casey*, 124 Mich. 279; *Lamb* v. *Lynch*, 56 Nebr. 135; *Chickering* v. *Brooks*, 61 Vt. 554. This requirement has been frequently held inapplicable to medical experts; *Crockett* v. *Davis*, 81 Md. 134; WIGMORE, § 1922; and there is an exception to the rule in favor of attesting witnesses, who, although laymen, are allowed to give their opinion unaccompanied by the facts. The principal case recognizes this exception. The court says, "He was not an expert witness nor an attesting witness to the will and he did not fall within the rule which allows this class of witnesses to testify as to the mental capacity of the testator without first stating the facts and circumstances on which the opinion was formed." Such is the settled law in Maryland. *Berry Will Case*, 93 Md. 560; *Jones* v. *Collins*, 94 Md. 403; and the exception is generally recognized elsewhere; *McCurry* v. *Hooper*, 12 Ala. 827; *VanHuss* v. *Rainbolt*, 2 Coldw. (Tenn.) 141; *Lodge* v. *Lodge*, 2 Houst. (Del.) 418; *Hertrich* v. *Hertrich*, 114 Ia. 643; *Robinson* v. *Adams*, 62 Me. 369; *Titlow* v. *Titlow*, 54 Pa. St. 216; *Scott* v. *McKee*, 105 Ga. 256; even in states which exclude entirely the opinion of other lay witnesses. *Williams* v. *Spencer*, 150 Mass. 348. The attesting witness thus occupies an anomalous position, difficult, perhaps, to justify in reason, but firm-established by authority.

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS.—In an action brought by a wife against the mother and step-father of her husband for alienating his affections, relief was denied and it was *held* that though the result of the parents' action was the alienation of the husband's affections, yet no recovery could be had if the parents acted in good faith. *Brison* v. *McKellop*, (Okla. 1914) 138 Pac. 154.

"In every suit of this character the prime inquiry is: From what motive did the father act? Was it malicious or was it inspired by a proper parental regard for the welfare and happiness of the child?" *Tucker* v. *Tucker*, 74 Miss. 93, 32 L. R. A. 623. The substance of the foregoing statement is universally recognized as giving the governing principle. *Multer* v. *Knibbs*, 193 Mass. 556, 9 L. R. A. N. S. 322. A parent may not interfere simply because he is displeased with the marriage, or because it was against his will, or because he wishes the marriage relation to cease. But if he acts in good faith and upon reasonable grounds, although his advice turns out to be unfortunate, yet the parent is not liable. *Oakman* v. *Belden*, 94 Me. 280, 80 Am. St. Rep. 396. If the intermeddler is a stranger a more stringent rule is applied. *Barton* v. *Barton*, 119 Mo. App. 507. But at least one court has held that advice honestly given will bar a right to recover damages even from a stranger. *Tasker* v. *Stanley*, 153 Mass. 148, 26 N. E. 417.

MASTER AND SERVANT—FELLOW-SERVANTS AS "APPLIANCES."—In a personal injury suit against the defendant company the question arose as to whether the proximate cause of the injury was the negligence of a fellow-servant, or the negligence of the defendant in failing to supply a sufficient number of workmen to insure the safety of the plaintiff, or the negligence of the defendant in employing and retaining in its service, as a fellow-servant with the plaintiff, one whose character and habits so far unsuited him for employment in the work on which the defendant's servants were engaged as to jeopardize the plaintiff's safety. The laws of South Carolina were pleaded as the basis of the action, the cause having arisen in that state. *Held*, that the laws of that state would govern, and under the rulings of its Supreme Court the term "appliances" includes human agencies, by virtue of which holding, the jury were to determine whether the defendant was liable for the acts of the agent on the ground that unsafe appliances had been furnished, thereby negativing the "fellow-servant" defence. *White* v. *Seabord Air Line Railway*, (Ga. App. 1914) 80 S. E. 667.

An appliance has been defined as anything brought into use as a means to effect some end. *Honaker* v. *Board of Education*, 42 W. Va. 170. Under such a comprehensive meaning, the South Carolina courts are perfectly justified in holding that the term "appliance," as used in the Constitution, Art. 9; Sect. 15, "includes not only inanimate machinery and tools and apparatus, but also the living men or persons needed to operate the machinery." *Bodie* v. *Charleston & W. C. Ry. Co.*, 61 S. C. 468. The same rule has also been pronounced in Wisconsin in *Johnson* v. *Ashland Water Co.*, 71 Wis. 553. In most of the cases in which this point has been considered the question was whether the master is liable for injury to a servant where the number

of servants employed was insufficient to do the work. The authorities have answered in the affirmative in the great majority of cases, considering a sufficient number of workmen collectively as an appliance or instrumentality which the master is bound to make safe. *Jones* v. *Old Dominion Cotton Mills*, 82 Va. 140; *Mad River etc. R. R. Co.* v. *Barber*, 5 Oh. St. 541; *Booth* v. *Boston etc. R. R. Co.*, 73 N. Y. 38. Very seldom in this country, however, has it been determined that an individual laborer, isolated from the body of workmen, is to be considered an appliance or within the clear meaning of that term. *Flike* v. *Boston & Albany R. R. Co.*, 53 N. Y. 549; *Laning* v. *New York Central R. R. Co.*, 49 N. Y. 521; *Whaley* v. *Bartlett*, 42 S. C. 454; *Ohio etc. R. R. Co.* v. *Collarn*, 73 Ind. 261. If such a view is widely adopted, it will be interesting to note to what extent it will affect the defences of contributory negligence and the fellow-servant doctrine under the comparatively recent Compensation and Safety Appliance legislation.

MONOPOLY—COPYRIGHT ACT—SHERMAN ACT.—The plaintiffs conducted a department store in New York City, a large department of which was devoted to books, magazines and pamphlets, and because of their superior business methods they were able to undersell other retail stores. The American Publishers' Association, comprising 75% of the publishers of copyright books, and the American Booksellers' Association, which was composed of practically all the large book dealers, agreed to maintain the prices of books in the trade and to prevent the selling of books to retailers who would undercut the price sought to be maintained by this combination. The plaintiffs continued to cut the prices fixed by this combination, and the defendants, through the means of the aforesaid associations, by various methods made it impossible for plaintiffs to obtain books in the ordinary course of business. The plaintiffs asked that defendants be enjoined from interfering with the purchase and sale of copyright books by the plaintiff; it having been already determined that the agreement as to uncopyrighted books was illegal. *Held*, that the injunction should be granted as the Copyright Act did not take this agreement out of the operation of the Sherman Act. *Straus* v. *American Publishers' Association*, 34 Sup. Ct. 84.

The Sherman Act has a twofold purpose, to permit commerce to flow in its natural course unrestricted and to give to the public the benefits arising from competition. *U. S.* v. *Hopkins*, 82 Fed. 529. The agreements between publishers and sellers in the principal case, not the Copyright Act, created the monopoly which violated the Sherman Act. *U. S. Shoe Machinery Co.* v. *La Chapelle*, 212 Mass. 467, 99 N. E. 289. It seems that a monopoly arising from the Copyright Act alone would be unobjectionable, for the monopoly arising from a patent itself has been declared legal, and is only limited when articles become affected with a public use. *Chesapeake etc. Tel. Co.* v. *Telegraph Co.*, 66 Md. 399. With reference to patents, the owners of different patents in agreeing to restrict competition between themselves are acting beyond those powers conferred upon them by the patent statute. *Nat'l Harrow Co.* v. *Hench*, 83 Fed. 36; *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, although the contrary is held in *U. S. etc. Seeded Raisin Co.*

v. *Griffin & Skelley Co.*, 126 Fed. 364, 61 C. C. A. 334, due to a misconception of the holding in *Bement* v. *Nat'l Harrow Co.*, 186 U. S. 70. In view of *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 52 L. ed. 1086, 28 Sup. Ct. 722, that the owner of a copyright could not control the resale price and also because of a like holding in *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1, 57 L. ed. 1045, 33 Sup. Ct. 616; 12 MICH. LAW REV. 394, that a patentee could not control the resale price of a patented article, although these cases seem in conflict with *Henry* v. *Dick*, 224 U. S. 1, 56 L. Ed. 645, 32 Sup. Ct. 364; 10 MICH. LAW REV. 579, it is impossible to see how a different conclusion could have been reached in the principal case.

MUNICIPAL CORPORATIONS—CONSTITUTIONAL AND STATUTORY PROVISIONS CONCERNING POLICE POWER.—The legislature enacted a statute creating the office of state fire marshal, authorizing the governor to appoint the incumbent thereof. The act empowered such marshal to investigate the cause and surrounding circumstances of every fire in any city, to search for incendiarism, to direct the chiefs of city fire departments in making such investigation, and to order the repair and removal of dangerous and dilapidated buildings. The state constitution provided that "the electors of the city of New Orleans * * * shall have the right to choose the public officers, who shall be charged with the exercise of the police power and with the administration of the affairs of said corporations in whole or in part." *Held*, by a divided court, that the statute in question violated the constitutional provision just mentioned. *State* v. *LaFayette Fire Ins. Co.*, (La. 1913), 63 So. 630.

The theory of the minority decision was that the constitutional provision referred only to the police administration of the city, and did not affect the exercise of the general police power of the state; that part of the statute, at least, referred to a felony—arson—over which the municipality had no jurisdiction. Nor is this theory entirely without merit. In *State* v. *Flower et al.*, 49 La. Ann. 1199, 22 So. 623, wherein an article of an earlier constitution, similar to the one under discussion, was construed, the court said: "The attribute of government we call the police power, resides in the State, can not be relinquished by the Legislature, and if it can be surrendered by the organic law, at least, the abandonment to command judicial acceptance should find the clearest expression. * * * It has never been supposed that the State has parted with all legislative control of such subjects (drainage) by the provision in the Constitution giving to the citizens of New Orleans the appointment of the officers required for the police administration of the city. The police power given to the state, * * * we can not appreciate, is to be abridged by a constitutional provision dealing with the ordinary functions of the police administration of the city, and confiding such duties to the agents selected by the citizens." Moreover, in discussions of the right of local self-government, it is recognized that "the maintenance of peace and quiet, and the suppression of crime and immorality, are matters of general interest, and to the attainment of these ends the cities and towns are largely subject to legislative control." *Arnett* v. *State ex rel.*, 168 Ind. 180, 80 N. E. 153. Yet where,

as in the principal case, the legislature creates an office and provides that its incumbent shall exercise powers some of which are of local and some of state-wide concern, there is authority for adjudging the whole act invalid. *City of Evansville* v. *State ex rel.*, 118 Ind. 426, 4 L. R. A. 93.

NEGLIGENCE—PARENT'S NEGLIGENCE NOT IMPUTED TO CHILD.—The plaintiff, a three-year-old infant, was maimed by the dangerous alluring machinery of the defendant company, around which she was accustomed to play. Her father was manager of the defendant company, resided with her upon the premises and knew of her habit of playing near the uncovered machinery. *Held*, that the parent's negligence could not be imputed to the child, since the child is not responsible for the negligence of its parents. *Clover Creamery Co.* v. *Diehl* (Ala. 1913) 63 So. 196.

The decision in the principal case represents the trend of modern decisions and the weight of authority. *Neff* v. *City of Cameron*, 213 Mo. 350, 18 L. R. A. N. S. 320; *Union Pac. Ry. Co.* v. *Young*, 57 Kan. 168, 45 Pac. 580; *City of Murphyboro* v. *Woolsey*, 47 Ill. App. 447. In the extensive note in 18 L. R. A. N. S. 320 the annotator declares that since 1892 the decisions in nearly all the states except New York (which continues to follow *Hatfield* v. *Roper*, 21 Wend. 615, 34 Am. Dec. 273) have been in favor of the doctrine of the principal case. Cases appearing to announce a contrary rule are *Holly* v. *Boston Gas Light Co.*, 74 Mass. 123, 69 Am. Dec. 233, and *Leslie* v. *City of Lewiston*, 62 Me. 468. See 4 MICH. L. REV. 79, 167; 9 ID. 165.

RAILROADS—INJURIES TO TRESPASSERS—CARE AFTER INJURY.—Decedent, while riding on one of defendant's freight trains, was thrown off and received serious injury. While utterly helpless and bleeding profusely, he was placed by defendant's agents and servants, over his protest, in an unheated box car, where he was allowed to remain without medical attention or other care for about four hours, and in consequence of such exposure and negligence he bled to death before reaching a hospital to which he was subsequently taken. *Held*, that, though defendant was not liable for the original injury, its servants having assumed control over decedent over his protest and with knowledge of his imminent peril, their conduct amounted to wanton negligence in decedent's treatment, for which defendant was liable. *Slater* v. *Illinois Cent. R. Co.* (C. C. Tenn. 1913) 209 Fed. 480.

The authorities generally agree that a railroad company, free from negligence in injuring a trespasser, cannot be made liable on the ground that its servants were negligent in caring for him after the accident. The railroad company is under no legal obligation—however strong the moral obligation—to take charge of the wounded man. If the law were otherwise "no humane or gratuitous act could be done without subjecting the doer of it to an action on the ground that the defendant ought to have acted more quickly or with more judgment." *Union Pac. R. Co.* v. *Capper*, 66 Kans. 649; *Griswold* v. *Boston etc. R. R. Co.*, 183 Mass. 434; *Kendall* v. *Louisville & N. R. Co.*, 25 Ky. Law Rep. 793; Contra; *Northern C. R. Co.* v. *State*, 29 Md. 420; *Baltimore & O. R. R. Co.* v. *State*, 41 Md. 268; *Whitesides* v. *Southern R. Co.*,

128 N. C. 229. But in the principal case, as the court points out, the question is not whether the company is liable for not taking care of an injured trespasser, but whether, after assuming control of the injured person, they are bound to take care of him and see that proper medical attention is secured. In determining this question the court adopts the holding in the case of *Dyche* v. *Railroad Co.*, 79 Miss. 361, that where a railroad company had injured a trespasser under such circumstances that it could not be held liable for the original injury, if it assumed charge of the injured person when in a helpless condition and shipped him to another place from that at which he had been injured, it was charged with the duty of ordinary humanity in taking care of him while he was thus in its charge. See *Needham* v. *S. F. & S. J. R. Co.*, 37 Cal. 409. The Massachusetts court in the case of *Griswold* v. *Railroad Co.*, supra, criticises the *Dyche* case, supra, as not proceeding on strict legal theory. Nevertheless it seems that it may well be justified under the principle laid down by Chief Justice KENT in the case of *Thorne* v. *Deas*, 4 Johns. 84, that "if a party who makes an engagement (the gratuitous performance of business for another), enters upon the execution of the business, and does it amiss, through the want of due care by which damage ensues to the other party, an action will lie for the misfeasance." And again it is said that "the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." 1 SMITH'S LEADING CASES, 82. The question might well arise in a case like the one under consideration whether the tortious conduct of the agents and servants was so within the scope of their duties and employment as to charge the master for the resulting injury. In the solution of this problem it is material to note the observations of an eminent text writer, "The extent of the liability of railways for the acts of their agents and servants, both negative and positive, seems not very fully settled in many of its incidents. But the disposition of the courts has been to give such agents and servants a large and liberal discretion, and hold the companies liable for all their acts, within the most extensive range of their charter powers." 1 REDFIELD, RAILWAYS, 510.

RIGHT OF PRIVACY—INTERPRETATION OF THE NEW YORK STATUTE.—The plaintiff had been a wireless-telegraph operator on the vessel Republic, and after a collision between the Republic and another ship, summoned help by the use of the wireless. The defendant, a corporation engaged in making films for use in moving picture machines, produced films purporting to portray the circumstances attending the disaster. This was done by constructing scenes to represent the events which took place, employing actors to take the parts of the actual participants. One of these actors was made up to imitate the plaintiff, and in one scene appeared alone, unconnected with any of the events of the accident; plaintiff's name was used several times in the film and also in advertising circulars. Plaintiff applied for an injunction and damages under the Civil Rights Law (Consol. Laws c. 6) §§ 50 and 51. Defendant claimed, inter alia, that this was not a picture of the plaintiff but of another individual who merely represented the plaintiff. *Held*, a picture within the meaning of the statute is not necessarily a photograph, but includes any representation of

a person, and the defendant's use of plaintiff's name and picture is actionable. *Binns* v. *Vitagraph Co. of America,* (N. Y. 1913) 103 N. E. 1108.

No case has heretofore arisen where the picture was not actually that of the complainant, and the court's construction seems to be the most liberal that has yet been placed upon this penal statute. If the purpose of this statute is to remedy such situations as arose in *Roberson* v. *Rochester Folding Box Co.,* 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 823, its aim must be to prevent the unauthorized use of one person's name, picture, or portrait, by another who seeks to advertise, or increase the profits of his business, by the use of the complainant's picture, name, etc., thereby exhibiting publicly the name and personal peculiarities of act or appearance of the complainant and bringing upon him mortifying or at least unpleasant notoriety and ridicule. *Moser* v. *Press Pub. Co.,* 109 N. Y. Supp. 963; *Wyatt* v. *James McCreery Co.,* 111 N. Y. Supp. 86. The statute is penal and a strict construction of it would seem to permit the courts to go no further than to enjoin a graphic representation of the complainant, but the language used by the court in the principal case appears to give more latitude to the meaning of the words of the statute. If a picture of a different individual, made up to represent the complainant, falls within the prohibition of the statute, it would seem that the actual impersonation of another by an actor on the stage could also be restrained. Such an impersonation would fall within the court's definition of trade purposes in the principal case; it would also be "a representation of the person" impersonated; and would fall within the spirit of the law as construed by the court in the principal case. As to the right of privacy generally, see 4 HARV. L. REV. 193, 3 MICH. L. REV. 559, 5 ID. 378, 7 ID. 83, 8 ID. 221, 11 ID. 338.

SALES—CONDITIONAL SALES—NECESSITY OF RECORD—WHAT LAW GOVERNS. —A steam shovel was sold conditionally in Pennsylvania, to be removed to Virginia to be used in construction work. The conditional sale was not recorded in Virginia as required by its laws. Vendee made an assignment for the benefit of creditors, and plaintiff, the conditional vendor, sues for a return of its shovel. *Held,* the sale was subject to the recording laws of Virginia, and was therefore invalid as against creditors. *Corbett* v. *Riddle,* 209 Fed. 811.

The principal case based its opinion on the authority of *Hervey* v. *Locomotive Works,* 93 U. S. 664, and *Green* v. *Van Buskirk,* 5 Wall. 307 (7 Wall. 139). These two cases, sound law in themselves, have led to much confusion. The validity and effect of contracts relating to personalty are generally determined by the laws of the state or country where made, and as a matter of comity, will be enforced in another state, if valid where made. It has accordingly been held in many states, where the question of chattel mortgages was involved, that the removal of a mortgagor from the state in which he resided when the mortgage was given, and where it was duly recorded, and the taking of the mortgaged property with him, does not invalidate the record of the mortgage or necessitate the recording of it again in the state to which he has removed. *Offut* v. *Flagg,* 10 N. H. 46; *Ferguson* v. *Clifford,* 37 N. H.

86; *Cobb* v. *Buswell*, 37 Vt. 337; *Ballard* v. *Winter*, 39 Conn. 179; *Keenan* v. *Stimson*, 32 Minn. 377; *Martin* v. *Hill*, 12 Barb. (N. Y.) 631; *Kanaga* v. *Taylor*, 7 Oh. St. 134, 70 Am. Dec. 62; *Simms* v. *McKee*, 25 Iowa 341; *Feurt* v. *Powell*, 62 Mo. 524; *Hornthal* v. *Burwell*, 109 N. C. 10, 13 L. R. A. 740, 26 Am. St. Rep. 556; *Cool* v. *Roche*, 20 Neb. 550; *Shapard* v. *Hines*, 104 Fed. 449, 52 L. R. A. 675; see also 4 MICH. LAW REV. 356. The theory upon which these cases are based is that the lex loci contractus should prevail over every other law. MINOR, CONFLICT OF LAWS, § 132; *Barker* v. *Stacy*, 25 Miss. 471. Other states arrive at the same result by saying that it is the duty of the third party to investigate at the residence from which his vendor came. *Handley* v. *Harris*, 48 Kans. 606, 30 Am. St. Rep. 322. While others say that a mortgage as security would be well nigh worthless if this rule was not applied. *Hoit* v. *Remick*, 11 N. H. 285. Michigan, however, refuses to follow the rule on any theory. *Corbett* v. *Littlefield*, 84 Mich. 30, 11 L. R. A. 95, 22 Am. St. Rep. 681. The rule as above stated in reference to chattel mortgages, applies generally to contracts of conditional sale. *Dixon* v. *Blondin*, 58 Vt. 689; *Public Parks Amusement Co.* v. *Carriage Co.*, 64 Ark. 29; *Harper* v. *People*, 2 Colo. App. 177; *Weinstein* v. *Freyer*, 93 Ala. 257, 12 L. R. A. 700; *Marvin Safe Co.* v. *Norton*, 48 N. J. L. 410, 57 Am. Rep. 566; *Waters* v. *Cox*, 2 Ill. App. 129. The principal case and the two cases upon which it relies, then, may be said to be exceptions to the general rule, or, more properly, to lay down a distinct rule, that where the parties reside in one state and the contract is made there, if the property is at that time situated in another state, or taken there by virtue of the contract or with the consent of the mortgagee or conditional vendor, then the law of the latter state applies, and the conditional vendor or mortgagee must comply with the provisions of its laws. This is what the court meant in the principal case when it said, "Whoever sends property to another state impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides." *In re Legg*, 96 Fed. 326; *Knowles Loom Wks.* v. *Vacher*, 57 N. J. L. 490, 33 L. R. A. 305; *Beggs* v. *Bartels*, 73 Conn. 132, 46 Atl. 874; *McGourkey* v. *Ry. Co.*, 146 U. S. 536; *Holt* v. *Knowlton*, 86 Me. 456.

BOOK REVIEWS.

THE JUDICIARY AND THE PEOPLE. By Frederick N. Judson, St. Louis, Mo. Yale University Press, New Haven; and Humphrey Milford, Oxford University Press, London, England, 1913. pp. 270.

This book is made up of the William L. Storrs lectures delivered by Mr. JUDSON for the law school of Yale University in 1913. The author has treated of a number of questions relating to the administration of law which have been before the country during the last few years. Chief among these are the matters of the independence of the judiciary, the separation of the powers of government, judicial review of legislation, and modern administrative commissions. Incidentally the subjects of recall of judges and recall of judicial decisions are considered. While the book does not profess to be one of research it is an original, well-balanced and suggestive treatment of the topics covered. In tone it is dispassionate and judicial. The author freely concedes that there are serious defects in our law and its administration but he finds weighty reasons in history and in logic for rejecting some of the nostrums already referred to offered for curing these ills. Like most other thoughtful lawyers, Mr. JUDSON believes that the recall of judges (at least if we are to retain our present short judicial terms), and the recall of judicial decisions would utterly fail to have the effect desired and would produce disastrous and fundamental changes in our political institutions. Mr. JUDSON also thinks that there may be detected perhaps a tendency to swing away from the short elective terms of judges and to return to appointment. He states that in 1789 no state judges were elected, whereas now state judges are elected in all but five states. But he points out that Mississippi, which was among the first of the states to adopt election as the mode of filling the bench, has abandoned it for appointment. See page 160.

Reference is made by the author to many of the best recent scholarly contributions to this general subject and the researches and views of the best recent writers have entered into his judgment. The proof-reading has not been done as carefully as it might have been but this has caused but slight defects in a very sound little book. H. M. B.

THE LAW OF DECEDENTS' ESTATES, INCLUDING WILLS. An abridgment for the use of law students of J. G. Woerner's treatise on the American Law of Administration. Edited by William F. Woerner and F. A. Wislizenus, instructors in the law department of St. Louis and Washington Universities. Little, Brown & Co., Boston, 1913. pp. xxxvi. 527.

Judge WOERNER's original treatise on the American Law of Administration was perhaps the greatest contribution to the American law of decedents' estates, and has been used by practitioners and students more than any other single work on the subject. The present book is an abridgment of this work for use in law schools, and the editors, who have taught the subject in their

respective law schools, have endeavored to eliminate much of the detail and citation of authorities, indispensable to the practicing lawyer but unnecessary and confusing to the student. Apparently they have succeeded in doing this with much success. And the result of their work, so far as the reviewer has been able to test it, is an accurate statement of the fundamentals of the subject. Of course the use of textbooks has been abandoned in most of the leading law schools of the country, but for students in school or out who wish to use a compact and accurate statement of the law of administration this book may be commended. H. M. B.

AIDS TO THE STUDY AND USE OF LAW BOOKS. A selected list, classified and annotated, of publications relating to law literature, law study and legal ethics, by Frederick C. Hicks, A.M., LL.B., Assistant Librarian of Columbia University. New York, Baker, Voorhis and Company, 1913. 129 p.

In a few more than a hundred pages, the compiler has classified some two hundred and twenty-six items under the following heads: Law Study; How and Where to Find the Law; Legal Bibliographies; Legal Terminology; Textbooks and Treatises; Case Law; Statutes and Session Laws; Law Collections in the United States; Legal Ethics. Each chapter opens with a few explanatory paragraphs which are followed by annotated titles of books which describe law books. These lists do not aim to be complete but the selections are thought to be practically useful to students. Many of the entries under chapter heads could be more closely grouped to good advantage. For example, the Lists of Abbreviations and Regnal Years would be more convenient to consult, had they been printed on two pages instead of eight.

The index appended to the book is crude, at times misleading, and inadequate to bring out all the information contained therein. How and Where to Find the Law cannot be answered by referring to an instruction book alone, but one who reads or even looks at the volumes listed, cannot fail to derive much benefit. Until the time comes when a course in legal bibliography is included in every Law School curriculum, the assistance rendered by books such as the one reviewed, will be welcomed and appreciated and Mr. HICKS is to be commended for his efforts to help not only the students of his own university but others as well. G. E. W.

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TRUSTS BASED ON ORAL PROMISES TO HOLD IN TRUST, TO CONVEY, OR TO DEVISE, MADE BY VOLUNTARY GRANTEES.

II.

SITUATION 4.

Where a grantor conveys without consideration other than the grantee's promise to hold in trust for, or to reconvey or to devise to, the grantor.

The situations heretofore considered have all dealt with conveyances on an oral trust for, or oral promise to convey or to devise to, some one other than the grantor. Is the case of a conveyance where the oral promise is for the benefit of the grantor essentially any different? A correct answer to that question necessitates a brief historical consideration of the origin of uses and trusts.

The history of the court of chancery reveals that from time to time three kinds of resulting uses and three kinds of so-called resulting trusts have been enforced, namely: (1) Uses and trusts arising on conveyances without consideration and without the declaration of a use to the grantee or to some one else; (2) Uses and trusts raised when on a voluntary conveyance the uses or trusts declared do not dispose of the whole use or trust fee or other trust interest which the grantor could dispose of; and (3) uses and trusts arising where one man pays the purchase money for land and the deed is executed and delivered to another as grantee.

The first kind of resulting use or trust owes its origin to the popularity of uses or trusts. Prior to the statute of uses it was so common for land to be conveyed in trust that it was only fair for the court of chancery to presume that a feoffor who enfeoffed another without consideration did so on a trust for himself, and was only right for it to put on the feoffee the burden of rebutting that presumption by establishing affirmatively that a gift was intended, if such was the case. In establishing its presumption the court of chancery simply took judicial notice of the nation-wide practice which had grown up

whereby owners of land vested the titles to their lands in others on secret trusts for themselves. At the same time, chancery left to owners of land the right to make gifts of land and therefore permitted the donees of the land to rebut the presumption of a resulting use or trust by showing that the transfer of title was by way of gift; and in addition chancery made the declaration of a use or trust for the grantee on the feoffment sufficient evidence of a gift intended to rebut the presumption of a resulting use or trust.

The first kind of resulting use practically ceased to exist after the statute of uses was passed, since conveyances operating under that statute became the common mode of conveyance in the place of feoffment. Indeed, it has come to be believed that the statute of uses itself nullified the effect of any feoffment made without consideration and without a statement of the use to which it was made.[43] Very naturally, then, the statute of uses broke up the practice on the part of owners of land of conveying their lands on secret oral trusts, and while some such conveyances undoubtedly took place, they constituted exceptional transactions in which the grantor relied on the honor or conscience of the grantee. In the period of about a hundred years before chancery realized that despite the statute of uses there were a number of situations demanding the recognition and enforcement of passive trusts—the most noteworthy being the passive use on a passive use—and acted upon that realization by giving us the modern passive trust, conveyances without consideration on secret oral or written trusts for the grantor became so relatively rare that the presumption of a resulting trust could not fairly be indulged .

The typical conveyances after the statute of uses were the bargain and sale deed and the covenant to stand seised to uses. In the case of a bargain and sale deed there was a "valuable consideration" on which a use to the bargainee was raised, and there to imply, i. e., presume, a resulting trust would generally have been to act in violation of the intent of the parties. In the case of a covenant to stand seised to uses there was at least a "good consideration," and a "good consideration," with the natural inference from it that a gift to the covenantee was intended and was deserved, made it just as unreasonable to imply, i. e., presume, a resulting trust for the covenantor, after the statute of uses had executed the use in the convenantee, as it would be today to imply a resulting trust where the hus-

[43] "In cases in which before the statute of uses a use resulted to the grantor owing to the want of consideration for the conveyance, in the absence of an express declaration of use, after the statute the use thus resulting to the grantor was converted into a legal estate, and he remained seized as before."—1 Tiffany, Modern Law of Real Property, § 89. But Lord Holt did not agree. See Shortridge v. Lamplugh, 2 Ld. Raym. 798, 801-802.

band pays the purchase money and the title is conveyed to his wife The reasonable presumption, in the absence of special circumstances, was that a gift or advancement was intended. What was true of bargain and sale deeds was deemed true of the statute of uses conveyance of lease and release, where there was in form a bargain and sale lease followed by release, but where in practice no consideration was needed.[44] The result was that even after passive trusts, and among them uses on uses, were recognized and enforced by chancery, the court of chancery would not imply a use on a use in favor of a voluntary grantor where the conveyance operated under the statute of uses, i. e., would not presume a use for such a grantor to be attached to the estate vested by the conveyance and the statute in the grantee. The refusal to presume such a use on a use was not because of any insuperable theoretical difficulty—a conveyance operating under the statute of uses would not be rendered nugatory by a written agreement to hold the estate conveyed in trust for the grantor, and so would not necessarily be contradicted by one implied in fact—but because the condition of land holding had so changed that a presumption that no trust was intended accorded with common experience. There are not wanting intimations in the English books that this is no longer true in England, and that on a voluntary conveyance in England today, even though it be one operating under the statute of uses, there will be indulged a presumption of a resulting trust for the grantor.[45] But the American rule is otherwise and it would seem properly so.

Trusts for a grantor in a voluntary conveyance, which operates under the statute of uses or some modern statute, and which does

[44] Challis, Real Property, 3 ed. 420.

[45] "In England, however, the later decisions have shown a disposition on the part of the judges to imply a resulting trust in favor of the grantor, though the deed recites a consideration, from the mere nonpayment of the consideration money."—15 A. & E. Ency. Law, 2 ed., 1125. "For no valuable consideration I convey land unto and to the use of A and his heirs. Here the use does not result, for a use has been declared in A's favor, so A gets the legal estate, but in analogy to the law of resulting uses, the court of Chancery has raised up a doctrine of resulting trusts. If without value by act inter vivos I pass the legal estate or legal rights to A and declare no trust, the general presumption is that I do not intend to benefit A, and that A is to be a trustee for me. However, that is only a presumption in the proper sense of that term, and it may be rebutted by evidence of my intention."—Maitland's Equity, 63.

See Lewin on Trusts (Flint's Ed.) 144; (12th Engl. Ed.) 164, to the same effect. In a note to Lewin it is said: "But in Lloyd v. Spillet, 2 Atk. [148], 150 [year 1740], and Young v. Peachy, Ib. [254], 257 [year 1741], Lord Hardwicke was apparently of opinion that since the statute of frauds, there are only two cases of resulting trust, viz., 1st, where an estate is purchased in the name of a stranger; and 2ndly where on a voluntary conveyance a trust is declared of part, in which case the residue results. It would seem to follow that, in his opinion, should a voluntary conveyance be made and no trust at all be expressed, the grantee would take the beneficial interest to his own use."

not disclose the trust, are so relatively rare that they cannot fairly be implied in fact, i. e., such a trust cannot fairly be presumed from the mere fact that the grantee paid nothing; and if secret oral trusts are to have any trust effect, or trust consequences, it must be through their operation either as express trusts or as part of the circumstances which impel equity to raise constructive trusts.

But when it is said that it is fair to indulge a presumption against a resulting trust, where a grantor conveys to the grantee by absolute deed, even though no actual consideration is given by the grantee, it must also be said that the presumption against a trust is properly only one of fact. Those American courts which have made it a conclusive presumption of law have gone altogether too far. Like the presumption of no resulting trust where a man pays the purchase money for realty and has the conveyance made to his wife or child, it is fairly to be considered only a rebuttable presumption. And if the presumption is rebutted, the trust which arises, whether it be called resulting or constructive, is on sound principle precisely the same in both cases.

The second kind of so-called resulting use or trust, namely, where the donor creator of a trust fails to dispose, in so many words, of the whole equitable interest, has not been the subject of controversy. Such so-called resulting trusts seem to be recognized and enforced everywhere. The grantor who is paid nothing is deemed to get the seemingly undisposed of equitable interest as a trust which is called by the courts resulting, but which seems instead to be a trust found by construction of the express trust, and hence to be entitled to be called an express trust.[45a] Where the creator of the trust is not a

[45a] See 27 Harv. Law Rev. 437, 454-455. If this kind of a trust is an express trust defined by construction, the practical consequence will be that oral evidence offered by the grantee that it was the oral agreement of the grantor and himself that he should keep for himself any undisposed of equitable interest, or, perhaps, even that he should be trustee of it for third persons, will properly be inadmissible, against objection, because it would vary or contradict the deed. Though an oral agreement that the grantee should hold for himself the undisposed of equitable interest might perhaps be deemed the grantor's contemporaneous oral assignment to the grantee of the equitable interest which "results" to the grantor by construction of the trust instrument, and so would not have to meet the parol evidence rule, it would then be void under the 9th section of the statute of frauds. If, on the other hand, the trust above mentioned is a resulting trust by presumption, such oral evidence will properly be admitted to rebut the presumption of resulting trust and to point out the third person constructive cestuis for whom on principle the grantee must hold, if he is not to keep for himself.

It ought here to be pointed out that the view that the trust is express by construction, where a trustee is given a larger estate than is needed for the trust stated in explicit words or where the trust so stated fails, may be entertained and yet a conveyance expressly "in trust" but wholly silent as to the nature of the trust may be deemed not express but resulting, or, on occasion, constructive. In the former case, the expression of the trust in apt words as to part of the equitable interest makes it fair, if not

necessary, under a liberal interpretation of the principle that expressio unius est exclusio alterius, to say that no express trust can be considered that is not found by a scrutiny of what is within the "four corners" of the document. The non-payment of consideration, however, can be shown; for the rules of construction permit proof of the circumstances of the transaction, since such proof simply enables the court to put itself in the position the parties occupied and to construe the document accordingly. In the situation mentioned in the text, therefore, the trust which is found for the grantor, in the light of that fact of non-payment of consideration, seems fairly to be deemed express by construction. But where the conveyance is "in trust," yet no part of the equitable interest is given in so many words to anybody,—as, for instance, if the deed should recite that the grantee is to hold for those whom the grantor has privately instructed him about—the express language seems to be awarded its full effect when it is taken to show that the grantee is not to take beneficially but is to hold in trust for some one, and the writing is not contradicted or even varied by oral evidence that the conveyance was on an oral trust for third persons alone, or for third persons and the grantor, or even for third persons and the grantee.

The difference between the two kinds of situations above discussed is that suggested somewhat inartistically in the following statement on p. 170 of the 12th English edition of Lewin on Trusts, namely: "Where a trust results to the settlor of his representative not by presumption of law, but by force of the written instrument, the trustee is not at liberty to defeat the resulting trust by the production of extrinsic evidence by parol."

In the second situation above discussed, in the absence of any evidence of an oral trust, i. e., of what "the trust" referred to in the conveyance is, a resulting trust to the grantor will be found, if the conveyance was voluntary (Ames, Cases on Trusts, 1st ed., 211, n.); but that is ex necessitate, since the express language prima facie shows that the grantee does not take beneficially and, by supposition, the unpaid grantor alone comes forward with an equitable claim. As Dean Ames pointed out, "In Taylor v. Haygarth, 14 Sim. 8, for the same reason, there being no heir or next of kin of the testator, the real estate went to the trustee and the personal estate to the crown."—Ames, Cases on Trusts (1st ed.) 211, n. If, however, evidence is offered that one of the oral trusts above suggested was undertaken by the grantee, expressly or by conduct, as the inducing cause of the conveyance, the statute of frauds (though not, it would seem, the parol evidence rule), will stand in the way of enforcement of the express oral trust as such; but on principle a constructive trust for the intended cestuis should be enforced. The better considered statute of wills cases make this plain. See Riordan v. Banon, Irish Rep. 10 Eq. 469; Curdy v. Berton, 79 Cal. 420; In re Huxtable [1902] 2 Ch. 793. But see contra Olliffe v. Wells, 130 Mass. 221; Smith v. Smith, 54 N. J. Eq. 1; Heidenheimer v. Bauman, 84 Tex. 174; Sims v. Sims, 94 Va. 580. It being clear only that the voluntary grantee is to hold for some one, that some one may be selected on sound resulting trust or constructive trust principles.

While in those statute of wills cases which do not permit the oral evidence that a trust for third persons was intended to stand in the way of a trust for the heirs of the testator, the courts do not articulate the proposition, but instead follow the Massachusetts court's indefensible lead in regarding the testator as having had in separate ownership both the legal and the equitable interests in the property affected and as having devised only the legal and therefore as having died intestate as to the equitable, it would seem as if they really affirm that on a devise "in trust," the trust being otherwise not set out, there is by construction an express trust for the testator's heirs which the oral evidence contradicts. Though the writer can see the possibility of that position, he does not accept it, and, accordingly, does not find an express trust for the grantor in a deed which shows on its face that it is made in trust but does not in words set out any trust. In dealing with situations in this "twilight zone," there is no overwhelming necessity of seeing one thing rather than another, but the writer cannot see an express trust by construction for the grantor where only the words "in trust" are in the instrument but is convinced that he does see one in the situation mentioned in the text supra.

If either kind of conveyance in trust discussed in this note is not voluntary, but the property really is purchased by the grantee, there can be no trust for the grantor not

donor but is paid for the property, there is no trust for him if the equitable interest is not fully disposed of to the designated *cestuis,* but instead there is the third kind of resulting trust for the payer of the purchase money.[45b]

The third kind of trust called resulting—the name in this case is deserved—we have already mentioned sufficiently in the discussion of situation 1 *supra.* The presumption of fact of a resulting trust for the payer of the purchase money for realty, where the deed is made to one not his wife or child and not a person to whom he stands *in loco parentis,* prevails wherever a state statute has not abolished the presumption or the trust itself, and wherever it prevails it is a rebuttable presumption of fact.

With this historical retrospect, we are ready for the question whether a grantor should be allowed to show that, despite the recitation of consideration in his deed and despite a recitation in it that the grantee was to have and to hold to the grantee's own use, the deed was in fact made on an oral trust for the grantor or on an oral promise of the grantee to reconvey or to devise to the grantor. Two objections to the admission of such evidence are urged: (1) That there is a conclusive presumption against such a trust from the very form of the deed, i. e., that to permit such evidence would violate the rule that a written instrument should not be contradicted, altered or varied by oral evidence; and (2) that the statute of frauds renders the evidence incompetent.

Objection (1) has a statutory phase which should be noted in passing. That is due to the state statute which provides that a conveyance shall pass the fee in the absence of a contrary intent clearly

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stated in so many words in the instrument, and because of the statute of frauds defense the purchasing grantee may keep for himself whatever is not in so many words expressed to be held for the designated cestuis, even if he did orally agree to hold that part for other third persons. The grantee, having bought the property, is not unjustly enriched if he retains that part of it as against orally designated cestuis, so there is no chance to raise a constructive trust against him, and the express oral trust is unenforcible. In the absence of an oral trust for third persons, and on a failure of the express trust, the grantee for a valuable consideration of course keeps for himself. Kerlin v. Campbell, 15 Pa. St. 500; Gibson v. Armstrong, 7 B. Mon. (Ky.) 481. The same result is sometimes reached in another way. See In re West [1900] 1 Ch. 84, where Kekewich, J., points out that before a presumption of a resulting trust can arise in the case of a gift in a will to trustees, it must be ascertained by construction that the whole fund was given for the particular purpose, instead of the fund being given to the persons named as trustees with a charge on the fund for the carrying out of that purpose. The first paragraph of the syllabus is a good summary of the point: "A gift by will, for a particular purpose only, gives rise to a resulting trust of any surplus not required for that purpose, but a gift, subject to the performance of a particular purpose, gives the donee a beneficial interest subject to that purpose."

[45b] Heiskell v. Trout, 31 W. Va. 810; In re Davis, 112 Fed. 129.

expressed in the conveyance.[46] Objection (1) is voiced in two judicial utterances now to be quoted.

In *Patton* v. *Beecher*[47] BRICKELL, C. J., pointed out that in Alabama all conveyances operate under the statute of uses or substantially the same Alabama statute and said:

"These conveyances are founded on a consideration expressed on the face—a bargain and sale on a *valuable consideration*—a covenant to stand seized on a *good consideration*. The statute intervenes and by its own force converts the use into a legal estate in the bargainee or covenantee. Parol evidence disproving the consideration expressed, changing the character of the conveyance, is inadmissible, without violating the principle that parol evidence cannot control, alter, vary or contradict a writing, as, between the parties, no part of a conveyance is more essential, or more solemn, than the expression of the consideration, which determines its character, either as a bargain and sale, or as a covenant to stand seized. The grantor is bound by it, as he is by any other recital or admission the deed may contain. The consideration may, as in the present conveyance, be pecuniary, and it may be permissible for either party to show a greater or less consideration of the same kind, than that expressed. *Sanders v. Hendrix,* 5 Ala. 224. But in the absence of fraud or mistake, it is not permissible for them, by parol, to show a want of consideration, or a consideration of another kind."

In *Porter* v. *Mayfield,*[48] LOWRIE, J., for the court, said:

"There are cases wherein trusts may be proved by oral testimony; but not in violation of the rule that protects written agreements against such testimony. As a deed of conveyance is intended to define the relations between the parties to it, it is not contradicted when it is shown that the vendee purchased in trust for a third person; for such evidence only establishes a new and consistent relation. But evidence that at the time of the conveyance, the vendee agreed to hold the title in trust for the vendor, is a flat contradiction of the written instruments executed by the parties as the bond and the evidence of their relation, and would make them void from their very inception. Oral testimony can have no such power. As between vendor and vendee, such testimony cannot be heard to change a title, absolute on its face, into a trust."

It will be noticed that in the two passages above quoted the old

[46] Campbell v. Noble, 145 Ala. 233. In that case it was held that the statute dispensed with the necessity of showing consideration in a deed of bargain and sale to prevent a resulting trust for the grantor.

[47] 62 Ala. 579, 588.

[48] 21 Pa. St. 263, 264.

notion that a use on a use is a nullity is really reasserted. The use on the use cannot be allowed, it is said, because the statute has executed the first use and to allow the second use any effect would be to render the first use nugatory and even void. The answer is, of course, that uses on uses are allowed as trusts or otherwise every day, and if they are expressed in the one conveyance, as in the case of a bargain and sale deed to B to the use of C, or a deed to A to the use of B to the use of C, no one would contend that the vesting by the statute of uses of the legal title in B was at all interfered with or nullified or rendered void by the enforcement of the use to C as a trust. So far then as the use implied in the grantee from the bargain and sale, or the use expressly stated to be in the grantee, is concerned, any trust for the grantor or for any one else, whether that trust be express or be implied in fact, is perfectly permissible as a matter of logic. All that was really settled by chancery, beginning about one hundred years after the statute of uses was passed. If then a conclusive presumption against a resulting trust or a constructive trust for the grantor is to stand in the way of showing an oral agreement by the grantee to hold in trust for him, some other reason must be found.

The other reasons urged are the stated consideration, and, where they exist, the warranties in the deed. The grantor, it is said, is estopped by the recital of consideration and the warranties to show that there was no consideration and to show that a trust for himself was intended. And why is he estopped? The admission contained in the passage quoted from LOWRIE, J's, opinion that there is no estoppel against showing an oral trust for a third person is significant. Not all courts will concede that there is no estoppel in such a case,[49] but in one situation, at least, it is well settled that there is no such estoppel, namely, in the case where one man pays the purchase money and the deed is taken in the name of a legal stranger. In such case, despite the fact that the deed is expressly to the use of the grantee,[50] that the consideration is expressly stated in the

[49] See the discussion of the matter in Troll v. Carter, 15 W. Va. 567, 578-582. But West Virginia at last adopted the view of no estoppel in a case where the grantee took on express oral trust for the buyer of the property. Currence v. Ward, 43 W. Va. 367. See Richardson v. McConaughey, 55 W. Va. 546, 555.

[50] Stratton v. Dialogue, 16 N. J. Eq. 70; Cotton v. Wood, 25 Ia. 43.

[51] Brooks v. Union Trust & Realty Co., 146 Cal. 134; Howard v. Howard, 52 Kans. 469; Buck v. Pike, 11 Me. 9; Livermore v. Aldrich, 59 Mass. (5 Cush.) 431; Blodgett v. Hildreth, 103 Mass. 484; Dismukes v. Terry, Walker (Miss.) 197; Chicago, B. & Q. R. R. Co. v. First Nat'l Bk., 58 Neb. 548, 59 Neb. 348; Page v. Page, 8 N. H. 187, DePeyster v. Gould, 3 N. J. Eq. 474; Boyd v. McLean, 1 Johns. Ch. 582; Rank v. Grote, 110 N. Y. 12; Dudley v. Bosworth, 10 Humph. (Tenn.) 9; Neil v. Keese, 5 Tex. 23; Pinney v. Fellows, 15 Vt. 525; Murry v. Sell, 23 W. Va. 475.

deed to have been paid by the grantee[51] and that the covenants in the deed are unqualified, the trust for the payer will be enforced. All the payer resulting trust cases are cases to that effect even if the question is not expressly considered, as it is in the cases cited.[51a] But if the consideration can be negatived and the use stated can be added to and the covenants can be shown to be consistent with a trust of some kind for a third person, why may not all these things be shown where a trust for the grantor is sought to be enforced? The answer is that there is no reason why not, and that as a matter of fact in all jurisdictions they may be shown in any case where the grantee had at the time of the conveyance an actual intent to defraud. In the opinion in *Patton* v. *Beecher*[52] this was clearly recognized. Given a sufficient emergency—given fraud of the right kind —and in every jurisdiction all these objections about contradicting written instruments, estoppels by deeds, etc., will go by the board and a trust for the grantor will be enforced.[53]

[51a] In Cotton v. Wood, 25 Ia. 43, 47, Beck, J., for the court, said:

"It is further objected that where there is an express declaration in the deed that the conveyance is for the use of the grantee and for a good and valuable consideration, there can be no presumptive or resulting trust; and that, inasmuch as the deed of the property in question, as to the wife, states these facts, she will be presumed to have the beneficial interest in the property, and the presumption cannot be rebutted by parol evidence.

"This may be the rule, but it does not extend to cases where land is purchased with the funds of a party, or the consideration paid by him, and the conveyance taken in the name of another. Such cases are exceptions to the rule. Unless such exceptions are recognized there could be, in fact, no such thing as a presumptive trust unless evidence thereof appeared in the body of the deed," as by recitation in the deed that the purchase money was paid by A when B was grantor and C was grantee.

In Stratton v. Dialogue, 16 N. J. Eq. 70, 71, Chancellor Green said:

"The material question in the case is, whether the land was in fact paid for with the funds of the company. If it was, there is clearly a resulting trust in favor of the company, although the deed is made absolute to Dialogue and purports upon its face to be for his own use and benefit."

[52] 62 Ala. 579.

[53] In Brison v. Brison, 75 Cal. 525, 532-533, Hayne, C., for the court, said:

"Nor does the recital of a consideration stand in the way of the relief. As is well known, it was a settled rule of the early law that if no consideration was expressed or proved a use resulted to the grantor. To prevent this, it became common to make the deed recite a consideration. And while such recital could be contradicted for collateral purposes, it could not be contradicted for the purpose of avoiding the deed (Farrington v. Barr, 36 N. H. 89; Coles v. Soulsby, 21 Cal. 47; Rhine v. Ellen, 36 Cal. 369; Martin v. Splivado, 69 Cal. 614); or for the purpose of raising a resulting trust (Russ v. Mebius, 16 Cal. 356; Graves v. Graves, 29 N. H. 129; Philbrooke v. Deland, 16 Me. 412, 413). But this only means that the recital could not be contradicted for the mere purpose of showing a want of consideration. Where fraud is charged, the want of consideration may be shown in connection with and as part of the fraud. In cases like the present, the confidential relation [merely that of husband and wife] is one circumstance, the parol promise is another, and the want of consideration is a third. In cases of fraud, actual or constructive, no mere form of words which the parties have made use of can shut

The question then comes down to what fraud will serve. In the preceding pages the fraud that on sound principle should suffice has been discussed,[54] as has also the statute of frauds defense. Whether the fraudulent intent of the grantee be contemporaneous with the conveyance or be conceived first at the time for performance, it is actual fraud, and all actual fraud should have the effect of rendering unavailable to the fraudulent party all technical defenses and of enabling equity to hold him a constructive trustee.[55]

As for the statute of frauds defense, it must be repeated again that Parliament expressly gave chancery a free hand as to resulting and constructive trusts. And as for the parol evidence rule, the courts ought not to let that creation of theirs be used to foster fraud. The failure to realize the needs of the situation is the occasion for such a remark as that of LUMPKIN, J., in *Robson* v. *Harwell*,[56] namely:

"Let the doctrine be once established that a failure to comply with a parol promise made contemporaneous with a deed is *ipso facto* a fraud and can be proved, and the promise decreed to be performed in equity, on the ground of fraud, and you do what the Master of the Rolls, in *Portmore* v. *Morris* refused to do—*demolish one of the foremost rules of law.* You have but to allege a *failure* to comply with any *parol* stipulation, and equity must relieve on the score of fraud."

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out inquiry as to the real facts. And this from the necessity of the case. For, as has been pertinently asked, if parol evidence be not admissible, how else can the fraud be shown?"

[54] See ante pp. 437-441.

[55] In these cases of trusts for the grantor, as in the other cases, the oral trust, if honestly entered into, is a valid, if unenforcible, trust at the start, and for the trustee to breach it to his own financial gain at the expense of his cestui is grossly fraudulent. Not only is the oral trust valid until repudiated, but in those cases where the oral promise of the grantee is to sell the land conveyed and turn over the proceeds or part thereof to the grantor, it is held in some jurisdictions that as soon as the grantee sells and the trust res becomes reduced to personalty, to which the statute of frauds does not apply, the oral trust immediately becomes valid, and the promise to turn over the proceeds becomes enforcible in equity or at law. Collins v. Tillou, 26 Conn. 368; Woolfolk v. Earle, 19 Ky. L. Rep. 343, 40 S. W. 247; Zwicker v. Gardner, 213 Mass. 95 (semble); Peacock v. Nelson, 50 Mo. 256; Bork v. Martin, 132 N. Y. 280; Logan v. Brown, 20 Okla. 334; Kollock v. Bennett, 53 Ore. 395. But that the trust is unenforcible even after the conversion into personalty is held in Chesser v. Motes, (Ala.) 61 So. 267; McGiness v. Barton, 71 Ia. 644; Randall v. Constans, 33 Minn. 329; Wolford v. Farnham, 44 Minn. 159; Cameron v. Nelson, 57 Neb. 381; Marvel v. Marvel, 70 Neb. 498. In some jurisdictions, and perhaps in all, the trust may be enforced in equity or recovery had at law, if after the conversion of the land into personalty the trustee orally acknowledges the trust and promises to perform it. Mohn v. Mohn, 112 Ind. 285; Thomas, Adm. v. Merry, 113 Ind. 83; Calder v. Moran, 49 Mich. 14 (semble); Collar v. Collar, 75 Mich. 414, 86 Mich. 507; Cooper v. Thomason, 30 Ore. 161; Maffitt's Adm. v. Rynd, 69 Pa. St. 380; Bechtel v. Ammon, 199 Pa. St. 81.

[56] 6 Ga. 589, 615-616.

That remark misconceives the doctrine at which it is directed. It is not claimed that a mere failure to comply with any parol stipulation to which the parol evidence rule or the statute of frauds is pleaded as a defense can constitute fraud. It is only where the breaker of a promise is unjustly enriched through its breach that fraud remediable, despite the parol evidence rule and despite the statute, can exist and on sound principle does exist. As Dean AMES so forcibly said with reference to another situation but in language applicable here:

"It is one thing for a promisor to save himself from a loss by reliance upon the statute and quite another to make the statute a source of profit to himself at the expense of the promisee. Justice demands the restoration, so far as possible, of the *status quo* by compelling the trustee to surrender to the *cestui que trust* whatever he received from the latter upon the faith of his promise to perform the trust. Such relief does not in any way infringe upon the statute. The invalidity of the express trust is fully recognized. Indeed, it is the exercise of the trustee's right to use it as a defense that creates the *cestui que trust's* right of *restitutio in integrum.*"[57]

Any attempt to confine the jurisdiction of equity to enforce constructive trusts for grantors to the case of fraudulent intent on the grantee's part at the time of the conveyance is unsound. As was said by SMITH, C., for the court, in *Kimball* v. *Tripp*,[58] where the grantor at the time of the conveyance made the grantee his agent to dispose of the property as directed on the grantor's death, and where the court held that a confidential relation was constituted which made it unnecessary to prove fraud:

"The position of the appellant upon this point is that as there was no fraud in the procurement of the conveyances, the plaintiff can have no relief. But assuming the absence of fraud (though in view of the defendant's relation to the grantor as her agent this can hardly be assumed), it does not follow that equity cannot afford relief. The deeds, it is found, were made to the defendant simply as her agent, and were therefore taken by him in trust for her; and though the trust was not expressed in writing, equity will not permit the defendant to convert the property to his own use, contrary to the intention of the parties and to the confidence reposed in him. '[Fraud, accident and mistake are special grounds of equity jurisdiction, and may be shown by any satisfactory evidence, written or verbal, with reference not merely to mortgages,

[57] Ames, Lectures on Legal History, 426. See same passage in 20 Harv. L. Rev. 549, 550.

[58] 136 Cal. 631, 634-635.

but to all written instruments. From their nature they must generally be established by parol evidence. And the evidence is admissible, not for the purpose of contradicting or varying the terms of the instrument—not to make its language mean one thing when it speaks another, but to show a state of facts *dehors* the instrument, raising an equity, which a court of chancery will enforce by annulling or reforming the instrument, or limiting its operation, or enjoining its use.][59] And the doctrine is both novel and startling which restricts, in matters of fraud, its jurisdiction over the operation of written instruments to those cases where the fraud has been committed in their creation. If maintained, it will sweep away its heretofore admitted jurisdiction in an infinite variety of cases, of almost daily occurrence, where the fraud alleged consists in the use of instruments entered into upon a mutual confidence between the parties. Fraud in their use is as much a ground for the interposition of equity as fraud in their creation. There is no distinction in the principle upon which the jurisdiction is asserted in the two cases. In both there is the same abuse of confidence and from both the same injury results' (*Pierce* v. *Robinson,* 13 Cal. 127). In the case cited the instrument was a deed absolute in its terms, shown by parol evidence to have been intended as a mortgage. But the principle applies equally to other cases. . . . There is also another principle upon which the rule may be sustained, which is, that in such cases generally, and in this case especially, there is an entire failure of consideration."

In an Indiana case where the grantee, who solicited the conveyance, conceived the idea of holding the property as his own only after the deed was executed and recorded, HOWARD, C. J., for the court, said:

"Counsel make no claim that the land rightfully belongs to appellant, but only that he did no wrong up to the time of procuring the deed; in other words, that the wrongful taking of the property and the appropriation of the proceeds to his own use occurred only after the deed was made, and hence 'this breach of contract is not fraud, and would not take the case out of the statute.'

"It is a salutary maxim that the statute against frauds cannot be used as a cover for fraud. The fraud in this case is clear, shameless and barefaced. A young business man, a favorite grandson, under pretense of aiding the old people in caring for their property, proceeds deliberately to appropriate to his own use the whole estate of

[59] The brackets contain a part of the opinion quoted by Smith, C., but not quoted by him.

his aged grandparents; and when called upon to account for the transaction, he coolly informs the court that the statutes enacted to protect innocent holders of real estate from the results of fraud in transfers of title have become to him a shield under cover of which he proposes to keep his ill-gotten gains. It would be a reproach to the law if such a claim could be allowed."[59a]

But there is no need to amplify the argument, and instead we may proceed to collate the authorities and to make suggestions for the future.

Only one jurisdiction—England—has been practically consistent in its refusal to make a distinction between the case where there is actual fraudulent intent on the grantee's part at the time he makes his promise and the case where there is such actual fraudulent intent only at the time of the subsequent refusal to perform.[60] A Canadian case accords with the English rule.[61]

The overwhelming weight of American authority—the cases will be found cited a little further on—is contrary to the English rule, though in some jurisdictions which in fact do not adopt the English rule there are stray cases which but for an ambiguous reference to "confidential relation," "fiduciary relation," etc., would properly be classed as in support of that rule.[62]

Because of the danger of misjudging a decision, it is impossible to say with certainty that any American jurisdiction holds the English rule. It would seem, however, as if California has, at last, achieved the English point of view,[63] and as if it is possible to hope that Nevada,[64] New York,[65] North Dakota,[66] and Oklahoma,[67] will

[59a] Giffen v. Taylor, 139 Ind. 573, 577-578.

[60] Davies v. Otty, 35 Beav. 208; Haigh v. Kaye, L. R. 7 Ch. App. 469; Booth v. Turle, L. R. 16 Eq. 182; In re Duke of Marlborough [1894] 2 Ch. 133; Rochefoucauld v. Boustead [1897] 1 Ch. 196, [1898] 1 Ch. 550. See the earlier cases of Hutchins v. Lee, 1 Atk. 447, and Young v. Peachy, 2 Atk. 254. It was in the last case that Lord Hardwicke said that the retention of the property in breach of promise is fraud for "the doing it is dolus malus." In Davies v. Otty, 35 Beav. 208, Lord Romilly, M. R., put the decision on the proposition that "it is not honest [of defendant] to keep the land."

[61] Clark v. Eby, 13 Grant Ch. (U. C.) 371.

[62] See Hall v. Linn, 8 Colo. 264; Hilt v. Simpson, 230 Ill. 170; Myers v. Jackson, 135 Ind. 136; Koefoed v. Thompson, 73 Neb. 128; Gray v. Beard, — Ore. —, 133 Pac. 791. Nevada and North Dakota have not yet positively—and fortunately not even impliedly—taken a stand against the English rule or it would be necessary to cite here the cases of Bowler v. Curler, 21 Nev. 158, and Hanson v. Svarverud, 18 No. Dak. 550.

[63] Taylor v. Morris, 163 Cal 717, which impliedly overrules such cases as Barr v. O'Donnell, 76 Cal. 469, and Smith v. Mason, 122 Cal. 426. Compare the confidential relation case of Bradley v. Bradley, (Cal.) 131 Pac. 750.

[64] See Bowler v. Curler, 21 Nev. 158, where the confidential relation spoken of seems to have been no more than exists in every case of conveyance on an oral promise of the grantee to hold in trust for, or to convey to or devise to, the grantor. In that case

achieve it, if New York and Oklahoma have not already done so; but in these jurisdictions the courts are anxious to find a special confidential relationship on which to base a trust,[68] and are loath to hold squarely that the conveyance on the oral promise in itself constitutes a confidential relationship and that the refusal to perform when coupled with the retention of the property conveyed confidentially is necessarily a breach of a special confidential relationship, and necessarily fraud redressible in equity even against a plea of the statute of frauds,[69] and even against the grantee's reliance on the parol evidence rule.[69a]

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at p. 161, Belknap, C. J., said of a conveyance by plaintiff to his father-in-law on oral trust for the plaintiff, and, in case of the plaintiff's death, for his infant daughter:

"The plaintiff conveyed the property to the defendant because of the confidence reposed in him without consideration other than he should hold it subject to the trust mentioned. If defendant were permitted to retain it, plaintiff could be defrauded, and the statute, which was intended to prevent frauds, would be the means for the accomplishment of a fraud. To prevent such a result, equity raises a constructive trust in the grantee and in favor of the grantor."

[68] Medical Laboratory v. New York University, 178 N. Y. 153; Lang v. Lang, 131 N. Y. Supp. 891. Compare the confidential relation cases of Goldsmith v. Goldsmith, 145 N. Y. 313, and Gallagher v. Gallagher, 135 N. Y. App. Div. 457. See 21 Bench and Bar (N. S.) 61, for a discussion of the New York law.

[69] In Hanson v. Svarverud, 18 No. Dak. 550, 553, 555, Morgan, C. J., for the court, said:

"A trust relationship may be enforced, and the refusal to enforce it declared constructively fraudulent although no fraudulent conduct or acts are shown as a fact. Implied or constructive fraud is sufficient to warrant a court of equity in declaring a deed absolute in form to be in trust for the grantee [grantor], or in trust for some other person at the grantor's request. A court of equity will enforce a trust agreement under such circumstances, although the requirements of the statute of frauds have not been complied with. The agreement is enforced because it would be inequitable and unjust to permit the grantee to profit by his wrongful conduct in refusing to execute and carry out the terms of his agreement. * * * In the case at bar, the complaint states facts showing that the grantors had confidence in their two sons, and relying upon such confidence, conveyed their land to them in trust for the grantors as a matter of fact while they lived and after their death the land was to be equally divided between all their children. It would be giving effect to a constructive fraud to permit the defendants to hold the land under such circumstances, although the contract would not be enforcible in a court of law. * * * We think the allegations of the complaint in this case sufficient to allege a constructive trust."

[69] Flesner v. Cooper (Okla.) 134 Pac. 379. See J. I. Case Threshing Mach. Co. v. Walton Trust Co. (Okla.) 136 Pac. 769.

[69] Bradley v. Bradley, (Cal.) 131 Pac. 750; Brison v. Brison, 75 Cal. 525, 90 Cal. 323; Cooney v. Glynn, 157 Cal. 583; Goldsmith v. Goldsmith, 145 N. Y. 313; Wood v. Rabe, 96 N. Y. 414; Gallagher v. Gallagher, 135 N. Y. App. Div. 457.

[69] Taylor v. Morris, 163 Cal. 717, and Medical College Laboratory v. New York University, 178 N. Y. 153, seem, however, to be in substance such holdings.

[69a] In Taylor v. Morris, 163 Cal. 717, 722, Henshaw, J., said of argument that the grantee in a deed absolute in form could not properly be held to be a trustee because of an oral agreement to hold in trust:

"To this proposition the familiar sections of the code and the familiar decisions under them, forbidding the attempt to vary the language of written contracts by parol are cited. But appellant mistakes the scope of the rule. The statute of frauds is never

By the great weight of American authority the plea of the statute of frauds, and the objection that a deed cannot be varied or contradicted by parol evidence, will prevent the enforcement of a constructive trust in favor of a grantor and against his grantee who obtained the conveyance without solicitation, without fraudulent intent and without special confidential relations with the grantor, even though he took on the oral agreement to hold in trust for the grantor, or to reconvey or to devise to him, the land conveyed. That general American rule is announced or assumed in cases which recognize a trust from the pleadings or the proof because the grantee solicited the conveyance[70]—which is taken as satisfactory evidence of fraud or of duress—or because of the existence of a special confidential relationship between the parties,[71] or because of an actual fraudulent intent on the part of the grantee at the time of making the promise,[72] and is the actual basis of decision in cases where the court refuses to recognize a trust on the pleadings or the proof because of the lack of a fraudulent intent by the grantee at the time of the conveyance,[73] or of the absence of a special confidential relationship

permitted to become a shield for fraud, and fraud at once arises upon the repudiation by the trustee of any trust, even if that trust rests in parol. When it rests in parol, either parol evidence must be received to establish the trust, or the faithless trustee will always prevail. Certainly no elaboration of so plain a proposition is necessary * * *."

[70] Lehrling v. Lehrling, 84 Kans. 766; Giffen v. Taylor, 139 Ind. 573; cf. Ashby v. Yetter, 19 N. J. Eq. 196; Goodwin v. McMinn, 193 Pa. St. 646.

[71] Brison v. Brison, 75 Cal. 525, 90 Cal. 323; Jones v. Jones, 140 Cal. 587; Becker v. Schwerdtle, 141 Cal. 386; Crabtree v. Porter, 150 Cal. 710; Cooney v. Glynn, 157 Cal. 583; Bradley v. Bradley (Cal.) 131 Pac. 750; Hall v. Linn, 8 Colo. 264; Bohm v. Bohm, 9 Colo. 100; Jerome v. Bohm, 21 Colo. 322; Stahl v. Stahl, 214 Ill. 131; Hilt v. Simpson, 230 Ill. 170; Noble v. Noble, 255 Ill. 629; Catalini v. Catalini, 124 Ind. 54; Myers v. Jackson, 135 Ind. 136; Giffen v. Taylor, 139 Ind. 573; Henderson v. Murray, 108 Minn. 76; Peacock v. Nelson, 50 Mo. 256; Koefoed v. Thompson, 73 Neb. 128; Bowler v. Curler, 21 Nev. 158; Coffey v. Sullivan, 63 N. J. Eq. 296 (semble); Wood v. Rabe, 96 N. Y. 414; Gallagher v. Gallagher, 135 N. Y. App. Div. 457; Hanson v. Svarverud, 18 No. Dak. 550; Gray v. Beard (Ore.) 133 Pac. 791. The Oregon case has, however, a leaning toward the English rule, and the California, Nevada, New York and North Dakota cases are cited here without prejudice to the statements about those states found in the text on pp. 527-528, supra.

[72] Smith v. Smith, 153 Ala. 504; Crabtree v. Porter, 150 Cal. 710; Hall v. Linn, 8 Colo. 264; Brown v. Doane, 86 Ga. 32; Gregory v. Bowlsby, 115 Ia. 327; Ashby v. Yetter, 79 N. J. Eq. 196; Parrish v. Parrish, 53 Ore. 486; Goodwin v. McMinn, 193 Pa. St. 646, as explained in O'Donnell v. Vandersaal, 213 Pa. St. 551, 556; Chadwick v. Arnold, 34 Utah 48 (semble); Rozell v. Vansyckle, 11 Wash. 79.

[73] Patton v. Beecher, 62 Ala. 579; Brock v. Brock, 90 Ala. 86; Manning v. Pippen, 95 Ala. 537; Jacoby v. Funkhouser, 147 Ala. 254; Barr v. O'Donnell, 76 Cal. 469; Dean v. Dean, 6 Conn. 284; Verzier v. Conrad, 75 Conn. 1; McCartney v. Fletcher, 11 App. D. C. 1; Biggins v. Biggins, 133 Ill. 211; Williams v. Williams, 180 Ill. 361; Skahen v. Irving, 206 Ill. 597; Lancaster v. Springer, 239 Ill. 472; McHenry v. McHenry, 248 Ill. 506; Fouty v. Fouty, 34 Ind. 433; McGuire v. Smith (Ind. App.) 103 N. E. 71 (semble); McClain v. McClain, 57 Ia. 167; Luckhart v. Luckhart, 120 Ia. 248; Willis v. Robertson, 121 Ia. 380; Ostenson v. Severson, 126 Ia. 197; Heddleston v. Stoner, 128 Ia. 525; Burch v. Nicholson (Ia.) 137 N. W. 1066; Wentworth v. Shibles, 89 Me. 167; Wilson v. Watts,

between the grantor and the grantee,[74] both of which things are sometimes assumed in the short reason for decision given that the trust was express and not manifested in writing as required by the statute[75] or in the further reason offered that to enforce a trust would be to allow the recitation of consideration in the deed, or the statement that the grantee is to hold to his own use, to be contradicted or varied by parol evidence.[76] This last parol evidence rule reason is, as we have seen, unsound[77] and if it is accepted it renders useless any discussion of the seventh section of the statute of frauds as applicable to the oral trust for grantor situation.[78] In Massa-

9 Md. 356 (semble); Tatge v. Tatge, 34 Minn. 272; Moore v. Jordan, 65 Miss. 229 (semble); Horne v. Higgins, 76 Miss. 813; Feiss v. Heitkamp, 127 Mo. 23; Rogers v. Ramey, 137 Mo. 598; Marvel v. Marvel, 70 Neb. 498; Connor v. Follansbee, 59 N. H. 124; Lovett v. Taylor, 54 N. J. Eq. 311; Holton v. Holton, 72 N. J. Eq. 312; Down v. Down, 80 N. J. Eq. 68; Sturtevant v. Sturtevant, 20 N. Y. 39; Hutchinson v. Hutchinson, 84 Hun. 482, 32 N. Y. Supp. 390; Barry v. Hill, 166 Pa. St. 344 (semble); Grove v. Kase, 195 Pa. St. 325; Braun v. First Church, 198 Pa. St. 152 (semble); O'Donnell v. Vandersaal, 213 Pa. St. 551; McHendry v. Shaffer (Pa.) 89 Atl. 587; Turney v. McKown (Pa.) 89 Atl. 797; Kinsey v. Bennett, 37 S. C. 319, (But see Lee v. Lee, 11 Rich. Eq. (S. C.) 574); Salisbury v. Clarke, 61 Vt. 453; Arnold v. Hall, 72 Wash. 50; Troll v. Carter, 15 W. Va. 567 (semble); Whiting v. Gould, 2 Wis. 552; Fairchild v. Rasdall, 9 Wis. 379; Fillingham v. Nichols, 108 Wis. 49.

[74] Biggins v. Biggins, 133 Ill. 211; Moore v. Horsley, 156 Ill. 36; Burch v. Nicholson, (Ia.) 137 N. W. 1066; Bullenkamp v. Bullenkamp, 34 N. Y. App. Div. 193, 43 N. Y. App. Div. 510.

[75] O'Briant v. O'Briant, 160 Ala. 457; McDonald v. Hooker, 57 Ark. 632; Stevenson v. Crapnell, 114 Ill. 19; Lawson v. Lawson, 117 Ill. 98; Mayfield v. Forsyth, 164 Ill. 32; Stubbings v. Stubbings, 248 Ill. 406; Hemstreet v. Wheeler, 100 Ia. 290; Gee v. Thrailkill, 45 Kans. 173; Blackwell v. Blackwell, 88 Kans. 495. (But see Clester v. Clester, 90 Kans. 638, 640-641); Walker v. Locke, 5 Cush. (Mass.) 90; Curry v. Dorr, 210 Mass. 430 (semble); Waldron v. Merrill, 154 Mich. 203; Bartlett v. Tinsley, 175 Mo. 319; Crawley v. Crafton, 193 Mo. 421; Walker v. Brungard, 13 Sm. & M. 723 (semble); Cameron v. Nelson, 57 Neb. 381; Veeder v. McKinley, etc., Co., 61 Neb. 892; Taft v. Dimond, 16 R. I. 584; Spaulding v. Collins, 51 Wash. 488; Kalinowski v. McNeny, 68 Wash. 681; Pavey v. Amer. Ins. Co., 56 Wis. 221.

[76] McGuire v. Smith (Ind. App.) 103 N. E. 71; Byerly v. Sherman, 126 Ia. 447; Shelangowski v. Schrack, (Ia.) 143 N. W. 1081; Blodgett v. Hildreth, 103 Mass. 484; Gould v. Lynde, 114 Mass. 366; Curry v. Dorr, 210 Mass. 430 (semble); Brown v. Bronson, 35 Mich. 415; McKusick v. County Comrs., 16 Minn. 151; Graves v. Graves, 29 N. H. 129; Farrington v. Barr, 36 N. H. 86; Taylor v. Sayles, 57 N. H. 465; Hogan v. Jaques, 19 N. J. Eq. 123; Baker v. Baker, 75 N. J. Eq. 305; Gaylord v. Gaylord, 150 N. C. 222 (semble); Ricks v. Wilson, 154 No. Car. 282 (semble); Jones v. Jones (N. C.) 80 S. E. 430 (semble); Taft v. Dimond, 16 R. I. 584; Salisbury v. Clark, 61 Vt. 453; Eaves v. Vial, 98 Va. 134; Troll v. Carter, 15 W. Va. 567; Pusey v. Gardner, 21 W. Va. 469; Handlan v. Handlan, 42 W. Va. 309; Poling v. Williams, 55 W. Va. 69; Crawford v. Workman, 64 W. Va. 19. The North Carolina and West Virginia cases are in jurisdictions not having section 7 of the statute of frauds.

[77] See the discussion on pp. 520-527, ante and the quotation from Brison v. Brison, 75 Cal. 525 in note 53 ante. See also Hall v. Livingston, 3 Del. Ch. 348; Fleming v. Donohoe, 5 Ohio 255; Williams v. Emberson, (Texas Civ. App.) 55 S. W. 595.

[78] In Gaylord v. Gaylord, 150 N. Car. 222, 235, Connor, J., who concurred in reversing the judgment below, refused to agree that the parol evidence rule stood in the way of enforcing a trust because of the breach of the oral promise of the grantee, and for himself and Walker, J., quoted from the opinion of Chief Justice Pearson in Shelton v.

chusetts a constructive trust will not be enforced against the grantee in favor of the grantor,[79] but the grantor is allowed to recover a money judgment for the value of the lands against the unconscientious grantee.[80] While that view is not as satisfactory as is the English doctrine, it is not as unsatisfactory as is the general American doctrine.[81]

The argument for the majority American view is perhaps put as strongly in *Patton* v. *Beecher*[82] as anywhere. In that case, BRICKELL, C. J. said:

"The plain meaning of the statute [of frauds] is that a trust in lands, not arising by implication or construction of law, cannot be created by parol—that a writing signed by the party creating or declaring the trust is indispensable to its existence. Fraud, imposition, mistake, in the original transaction, may constitute the purchaser, or donee, a trustee *ex maleficio*. It is *fraud then,* and not *subsequent fraud,* if any exist, which justifies a court of equity in intervening for the relief of the party injured by it—as it is the pay-

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Shelton, 58 N. C. 292, the argument that the parol evidence rule has no application to the oral trust or to an oral promise to reconvey, because if it did "the English statute in respect to the declaration of trusts was uncalled for, and the doctrine of verbal declaration of trusts would not have obtained at common law. The truth is, neither the declaration nor the implication of a trust has ever been considered as affected by that rule of evidence. The deed has its full force and effect in passing the absolute title at law, and is not altered, added to, or explained by the trust which is an incident attached to it in equity as affecting the conscience of the party who holds the legal title." Connor, J., added: "As said by Judge Pearson, if an express trust comes within the parol evidence rule, there was no occasion for the adoption of the seventh section of the statute. It is not easy to perceive how the introduction of parol evidence to show that at the time of the delivery of the deed a declaration of trust for the grantor was made and accepted by both parties contradicts the deed, whereas, if made under the same circumstances in favor of a third person, it does not do so. In both cases the land is conveyed to the grantor [grantee]. The additional words, 'to his own use and behoof' adds nothing to the usual form of the habendum. Certainly they do not prevent the engrafting of a parol trust for a third person. I find that in Murphy v. Hubert, 7 Pa. St. 420, Gibson, C. J., held that as the seventh section of the statute of frauds had not been enacted in that state, the court was not authorized to reject parol evidence of the declaration of a trust made at the time the title passed. He asks, 'Why was the seventh section, with others, omitted? Certainly, to prevent its provisions from becoming the law of the land. And how can we make them the law of the land in the face of such a demonstration of legislative intent?'" Cf. Jones v. Jones (N. C.) 80 S. E. 430.

[79] Titcomb v. Morrell, 10 Allen 15; Walker v. Locke, 5 Cush. 90; Blodgett v. Hildreth, 103 Mass. 484; Gould v. Lynde, 114 Mass. 366; Fitzgerald v. Fitzgerald, 168 Mass. 488; Curry v. Dorr, 210 Mass. 430.

[80] Basford v. Pearson, 9 Allen 387; O'Grady v. O'Grady, 162 Mass. 290; Cromwell v. Norton, 193 Mass. 291. Cf. Dix v. Marcy, 116 Mass. 416. In Logan v. Brown, 20 Okla. 334, 346, the doctrine that the money value of the land may be recovered is commended.

[81] See Ames, Lectures on Legal History, 428. See same passage in 20 Harv. Law Rev. 549, 552.

[82] 62 Ala. 579.

ment of the purchase money at the time the title is acquired, which creates a resulting trust and not a subsequent payment, whatever may be the circumstances attending it. *Barnett* v. *Dougherty*, 32 Penn. 371. When the original transaction is free from the taint of fraud or imposition; when the written contract expresses all the parties intended it should; when the parol agreement which is sought to be enforced is intentionally excluded from it; it is difficult to conceive of any ground upon which the imputation of fraud can rest, because of its subsequent violation or repudiation, that would not form a basis for a similar imputation, whenever any promise or contract is broken. *Wilson* v. *Watts*, 9 Md. 356-436. It is an annihilation of the statute to withdraw a case from its operation because of such violation or repudiation of an agreement, [which] it declares shall not be made or proved by parol. There can be no fraud, if the trust does not exist, and proof of its existence by parol, is that which the statute forbids. In any and every case in which the court is called to enforce a trust, there must be a repudiation of it, or an inability from accident to perform it. If the repudiation is a fraud, which justifies interference in opposition to the words and spirit of the statute, the sphere of operation of the statute is practically limited to breaches from accident, and no reason can be assigned for the limitation. We are not inclined to establish a precedent in the early days of the construction of the statute of which it can be justly said, that it trenches upon its policy and objects, creating an exception to its words, and opening a door for all the mischief it was intended to suppress."[83]

The first fallacy in that argument is the conclusion that resulting trusts and constructive trusts are of the same nature. A resulting trust for the payer of the purchase money is an intention trust deduced from the conduct of the parties, as we have seen, and unless one was intended at the time of the purchase and conveyance there is not one. A so-called resulting trust for a grantor, deemed to exist where a deed expressly in trust is made without consideration and where a part of the equitable interest is undisposed of in so many words, is also an intention trust, and the trust accordingly arises at the time of the conveyance. A resulting trust for a grantor who con-

[83] Id., 592-593. In McClain v. McClain, 57 Ia. 167, 171, Beck, J., said:

"The case amounts briefly to this: The conveyance was made to defendant without any act or representation on his part inducing it. No fraud has been shown prior to or contemporaneous with the execution of the deed to defendant. His fraud consists in denying and repudiating his agreement to convey the land to plaintiff. However abhorrent this fraud may be in the eyes of honest men, yet it is not a ground upon which the case may be removed from the operation of the statute of frauds, so that parol testimony may be admitted to establish the agreement creating the express trust."

veys by absolute deed but without consideration no longer is presumed, and an attempt to bolster up such a trust by evidence that there was an express oral agreement of trust proves only an express trust instead of a resulting one; for the proof that there was an express trust leaves no room for a presumption of fact of a trust and if the express trust is unenforcible the only possible trust to enforce is a constructive trust. A so-called resulting trust, attempted to be established against a presumption of no trust by oral evidence of an express trust, is logically only express, or, if the express trust is unenforcible, then is only constructive, however much reason in legal history there may be for saying that it is resulting within the meaning and intent of the words "result by the implication or construction of law" in section eight of the English statute of frauds. But, in any event, all three so-called resulting trusts are pure intention trusts, whereas a constructive trust is not an intention trust, but instead is an *ex maleficio* trust. While a resulting trust, being an intention trust, must arise at the time of conveyance or not at all, a constructive trust may arise later. A constructive trust arises when the fraudulently enriching conduct occurs.

The second fallacy in the argument quoted from the Alabama case is the assertion that if a constructive trust is enforced against a grantee who took honestly, but, in breach of his oral promise, is keeping dishonestly, any breach of an oral promise can be redressed in that way. The fallacy lies in the assumption that all who break oral promises are enriched in consequence. It is not the breaking of the promise that constitutes fraud, but the enrichment retained despite the breaking, and accordingly it is only the unjust enrichment that gives equity the right and the duty to raise a constructive trust. The statute of frauds was meant to be a shield to the just and the unjust, but not a sword for the highwayman.

The third fallacy in the argument is in saying that when the express oral promise is made honestly there is no trust because of the lack of a writing. There is a trust until its dishonest repudiation in reliance on the statute. The trustee's repudiation of that trust plus his attempt to retain for his own purposes the trust *res,* constitute fraud sufficient for the enforcement of a constructive trust.

The fourth and last fallacy in the argument that is worth noticing is the notion that the liberal interpretation of the eighth section of the statute of frauds is not consonant with the statute's purpose. The eighth section is indeed a *proviso,* but a *proviso,* dignified by being made into a separately numbered section, is not like an ordinary exception to a statute. The whole legislative history of the statute of frauds shows that the resulting and construcive trust doc-

trines of chancery were to have the free scope which the eighth section expressly stated that they should, namely, to "be of like force and effect as the same would have been if this statute had not been passed." The courts which have slighted the eighth section of the statute of frauds have been the ones to violate the intent of that statute.

Conclusions and Suggestions.

We have seen that where one man conveys to another on an express oral trust for, or on the grantee's oral promise to convey or to devise to, a third person who pays the grantor the purchase price, there is deemed to be a resulting trust for the third person despite the express oral trust, but that on principle the trust enforced is constructive. We have seen that such a trust is enforced in favor of the payer and against the grantee practically everywhere if the grantee is not the payer's wife or child or one to whom the payer stands *in loco parentis,* and, in a majority of jurisdictions, even if the grantee is so related to the payer. We have also seen that where one man, without consideration other than the grantee's oral promise, conveys to another on the latter's oral promise to hold in trust for, or to convey or to devise to, a third person who is a volunteer, only a minority of jurisdictions will enforce a trust in the third person's favor, or any trust, in the absence of a solicitation of the conveyance by the grantee or of an actual intent to defraud entertained by him at the time of the conveyance, or of a breach of a special confidential relationship.[83a] We have further seen that where one man pays the purchase money for realty and the conveyance is made by the vendor to a third person on an oral trust for, or an oral promise to convey or to devise to, a fourth person, the few jurisdictions which have considered the question are about equally divided on the question of whether the fourth person shall be allowed to enforce a trust or the repudiating grantee shall keep for himself, in the absence of the solicitation, contemporaneous fraudulent intent, or special confidential relationship noted above, though it seems clear that he should hold for the payer if the fourth person is not allowed to enforce a trust. And finally we have found that, in the great majority of jurisdictions, on a conveyance without consideration other than the grantee's oral promise to hold in trust for, or to reconvey or to devise to, the grantor, a trust will not be enforced

[83a] To the majority cases in note 28, ante, should be added Veasey v. Veasey (Ark.) 162 S. W. 45, and Hunter v. Briggs (Mo.) 162 S. W. 204 (semble). Veasey v. Veasey should also be cited in note 30, ante, to the same effect as Irwin v. Ivers, 7 Ind. 308, but in Veasey v. Veasey the plaintiffs were barred by laches and the statute of limitations.

for the grantor in the absence of such solicitation, contemporaneous fraudulent intent, or special confidential relationship.

In each and every one of the foregoing situations of express oral trust, or express oral promise, the trust enforced, if one is enforced despite the parol evidence rule and despite the plea of the statute of frauds, is on principle constructive; yet some courts regard the express oral trusts or promises for the payer of the purchase money as giving rise to resulting trusts, and enforce them as such when, often, they would not enforce them if they were to regard them as having to meet the constructive trust tests. In view of that fact and of the further fact of the emphasis laid on the existence of a special confidential relationship as a constructive trust test, it would seem that the hope of bringing the courts to the right point of view in situation 4 as well as in the other situations, and of keeping them right, is to proceed along the following lines:

1. Demonstrate that historically, and on reason, a conveyance on an oral trust for the grantor is just as much a resulting trust within the meaning of the statute of frauds or proper trust usage as is a conveyance of land bought by a man who has the title conveyed to his wife or child on an oral trust for himself.[84] In both cases there is a presumption of no trust overcome by affirmative evidence of a trust, and in both cases it is necessary to go behind the recitation of the deed as to payment of consideration by the grantee and behind the *habendum* to the use of the grantee. In both cases there is the same equitable reason for enforcing a trust, whether it be called resulting or constructive, and although in the oral trust for grantor case the objection of estoppel by deed seems at first sight to be stronger than in the other case, the doctrine of estoppel by deed is equitable in its origin and nature and clearly a wrongdoer must not be allowed to use it inequitably even against his grantor.

2. Force home the truth that in all cases of devises and conveyances on oral trusts, or on oral promises to convey or to devise, there is either a constructive trust at the start because of the grantee's fraudulent acquisition, or else there is *ipso facto* a relation of special trust and confidence entered into, the breach of which, to the consequent unjust enrichment of the oral trustee or promisor, is actual fraud, no matter how good the intentions of the promisor were at the start. In every such case it is as true of the grantee as it was of the defendant in an Ohio case, that "He took in confidence what he could not retain without bad faith and fraud."[85] If the

[84] See Flesner v. Cooper (Okla.) 134 Pac. 379.

[85] Newton v. Taylor, 32 Ohio St. 399, 413.

grantee had bad intent at the start his fraudulent acquisition will not keep him from being a constructive trustee, even though because of his fraudulent intent he may possibly never have been, strictly speaking, an express trustee, for his fraudulent retention will make him a constructive trustee. On the other hand, if the grantee had honest intent at the start, and so became and remained while the honesty lasted an express trustee, his breach of trust and fraudulent retention of the trust *res,* constituting a breach of the special confidential relationship of trustee and *cestui,* of course render him a constructive trustee. To quote again the sentence from the opinion of HENSHAW, J., in *Taylor* v. *Morris,*[85a] already twice quoted in this article:

"The statute of frauds is never permitted to become a shield for fraud, and fraud at once arises upon the repudiation by the trustee of any trust, even if that trust rests in parol."[86]

3. Keep emphasizing the proposition that fraud at the start and fraud at the end, actual fraud at the time of the deed and so-called "constructive fraud" at the time of the refusal to perform, all constitute actual fraud which derives its whole trust significance from the unjust enrichment of the grantee through his unconscientious retention of the trust *res.* Even in the case of fraud at the start it is the fraudulent retention alone that gives equity jurisdiction to declare a trust.[87]

[85a] 163 Cal. 717, 722.

[86] As most of the grantees on oral trusts or promises for the grantor or for third persons are relatives of the grantor, the case of Goldsmith v. Goldsmith, 145 N. Y. 313, may be taken as typical of the proper judicial point of view. The court there enforced a constructive trust because of the grantee's unjust enrichment through breach of his oral promise in violation of the oral "arrangement founded upon the relation of mother and son, and brothers and sisters, involving the trust and confidence growing out of that relation, and intended as a settlement of the family affairs" (145 N. Y. 313, 316-317). Compare Hilt v. Simpson, 230 Ill. 170. Of husband and wife living amicably together the court ought to say, as was said in the Kansas case passage quoted in note 18, ante:

"Their relationship—that of husband and wife—was confidential in the highest degree known to the law." Much the same can be said of engaged persons. Bradley Co. v. Bradley, — Cal. —, 131 Pac. 750. Where the grantor and grantee are not so intimately related, and something short of the view above advanced of an express trust relationship begun on the conveyance and later violated by the grantee is deemed desirable, the view that the transaction is at least one of oral agency and hence that a fiduciary duty is violated by the grantee is possible. See Koefoed v. Thompson, 73 Neb. 128; Kimball v. Tripp, 136 Cal. 631.

[87] In some states it is held that from the subsequent wrongful refusal of the oral trustee to perform, whereby he enriched himself, the court will presume a bad intent at the start. Dowd v. Tucker, 41 Conn. 197; Larmon v. Knight, 140 Ill. 232; Gemmell v. Fletcher, 76 Kans. 577. In those jurisdictions the presumption is one of fact and so rebuttable. If the courts in those jurisdictions are going to stick to the language of presumptions on that matter, they should make the presumption from the subsequent fraudulent retention a conclusive presumption of law entitling the grantor to get back the

4. Make it plain that the essential aim of section seven of the statute of frauds was to protect oral trustees from being called to account for breaches of active duties;[88] that the essential aim of section eight was to insure that no unjust enrichment should be tolerated as to any property over which chancery had jurisdiction; and that both sections can be given full and appropriate operation only if a grantee who has taken title on an oral promise which he is refusing to fulfill is compelled to yield to the person really damaged by that refusal the title by which in the absence of that compulsion he would be unjustifiably enriched. The fact that a number of jurisdictions get along quite satisfactorily without sections seven and eight of the statute of frauds shows that most courts overemphasize the value of section seven. All courts should be willing to restrict section seven to its proper sphere and to give section eight its full operation of preventing all unjust enrichment not adequately remediable at law.

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land. The correct way, of course, is not to indulge any presumption of prior fraud but to treat the fraudulent retention of the res in breach of faith as actual present fraud, and as sufficient ground for raising a constructive trust.

[88] Only after Lord Eldon's innovation, in 1811, in ex parte Pye, 18 Ves. 140, established that a voluntary declaration of trust is enforcible was section seven needed as a defense by those who orally declared themselves trustees of real property for voluntary cestuis. The statute of frauds properly became a defense for them. See notes 15 and 20, ante.

MARBURY V. MADISON AND THE DOCTRINE OF JUDICIAL REVIEW.

WHAT is the *exact legal basis* of the power of the Supreme Court to pass upon the constitutionality of acts of Congress? Recent literature on the subject reveals a considerable variety of opinion. There are radicals who hold that the power owes its existence to an act of sheer usurpation by the Supreme Court itself, in the decision of *Marbury* v. *Madison*.[1] There are conservatives who point to clauses of the Constitution which, they assure us, specifically confer the power.[2] There are legists who refuse to go back of *Marbury* v. *Madison*, content in the ratification which, they assert, subsequent events have given the doctrine of that decision.[3] There are historians who show that a considerable portion of the membership of the body that framed the Constitution are on record as having personally favored judicial review at one time or another, either before, during, or after the Convention.[4] Finally, there are legal-historians who represent judicial review as the natural outgrowth of ideas that were common property in the period when the Constitution was established.[5] In the following article I accept this last view as in a general way the correct one. In doing this, however, I discover that I have only raised some further questions. For before ideas contemporary with the framing of the Constitution can be regarded as furnishing the *legal* basis of judicial review, it must be shown that they were, by contemporary understanding, incorporated in the Constitution, that they were regarded by the framers of the Constitution as furnishing judicial review, and that they were logically sufficient to do so. To investigate these questions is the purpose of the study to follow.

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[1] See, for instance, H. L. Boudin in 26 Polit. Sc. Qtly. 238.

[2] J. H. Dougherty in his recent volume follows Brinton Coxe in taking this position.

[3] This is the position taken by James Parker Hall in his Constitutional Law, and by Mr. Cotton in his "Introduction" to his Decisions of John Marshall.

[4] C. A. Beard, The Supreme Court and the Constitution. I have also seen an able article by Mr. Frank E. Melvin, Harrison Fellow at the University of Pennsylvania, continuing Prof. Beard's investigations. The article is about to be published, I believe, in the Am. Polit. Sc. Rev.

[5] A. C. McLaughlin, The Courts, the Constitution, and Parties; C. G. Haines, The American Doctrine of Judicial Supremacy. Before, however, any of the above mentioned works had appeared, the present writer had considered both the theoretical and historical grounds of judicial review at length and had arrived substantially at the conclusions which are emphasized in the following article. See 9 Mich. Law Rev. 102-25, 284-316.

court itself had repeatedly taken jurisdiction of cases brought under that provision;[9] and thirdly, the fact that in other connections affirmative words of grant in the Constitution had not been deemed to infer a correlative negative. Thus, were the rule laid down in *Marbury* v. *Madison* to be followed, Congress would have power to enact penalties against only the crimes of counterfeiting, treason, and piracy and offences against the Law of Nations, whereas in fact it had, even as early as 1790, enacted penalties against many other acts, by virtue of its general authority under the "necessary and proper" clause.[10]

Yet it must be admitted that the rule of exclusiveness does often apply to cases of affirmative enumeration, so that the only question is whether Article III, §2, par. 2, furnished such a case. Speaking to this point, the Chief Justice said:[11] "A negative or exclusive sense must be given them [the words of the paragraph in question] or they have no operation at all." But this is simply not so. For though given only their affirmative value, these words still place the cases enumerated by them beyond the reach of Congress,—surely no negligible matter. Nor does the Chief Justice's attempt to draw support from the further words of the same paragraph fare better upon investigation. "In all other cases," he quotes, the Supreme Court is given appellate jurisdiction, that is, as he would have it, *merely* appellate jurisdiction. Unfortunately for this argument the words thus pointed to are followed by the words—which the Chief Justice fails to quote—"with such exceptions . . . as the Congress shall make." But why should not the exceptions thus allowed to the appellate jurisdiction of the Supreme Court, have been intended to take the form, if Congress so willed, of giving the court original jurisdiction of the cases covered by them?

Moreover, the time was to come when MARSHALL himself was to abandon the reasoning underlying the rule laid down in *Marbury* v. *Madison*. This rule, to repeat, was that the Supreme Court's original jurisdiction is confined by the Constitution to the cases specifically enumerated in Article III, §2, par. 2, and—though this was only dictum—that the court's appellate jurisdiction is confined "to all other cases." But now it must be noted that jurisdiction is always *either original or appellate*,—that there is, in other words, no third sort. The rule laid down in *Marbury* v. *Madison* becomes therefore the logical equivalent of the proposition that the Su-

[9] See argument of counsel in 1 Cr. 137-53.
[10] 1 Stat. L. 112 ff'g (Apr. 30, 1790).
[11] 1 Cr. 174.

of mandamus to civil officers of the United States as auxiliary to the original jurisdiction which the Constitution conferred upon it? It is certain that the court has more than once entertained motions by original suitors for injunctions to such officers,[16] and it is apparent that, so far as the question here discussed is concerned, an application for a writ of mandamus must rest on the same footing.[17]

Furthermore, the proposition that the writ of mandamus is not to be regarded ordinarily as a means of obtaining jurisdiction, but only of exercising it, was recognized and applied by the Supreme Court itself a few years later, in a case the exact parallel of *Marbury* v. *Madison*. By §14 of the Act of 1789 the circuit courts of the United States were given the power, in words substantially the same as those employed in §13, to issue certain writs "in cases authorized by the principles and usages of law." Yet in *McIntire* v. *Wood*,[18] where the issue was the validity of a writ of mandamus to a person holding office under the authority of the United States the Supreme Court ruled that before a circuit court could utilize the power given it in §14 in a case, it must have jurisdiction of the case on independent grounds, and the same rule was later reiterated in *McClung* v. *Silliman*.[19] But clearly, had the court followed this line of reasoning in *Marbury* v. *Madison*, it could not have questioned the validity of §13. Indeed, had it but followed the, today at any rate, well-known maxim of Constitutional Law that of two possible interpretations of a statute, the one harmonious with the Constitution, the other at variance with it, the former must be preferred,[20] it could not have challenged the legislation in question. By its view of Article III, §2, par. 2, it must still doubtless have declined jurisdiction of the case, but the ground of its action would have been, not the error of Congress, but the error of plaintiff.

In short there was no valid occasion in *Marbury* v. *Madison* for any inquiry by the court into its prerogative in relation to acts of Congress. Why then, it will be asked, did the court make such an inquiry? In part the answer to this question will appear later, but in part it may be answered now. To speak quite frankly, this de-

[16] Miss. v. Johnson, 4 Wall. 475; Ga. v. Stanton, 6 Wall. 50. The grounds on which these cases were dismissed do not affect the view urged in the text.

[17] Suppose Congress should transfer the business of interstate extradition to federal commissioners, as it would be within its power to do, there would be plenty of occasions when the Supreme Court would be asked for writs of mandamus to civil officers of the United States. See Ky. v. Dennison, 24 How. 65.

[18] 7 Cr. 504 (1813).

[19] 6 Wheat. 598 (1821).

[20] For a rather far-fetched application of this rule see the "Commodities Clause" Case, 213 U. S. 366 (1908).

of a possible fifty-five, but let it be considered whose names they are. They designate fully three-fourths of the leaders of the Convention, four of the five members of the Committee of Detail which drafted the Constitution,[22] and four of the five members of the Committee of Style which gave the Constitution final form.[23] The entries under these names, in the Index to FARRAND'S RECORDS occupy fully thirty columns, as compared with fewer than half as many columns under the names of the remaining members. We have in this list, in other words, the names of men who expressed themselves on the subject of judicial review because they also expressed themselves on all other subjects before the Convention. They were the leaders of that body and its articulate members. And against them are to be pitted, in reference to the question under discussion, only MERCER of Maryland, BEDFORD of Delaware, and SPAIGHT of North Carolina, the record in each of whose cases turns out to be upon inspection of doubtful implication. For while SPAIGHT, for instance, undoubtedly expressed himself, during the period of the Convention, as strongly adverse to the theory of judicial review,[24] yet he later heard the idea expounded both on the floor of the Philadelphia Convention and the North Carolina convention without protest. The words of BEDFORD which are relied upon in this connection are his declaration that he was "opposed to every check on the legislature." But these words were spoken with reference, not to judicial review, but to the proposition to establish a council of Revision.[25] MERCER of Maryland did not sign the Constitution and opposed its adoption. It is by no means impossible that one of the grounds of his opposition was recognition of the fact that the Constitution established judicial review.[26] Altogether it seems a warrantable assertion that upon no other feature of the Constitution with reference to which there has been considerable debate is the view of the Convention itself better attested.

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review, thus: "On no subject am I more convinced than that it is an unsafe and dangerous doctrine in a republic ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or two, or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have any advocates in this country"; quoted from Wharton's State Trials, 412, by Mr. Horace A. Davis in Am. Polit. Sc. Rev., 551. Madison's later views are considered *infra*.

[22] Gorham, Rutledge, Randolph, Ellsworth, and Wilson.

[23] Johnson, Hamilton, Morris, Madison, and King.

[24] See McRee, Life and Correspondence of James Iredell, II, 169-76.

[25] Farrand I, 100, 106.

[26] Ib. II, 298.

ance" clause does not appear in Article III, where the judicial power of the United States is defined.

A clause more insisted upon, however, in this connection is the clause in this same Article III: "The judicial power of the United States shall extend to all cases arising under this Constitution." No doubt it must be allowed that cases involving the question of constitutionality with reference to acts of Congress are describable as "cases arising under this Constitution." Nevertheless, it must be insisted that the clause just quoted was not placed in the Constitution for the purpose of bringing such cases within the judicial power of the United States, and this for the simple reason that, *admitting the legal character of the Constitution,* they were already there. Thus we have just noted that the "pursuance" clause does not appear in Article III. But what this signifies is that the judicial power of the United States extends to *every* act of Congress whether made in pursuance of the Constitution or not; or, to quote the words of Chief Justice TANEY in *Ableman* v. *Booth,* that it "covers every legislative act of Congress, whether it be made within the limits of its delegated power or be an assumption of power beyond the grants in the Constitution."[27] Had, therefore, the clause "arising under this Constitution" been inserted to extend the judicial power of the United States to cases involving the constitutionality of acts of Congress, it would be so far forth mere surplusage.

The explanation of the clause must then be sought in a class of cases to which *but for it* the judicial power of the United States could not possibly extend, even assuming the legal character of the Constitution. Nor, relying upon the guidance of HAMILTON in the FEDERALIST is it difficult to discover such a class of cases. Construing the clause under discussion in FEDERALIST 80, HAMILTON explains that it refers to cases arising in consequence of *State* enactments transgressing prohibitions of the Constitution upon *State* legislative powers, cases of which, therefore, but for this clause, would terminate in the *State* judiciaries. HAMILTON'S explanation is confirmed by MADISON'S analysis of Article III in the Virginia convention[28] and by DAVIE'S language in the North Carolina convention,[29] but it is confirmed even more strikingly by the failure of the spokesmen for judicial review, while the Constitu-

[27] 21 How. 506, 519-20 (1858).
[28] Elliot, III, 484-5.
[29] Ib. IV, 165.

eral principles? The task of identifying them is, perhaps, at this date not an entirely simple one. For while the ideas that are essential to explaining and sustaining judicial review *as a matter of law,* which are the ideas we are in quest of, are relatively few, they have to be sifted from a more considerable stock of ideas which contributed to the rise of judicial review, *as a matter of fact,* or which have since been offered with the aim of curtailing its practical operation. It will be profitable to begin by criticising some remarks by Professor MCLAUGHLIN in the course of his recent interesting study of the subject.

Thus, at the outset of his essay, writing with MARSHALL'S argument in *Marbury* v. *Madison* in mind, Professor MCLAUGHLIN states the doctrine of judicial review as follows: "In theory any court may exercise the power of holding acts invalid; in doing so, it assumes no special and peculiar role; for the duty of the court is to declare what the law is, and, on the other hand, not to recognize and apply what is not law." Further along, however, he sets himself the task of refuting the idea that the courts claim a superiority over the other departments in relation to the constitution, and we then find him writing thus: "This authority then in part arose ... from the conviction that the courts were not under the control of a co-ordinate branch of the government but entirely able to interpret the constitution themselves when acting in their own field." And from this it is quite logically deduced that, "If our constitutional system at the present time includes the principle that the political departments must yield to the decisions of the judiciary on the whole question of constitutionality, such principle is the result of constitutional development, and ..... of the acquiescence of the political powers, because of reasons of expediency." Yet at the same time it is conceded that the political departments must "accept as final" "the decision of the court in the particular case." Finally, it is urged that "no one is bound by an unconstitutional law."[32]

In other words, Professor MCLAUGHLIN presents the right of interpreting the constitution that is enjoyed by the courts first, as a *judicial* power, and therefore one to be exercised by courts *as such;* secondly, as a departmental or official function, and therefore one to be exercised by all departments of government equally, *including the courts;* and thirdly, as an individual prerogative, and therefore one belonging to everybody, *including judges.* In the

[32] The Courts, the Constitution, and Parties, pp. 6, 51, 55, 56.

even in particular cases.[34] On the other hand, if what is meant is that the three departments have an equal right, when acting within their respective spheres, to determine the validity of their own acts, then it is untrue. This, of course, is apparent enough as respects the legislative department, for otherwise there would be no judicial review at all. It is true that the legislature is not arrested when it violates the constitution, that the only legal disadvantage it suffers is to have its acts disallowed, in the same way as the private citizen who makes a contract contrary to the statute of frauds or a will contrary to the rule against perpetuities has *his* act disallowed. But a statute that has been disallowed is usually harmless, and so the remedy is ordinarily quite adequate.

Still there are those who have asserted that the advantage which the judiciary enjoys over the legislature is due merely to the accident that in the scheme of law-making and law-enforcement provided by the constitution the judiciary has the later say, that it is, in other words, not one of *right* but of *position*.[35] The real test, therefore, of the departmental theory is supplied by the question whether it applies to the executive department, which occupies with reference to the judiciary the same favorable position that the latter does with reference to the legislature. JACKSON, in his famous Bank Veto Message of 1832, claimed, it will be recalled, the benefit of the departmental theory to the fullest extent. His claim was met by WEBSTER in the following terms: "The President is as much bound by the law as any private citizen ..... He may refuse to obey the law and so may any private citizen, but both do it at their own peril and neither can settle the question of its validity. The President may *say* a law is unconstitutional, but he is not the judge ..... If it were otherwise, there would be not government of laws, but we should all live under the government, the rule, the caprices of individuals; ..... The President, if the principle and reasoning of the message be sound, may either execute or not execute the laws of the land, according to his sovereign pleasure. He may refuse to put into execution one law, pronounced valid by all branches of government, and yet execute another which may have been by constitutional authority pronounced void." In brief, WEBSTER concluded, the message converted "constitutional limitations of power

[34] In an early Massachusetts case C. J. Parker has some very sensible words on this subject. At the moment of writing, however, I am unable to recover the reference.

[35] Madison took this position tentatively in 1788; Letters and Other Writings, I, 195 (1865). His words on this occasion are considered *infra*. Cf Federalist No. 49.

to the ordinary law. In both cases alike the courts are interpreting the law; and if those subject to the ordinary law are bound by the judicial interpretation of *it*, then those subject to the constitution are bound by the judical interpretation of *it*. The unique element of the latter case is merely the fact that in the constitution we have a law that binds the government itself.[38]

It is therefore submitted that judicial review rests upon the following propositions and can rest upon no others: 1—That the constitution binds the organs of government; 2—That it is law in the sense of being known to and enforceable by the courts; 3—That the function of interpreting the standing law appertains to the courts alone, so that their interpretations of the constitution as part and parcel of such standing law are alone authoritative, while those of the other departments are mere expressions of opinion. That the framers of the Constitution of the United States accepted the first of these propositions goes without saying. Their acceptance of the second one is registered in the Constitution itself, though this needs to be shown. But it is their acceptance of the third one which is the matter of greatest significance, for at this point their view marks an entire breach, not only with English legal tradition, but, for the vast part, with American legal tradition as well, anterior to 1787.

[38] A very explicit statement of the doctrine of departmental construction is that of Abraham Baldwin in the United States Senate, Jan. 23, 1800; Farrand, III, 383. For Jefferson's view as formulated late in life, see his Writings (Mem. Ed.), XV, 212 ff'g. Madison as President took the position that he had no discretion in the matter of enforcing, not only decisions of the judiciary, but acts of Congress: Am. St. Papers, Misc. II, 12 (1809). Jackson, on the other hand, is credited with the sentiment, with reference to Worcester v. Ga. (6 Pet. 515): "John Marshall has made his decision, now let him enforce it"; Greeley, American Conflict, I, 106. Lincoln's views expressed in criticism of the Dred Scott decision are contradictory. Prof. McLaughlin refers approvingly to old Gideon Welles' attempt "to make General Grant see that he was not under constitutional obligation to obey an act if that act was unconstitutional. Grant maintained that he was under obligations to obey a law until the Supreme Court declared it unconstitutional. Such is the natural position of the layman." The illustration, however, falls down at the critical point, for even Welles had no idea of maintaining that the President would not be bound by a decision of the Supreme Court: Diary of Gideon Welles, III, 176-80. Furthermore, on the precise question in issue between Welles and Grant, I must express a preference for the views of the latter. Obedience to the mandates of the legislature till they are proved to be void is one of the risks of office under our system. The contrary view leads to irresponsibility and disorder. Bancroft, in his History, supports Prof. McLaughlin's view on page 350 (Last Revision): "The decision of the Court in all cases within its jurisdiction is final between the parties to a suit and must be carried into effect by the proper officers; but as an interpretation of the Constitution, it does not bind the President or the Legislature of the United States." This view is stated *ex cathedra* and without any attempt at argument, and three pages later (p. 353) is substantially contradicted. The position taken by President Taft and Congress with reference to the proposal to enact an income tax in the face of Pollock v. Farmers' Loan and Trust Co. (158 U. S.) is fresh in mind.

edly indicate COKE'S belief that the principles of "Common right and reason," being part of the Common Law, were cognizable by the judges while interpreting acts of Parliament. But for the rest they must be read along with COKE'S characterization of Parliament as the "*Supreme* Court" of the realm. As he plainly indicated by his connection with the framing of the Petition of Right, COKE regarded Parliament itself as the final interpreter of the law by which both it, the King, and the judges were bound.

But it is the tendency of doctrines to strip themselves, so to speak, for action or else to disappear. A contemporary of COKE'S, HOBART, early gave the dictum in *Bonham's Case* an interpretation which, had it been followed, might have meant something very like judicial review.[43] HOBART'S doctrine in turn found its way to America through BACON'S ABRIDGEMENT, where OTIS found it an available weapon for the moment in the *Writs of Assistance Case* in 1761.[44] More than a century before this, however, the English judges in *Streater's Case*[45] had decisively repudiated the dictum, while early in the 18th century Lord HOLT. minded to give his predecessor's words some meaning, had reduced their application to the single case where an act of Parliament should be so self-contradictory in terms as to be impossible of execution.[46] Just as the Americans were about to frame their first constitutions, HOLT'S doctrine found its way to them in the influential pages of BLACKSTONE,[47] in company with the notion of legislative sovereignty. Its initial effect, in co-operation with other influences, was to give judicial review a set-back, though finally it was to furnish the way of return thereto. Undoubtedly the most influential case in which judicial review was broached before the Convention of 1787 was that of *Trevett* v. *Weeden*,[48] in which

[43] Savadge v. Day, Hob. 85 (1615).

[44] See my "Establishment of Judicial Review" in 9 Michigan Law Review 104-06. For the spread of the influence of Otis' argument, see the case of Robin v. Hardaway, Jefferson's Reports, 114. Professor McMaster informs me that in 1765 the Stamp Act was declared unconstitutional by the County Court of Northampton County, Va.

[45] 5 State Trials 386 ff'g. (1653).

[46] City of London v. Wood, 12 Mod. 669 (1701).

[47] 1 Comms. 91. The case discussed by Hobart, Holt, and Blackstone in turn is that of an act of Parliament making a man a judge in his own case. Such an act, says Hobart, would be against the laws of nature and void, but Holt and Blackstone merely say it would be self-contradictory. The discussion starts with Coke's citation of a case arising in the manor of Dales, where it was held merely that an act of Parliament conferring in general terms upon a specific person the jurisdiction of cases arising in the manor did not apply to a case to which that person was an interested party: 8 Rep. 118-20.

[48] J. B. Thayer, Cases on Constitutional Law, I, 73-8; Brinton Coxe, Judicial Power and Unconstitutional Legislation, 234-48.

power.[51] In the first place, all through colonial times, the legislature had stood for the local interest as against the imperial interest, which had in turn been represented by the governors and the judges. In the second place, the legislative department was supposed to stand nearest to the people. Finally, *legislative* power was *undefined* power. As applied against the legislative department, therefore, all that the principle of the separation of powers originally meant was that those who held seats in the legislature should not at the same time hold office in either of the other departments.[52] But the legislature itself, like the British Parliament and like the colonial legislatures before it, exercised *all kinds of power,* and particularly did it exercise the power of interpreting the standing law and interfering with the course of justice as administered in the ordinary courts;[53] and the only test deemed available to its acts was that they should be passed in the usual

[51] The position of the legislature in the early State constitutions is described at length by Morey, in Annals of the Am. Acad. of Soc. and Polit. Sc., IX, 398 ffg; also by Davis, "American Constitutions" in Johns Hopkins University Studies, 3rd Series.

[52] The doctrine of the separation of powers receives recognition in the body of the first Virginia constitution in the following words: "That the legislative, executive, and judiciary departments shall be distinct; so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time," etc. See also the first New Jersey Constitution, Art. XX; the original North Carolina Constitution, Arts. XXVIII-XXX; the first Pennsylvania Constitution, Sec. 23; the first South Carolina Constitution, Art. X: Thorpe, Am. Charters, Constitutions, etc.

[53] For Parliament's relation to the standing law in the 17th century, see the instructive pages in McIlwain, High Court of Parliament, etc., Ch. III, especially pp. 109-66. Said Harrington in his Oceana: "Wherever the power of making law is, there only is the power of interpreting the law so made"; loc. cit. 163. See also Blackstone, 1 Comms. 160. For the case of the colonial legislatures, see Works of James Wilson (Andrews' Ed.), II, 50; Minot, History of Massachusetts, I, 29; Hutchinson, History of Massachusetts, etc., I, 30, II, 250, 414; 15 Harvard Law Rev. 208-18; Massachusetts Acts and Resolves (to 1780), passim; Journal of Virginia House of Burgesses, passim. For the case of the early state legislatures, see Federalist Nos. 48 and 81, the latter of which is quoted *infra* on this subject. See also Jefferson's "Virginia Notes" in Works (Mem. Ed.) II, 160-78; also the Reports of the Pennsylvania Council of Censors of their sessions of Nov. 10, 1783, and June 1, 1784, in The Proceedings Relative to the Calling of the Conventions of 1776 and 1790, etc. (Harrisburg, 1825), pp. 66-128. See also Langdon of New Hampshire's letters complaining of acts of the state legislature annulling judgments, in New Hampshire State Papers, XI, 812, 815, and XXII, 749, 756 (June, 1790). For concrete instances in Massachusetts under the Constitution of 1780, see Acts and Resolves under following dates: 1780, May 5, June 9, Sept. 19; 1781, Feb. 12, Apr. 28, Oct. 10; 1782, Feb. 13, 22, Mar. 5, 7, May 6, 7, June 7, 18, Sept. 11, Oct. 4, Nov. 2; 1783, Feb. 4, 25; Mar. 17, Oct. 11; 1784, Feb. 3; 1785, Feb. 28, Mar. 17; 1786, June 27, J'ly 5; 1787, Feb. 26, Mar. 7, J'ly 7; 1790, Feb. 25, 26, Mar. 9; 1791, Feb. 24. See also Kilham v. Ward *et al.*, 2 Mass. 240, 251; also, Proceedings of the Massachusetts Historical Society, for 1893, p. 231; also Story's Commentaries, § 1367. Further testimony will be found in a speech by Roger Sherman in his contemporary essays on the Constitution; Moore's History of North Carolina; Jeremiah Mason's Memories, etc.; Tucker's Edition of Blackstone (1802), the appendix; Flumer's Life of Wm. Plumer; various judicial his-

the idea of an ordered and regular procedure for making constitutions, with the result inevitably of furthering the idea of an enacting power in the people at large and that of the legal character of the constitution;[57] (2) from New Jersey, Connecticut, Virginia, New Hampshire, and Rhode Island came the idea of judicial review, partly on the basis of the doctrine of the right of revolution and partly on the basis of the doctrine of certain principles fundamental to the Common Law that had found recognition in the State constitutions;[58] (3) from North Carolina, just as the Philadelphia Convention was assembling, came the idea of judicial review based squarely on the written constitution and the principle of the separation of powers;[59] (4) from various sources came the idea that legislative power, instead of being governmental power in general, is a *peculiar kind of power*;[60] (5)

[57] On the making of the revolutionary State constitutions, see Davis in Johns Hopkins University Studies, 3rd Series, pp. 516 ff'g. The legal character of the Massachusetts constitution of 1780 was recognized and enforced by the supreme court of the State in a series of decisions, in 1780-81, pronouncing slavery unconstitutional. See G. H. Moore, History of Slavery in Massachusetts. The writers on the subject of judicial review seem not to have discovered the importance of these cases.

[58] The New Jersey case referred to is Holmes v. Walton, 1780, on which see Austin Scott in the Am. Hist. Rev., IV. 456 ff'g. The case dealt with the question of trial by jury. The legislature complied with the court's view of the matter only very incompletely. The Connecticut case is the Symsbury Case, 1785, to which I first drew attention in my "Establishment of Judicial Review." The case, which is reported in Kirby (Conn.), 444 ffg., dealt with the subject of vested rights. The Virginia case is Com. v. Caton, 1782 (4 Call 5), which is important for the dicta. However, it should be noted that the much quoted words of Chancellor Wythe in this case deal with the question of the duty of the court in the face of an attempt by one chamber of the legislature to usurp power, not that of its duty in face of a void act of the whole legislature. The case of Josiah Phillips, which Professor Trent tries to make out a precedent in this connection (Am. Hist'l Rev., I, 444 ff'g) is no precedent. Phillips was finally proceeded against in the regular way, rather than under the bill of attainder that had been voted against him because it was contended in his behalf that he was a British subject and, therefore, not capable of treason against Virginia. This is Jefferson's explanation of the matter, given repeatedly, and he was governor at the time. The mythical view of the case derives its chief support from a passage in Tucker's Blackstone, I, 293 (App.), cited by Haines, p. 79. See also my article in 9 Mich. Law Rev. The Rhode Island case is Trevett v. Weeden. "The sole power of judging of the laws," said Varnum, belongs to the courts. The New Hampshire case is referred to in Plumer's Life of Wm. Plumer and in Jeremiah Mason's Memories, but I cannot furnish the citations at this writing. It dealt with the subject of vested rights. The much cited case of Rutgers v. Waddington marked, as I point out in 9 Mich. Law Rev., a triumph for the notion of legislative sovereignty.

[59] Bayard v. Singleton, 1 Martin 42. See note 24, above. Mr. W. S. Carpenter finds from the contemporary newspapers that this case was decided in May, several days before the Philadelphia Convention had actually come together.

[60] See, in this connection, the Reports of the Fennsylvania Censors, referred to in note 53, above. The earliest statement of the respective limits of legislative and judicial powers came from the royal governors, in an effort to check the former. See, for example, the message of Gov. Fletcher to the New York Assembly, Apr. 13, 1695: "Laws are to be interpreted by the judges," *i. e.*, the judges alone: Messages from the Governors

imperfect recognition of the implications of the doctrine of the separation of powers, for it associated members of the judiciary in a council with the executive to revise measures of the national legislature and it left to the the national legislature the task of keeping State legislation subordinate to national powers. The first important step in the clarification of the Convention's ideas with reference to the doctrine of judicial review is marked, therefore, by its rejection of the Council of Revision idea on the basis of the principle stated perhaps most precisely by STRONG of Massachusetts, "That the power of *making* ought to be kept distinct from that of *expounding* the laws." "No maxim," STRONG added, "was better established," and the utterances of other members bear out his words.[64] For, in one form or another, the notion of legislative power as *inherently limited power,* distinct from and exclusive of the power of interpreting the standing law, was reiterated again and again and was never contradicted. When, therefore, the Convention adopted Article III of the Constitution vesting "the judicial power of the United States in one Supreme Court and such inferior courts as Congress shall from time to time establish," it must be regarded as having expressed the intention of excluding Congress from the business of law-interpreting altogether.

But a not less important step toward the final result was taken when the idea of a Congressional veto of State Laws was dropped and for it was substituted the Small State proposition of giving the Constitution the character of supreme law within the individual States enforceable by the several State judiciaries.[65] Thus it was settled that as against State legislation at any rate the Constitution should be *legally* supreme. Why not then as against national legislation as well? When it was decided that the Constitution should be referred for ratification to conventions within the States, the question was probably determined for the majority of the members. Said MADISON: "A law violating a constitution established by the people themselves would be considered by the judges as null and void.[66] Later the Convention

[64] Farrand II, 73-80.

[65] Note particularly the significance of Sherman's words with reference to Congressional veto: "Such a power involves a wrong principle, to wit, that a law of a State contrary to the Articles of Union would, if not negatived, be valid and operative." Yet as late as Aug. 23, John Langdon of New Hampshire said: "He considered it [the question of a Congressional veto] resolvable into the question whether the extent of the National Constitution was to be judged of by the State governments": Farrand II, 391. The "arising" clause was adopted Aug. 27.

[66] Farrand, II, 93.

when the new system was set going, not only in the light of the views of its authors, but for the most part under their personal supervision. But the interest of the period also arises in part from the real paradox which judicial review has always presented in our system from the outset, the paradox namely of trying to keep a government based on public opinion within the metes and bounds of a formally unchangeable law. The dilemma thus created did not at first press, but with the rise of political opposition it became grave enough, and when this opposition finally triumphed, not only judicial review but even judicial independence was for the moment in peril.

But, indeed, the difficulty at the time of the adoption of the Constitution was hardly a new one, for some such objection had been forthcoming even earlier to judicial review within the States, where, however, the judges were generally much less secure of independence than under the United States Constitution, [68a] and where, moreover, judicial power in the last resort often resided still with a branch of the legislature or with the whole of it. Furthermore, as I have already indicated, judicial review in the States had thus far rested upon a somewhat uncertain logic which put it in the light of a highly extraordinary, quasi-revolutionary remedy, or in best gave it sway within the limited area marking the intersection, so to speak, of the written constitution with certain fundamental principles of the Common Law, like trial by jury or the security of vested rights.

It is not surprising, therefore, to find HAMILTON turning from his work of planting judicial review squarely within the Constitution and of rendering its field of operation co-extensive with the four corners of that instrument, to consider certain objections. Thus he recites: "The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the spirit of the Constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous.... The Parliament of Great Britain and the legislatures of the several States can at any time rectify by law the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless." HAM-

He admitted that it represented an attempt by Congress to construe the Constitution *finally* at the point involved, but he asserted that it was within Congress' power to do this very thing in a case where the Constitution was silent and the question raised concerned an apportionment of power among departments. In other words an assumed incompleteness at points was to give Congress its opportunity. But, rejoined GERRY of Massachusetts, "I would ask, gentlemen, if the Constitution has given us the power to make declaratory acts, where is the necessity of inserting the Fifth Article for the purpose of obtaining amendments? The word amendmend implies a defect, a declaratory act conceives one. Where then is the difference between an amendment and a declaratory act?" The protest against an "attempt to construe the Constitution" was also voiced by SHERMAN of Connecticut, PAGE and WHITE of Virginia, and BENSON of New York, with the result that eventually MADISON himself joined in support of a motion striking out the exceptionable clause and substituting for it phraseology merely inferring that the President would exercise the power of removal and making provision for the event.[73] A little later the House passed the Judiciary Act almost without comment upon the 25th section of it, which recognizes the judicial prerogative in relation to the written constitution in the most explicit fashon.[74]

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[73] For this debate, see Annals of Congress, I, col. 473 ff'g.

[74] Professor Beard in his Supreme Court, etc., assumes that all who voted for the act of 1789 favored judicial review in 1787. The argument has little independent force, for judicial review was a rapidly spreading idea during this period. On the floor of the Convention itself there were several converts. Read, for example, in this connection the exact statements of Gerry, Wilson, and Dickinson, as reported by Madison. Compare Dickinson in his "Letters of Fabius." Compare Morris' words in 1785: Sparks, Life of Gouverneur Morris, III, 438. Also, the list is incomplete. Perfected, it would include the following names of those who attended the Philadelphia Convention and supported the Act of 1789: Ellsworth, Paterson, Strong, Bassett, and Few—all of whom were on the Senate Committee that drafted the act; Robert Morris and Read, also Senators; and Madison, Baldwin, and Sherman in the House. Mr. Horace Davis in the November Am. Polit. Sc. Rev. seeks to prove, on the other hand, that those who supported the Act of 1789 thereby showed that they did not believe in the power of the Supreme Court to pass upon the validity of acts of Congress, except as the question was raised in cases coming up from the State courts. If Mr. Davis had turned to the debate, just reviewed, on the establishment of the Department of Foreign Affairs, he would have found at least half a dozen men championing the notion of judicial review who later voted for the Act of 1789. Also, I should like to ask where the State courts get their power to pass on the validity of acts of Congress save as it is intrinsic to judicial power under a constitution regarded as law. Mr. Davis' error consists apparently in the assumption that Congress, in the 25th section of the Act of 1789, conferred power upon the Supreme Court that it would not otherwise have had, instead of, as is the fact, organizing a particular branch of "the judicial power of the United States." For some later references in Congress to judicial review, see Annals, II, cols. 1978, 1988.

And meantime, judicial review was also advancing within the States, and what is an even more significant development, was being transferred from the earlier basis of fundamental principles to the written constitution. Two illustrative cases are *Bowman* v. *Middleton,*[79] and *Kamper* v. *Hawkins.*[80] In the former, decided in 1789, the South Carolina supreme court pronounced an early colonial statute to have been void *ab initio* as contrary to "common right" and "Magna Charta." In the latter, four years later, the Virginia court of appeals pronounced an act of the State legislature void as in conflict with the letter and spirit of the Virginia constitution, which was described as an ordinance of the people themselves and therefore superior to an ordinary statute, but as nonetheless a source of rules determinative of the rights of individuals.[81]

One thing that retarded the growth of judicial review in the States was the continuing influence of BLACKSTONE, with his notions of Parliamentary sovereignty,[82] but a more potent factor was the retention of the doctrine that legislative power extended to the interpretation of the standing law. Thus as late as 1798 we find Justice CHASE of the United States Supreme Court declaring that only in the Massachusetts constitution were the *powers* of government *distributed;* and two years later the same judge announced his opinion that the mere statement of the general principle of the separation of powers in a State constitution did not serve to restrict the legislative powers, that such general principles were "not to be regarded as rules to fetter and control, but as matter merely declaratory and directory."[83] But in *Ogden* v. *Witherspoon,*[84] which was a

[79] 1 Bay (S. C.) 93.

[80] Va. Cases, 20.

[81] Note J. Nelson's words, p. 131 of the volume: For the legislature to decide whether its own act is void or not would be unconstitutional, "since to decide whether the plaintiff of defendant under the existing law have a right is a judicial act."

[82] For an illustration of the Blackstonian influence, see Zephaniah Swift, The System of Laws of Connecticut (1795), pp. 16-7, 34-5, 52-3. Also, in the same connection, see arguments of attorneys in 4 Halstead (N. J.) 427 and 1 Binney (Pa.) 416. For a decidedly disingenuous and somewhat amusing attempt to explain Blackstone's words away, see Works of James Wilson (Andrews' Ed.), II, 415. Note also, Marshall's words, as attorney in Ware v. Hylton, 3 Dall. 199, 211: "The judicial authority have no right to question the validity of a law unless such a jurisdiction is given expressly by the Constitution."

[83] The cases referred to are Calder v. Bull, 3 Dall. 386, and Cooper v. Telfair, 4 Dall. 13. Justice Chase indicates by his remarks in these cases, significantly, reluctance to admit judicial review save on the basis of natural rights and the social compact. His remarks in the latter case, however, contain interesting testimony as to the unanimity of opinion on the subject among bench and bar, both in 1800 and at the time of the adoption of the Constitution.

[84] 3 N. C. 404(1802).

the Supreme Court's interpretation of the Constitution in relation to acts of Congress by JEFFERSON and his more radical followers in the years 1798-1802. For it was in part at least some such understanding that accounts for the entire failure of this challenge even while its authors were borne into higher office by an overwhelming political triumph.

The debate and vote on the Judiciary Act of 1789 prove that originally the advocates of State rights—for they existed from the beginning—were nothing loath to accept the Supreme Court's view of the Constitution as final, both in relation to national and to State power. When, however, the federal judges showed themselves disposed to uphold and enforce the Alien and Sedition Laws of 1798, and some of them indeed to entertain prosecutions for sedition under a supposed Common Law of the United States, the State-rights champions began to appreciate for the first time the added sanction given to national authority by judicial decision. The Virginia and Kentucky Resolutions of 1798 and 1799 were framed primarily with the design of breaking through this subtle control, on the warrant of the propositions, first that the Constitution was a compact of sovereign States and, second, that the organ of sovereignty within a State was its legislature, from which propositions the conclusion was drawn that the final word in construing the national Constitution lay with the individual State legislatures.[87] But the final outcome of the propaganda thus undertaken was not merely a further vindication of the prerogative of the Supreme Court of the United States, but of *all* courts. Thus having been forwarded to the other legislatures, the resolutions elicited from the seven Northern of them unequivocal declarations of the right of the "Supreme Court of the United States ultimately" to decide "on the constitutionality of any act" of Congress.[88] In his famous Report of 1799 to the Virginia legislature, MADISON endeavored at first to meet these responses by reiterating the doctrine of the original resolutions, but even in so doing he admitted the finality of judicial constructions of the Constitution as against the *other* branches of the National Government, and in the end he abandoned his case completely.[89] The Resolutions, he contended, taking a defensive tone,

Constitution, is worth notice. The ground of the opinion is indicated by the following words: "We think the Constitution to be paramount [to] the acts of the legislature": Pa. Archives, 1st ser., XII, 36.

[87] MacDonald, Select Documents, 148-60; Elliot, IV., 528-32, 540-45.

[88] H. V. Ames, State Documents on Federal Relations, 16-26.

[89] Writings (Hunt's Ed.), VI, 341-406.

tution, and by that view of the principle of the separation of powers which sharply distinguishes law-making from law-interpreting and assigns the latter exclusively to the courts, the view which was demonstrably held by the framers of the Constitution when they drafted Article III. But in the last analysis judicial review rests upon the assumption, hardly concealed by this interpretation of the principle of the separation of powers, that the judges alone really *know* the law. To a generation born and bred under the *regime* of the Common Law this was a natural assumption to make. Today, however, the activity of the legislatures in the field of social reform imparts to the law more and more the character of an assertion of authority, with the result that the possibility of a purely mechanical interpretation of it comes to be denied.[95] At the same time, with the rise of administrative bodies, the courts are losing the role which once was theirs almost exclusively, of mediating between the state and the individual, with the result that men today find it requisite to look to them for their rights less frequently than in the past. On both these accounts the theoretical argument for judicial review tends to lose touch with the nourishing earth of solid facts and congenial ideas, and its peruasiveness to weaken. But on the other hand it is by no means certain that this will always be the case. The doctrine of Due Process of Law, while it has enlarged the scope of judicial review enormously, has also rendered it correspondingly flexible. Granting the judges due wisdom, there is today no good reason why the aegis of the constitution may not be thrown about almost any sensible measure of social reform, to give it legal stability. Who can doubt, then, that history will repeat itself, and that the muck-rakers of today will become the stand-patters of tomorrow?

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[95] See especially John Chipman Gray's Nature and Sources of the Law.

The case of *Fairfax* v. *Hunter*,[2] decided in 1812, was an action in ejectment involving the construction of the treaties of 1783 and 1794 with Great Britain. In his opinion, Justice STORY declared that the defeasible title of the plaintiff alien claimed under the above treaties was confirmed and made absolute against any subsequent legislation of Virginia.

In the case of *Chirac* v. *Chirac*,[3] decided in 1817, there was called into question the validity of a law of Maryland, which contravened provisions in the Treaty of Amity and Commerce of 1778 with France, Article XI provided in substance that citizens of the United States might dispose of their property, real or personal, to any persons they wished, and that such donees, subjects of the United States, whether resident in France or elsewhere, should be allowed to take title without being obliged to obtain letters of naturalization. The subjects of the French King, resident in the United States, were to enjoy perfect reciprocity in this regard. A Frenchman who owned real estate in Maryland died intestate and his only heirs were French citizens. Maryland claimed that the property was escheatable, and according to its anti-alien laws conveyed it to a relative resident in this country. The plaintiffs, heirs of the intestate and citizens of France, brought this suit against the grantee of the state of Maryland on the ground that the treaty took precedence over the statute of Maryland. This position was sustained by the Supreme Court in the opinion rendered by Chief Justice MARSHALL. The fact that the treaty had expired was immaterial, since a right once vested does not require for its preservation the continuance of the power by which it was acquired.[4]

The case of *Geoffroy* v. *Riggs*,[5] also involved statutes of the state of Maryland. Two laws passed in 1780 and 1791 prevented citizens of France from taking property within the United States, either real or personal, by inheritance from citizens of the United States. Justice FIELD reviewed the cases upon the subject and held that the above statutes were suspended by the terms of the treaty of 1800 with France.

The decisions of greatest interest for our purposes have been rendered in cases arising from attempts of the Pacific States to

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[2] Fairfax's Devisee v. Hunter's Devisee, 7 Cranch. 602 (1812).

[3] 2 Wheat. 259 (1817).

[4] The superiority of treaties to state statutes was again affirmed in the Pollard Case, decided by the Supreme Court in 1840. It involved the validity of a grant under the treaty of 1802 with France and the treaty of 1819 with Spain.

[5] 133 U. S. 258 (1889).

The case of *United States* v. *Iuong Woo*,[9] involved an ordinance of San Francisco which made it unlawful to establish and carry on laundries within certain limits without obtaining the consent of the Board of Supervisors. This consent was to be based upon the recommendations of not less than twelve citizens and tax-payers in the block in which the laundry was to be established. The local regulation was considered repugnant to the treaty provisions and declared void.

There were cases, however, in which municipal ordinances were sustained, and of these *Soon Hing* v. *Crowley* [10] is an example. Another ordinance of San Francisco was involved, imposing certain regulations and restrictions upon laundries and ostensibly aiming against the Chinese. In his opinion Justice FIELD conceded that the regulation of laundries was a matter which came within the right of the municipality and the Federal Government could not, in its treaty stipulations as to the rights of aliens to live and labor, infringe upon municipal jurisdiction. "When the general security and welfare require that a particular kind of work should be done at certain times or hours, and an ordinance is made to that effect, a person engaged in performing that sort of work has no inherent right to pursue his occupation during the prohibited time."

The complaint was made by the Chinese that this ordinance was aimed exclusively at them. To this assertion the court replied that there was nothing in the language of that ordinance or in the record of its enactment to support that claim. The court declared itself unable "to inquire into the motives of legislators in enacting laws, except as they may be disclosed on the face of the act or be inferable from their operation, considered with reference to the condition of the country and existing legislation." This regulation was upheld as a legitimate police ordinance, and as such it was not annulled by the treaty provisions.

The cases cited above have been adjudicated in the federal courts. There are, however, a large number of cases involving a conflict of state statutes with federal treaties which have been decided in state courts with admirable impartiality.

In *Cornet* v. *Winton*,[11] the Supreme Court of Tennessee decided in favor of the supremacy of treaties over all state laws. In one of the opinions the following passage occurred: "Must the whole Union because of the misconduct of one state be forced into a war? Shall

[9] 13 Fed. 229; 7 Sawy. 526 (1882).
[10] 113 U. S. 703 (1885).
[11] 2 Yerger, 143 (1826).

In the case of *People v. Naglee*,[14] the Supreme Court of California laid down the rule, which it attempted to support by decisions of the Supreme Court of the United States,[15] that "a treaty is supreme only when it does not transcend certain limits, and that it cannot supersede a state law which enforces or exercises any part of the state power not granted away by the Constitution." The obvious reference made here was to the police powers of the states, constituting the most important and far-reaching of the "reserved rights." Five years later a case[16] arose which involved a statute of California conflicting with the Prussian treaty of 1828[17] confirming Prussian citizens in America in their enjoyment of full rights of inheritance. The opinion contained the following strong defense of the supremacy of treaty stipulations:

"The treaty-making power of the Federal Government must, from necessity, be sufficiently ample to cover all the usual subjects of treaties between different powers. If we were to deny to the treaty-making power of our government the exercise of jurisdiction over the property of deceased aliens upon the ground of interference with the course of descents, or the laws of distribution of a state where property may exist, by parity of reasoning we should not make commercial treaties with foreign nations because, it might be said, some of their provisions would injure the business of a portion of the citizens of one of the states of the Union. If the treaty-making power which resides in the Federal Government is not sufficient to permit it to arrange with a foreign nation the distribution of an alien's property, then that power resides nowhere, since it is denied to the states."

It may be said that the tendency of state courts as a rule has been one of impartiality in attitude towards their state statutes and federal treaties. It is only natural, however, that in those states which have encountered particular problems of immigration, public sentiment should be influenced by the conditions that prevailed. Accordingly California has shown a rather persistent tendency to construe her laws favorably, and this is not wholly a cause for condemnation. During the years of the great influx of Chinese immigration before Congress undertook to deal with the problem the state naturally assumed the initiative in the matter, and the habit of self-help has continued in some measure to the present time. The last manifes-

[14] 1 Cal. 232 (1850).
[15] Passenger Cases, 7 How. 283; License Cases, 5 How. 504, 588.
[16] People v. Gerbe, 5 Cal. 381 (1855).
[17] Federal Statutes Annotated, Vol. VII, p. 770, Art. XIV.

tion of the Secretary of State, Mr. BLAINE, who telegraphed the Governor of Louisiana the provisions of the treaty of 1871,[13] which had been violated. Article III provided that "the citizens of each of the High Contracting Parties shall have in the states and territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are accorded the natives, on their submitting themselves to the conditions imposed upon the natives."

The event occasioned great excitement in Italy, and the Marquis DI RUDINI, at that time Premier, being threatened with a serious ministerial crisis, made very exacting demands upon the government of the United States. He not only asked the official assurance by the United States that the guilty parties should be brought to trial, but that it should be recognized in principle that an indemnity was due the relatives of the victims.

In substance Mr. BLAINE replied that the punishment of the murderers must be left to the local tribunals in the first instance and if they would not comply with the procedure locally prescribed, it would then be the duty of the United States to consider some other form of redress. Mr. BLAINE declared that Italy must look to the local government for the punishment of the offenders, since the President could not interfere in the course of justice even if natives were the aggrieved parties.

This position was somewhat different from the policy of the government towards the United States of Colombia when circumstances were reversed in 1871. April 6, twenty years previous to the Mafia Riots, the steamer "Montijo," owned by citizens of the United States, while on a voyage to Panama, was seized and burned by persons engaged in revolution in Colombia. The event occurred in waters within the jurisdiction of the state of Panama, and the United States of Colombia sought to escape liability on these grounds. The controversy was finally submitted to arbitration, and the decision rendered by the umpire, July 25, 1875, was in favor of the complainants, citizens of the United States of America, and exactly coincided with our views in the matter. We maintained the liability of the general government for every international wrong committed by a state, and declared that "since a state has no entity in international relations, the general government is bound to be responsible to foreign nations and to show in every case that it has done its best to obtain satisfaction from the aggressor."

[13] Fed. St. Annotated, Vol. VII, p. 656, Art. III.

and perfect protection for their persons and property. In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind, * * * the citizens or subjects of each Contracting Party shall enjoy in the territories of the other the same privileges, liberties and rights" as citizens of the most favored nation, excepting the right to become naturalized citizens. It is further provided in this treaty that these stipulations should not in any way affect the laws, ordinances and regulations with regard to trade, the immigration of laborers, police and public security which are in force or may hereafter be enacted in either of the two countries. It was the "most favored nation" clause above cited which Japan claimed had been violated by the act of the San Francisco School Board, since children of aliens who were citizens of other countries were allowed to attend the regular schools.

In construing the treaty the first question that presented itself was the extent of the rights included under the term "residence."[22] If the right of the Japanese to attend the public schools existed at all, it was necessarily founded upon the treaty rights of residence. There was no other right or privilege mentioned in the treaty which could be considered to include the right of attending the public schools. Apparently the phraseology of the treaty, liberal as it may be, scarcely extended the privilege of the public schools of a state to unnaturalized foreigners, and if the Federal Government had so intended, it was only natural to suppose that the treaty would have provided in express terms for schooling rights. The treaty carefully covered the rights of entry, travel, residence, disposition of property of all kinds, but nowhere were there provisions concerning school privileges. Such were the arguments of the state in behalf of the action of the School Board.

The United States, defending the position of the Japanese, insisted that if the state chose to supply education as a government function, it could not discriminate against alien children of any particular nation. Edwin MAXEY, the counsel for the Japanese Government in this controversy,[23] emphasized the obligations of the states to obey federal treaty stipulations. In the treaty under consideration the right of residence was declared by him to include the privilege of attendance at schools with native-born children. He

[22] For the difficulties and uncertainty attending the interpretation of the term "residence," see 34 Cyc. 1647 et seq.

[23] Yale Law Journal, XVI, pp. 90-03; Exclusion of the Japanese Children from Public Schools. His position is naturally one of strong defense of the Federal and Japanese point of views.

against the great number of Japanese laborers was the real cause for the action countenanced and defended by the state of California. A satisfactory settlement was finally reached when it was agreed to admit Japanese children into the public school of San Francisco on condition that Japanese coolies be excluded from future entrance into the country.[27]. A treaty with more restricted rights to aliens was concluded with Japan four years later, and it has been in reference to this treaty that the present question of possible conflict of California's measure has arisen.

The present controversy has presented a unique situation whose constitutional and diplomatic intricacies can be discussed most satisfactorily by those who have dealt with the problem. When the state joined issue with the Federal authorities, two alternatives presented themselves to the State Department. It could consider the treaty violated in law as well as spirit, reprove the state for its obstinate refusal to repeal the legislation in question, and after all modify the existing treaty to harmonize with the California statute. Or, it could consider the treaty violated only in spirit, yield to the state, assume the responsibility for the act, and make its peace with the offended country. Either policy carried with it embarrassment to the Federal Government. The adoption of the latter alternative involved the State Department in a series of negotiations pending at present. The historical background of the controversy presenting similar though not identical cases both in and out of the courts, may serve to throw into clearer relief the complications of the recent problem.

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[27] Yale Law Journal, XVI, pp. 400-404. A compromise in the Japanese Controversy, again emphasizing the foreign point of view.

prohibition exists or may exist, control over intoxicating liquors the moment they reach the borders of those States.

In *State* v. *Grier* (Del.), 88 Atl. 579; *State* v. *Van Winkle* (Del.), 88 Atl. 807; *State* v. *United States Express Co.* (Iowa), 145 N. W. 451, and *United States* v. *Ore. Wash. Ry. & Nav. Co.*, 210 Fed. 378, the constitutionality of the WEBB-KENYON ACT was sustained. To this act the two objections were that: first, Congress has no power to declare that interstate commerce interests are subordinate to, and should give way when they come in conflict with, State police interests; and second, Congress can not delegate to the States the power to regulate commerce. It is interesting to note that these objections were the very objections upon which President TAFT's veto was based and over which the act was passed.

The first cases of historical importance relating to this subject are known as the *License Cases*, 5 How. 504, 12 L. Ed. 256, decided in 1847. And the doctrine was laid down by CATRON, J., that until Congress had regulated commerce the States could exercise the power of regulation, non-action on the part of Congress presuming consent to the State regulations. Such a doctrine one would expect to emanate from a court, the majority of whose members were ardent State-rights men.

But these cases were subsequently overruled by *Bowman* v. *Chic., etc., Ry Co.*, 125 U. S. 465, 31 L. Ed. 700, 8 Sup. Ct. 689, and *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. 681, which cases held that the power of Congress in the field of interstate commerce is exclusive, and that consent to State regulations cannot be presumed from mere non-action on the part of Congress. In *Leisy* v. *Hardin* it was said that in the absence of enabling legislation by Congress the State did not have the power to prohibit the transportation of liquors into the State, the power of the State only attaching when the liquor became commingled with the general mass of property in the State.

Acting upon the dictum in *Leisy* v. *Hardin*, Congress enacted the WILSON ACT of Aug. 8, 1890 (26 Stat. at L. 313), the purpose of which act was to render possible the full exercise of the police power of the State by taking away the interstate commerce character of spirituous liquors "upon their arrival" in the State. This act was declared constitutional in *Re Rahrer*, 140 U. S. 545, 35 L. Ed. 572, 11 Sup. Ct. 865. In view of the preceding cases and the wording of the act it seems as if Congress had meant to give the State control when the liquors reached the borders. But the WILSON ACT was rendered practically useless by the holding in *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. Ed. 1088, 18 Sup. Ct. 664, which declared that the word "arrival" meant actual delivery to the consignee, and that the power of the State did not attach till then. A very pointed illustration of the evils of *Rhodes* v. *Iowa* is furnished by the case of *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, 223 U. S. 70, 56 L. Ed. 355, 32 Sup. Ct. 189, in which case it was held that an injunction would issue to compel a carrier to transport liquor into "dry" territory.

It is manifest that so long as the law remained as expressed in *Rhodes* v. *Iowa* and *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, no State could

so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in State laws in dealing with such property. * * *

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so." So the decision in the case is that Congress acts not upon the States but upon things, so that what was interstate commerce prior to the legislation of Congress has ceased in part to be such after that legislation.

Of those cases upholding the WEBB-KENYON ACT *State* v. *United States Express Co.* clearly points out how Congress acts upon things in the following words, "It is true that the effect of the act is to give the States more power, but there is no such express delegation, and the language of the act is in no sense permissive. The act is prohibitory in character, and acts not upon States, but upon articles of commerce. Interstate commerce in these things is prohibited under certain conditions, and, as we shall presently see, the act is uniform in its operation."

The doctrine that in such legislation Congress acts upon things rather than upon the States has hardly been followed to any great extent even by the Supreme Court of the United States. *Indianapolis* v. *Bieler*, 138 Ind. 30, speaks of such acts as subjecting interstate commerce to the power of the States; *State* v. *Hanaphy*, 117 Iowa 15, 90 N. W. 601, as giving power to the States; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17, 49 L. Ed. 925, as conferring power upon the States; *Ex parte Jervey*, 66 Fed. 957, as the permission of Congress; *In re Bergen*, 115 Fed. 339, as the consent of Congress; *People* v. *Hesterberg*, 184 N. Y. 126, as authority from Congress; *Delamater* v. *S. Dak.*, 205 U. S. 93, 51 L. Ed. 724, as allowing or enabling the States to act.

That Congress has no discretion to declare that interstate commerce interests must give way to police interests when the two powers come in conflict does not seem to be socially and politically sound. It does not seem as if those who made the Constitution ever intended that the commerce clause should establish the supremacy of interstate commerce interests when in conflict with the police power, irrespective of the importance of the two interests. A great deal of confusion is no doubt due to the failure to distinguish between those interests which are commercial, and those which are social and moral, affecting commerce only incidentally.

If this objection were tenable how could we justify the innumerable cases where police measures were sustained although commerce was affected indirectly and incidentally? As examples of such legislation are State regulations of interstate trains, requiring such trains to stop at populous centers. *Lake Shore, etc., Ry. Co.* v. *Ohio*, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. 465; State inspection laws, *Turner* v. *Md.*, 107 U. S. 38, 27 L. Ed. 370, 2 Sup.

of frauds certainly has no application. Many contracts of indemnity involve only this question, and where this is the case the authorities are practically unanimous in holding that they are not within the statute. A typical example of such a contract is a promise to indemnify a sheriff for making a levy upon property claimed to be exempt from levy, *Lerch* v. *Gallup*, 67 Cal. 595, 8 Pac. 322. With these may be classed promises to indemnify a surety on a criminal bail bond, since the prisoner is under no obligation to indemnify him, *Cripps* v. *Hartnoll*, 4 Best & S. 414, 116 Eng. C. L. 116; *Anderson* v. *Spence*, 72 Ind. 315. But the distinction between civil and criminal bonds does not seem to be generally recognized in this country, *May* v. *Williams*, 61 Miss. 126.

But there are other contracts of indemnity which involve different questions, and it is as to these that confusion has arisen. These are the cases where, in addition to the promise of the defendant to indemnify, there is a co-existing obligation on a third person to pay the same obligation. The typical case of this kind is a promise to indemnify another if he will become surety for a third person on a note, bond, or other obligation. As already seen, we can dismiss all question of the surety's obligation on the instrument. But arising at the same time there is an implied obligation on the part of the principal to indemnify the surety against any loss which he may sustain by reason of the contract. As to this obligation the surety is a creditor. True, this is merely a promise implied in law, but it is not necessary that the obligation guaranteed should arise from an express contract, BROWNE, STATUTE OF FRAUDS, § 158. Else all guarantees of obligations arising from torts would be without the statute. The question is as to the relation between this implied obligation and the express promise to indemnify; whether one of them is collateral to the other or whether they are both independent and original undertakings which have no connection.

Where this question has been presented in its simplest form, as where the promisor was a stranger to the main contract, and his object was not to benefit himself by his undertaking, the courts have split and are still fairly evenly divided. Such a case was *Green* v. *Creswell*, 10 A. & E. 453, the leading English case holding such promises not to be within the statute. This case took exception to the broad doctrine of *Thomas* v. *Cook*, already mentioned. It is no longer authority in England, having been overruled in *Wild* v. *Dudlow*, L. R. 19 Eq. Cas. 198, in which the doctrine of *Thomas* v. *Cook* was reinstated. This vacillation among the English authorities has led to confusion in the American decisions. Several courts follow *Green v. Creswell* in holding that such promises are not within the statute. It is difficult to avoid the conclusion reached in these cases if it is admitted that the promises concerned have any relation whatever. They are both to pay the same debt, and the obligation of the principal can scarcely be said to be collateral to anything, since he is the person ultimately liable to pay the debt. The American cases sustaining this view which are still authorities in their jurisdictions may be classified as follows: Early cases decided without reference to the English authorities—*Brown* v. *Adams*, 1 Stew. (Ala.) 51; *Simpson* v. *Nance*, 1 Spears (S. C.) 4; *Draughton* v. *Bunting*, 31 N. C. 10; cases

St. Rep. 56, which is now overruled by the principal case the Virginia Court saying that the question must now be regarded as settled to the contrary. In addition to the grounds already discussed, these cases are usually based upon the doctrine laid down in *Davis* v. *Patrick*, 141 U. S. 479, 45 L. Ed. 826, that when a promise, though in form to answer for the debt of another, is in reality meant for the benefit of the promisor, it is an original undertaking and not within the statute. It may be doubted whether, apart from the reasons peculiar to indemnity contracts, a surety derives such benefit from having another liable with him on a debt as should bring these cases within this doctrine, but the distinction has often been made between such cases and those discussed above, *Mickley* v. *Hochsleder*, 10 Pa. Co. Ct. R. 345; *Farrell* v. *Maxwell*, 28 O. St. 383, 22 Am. St. Rep. 393; *Hartley* v. *Sandford, supra*. The same principle has controlled other cases where the interest was of a different nature. It is well illustrated by a comparison of the Connecticut cases of *Clements' Appeal*, 52 Conn. 464, and *Smith* v. *Delaney*, 64 Conn. 264, 29 Atl. 496, 42 Am. St. Rep. 181. P. B. B. Jr.

What Law Governs the Liability on Commercial Paper?—The recent case of *Belestin* v. *First National Bank*, (Mo. App. 1914), 164 S. W. 160, presents a novel question as to the law governing the liability of the drawer of a bill of exchange payable in another jurisdiction.

Plaintiff, living in Missouri, wished to send money to his brother, living in Greece, and bought of defendant bank in Kansas City, Missouri, its draft on a London bank, and on the same day mailed the draft to his brother. The draft was stolen before it reached the addressee, and was presented to the drawee bank, which paid it; the indorsement was in fact a forgery, but the drawee bank believed it to be genuine and paid it in good faith. The purchaser sued the drawer bank in Missouri, where they both lived, for the amount paid for the draft. The defendant set up the statutory law of England, which provides that a bill is discharged by payment in due course by the drawee, and that the drawee is deemed to have paid the bill in due course if he acts in good faith, even though the indorsement of the payee's name is a forgery. The plaintiff claimed the law of Missouri should be applied, which does not allow the good faith of the drawee banker to discharge him if he pays the bill on a forged indorsement. The court held that the bill had been paid according to the law of the place of payment, which must govern as to matters of payment, and hence the drawer as well as the drawee was discharged from any liability.

The controlling principle of the instant case is that the law of the place of performance governs as to matters of performance, and especially "for the purpose of payment and the incidents of payment." In support thereof the case of *Scudder* v. *Union National Bank*, 91 U. S. 406, is cited.

But the question actually before the court in that case was not whether the law of the place of performance should control as to the fact of payment, but only whether a parol acceptance made in Illinois of a draft drawn in that state on a firm in Missouri was to be governed by the law of Illinois,

drawer's contract and the lex solutionis as governing the other, which to say the least adds confusion to conflict.

Nor is this a question of the sufficiency of certain steps taken to release the drawer, for the vital point is not whether payment is sufficient, but whether there has been any payment at all. The law of England says there has been a payment, while the law of Missouri says there has not been, so the case simmers down to the question, what law is to govern in determining whether a drawer is discharged from liability upon a draft drawn by him? It seems that the same law should be applied in dealing with this essential to his discharge as is applied in dealing with the requisite of notice of protest to hold him liable.

The decision in the instant case also violates a rule laid down by STORY in his CONFLICT OF LAWS (8 ed.) § 343, that the law of the place where the contract between the particular parties is made will operate, as well in respect to the discharge as to the obligation thereof. This would seem to be a direct answer in the negative to the question propounded by the court as the real question involved, *i. e.*, "Is a payment made according to the law of the place of payment a discharge of the drawer's obligation?"

It will be noted that this case was not decided by a court of last resort, and it will be unfortunate if such a court is not given the opportunity to pass upon the question, for the doctrine as it stands seems to violate an established rule of private international law as applied to commercial paper.

J. S. K.

Apple Suit & Cloak Co., 198 Fed. 407. This amendment also gives the trustee the benefits of the state recording acts. *In re Calhoun Supply Co.*, 189 Fed. 537. Thus it becomes a question of state law as to whether the defrauded vendor has a right to the goods which is superior to that of an attaching creditor, and what has been termed a conflict in the rule applied is nothing more than the result reached as to the rights of a defrauded vendor and an attaching creditor under such state law. *In re Whatley Bros.*, 199 Fed. 362. The trustee is not an innocent purchaser and the attaching creditor cannot defeat the defrauded vendor. *Richardson* v. *Vick*, 145 S. W. 174; *Halsey* v. *Diamond Distilleries Co.*, 191 Fed. 498; *In re Bendall*, 183 Fed. 816. See also 13 COL. LAW REV. 158.

CHATTEL MORTGAGES—SUFFICIENCY OF WORDS USED TO PASS AFTER-ACQUIRED PROPERTY.—T. purchased a stock of groceries and gave a mortgage thereon to secure the notes given for the purchase price. The mortgage contained a stipulation covering "all increase from said stock of whatever kind and nature." T. continued in business and sold all the old stock, and by replacing that sold with new stock soon had a stock of goods different from that originally covered. He made an assignment for benefit of creditors and the mortgagee claims priority over a general creditor who sold the new stock to the mortgagor. *Held.* Mortgage did not include the "additions and substitutions" of stock. *In re Thompson* (Iowa 1914), 145 N. W. 76.

A mortgage of future property is generally void at law. *In re Sentenne & Green Co.*, 120 Fed. 436; *Jones* v. *Richardson*, 10 Met. 481; *Ferguson* v. *Wilson*, 122 Mich. 97; *Deeley* v. *Dwight*, 132 N. Y. 59, 18 L. R. A. 298; *Griffith* v. *Douglass*, 73 Me. 532, 40 Am. Rep. 395; *Chapman* v. *Weimer*, 4 O. St. 481. But in equity a mortgagee of after-acquired property is protected. *Mitchell* v. *Winslow*, 2 Story 630; *Holroyd* v. *Marshall*, 10 H. L. Cas. 191; *Williams* v. *Briggs*, 11 R. I. 476, 23 Am. R. 518; *Des Moines Nat. Bank* v. *Savings Bank*, 150 Fed. 301. Iowa, as stated in the principal case, follows the equitable doctrine that one may mortgage after-acquired property. But the majority of the court and the dissenting judge differed in their opinions as to whether the use of the word "increase" was sufficient to include after-acquired property. The majority, being influenced by the fact that the words were used in a printed blank, held that the words "additions to" or "substituted for" should have been used instead of the "increase thereof." The dissenting judge held that it was not a question of what specific words were used, but whether such terms were used as to show that the parties intended to pass the property, and that the word "increase" meant "added to" as used here and was sufficient to include future property; this view seems to accord with the rule as laid down by Justice STORY in *Mitchell* v. *Winslow*, "Whenever the parties by their contract intend to create a lien or charge either upon real or personal property"—clearly stating that all that is necessary are terms sufficient to show the intend to pass the after-acquired property.

CONVEYANCING—PUBLIC HIGHWAY AN INCUMBRANCE.—The defendant contracted to convey by warranty deed to the plaintiff a farm clear of all in-

Ann. Cas. 1912D 1114 (irrigation canals). Such a rule of public policy seems necessary in view of the fact that public easements are rarely excepted and parties seldom regard their existence on the land as constituting a breach of the covenant against incumbrances.

CORPORATIONS—LIABILITY OF DIRECTORS FOR SECRET PROFITS.—By a concerted scheme of all the defendants, directors of a corporation, they sold certain mineral lands to the corporation at a price greatly in excess of their intrinsic market value, taking in payment thereof stock of the corporation, thereby gaining control of the corporation and preventing any disclosure to the stockholders of the misappropriation of the company's assets. Later the defendants organized another corporation which they also controlled, and to which all the assets, good will, patents, choses in action, personal property, and business of the first corporation were transferred, the transfer being effected on the basis of an exchange share for share of the stock of the first corporation for the stock of the second corporation. The second corporation later elected a disinterested board of directors and discovered the fraud and now sues to recover the secret profits. The defendants demurred to the bill. *Held*, that the demurrer should be sustained. *United Zinc Companies* v. *Harwood et al.* (Mass. 1914), 103 N. E. 1037.

The defendants were guilty of a fraud against the first corporation for which it could either have rescinded the sale, *Ginn* v. *Almy*, 212 Mass. 486; *Cumberland Coal & Iron Co.* v. *Parish*, 42 Md. 598; *Pope* v. *Valley City Salt Co.*, 25 W. Va. 789, or sued for the secret profits, *Haywood* v. *Leeson*, 176 Mass. 310, 39 L. R. A. 725. But the suit was not brought by the old corporation. A new corporation was created. There was no attempt to consolidate and there was no statute permitting a consolidation. Had there been, the new corporation would have succeeded to all the rights, privileges, and franchises of the old and could have sued on rights of action existing in favor of the old, *Zimmer* v. *State*, 30 Ark. 677; *Meade* v. *N. Y., H. & M. Ry. Co.*, 45 Conn. 199; *Chicago, R. I. & P. Ry. Co.* v. *Moffitt*, 75 Ill. 524; *Miller* v. *Lanchester*, 45 Tenn. 514. But the old corporation still exists. Even though shorn of all its assets, it still retains its corporate entity, *State* v. *Bank of Maryland*, 6 Md. 205; *Price* v. *Holcombe*, 89 Iowa 123, and the mere right to litigate for a fraud is not assignable either in law or equity. It is not a salable asset nor such an interest in property to which the right to sue passes as incidental, *Cutter* v. *Hamlen*, 147 Mass. 471, 1 L. R. A. 429; *Emmons* v. *Barton*, 109 Cal. 662; *Life Ins. Co.* v. *Fuller*, 61 Conn. 252; *Dayton* v. *Fargo*, 45 Mich. 153; *Graham* v. *R. R. Co.*, 102 U. S. 148. The only way therefore in which the defendants can be reached is by bringing the suit in the name of the old corporation, and the demurrer was therefore properly sustained.

CORPORATIONS—WHO CAN SUE ON MORTGAGE BONDS.—Plaintiff owned mortgage bonds executed by defendant corporation, containing a clause providing for sale, suit, or entry upon and management of the mortgaged property by the trustee, after default in payment, on request of one-third of

the bond holders. Defendant made default in payment, and plaintiff, without any request having been made upon the trustee, sues to recover on the past due bonds. *Held*, that the common-law right to sue upon the bonds is not affected by the remedy provided in the mortgage given for their security, unless the provisions of the mortgage exclude such right in express terms or by necessary implication. *Fleming* v. *Fairmont & M. R. Co. et al.* (W. Va. 1913), 79 S. E. 826.

The argument against allowing the recovery in this action, viz., that it would prejudice the rights of the other bond-holders, cannot be sustained, for any lien that the plaintiff might acquire on the defendant's property must necessarily be secondary to the mortgage. If execution is had upon the judgment, the levy must be upon property other than that secured by the mortgage, thereby retaining to the other bond-holders an equal share in the mortgaged property, *Kimber* v. *Gunnel*, 126 Fed. 136; *Hospital* v. *Library Co.*, 189 Pa. 266. The other bond-holders not being embarrassed, there seems to be no reason why the remedy provided in the mortgage should not be held to be cumulative and not exclusive of the common-law right, *Dow* v. *Memphis, etc., R. Co.*, 124 U. S. 652; *Manning* v. *Norfolk & So. R. Co.*, 29 Fed. 839; *Wheelwright* v. *St. Louis, N. O. & O. Canal Transp. Co.*, 56 Fed. 164; *Phila. & Balt. Cent. R. Co.* v. *Johnson*, 54 Pa. 127; *Commonwealth* v. *Susquehanna, etc., R. Co.*, 122 Pa. St. 306; except where the whole scheme shows that the intention was that the bond-holders should look exclusively to the rights given in the mortgage, *Batchelder* v. *Council Grove Water Co.*, 131 N. Y. 42, 29 N. E. 801. But where the bond-holder sues to foreclose the mortgage, a different rule applies, for it would authorize an individual bond-holder to disturb the security of the other bond-holders, *Ashhurst* v. *Montour Iron Co.*, 35 Pa. St. 30; *Bowling Green Trust Co.* v. *Va. Passenger & Trust Co.*, 164 Fed. 753; *Batchelder* v. *Council Grove Water Co., supra.* But the bond-holders stand in much the same relation to the trustee as the stockholders of a corporation do to the corporation, and where it can be shown that the trustee neglects or refuses to act except on unjustifiable terms, or that he is incurably insane and the financial condition of the company is in such a condition that an immediate foreclosure is necessary to protect the interests of the bond-holders, then the individual bond-holder can foreclose for the benefit of all the bond-holders, *Owens* v. *Ohio, etc., R. Co.*, 20 Fed. 10; *Beekman* v. *Hudson River, etc., R. Co.*, 35 Fed. 3; *Consolidated Water Co.* v. *City of San Diego*, 89 Fed. 272; *Schultz* v. *Van Doren*, 65 N. J. Eq. 764; *Ettlinger* v. *Persian Rug & Carpet Co.*, 66 Hun. (N. Y.) 94; but such proof must be clear and convincing, *Beebe* v. *Richmond Light, Heat & Power Co.*, 35 N. Y. Supp. 1. The principal case, however, was not for foreclosure but merely an action at law to recover the value of the past due bonds. The decision was therefore correct.

COURTS—CONFERRING JURISDICTION BY CONSENT.—On motion of the defendant, the trial court entered an order of dismissal for want of prosecution; after adjournment, by agreement of both parties, it re-instated the

cause, and the defendant appeared at a regular term and confessed judgment in open court for the purposes of an appeal. After the case had been twice tried in the superior court and a new trial granted in each instance, the defendant moved to dismiss for want of jurisdiction, although it was conceded that the court had general jurisdiction of the subject-matter and of the parties. *Held,* that after the dismissal for want of prosecution the court, in vacation, was without power to reinstate the cause; and that the motion was properly granted. *Owens v. Cocroft* (Ga. 1914), 80 S. E. 906.

The court in the instant case seems to have made an erroneous application of the general principle that where a court has not been invested with jurisdiction of the subject-matter by law, jurisdiction cannot be conferred by consent. That this is the universal rule needs no citation of authority. On the other hand, where the court has general jurisdiction of the subject-matter but does not have control of the particular case by reason of some informality in the proceedings, such irregularity may be waived by the parties. *In re Spring St.,* 112 Pa. St. 258; *Foreman* v. *Hough,* 98 N. C. 386. Thus it has been held that a court may try an action transferred by agreement from another county, *Milner* v. *Chicago Railroad Co.,* 77 Iowa 755; that jurisdiction over a particular case can be conferred by consent where the court has general jurisdiction of that class of cases, *Greer* v. *Cagle,* 84 N. C. 385; *Tucker* v. *Sellers,* 130 Ind. 514; that consent may restore a jurisdiction which has once attached but which has been exercised so that the court's power is gone, *Brown* v. *Crow,* Hard. (Ky.) 443; *Bogle* v. *Fitzhugh,* 2 Wash. (Va.) 213. What is perhaps the true rule is stated thus in *Groves* v. *Richmond,* 56 Iowa 69, "The rule that jurisdiction cannot be conferred by consent applies only where the court has not the right to assume general jurisdiction of the subject-matter of an action. Where the court has such general jurisdiction, the parties may waive the ordinary process by which it is invoked." Such decisions as that in the instant case are what have subjected our courts to the criticism that they are dilatory and overtechnical.

COVENANTS—AFFIRMATIVE COVENANTS DO NOT RUN WITH LAND.—The Phoenix Mills was seized of a certain tract of riparian land upon which stood a mill run by water power. They were also owners of a second tract situated near the first. In 1872 they conveyed away the second tract, the deed containing a covenant that the grantors, their heirs and assigns would construct and maintain a shaft running from the mill on the first tract to the mill on the second tract to convey power. The grantor later conveyed the first tract to the defendant and the second tract was conveyed to the plaintiff. This action was brought to secure a construction of the covenants and to require defendant to construct the shaft and furnish the power. *Held,* that the covenant being an affirmative one, even though made for the benefit of the second tract, it could not be enforced in the hands of a subsequent grantee. *Miller* v. *Clary et al.* (N. Y. 1913), 103 N. E. 1114.

It is not at all certain that this decision does not change the rule on this question in New York. The court, while admitting that there was much

authority in this country to the effect that affirmative covenants will be binding on subsequent grantees taking with notice, and also that some of the New York decisions would seem to hold the same way, said that the rule finally laid down was the wiser one and did not directly override any New York decision. The court remarked that the New York decisions enforcing covenants to build party walls, fences and covenants to repair were merely exceptions to the general rule as laid down in the principal case. In spite of some decisions to the contrary it has become a well settled rule in England that affirmative covenants, with some exceptions, will not be enforced in the hands of subsequent purchasers. *Haywood* v. *Brunswick Bldg. Soc.*, L. R. 8 Q. B. 403; *London & S. W. Ry. Co.* v. *Gomm*, 20 Ch. Div. 562. On principle it would seem that there should be no distinction between the rules applicable to restrictive and affirmative covenants, since in either case the grantee purchases the land at a less price than he would be able to if there were no covenant in existence. And that is the view taken by the leading text-writers and by the majority of the courts in this country. *Whittenton Mfg. Co.* v. *Staples*, 164 Mass. 319; *Sharp* v. *Cheatham*, 88 Mo. 498; *Willoughby* v. *Lawrence*, 116 Ill. 11; *Maxon* v. *Lane*, 102 Ind. 364; *Gilmer* v. *Mobile Co.*, 79 Ala. 569; *Countryman* v. *Deck*, 13 Abb. N. C. 110; *R. R. Co.* v. *R. R. Co.*, 171 Pa. 284; *Lydick* v. *Balt. Co.*, 17 W. Va. 427; *Fledge* v. *Covington*, 122 Ky. 348; 3 POMEROY, EQ. JUR., § 1275 (3rd ed.); see 17 HARV. L. REV. 176, 18 ID. 214.

DAMAGES—PHYSICAL PAIN AND SUFFERING RESULTING FROM SEDUCTION.—The plaintiff alleged a promise of marriage and breach of the contract by the defendant. Evidence was admitted tending to show that the plaintiff, relying on the defendant's promise, submitted to intercourse resulting in pregnancy and birth of a child. The court instructed the jury that it might, in assessing the damages, take into consideration the pain and physical suffering occasioned by the birth of the child. On appeal *Held*, that the instruction was correct as the physical pain and suffering are not more remote than the mental suffering and humiliation resulting from the seduction and birth of child. *Booren* v. *McWilliams* (N. D. 1914), 145 N. W. 410.

The instruction and the opinion of the Supreme Court on it were only incidental to the decision of the case, but the doctrine advanced and followed by the court is unusual and extends the already liberal rule of compensation for seduction. At Common Law no recovery was allowed a woman for her seduction in an action for breach of a contract of marriage. *Weaver* v. *Bachert*, 2 Pa. St. 80, 44 Am. Dec. 159; *Wrynn* v. *Downey*, 27 R. I. 454, 4 L. R. A. (N. S.) 615. Generally, however, the courts have come to hold that evidence of seduction, resulting pregnancy, and birth of a child, are admissible to show mental suffering, loss of reputation and character, disgrace and humiliation. The theory is that the breach of the contract to marry is not only a breach of contract but also is a breach of trust and confidence, and that the elements of damage before mentioned are consequential results of the breach and therefore are recoverable. The feelings of the parties are so intimately connected with this contract that

they may be regarded as the subject-matter of the contract and its breach is a direct injury to them occasioning the real damage which is the gist of the recovery, *Chapman* v. *Western U. T. Co.*, 90 Ky. 265, 13 S. W. 888. But the cases extending the recovery thus far expressly refuse to go farther and allow a recovery for physical pain and suffering, apparently on the theory that it is not a consequence of the breach which furnishes the cause of action sued on, but is a result which would have occurred whether there had been a breach or not. *Giese* v. *Schultz*, 53 Wis. 462, 10 N. W. 598, 65 Wis. 487, 27 N. W. 353, 69 Wis. 521, 34 N. W. 913; *Dalrymple* v. *Green*, 88 Kan. 673, 129 Pac. 1145; *Musselman* v. *Barker*, 26 Neb. 737, 42 N. W. 759; *Schmidt* v. *Durnham*, 46 Minn. 227; *Salchert* v. *Reinig*, 135 Wis. 194; *Haymond* v. *Saucer*, 84 Ind. 3; *Osmun* v. *Winters*, 25 Or. 260, 35 Pac. 250; also see *Wrynn* v. *Downey*, *supra*, and case note 4 L. R. A. (N. S.) 616. In only one other case that has been found, has an instruction as broad as that in the principal case been approved. In *Wilds* v. *Bogan*, 57 Ind. 453, an instruction, on the measure of damages, was upheld which stated to the jury that if plaintiff had been seduced by the defendant under a promise of marriage and had given birth to his bastard child, they might, in assessing damages, take into consideration the plaintiff's feelings, pain and humiliation, in giving birth to such a child. But in the later case of *Haymond* v. *Saucer*, 84 Ind. 3, a different rule was laid down by the same court without comment on the previous case.

DIVORCE—HUSBAND'S LIABILITY FOR SUPPORT OF HIS MINOR CHILDREN AFTER DIVORCE.—A husband obtained a divorce from his wife on the ground of desertion, she being defaulted after service by publication. Neither the bill nor the decree made any reference to the child of the parties; the wife now seeks to recover sums expended in supporting the child, which has remained in her custody, and to obtain an order requiring the defendant to pay a certain sum monthly for its support. *Held*, that he is liable. *Schoennauer* v. *Schoennauer* (Wash. 1914), 137 Pac. 325.

The court overruled defendant's contention that, since the decree was granted because of the wife's fault, therefore she could not recover, declaring that defendant's liability for the support of the child had not been previously determined, and that such liability would remain even though the wife had been remiss. This defense was allowed in *Fitler* v. *Fitler*, 33 Pa. 50; *Fulton* v. *Fulton*, 52 Ohio 229, 49 Am. St. Rep. 720, 29 L. R. A. 678. See also *Foss* v. *Hartwell*, 168 Mass. 66, 37 L. R. A. 589; *Baldwin* v. *Foster*, 138 Mass. 449; *Glynn* v. *Glynn*, 94 Me. 465; *Lapworth* v. *Leach*, 79 Mich. 16; 12 MICH. L. REV. 149. It would seem that children should not be deprived of their right to support by their father, because of their mother's wrongdoing, and in accord with the principal case are *White* v. *White*, 169 Mo. App. 40, 154 S. W. 872; *Bemus* v. *Bemus* (Tex. Civ. App.), 133 S. W. 503. For a recent general discussion of the liability of the father to support his minor children see *Johnson* v. *Latty* (1914 N. D. Ohio), 210 Fed. 961, which affirms his liability.

EQUITY—EXECUTION SALE SET ASIDE BECAUSE SOLD EN MASSE.—An eighty acre tract of land was sold to the defendant at a sheriff's sale, to satisfy a judgment against one N. The plaintiff had previously bought the same land from N., after the judgment, but before the issuance of execution and sale of the land under it. He had no actual notice or knowledge of the execution or sale, or of the judgment itself, until long after the sheriff's deed was made. The life estate of N. in the land was worth $6,000, he had sold it to the plaintiff for $5,000, and it was sold at the sheriff's sale, *en masse,* for about $125. *Held,* the plaintiff was entitled to have the sheriff's deed cancelled, upon payment to the judgment creditor of the amount of the judgment against N. *Van Gundy* v. *Hill* (Ill. 1914), 104 N. E. 147.

It is well settled that the creditor may insist that his debt shall be paid; but when a needless sacrifice is made of the debtor's property, an unconscionable advantage is taken of the debtor, not warranted by law. *Smith* v. *Huntoon,* 134 Ill. 24, 24 N. E. 971. Many of the states have statutes which in effect provide that lands susceptible of sale under execution be sold in separate tracts or lots. For an example of such a statute see Hurd's (Ill.) Rev. St. 1899, c. 77, § 12. Where such statutes are in force the approved practice in the sale of divisible property is for the officer to offer each tract separately, and if no bidder can be secured, to add another tract thereto, and so on until a bidder is secured. *Henderson* v. *Harness,* 184 Ill. 520, 56 N. E. 786; *Weaver* v. *Guyer,* 59 Ind. 195. If the officer, in spite of the statute, sells property *en masse* which is capable of sale in separate parcels, such a sale is variously regarded in the several states. In some cases such a sale is held void. See *Forbes* v. *Hall,* 102 Ga. 47; 28 S. E. 915, 66 Am. St. Rep. 152; *Bardeus* v. *Huber,* 45 Ind. 235; *Brian* v. *Robinson,* 102 Tenn. 157, 52 S. W. 802. In others, a sale *en masse,* under execution, of separate tracts of land, is valid until set aside by some direct proceeding therefor. *Palmer* v. *Riddle,* 180 Ill. 461, 54 N. E. 227; *Rector* v. *Hartt,* 8 Mo. 448, 41 Am. Dec. 650. In still other cases it is held that such a sale is not invalid in the absence of proof that the property was sacrificed. *Glasscock* v. *Price,* 92 Tex. 271, 45 S. W. 415, 47 S. W. 965; *Hudepohl* v. *Liberty Hill Water & Mining Co.,* 94 Cal. 588, 28 Am. St. Rep. 149. The remedies of the owner in such a case would seem to be confined to setting the sale aside by motion, or by a proceeding in equity. *Boyd* v. *Ellis,* 11 Ia. 97; *White* v. *Watts,* 18 Ia. 74. A dictum in *Miller* v. *Baxter,* 108 Ga. 600, 34 S. E. 169, seems to indicate that the officer could be enjoined from selling more land than is necessary to satisfy the judgment. An injunction against the completion of a sheriff's sale under similar circumstances was denied, however, in *Holmes* v. *Steele,* 28 N. J. Eq. 173; *Ballance* v. *Loomiss,* 22 Ill. 82, and *White* v. *Crow,* 110 U. S. 183, 28 L. ed. 113.

EQUITY—STATUTE OF LIMITATIONS, WHERE JURISDICTION CONCURRENT.—Plaintiff alleged in his bill that in 1891 he had sold a tract of land to defendants for $5.00 an acre, and that the land conveyed exceeded the estimated quantity by some 159 acres. He is suing to recover $1,758, the

balance of the purchase money. *Held,* that he was barred by the statute of limitations. *Craig* v. *Gauley Coal Land Co.,* (W. Va. 1914), 80 S. E. 945.

Some states have statutes of limitations which apply to equitable as well as to legal causes of action. Under such statutes an equitable cause of action will be barred, unless expressly excepted: *Lile* v. *Kincaid,* 142 S. W. 434; *Wentworth* v. *Wentworth,* 75 N. H. 547, 78 Atl. 646. In the absence of these statutes there is no strict time which bars actions in equity; for relief may be granted even after the running of the statute, or an action may be barred in a shorter time. *Carlock* v. *Carlock,* 249 Ill. 330, 94 N. E. 507. The statute of limitations does not control suits in equity with the same strictness as it does actions at law: *Moncta* v. *Hoffman,* 249 Ill. 56, 94 N. E. 72. The cause of action in the principal case, if any existed, arose from the mutual mistake of the parties as to the quantity of land conveyed. For the correction of such a mistake, resort may be had to a court of law or a court of equity, as the injured party may elect. See cases cited in principal case. Equity therefore has concurrent jurisdiction. As a general rule where the jurisdiction of courts of equity and courts of law is concurrent, if a recovery at law is barred by delay, no recovery can be had in equity. *Tooker* v. *Nat'l Sug. Ref. Co.,* 80 N. J. Eq. 305; *Bowes* v. *Cannon,* 50 Colo. 262, 116 Pac. 336; *City of Centerville* v. *Turner County,* 126 N. W. 605. The statute will begin to run from the time the cause of action arises, unless the plaintiff, without fault or neglect on his part, is ignorant of the mistake. The bill in the principal case carries on its face an admission of knowledge sufficient to put the plaintiff on inquiry as to the quantity of land. The plaintiff, therefore, was not without fault, and the statutory period having run, and his legal action being barred, he is barred in equity also.

EXECUTION—WHAT CONSTITUTES A VALID LEVY.—Where a marshal attempting to make a levy on a stock of merchandise is prevented from entering the premises and his deputies who are admitted do no act beyond merely announcing the purpose of their entrance and the fact of their deputization, *held,* there was not a valid levy. *Hobbs* v. *Williams, et al.* (Mo. 1914), 162 S. W. 334.

The decision in the principal case reaffirms the common test of the validity of a levy, namely, the doing of some act by the officer, which but for the protection of the writ, would render him liable as a trespasser. *Douglas* v. *Orr,* 58 Mo. 573; *State ex rel. McPherson* v. *Beckner,* 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257; *Battle Creek Valley Bank* v. *First Nat. Bank,* 62 Neb. 825, 88 N. W. 145, 56 L. R. A. 124; *Pitkin* v. *Burnham,* 62 Neb. 385, 87 N. W. 160, 55 L. R. A. 280, 89 Am. St. Rep. 763; *Hibbard* v. *Zenor,* 75 Ia. 471, 39 N. W. 714, 9 Am. St. Rep. 497. See *Green v. Burke,* 23 Wend. (N. Y.) 490; *Russell* v. *State* (Ga.), 79 S. E. 495; *Sanders* v. *Carter,* 124 Ga. 676, 52 S. E. 887. The nature of the act required, however, must necessarily depend largely upon the facts of each particular case, with special consideration of the persons against whose rights the levy is sought to be asserted and the nature of the property involved; and the exercise

or assumption of dominion without manual interference is often sufficient. *Throop v. Maiden*, 52 Kans. 258, 34 Pac. 801; *Boslow* v. *Shenberger*, 52 Neb. 164, 71 N. W. 1012, 66 Am. St. Rep. 487. See *Dorrier* v. *Masters*, 83 Va. 459, 2 S. E. 927. Thus a levy may be good as against the defendant in the writ, when it would not be good as to third persons. This is based upon the fact that the defendant's conduct may amount to a waiver or an estoppel or an agreement that there shall be a levy, even in the absence of overt arts on the part of the officer. *Taffts* v. *Manlove*, 14 Cal. 48, 73 Am. Dec. 610; *Throop* v. *Maiden, supra*. Again the nature of the property may render it sufficient that the officer do on the premises some open and unequivocal act which as nearly as possible amounts to a seizure, and indorse the levy on the writ. *Boslow* v. *Shenberger, supra*. Thus where execution is sought to be levied on growing crops, the taking of which would necessarily mean their destruction, or on ponderous or immovable property, or on the contents of a locked receptacle or safe, or where the taking of actual possession is unfeasible or impractical, an assertion of authority and the posting of notices, or the calling of witnesses has been deemed sufficient. *Bank of Holton* v. *Duff* (Kans.), 94 Pac. 260, 16 L. R. A. (N. S.) 1047; *Davidson* v. *Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *State* v. *Fowler*, 88 Md. 601, 42 Atl. 201, 42 L. R. A. 849, 71 Am. St. Rep. 452 (levies on growing crops); *Smith* v. *Clark*, 100 Ia. 605, 69 N. W. 1011; and note in 41 L. R. A. (N. S.) 764 (contents of locked receptacles). In the principal case, however, there was neither actual interference with the stock or any part of it, and the act of the deputies in entering the premises and merely announcing their purpose, in the absence of any symbolical act, cannot be construed as such an assumption of authority as to bring the case under the above cited decisions. *Meyer* v. *Missouri Glass Co.*, 65 Ark. 286, 45 S. W. 1062, 67 Am. St Rep. 927; *Hibbard* v. *Zenor, supra*.

GARNISHMENT—JURISDICTION OF DEFENDANT.—Where plaintiff sought, by a proceeding in garnishment, to subject certain accounts of the defendant in a local bank to the payment of any judgment that might be obtained against him, *held*, the court had jurisdiction to render judgment, though the service is by publication and the defendant does not appear. *State, ex rel., Bank of Herrick* v. *Circuit Court of Gregory County*, (S. D. 1913), 143 N. W. 892.

The principal case illustrates an assumption of jurisdiction, which since the decisions in *Harris* v. *Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023, 3 Ann. Cases 1084; and *L. & N. R. Co.* v. *Deer*, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. Ed. 426, is entitled to full faith and credit in the several states. In the earlier cases in this country much learning was expended in an effort to determine, for the purposes of garnishment, the original situs of the debt. See *Nat. Broadway Bank* v. *Sampson*, 179 N. Y. 213, 71 N. E. 766; *L. & N. R. Co.* v. *Nash*, 118 Ala. 477, 23 So. 825, 41 L. R. A. 331, 72 Am. St. Rep. 181; *Ill. Cent. R. Co.* v. *Smith*, 70 Miss. 344, 12 So. 461, 19 L. R. A. 577 and note, 35 Am. St. Rep.651. But it is now well settled that, where the question is merely one of power, a consideration of the situs of the debt is unnecessary. *Harris* v. *Balk, supra; L. & N. R. Co.* v. *Deer, supra;*

Harvey v. *G. N. R. Co.*, 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84; *Wyeth Mfg. & Hdw. Co.* v. *Lang & Co.*, 127 Mo. 242, 29 S. W. 1012, 27 L. R. A. 651, 48 Am. St. Rep. 626; *So. Pac. R. Co.* v. *Lyon & Co.*, 99 Miss. 186, 54 So. 728, Ann. Cases 1913 D 800, overruling, *Ill. Cent. R. Co.* v. *Smith, supra.* And this is true even to the extent of applying the exemption laws of the forum. *C. R. I. & P. R. Co.* v. *Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144. A distinction may, however, be noted between situs for the purpose of jurisdiction and situs for the purpose of determining the rights of the parties. In the latter case considerations of justic and public policy would seem to enjoin on the courts an attention to the situs of a debt, which may be wholly disregarded where the question is merely one of power. ROOD, GARNISHMENT, Art. 246; *Mason* v. *Beebe*, 44 Fed. 556.

INSURANCE—EFFECT OF TEMPORARY BREACH OF VACANCY CLAUSE.—A fire insurance policy provided that the whole should be void if the premises should become vacant and remain so for more than 30 days without the consent of the insurer in writing. The premises were allowed to become vacant for more than 30 days but were reoccupied before the fire. *Held*, the vacancy worked a forfeiture of the policy and not merely a suspension of the risk, and the subsequent reoccupancy did not revive the insurance. *Dolliver* v. *Granite State Fire Insurance Co.* (Me. 1913), 89 Atl. 8.

The case is one of first impression under the Maine standard form of fire insurance policy. The particular clause in question follows the wording of the Massachusetts standard policy and is almost identical with that used in the New York standard form. Vacancy for more than a specified time is one of a number of conditions, the breach of which, most policies declare, will render the insurance void. But the authorities are in conflict upon the question of the effect of a temporary breach of these conditions which is not a contributing cause of the loss. *Sumter Tobacco Warehouse Co.* v. *Phoenix Ins. Co.*, 76 S. C. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736, holds that a temporary increase in risk, which has terminated before the fire and is not one of its causes, merely suspends the policy. But see *Kyte* v. *Commercial Union Assur. Co.*, 149 Mass. 116, 29 N. E. 361, 3 L. R. A. 508, where it is held that the insurance was rendered void. The same difference of opinion exists as to the effect of the condition as to incumbrances. See *German American Ins. Co.* v. *Humphrey*, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297, holding the policy forfeited by reason of a temporary breach of such a conditions, and *Bern* v. *Home Ins. Co.*, 110 Iowa 379, 81 N. W. 676, 80 Am. St. Rep. 300, holding it merely suspended. For condition as to other insurance see *Obermeyer* v. *Glove Mut. Ins. Co.*, 43 Mo. 573, contra, *Georgia Home Ins. Co.* v. *Rosenfield*, 95 Fed. 358; and as to an unauthorized use of the premises see *Concordia Fire Ins. Co.* v. *Johnson*, 45 Pac. 722, contra, *Kircher* v. *Milwaukee Mechanics Mutual Ins. Co.*, 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779. It is remarkable that although in most policies the same clause avoids the insurance for the breach of all of these conditions the decisions in some states differ as to its effect in the case of different conditions. The authorities are divided upon the question of the effect of a

temporary breach of the vacancy clause as in the case of the other conditions. The principal case contains a thorough review of the decisions upon the subject. The majority of the decisions hold with the principal case that even a temporary breach renders the policy void. *German Ins. Co.* v. *Russel,* 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234; *Hardiman* v. *Fire Ass'n.,* 212 Pa. 383, 61 Atl. 990. On the other hand a number of decisions hold that a temporary vacancy only suspends the policy during the vacancy and that it is revived by reoccupancy, *Ins. Co. of N. A.* v. *Garland,* 108 Ill. 220; *Phoenix Ins. Co.* v. *Burton,* 39 S. W. 319; *Ins. Co. of N. A.* v. *Pitts,* 88 Miss. 587, 41 So. 5, 7 L. R. A. N. S. 627. These decisions seem to ignore the plain words of the contract, which in terms renders the whole insurance void. As is pointed out in the principal case some of these decisions are based upon the authority of old cases arising under policies containing entirely different stipulations, the courts having followed them at the expense of the express provisions of the modern contracts. For a further discussion of the subject see notes to 10 L. R. A. (N. S.) 737, and 28 L. R. A. (N. S.) 593.

INSURANCE—INSURABLE INTEREST OF A CORPORATION IN THE LIFE OF AN OFFICER.—The insured was president, general manager, and the principal incorporator the plaintiff company. By agreement he insured his life in the defendant company for the benefit of the plaintiff corporation, the policy stating that the interest of the beneficiary was the "loss of service in the event of death." The first and all subsequent premiums were paid by the plaintiff company. *Held,* the contract was not ultra vires on the part of the plaintiff corporation, and the contract of insurance was not obnoxious to public policy as the plaintiff had an insurable interest in the life of the insured. *Mutual Life Ins. Co. of New York* v. *Board, Armstrong & Co. Corporation* (Va. 1914), 80 S. E. 565.

Although this form of life insurance is not uncommon the question of its validity has not often been before the courts. Life insurance is not a contract of indemnity merely, but a contract to pay the beneficiary a certain sum of money in the event of death. *Howe* v. *Griffin,* 126 Ky. 373, 103 S. W. 714, 128 Am. St. Rep. 296 and note. Any reasonable expectation of pecuniary benefit from the continued life of another creates an insurable interest in such life. The essential thing is that the policy shall be obtained in good faith and not for the purpose of speculating upon a life in which the assured has no interest. *Mutual Life Ins. Co.* v. *Schaefer,* 94 U. S. 457, 24 L. Ed. 251. Applying this principle it has been held that a co-partnership has an insurable interest in the life of one of the partners. *Rahedus et al.* v. *Peoples Bank of Minneapolis,* 113 Minn. 496, 130 N. W. 16, Ann. Cas. 1912 A 299. But see *Powell* v. *Dewey,* 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818, where the contrary was held. The decisions on the subject of insurance by a corporation upon the life of an officer have usually involved two questions: first, the insurable interest of a corporation in the life of an officer or principal stockholder; second, the power of a corporation to enter into such a contract. On the first question it was held in *Mechanics*

National Bank v. *Comis.*, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650, that a creditor of a corporation had an insurable interest in the life of its manager. Such an interest could certainly be no greater than that of the corporation itself, and the language of the court would indicate that such was its view of the case, but the right of a corporation to carry such insurance was not before the court. In *Keckley* v. *Conshohockton Glass Co.*, 86 O. St. 213, 99 N. E. 299, Ann. Cas. 1913 D. 607 and note, the court says that a corporation can have an insurable interest in the life of a principal stockholder and promoter. But the question arise in a suit between two beneficiaries under the policies. The insurer did not deny liability and the case was decided upon the ground of estoppel. It is believed that the principal case is the first one to sustain such a policy in a suit against the insurer. On the other hand see *Security Mutual Ins. Co.* v. *Schott*, 30 Ohio Cir. Dec. 249, holding that a corporation has not an insurable interest in the life of a director, and *Tate* v. *Commercial Building Ass'n.*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 770, that a building association has no insurable interest in the life of a stockholder who is not a debtor of the association. From these decisions and upon general principles it would seem that while an insurable interest will not arise from the mere relation of director or stockholder, yet a corporation by reason of peculiar circumstances may have such a pecuniary interest in the life of an officer or promoter as would ordinarily be insurable. Is there any reason why a corporation should not carry such insurance? This raises the second question as to whether such contracts are ultra vires of a corporation. The principal case holds that they are not and that such contracts are not contrary to public policy because of the corporate nature of the beneficiary. The contrary was held in *Victor* v. *Louise Cotton Mills*, 148 N. C. 107, 16 Ann. Cas. 295, 16 L. R. A. (N. S.) 1020. This was a suit by a stockholder to enjoin the corporation from carrying insurance on the life of its president. The president had resigned at the time the suit was brought, but the reasoning of the court is broad enough to cover the present case. For further cases on the subject see notes in 16 Ann. Cas. 295 and 16 L. R. A. (N. S.) 1020.

JUDGMENT—FOREIGN JUDGMENT IN PERSONAM ON CONSTRUCTIVE SERVICE.—Where the defendant, a Bavarian subject, was sued in New York on a judgment rendered against him in Bavaria on service by publication, ***held*** that the judgment would not be enforced here, it appearing that the defendant was domiciled and resident in New York and had filed notice of his intention of becoming a citizen of the United States at the time the said foreign judgment was rendered. *Grubel* v. *Nassauer*, (N. Y., 1913) 103 N. E. 1113.

Though the validity of personal judgments rendered on constructive service of process against non-residents is quite generally denied, when called in question in foreign jurisdictions, *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565; *Deering* v. *Bank of Charleston*, 5 Ga. 497, 48 Am. Dec. 300; see 12 MICH. L. REV. 312, and 16 L. R. A. 231; numerous cases have suggested obiter the right of a state to authorize personal judgments upon constructive

or substituted service against a citizen and resident absent from the state at the time, and the granting to such judgments full faith and credit in the forum. *Re Denick,* 92 Hun. (N. Y.) 161, 36 N. Y. S. 518; *Hamill* v. *Talbott,* 72 Mo. App. 22; *Henderson* v. *Staniford,* 105 Mass. 504, 7 Am. Rep. 551; *Huntley* v. *Baker,* 33 Hun. (N. Y.) 578; *Ouscley* v. *L. V. Trust & S. D. Co.,* 84 Fed. 602; *Schibsby* v. *Westenholz,* L. R. 6 Q. B. 155. These dicta rest on a recognition of allegiance as a sole and sufficient basis for the exercise of jurisdiction by a foreign tribunal. Though this view finds support in *Douglas* v. *Forest,* 4 Bing. 686, which appears to be the sole case exactly in point with the principal case, it has been repudiated in this country by several cases of unquestioned authority, and is impossible to reconcile with the reasoning of many others. *De la Montanya* v. *De la Montanya,* 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; *McEwan* v. *Zimmer,* 38 Mich. 765; *Smith* v. *Grady,* 68 Wis. 215, 31 N. W. 477; *Shepard* v. *Wright,* 59 How. Pr. (N. Y.) 512; *Amsbaugh* v. *Exchange Bank,* 33 Kans. 100, 5 Pac. 384; *Webster* v. *Reid,* 11 How. 437. In the last named case it is said "these suits were not a proceeding in rem against the land, but were in personam against the owners of it. Whether they all resided within the Territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached. In this case there was no personal notice nor an attachment or other proceedings against the lands, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the lands were sold." In the principal case the defendant was domiciled and resident in New York, and a contrary decision would have to be supported solely on the basis of allegiance, and would result in the paradox of determining an individual's civil rights by his political rather than by his civil status. The rights of prospective citizens, during the period of naturalization, might be seriously prejudiced, and the protection of our laws nullified. It is difficult to see how a contrary decision could be supported here, either on reason or authority, or even as a matter of policy.

JUDGMENT—NECESSITY OF STRICT COMPLIANCE WITH STATUTE IN CASE OF SERVICE BY PUBLICATION.—Where an affidavit for publication of summons was filed under a statute requiring, "stating the place of defendant's residence, if known to the affiant, and if not known, stating that fact," as a basis for substituted service, *held,* that filing an affidavit stating "that the last known post-office address of the defendant is unknown" is not a substantial compliance with the statute, and judgment rendered thereon is void. *Atwood* v. *Roan* (N. D. 1914) 145 N. W. 587.

The principal case reiterates the well established rule that there must be a strict compliance with statutes providing for service by publication, *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. Ed. 565; *Tunis* v. *Withrow,* 10 Ia. 305, 77 Am. Dec. 117; *Gilmore* v. *Lampman,* 86 Minn. 493, 90 N. W. 1113, 91 Am. St. Rep. 376; *Albers* v. *Kozeluh,* 68 Neb. 522, 94 N. W. 521, 97 N. W. 646; *Schoenfeld* v. *Bourne,* 159 Mich. 139; *Gibson* v. *Wagner,* (Colo. 1913) 136

Pac. 93; and that every fact must be shown in the affidavit which is necessary to give the right to an order for service by publication, *Lbr. Co.* v. *Johnson,* 196 Fed. 56; *Harvey* v. *Harvey,* 85 Kans. 689. Where, however, the attack is collateral, there is considerable conflict of authority as to the validity of the judgment, the weight of authority upholding its validity. *Cooper* v. *Reynolds,* 10 Wall. 308; *Morris* v. *Robbins,* 83 Kans. 335, 111 Pac. 470; contra, *Greenvault* v. *Farmers' & Mechanics' Bank,* 2 Doug. (Mich.) 498; *Gibson* v. *Wagner,* supra. But on direct attack, as in the principal case, even slight variances from the requirements of the statute are held fatal, e. g. use of "residence" in the affidavit where the statute required "post-office address," *Norris* v. *Kelsey,* 23 Colo. 555, 130 Pac. 1088; use of affidavit on information and belief where statute required it be in a direct and positive manner, *Feikert* v. *Wilson,* 38 Minn. 341, 37 N. W. 585. *See San Diego Savings Bank* v. *Goodsall,* 137 Cal. 420, 70 Pac. 300. The court suggests obiter that a distinction, based upon the recitals in the judgment, might be drawn, and defects in the affidavit held not to be jurisdictional in those states where the affidavit is not a necessary part of the record. This distinction is unsupported by the decision cited, *Gilmore* v. *Lampman, supra,* and would appear to be, in cases of direct attack, a too technical attempt to reconcile contrary holdings, though perhaps good in cases of collateral attack. See *Duval* v. *Johnson,* 90 Neb. 503, 133 N. W. 1125, Ann. Cas. (1913B) 26.

LANDLORD AND TENANT—LIABILITY OF LANDLORD FOR INJURY TO THIRD PERSONS.—The defendant leased a hotel fully furnished, lessee agreeing to keep the elevator and other machinery in good order. The elevator was out of repair at the time of the lease. It was without light, and would "creep" when left standing, of which facts both parties had knowledge. Plaintiff was a guest of the lessee, and walked into the elevator shaft one afternoon when the elevator door had been left open and the elevator had crept up ten feet. *Held* that both lessor and lessee were liable for negligence. The lessor of property intended for a public or semi-public use is liable for injuries to third persons if the leased property was not safe for the contemplated use at the time of the lease, or if there is a dangerous condition on the premises in the nature of a nuisance, of which the owner is chargeable with knowledge. *Colorado Mortgage & Investment Co.* v. *Giacomini,* (Colo. 1913) 136 Pac. 1039.

It is a wellnigh universal rule that as between landlord and tenant, in the absence of fraud or concealment, where there is no express warranty or covenant to repair, the lessee is subject to the rule of *caveat emptor.* There is no implied contract that the premises are fit for habitation or free from dangerous defects. *Moore* v. *Parker,* 63 Kan. 52, 64 Pac. 975, 53 L. R. A. 778; *Jaffe* v. *Harteau,* 56 N. Y. 398, 15 Am. Rep. 438; *Cowen* v. *Sutherland,* 145 Mass. 363, 1 Am. St. Rep. 469. Third persons invited by the tenant—employees, members of the family, visitors—are subject to the same rule. It is the lessee's duty to inform them. *Whitmore* v. *Orono Pulp & Paper Co.,* 91 Me. 297, 39 Atl. 1032, 64 Am. St. Rep. 229; *Sterger* v. *Van Sicklen,* 132 N. Y. 499, 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep.

594; *Jordan* v. *Sullivan,* 181 Mass. 348, 63 N. E. 909. Contra, *McConnell* v. *Lemley,* 48 La. Ann. 1433, 20 So. 887, construing a local statute. But where the lessor retains control of the premises or parts thereof used by the several tenants, he is liable to tenants and others impliedly invited for injuries resulting from dangerous conditions in such places of which had or reasonably ought to have had knowledge. *Harrison* v. *Jelly,* 175 Mass. 292, 56 N. E. 283. *Siggins* v. *McGill,* 72 N. J. Law, 263, 62 Atl. 411, 111 Am. St. Rep. 666. There are two cases which are generally regarded as exceptions. Where, as in the principal case, the entire premises are leased for a public or semi-public purpose, as a wharf, public hall, hotel, or amusement place, the lessor is liable for injuries to strangers caused by defects existing at the time of the demise of which he knew or ought to have known. *Swords* v. *Edgar,* 59 N. Y. 28, 17 Am. Rep. 295; *Burner* v. *Higman & Skinner Co.,* 127 Ia. 580, 103 N. W. 802; *State* v. *Boyce,* 73 Md. 469, 21 Atl. 322, excusing lessor for lack of knowledge. Again, where the cause of the injury was a nuisance which was on the property when leased and would be likely to cause injury in the course of ordinary use by the tenant as contemplated by the parties, the lessor is liable. *House* v. *Metcalf,* 27 Conn, 632; *Kalis* v. *Shattuck,* 69 Cal. 593, 58 Am. Rep. 568; *Isham* v. *Broderick,* 89 Minn. 397, 95 N. W. 224. Though in England the landlord is exempted from liability by a covenant by the lessee to repair, as in *Gwinnell* v. *Eamer,* 32 L. T. R. (N. S.) 835, L. R. 10 C. P. 658, he is not so relieved in this country. *Nugent v. B .C. & M. R. Co.,* 80 Me. 62, 12 Atl. 797, 6 Am. St. Rep. 151; *Bailey* v. *Dunaway,* 8 Ga. App. 713, 70 S. E. 141; *Swords* v. *Edgar, supra.* The Tennessee Court repudiates the distinction between public and private uses, and holds the lessor liable in both cases, if he ought to have known of the dangerous condition. *Hines* v. *Willcox,* 96 Tenn. 148, 33 S. W. 914, 34 L. R. A. 824, 54 Am. St. Rep. 823, affirmed in 100 Tenn. 524. See also *Bailey* v. *Kelly,* 86 Kan. 911, 122 Pac. 1027, 39 L. R. A. (N. S.) 378, and *dictum* in *Edwards* v. *N. Y. C. & H. R. Co.,* 98 N. Y. 245, 50 Am. Rep. 659. These cases stand alone, but courts cite them indiscriminately with other cases.

LEGITIMATION—CAN FATHER INHERIT FROM A LEGITIMATED CHILD?—Under a statute providing that; "The father of an illegitimate child, by publicly acknowledging it as his own, and receiving it as such, with the consent of his wife if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth * * *." Defendant legitimated a child and claimed the right to inherit from it. *Held,* that the mother inherited all of the child's property, and that where the rights of the mother are involved the child is still illegitimate and a bastard. *Templeman* v. *Bruner,* (Okla. 1914) 138 Pac. 152.

At common law a bastard's mother did not inherit his property, *Cooley* v. *Dewey,* 4 Pick. 93. And the court in the principal case declared that the mother's right to the child's property was derived from a statute declaring:

"If an illegitimate child, who has not been acknowledged or adopted by his father, dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law." It would seem to be a strained construction of this statute to allow the mother to inherit where the child has been legitimated. In *Allison* v. *Bryan*, 21 Okla. 557, 18 L. R. A. N. S. 931, a father who had legitimated his child was held entitled to its custody as against its mother, under a statute providing that "the father of a legitimate unmarried minor child is entitled to its custody, services, and earnings." This invaded a well recognized right of the mother, since in general the right of the mother of a natural child to its custody is superior to that of its reputed father, *Hudson* v. *Mills*, 8 N. H. 417. But in *Allison* v. *Bryan*, 26 Okla. 520, (a case between the same parties) the father was denied the right to adopt the child with the consent of his wife, against the wishes of its mother. In conflict with the decision in the principal case is *Pratt* v. *Pratt*, 5 Mo. App. 542, which declares that a legitimated child may be inherited from, in an ascending, decending or collateral direction. The case of *McCormick* v. *Cantrell*, 15 Tenn. 614, which held that a statute declaring that an illegitimate child shall in all respects, both in law and equity, be upon an equal footing with the father's other children, does not enable the father to inherit from him, lends support to the decision in the principal case. By perhaps the weight of authority an adoptive father cannot inherit from an adopted child under statutes providing that "he shall be deemed and taken to all legal intents and purposes, the child of the persons adopting him." *Hole* v. *Robbins*, 53 Wis. 514; *Upson* v. *Noble*, 35 Ohio St. 655. But as legitimation creates a status it would seem that all the incidents of that status should be recognized.

MASTER AND SERVANT—FEDERAL REGULATION—HOURS OF SERVICE.—Two employees of a railway carrier were kept on duty for more than sixteen consecutive hours by reason of the same delay of a train, on which they were to perform labor. *Held*, that a separate penalty was incurred for each employee kept on duty contrary to the Hours of Service Act of March 4, 1907, (34 Stat. at L. 1415, Chap. 2939), such statute making the carrier which permits "any employee" to remain on duty in violation of its terms liable to a penalty "for each and every violation." *Missouri, Kansas, & Texas Railway Co. of Texas and American Surety Co. of New York, Petitioners,* v. *United States*, 34 Sup. Ct. 26.

The petitioner's argument was to the effect that "when one act has several consequences that the law seeks to prevent, the liability attaches to the act, and is but one;" that the "delay of the train was such an act, and the principle * * * * applies." In answer the court observed, "The statute was not violated by the delay. That may have made keeping the men overtime more likely, but was in itself not wrongful conduct quoad hoc. The wrongful act was keeping an employee at work overtime, and that act was distinct as to each employee so kept." Singularly the precise question involved here has been of very infrequent occurence, and in determining the solution it would

seem that the general principles relating to the recovery of cumulative penalties under a penal statute are applicable. In view of the fact that nearly all of the cases discussing the question whether a statute imposing a penalty is to be construed as authorizing the recovery of cumulative penalties, have turned in great measure upon the language of the particular act under which penalties were sought to be recovered, it is practically impossible to lay down any general rule or rules applicable in all cases to particular classes of statutes. However, it is almost universally recognized as a general rule that a penal statute must be strictly construed, and that cumulative penalties are not recoverable unless the legislative intent to impose such penalties is clear and unmabiguous. *State* v. *Wisconsin Central Ry. Co.*, 133 Wis. 478; *Sturgis* v. *Spofford*, 45 N. Y. 446; *Morgan* v. *Hedstrom*, 164 N. Y. 224. The court in the principal case, recognizing the foregoing rule, based its decision upon the clear meaning and wording of the statute, as evidenced by its words; "The statute makes the carrier who permits 'any employee' to remain on duty in violation of its terms, liable to a penalty 'for each and every violation.' The implication of these words cannot be made much plainer by argument. But it may be observed, as was said by the government, that as towards the public, every overworked man presents a disinct danger, and as toward the employees each case is distinct." See *U. S.* v. *St. Louis Southwestern R. Co.*, 184 Fed. 28; *People* v. *Spencer*, 201 N. Y. 105. In so far as the decision authorizes the recovery of cumulative penalties under the statute it is undoubtedly supported by the weight of authority although there is apparent conflict on the question. *Brooke* v. *Milliken*, 3 T. R. 509; *Holland* v. *Bothmar*, 4 T. R. 228; *Milnes* v. *Bale*, L. R. 10 C. P. 591; *Indianapolis etc. R. Co.* v. *People*, 32 Ill. App. 286; *Southern Ry. Co.* v. *State*, 165 Ind. 613; *Lippert* v. *Lippert*, 110 Iowa, 550; *Kennedy* v. *Saunders*, 142 Mass. 9; *U. S.* v. *Chicago, G. W. R. Co.* 162 Fed. 775; *Commonwealth* v. *Chesapeake etc. R Co.*, (Ky.) 108 S. W. 851; *Pittsburg etc. R. Co.* v. *Moore*, 33 Oh. St. 384; Contra; *Geo. F. Dittman Boot etc. Co.* v. *Mixom*, 120 Ala. 206; *Loveland* v. *Garner*, 71 Cal. 541; *Kansas City etc. R. Co.* v. *Spencer*, 72 Miss. 491; *Clark* v. *Lisbon* 19 N. H. 286; *Parks* v. *Nashville etc. Ry. Co.*, 13 Lea. 1. It is interesting to observe in this connection, the words of the court in *Balto. etc. R. Co.* v. *U. S.*, 220 U. S. 94, a case arising through failure of a carrier to unload cattle at certain specified times, according to a statutory enactment, which imposed a penalty for such failures; "Under the Twenty Eight Hour law, the test of a railway company's liability with respect to the number of penalties to be imposed, where a number of different shipments loaded at different points and different times, have been carried by the same train, is the number of times the company failed to unload as required by statute. This does not depend in any manner on the carload or on the shipment, and if two shipments of different owners are made at the same time, then, in case of a violation of the statute as to both, but one penalty may be imposed." See also *U. S.* v. *Southern Pac. R. Co.*, 157 Fed. 459; *U. S.* v. *Atchison etc. R. Co.*, 166 Fed. 160; *U. S.* v. *Sioux City Stock Yards Co.*, 162 Fed. 556.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.—The plaintiff's decedent, who was a teamster in the employ of the defendant, by reason of loss of memory caused by a personal injury received about five years before by falling from his wagon, lost his way while driving, left his wagon and wandered about and fell into a swamp, where he remained all night, by reason of which exposure pneumonia was contracted and death ensued. *Held,* that his death did not arise "out of and in the course of" his employment, within the Workmen's Compensation Act, (St. 1911, c. 751, as amended by St. 1912, c. 571.). *Milliken* v. *A. Towle & Co.,* (Mass. 1914) 103 N. E. 898.

The court remarks that "the difficulty in the case arises from the provision that the personal injury must be one 'arising out of' as well as one 'in the course of his employment,' and that the injury here did not 'arise out of' Milliken's employment. The fact that Milliken 'would not have met his death as he did but for the horse and wagon and his efforts to get them to the stable' goes no farther than to show that the personal injury suffered by Milliken was a personal injury 'in the course of his employment.'" *McNicol's Case,* 215 Mass. 497. The correctness of the court in the construction of the words "arising out of and in the course of employment" cannot be seriously questioned. It has been generally held that the words are used conjunctively, not disjunctively, and are therefore to be construed as meaning different things. Explanatory of the meaning, *Buckley,* L. J., observes; "The words 'out of' point, I think, to the origin or cause of the accident; the words 'in the course of' to the time, place and circumstances under which the accident takes place." *Fitzgerald v. Clark,* 99 L. T. 101; *Whitbread* v. *Arnold,* 99 L. T. 103; *Hill* v. *Begg,* 99 L. T. 104; *Hawkins* v. *Powell's Tillery Steam Coal Co.,* 104 L. T. 365; *Barnabas* v. *Bersham Colliery Co.,* 103 L. T. 513.

MUNICIPAL CORPORATIONS—POWER TO REGULATE STREET EXCAVATIONS.—A gas and electric company laid pipes and conduits in various streets of a city. Subsequently, an amendment to the state constitution was made, providing that "in any city where there are no public works owned and controlled by the municipality any individual or any company shall under the direction of the superintendent of streets, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and of laying down pipes and conduits therein." Still later, the city passed an ordinance making it unlawful to excavate in any street without permission from the board of public works, to be had on written application showing the location and purpose of the excavation, the right of the applicant, and such application to be accompanied by a deposit to cover the cost of inspection and restoration of the surface. *Held,* although the gas and electric company had a vested right to occupy such part of the street, the ordinance in question was not invalid, since it did not give the board any discretion to grant or refuse a certificate. The requirements of written application and deposit were legitimate regulations, because they furnished evidence showing who alone were

entitled to the right to enter and excavate. *Ex parte Keppelman,* (Cal. 1914), 138 Pac. 346.

The principal case is interesting as showing the strenuous effort of the California court to extricate the municipalities of the state from the danger to which, as a result of the above-mentioned constitutional provision as interpreted by earlier decisions, they were apparently subject. In *People* v. *Stephens,* 62 Cal. 209, the court held such provision to be a direct grant from the people to the persons therein designated of the right to lay pipes in city streets for the specified purposes, without legislative permission, and free from legislative interference. The privileges of water or light companies were still further emphasized in the case of *In re Johnston,* 137 Cal. 115, 69 Pac. 973. The question there before the court was whether an ordinance of the city of Pasadena, prohibiting the laying in the city streets of pipes for gas or water without first obtaining a permit from the superintendent of streets was in violation of the constitutional provision supra. The court said, "The constitution does not authorize the municipality to require a permit as a condition upon which the pipes may be laid in its streets, and its claim of a right to require a permit includes the right to refuse one; and the right to annex one condition to the exercise of the privilege implies the right to annex others, which may at least impair, if not in fact amount to a denial of, its exercise." In the principal case the court attempts a distinction between the ordinance there in question and the ordinance construed in the Johnston case, the basis of the distinction being that the ordinance in the latter case asserted a right on the part of the municipality to grant or refuse a permit in its discretion. It is somewhat difficult to see any real difference between the cases, and the complaint of MELVIN, J., that "the opinion in that proceeding (the *Johnston* case) and the one prepared * * * in this are in conflict upon the fundamental question involved in each," seems well taken. That an ordinance which attempts to make the exercise of a constitutional or statutory right subject to the discretion of city officers puts an unwarranted limitation upon that right is of course a proposition universally conceded. *City of Atlanta* v. *Gate City Co.,* 71 Ga. 106; *Mich. Telephone Co.* v. *City of Benton Harbor,* 121 Mich. 512, 80 N. W. 386; *Hodges* v. *Telegraph Co.,* 72 Miss. 910, 18 So. 84.

MUNICIPAL CORPORATIONS—RIGHT OF TOWN CONSTABLE TO REWARD.—Plaintiff was duly elected town constable and qualified for the office, receiving compensation for his duties, though there was no evidence that it was regularly paid, or that defendant town had contracted specially to pay plaintiff any particular salary. Defendant offered a reward "to any person furnishing evidence that will convict the person or persons who" had set recent fires in the town. Plaintiff engaged in detective work, was successful in apprehending the culprit, and sued defendant for the reward. *Held,* that plaintiff could recover. *Hartley* v. *Inhabitants of Granville,* (Mass. 1913), 102 N. E. 942.

It is certainly true, as the court in the principal case remarks, "the case on its facts is rather close to the line." It is well settled that a promise

of reward to a public officer for additional compensation for services rendered in the performance of his duty cannot be enforced. The cases pronouncing the rule advance as the ground of holding, either one or the other, or both, of these reasons: First, that there is no consideration for the promise, or secondly, that to enforce it would be violative of public policy. Ample authority in Massachusetts may be found declaring the general rule. *Dunham* v. *Stockbridge,* 133 Mass. 233; *Davies* v. *Burns,* 5 Allen 349; *Brophy* v. *Marble,* 118 Mass. 548; *Pool* v. *Boston,* 5 Cush. 219. The states generally follow the rule as stated above. *Somerset Bank* v. *Edmund,* 76 O. S. 396, 81 N. E. 641, 11 L. R. A. (N. S.) 1170; *Marking* v. *Needy,* 71 Ky. (8 Bush.) 22; *Warner* v. *Grace,* 14 Minn. 487; *Ex parte Gore,* 57 Miss. 251; *Riley* v. *Grace,* 17 Ky. Law Rep. 1007, 33 S. W. 207; *Gilmore* v. *Lewis,* 12 Ohio 281; *Stamper* v. *Temple,* 25 Tenn. (6 Humph.) 113, 44 Am. Dec. 296; *Rogers* v. *McCoach,* 120 N. Y. S. 686. The rule is also recognized that a contract to pay a public officer for services rendered outside and not inconsistent with his official duty is enforceable. *Bronnenberg* v. *Coburn,* 110 Ind. 169, 11 N. E. 29; *Kinn* v. *First Nat. Bank,* 118 Wis. 537, 95 N. W. 969; *Studley* v. *Ballard,* 169 Mass. 295, 47 N. E. 1000. The court in the principal case rested its decision on the last-stated rule. It was said that "constables are not expected nor required to devote a considerable portion of their time to the work of their office," and that "the obligation is not incumbent upon the constable to give up his ordinary occupation and spend substantial time in search for evidence which may or may not lead to the detection of criminals." In *Kasling* v. *Morris,* 71 Tex. 584, 9 S. W. 739, the court reached the same conclusion on facts quite similar to those of the principal case. But in *Somerset Bank* v. *Edmund, supra,* not cited in the principal case, a different view was taken. So also in *Riley* v. *Grace,* and *Gilmore* v. *Lewis, supra,* the plaintiff, in the first case a town marshal and in the second a constable, sought out and discovered the criminal, and in both, the holding of the court was adverse to the officer's claim. Whether the principal case would be followed in all jurisdictions is, therefore, at least doubtful. A distinction has sometimes been made between the right of a public officer to take a reward from a private individual for the performance of his official duty, and his right to the reward when offered by a statute or public authority, some cases holding that in the latter situation he is entitled. *Porterfield* v. *State,* 92 Tenn. 289, 21 S. W. 519; *U. S.* v. *Matthews,* 173 U. S. 381; *McCain's Petition,* 4 Pa. Co. Ct. Rep. 9. But it cannot be said that this view has gained wide recognition. *Lees* v. *Colgan,* 120 Cal. 262, 52 Pac. 502.

MUNICIPAL CORPORATIONS—VALIDITY OF STATUTE REQUIRING PURCHASE OF WATER WORKS.—A state constitution provides that the legislature "shall not impose taxes for the purposes of any county, city, town or other municipality." The legislature passed an act requiring any city, before establishing its own water system in any neighboring town which it might annex, to purchase the property of the company then supplying the town. *Held,* that this statute was invalid, because violative of the above article of the constitution, since

the purchase of waterworks would make necessary the levy of a tax, and the legislature cannot do indirectly what it cannot do directly. *Kenton Water Co.* v. *City of Covington*, (Ky. 1913), 161 S. W. 988.

Apparently the only other reported case touching the exact point of the principal case is *Helena Consolidated Water Co.* v. *Steele*, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412. In that case the constitutional provision was the same, and the statute provided that "no city having a water supply furnished by private parties * * * shall proceed to the erection * * * of a water plant to be operated by it, but in case the city shall desire to own and operate its water supply it shall acquire the plant already in operation as herein provided." It was left optional with the city whether or not it would establish its own system. This court held the statute invalid also because it was violative of the constitutional provision prohibiting the legislature from levying taxes upon the inhabitants or property of any municipality. Plaintiff's counsel in the principal case sought to distinguish the Montana case on the ground that the Montana court held that the furnishing of water to its inhabitants was done by the city in its private capacity, whereas in Kentucky the same act had been held to be governmental. The court denied the force of the distinction, saying, first, that the question whether the city in furnishing water was acting in a private or governmental capacity was not the controlling point of the Montana decision, and secondly, that the Kentucky doctrine was not as plaintiff assumed it to be, but just the reverse, namely that it is now settled law in Kentucky that the establishment of a water system in a city is a private, not a governmental, function. The situation presented by the Montana case, and the principal case must be distinguished from two others. First, where there is no constitutional limitation upon the legislature's power to impose taxes for municipal purposes, and no statute requiring the city to purchase an existing private plant, but only a contract entered into by the city and a private water company, binding the city to purchase the water system of the private company at the end of the latter's franchise; in such a case, the city may be held to its agreement, *National Water Works Co.* v. *Kansas City*, 62 Fed. 853, 10 C. C. A. 653, 27 L. R. A. 827. Secondly, where there is a statute similar to the one in the principal case, but no constitutional provision; here it is held that if the city elects to construct its public utility, it must purchase the company's plant, as provided by statute, *Newburyport Water Co.* v. *Newburyport*, 103 Fed. 584; *Citizens' Gas Light Co.* v. *Wakefield*, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457. The principal case contains certain statements which are somewhat misleading. For example, speaking of plaintiff's contention that the authority of a city to construct a waterworks is purely a matter of legislative grant subject to be withdrawn or modified at any time, the writer of the decision uses this language: "There is no authority for the contention to the effect that the power of a municipality must come by way of legislative grant." This assertion is certainly too broad. That the power of a city to provide water for its inhabitants is not necessarily inherent, but depends upon a legislative grant of authority, general or special, express or implied, is well settled. *Huron Water Works Co.* v. *City of Huron*, 7 S. D. 9, 30 L. R. A. 484; *White* v. *Meadville*,

177 Pa. 643; *Matter of White Plains Water Com'rs*, 176 N. Y. 239; *Spaulding* v. *Peabody*, 153 Mass. 129; *Queens Co. Water Co.* v. *Monroe*, 83 N. Y. App. 105.

PROCESS—EXEMPTION FROM SERVICE OF NON-RESIDENT DEFENDANT.—The defendant, a resident of the state of Minnesota, had gone into the state of venue, without extradition, to answer the charge of embezzlement. After his discharge on bail but before leaving the court room he was served with a summons, complaint, and order for arrest, in a bail and arrest proceedings. He then filed a petition for a writ of habeas corpus which was denied in the lower court. *Affirmed* on the ground that the reason for the rule which exempts witnesses and parties to a civil suit from service of process in another action is not present here. The reason of the rule as given is that since such persons cannot be compelled to submit themselves to the civil jurisdiction of the courts of a foreign state, furtherance of justice requires that they should be privileged from service of process in order to secure their voluntary attendance. *Ex Parte Hendersen* (N. D. 1914), 145 N. W. 574.

The court in arriving at this decision follows what seems to be the weight of authority on a question of which the courts have taken opposite views. Of the contrary holding the following are the leading cases: *Murray* v. *Wilcox*, 122 Ia. 188, 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. Rep. 263; *Kaufman* v. *Gardner*, 173 Fed. 550; *Martin* v. *Bacon*, 76 Ark. 158; 6 A. & E. Ann. Cas. 336; *Moletor* v. *Sinned*, 76 Wis. 308, 7 L. R. A. 817, 20 Am. St. Rep. 71; *Hattabaugh* v. *Boynton*, 140 Wis. 89. Without exception the above cases rely on cases involving civil suits as authority for the proposition that the defendant should be exempt from service of process. Some of them recognize that other courts have drawn a distinction between civil and criminal actions, but refuse to consider the distinction as a valid one, either because as they say to do so would be to incorporate in the rule a refinement that was never intended, or that it would tend toward a corrupt use of the power of extradition. It would seem that the latter objection is overcome by the fact that a remedy is given by law for an abuse of the power of extradition. If the reason for the rule is that given in the instant case (and all the courts agree that such is the reason), then the result arrived at is undoubtedly correct, for in criminal cases where the power of extradition exists, the reason for the rule failing the rule itself has no application.

SALES—DELIVERY AS A CONDITION PRECEDENT TO PASSAGE OF TITLE.—Plaintiff sold coal to defendant, to be delivered "alongside" vendee's "dock at Syracuse, N. Y." When two canal-boat-loads of coal arrived at Syracuse, and approached to within 300 or 400 feet of vendee's dock, the boat captain notified vendee of their arrival, and an entry of the time of arrival and the quantity of coal was made in the books of the vendee. The boat could not be docked because other boats occupied the docks, and in accordance with traffic rules, the boats moved to the opposite side of the canal; by reason of a break in the canal and without fault of the vendor the coal was lost.

Vendor sues for purchase price. *Held,* (KRUSE, J., dissenting), vendor cannot recover. *Westmoreland Coal Co.* v. *Syracuse Lighting Co.,* 145 N. Y. S. 420.

The opinion of the court says: "The carrier was for this purpose [transportation] the plaintiff's and not the defendant's agent. * * * Delivery of the coal at the place specified in the contract was required to be made, and then only would the defendant's assent to such appropriation in part fulfillment of the contract be established, therefore title did not pass to the defendant." The case clearly holds, therefore, that delivery was a condition precedent to the passage of title, basing its decision on *McNeal* v. *Braun,* 53 N. J. Law. 617, 26 Am. St. Rep. 441; *Magruder* v. *Gage,* 33 Md. 344, 3 Am. Rep. 177; and *Bigler* v. *Hall,* 54 N. Y. 167. But not one of these cases is authority for the position the court took. KRUSE, J., dissenting, held that there being an appropriation by vendor and an assent by the vendee, by entry on the books, title passed, and since the property was lost through no fault of vendor, the vendee should stand the loss. But even though title had passed the vendor was not discharged of his contract duty to deliver. This was an absolute and unconditional promise which he was under obligation to fulfill. As a broad statement the following cases might be stated as holding that where one contracts to deliver at a specified place, such delivery is a condition precedent to passage of title. *Neimeyer Lumber Co.* v. *Burlington Ry.,* 54 Neb. 321, 40 L. R. A. 534; *Sneathen* v. *Grubbs,* 88 Pa. St. 147; *Braddock Glass Co.* v. *Irwin,* 153 Pa. St. 440; *Laughlin* v. *Marston,* 78 Wis. 670; *Hanaur* v. *Bartels,* 2 Colo. 514; *Devine* v. *Edwards,* 101 Ill. 138.

TRIAL—DIRECTING A VERDICT—EFFECT OF REQUESTS BY BOTH PARTIES.—In an action against a notary public for negligence in taking an acknowledgment, both parties, at the close of the evidence, requested a directed verdict without asking that any of the issues be submitted to the jury. *Held,* that this amounted to a withdrawal of the case from the jury and placed upon the court the duty of determining all matters of fact as well as of law. *Peterson* v. *Mahon,* (N. D. 1914), 145 N. W. 596.

The question involved in the instant case is one upon which there is an irreconcilable conflict of authority. In several states the rule is well settled that mutual requests for a directed verdict will under no circumstances amount to a waiver of a jury trial or relieve the jury from the duty of determining any and all disputed questions of fact. *Wolf* v. *Chicago Sign Printing Co.,* 233 Ill. 501; *German Savings Bank* v. *Bates Addition Imp. Co.,* 111 Iowa 432; *Stauff* v. *Bingenheimer,* 94 Minn. 309; *National Cash Register Co.* v. *Booneville,* 119 Wis. 222; *Lonier* v. *Ann Arbor Savings Bank,* 153 Mich. 253; *Farnum* v. *Davidson,* 3 Cush. (Mass.) 232. One court at least has taken the view directly opposed to these cases and has held that mutual requests of this kind amount to an absolute submission of the whole case to the court even though special instructions covering disputed matters of fact are requested. *Home Savings Bank* v. *Woodruff,* 14 N. M. 502. The rule announced in the principal case, which is also the rule in the United States courts, seems to be gaining in favor. It is to the effect that where

both parties move for a directed verdict and do nothing more, they thereby impliedly waive a trial by jury and confer upon the court the power to determine matters both of law and fact. *Empire State Cattle Co.* v. *A., T. & S. F. Ry. Co.*, 210 U. S. 1, reversing 147 Fed. 457; *Beuttell* v. *Magone*, 157 U. S. 154; *Patty* v. *Salem Flouring Mills Co.*, 53 Ore. 350; *Lindquist* v. *Northwestern Port Huron Co.*, 22 S. D. 298; *Home Fire Ins. Co.* v. *Wilson*, 159 S. W. (Ark. 1913) 1113. The rule as applied in these cases has, however, the modification that if either party on denial of his motion makes a special request to have certain matters of fact determined by the jury, this rebuts the implied presumption of waiver, and such matters must be submitted to the jury. *Minahan* v. *Grand Trunk*, 138 Fed. 37; *Kinner* v. *Whipple*, 198 N. Y. 585; *Duncan* v. *Great Northern*, 17 N. D. 610; *Victoria First National Bank* v. *Hayes*, 64 Oh. St. 100. It is said in *Minahan* v. *Grand Trunk, supra*, "The fact that each party asks for a peremptory instruction to find in his favor does not submit the issues of fact to the court so as to deprive the party of the right to ask other instructions, and to except to the refusal to give them, nor does it deprive him of the right to have questions of fact submitted to the jury if issues are joined on which conflicting evidence has been offered." It is submitted that the rule which permits a resort to the jury in all cases where there are disputed facts is the more logical for the reason that a motion for a directed verdict is in effect a demurrer to evidence. As such it would not seem to imply that the party is willing to have the court pass upon the weight of the evidence, since in considering the motion the court cannot look to any of the evidence introduced by the moving party which is favorable to him.

WILLS—LEGACY—DIVIDENDS ON CORPORATE STOCK.—The stock of a corporation was given in trust to pay the income to the testator's widow for life, with remainder to a daughter absolutely. After the testator's death the corporation declared an extra dividend of 100 per cent. on the capital stock, for the payment of which dividend securities purchased by the corporation out of its cumulative profits were sold. *Held*, that such extra dividend was not income but that it constituted part of the corpus of the trust estate. *Foard* v. *Safe Deposit & Trust Company of Baltimore* (Md. 1914), 89 Atl. 724.

There are three conflicting rules upon the question of how distributions made by a corporation during the continuance of a life estate should be apportioned between the life tenant and the remainderman. The so-called Massachusetts rule is that stock dividends declared out of earnings accumulated during the testator's lifetime go to the remainderman, and cash dividends go to the life tenant. *Minot* v. *Paine*, 99 Mass. 108; *Gibbons* v. *Mahon*, 136 U. S. 549; *Smith* v. *Dana*, 77 Conn. 543; *De Koven* v. *Alsop*, 205 Ill. 309. This rule is somewhat difficult of application for the reason that before it can be applied it is necessary to ascertain whether the distribution by the corporation is from earnings or whether it represents a reduction or change of the form of capital. The Pennsylvania rule, the one followed by the principal case, is that both stock and cash dividends are appor-

tioned between the life tenant and the remainderman according as they represent earnings before or after the creation of the trust fund. *Earp's Appeal*, 28 Penn. 368; *Soehlein* v. *Soehlein*, 146 Wis. 330; *Goodwin* v. *McGaughey*, 108 Minn. 248. The difficulty in the application of this rule arises in attempting to ascertain when the money which entered into the dividend was earned. The New York and Kentucky rule is that dividends, whether stock or cash, are non-apportionable, and must be considered as accruing in their entirety as of the date when they are declared, and therefore if declared during the life tenancy, they go to the life tenant. *McSouth* v. *Hunt*, 154 N. Y. 179; *Hite* v. *Hite*, 93 Ky. 257.

BOOK REVIEWS.

THE PRINCIPLES OF JUDICIAL PROOF, AS GIVEN BY LOGIC, PSYCHOLOGY AND GENERAL EXPERIENCE, AND ILLUSTRATED IN JUDICIAL TRIALS. By John Henry Wigmore, Professor of the Law of Evidence in Northwestern University, and Author of a System of Evidence in Trials at Common Law. Little, Brown & Company, Boston, 1913, pp. xvi, 1179.

This new work of Professor WIGMORE is, to use his expression, a "tentative attempt to call attention to the principles of judicial proof as a whole, and as a system." He insists that the influences and processes which lead us, as the result of the consideration of evidence presented, to the conclusion that a fact is, or that a fact claimed to exist is not, are scientific, and are therefore the proper subject of study. He seems as yet, doubtful as to whether this science of proof is capable of formulation, but contends that it is susceptible of being better understood by the members of the profession than is now common.

"The mind *is* moved" by evidence presented, and this work is an effort to "explain *why* it is moved." The question here discussed is not one of the admissibility of evidence, but conceding admissibility, does it satisfy us of the existence of the *factum probandum?*

The author has brought to this work the ripe scholarship of one recognized as a master in the general law of evidence, and that remarkable power of both analytic and synthetic reasoning so evident in his great work, the TREATISE ON THE LAW OF EVIDENCE.

It is fortunate that one so well qualified should have directed his efforts toward the solution of the problems presented in this field in which there has been comparatively little done. MR. MOORE, in his "TREATISE ON FACTS," had earlier rendered a real service to the profession, and others had done some work along this general line, but no one had attempted to systematize the principles involved.

The book is intended, as the author states, mainly for use in law schools, but the general practitioner will find its study most interesting and profitable.

His discussions center about three conditions of the evidence: 1st, that where the evidence is circumstantial; 2nd, that where the evidence is testimonial, and 3rd, that condition involving the consideration of both circumstantial and testimonial evidence. The first and second parts are introductory, in the sense that an understanding of the principles to be applied in solving an evidentiary problem involving circumstantial evidence only, or one involving testimonial evidence alone, will enable one more easily to appreciate and comprehend the processes involved in solving the more complex and much commoner problem in which both circumstantial and testimonial evidence are the factors, correct values for which are to be found.

"Most topics are introduced or followed by a brief expository passage" suggesting the possibilities of the topic, "though the main part of the material may, and must be, used inductively."

While the author contemplates that the student will work out in his own way, very largely, the problems suggested by the materials furnished, yet he has suggested a method of working out the questions as presented by the evidence in two cases, those of *Commonwealth* v. *Umilan*, 177 Mass. 582, and *Hatchett v. Commonwealth*, 76 Va. 1026, which is well worth studying, and present well the author's ideas of how the evidence in complicated cases may be rationally analyzed and conclusions reached, not intuitively, nor by giving effect to general impressions, but as the result of the careful and methodical consideration of each factor in the problem presented by the evidence.

Aside from the expository passages referred to, the material presented is a collection of the reports of actual cases which give the testimony upon which they were determined, gathered from various sources, arranged in an orderly way to develop the various topics.

Whether or not Professor WIGMORE'S prophecy that rules of admissibility are, in the future, to be regarded as of less and less importance, and the problem of how to deal with evidence produced, increasingly important, shall come true or not, this work is certain to claim the careful attention of the thoughtful lawyer and the serious student of the law. V. H. L.

HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS. By Roger W. Cooley, LL.M., Professor of Law, University of North Dakota. (Hornbook Series) pp. xii, 711. St. Paul, Minn. West Publishing Company. 1914.

This book is "designed especially for the use of students," and the aim of the author, as stated in the preface, is "to give a clear and concise statement of those fundamental principles which must be and are applied in any attempt to formulate or construe the law of Municipal Corporations as found in the various statutes." This task, which the author has thus outlined for himself, is gigantic, because first, the classifications in this subject are still very much unsettled, there is much dispute about some of the basic principles of the law, and the exact limits to many of the fundamental principles are still undefined; second, the field covered is so broad as to make it difficult, if not impossible, to condense even the general principles of the subject into the small compass of this book without leading the reader into misconceptions of the law.

Considering the nature of the task it is not surprising that even a writer of some experience, as is the author of this book, in condensing the material of the subject should have made some general statements that are inaccurate and misleading, if not actually untrue. A good example of such a statement is furnished by certain portions of Chapter III, in which the difficult subject of "Legislative Control" is discussed. In Section 24 of that chapter the black letter text reads as follows:

"In the absence of constitutional inhibition, the Legislature has unlimited power of control over those municipal officers who are charged with the performance of governmental functions devolved upon it (sic), but cannot interfere with those officers who perform functions of a distinctly municipal character."

The latter part of this sentence which indicates that in the absence of express constitutional inhibition the legislatures of the various states cannot interfere with those officers who are charged with the performance of corporate or municipal functions, is clearly not a fair statement of the law. At best this could be true only in those states which recognize the right of local self-government for municipal corporations as existing in the absence of an express constitutional guarantee. The courts of only Michigan, Indiana, Kentucky, Texas and perhaps one or two other states recognize the existence of the right by implication. The courts of the United States and of Pennsylvania, Massachusetts, New Jersey, Delaware, and Nebraska, at least, explicitly deny the right unless expressly guaranteed by the constitution, and the courts of many other states have rendered decisions which seem to commit them to such a position when the question is squarely presented to them.

The effect of the quotation cited will be to lead the uninitiated who read it to believe the doctrine stated therein is recognized in practically every state in the country, when one of the greatest writers on the subject of municipal corporations has stated his opinion to be that it is recognized in but a small minority of the states that have considered the question. See DILLON, MUNICIPAL CORPORATIONS, § 98, and cases cited to note 3 on page 156.

Not only does the author err in stating the doctrine as universal when it is probably recognized by but a small minority of the states, but he also defines it in such sweeping terms that unless one give a very technical meaning to the word "interfere" the statement will be misleading as to the law in even those states which recognize the existence of the right of local self-government in the absence of an express constitutional guarantee. The courts of Michigan, for instance, recognize the power and authority of the legislature to create offices and fix their corporate duties and to take these duties from one officer and confer them on another chosen by the people of the locality or appointed by an officer chosen by them. (*Attorney General* v. *Detroit,* 29 Mich. 108), to fix the length of the terms of such officers (*Stow* v.*Grand Rapids,* 79 Mich. 595) and to fix the salaries of local officers (*Speed* v. *Detroit,* 100 Mich. 92). The quotation designated will certainly lead the student, for whose especial use this book is prepared, to the conclusion that a legislature cannot pass laws of the sort suggested affecting local offices and officers.

This misconception is helped rather than hindered by certain statements in the text which follow and are intended to explain the black letter heading. This text reads as follows:

"The state, therefore, through the Legislature, has the right to the appointment (sic), election, tenure of office, and compensation of all officers that may be required to execute its general laws or to perform functions per-

taining to the government of the state and not of a municipal nature. On the other hand, it is equally well recognized that, in view of the fundamental right to local self-government, officers exercising purely municipal and local functions should be free from legislative control."

These sentences clearly encourage the misconception that the legislature cannot fix the compensation or terms of the municipal officer who has charge of only corporate or local affairs.

This is the most glaring example of misleading statement which the reviewer has found. Another of less consequence is found on pages 211 and 212, by which the reader is led to suppose that there is no substantial conflict of authority over the principle that there can be no de facto officer without a de jure office. This is not true, for while the doctrine as stated is laid down in *Norton* v. *Shelby County,* 118 U. S. 425, which is followed by the majority of the cases on this subject, still there is a well recognized and vigorous dissent from this doctrine set forth in *State* v. *Gardner,* 54 Ohio St. 24, and in several cases supporting this one. No discussion of this situation seems to be complete without mention of or reference to this Ohio case, yet we find none in the book under discussion.

There are other instances of this sort of inaccuracies and misleading statements, though perhaps none more conspicuous than those mentioned. This is not true of every part of the book; some sections, indeed, contain a fairly clear and accurate presentation of portions of the law; an example of this sort of treatment is found in the author's discussion of a "public purpose" on pages 407 to 442, inclusive. On the whole, however, this book seems to possess in a greater degree than even the ordinary treatise that no uncommon quality of modern legal texts, *i. e.,* that it is a rather incomplete and not too logically arranged digest of rules aplying to given situations rather than a scholarly and sympathetic treatment of the problems presented by the subject. These defects, whether due to the inherent difficulties of the task or whatever else, detract materially from the value of the book as a student's guide.

A rough estimate places the number of American cases on the subject here treated somewhere between forty and fifty thousand. The author has cited about seven thousand of these. This and the fact that there is a dearth of cases decided within the last ten years, a serious fault in a book on a rapidly growing subject, will greatly impair its value as a work for the use of the practitioner.

The last ninety-three pages of the book are taken up with the discussion of "quasi-corporations." In these pages the author considers not only the nature of such corporations, but also the rules of law governing their powers, the exercise thereof and the legislature's control over them. This seems to be a rather disproportionate amount of space to devote to this portion of the subject. As the rules of law respecting legislative control over such corporations, as well as those governing their powers and their exercise, are similar and in most cases the same as those governing the true municipal corporation in its aspect as a governmental agent, it seems that a separate treatment of the powers and liabilities of quasi-corporations might have

been dispensed with and the space thus saved could have been profitably devoted to a fuller examination of some of the more difficult problems of the general subject of municipal corporations which the author slips over easily or fails to notice at all. G. S.

CONSULAR TREATY RIGHTS AND COMMENTS ON THE "MOST FAVORED NATION" CLAUSE. By Ernest Ludwig, I. and R. Consul for Austria-Hungary, Cleveland, Ohio. The New Werner Company, Akron, Ohio, 1913, pp. 239.

Among the most important features of modern commercial treaties is the inclusion in a large number of cases of a clause providing for "most favored nation" treatment. By means of this device it is possible to incorporate subsequent commercial developments into the substance of any treaty without the delay attendant upon the ratification of a new convention. In this manner a desirable uniformity in international commerce is being developed. However, according as the national policy dictates a protective tariff or free trade, two contrasted interpretations of the "most favored nation" clause have arisen. By the earlier of these views, the American, "most favored nation" treatment is only to be granted in reciprocity for similar treatment, while the later Continental or English attitude demands an unconditional application of the clause. The present treatise, addressed to the various probate judges of Ohio and Lower Michigan and primarily concerned with consular privileges, is to all intents and purposes a brief in favor of the Continental standpoint, and this for the reason that nearly all consular rights under our treaties with Austria-Hungary are to be derived from the "most favored nation" clause.

After citing the text of the provisions in the treaties between the United States and Austria-Hungary which relate to the rights of consuls, the author gives in the form of a brief the relevant cases, some of them rather unimportant (vide the cases on pp. 58, 60 which have been appealed). There follows a criticism of the United States Supreme Court decision, *in re Rocca* v. *Thompson*, and of the opinion of *C. Cushing* which sets forth the American attitude.

Despite the fact that the author adduces considerable material tending to show that the American position has not been entirely consistent, his argument remains at the end rather inconclusive for the reason that he does not seem to have been able to dislodge its fundamental assumption, namely, that, as commercial treaties are based upon reciprocity of mutual advantage, the same principle should apply to the "most favored nation" clause. We can, furthermore, scarcely agree to the author's conclusion on p. 168 that CUSHING in his opinion maintains that "the mutual benefits stipulated in treaties *must* be equivalent." All this, however, hardly does justice to the work itself, for, although not written in the most elegant style nor as systematically arranged as it should be, it represents a considerable amount of painstaking compilation and is well-worthy the careful attention of any one interested in this mooted question. H. E. Y.

in jealousy on the part of another great profession and it has been revived and given a new life in recent times by the jealousy of rising professions which feel that the share in public affairs and the place in the public eye which should be theirs is usurped by the lawyer.

Let us look first at the circumstances which may be conceded to afford some basis for lay misunderstanding of the legal profession. Two are of general application wherever justice is administered according to law. Two are peculiar to our legal system and to its American environment.

Of the former perhaps the more important is the necessarily mechanical operation of rules, the circumstance that law acts in gross, with rules made for the average case, and hence often ignores elements in particular situations which seem controlling to the lay mind, focused upon the one case exclusively. The more certainty and stability are insisted upon, the more the law seeks to preclude all personal elements in the administration of justice, the more it will seem to the layman, looking at single causes, that the law is arbitrary and technical and that it defeats the justice it is set up to maintain.[3] But some periods insist strongly upon certainty and stability in the law, and in the reaction from such periods the lay tradition always thrives. Thus the period of the strict law, represented in our legal system by the stage of the common law, from the thirteenth to the sixteenth centuries, insisted upon rule and form as means of achieving certainty and uniformity in judicial decision and so as means of precluding arbitrary magisterial action.[4] In the reaction from the strict law, which is marked by the rise of the court of chancery and the development of equity, the tradition that a good lawyer was a bad Christian, started by clerical jealousy of the lawyer in the middle ages, found willing ears. Again, the nineteenth century, a period of maturity of law, insisted upon detailed rule as a means of securing the social interests in security of acquisitions and security of transactions. Where the seventeenth century insisted upon identifying law and morals, the nineteenth century, thinking of its economic structure resting on property and contract, insisted on differentiating them and on strictly defining their respective provinces. Hence in the reaction which has set in throughout the world, the reaction which European observers are calling the socialization of law, the tradition begun in the twelfth century and handed

[3] For a more extended discussion, see my paper, The Causes of Dissatisfaction with the Administration of Justice, 29 Rep. Am. Bar Assn. 395, 397.

[4] See my paper, The End of Law as Developed in Legal Rules and Doctrines, 27 Harvard Law Rev. 195, 204.

today between the common law and arbitrary pluralities or militant minorities, the progressive courtiers who have the ear of King Demos and seek to give him arbitrary powers, that pluralities and classes who govern in his name may use them benevolently in the interest of society, think of the will of the people as hampered by judicial usurpations based on dead precedents,[7] eighteenth-century bills of rights[8] and anti-social quibbles of lawyers. It is one of the chiefest of the advantages of law that, if only by compelling deliberation before change may be made, it ensures that the more important ultimate social interests shall not be sacrificed to the less valuable but more immediate interests of individuals or of classes. This is the justification of American constitutional law. But the resulting government of laws and not of men seems to be a government of lawyers and not of the people, and thus political jealousy is easily fomented.

In the United States the cult of incompetence, which seems to be an unhappy by-product of democracy, the distrust of special competency in special fields and the complacent royal delusion of Demos that the administration of justice is an easy task to which any man is competent, must also be reckoned with. The lay mode of judging an act is very simple. The layman takes what he calls a broad view. For him particular modes of conduct have certain traditional labels. If, from what appears on the surface, certain characteristics are present which call for one of these traditional labels, a moral judgment is formed at once.[9] The judge on the other hand cannot take this so-called broad view of the case. He is compelled to probe deeper, to listen to and test the relevance of all manner of circumstances of which the layman has taken no account, and the task of decision that has proved easy to the layman he may find very difficult. If his judgment varies from that of the layman, as special competence goes for nought, the reason can only be that lawyers have befogged and beclouded the issue and that the case has gone off on mere legalism.

But this American cult of incompetence has a worse phase in its relation to the attitude of the community toward the lawyer. A people who expect much from the bar have resolutely opposed all attempt to insure a bar adequate to bring about the results which they demand. The bar is expected to maintain the very highest and most disinterested standard of professional ethics. It is expected to maintain an efficiency beyond what is demanded in any

[7] "The way of social progress is barred by barricades of dead precedents." Professor Henderson in 11 American Journal of Sociology, 847.

[8] Johnstone, An Eighteenth-Century Constitution, 7 Illinois Law Rev. 265 .

[9] Westermarck, Origin and Development of the Moral Ideas, 1, 9.

lay tradition as to the lawyer has some foundation in twentieth century America, the American people, rather than the nature of the lawyer's calling, must bear the blame.

So much for the circumstances that have served to give currency to the lay tradition and to keep it alive. Now for its origin and history.

In its origin, the traditional attitude toward the lawyer was an incident of the disputes between theology and law which began with the revival of the study of Roman law in the Italian universities in the twelfth century.[12] In part these disputes turned on ethical conceptions and proceeded from clerical objections to litigation, based on texts of scripture. Partly the basis was theological, since theology was challenged by a lay "science of civil rights to be found in the human, heathen Digest."[13] But for the most part clerical jealousy of the rising profession of non-clerical lawyers was the determining element. We must remember that at first the administration of justice and the practice of advising litigants and of advocacy was in the hands of the clergy. Indeed for a time it seemed not unlikely that the universal church courts and church law would carry the day against the local courts and the local law. Naturally the clergy did not relinquish the practice of the law without a protest, and this protest could be made ex cathedra to credulous congregations in the name of religion and of sound morals. Such stories as the one of how the lawyers prayed for a patron saint and, upon the divine concession that the saint whose statue a representative lawyer, duly blindfolded, should select, might be claimed and revered by the profession as their patron, an eminent advocate with bandaged eyes groped about the chamber and as in duty bound embraced the statue of Satan[14]—such stories proceed from this period. Who indeed but Satan could be the patron of a pernicious profession that was taking away from brother Peter and brother Bartholomew one of the chief sources of their revenue?

At the Reformation, theological objections to law and lawyers were about the only thing on which Roman Catholic and reformer were agreed. The part which Roman law had played in the humanist movement and the prominent part taken by the great French jurists of the sixteenth century in the Huguenot party easily led the pious Catholic to the conclusion that the lawyer was an enemy of religion. "The more that one is a great jurist," said one of the

[12] On the subject see Stintzing, Das Sprichwort Juristen böse Christen; Kenny, Bonus Jurista malus Christa, 19 Law Quarterly Rev. 326.

[13] Maitland, Prologue to a History of English Law, 14 Law Quarterly Rev. 13, 32.

[14] The whole story, translated from the French, may be found in 6 Green Bag, 142.

supplanting of the clergy by the lawyers in the conduct of the state, reinforced this tradition and handed it down. For on the whole, down to the Reformation, the great offices of state had been the perquisites of the clergy. Clergymen had shared the reins of government at most only with soldiers. And in all the growing departments of governmental activity that had to do with the affairs of peace they had been supreme. When they found a new rival in the lawyer and when this rival pushed them out of one after another of the great offices of state, the pious clergymen could perceive clearly the peril to religion and good morals which this change involved. The zeal which coined such phrases as "Juristen böse Christen, ja diabolisten," "legum contortores, bonorum extortores," "legum doctores sunt legum dolores," "juris periti sunt juris perditi,"[18] was born of professional concern at the supersession of the clergy in the kingdoms of *this* world by the rise of the legal profession, and the natural disinclination of those who had been wont to lay down the law for both worlds to confine their attention to the less immediately profitable and immediately rewarded calling of preparing for the world to come. These phrases, which gained currency in the seventeenth century, express ideas which are the staple of modern denunciations of the lawyer by teachers of economics, politics and government.

In America the foregoing bit of history was repeated in such wise as to give new vitality to the twelfth-century clerical tradition. The Protestant tradition, adverse to lawyers, was strong in Colonial America. CROMWELL had found, as he put it, that the sons of Zeruiah were too hard for him[19] and had retired from a single attempt to impose his ideas upon the English bar. This did not lead to a charitable view of the profession on the part of the roundhead. MILTON wrote of lawyers that they ground "their purposes, not on the prudent and heavenly contemplation of justice and equity, which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat contentions and flowing fees."[20] The pamphlet literature of the Commonwealth teemed with attacks upon the legal profession[21] and the pious Puritan, apart from religious grounds,

[18] Stintzing, p. 20.

[19] "In a conversation with Ludlow, recorded by that historian, Ludlow says that Cromwell stated to him 'that it was his intention to contribute to the utmost of his endeavors to make a thorough reformation of the * * * law: but, said he, the sons of Zeruiah are yet too strong for us; and we cannot mention the reformation of the law but that they presently cry out we design to destroy propriety; whereas the law as it is now constituted serves only to maintain the lawyers, and to encourage the rich to oppress the poor.'" Parkes, History of the Court of Chancery, 165, citing Ludlow's Memoirs, 123. See also James, L. J., in Davey v. Garrett, 38 Law Times n. s. 81.

[20] The whole passage may be seen in Warren, History of the American Bar, 6.

[21] A partial list may be found in Warren, History of the American Bar, 7.

legal knowledge and invited legal interference in connection with almost every act of governmental activity. Hence, as Colonial America was the period of the clergyman, nineteenth-century America was the period of the lawyer. It was not merely that the administration of justice had passed into his hands. In nineteenth-century politics the sole rival of the lawyer was the soldier. From DE TOCQUEVILLE to BRYCE, observers were agreed as to the leadership of the lawyer in American communities.

It could not be expected that this passing of the hegemony from the pulpit to the bar would be acceptable to the learned and eloquent profession which had been displaced. Nor did the circumstance that the causes of this supersession were economic, or in other words, material, make it more acceptable. With their books full of the echoes of LUTHER'S diatribes, it was but natural that the clergy should view the rise of law and consequent rise of the lawyer as a triumph of the material over the spiritual, a sacrifice of justice and right to the greed and craft of a parasitic class. Sermons of the first half of the nineteenth century are full of this, and nothing but the inexorable operation of economic conditions that demanded law enabled lawyers to overcome the violent hostility to their profession that prevailed almost to the time of the Civil War.[24]

After the Civil War the lawyer's position seemed secure. The old tradition still lingered in stale jokes and conventional stories, but it had lost its vitality. But new rivals were arising to contest the leadership of the bar, and at the close of the last century new jealousies were beginning to give a new currency to the medieval clerical view of the legal profession. To say nothing of medicine, which has almost had a rebirth in our own day, engineering and journalism and, recently, the teaching of economics and government in colleges, have come forward to contest for the leadership. The physician sees that the government maintains an attorney general and a department of justice, but not a surgeon general and a department of health. The engineer sees the high offices of state filled with lawyers while there is no chief engineership of any of our commonwealths to which he may aspire. The journalist sees the lawyer continually in the public eye. He sees that what the reporter knows to be true and the editor daily proclaims in his columns, the courts persist in trying and determining in their slow and technical fashion. The physician may feel that he alone knows how to deal with insanity, but when he steps into court he is cross-

[24] Political and economic causes made immediately for this hostility to lawyers. The point which concerns us here is that under these circumstances the clerical tradition gained new strength. There is a good account of this period in American legal history in Warren, History of the American Bar, chap. 10.

It may be that the learned doctor really believes that the law as to insanity was deliberately devised and is deliberately maintained in order to fill the pockets of lawyers. If so, such belief argues a most unscientific mode of thought on the part of a scientific profession. It is significant of the mental habits of a profession that is compelled to think accurately and reason closely that no lawyer of eminence has soberly discussed the forensic doings of other professions in such vein. And yet every trial lawyer knows that physician and surgeon and alienist and neurologist, when their aid is sought in the administration of justice, do not exactly serve God for naught. The real point is, doubtless, that the lay expert is angered by the thought that he must expound his expert knowledge to the non-expert and must argue it with the lawyer. To those who are wont to speak ex cathedra, without the constant check of a keen-witted opponent, contradiction or even question seems akin to insult.

In its origin and in its continuance, then, the tradition of which I have been speaking is but a tribute to the position of the lawyer in the community. Nor is it likely permanently to impair that position. No reforms and no social programs that are likely to be achieved in such time as we may foresee will make it possible to do away with regulation of human conduct in a finite world where all the demands of every individual may not be satisfied. Nor is it likely that magistrates can ever be found to whom the royal power of administering justice without law may be safely entrusted. Our ambitious schemes of social reform call, not for less law, but for more law. The call of the time is not for less training and less specialization on the part of those who have to do with the administration of justice, but for more. In our larger states, even the experienced prosecutor cannot know the whole of the penal code he enforces, so overgrown has it become. Moreover, whatever other ends develop, the administration of justice will remain the chiefest end of government, and law will remain the chief agency by which it achieves its end. Hence, from the necessity of the case, those who expound, interpret and apply the law will always be men of mark, will always be, if not in name, yet certainly in substance, the leaders of the state—and for these very reasons will incur the jealousy of rival professions. When the tradition invented by twelfth-century priests and monks is forgotten, it will mean that anarchy or the millennium has obviated the social need for law and government.

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jection in a less palpable way applies to the other two words. Without consuming more time in pointing out the unsatisfactoriness of the formula as a working rule, it will be more profitable to proceed to an analysis of the cases that have generally been said by the courts to be within the scope of this rule.

It is but repeating familiar learning to call attention to the fact that what is for the sake of brevity referred to as "title" in land embraces various rights and duties. This is true both of the lessor's title and the lessee's title. Taking up the title of the lessee, it may be pointed out that he has certain rights in the strict sense with correlative duties on the part of those against whom the rights exist, including among others the lessor; no further express mention will be made of these rights, it being understood that the conclusions hereinafter arrived at with respect to the rights next to be considered will also be true as a matter of principle with respect to the rights (in the strict sense) good against the lessor. In addition to these rights with their correlative duties the lessee has also those rights, in the loose sense, that are more exactly defined as permissive rights[5] or privileges,[6] i. e., there are certain courses of action which because he is the owner, in a qualified sense, of the land, he may pursue without violating the rights of other persons; he is under no duty to engage in these actions, he may legally do so if he wishes. Thus he may till the land in whole or in part, he may build on it, engage in business on it, sell his interest in it and perform various other acts upon it or with respect to it.

A covenant that restricts him in the exercise of any one or more of these privileges constitutes a direct contractual limitation upon the totality of legal rights that he would otherwise be free to exercise with respect to the demised premises, and where the covenant creates a restriction on a privilege of action as to the actual physical corpus it is clear that such a covenant does in the most literal sense affect "the thing demised." The propriety of holding such a covenant to run is obvious. It can have no significance save as it applies to the tenant in possession of the premises. Hence it is well settled that covenants of this sort will bind the assignees of the lessee. Among the covenants to refrain from acting which have been held enforceable by the lessor against the assign of the lessee are the following: to let part of the land lie fallow every year;[7]

[5] Terry—Anglo-American Law, pp. 90, 370. Salmond, Jurisp. 2nd Ed. p. 19 expresses the same idea by the term "liberty."

[6] This term is used by Professor Hohfeld in an article in 23 Yale L. J. pp. 16, 32. The term seems to be fully as expressive as either of the other two and more in accord with judicial usage and it has been used throughout this article.

[7] Cockson v. Cock, Cro. Jac. 125 (1607).

done indirectly by taking steps which will create this power in some third person; that may be done voluntarily as where the lessee gives a third person a power of attorney to assign or sublease; or it may be done involuntarily as where the lessee engages in a course of action that causes him to be adjudged a bankrupt. With these powers there exists in the lessee the privilege of exercising them. The privilege of exercising one or more of these powers may be restricted by covenant in precisely the same way as the privileges with respect to the physical corpus of the lease. Such a covenant will bind the assignee of the lessee for the reasons already pointed out, viz. it can be operative only as it affects the tenant for the time being. It constitutes a contractual restriction of the use, not of the physical corpus, but of the estate. Such covenants are universally held to have come within the usual phrase and to "affect the thing demised." In other words the term "thing demised" must be held to include not only the land but the estate in the land. The most common illustration of this type is the covenant not to assign or sublease without the consent of the lessor.[15] The same principles apply to a covenant not to suffer the obtaining of a prescriptive right against the leased property,[16] and to a proviso for re-entry in case of bankruptcy.[17]

Corresponding covenants by the lessor may be either to restrict the exercise of the lessor's powers with respect to the estate of the lessee or to restrict the exercise of his powers with respect to his reversionary estate. A covenant that under certain circumstances he would not enter and forfeit the lease would be a covenant of the first sort.[18] This same principle would also seem applicable to a covenant by the lessor not to do an act that would give a third person the power to enter and forfeit the estate. Such a situation is suggested by the case of *Dewar* v. *Goodman*,[19] but it was not directly involved and hence was not discussed by the courts. A covenant by the lessor that under certain circumstances the rent should be

[15] Williams v. Earle, L. R. 3 Q. B. 739 (1868); Brolaskey v. Hood, 6 Phila. 193. In Williams v. Earle it is stated by way of dictum that while a covenant not to assign without the consent of the lessor will run, a covenant not to assign will not run. If this means that as a question of fact it may fairly be inferred from the form of the covenant that since the parties did not intend that the covenant should run because they did not contemplate the possibility of assignment, it is sound. If it means that as a matter of law such a covenant cannot run it seems unsound.

[16] Bally v. Wells, 3 Wils. 25 (1769).

[17] Doe d. Bridgman v. David, 1 C. M. & R. 405 (1834); compare Horsey v. Steiger, [1899] 2 Q. B. D. 79.

[18] Compare Bamford v. Hayley, 12 East 464 (1810).

[19] This case is considered at length, post pp. 650, 656, 658.

either for action by the lessor upon the demised premises or at least for action that will be physically manifest upon those premises, and hence may be said in a very palpable way to touch or concern them. This criterion however will not apply to *Simpson* v. *Clayton*.[30] In that case A was tenant under a lease for three lives, he subleased part of the premises to X for 60 years and covenanted that if the head lease ran out first he would use his utmost endeavors to get it renewed. This covenant was held to run to X's assignee, and rightly, but it is only in a loose way that it can be said to relate to the sub-lease; so far as its subject matter goes, it is rather the head lease.

The same difficulty exists with respect to covenants by the lessee. Those that call for action upon the demised premises may be said without difficulty to "touch or concern the thing demised." Such are covenants to build on the demised premises,[31] to live upon them,[32] to keep them in repair,[33] to sink oil wells in them,[34] to consume and spread on the land as manure all hay raised thereon.[35] Compare, however, with these covenants the covenant by the lessee to keep the premises insured. If by statute the lessor can avail himself of the proceeds of the policy to apply in rebuilding,[36] or if the policy is to be taken in the name of the lessor for the time being,[37] the covenant runs; a mere covenant to insure does not.[38] No one presumably would question the soundness of this distinction, yet, so far as the covenants per se are concerned, both touch or concern the thing demised; they both call for the taking out of a policy upon the premises. Reference also may be made to *Sampson* v. *Easterby*.[39] The facts in that case were these: A owned certain veins of minerals, the adjacent soil being owned by a third person; A apparently had a right to erect a mill thereon. A leased the veins to X for a term of years and X covenanted to build an ore mill upon the adjacent land, which was not included within the demise. The owners of the vein had however the right to remove such building. One would have difficulty in saying that this covenant related

[30] 4 Bing. N. C. 758 (1838).

[31] Anon., Moore 159 (1584).

[32] Tatem v. Chaplin, 2 H. Bl. 133 (1793).

[33] Dean of Windsor's Case, 5 Co. 24 a. (1601); Tilny v. Norris, 1 Salk. 309 (1701).

[34] Bradford Oil Co. v. Blair, 113 Pa. St. 83 (1886).

[35] Chapman v. Smith [1907] 2 Ch. 97.

[36] Vernon v. Smith, 5 B. & Ald. 1 (1821).

[37] Masury v. Southworth, 9 Oh. St. 341 (1859); Trust Co. v. Snyder's Admin., 76 Fed. 34 (1896).

[38] Compare Reed v. McCrum, 91 N. Y. 412 (1883); the dictum of Best, J., in Vernon v. Smith (supra) that such a covenant would run seems erroneous.

[39] 9 B. & C. 505 (1829); affirmed 6 Bing. 644 (1830).

fit of any given person, whether owner of an interest in the premises or not, it is essentially personal, and the agreement of the parties that the covenant is to enure to the benefit of the tenant or reversioner for the time being should make no difference. The tenant or reversioner is interested in the performance of this covenant, not because of his ownership of the land per se, but because he is persona designata.[42]

The second limitation is this: while it is true that a covenant of the sort now under consideration will not run unless it operates to the benefit of the rights of the lessor or lessee as such, the converse of this proposition is not true. It is easy to suggest covenants that will indirectly or mediately operate to the benefit of the covenantee with respect to his rights as owner of the soil, which clearly do not run. Thus a covenant by a lessor of farm lands that he will sell for the lessee all grain that shall be raised on the land and shipped to him would seem clearly to be a personal covenant. On the other hand a covenant by the lessor to maintain windbreaks upon the demised premises would be a real covenant. Yet both operate to make more valuable the privilege that the lessee has, as owner of the soil, of raising grain on it. The difference between the covenants of course is, and this is fundamental, that the first covenant operates primarily to benefit the covenantee not in the exercise of his privilege as owner of the soil but in the privilege that he has as owner of a chattel, of selling it; although this fact may in turn make more valuable the exercise of the privilege of raising grain. The second covenant, on the other hand, operates directly to make more valuable the exercise of the privilege of raising grain. The application of this distinction may in any case present two difficult questions; one of fact as to what privilege or power of the covenantee the covenant was primarily designed to and does protect, and one of law whether the privilege or power in question is one that he has as lessee or otherwise. Courts may be expected to differ in the conclusions to which they come on one or both of these points. The rule contended for, however, seems to be justified as a matter of principle and to furnish a rational connection between the covenant and the title with which it passes as an incident.

Again it may be pointed out that these covenants that have been held to run do not always operate exclusively for the benefit of the covenantee; if the premises are mortgaged, for example, the covenant to keep them insured so that the proceeds are available for rebuilding, or the covenant to pay the taxes, may be almost as

[42] See post p. 648.

the covenant by the lessor with respect to payment is, in substance if not in form, a covenant to buy up or extinguish this real right. Such a covenant is one, the performance of which, i. e., the payment, can enure only to the person who has this real interest to sell, and that person must be the tenant for the time being. Such are cases where the covenant provides that the lessee may remove the fixtures if the lessor does not pay for them,[53] or that the lessor will pay or renew the lease for a stated period,[54] or that the lessee shall have a right to remain in until the payment is made,[55] or that he shall have a lien upon the property for the value of the improvements, or even a mere covenant "to purchase" the improvements,[56] since the fair inference from such a covenant is that the title is to remain in the tenant until payment. Some of the cases above mentioned contain dicta to the effect that, in any case where there is a covenant by the lessee to make improvements, a covenant by the lessor to pay therefor will run, even though the lessee has no real right of the sort above mentioned. This is true only to a qualified degree. The benefit of such a covenant would run until the improvement had been made by any given tenant, whether the lessee or his assignee. The covenant is to pay a person putting improvements upon the land, and that person can be only a tenant, and the covenant enures to his benefit because he makes the improvement. But if the situation contemplated by the lease is that at the expiration thereof all rights of the then tenant in the premises should completely determine, a covenant by the lessor to pay the then tenant for the value of the improvements, irrespective of who put them there, is merely a covenant to pay a sum of money to a person answering a certain description, viz., occupant of the premises at the moment when the lease expires. Such a covenant no more benefits the lessee as such than would a covenant by the lessor to devise his property to the person who answered that description, and will neither bind the assignee of the lessor nor enure to the assignee of the lessee.[57] There are two factors that may exist in this latter case which involve legal principles totally different from those now being discussed. Admitting that this covenant does not

[53] Hunt v. Danforth, 2 Curtis 592 (1856).

[54] Hollywood v. Parish, 192 Mass. 269 (1906); Phillips v. Reynolds, 20 Wash. 374 (1898).

[55] Batchelder v. Dean, 16 N. H. 265 (1844); Hazlewood v. Pennypacker, (Tex. Civ. App.) 50 S. W. 199 (1899).

[56] Frederick v. Callahan, 40 Ia. 311 (1875).

[57] Gardner v. Samuels, 116 Cal. 84 (1897); Wilcox v. Kehoe, 124 Ga. 484 (1905); Bream v. Dickerson, 2 Humph. (21 Tenn.) 126 (1840); contra; Stockett v. Howard, 34 Md. 121 (1870) semble; Lametti v. Anderson, 6 Cow. (N. Y.) 302 (1826); see ante p. 645-6.

formance of the covenant might be, if the head lessor chose to enforce the forfeiture,[61] of direct consequence to the sublessee in that the rights of the sublessee in the demised premises would thereby be terminated. A covenant by the mesne lessee to indemnify against damages resulting from the breach of this last mentioned covenant would also run, for it would be in effect a covenant to make good losses resulting from the breach of a covenant that would itself be binding upon him in favor of the sub-lessee. There is nothing in the opinion of the court in *Doughty* v. *Bowman* to indicate that it would consider that such a covenant as this latter would not run. In the actual case the covenant was a single one i. e., to indemnify for all breaches of the terms of the head lease. This would include not only those breaches which might result in a forfeiture of the sublessee's interest, but any breaches which would result in damage to the sublessee, whether through forfeiture or otherwise. The court held that this covenant could not be split, and being broad enough to include breaches that would be collateral as regards the sublessee, it could not be held good so far as it related only to breaches that were collateral.[62] This is sound: but it should be noticed that the case does not involve the proposition that a covenant to indemnify is for that reason alone necessarily collateral.[63]

Whether a covenant by the lessor not to compete with the lessee

[61] It was suggested on similar facts in Dewar v. Goodman, [1907] 1 K. B. 612, that the fact that the head lessor might not elect to take advantage of the breach by the mesne lessee to enter and terminate the estate of the sublessee showed that the covenant affected the thing demised only in respect of collateral circumstances. This suggestion seems irreconcilable with the position taken by the Court of Appeal in Horsey v. Steiger, [1899] 2 Q. B. 79. In that case a lease contained a proviso for re-entry if the lessee should go into liquidation. A corporation, the assignee of the original lessee, went into voluntary liquidation proceedings for the purpose of effecting a reorganization. The court pointed out the difference between bankruptcy and liquidation proceedings, viz., that the latter, unlike the former, do not necessarily involve a dealing with the title; the result of the liquidation proceedings is not per se to vest the title in the liquidator but merely to give him the power to dispose of the title if in his discretion it shall become necessary so to do. The proviso was held, nevertheless, to be enforceable against the assignee of the lessee. providing proper statutory notice of an intent to enforce the forfeiture was given. "It is sufficient if * * * the act relied upon will in the ordinary course of events involve dealing with the interest in, or possession of, the premises" (Foa, Landlord and Tenant, 4th Ed. 421). This seems sounder than the view suggested in the Dewar case; if the landlord does not enforce the forfeiture this goes to the question of damages, but the possibility that in a given case he may not elect to enforce his rights has very little bearing on the question whether the covenant is or is not adapted to the protection of the covenantee in his rights as lessee.

[62] "If the covenant declared upon presents an alternative, it is merely a covenant to indemnify. Is that then ad idem with a covenant for quiet enjoyment, assuming that that covenant would pass? It is not. It might be broken in other ways than a covenant for quiet enjoyment and is therefore larger. And it cannot be split merely because one breach of it may affect the estate while the other is collateral." Parke B., 11 Q. B. N. S. 454.

[63] Doughty v. Bowman was followed in Dewar v. Goodman, ante, n. 61.

conveyance of the fee, it should be noticed that there is a marked difference between an attempt to tie up land in perpetuity and the restriction given by the lessor for the term of an ordinary short term lease.

To restate, in a word, the characteristics of the two groups into which the covenants that have been examined are divisible, it may be said that the reason why the first kind of what are essentially contract relations will pass with a conveyance of the title, the bond that connects them with the land, is found in the nature of the burden created by the covenant. It is fundamentally a limitation upon rights that form a part of the title to the land. As to the second group the basis of its connection with the land is in the character of the benefit conferred. It is fundamentally a benefit to the person who has the title and in respect of the title. There remains for consideration this question: if the obligation imposed by the covenant limits the real rights of the covenantor so that the burden of it will pass to his assignee, is it necessary, in order that the rights under that covenant should pass to the assignee of the covenantee, that it should benefit him with respect to the real rights that he has as such assignee? A similar question may be put as to covenants of the second class, or the whole problem may be more generally stated thus: if either the burden or the benefit of a covenant has the connection with the title outlined above, will both ends of the covenant run or will each end run only as it has this connection?

Taking first those covenants where the connection with the title is found in the nature of the burden thereby created, it will be remarked that many of those covenants that limit the lessee in the exercise of his privileges or rights as such lessee do in fact necessarily satisfy both these requirements.[69] It is not universally true, however, and whether it is true in any given case may depend upon the question of fact as to the lessor's motive in taking the covenant. Thus suppose A leases to X a shop and takes a covenant from X that he will not use the shop for the sale of liquor. A may take this covenant because he believes that the use of the premises for a saloon will make his reversionary interest worth less, or because he has other property in the neighborhood that will be depreciated in value by the existence of a saloon, or because he runs a neighboring saloon, or because he is opposed on principle to the sale of liquor. On the first supposition he is taking the covenant in his character as landlord and to protect his reversionary interest; on the next two suppositions he is taking it to protect his other premises and

[69] See ante pp. 640-1, 642.

by the lessor or his assigns) touches and concerns the demised premises and *therefore*[74] it runs with the reversion."[75] *Thurston* v. *Minke*[76] is a decision the other way. In that case the facts were these: A owned two parcels of land, on one of which was a hotel. He leased the other lot to X with a proviso that no building erected thereon should exceed three stories in height. A later sold the reversion to B, keeping the hotel parcel. A was allowed to enjoin X against a subsequent attempt to erect on the leased lot a building of more than three stories. The contention that the benefit of the proviso passed to the assignee of the reversion was overruled by the court, it finding that the proviso was inserted for the benefit of A not as lessor but as owner of the hotel lot. This decision, though purporting to go on equitable grounds, seems also correct as to the running at law of such a covenant. It is submitted that there is nothing in the 32 H. 8, ch. 34, properly construed, that compels the doctrine that if one end of a covenant runs with the leasehold interest the other must necessarily run with the reversion. Just as a leasehold may be burdened with an easement in favor of another piece of land[77] so on principle it may be burdened with a covenant in favor of another piece of land and the runnings of such a covenant would be determined not by statute but by the common law.

Only a few words are needed as to the application of a similar limitation to the covenants of the lessor. What has been said with respect to the lessee's covenants is equally applicable, *mutatis mutandis*, to the lessor's covenants. One may go even farther. The lessee's estate is a subordinate estate; out of the fee simple of A is carved the smaller estate of X. It is derived from A, and hence, as was pointed out,[78] any limitation on the rights of that estate, no matter why imposed, should be enforceable by A personally against any subsequent taker of the lease. Such of course is not the relation of A's estate to X's estate, and hence it may well be doubted on principle whether even the original covenantee, the lessee, could enforce as against an assignee of the reversion a covenant that did not, in addition to restricting the rights comprised in the reversionary title, also operate to the benefit of the lessee with respect to his rights as such. Practically all covenants by the lessor do however satisfy both these requirements. The only covenants by the lessor

[74] My italics.

[75] Acc. Hamley v. Hendon, 12 Mod. 327 (1699) semble. See also White v. Southend Hotel Co., ante p. 653; Zetland v. Hislop, L. R. 7 A. C. (Sc.) 427 (1882); Foa, Landlord & Ten. 4 ed. 435.

[76] 32 Md. 487 (1870).

[77] Cole's Case, 1 Salk. 196 (1692); Newhoff v. Mayo, 48 N. J. Eq. 619 (1891).

[78] Ante, p. 653.

to the lessor as such are in the nature of a continuing quid pro quo for the land.

Whether the burden of a covenant by the lessor that benefits the lessee as such should merely for that reason, follow the reversion into the hands of an assignee is more difficult of decision. It is arguable that the second section of 32 H. 8, ch. 34, which gives the lessee and his assigns the same rights against the assignee of the lessor as against the lessor will produce the same result that follows from the subordinate nature of the lessee's estate in the situation just considered, and that since the covenant is made by the lessor for the purpose of benefitting the lessee's estate it is for this reason alone within the purview of the statute. So far as the decisions go those that deal with the liability of the assignee of the lessor under these circumstances hold him to be bound.[81]

Admitting that there may be covenants of this sort binding upon the assignee of the lessor although not affecting his rights or privileges as owner of the reversion, there is a further limitation upon this possibility that should be noticed. The act to be performed by the covenantor may be an act the locus of the performance of which is a matter of indifference (as a covenant to purchase the improvements), or it may necessarily be performable on the demised premises (as a covenant to install a heating plant), or it may necessarily be performable upon or the covenant may be to refrain from performance upon another specified piece of land. The first two cases present no difficulty once it is admitted that a covenant by the lessor may bind his assignees even though it does not limit his reversionary rights. As regards the third case the fact that the covenant is performable elsewhere should not affect the running of the benefit,

[81] Ante p. 647 and following. See also, Mansel v. Norton, L. R. 22 Ch. D. 769 (1883); Gerzebek v. Lord, 33 N.J.L. 240 (1869); Myers v. Burns, 35 N.Y. 269 (1866); Storandt v. Vogel & Binder Co., 140 N. Y. App. Div. 671 (1910).

[82] To this effect are Ricketts v. Enfield Churchwardens [1909] 1 Ch. 544; Morris v. Kennedy [1896] 2 I. R. 247; Norman v. Wells, 17 Wend. (N. Y.) 136, (1837), ante p 651 n. 65-66. Compare Thomas v. Haywood, L. R. 4 Ex. 311, (1869), ante p. 651 n. 64. In Dewar v. Goodman, [1907] 1 K. B. 612, [1908] 1 K. B. 94, [1909] A. C. 72, the facts were these: A leased to M on long term lease a tract of land containing 200 buildings with a covenant by M and upon condition that he should keep the buildings in repair. M sub-leased two buildings to X taking a covenant from X to keep the two buildings in repair and covenanting with X to perform so much of the covenants and conditions in the head lease as related to the premises not included in the sub-lease. All the covenants and conditions purported to bind and enure to assigns. A assigned to B, M to N, and X to Y. N did not keep in repair the buildings not included in the sub-lease and B entered and retook possession of the entire tract including the two buildings of the sub-lease. N was held not liable to Y for breach of covenant. That the act was not to be performed upon the premises included in the sub-lease was apparently regarded by some of the judges as determining its character as a personal covenant even with respect to the benefit.

existing obligation running from the covenantor to the covenantee. The covenant to pay rent is the most obvious illustration of this type of covenant. Whether historically the covenant to pay rent is not to be differentiated from the covenants hitherto considered raises a different question, but for purposes of the present classification, it belongs in this third group.[88] Another covenant by the lessee of the same species is the covenant to commit no waste. A similar covenant by the lessor is the covenant for title that the lessee shall quietly enjoy the demised premises.[89] This is the case where the scope of the express covenant is no greater than the common law liability of the lessor; if it is greater, the covenant falls in the second group already discussed.[90]

To summarize with respect to the first two groups, for as just pointed out, the third group is sui generis and requires no comment: One clean-cut category of covenants, viz., those restricting the real rights of the lessee, will run with the leasehold under all circumstances; a second group, those covenants by the lessee that benefit the lessor with respect to his reversionary estate, as defined herein, will run both with the leasehold and with the reversion. covenants by the lessee of the first sort ought not to run with the reversion unless they also satisfy the test of the second group; it is doubtful if this latter statement represents English law; there seems to be nothing in the American decisions opposed to it. Covenants by the lessor of the first class will almost universally satisfy, also, the test of the second class, i. e., benefit the lessee as such: they should be purely personal unless they do: this is true of the English decisions and in most cases of the American decisions:

[88] See Athoe v. Hennings, 1 Rolle 80, s. c. Bulst. 281 (1615). Cases holding the covenant to pay rent binding on the assignees of the lessee are Stevenson v. Lambard, 2 East 575 (1802); Webster v. Nicolls, 104 Ill. 160 (1882); Jones v. Gundrim, 3 W. & S. (Pa.) 531 (1842); so of a rent in kind, Beach v. Barons, 13 Barb. (N. Y.) 305 (1850). That the amount of rent is to be fixed by reference to extrinsic transactions does not affect the running of the covenant; thus: amount of rent fixed by amount of traffic over railroad, Hemingway v. Fernandes, 13 Sim. 228 (1842); Hastings v. Eastern Ry., [1898] 2 Ch. 674; see also Keppel v. Bailey, 2 M. & K. 517 (1834); fixed by amount of damage done other land of lessor, Norval v. Pascoe, 34 L. J. Chan. N. S. 82 (1864); fixed by amount of grain raised on land, Raphoe v. Hawksworth, 1 Huds. & Br. 606 (1828); fixed by amount of oil obtained from land, Fennell v. Guffey, 139 Pa. St. 341 (1890).

In Vyvyan v. Arthur, 1 B. & C. 410 (1823) the lease contained this clause after the reddendum, "doing suit to the mill of the said Thomas (the lessor) his heirs and assigns * * * by grinding all such corn there as should grow in or upon the close demised." Action was allowed by the assignee of the lessor of both mill and reversion against the administrator of the lessee for breaches both before and after the lessee's death. Unless the case is to be sustained upon the theory that this reservation amounted to a rent service, it seems wrong. See also Raphoe v. Hawsworth, supra.

[89] Shelton v. Cochrane, 3 Cush. (Mass.) 318 (1849).

[90] Ante p. 641 and following.

THE EXPENSIVE FUTILITY OF THE UNITED STATES TRADE-MARK STATUTE

EVERY lawyer of much experience knows the client who tiptoes into his office, closes the door carefully, and with a great show of secrecy announces that he has discovered or invented the best name for a soda cracker, a patent medicine, a soft drink, or what not, that human ingenuity ever conceived. He wants it protected before any one can steal it from him. He wants it "Copyrighted." This is the expression most commonly used. He seems to be under the impression that some incantation can be performed by means of which he will be able to secure to himself the exclusive use of his new name for crackers or whatever it may be. His lawyer is probably under some similar delusion and sets about to find a way to endow his client with his discovery, enormous secrecy being religiously maintained all the while. He too has a hazy notion that he can copyright something whereby his client can exclude the world—all of which is due to a very general ignorance of what a trade-mark is and how the right to one is acquired.

A trade mark is a means by which merchandise is identified. A copyright is the exclusive right to multiply copies of a published intellectual work. A trade-mark is purely utilitarian, its function is commercial, it may be the result of an accident, in any event it does not depend upon invention or discovery or intellectual creation and need not be original.[1] A work to be the subject matter of copyright must embody creative intellectuality and must be the result of the creative effort of the mind resulting in a work of literature, art, the drama or music.[2] Copyright is a statutory creation and the purpose is to encourage "learned men to write useful books," to reward genius by securing the fruits of it, to stimulate art and letters. The right to a trade-mark does not depend upon creation, or invention. A trade-mark is not a work of literature or art, its creator is not necessarily a genius; its primary function is not to please the ear or eye. or to give instruction, information or intellectual enjoyment, but to indicate in an unmistakable fashion who is the maker or seller of the merchandise to which it is attached; and finally the right to it is not statutory but is a common

[1] Trade-Mark Cases, 100 U. S. 82.

[2] Trade-Mark Cases, 100 U. S. 82; Mott Iron Works v. Clow, 82 Fed. 318; Lithographic Co. v. Sarony, 111 U. S. 53, 58.

ments. No mark by which the goods of the owner of the mark may be distinguished from other goods shall be refused registration as a trade-mark on account of the nature of such mark unless (a) is immoral or scandalous; (b) consists of or comprises the flag or coat of arms or other insignia of the United States, or of any State, or municipality, or of any foreign nation, or the name or emblem of certain societies, provided that trade-marks which are identical with a registered or known trademark owned and in use by another and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trademark owned and in use by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers shall not be registered. No mark which consists merely in the name of an individual, firm, corporation or association not distinctively cast or in association with a portrait is registrable, neither are marks which consist merely in words or devices which are descriptive of the goods upon which they are used or of the character or quality of such goods, or are merely a geographical name or term. No portrait of a living individual may be registered except by consent of such individual evidenced by an instrument in writing, "and provided further that nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived in commerce with foreign nations or among the several States, or with Indian tribes, which was in actual and exclusive use as a trade-mark of the applicant or his predecessors from whom he derived title for 10 years next preceding February 20, 1905."

Upon the filing of an application for registration and payment of the fees, the Commissioner of Patents is required to cause an examination to be made, and if after such examination it shall appear that the applicant is entitled to have his trade-mark registered under the provision of the Act, the Commissioner shall cause the mark to be published at least once in the Official Gazette of the Patent Office. Any person who believes he would be damaged by the registration of a mark may oppose the same by filing notice of opposition, stating the grounds therefor in the Patent Office within thirty days after the publication of the mark sought to be registered. If no notice of opposition is filed within such time, the Commissioner shall issue a certificate of registration. If on examination an application is refused, the Commissioner shall notify the applicant, giving him his reasons therefor. In all cases where notice of opposition has been filed the Commissioner of Patents shall notify

Such assignment is void as against any subsequent purchaser for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from its date.

A certificate of registration (with certain exceptions) remains in force for twenty years and may be renewed from time to time for like periods. Certificates of registration are prima facie evidence of ownership of the mark registered. "Any person who shall without the consent of the owner thereof reproduce, counterfeit, copy, or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy or colorable imitation in commerce among the several states or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs."

"That the several courts vested with jurisdiction of cases arising under the present act shall have power to grant injunctions, according to the course and principles of equity to prevent the violation of any right of the owner of a registered trade-mark, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for wrongful use of a trade-mark the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction." Courts of equity are given the same power to increase damages, as is given for increasing damages found by verdict in actions of law; and in assessing profits the plaintiff is required to prove defendant's sale only; defendant must prove all elements of cost which are claimed.

The Federal Courts are given jurisdiction of all suits at law or in equity respecting registered trade-marks without regard to the amount in controversy. The successful plaintiff may have delivered up for destruction all infringing marks, labels and the like.

Whenever there are interfering registered trade-marks, any person interested in any one of them may have relief against the inter-

that the act does not create anything and is wholly unlike the patent and copyright statutes in this respect. It is then provided that certain marks shall not be registered and that nothing shall prevent the registration of any mark actually and exclusively used as a trade-mark by an applicant or his predecessor in interstate, foreign or Indian commerce for ten years next preceding February 20, 1905. This provision was adopted from the English act and was spoiled in the taking. In the English act the phraseology is understandable and a definite purpose was sought to be accomplished; to permit the registration of nontechnical trade-marks which had long been in use.[12] The mischievous and senseless insertion of the word "exclusive" in our statute effectually interferes with its efficiency and destroys the benefits which are made possible by the English act. It was first held that the word "exclusive" in our statute meant the right to exclude,[13] but later that it means exclusive in fact,—sole—and that any use by others than the applicant of the mark sought to be registered even in purely a descriptive sense, or even an infringing use prevents registration under this provision.[14] No one seems to know what this section of the act means or what are its results. The Courts are hopelessly at variance. Is it intended to create a trade-mark out of what is not and cannot be a trade-mark?

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[12] "Provided that any special and distinctive word or words, letter, figure or combination of letters or figures or of letters and figures, used as a trade mark before the thirteenth day of August, one thousand eight hundred and seventy-five may be registered as a trade-mark under this part of this act." Sec. 64, Act of 1883. (Sebastian on Trade Marks, 4 Ed. p. 331.) The act of 5 Edw. VII C. 15, (1905) contains this language (§ 9): "Provided always that any special or distinctive word or words, letter, numeral, or combination of letters or numerals used as a trade mark by the applicant or his predecessors in business before the thirteenth day of August one thousand eight hundred and seventy-five, which has continued to be used (either in its original form or with additions or alterations not substantially affecting the identity of the same) down to the date of the application for registration shall be registrable as a trade mark under this Act." Kerley & Underhay, "The Trade Mark Act of 1905" p. 23.

For Constructions see: Kerley on Trade Marks, (2nd ed. 1901) p. 187; Re Hopkinson's Trade Mark, (1892) 2 Ch. 116, 9 R. P. C. 102, 107; Bodega Co. v. Owens, 6 R. P. C. 236, 241, 242; Reinhardt v. Spalding, 49 L. T. Ch. 57, 38 W. R. 300, Austen-Cartmell Digest 285; Campania General v. Rehder, 5 R. P. C. 61, 65.

[13] Ex Parte Cahn Belt & Co., 118 O. G. 1936, C. D. (1905) 422; Ex Parte Yale & Towne Mfg. Co., 127 O. G. 3641, C. D. (1907) 122; Beech Hill Distillery Co. v. Brown Forman Co., 128 O. G. 1293, C. D. (1907) 146; Worcester Brewing Corporation v. Reuter, 128 O. G. 1687, C. D. (1907) 151; Capewell Horse Nail Co. v. Mooney, 167 Fed. 575, 592.

[14] Worcester Brewing Corporation v. Reuter, 133 O. G. 1190, 30 App. D. C. 428; Wrigley v. Norris, 152 O. G. 488; In re Wright & Taylor, 148 O. G. 834; Duluth Superior Milling Co. v. Koper, 167 O. G. 245; Becker v. Gambrill, 179 O. G. 1111; Sears v. Brakeley, 178 O. G. 885, 180 O. G. 882; Gambrill v. Waggoner Gates Milling Co., 181 O. G. 821.

For other cases see Underwood Card Digest of Trade Mark Cases No. 2975, Century Digest, Title Trade Marks, Sec. 14, Decennial Digest, Sec. 10.

and appropriated to merchandise of the *same descriptive properties;* in other words, infringing marks are not registrable, and in defining infringement the language used being "anyone who shall without the consent of the owner reproduce, counterfeit, copy or colorably imitate any such trade-mark and affix the same to merchandise of *substantially the same descriptive properties* as those set forth in the registration, * * *" The phrase "*descriptive properties*" has been the trouble maker. A virtuoso in vagueness must have conceived it.[20] The rule accepted by the courts in declaring the common law was understandable enough. A defendant could not escape a charge of trade-mark infringement by contending that his goods upon which he used the complainant's trade-mark were not identical with the complainant's. The false representation which the courts aim to suppress is a false representation as to the commercial origin of merchandise, so where the goods of the parties are of such a character that from the use of the same mark on both, an ordinary buyer would be likely to assume that they emanated from the same producer, the use of the mark by the defendant on such goods is restrained because it is calculated to represent that his goods are of the complainant's manufacture, or connected in some way with the complainant,—that there is a false representation as to their origin. The use of the complainant's mark upon defendant's goods enables the defendant to profit by the complainant's reputation and unfairly to secure for his productions a credit and salability to which they are not entitled. As Judge COXE once remarked:[21]

> "But it is urged that as the complainant did not manufacture tooth brushes at the time the defendants entered the field, it cannot be injured by the sale of tooth brushes by others. We do not think the conclusion follows. The complainant had acquired a reputation as the manufacturer of high grade toilet brushes; it certainly had a right to include tooth brushes at any time, and, when it did so, purchasers who were acquainted with the high character of its goods would quite likely purchase its tooth brushes, deeming its previous reputation a guaranty of excellence.
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> The public is deceived by such conduct, the reputation of

[20] This phrase was in the Act of 1870 (Sec. 4942, Rev. Stat. 16 Stat. at L. 211), in the act of 1876—(19 Stat. at Large, 141), and also in the Act of 1881 (Sec. 7) 21 Stat. at Large, 503), 7 Fed. Stat. Ann. p. 326-333). It was probably blindly copied from one into the others.

[21] Florence Manufacturing Co. v. Dowd, 178 Fed. 73. See also Mr. Justice Blatchford's discussion in Collins & Co. v. Oliver Ames & Co., 18 Fed. 561; Church v. Russ, 99 Fed. 276; Carroll v. Ertheiler, 1 Fed. 688.

but later for some inexplicable reason there was a change, until it seemed to be held that two articles of merchandise were not of the same descriptive properties unless they are likely to be confused as commodities. That is oil paint is not of the same descriptive properties as water paint or kalsomine, because a purchaser who wants to buy oil paint is not likely to buy kalsomine thinking he is getting oil paint, and hence the owner of a trade-mark for oil paint cannot complain of its use by a competitor on kalsomine.[22]

To quote the language of the Court of Appeals in a recent case:[23]

> "This is a stautory proceeding and we must of course be governed by the provisions of the statute relating thereto. * * * * Unless there are no distinguishing characteristics between the goods of the respective parties we have no authority to interfere.
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> It requires altogether too great a stretch of the imagination to conclude that any one calling for breakfast food would accept salted codfish without knowing the difference."
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> * * * * * *

If this be the law it is legitimate for one to use as a trade mark for canned peaches, a name or device made famous by another as a brand for canned pears, because surely it is unlikely that a person wishing to buy peaches would buy pears thinking he was getting peaches.

Within the year there has been still another change until it appears now as if there is a reversion to the first rule—all of which does not clarify the legal situation or help lawyers advise their clients.[23a] Some of the decisions showing the varying and confusing holdings under this section are given in the note.[24]

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[22] Muralo Co. v. National Lead Co. C. D. (1911), 324, 165 O. G. 475, 36 App. D. C. 541.

[23] Educator Food Co. v. Sylvanus Smith & Co., 175 O. G. 268, 37 App. D. C. 107, C. D. (1912) 440.

[23a] A reversion to the old rule seems to be intimated in Woven Steel Hose & Rubber Co. v. Keasbey & Matteson Co., 198 O. G. 495, and in H. Wolf & Sons v. Lord & Taylor, 202 O. G. 632, where the doctrine announced in Educator Food Co. v. Sylvanus Smith & Co. (note 23 above) seems to be repudiated though that case and other like it are not in terms overruled.

[24] In the following cases the marks were the same or so nearly alike that one may be assumed to infringe the other. The question presented was whether the goods of the parties on which the common mark was used were merchandise of the same "descriptive properties."

In Ex Parte Crown Distilleries, 98 O. G. 2590, C. D. (1902) 115, it was held that whiskey and fruit brandy are merchandise of the same descriptive properties.

In Vanderbergh & Co. v. Belmont Distillery Co., 107 O. G. 2235, C. D. (1903) 496, it was held that whiskey and gin are not merchandise of the same descriptive properties, while in Bowler v. Eager, 148 O. G. 571, it was held that they are. In

If the purpose of the body of the law which has grown up dealing with unfair trading, whether by imitation of trade-marks or otherwise, is to secure to the honest trader the good will of his business and to protect it against the injurious assaults of fraudulent competitors, this statute designed as an aid in the enforcement of that law is singularly inefficient. And this inefficiency of which the foregoing are examples is directly due to the slatternly draftsmanship of the act and its awkward phraseology.

It will be observed that three proceedings are provided for within the Patent Office: oppositions, interferences and cancellations. A notice of opposition may be filed by anyone who deems himself injured by an unissued published application for registration and must be filed within thirty days from publication of the mark in the Official Gazette; a cancellation proceeding may be instituted at any time by one who would be damaged by a mark which has been registered; and interferences are declared by the Patent Office, sometimes at the request of a party and sometimes of its own motion between a registration and an application, or two or more pending applications to register the same or similar trade marks. The procedure in general is the same in all of these proceedings. In opposition and cancellation cases, more or less formal pleadings are filed. A notice of opposition or petition for cancellation is first exhibited, setting out the grounds for the proceeding; the applicant or registrant, as the case may be, then answers or is defaulted, and issue is finally joined. In interference cases the Patent Office formulates the issue in a word or two, usually a notation on the bottom of the paper declaring the interference in some such way as this "Issue the word Quaker for rolled oats" or more vaguely still "Issue the marks claimed for the goods specified." The procedure in all these cases follows the equity practice in Federal Courts, except that all testimony is taken by deposition, commonly before a Notary Public who has neither the power nor usually the inclination to limit the examination. The records therefore are frequently scandalous in their prolixity and are full of incompetent testimony, supposition and surmise, long-winded objections, stump speeches and altercations between counsel, and in general are monuments to the evils of unsupervised testimony, and

mixed piece goods, Jackson v. Rogers, 174 O. G. 1025, Ex parte Rosenthal, 181 O. G. 541—Canned fish and canned salmon, Ex parte Sims, 179 O. G. 285; canned fruits and vegetables and pickles, Kidd v. Reuter, 2 T. M. Rep. 257; Sawing machines and saws, Ex parte Crescent Machine Co., 2 T. M. Rep. 257. While in Consumers Co. v. Hydrox Chemical Co., 182 O. G. 722, Hydrox Peroxide of Hydrogen and Hydrox distilled water were held not of the same descriptive properties.

See Underwood's Card Digest of Trade Mark Cases, Nos. 395, 395a.

is that they get nowhere. They are imitation law suits, sham battles making a deal of noise and smoke but where no one is hurt. But the ammunition costs as much as if the fight were in earnest.

It may be that some day a case will get to the Supreme Court and that court will construe the act in a way to make the registration statute a virile thing, but as it is now interpreted it is an expensive and misleading farce.[27]

The present trade-mark act is, in my judgment, wrong in principle. As long as the common law prevails in this country the right to a trade-mark can depend only upon priority of adoption followed by open, notorious and continuous use. The important inquiry to be made when the adoption of a new mark is under con-

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mark exists at common law and is independent of the statutes regulating registration. Under the present trade-mark act a certificate of registration is prima facie evidence of ownership; but this evidence may be contradicted in court, and the apparent right of the registering party shown not to exist. Registration cannot confer a title to a trade-mark, if some other individual has acquired a prior right by adoption and use; nor can it vest a title in the registrant as against another's common-law title. Glen Cove Mnfg. Co. v. Ludeling, (C. C.) 22 Fed. 823; La Croix v. May, (C. C.) 15 Fed. 236; Ohio Baking Co. v. National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116. The fundamental inquiry, therefore, in this case (as in most others relating to property in trade-marks), is: To which of the contending parties should judicial protection be granted upon the ground that he first produced or brought into the market an article of consumption that has found favor with the public, and first affixed thereto some name or symbol which serves to distinguish it as his? * * * The owner of a trade-mark has no estate in the trade-mark as such, nor does registration confer upon him any monopoly. His position bears no resemblance to that of a patentee. He is entitled to legal protection for his trade-mark only because by granting the same the courts protect the business designated or indicated to the public mind by the trade-mark." La Croix v. May, 15 Fed. 236; Luyties v. Hollandeer, 30 Fed. 632.

Glen Cove Co. v. Ludeling, 22 Fed. 823, 826, Wallace, J., "The defendant insists that his certificate of registry is a decision of the commissioner of patents that he is entitled to use the word 'Maizharina,' in connection with his picture, as a trade-mark, notwithstanding the complainant's trade-mark is the word 'Maizena;' which is a judicial determination, and is conclusive as between the parties. The sufficient answer to this proposition is that the act of Congress makes the registration of a trade-mark only prima facie evidence of ownership. Section 7. The inquiry is therefore always open as to the validity of the title to a trade-mark evidenced by the registration. The registration could not confer a title to the trade-mark upon the complainant if some other corporation or individual had acquired a prior right by adoption and use; nor could it vest defendant with a title as against the complainant's common-law title. In this view, the only office of a registration is to confer jurisdiction upon the court to protect a trade-mark when the proprietor has obtained the statutory evidence of title, and the only function of the commissioner of patents is to determine whether an applicant has a presumptive right to the trade-mark. An order is granted for an injunction, in conformity with this opinion."

Hennessy v. Braunschweiger, 89 Fed. 664. Hawley, J. (668): "It is only necessary to add that under the provisions of the act of 1881 the registration of a trade-mark is only prima facie evidence of ownership, and is not conclusive or binding upon the courts as to the right of a party to its exclusive use. Browne, Trade-Marks, Sec. 339; Manufacturing Co. v. Ludeling, 22 Fed. 824, 826."

[27] In Davids v. Davids (April 27, 1914) 202 O. G. 952, that court has upheld and strongly construed the so-called "ten year proviso."

only people to suffer would be infringers, who now seek to profit by preying on the trade-marks of more successful traders, and lawyers of a certain type properly classed with trade-mark pirates. who now make a living by fostering the abuses made possible by our present trade-mark registration statute. The infringer, of course, deserves no sympathy—the lawyers who would be hurt by the repeal of the present act may be expected to complain bitterly. In this respect one is reminded of Mr. Vholes.

> "'Repeal this statute, my good sir?' says Mr. Kenge to a smarting client, 'repeal it, my dear sir? Never, with my consent. Alter this law, sir, and what will be the effect of your rash proceeding on a class of practitioners very worthily represented, allow me to say to you, by the opposite attorney in the case, Mr. Vholes? Sir, that class of practitioners would be swept from the face of the earth. Now you cannot afford —I would say the social system cannot afford—to lose an order of men like Mr. Vholes. Diligent, persevering, steady, acute in business. My dear sir, I understand your present feelings against the existing state of things, which I grant to be a little hard in your case; but I can never raise my voice for demolition of a class of men like Mr. Vholes.' The respectability of Mr. Vholes has even been cited with crushing effect before Parliamentary committees, as in the following blue minutes of a distinguished attorney's evidence. 'Question (number five hundred and seventeen thousand eight hundred and sixty-nine). If I understand you, these forms of practice indisputably occasion delay? Answer. Yes, some delay. Question. And great expense? Answer. Most assuredly they cannot be gone through for nothing. Question. And unspeakable vexation? Answer. I am not prepared to say that. They have never given me any vexation; quite the contrary. Question. But you think their abolition would damage a class of practitioners? Answer. I have no doubt of it. Question. Can you instance any type of that class? Answer. Yes, I would unhesitatingly mention Mr. Vholes. He would be ruined. Question. Mr. Vholes is considered, in the profession, a respectable man? Answer'—which proved fatal to the inquiry for ten years—'Mr. Vholes is considered, in the profession, a most respectable man.'"

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orders, now seeks to recover) should be regarded as liquidated damages in case of plaintiff's default.

The contract also provided inter alia that "The distributors (defendant company) reserve the right to change all prices and discounts mentioned in this contract on two weeks notice," * * * "That no order * * * shall be binding on said distributors * * * unless it is accepted by the distributors at least 30 days prior to date of delivery," and "That this contract shall expire by its own limitation on September 1st, 1911, or may be cancelled by either party upon thirty days' written notice given to the other by registered letter, and such cancellation of this contract shall operate as a cancellation of all orders * * * which may have been received from said dealer and which have not been shipped prior to the date when such cancellation takes effect but shall not cancel any standing accounts for automobile parts, etc."

From these provisions it may be readily seen that the defendant was not bound to do anything by its apparent promise to sell cars to the plaintiff. It could at any time change the prices and discounts; it could give notice of cancellation of the contract and could refuse to fill and ship any orders for cars until after the date when cancellation was to take effect, which would, by the terms above set forth, operate to cancel the orders not shipped. In substance the contract was very similar to those in the cases of *Velie Motor Car Co.* v. *Kopmeier*, 194 Fed. 324, and *Oakland Motor Car Co.* v. *Indiana Automobile Co.*, 201 Fed 499, later referred to.

The prevailing opinion in the principal case upheld, in effect, the defendant's contention that plaintiff had broken a contract for the sale of chattels and was not entitled to recover the part of the price he had paid. The court held that, whether this agreement was mutual or not at its inception, it had *at its expiration* become a valid contract because the parties had, during its life, regarded it as good and had held themselves ready to perform according to its provisions; and when it expired it had been so executed on the part of the party originally not bound—the defendant —that there was a consideration for the promise of the plaintiff to buy cars, and therefore, there being a valid contract of sale, the plaintiff could not recover what he had paid.

Justice Goss strongly dissented, pointing out that the defendant was not bound at the inception of the contract by any enforceable legal obligation, and that nothing had since occurred or been done which by any stretch of imagination could be called a performance by the defendant, such as would remedy the lack of an enforceable obligation.

On principle it is believed that the dissenting opinion presents the better view and states the law correctly, and that the prevailing opinion cannot be supported on the grounds stated therein; authority, presently to be noted, supports this conclusion. At the outset, it will doubtless be admitted—as it is impliedly, at least, conceded in the opinion of the court in the principal case—that where a contract is executory and consists of mutual promises, each of which is the consideration for the other, these promises must, to render the contract valid, result in an immediately binding obligation on

purchase thereunder, leaving no basis for implying a promise on the part of the defendant to sell the 50 cars and no liability for refusal to make further sales to the plaintiff." The decision was further fortified by the fact that the contract was held bad for uncertainty.

The decision in the case of *Goodyear* v. *Koehler Sporting Goods Co.*, 143 N. Y. S. 1046 (the comment upon which in 12 MICH. L. REV. 321 is quoted from by Justice Goss in his dissenting opinion) is merely a reiteration of the above two decisions and reaches the same results. The facts differed in that six of the twenty cars the agent agreed to buy were sold and delivered, and in the contract the manufacturer boldly stipulated for exemption from all liability whatsoever under the contract. The agent as in the principal case, brought his action after the expiration of the contract for the balance of his deposit, and was allowed to recover. As to the efficacy, as consideration, of the appointment of plaintiff as "agent," see the *Velie* and *Goodyear* cases (cited above) and *Cool* v. *Cuningham*, 25 So. Car. 136.

Assuming, then, that the contract in the principal case was void for want of mutuality, can we accept the court's decision that "to the extent that the parties acted under and performed the same, it is valid and enforceable"? This compels an inquiry into the legal effect of an agreement which, for want of mutuality, fails of being a contract. Two positions have been taken on this point. First, that it has the effect of a continuing offer by the party, if any, whose engagement is binding in terms, which may, prior to revocation, be accepted by the other party, a contract resulting. Second, that no offer is involved, but that the agreement amounts, at most, to a preliminary negotiation looking to the formation of a future contract or contracts by offer and acceptance. PAGE, CONTRACTS, § 307. The latter position would seem the more sound. Here for example, the plaintiff offers to buy cars and act as agent; the defendant also proposes terms. The whole agreement is reduced to writing and the parties make promises to each other which are not legally binding because of lack of consideration. No offer by the plaintiff now exists, because all proposals by both parties have been merged in the agreement as completely as if it had produced a valid contract. *Vogel* v. *Pekoc*, 157 Ill. 339; *Hunt* v. *Livermore*, 5 Pick. 395, 397; *Davie* v. *Lumbermen's Mining Co.*, 93 Mich. 401; *Strong* v. *Sheffield*, 144 N. Y. 392; *Gulf, Colorado & Santa Fe R. R.* v. *Winton*, 7 Tex. Civ. App. 57. If the plaintiff thereafter ordered under the agreement, this would constitute an offer to buy, which upon acceptance by delivery of the cars, would make a unilateral contract of sale of the cars delivered. Or the defendant might have tendered cars to plaintiff, which would amount to an offer to sell, and, upon acceptance of the cars, would give rise to a like contract of sale. In both instances the offer would, as respects its terms, be construed in the light of the prior written agreement, and to this extent the prior agreement would be validated by the subsequent dealings.

But even if we grant the contention of the defense that the agreement in the principal case amounted, in legal effect, to a continuing offer such as might, if accepted by performance, be converted into a unilateral contract,

CONSTITUTIONALITY OF MINIMUM WAGE LAWS.—During the year 1913 the legislatures of many states, realizing the economic and social evils resulting from the underpayment of women employees, and following the example of England, Germany, New Zealand and Austria, enacted legislation establishing a minimum wage for such employees. See the Laws of 1913 in the following states: California (Ch. 324); Colorado (Ch. 110); Minnesota (Ch. 547); Oregon (Ch. 62); Utah (Ch. 63); Washington (Ch. 147); and Wisconsin (ch. 712). The act passed by the Nebraska Legislature (Ch. 211), is very similar to the Massachusetts act, Laws 1912, Ch. 706 as amended by Laws 1913, Ch. 672, in that these acts are not compulsory. In Connecticut, Indiana and Ohio commissions are investigating the problem and it is likely that these investigations will result in legislation upon the subject. And in New York and Michigan provisions have been made for the investigation and study of the question.

The vital question in regard to these acts is their constitutionality, and a decision upon this point has been awaited with great interest. The case of *Stettler* v. *O'Hara et al*, 139 Pac. 743, decided by the Supreme Court of Oregon, upholds the constitutionality of such legislation, and contains an able treatment of a question of first impression. Prior to this decision the only discussion of the question was contained in dicta of cases where the question directly before the court was the power of the legislature to fix a minimum wage for workmen employed by private persons upon a public work, or for employees or officers of a municipality. In these cases it was assumed that the legislature had no right to fix wages in strictly private employment. See *People* v. *Coler*, 166 N. Y. 1.

The Governor of Oregon, pursuant to Laws 1913, Ch. 62, appointed the defendants members of the Industrial Welfare Commission. A conference was held, recommendations made and approved, and an order issued, all the steps being taken in accordance with the above act. The part of this order, material to this discussion, provided, in the case of women employees in certain factories, that nine hours a day and fifty hours a week should be the maximum hours of employment, that there be a noon hour lunch period of forty-five minutes, and that there be paid a minimum wage of $8.64 a week for an experienced adult woman worker in such establishments. The plaintiff brought suit to annul and vacate this order, but the court held the legislation to be a valid exercise of the police power of the state.

The basis for this decision is shown by the words of the court. "Every argument put forward to sustain the maximum hours law, or upon which it was established, applies equally in favor of the constitutionality of the minimum wage law as also within the police power of the state and as a regulation tending to guard the public morals and the public health."

It is apparent from that portion of the opinion first quoted that the decision rests upon the assumption that the regulation of hours of employment of women is a valid exercise of the police power. The position of the court is supported by authorities most numerous, among which is *Muller* v. *Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. 304, 13 Ann. Cas. 957. This case also involved the constitutionality of an Oregon statute fixing the

The rules of law applicable to the question of a minimum wage are few and well settled. These rules are best set forth in *Lochner* v. *New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. 539, and are as follows. The right to purchase and sell labor is a part of the "liberty" protected by the fourteenth amendment. This right to "liberty" is, however, subject to such reasonable restraint of action as the state may impose in the exercise of the police power for the protection of the health, safety, morals and general welfare. The legislation enacted by virtue of the police power must have a direct relation to the end to be attained, reasonably adapted to accomplish that end, and the end itself must be appropriate and legitimate. And these minimum wage laws must be sustained unless the court can find that there is no fair ground, reasonable in and of itself, to say that there is material danger to the public health or safety, or to the health or safety of the employees, or to the general welfare, in permitting women to work in a manufacturing establishment for less than a weekly wage of $8.64.

There is no doubt that the purpose of the minimum wage legislation for women is within the police power of the state, in that the aim of such legislation is to better the health, morals and welfare of the community by improving the conditions of women employees in certain occupations. *Barbier* v. *Conolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. 357; *Webber* v. *Virginia*, 103 U. S. 343, 26 L. Ed. 565.

The real question, then, is whether or not such legislation is directly related to the end to be accomplished and reasonably adapted to attain that end. From the investigations carried on in both this country and abroad the result has been that the commissions have reported a direct connection between wages on the one hand, and health, safety, morality and general welfare among employees on the other hand in many occupations. And many commissions have further reported that in certain industries the women employees were receiving less than the cost of living and the reasonable provision for maintaining their health. The realization of the number of underpaid women employees, the effect of low wages upon health, morality and welfare, and the particular need of protecting women as set forth in *Muller* v. *Oregon*, supra, induced the legislatures of many states to pass these minimum wage laws. As the commissions of various states presented reports sufficiently convincing to cause the legislators to act, this fact would tend to show that there was a real connection between wages paid to women in certain occupations and health and morality. These facts should have a great influence upon the courts as tending to uphold this legislation, particularly so in view of the rule applicable to such a situation. For if the end which the legislature seeks to accomplish is within its power, but the means employed are not the wisest or the best, yet if those means are not plainly and palpably unauthorized by law the court can not interfere. *Lochner* v. *New York*, supra, *Patterson* v. *Kentucky*, 97 U. S. 501, 24 L. ed. 1115.

The holding of the Oregon Court in *Stettler* v. *O'Hara et al* is an excellent illustration of the fact that courts not only progress but keep abreast

defendant liable said, "The law requires from all persons, including those who render gratuitous services, reasonable care for the safety of life and person." The second case is that of *Patnode* v. *Foot*, 153 App. Div. 494, 138 N. Y. Sup. 221, in which defendant was held liable on the authority of the case of *Pigeon* v. *Lane*, 80 Conn. 237, in which the plaintiff, riding on invitation, was declared to be a licensee, and in such case it was said, "The defendants could only be held for their active negligence in causing the injury * * * by which the danger of riding upon the conveyance was increased or a new danger created, while plaintiff was riding under such license." No statement in the case warrants the rule stated by the New York case to be announced therein and adopted by the Kentucky court in the instant case to the effect that the licensor is bound to use ordinary care to avoid increasing the danger to the licensee or creating a new one. The word used is that the defendant was to be liable for "active" negligence by which the danger of riding upon the conveyance was increased, or a new danger created.

Active as distinquished from passive, negligence, means an affirmative act, an act of commission in contradistinction to an act of omission. *Felton* v. *Aubrey*, 20 C. C. A. 436, 74 Fed. 350. This distinction is recognized in many cases where the duty of the licensor to the licensee was involved, and the rule announced is that the licensor owes no duty of active vigilance to prevent injury to the licensee, but only to refrain from intentionally or wantonly injuring him. *Nicholson* v. *Erie R. Co.*, 41 N. Y. 525; *Southcote* v. *Stanley* 1 Hurlst. & N. 246; *Benson* v. *Baltimore Tr. Co.*, 77 Md. 535, 20 L. R. A. 714; *Cole* v. *Vilcutt & Sons Co.*, 214 Mass. 454.

The rule has been announced by the Kentucky court in the case of *Indian Refining Co.* v. *Mobley*, 121 S. W. 657, 24 L. R. A. (N. S.) 497, where plaintiff, while a licensee upon defendant's premises, was injured by the explosion of a steam pipe caused by defendant's negligence. In the opinion denying a right of recovery, it is said, "The generally recognized and established rule is that liability attaches only where some duty is owed, and that a licensee, in entering upon the premises of another, does so at his peril, the owner of the premises being liable only for injuries resulting from wilful acts." And the court quotes with approval the paragraph in COOLEY, TORTS, cited above. It will be seen then that this court recognizes the established doctrine that the licensor's duty to the licensee is to refrain from wilfully or intentionally injuring him. But that this is far different from imposing upon him the duty to use ordinary care not to increase the danger to the licensee or to creat a new one is obvious. The difference between these two degrees of duty is clearly stated in a recent case in Massachusetts, *O'Brien* v. *Union Freight Co.*, 209 Mass. 449, 36 L. R. A. N. S. 492, where, in the course of the opinion denying a right of recovery to the licensee, Justice HAMMOND says, "But it is urged by the plaintiff that this principle is applicable only where the negligence is passive, and that where the danger is caused by an active act which is negligent the owner is answerable, or in other words that the owner or occupier owes to the licensee the duty to refrain from injuring him by an actively negligent act. If the term "act-

WHEN DOES AN INJURY ARISE "OUT OF" A SERVANT'S EMPLOYMENT?—Workmen's Compensation Acts have given rise to many nice questions as to the meaning of many terms used in the statutes, and the decisions on such questions have unfortunately, not always been uniform or even reconcilable. A recent English case *Parker* v. *"Black Rock"* (*Owners,*) [1914] 2 K. B. 39, 83 L. J. K. B. 421, presents a question which has been one of peculiar difficulty for the English courts. The facts and decision of the case are as follows:

A fireman was engaged on a ship under articles in which the Board of Trade scale of diet was struck out and "Crew to furnish their own provisions" was inserted. The crew had to leave to go ashore to buy food when necessary. When the ship was in port moored alongside a pier the fireman went ashore, bought provisions, and while returning at night direct to his ship fell into the water somewhere off the pier and was drowned. While he was away the ship had moved to another pier. The night was dark and a heavy gale was blowing. Held (COZENS-HARDY, M. R., and EVE, J.; Sir Samuel EVANS, P., dissenting), upon the construction of the articles that there was no express contract by the deceased to provide himself with provisions and that no such contract could be implied; that the deceased was about his own business and not about the ship's business; and that the accident did not therefore arise "out of" the employment within section 1, sub-section 1 of the Workmen's Compensation Act, 1906.

The question for decision was whether the accident which caused the death of the appellant's husband arose "out of" his employment, as it was not contended that it did not arise "in the course of" his employment. The apparent basis for the majority opinion was that there was no contractual obligation by the deceased fireman towards the ship owners that he would provide his own provisions; that in going ashore to order provisions the man was only acting in his own interest and for his own purpose. In meeting this objection the dissenting opinion observes—"In one sense his buying of provisions was his own business; but in another, and a very real, sense it was part of the ship's business that he should procure the food necessary to enable him to do his work as one of the crew, and so perform his share in the work without which the ship's voyage could not be completed or continued. His employment was continuous during night and day, on board and on shore, unless he travelled outside the employment for purposes foreign to it. * * * If there was no such express contract by him, such a contract would be implied. But whether there was such a contract, express or implied, or not, it was a natural and a necessary incident of his employment that the seaman should provide his own food; and in going on shore to purchase it, and in returning to the vessel after doing so, he was doing a thing which was not only incidental, but essential to his employment, and without which his employment and his work as one of the ship's crew would come to a speedy and unhappy end." Sir Samuel EVANS, President, then proceeds to show that the insertion "Crew to provide their own provisions" was a contract between the master and the crew and gave rise to an obligation on the part of the crew to furnish their own food.

of Lords that the accident arose out of and in the course of the man's employment and that his dependent was entitled to compensation. See also *Kearan* v. *Kearan*, 45 Irish L. T. 96; *Keyser* v. *Burdick & Co.*, [1910], 4 B. W. C. C. 87.

In *Robertson* v. *Allan Bros. & Co.*, [1908], 98 L. T. 821, a steward of a steamship which was lying at a port went on shore in the evening as he was permitted to do. Returning to the ship late in the evening, as was alleged in a state of intoxication, he attempted to board the ship by using the cargo skid or stage, instead of the gangway. In doing so he slipped and fell and received injuries for the effect of which he died. It was held that the injury arose out of and in the course of the employment.

These cases suffice to show that although as a general proposition the time while a man is going to and from his work is no part of his employment, there are enough exceptions to this principle to make it a pregnant source of controversy. In one of the cases cited by the court in support of the decision in the principal case, the second engineer of a steam trawler, which was in dry dock at the time, went ashore to his home for dinner. As he returned to the ship he fell into a dry dock and was killed. It was held that the accident did not arise out of and in the course of his employment. *Gilbert* v. *"Nizam" Steamship*, 79 L. J. K. B. 1172. The court observed—"I decline to assent to the view that a ship is in a different position from a factory for this purpose. This is a simple case where a man has been to his home to get his dinner, and has met with an accident on his way back to the scene of his labors." See also *Hewitt and Others* v. *"Duchess" Owners*, [1910], 120 L. T. 204. Yet it can readily be seen that there is an essential difference where a ship is in a dry dock and where it is on an ocean voyage; in the first case it is not within the course of the employment to take one's meals on shipboard because of the very position of the ship, while in the latter case, from the very nature of the employment, it is contemplated by both master and servant that the necessary meals are to be partaken on board. And moreover in the *Moore case*, supra, Lord Justice Fletcher MOULTON, in referring to the nature of the employment of a seaman on an ocean voyage, says;—"His employment is continuous and there is no moment when he, either on board or on shore, is not bound to obey the captain's orders." It logically follows that if the seaman is subject to the commands of the captain even when he is on shore, and he is doing nothing unlawful, then he must be subject to the rights and obligations of his employment, if engaged in an act incidental to such employment, and it surely cannot be denied that the acquisition of necessary provisions is at least incidental to the employment.

The only cases which seem to support the principal case are those where the employee went ashore for his own purposes, or more precisely for purposes in no way connected with or incidental to the employment. The present case is more strongly in favor of the applicant than any of these cases for the reason that the deceased fireman went ashore in pursuance of a duty arising either under an express or implied contract, or at any rate a duty not only to himself, but to his employers as well, the performance of which

RECENT IMPORTANT DECISIONS.

BANKRUPTCY—PENALTIES NOT ALLOWABLE CLAIMS.—The state of New York recovered a judgment for a penalty for the violation of a milk law, against a partnership which was later adjudicated bankrupt. The bankrupts filed a petition asking that the state be stayed from enforcing the said judgment until twelve months after the adjudication or until the question of the discharge be determined. *Held,* the penalty recovered by the state is not a debt that can be proved or allowed as such against the bankrupts' estate, except to the extent of the pecuniary loss sustained by the act out of which the penalty arose, together with costs and interest, and that the state's suit should therefore not be stayed. *In re Abramson,* (C. C. A., 1914) 210 Fed. 878.

Owing to the fact that such a claim is a fixed liability at the time of the filing of the petition there is much ground for argument that it should be a provable claim, but the courts say such a claim may be within the letter of the law but not within the spirit of it. *In re Moore,* 111 Fed. 145. The English courts hold such a claim not provable under their bankruptcy statutes. *Rex* v. *Norris,* 4 Burr. 2142; *Bancroft* v. *Mitchell,* L. R. 2 Q. B. 549; *Ex parte Graves,* 3 Ch. App. 642. The decisions on this point were not in accord under the act of 1867, but when the question reached the supreme court it decided that a penalty was not a provable claim. *United States* v. *Herron,* 20 Wall. 251. Under the act of 1898 the decisions are nearly uniform in holding the claim not provable. *In re Southern Steel Co.,* 183 Fed. 498; *In re Baker,* 96 Fed., 963; *In re McBride,* 99 Fed., 686; *Beers* v. *Hanlin,* 99 Fed., 695. But see *In re Alderson,* 98 Fed., 588, contra.

BANKRUPTCY—TERMINATION OF THE RELATION OF LANDLORD AND TENANT.—A written lease for a term of years was entered into, beginning Feb. 1, 1912. A petition in bankruptcy against the lessee was filed on April 27, 1912, and on that day a receiver was appointed who entered and took charge of the premises. *Held,* the bankruptcy of a tenant does not terminate the contractual relations existing between tenant and landlord, but the tenant remains liable, and the obligation to pay rent is not discharged as to the future unless the trustee elects to retain the lease as an asset. *In re Sherwoods,* (C. C. A. 1913), 210 Fed. 754.

There is a conflict of authority as to whether or not the bankruptcy of a tenant terminates the contractual relations existing between tenant and landlord, but is is safe to say this decision is in accord with the weight of authority. The question arises more frequently where an attempt is made by the landlord to prove his claim for future rent to accrue subsequent to the filing of the petition. *Watson* v. *Merrill,* 136 Fed. 362; *Bray* v. *Cobb,* 100 Fed. 27. The cases holding contra to the principal case say the claim for the rent which would otherwise accrue is not a provable debt as the rent can never accrue at all because by the bankruptcy of the tenant the relation is

promiscuously in boxes and the only identifying marks upon the packages being specifications of their contents. The defendant hired a drayman who delivered the goods, the orders being filled by checking from the original orders. MICHIGAN COMP. LAWS 1897, § 5324 required hawkers and peddlers to take out a license, which defendant did not do, and he was tried and convicted for violation of said act. The conviction was affirmed by the Supreme Court of Michigan in 167 Mich. 417; 132 N. W. 1071. On writ of error this decision was reviewed and reversed by the United States Supreme Court. *Stewart* v. *Michigan* 232 U. S. 665.

The holding of the principal case is in accord with the settled doctrine that a state can not demand a license fee from citizens of other states taking orders within its limits for goods to be shipped from without the state. *Robbins* v. *Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. 592; *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. 829; *Caldwell* v. *North Carolina*, 187 U. S. 622, 47 L. ed. 326, 23 Sup. Ct. 159; *Dozier* v. *Alabama*, 218 U. S. 124, 54 L. ed. 965, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. 649; *Crenshaw* v. *Arkansas*, 227 U. S. 389, 57 L. ed. 565, 33 Sup. Ct. 294. Goods which are the product of other states are not free from taxation within the state into which they may be brought, if there be no discrimination in favor of local commodities, and they have become commingled with the general mass of property of the State. *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. 1091; *Pitts. Etc. Coal Co.* v. *Bates*, 156 U. S. 577, 39 L. ed. 538, 15 Sup Ct. 415. The Supreme Court of Michigan, in the principal case, took the view that because the goods came to defendant in packages upon which the name of the person who had ordered them did not appear they were proper subjects for taxation, being within the rule above stated. But the real test is whether or not there has been an interstate movement of goods, because of orders taken for their sale. *Emert* v. *Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. 367.

CONTRACTS—MUTUALITY BASED ON IMPLIED OBLIGATION.—Plaintiff agreed with defendant railroad to transfer its passengers from its passenger depot to that of another railroad for an agreed price per passenger. The defendant did not contract to furnish any passengers for the plaintiff to carry. The agreement was terminable by either party at any time on 30 days written notice. Defendant railroad put on a through coach for passengers destined to points on the other railroad, which coach was switched to the other railroad's line, and as a result there were no passengers to be carried by plaintiff. No notice of the termination of the contract was given to him. He then sued for the breach of the contract. *Held* that though the defendant promised nothing expressly, the contract was not lacking in mutuality and there was a sufficient consideration, since the law would imply an obligation on the part of the defendant railroad to perform its part of the contract. *Chicago R. I. & G Ry. Co.* v. *Martin*, (Tex. Civ. App. 1914.) 163 S. W. 313.

The court cites and follows *Lewis* v. *Atlas Mut. Life Ins. Co.*, 61 Mo. 534; *Thomas-Huycke Martin Co.* v. *Gray & Sons*, 94 Ark. 9, 125 S. W. 659,

earnings as a surplus, it was essential that a dividend be declared, *Guthrie's Trustee et al* v. *Akers* (Ky. 1914) 163 S. W. 1117.

The decision involves the question as to the respective rights of the life-tenant and remainder-man to dividends declared in the life time of the life-tenant. The early English rule was that all ordinary, regular and usual dividends were regarded as income and went to the life-tenant, while extra dividends or bonuses, whether in cash or stock, were regarded as belonging to the corpus of the trust. *Brander* v. *Brander*, 4 Ves. Jr. 800; *Hooper* v. *Rossiter*, McClel. 527, 13 Price 774; *Paris* v. *Paris*, 10 Ves. Jr. 184. But the rule there now is that extra dividends or bonuses are regarded as income if they are declared from earnings. *Bates* v. *Mackinley*, 31 Beav. 280, 31 L. J. Ch. 389; *Pierce* v. *Anderson*, 38 Eng. Ch. 474; *Dale* v. *Hayes*, 40 L. J. Ch. N. S. 244; *Bouch* v. *Sproule*, L. R. 12 App. Cas. 397. This makes the English rule practically the same as the Massachusetts rule, which is that cash dividends go to the life-tenant and stock dividends go to the remainder-man, *Minot* v. *Paine*, 99 Mass. 101; *Adams* v. *Adams*, 139 Mass. 449. This rule is numerically the weight of authority in this country, with this qualification, viz., that though the dividend be in form a cash or stock dividend, the court will determine its true character in that respect and will distribute it accordingly, *Leland* v. *Hayden*, 102 Mass. 542; *Harvard College* v. *Amory*, 9 Pick. (Mass.) 446; *Deland* v. *Williams*, 101 Mass. 571; *Rand* v *Hubbell*, 115 Mass. 461; *Richardson* v. *Richardson*, 75 Me. 570; *Green* v. *Bissell*, 79 Conn. 547; *Brimley* v. *Grou*, 50 Conn. 66; *Greene* v. *Smith*, 17 R. I. 28; *Gibbons* v. *Mahon*, 136 U. S. 549. For late cases supporting this rule see *Bishop* v. *Bishop*, 81 Conn. 509; *Gray* v. *Hemenway*, 206 Mass. 126; *Jackson* v. *Maddox*, 136 Ga. 31. Under what is known as the New York-Kentucky rule, dividends, whether of cash or stock, are considered as accruing in their entirety as of the date when they are declared, *Clarkson* v. *Clarkson*, 18 Barb. (N. Y.) 646; *Simpson* v. *Moore*, 30 Barb. 637; *In re Kernochan*, 104 N. Y. 618; *McLouth* v. *Hunt*, 154 N. Y. 179; *Hite* v. *Hite*, 93 Ky. 257, but an exception is made where the action of the corporation evidences an intention to make an appropriation of capital rather than of earnings, *Chester* v. *Buffalo & Mfg. Co.*, 75 N. Y. Supp. 428. It results from this view, the same as from the Massachusetts rule, that an accumulated surplus cannot be regarded as income until dividends have been declared, and as the principal case arose in Kentucky it was properly decided according to the rule in that state as laid down in *Hite* v. *Hite*, supra. The more equitable rule however is that laid down by the Pennsylvania courts. It is like the New York rule and unlike the Massachusetts rule in that it rejects, as the criterion of the rights of the parties, the character of the dividend as a cash or as a stock dividend, and it is unlike both in that it inquires whether the dividend arises from earnings and profits, or from capital. If the dividends are found to represent earnings that accrued prior to the creation of the trust, they belong to the corpus of the trust; or if they represent natural growth and increase in the value of the corporate plant and business, whether before or after the creation of the trust, they are to that extent capital, otherwise

it upon its formation, becomes as to each subscriber a contract between him and the corporation. The promoter, who solicits and obtains the subscriptions, occupies the position of agent for the subscribers as a body, to hold the subscriptions until the corporation is formed, and then to turn them over to the company without any further act of delivery on the part of the subscribers. The corporation then becomes the party to enforce the rights of the whole body of subscribers. To permit a subscriber to relieve himself from liability would be a fraud upon others who have subscribed and paid for stock, upon the corporation which has incurred liabilities in reliance upon the subscription, and upon creditors who have trusted it. *Minneapolis Threshing Machine Co.* v. *Davis*, 40 Minn. 110, 12 Am. St. Rep. 701, 3 L. R. A. 796; *Homan* v. *Steele*, 18 Neb. 652; *Osborne* v. *Crosby*, 63 N. H. 583; *Lathrop* v. *Knapp*, 27 Wis. 214; *Troy Conf. Acad.* v. *Nelson*, 24 Vt. 189; *International Fair Ass'n.* v. *Walker*, 83 Mich. 386; *Peninsular R. Co.* v. *Duncan*, 28 Mich. 130; *Chicago Bldg. & Mfg. Co.* v. *Peterson*, 133 Ky. 596; *Hughes* v. *Antietam Mfg. Co.*, 34 Md. 316; *Johnson* v. *Wabash R. Co.*, 16 Ind. 389. It has been held that where the subscribers agreed to pay to a third party, constituting him agent to receive and collect the subscriptions as trustee of the proposed corporation, there was a valid contract between the subscribers and the agent which could be enforced. *West* v. *Crawford*, 80 Cal. 19.

ELECTIONS—DOMICILE OF VOTER.—Three unmarried men worked on a ranch which was divided by the line between two voting districts. They slept in a bunkhouse which was on one side of the line, and ate in another house which was on the other side of the line. Thus they worked in both voting districts, slept in one, and ate in the other. In an election contest the question arose as to which district they could vote in. *Held*, that the place where the men slept was their domicile and therefore the place where they should have voted. *Gray* v. *O'Banion*, (Cal. 1914) 138 Pac. 977.

The statute relative to the question is simply declaratory of the common law, and does not help much in arriving at a conclusion. It reads as follows, "That place must be considered and held to be the residence of a person in which his habitation is fixed and to which, whenever he is absent, he has the intention of returning." The almost universal authority seems to be with the decision in this case. In *East Montpelier* v. *City of Barre*, 79 Vt. 542, where from the meager facts it seems the bedroom, woodshed, and pantry were on one side of the line and the rest of the dwelling on the other, it was held where the bedroom, etc. were was the domicile of the owner. *Chenery* v. *Waltham*, 8 Cush. (Mass.) 327 is another case somewhat similar. In *Abington* v. *Bridgewater*, 23 Pick. (Mass) 170, it is expressly said that where a man has two dwellings, that which constitutes his sleeping place shall be regarded as his domicile. However the authorities may be, it would seem that the intention of the resident should be the criterion to follow. This view is expressed in *Follweiler* v. *Lutz*, 112 Pa. 107, 2 Atl. 721, where the courts resorted to the acts, declarations, etc., to determine which county

The court says, "Actual sales are the best evidence, but in the absence of such evidence bona fide offers to purchase for cash are some evidence of what the property would be reasonably worth. * * * * * The bona fides of an offer and the weight to be given it are for the jury. There ought to be great liberality in admitting evidence to enable the jury to correctly determine value, and we have permitted great freedom in receiving opinion evidence on that subject." The decision seems quite as liberal as any on the subject, and goes farther than many courts have seen fit to go. There are some decisions to the effect that the price actually paid for land, standing alone, is not competent evidence to prove value, even where the transaction is bona fide. *Anderson* v. *Knox*, 20 Ala. 156; *People* v. *Rushford*, 80 N. Y. Supp. 891. Likewise, offers to sell land at a certain figure are inadmissible except as involving the admission of the owner. *Houston* v. *Ry.*, 204 Pa. St. 321; *Sherlock* v. *Ry.*, 130 Ill. 403. But generally evidence of cash transactions is admissible to prove value; and decisions are not wanting that bona fide offers to purchase land are also competent. *Muller* v. *Ry.* 83 Cal. 240; *Faust* v. *Hosford*, 119 Ia. 97; *Cottrell* v. *Rogers*, 99 Tenn. 488; although this is denied in *Watson* v. *Ry. Co.*, 57 Wis. 332, and *Sharpe* v. *U. S.*, 191 U. S. 341. Whether the value of adjoining property is relevant and admissible as the basis of inference as to the value of the property in question is disputed. The following cases admit such evidence; *Culbertson Pack Co.* v. *Chicago*, 111 Ill. 651; *Hunt* v. *Boston*, 152 Mass. 168; *Washburn* v. *Ry. Co.*, 59 Wis. 364; *Hart* v. *Langan*, 144 N. Y. 653; *Norton* v. *Willis*, 73 Me. 580; *Cherokee* v. *Sioux City Lot Co.*, 52 Ia. 279. In the principal case there was no evidence of actual sales, and the testimony which the Supreme Court held admissible established only cash offers. These were in turn open to the objection that they were offers on adjacent property and not on the land in question, and the ruling of the court in admitting the evidence appears unusually liberal.

HUSBAND AND WIFE—CAN A WIFE RECOVER AGAINST HER HUSBAND FOR A PERSONAL TORT.—The Connecticut Married Woman's Act was construed to authorize an action by a wife against her husband for damages for an assault and battery and false imprisonment, although the act did not expressly authorize an action by a wife against her husband. *Brown* v. *Brown*, (Conn. 1914) 89 Atl. 889.

It would seem that this case stands alone. In *Thompson* v. *Thompson*, 218 U. S. 611, 30 L. R. A. N. S. 1153 a wife was denied the right to sue her husband for a tort, although the statute authorized married women "to sue separately for the recovery, security or protection of their property and for torts committed against them as fully as if they were unmarried." In accord are *Bandfield* v. *Bandfield*, 117 Mich. 80, 72 Am. St. Rep. 550; *Libby* v. *Berry*, 74 Me. 286, 43 Am. Rep. 589; *Main* v. *Main*, 46 Ill.. App. 106, TIFFANY, DOM. REL. 74, declares that "the common law rule has been changed by statute so that a wife may maintain an action against her husband for a tort, in a few states," but no cases are cited. *Peters* v. *Peters*, 156 Cal. 32, 23

MASTER AND SERVANT—EIGHT HOUR LAW.—On a petition for a writ of habeas corpus, it appeared that two criminal complaints had been filed, charging the petitioner Albee, as mayor of Portland, with violating the provisions of the Labor Laws of Oregon, in that he permitted and required a designated fireman and a specified policeman to labor in their departments more than eight hours in one day, when there was no emergency demanding the performance of such extra service. *Held;* a policeman or fireman, required by municipal law to take an oath of office, and not subject to removal at the pleasure of the appointing power, but only in accordance with the civil service rules, is an officer, and not a "laborer" within the eight hour law for laborers employed by the state or its auxiliaries. (Laws 1913 c. 61.). *Albee* v. *Weinberger, Constable,* (Ore. 1914) 138 Pac. 859.

The court evidently arrived at its conclusion from the facts that the fireman and policeman were required to take an oath of office and were not subject to discharge except by virtue of the civil service rules. The language of the court in *Collins* v. *Mayor etc.,* 3 Hun. 680, was quoted: "probably the true test to distinguish officers from simple servants or employees is in the obligation to take the oath prescribed by law." In *State* v. *Martindale,* 47 Kans. 147, it was held that Sess. Laws, 1891, c. 114, making it unlawful for laborers, workmen, mechanics or other persons employed by the state of Kansas to work more than eight hours a day, did not include an officer or employee for whom an annual salary had been specifically named and appropriated by the legislature. In *Robinson* v. *Aiken,* 39 N. H. 211, it was decided that "labor" as used in the Rev. St. c. 208, Sect. 9, which provides that no person summoned as trustee shall be charged as such on account of any labor performed by the debtor after service of the process, etc., includes the official services of the mayor of the city, and hence the city could not be charged as trustee on account of such services. The rules applied in these two cases would seem to be much fairer and more nearly within the spirit of such legislation than the test in the principal case. In determining whether a particular employee is really a laborer, the character of the work he does must be taken into consideration, and he should be classified, not according to the arbitrary designation given to his calling, but with reference to the character of his services. *Oliver* v. *Macon Hardware Co.,* 98 Ga. 249. *McPherson* v. *Stromp,* 100 Ga. 228.

NEGLIGENCE—BAILEE'S CONTRIBUTORY NEGLIGENCE NOT IMPUTABLE TO BAILOR.—Plaintiff loaned his horse to X, without compensation and merely for the accommodation of X. The horse was killed by defendant railroad through the contibutory negligence of X who was riding the horse at the time. *Held* that the contributory negligence of X could not be imputed to plaintiff, and that defendant was liable. *Spellman* v. *Delano,* (Mo. App. 1914) 163 S. W. 300.

The authorities on this precise point are few and almost evenly divided. Those which hold contrary to the principal case proceed on the theory that the bailee is, in a sense, the agent of the bailor, and consequently the

WILLS—VALIDITY OF PROVISION INTERFERING WITH MARRIAGE RELATION.—A will recited that the testator understood that M, on account of the extreme cruelty of her husband, had been compelled to leave her home, and provided that if "she shall be compelled to live apart from her husband and shall have to support herself," he, the testator, bequeathed her $2,000 to be paid to her "as soon as my executor shall be convinced that it is impossible for the said M to live with her husband." At the time of making the will the testator knew that M was living apart from her husband, and had begun divorce proceedings. *Held*, that the condition in the bequest to M was reasonable, and was not void as against public policy as tending to induce M to live apart from her husband. *Dusbiber* v. *Melville*, (Mich. 1914) 146 N. W. 208.

Where a condition precedent is annexed to a gift of personal property which prohibits the marriage relationship absolutely or unreasonably, the condition is void, and the legacy passes regardless of the condition. *Waters* v. *Tazewell*, 9 Md. 291; *Maddox* v. *Maddox*, 11 Grat. 804; *Brown* v. *Peck*, 1 Eden 140; *Hawke* v. *Enyart*, 30 Nebr. 149. On the other hand, conditions to testamentary or other gifts in partial and reasonable restraint of marriage, are valid and operative. *Phillips* v. *Ferguson*, 85 Va. 509; *Ransdell* v. *Boston*, 172 Ill. 439; *Born* v. *Horstman*, 80 Cal. 452; *Collier* v. *Slaughter*, 20 Ala. 263; *Graydon* v. *Graydon*, 23 N. J. Eq. 229. The court in the instant case takes cognizance of the above principles and then proceeds to decide the question as to whether or not the condition imposed upon the legacy to M is a reasonable one. The language of the decision intimates that if the legatee herself had been appointed to judge whether or not she could live with her husband, the decision would probably have been different. But since that determination lies with the executor and not with the legatee, the court concludes that the condition is reasonable. Without saying that the decision is erroneous, might it not be said that the mere substitution of the discretion of the executor for that of the legatee does not remove the condition from the unreasonable class?

public corporations; also the addition of ninety-one corporation forms, mostly taken from those in actual use, and prepared by the most eminent counsel. Each form also indicates the section in the text treating of the subject-matter, which therefore serves as a most useful annotation of the form.

This edition adds 6000 new citations,—perhaps over 3000 new cases,—making over 60000 citations in this edition from about 32000 cases. In the 4th edition (1898) there were approximately 38000 citations from 19000 cases, while in the first edition (1897) there were about 6000 citations from 3000 cases. From the first to the last editions Mr. Cook has done his own abstracting and analyzing the cases cited in the notes.

The first edition contained four parts, which have been continued throughout all editions. These were: Part I, Issue and Liability on Stock—298 pp. in the 1st Ed., 818 in the 6th., and 860 in this; Part II, Transfer of Stock—147 pp. in the 1st Ed., 336 in the 6th, and 362 in this; Part III, Miscellaneous Incidents of Stock—195 pp. in the first Ed., 705 in the 6th., and 781 in this; Part IV, Stockholders Wrongs and Remedies—106 pp. in the 1st. Ed., 710 in the 6th Ed., under the title, "Frauds Ultra Vires, Intra Vires, Negligent and Irregular Conduct of Directors, Stockholders, Promoters and Agents; with 801 pages in this edition under the same title. In the 3d Ed. (1894) Part V—Bonds, Mortgages, Receivers, Foreclosures and Reorganization, was added to the work then, with 310 pp.; in the 6th Ed. this topic covers 674 pages, and 709 in this. To the 3d Ed. was also added Part IV—Steam Railroads, Street Railways, Telegraphs, Gas, Electric Light, Water Works, and other Quasi-public Corporations, to which was given 117 pages; in the 6th Ed. the same was given 430 pages; and 515 in this. In a general way these figures show the relative growth of these large topics. The third edition also contained Part VII—Abstracts of the Statutory and Constitutional Provisions of the Various States, and the Federal government. This has been left out of subsequent editions.

In a rough way the growth of Corporation law for the last 25 years is indicated by the size of the volumes in the various editions of Mr. Cook's work: 1st Ed. (1887), 787 pages; 2d Ed. (1889), 1066 pp.; 3d Ed. (1894), 2068 pp.; 4th Ed. (1898), 2783 pp.; 5th Ed. (1903), 2970 pp.; 6th Ed. (1908), 4309 pp.; 7th Ed. (1913), 4984 pp. In the preface to the first edition Mr. Cook stated that the remarkable growth of Corporations during the past 25 years (i. e. from about 1862-1887) had then created a body of law "so vast, complicated, and unwieldy," as to require treatment in separate parts. Since then it has become vastly larger and more complicated, but such works as Mr. Cook's have made it possible to keep track of what has been going on.

In fact, reading Mr. Cook's prefaces in the various editions, five years apart, gives a very clear and succinct statement of the broad course of corporation development. When the first edition was prepared the rights, duties and obligations of the stockholders,—the real parties in interest,—had not been worked out, and were perhaps the center of discussion. In the second edition the "Trusts and recent combinations in trade are explained and their legality considered." In the third edition, bonds, mortgages, deeds of trust, foreclosures, receivers, reorganizations, watered stock, and the

THE CONTINENTAL LEGAL HISTORY SERIES. Edited by a Committee of the Association of American Law Schools.

II. GREAT JURISTS OF THE WORLD, FROM GAIUS TO VON JHERING. By various authors. Edited by Sir John MacDowell, Fellow of the British Academy, and Edward Manson, Secretary of the Society of Comparative Legislation. With an introduction by Van Vechten Veeder, Judge of the United States District Court, New York. With portraits. Boston: Little, Brown, and Company, 1914. pp. xxxii 607.

The general features of this series have been noted in reviews of Volume I and Volume III (Cf. 11 MICH. L. REV. 342). This volume is an excellent supplement to its immediate predecessor, "A General Survey of Events, Sources, Etc." and it has the human interest that belongs to biography. As the product of various authors it is naturally somewhat uneven in the style and execution of the several lives. With some of the writers the desire to present the salient features of the lives in full detail has been yielded to with the result of a decrease of interest in the story of the human achievement. Among the most interesting of the essays are those on Grotius, Montesquieu, Bentham and Savigny partially due, to be sure, to the intrinsic interest of the subjects but also in part to the skill in presentation.

J. H. D.

THE MODERN LEGAL PHILOSOPHY SERIES. Edited by a Committee of the Association of American Law Schools.

V. LAW AS A MEANS TO AN END. By Rudolf von Jhering, Late Professor of Law in the University of Göttingen. Translated from the German by Isaac Husik, Lecturer on Philosophy in the University of Pennsylvania. With an Editorial Preface by Joseph H. Drake, Professor of Law in the University of Michigan. With Introduction by Henry Lamm, Justice of the Supreme Court of Missouri and W. M. Geldart, Vinerian Professor of English Law in the University of Oxford. Boston: The Boston Book Co. 1913. pp. lix, 483.

XII. PHILOSOPHY OF LAW. By Joseph Kohler, Professor of Law in the University of Berlin. Translated from the German by Adalbert Albrecht, Associate Editor of the Journal of Criminal Law and Criminology. With an Editorial Preface by Albert Kocourek, Lecturer on Juriprudence in Northwestern University. With Introductions by Orrin N. Carter, Justice of the Supreme Court of Illinois, and William Caldwell, Professor of Logic and Moral Philosophy in McGill University, Montreal. Boston: The Boston Book Co. 1914. pp. xliv, 390.

The earlier volumes of this series have been discussed in previous issues of this Review. (Cf. 8 MICH. L. REV. 351; 10 MICH. L. REV. 663 and 11 MICH. L. REV. 174.) In addition to the editorial contributions mentioned on the title pages, each of the volumes contain valuable appendices. Appendix I, of Volume V, gives an appreciative account of Jhering, the man and his works,

The struggle for a better definition of law has resulted in a progressive widening of the application of law. To one who will read carefully the several volumes of the "Legal Philosophy Series" it will be perfectly evident that the struggle for a wider and deeper philosophic conception of the bases of law has had a like result. The practical bearings of Aristotle's fundamental postulate of justice that "equality is equity" was recognized but dimly in his own time, but throughout all subsequent time it has been used as a working formula in state-building and law-making and is now universally accepted as the guiding principle of modern democracy. The theory of natural law first definitely formulated by Aristotle was adopted as a unifying principle by the practical Roman. Throughout the Middle Ages it served as a bulwark for the protection of the people against the encroachments of Emperor and Pope. In the hands of Grotius it was made the basis of the law of nations. In its modern garb of the law of reason it has been said to be "the life of the modern Common Law." The pseudo-philosophical theory of utility as elaborated by Bentham and his followers became the practical basis of law reform by which large portions of the English system were completely reconstructed. The social utilitarian theories of Jhering and his insistence upon the idea that law is not simply a growth, the various stages of which are to be observed and registered, but that law is the result of a striving with a purpose toward a previously determined goal, has borne abundant fruit in Germany and can be made of great practical use in our own system of law where our growing social needs demand an expansion of our historical common law. As we take the long look back over the history of juristic philosophy we must acknowledge that metaphysical lucubration has been an efficient handmaid of practical progress. The philosophic as well as the practical advance has been at times discouragingly slow and we frequently have our patience tried by the logomachy of the theorists which so frequently only destroys what has gone before and takes no step forward. But a careful reading of master works of the really great juristic philosophers shows that each does make some slight advance upon the work of his predecessor and each brings some aid to the solution of the practical problems of being and doing.

The last published volume, Kohler's "Philosophy of Law," is in many respects the most inspiring and helpful of the series. The phenomenal genius of the man shows in this volume as in all his work, and his life work is such as to make a non-Teutonic professor gasp with astonishment. In 1903, when the last census of him was taken, his published works included 526 separate titles, many of them large books, covering topics in general jurisprudence, civil law, criminal law, four good-sized volumes on aesthetics and five in poetry. He is classed as a Neo-Hegelian and is acknowledged to be the leader of this school. He accepts Hegel's "philosophy of identity and doctrine of evolution but rejects his dialectics, (that is the theory of a thoroughly logical, rhythmical growth)" (See page 22). His philosophy of law starts with the "reconstruction of Hegel's doctrine and interprets his doctrine of evolution to mean that mankind constantly progresses in culture." (Cf. p. 26). This "culture" is, of course, the German "Kultur" so much dwelt upon by the other

In his last chapter the author urges that the courts throw overboard the doctrine of *stare decisis* and appeal all questions to the principle of sufficient reason, though what that principle may be is not too clearly enunciated. His point of view in general is that of the modernist who interprets the much abused doctrine of equality as an equality of opportunity to be guaranteed by an impartial tribunal, and who insists that the highest duty of the practicing lawyer is to apply himself vigorously to the discovery and exposition of the principles of right reason. The book is not a profound contribution to the philosophy of law but as an application of certain basic working formulae of justice to our present day legal problems may be said to justify itself. J. H. D.

BOYCOTT AND THE LABOR STRUGGLE. By Harry W. Laidler. Introduction by Henry R. Seager, Ph.D., New York, John Lane Company; London. John Lane, 1914, pp. 488.

This work comes at an opportune time, when legislatures are being urged to legalize this weapon of the laboring classes by statute.

It is a well written and most careful study of the subject by a member of the New York Bar, and an economist, and is a valuable work from both the economic and legal standpoints.

The author first discusses the economic side. He traces the past forms known to students of history, and shows that while the practice is old, the term originated with Father John O'MALLEY in 1881. He then gives the kinds employed in modern business as: (1) Consumers; e. g. by the Consumer's League label; (2) Employer's, e. g. by the Blacklist; (3) Trade,—such as the Lumbermen's Associations; (4), Political,—as the boycott of James G. Blaine by the printers in 1884; (5) International, such as Chinese refusal to purchase American goods, or the Persians to handle British commodities.

The author defines "boycott" in its broadest sense, as "an organized effort to withdraw and induce others to withdraw from social or business relations with another" (p. 27), and gives special definitions for the employers (p. 36) and the laborers (p. 60) boycotts.

He discusses the latter under two heads: Negative, and Positive. The negative is to secure for "fair" firms the trade of labor,—as by the Union label. The positive is to prevent trading with the "unfair" firms,—as by the "unfair" or "we don't patronize list." These latter are: Primary—simple combination to suspend dealings, without inducing or coercing others; Secondary,—a combination to induce or persuade others to stop dealing with the supposed offender; Compound,—inducement through coercion and intimidation, either by threats of pecuniary injury, or of physical violence.

His conclusion is that the boycott can be successful only when used with great care and as a last resort. The American Federation of Labor has used it with great care. Success depends largely upon the vigor with which it is pushed at the outset, and there is small chance of success against a firm that has a monopoly.

Negative boycotts are legal, and 41 states have provided for registering a label.

ration under Powers other than that over Commerce; Methods of Obtaining Compulsory Federal Incorporation; State Legislation with Reference to State Corporations Engaged in Interstate Commerce; State Legislation with Reference to Federal Corporations Engaged in Interstate Commerce; Jurisdictions of Federal Courts over Suits by or against Federal Corporations; The Meaning of the Term "Commerce Among the Several States."

The conclusion arrived at by the discussion in the first two chapters is: "Congress, as an appropriate means of regulating commerce among the States, can incorporate not only railroad and bridge companies, but also trading companies. As an incidental right, a federal trading corporation could make intrastate sales. It could also be given the corporate power to produce, which could be exercised as a legal right in the District of Columbia and the Territories, and which could also be exercised within a state, if the laws of the state did not deny such right." The author takes issue with Mr. GARFIELD upon the Federal power to confer the right to produce within a State without its consent, and also denies the power of Congress to confer the *capacity* to produce on a Federal Corporation, except as the local legislature of the District of Columbia, or over the Territories.

In chapter three he concludes that a corporation could be incorporated by Congress under the taxing or post-office, or army power, but such corporation could carry out only such powers and would be limited to such purposes, and they would not justify a practical working incorporation act for corporations engaging in commerce.

To what extent the Federal government could compel Federal incorporation is treated in chapter four. Four methods have been suggested: (1) By excluding the products of State corporations from interstate commerce. The author concludes that both by reason and authority the "power to regulate commerce among the states" includes the power to prohibit such commerce, and shipments from one state into another are not "exports," nor "imports" within the provisions of §§ 9 and 10 of Art. I; but effectively to exclude the products of a state corporation they would have to be excluded from interstate commerce when purchased and owned by individuals, and to do this would be an arbitrary and unreasonable classification, and so violate the due process provision of the Fifth Amendment.

(2) By direct exclusion of State Corporations from interstate commerce. He believes this can be done under either the "entity," or "group" theory of corporate existence. "The state cannot grant to the entity the absolute right to engage in interstate commerce, because it is beyond the power of the state to make such a grant," for Congress has exclusive jurisdiction over interstate commerce—under the "group" theory. "The privileges conferred by the state can have no extraterritorial effect, but can be exercised as of right only within the limits of the state which granted them," and Congress can refuse to allow the extension of such privileges to enter state commerce.

(3) Taxation of interstate commerce transacted by state corporations,—this, while "much less desirable than the direct exclusion of state corporations from interstate commerce," he believes would be constitutional under

tions materially burdens such commerce is invalid. And as to any producing function of such Federal Corporation, the states could admit or exclude or attach conditions the same as in the case of any State Corporation not engaged in interstate commerce.

As to suits against such Federal Corporation Congress could provide that only the Federal Courts should have jurisdiction, even with reference to any producing function conferred upon such corporation.

The last chapter is a valuable one as to the meaning of "Commerce among the States."

The author finds many points upon which the Supreme Court has not yet passed, but upon nearly every one something has been said, or some pretty definite analogy is to be found in some one of the more than two hundred cases,—nearly all from the United States Supreme Court—reviewed or referred to. And although, perhaps, many will not fully agree with all of his conclusions, yet all will find here a thoroughly excellent working out of the important questions that would arise from Federal incorporation of trading corporations. The book deals only with legal questions, and not at all with the economic or political problems such a policy raises. H. L. W.

COMMENTARIES ON THE LAW OF MASTER AND SERVANT. By C. B. Labatt, B.A. (Cantab) M.A. (Toronto), of the Bar of San Francisco, Cal. Second Edition. The Lawyer's Co-operative Publishing Co., Rochester, New York, 1913. 8 Vols. pp. ccv, 10090.

From BLACKSTONE's chapter of 11 small pages written 150 years ago, summing up the results of 700 years' growth of the English law of Master and Servant, to this monumental work, is a long period, if measured in the pages needed to treat this topic. At the same rate, 63 years to the page, we have in the last 150 years, traveled 63000 years beyond BLACKSTONE, or, in other words, we are 90 times as far away from his time, as he was from the Norman Conquest. He wrote at the very beginning of the modern industrial system, before the steam engine, the factory system, the railroad, or the development of the modern sciences underlying our application of machinery to industry. When he wrote, Master and Servant was for the most part one of the Domestic Relations, as he treated it, and had been so for thousands of years; but now it has become a contract relation extending to every situation in which one person undertakes to work for another under or subject to the latter's control, and these volumes forcibly call attention to the almost infinite complexity of our modern industrial life.

This work treats this relation in almost every conceivable detail except "the hiring of seamen and persons in public employments." There are eight volumes, 126 chapters, 10090 pages, with many additional ones as 8944, 8944a to 8944yy, including such as 8944kk-1 to 18. There are also 2793 sections with many numbers duplicated by a, b, &c. The table of contents contains 205 pages; the table of cases 718 pages, and the index 445. Every facility is therefore employed to make the material available. It is evident that

When the first two volumes were prepared the author ventured to call attention to and criticise the unreasonable extent to which the doctrines of "assumed risk," and "fellow servant" had been pushed, and the unsubstantial foundations upon which they are based. In this edition he is able to see the progress made in legislation in abolishing or modifying such doctrines, and perhaps in some degree as the fruit of his labors and criticism.

From any test the present writer has been able to apply to the work, and in whatever place he has examined it, or upon whatever topic fairly within the province of the work, he has found it unexcelled, exhaustive, luminous and learned. It is preeminently valuable for the practitioner, and will undoubtedly remain for a long time, the unrivalled authority upon the subject. H. L. W.

SELECTED CASES ON THE LAW OF CONTRACTS, by Ernest W. Huffcut, late Dean of the Cornell University College of Law, and Edwin H. Woodruff, Professor in the Cornell University College of Law. Third Edition, revised and enlarged by Edwin H. Woodruff. Banks & Company, Albany, N. Y. 1913. pp. xvii, 774.

The third edition of HUFFCUTT & WOODRUFF'S selected cases in contract law, is in many respects, an improvement on the earlier editions, which at the time they were published left little to be desired. They have been generally used for several years by those engaged in educational work and the present edition will be received with favor. Professor WOODRUFF has added some new features of great value to the teacher and the student.

In addition to including the more recent cases, he has given to his reference notes great value in that he refers the student, under most cases, to the Cyclopedia of Law and Procedure; to subject notes in the Lawyers' Reports Annotated; to leading articles in various legal periodicals, in which the doctrine of the principal case is discussed or involved. The thoughtfulness of the editor in giving this helpful aid to the student can not be too highly commended. We regret, however, that Professor WOODRUFF acquiesces in the idea of a few educators that contractual capacity should be discussed under the law of Persons. Personal responsibility depends generally upon the subject as well as on the person. In dealing with persons the law presumes capacity to contract. The contrary must be made to appear. We have criminal responsibility, testamentary capacity and contractual capacity, and if we are to discuss criminal responsibility in the law of crimes why not discuss contractual capacity in the law of contracts? It is necessarily involved in the law of the subject and has very little relation to other questions of legal responsibility.

The work of the publishers is well done. The paper and the type are good and the pages of the book please the eye. J. C. K.